The Implications of the *Vavilov* Framework for *Doré* Judicial Review

Vincent Roy*

The Supreme Court of Canada established a novel approach for judicial review of administrative decisions affecting Charter protections in Doré v Barreau du Québec (Doré). *The author begins by highlighting discontent with the* Doré *framework and then explores the potential implications that the Supreme Court of Canada's decision in* Canada (Minister of Citizenship and Immigration) v Vavilov *(*Vavilov*) may have on the framework. After concluding that* Vavilov *can induce change in* Doré *judicial review, the author explores two possible implications: (1) that* Vavilov *could change the applicable standard of review from "reasonableness" to "correctness", and (2) that* Vavilov *could maintain the reasonableness standard but change what it means and how it is applied. The extent of the implications of the* Vavilov *revised framework for judicial review is undetermined, but the author concludes that the* Doré *approach will not remain unaltered in the wake of* Vavilov*'s principles.*

* LLB (Laval), LLM (Cambridge), lawyer and parliamentary clerk at the National Assembly of Quebec. All views expressed are the author's own and should not be attributed to the National Assembly of Quebec. The author wishes to thank Dr. John Allison for his supervision of the thesis from which this article is adapted. He also thanks the students of the 2020–2021 LLM Public Law Seminar and the two anonymous reviewers for their constructive advice.

Introduction

Canadian administrative law is not neatly separated from constitutional law. In matters of judicial review, *Doré v Barreau du Québec* (*Doré*)[1] sits atop the vaguely defined juncture: in particular, the divide between judicial review of administrative action and judicial review for constitutionality. Yet, when the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov* (*Vavilov*)[2] recently sought to reconsider and clarify[3] the whole of judicial review of administrative action theory, it decided that it would not revisit—for now—"the approach to the standard of review set out in *Doré*".[4] The Court of Appeal for Saskatchewan rightfully noted, therefore, that a question was left unanswered by *Vavilov*: "[T]hat is, what is the standard of review when the issue of whether an administrative decision has unjustifiably limited *Charter*[5] rights is raised on judicial review"?[6] This last question is what

1. 2012 SCC 12 [*Doré*].

2. 2019 SCC 65 [*Vavilov*].

3. *Ibid* at para 2.

4. *Ibid* at para 57.

5. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6. *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at para 133. The *Doré*

preoccupies this paper. I will consider three possible implications of *Vavilov*'s revised framework for judicial review of administrative discretionary decisions affecting *Charter* protections. Focusing on the Supreme Court of Canada's case law, I will evaluate first (a) whether *Vavilov* can induce any change at all in the *Doré* framework. Concluding that it does, I will evaluate the extent of the implication: either that (b) *Vavilov* could change the applicable *Doré* standard of review from "reasonableness" to "correctness", or that (c) *Vavilov* could leave reasonableness as the applicable standard but change what it means and how it is applied. As the title of this paper suggests, my work focuses on indicating which logical implications should be singled out as flowing from the *Vavilov* to the *Doré* method. My inquiry will proceed from a concern for jurisprudential clarity and coherence but also will attend to practical issues of *Charter* judicial review. Revisiting *Doré* has impacts on the burden of proof *Charter* right-holders should bear, on the role of *Charter* values, on judicial review's justification in the rule of law, on the level of deference owed to human rights tribunals and other administrative entities, and on the tools courts have at their disposition to assess an administrator's discretion.

I. Context

The Supreme Court of Canada has set out in *Doré* the foundation of the exceptional approach to judicial review of administrative decisions affecting *Charter* protections. Mr. Doré faced disciplinary action before the Disciplinary Council of the Barreau du Québec as a result of him sending a letter of insults to a Superior Court justice. The Council found his actions were in breach of both section 2.03 of the *Code of Ethics of Advocates* (*Code of Ethics*)[7] and of his oath of office. After a series of reviews and appeals,[8] Mr. Doré argued at last before the Supreme Court of Canada that the Council's decision violated his freedom of expression under section 2(b) of the *Charter*.[9] This argument

problem is the only question explicitly left unanswered, although other questions are also in want of clarification following *Vavilov*. See e.g. Paul Daly, "Unresolved Issues after *Vavilov*" (2020), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com> (four-part blog post).

7. RRQ 1981, c B-1, r 1, s 2.03.

8. See *Doré c Avocats (Ordre professionnel des)*, 2007 QCTP 152; *Doré c Tribunal des professions*, 2008 QCCS 2450; *Doré c Bernard*, 2010 QCCA 24.

9. See *Doré*, *supra* note 1 at para 22.

created a subtlety which Abella J noted at the start of her reasons for the unanimous judgment:

> The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor . . . does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the C*anadian Charter of Rights and Freedoms*.[10]

Since Mr. Doré contended that the individual discretionary administrative decision was itself unconstitutional, Abella J refused to see his claim falling under the *Dunsmuir v New Brunswick*[11] (*Dunsmuir*) "constitutional questions" category for correctness standard. Instead, she provided a novel approach to deal with such situations, stabilizing an ambivalent past jurisprudence.[12]

Justice Abella proceeded to evaluate the merits of the "two options"[13] with which she was faced—both having been endorsed at some point by majorities or minorities of the Court.[14] She rejected a pure section 1 *R v Oakes* (*Oakes*)[15]

10. *Ibid* at para 2 [emphasis in original].

11. 2008 SCC 9 [*Dunsmuir*].

12. For a discussion of what events led to and culminated with *Doré*, and why the Supreme Court created the *Doré* framework, see *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 [*Multani*] and *Lake v Canada (Minister of Justice)*, 2008 SCC 23, discussed in Evan Fox-Decent & Alexander Pless, "The *Charter* and Administrative Law Part II: Substantive Review" in *Administrative Law in Contex*t, 3rd ed (Toronto: Emond, 2018) at 526 (table 13.1) [Fox-Decent & Pless, "*Charter* and Administrative Law Part II"]; Christopher D Bredt & Ewa Krajewska, "*Doré*: All That Glitters is Not Gold" (2014) 67:1 SCLR 339 at 340–46; Paul Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the *Charter of Rights and Freedoms*" in Graham Mayeda & Peter Oliver, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron / Principes et pragmatisme : Essais en l'honneur de Louise Charron* (Markham: LexisNexis, 2014) [Daly, "Prescribing Greater Protection for Rights"].

13. *Doré*, *supra* note 1 at para 34.

14. See Fox-Decent & Pless, "*Charter* and Administrative Law Part II", *supra* note 12 at 508.

15. [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*]. The *Oakes* test generally goes as follows (here redrafted to question format from the steps highlighted in Halsbury's Laws of Canada (online), *Constitutional Law (Charter of Rights)*, "Limitation of Rights: Prescribed by Law"

analysis on the ground that it is not consistent with the nature of discretionary decision-making.[16] In other words, she rejected the general principle under which *Charter* review would always follow an analysis following section 1 and *Oakes*. Justice Abella praised instead the "flexible" administrative law approach.[17] She nevertheless modified the scope of the second option before adopting it: she embraced what she called a "richer conception of administrative law".[18] First, this new version adopts reasonableness—and not correctness—as the standard of review of a *Charter* challenge to a discretionary decision.[19] Second, it demands that administrative discretion must be exercised "in the light of constitutional guarantees and the values they reflect".[20] In practical terms, the judicial review of the exercise of statutory discretion must evaluate "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play".[21]

III.2.) at HCHR-18, "Limitation of Rights: Reasonable Limits: The *Oakes* Test: The *Oakes* test analysis" (III.3.) at HCHR-19 (2019 Reissue) (Newman).

(1) Is the limit to rights and freedoms prescribed by law?

(2) Is the objective pursued by the limit of sufficient importance as to warrant the overriding of the right?

(3) Is the limit proportionate? That is:

a. Is there a rational connection between the measures containing the limit and the objective pursued?

b. Is the degree of infringement minimal?

c. Is there an overall proportionality between the deleterious and salutary effects of the measure?

Past jurisprudence gave importance to the differences in the English and French translations of section 1 to explain a certain approach to *Doré*-type issues. See Robert Leckey, "Prescribed by Law/Une règle de droit" (2007) 45:3 Osgoode Hall LJ 571. An in-depth analysis about whether the language differences are salient is beyond the scope of this paper.

16. See *Doré*, *supra* note 1 at paras 37–38 [internal quotations omitted].

17. *Ibid* at para 37.

18. *Ibid* at para 35.

19. See *ibid* at para 45.

20. *Ibid* at para 35, quoting *Multani*, *supra* note 12 at para 152.

21. *Doré*, *supra* note 1 at para 57.

In sum, the *Doré* test can be broken down into the following steps:

1. Infringement
   a. Is there a *Charter* protection at issue and, if so, was it infringed?

2. Proportionality and balancing of *Charter* protections with the statutory objectives
   a. What are the statutory objectives of the regulatory regime?
   b. Did the administrative decision strike a reasonable balance between the severity of the interference with the *Charter* protection and the statutory objectives? This requires asking how the *Charter* protection at issue would best be protected in view of the statutory objectives.[22]

Justice Abella saw it as a middle ground between the approach of administrative law and constitutional law. She considered the compromise brought "conceptual harmony between a reasonableness review and the *Oakes* framework".[23] Most importantly, it gave meaning to the expertise of decision makers[24] and their "particular familiarity with the competing considerations at play in weighing *Charter* values".[25] The *Doré* approach was an exception to two frameworks of general application: it was neither an *Oakes* review nor a *Dunsmuir* review.

Dissatisfaction with the *Doré* framework grew over the years, both in legal doctrine and in the Supreme Court of Canada. In *Loyola High School v Quebec (Attorney General)* (*Loyola*),[26] while the majority thought the case "squarely engage[d] the framework set out in *Doré*",[27] McLachlin CJ and Moldaver J delivered concurring reasons that did not even mention *Doré*. They preferred to ground their analysis in section 1 of the *Charter* rather than in administrative

22. See *ibid* at para 56. These steps are adapted from Bredt & Krajewska, *supra* note 12 at 348.
23. *Ibid* at para 57.
24. See *ibid* at para 46.
25. *Ibid* at para 47.
26. 2015 SCC 12 [*Loyola*].
27. *Ibid* at para 35.

law principles. However, it should be noted that the concurring justices did not specifically mention *Oakes* either, which might explain why it does not appear that a full "traditional" section 1 analysis [28] was conducted in their reasons.[29] The double *Law Society of British Columbia v Trinity Western University* (*LSBC*)[30] and *Trinity Western University v Law Society of Upper Canada* (*LSUC*)[31] cases brought a similar state of affairs. Where the majority went further in asserting that "*Doré* and *Loyola* are binding precedents of [the] Court",[32] four of the Court's justices gave sharp concurring and dissenting reasons to the contrary.[33] The dissent thought that the basic idea of *Doré*—that a section 1 analysis does not fit the judicial review of an administrative decision challenged on the basis of the *Charter*—was far from receiving large consensus in the Court's case law.[34] Correspondingly, the dissenting justices did not see the *Doré-Loyola* framework as untouchable and, in contrast, saw it as needing improvements. The minority justices agreed (as they did in *Loyola*) that the Court should revert to a section 1 *Oakes* analysis, proving Abella J's worries on the awkward fit of an *Oakes* analysis for administrative decisions to be unwarranted.[35] Yet, the minority justices again did not strictly conduct a point-by-point *Oakes* analysis in their reasons. They insisted rather on the identification of the Law Society's

28. See footnote 15 for a discussion on section 1 analysis.

29. See *Loyola*, *supra* note 26 at paras 146–51. The minority justices most particularly insisted on the "minimal impairment" step.

30. 2018 SCC 32 [*LSBC*].

31. 2018 SCC 33 [*LSUC*]. Hereinafter, I will refer to *LSBC* and *LSUC* collectively as "*Trinity*". Where I need to refer to a specific case, I will use either *LSBC* or *LSUC*, although the latter will be referred to only where necessary for it merely applied the principles developed in the former.

32. *LSBC, supra* note 30 at para 59.

33. See *ibid*. Chief Justice McLachlin and Rowe J gave both their own concurring reasons; Côté and Brown JJ gave a joint dissent. This leaves Abella, Moldaver, Karakatsanis, Wagner, and Gascon JJ for the majority (5-1-1-2).

34. See *LSBC*, *supra* note 30 at para 303; Léonid Sirota, "The Supreme Court v the Rule of Law" (18 June 2018), online (blog): *Double Aspect* <doubleaspect.blog/2018/06/18/the-supreme-court-v-the-rule-of-law/>.

35. This is rather unsurprising since courts in the United Kingdom and in New Zealand have praised the structure the *Oakes* test provides and have applied it without difficulty to the administrative context. See Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law Public Law for the Twenty-First Century" (2016) 66:1 UTLJ 121 at 159, 168; Daly, "Prescribing Greater Protection for Rights", *supra* note 12 at 276–79.

statutory objectives and their importance, and on proportionality between positive and negative impacts of furthering these objectives.[36] This highlights that the *Doré* and the section 1 frameworks share some attributes. Both methods start with determining whether there is an infringement, and both are followed by an analysis that integrates elements of "rational connection, minimal impairment and balance or proportionality".[37] Moreover, where *Doré* insists on deference and reasonableness, "the critical step of the *Oakes* analysis (minimal impairment) has always required deference to legislative choice".[38] *Oakes* is also close to *Doré* in requiring that government action "must fall within a range of reasonable alternatives".[39] Nevertheless, the minorities in *Loyola* and *Trinity* have maintained their claim that section 1 of the *Charter* must be invoked in *Doré*-type cases rather than following Abella J's administrative law principles. I suggest that *Doré*'s methodological defects underwrite the minority's preference for applying a section 1 framework to administrative decisions affecting *Charter* protections. I will expound the nature of two of these defects in section III.

II. The *Vavilov* Framework

To properly characterize the implications of *Vavilov* for *Doré* judicial review in section III, I must first describe the principles laid down in *Vavilov* with respect to Canadian judicial review theory.

For our purposes, the facts of the case can be summarized as follows. Alexander Vavilov was the Canadian-born son of undercover Russian spies. Shortly after his parents were arrested and deported from Canada as a result of their activities, Mr. Vavilov engaged in administrative procedures to renew his Canadian passport. These brought him to ask the Canadian Registrar of Citizenship for a certificate of citizenship, which was issued.[40] However, it was then cancelled. Briefly put, the Registrar interpreted section 3(2)(a) of the *Citizenship Act*[41] as prohibiting Mr. Vavilov from being a Canadian citizen:

36. *LSBC*, *supra* note 30 at paras 119, 135–50, 321–25.

37. Andy Yu, "Delegated Legislation and the *Charter*" (2020) 33 Can J Admin L & Prac 49 at 54.

38. Fox-Decent & Pless, "*Charter* and Administrative Law Part II", *supra* note 12 at 512.

39. *Ibid*; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, 127 DLR (4th) 1 [*RJR-MacDonald*]; *Doré*, *supra* note 1 at para 56.

40. See *Vavilov*, *supra* note 2 at paras 147–50.

41. RSC 1985, c C-29, s 3(2)(a).

since his parents were supposedly "employees or representatives of a foreign government" (as spies) at the time of his birth, he had never been a Canadian citizen.[42] Mr. Vavilov sought judicial review of the Registrar's statutory interpretation in the Federal Court of Canada, where his application was dismissed.[43] After a majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal,[44] the Minister of Citizenship and Immigration for Canada finally appealed to the Supreme Court of Canada. It was there joined with two other cases of judicial review.[45]

The Supreme Court sent a clear signal in allowing the appeals that one of them would be the newest landmark case for judicial review theory. In a highly unusual move,[46] it gave specific instructions to the parties, as it considered that:

> [T]hese appeals [provided] an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir* . . . and subsequent cases. To that end, the appellants and respondent [were] invited to devote a substantial part of their . . . submissions on the appeal to the question of standard of review.[47]

The majority would later explain that "[d]espite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging."[48] The Court allowed for the participation of twenty-seven interveners and appointed two

42. *Vavilov*, *supra* note 2 at para 152. The Registrar's letter informing Mr. Vavilov of the decision did not offer this analysis, but "it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision" (*ibid* at para 153).

43. See *Vavilov v Canada (Citizenship and Immigration)*, 2015 FC 960.

44. See *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132.

45. See *Bell Canada v Canada (Attorney General)*, 2017 FCA 249, leave to appeal to SCC granted, 2019 SCC 66; *National Football League, et al v Attorney General of Canada*, 2017 FCA 249, leave to appeal to SCC granted, 2019 SCC 66.

46. Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33:2 Can J Admin L & Prac 111 at 114 [Daly, "The *Vavilov* Framework"].

47. *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2017 FCA 132, leave to appeal to SCC granted, 2019 SCC 65 [*Vavilov* 2018].

48. *Vavilov*, *supra* note 2 at para 6.

amici curiae, transforming the hearings into what was later dubbed a"quasi-consultation"[49] on judicial review. The ground was set for these appeals to introduce new conceptual insight on judicial review theory.

The majority in *Vavilov* set out a comprehensive judicial review framework, which was then applied in *Bell Canada v Canada (Attorney General)*.[50] In both cases, justices on the Court did not agree as to how "to consider the nature and scope of judicial review of administrative action"[51]—Wagner CJ and Moldaver, Gascon, Côté, Brown, Rowe, and Martin JJ composed the majority, leaving Abella and Karakatsanis JJ concurring. The minority did not believe the majority's reassurance that it merely reconsidered and clarified[52] the judicial review framework—those were euphemisms: it was squarely "overturn[ing] precedent".[53] Precisely, the majority took on to tackle "two key aspects"[54] of judicial review jurisprudence: the selection of the standard of review and the method to conduct reasonableness review.

A. Selecting the Standard of Review

The first aspect starts with the establishment of a "presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions".[55] The conceptual basis for past presumptions and for applying the reasonableness standard, in general, had largely relied on respect for administrative expertise. The Court stepped away from this conceptual ground.[56] The larger scope of the *Vavilov* presumption now rests on the Court's "respect for . . . institutional design choice and the democratic principle, as well as the need for courts to avoid undue interference with the administrative decision maker's discharge of its functions".[57]

49. See "Fascicule 10: Normes de contrôle judiciaire" at no 10.3, in Stéphane Beaulac & Jean-François Gaudreault-DesBiens, eds, JCQ *Droit administratif* (QL).

50. 2019 SCC 66 at para 4 [*Bell Canada*].

51. *Vavilov* 2018, *supra* note 47.

52. See *Vavilov*, *supra* note 2 at para 2.

53. *Ibid* at para 269.

54. *Ibid* at para 2.

55. *Ibid* at para 16.

56. See *ibid* at paras 26–31.

57. *Ibid* at para 30 [internal quotation marks omitted].

The same considerations explain that the presumption is rebutted if it is established that the legislature explicitly prescribed the applicable standard of review.[58] This can be done in two separate ways. The first is the legislature providing a "legislated standard of review".[59] The second is the legislature providing for statutory appeal mechanisms.[60] In other words, a legislature can straightforwardly write into law either that correctness is the applicable standard to a certain situation, or that *appellate standards* apply. As a general rule, a court hearing an appeal to an administrative decision must apply the correctness standard to questions of law, and the palpable and overriding error standard on questions of fact.[61]

The presumption of reasonableness can also be rebutted using arguments grounded in the "rule of law". Although the majority did not flesh out this latter concept in any detail,[62] it made clear that certain decisions cannot merely be *reasonable*, they must be *correct*:

> The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.[63]

There are three categories of questions where the rule of law requires that correctness review be applied: (1) constitutional questions, (2) general questions of law of central importance to the legal system as a whole, and (3) questions regarding the jurisdictional boundaries between two or more administrative bodies.[64]

---

58. See *ibid* at paras 32–35.

59. *Ibid* at paras 34–35. As an example, the Supreme Court of Canada refers to the legislated standards of review appearing in the *Administrative Tribunal Acts*, SBC 2004, c 45 s 58–59.

60. See *Vavilov*, *supra* note 2 at paras 36–52.

61. See *ibid* at para 37, repeated in *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 at para 147. For a more precise account of appellate standards, see *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 19, 26–37.

62. See Edward J Cottrill, "Administrative 'Determinations of Law' and the Limits of Legal Pluralism after *Vavilov*" (2020) 58:1 Alta L Rev 153 at 182.

63. *Vavilov*, *supra* note 2 at para 53.

64. See *ibid* at paras 55–57, 58–62, 63–64 (in order).

The Court warned that it "would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption . . . in a future case".[65] Notwithstanding the Court's further warning that the establishment of new categories cannot be routine,[66] Professor Paul Daly, noted administrative law expert, suggested that the "rule-of-law" door is left slightly open for lawyers' creativity to find new ways to attain correctness review.[67] His prediction was accurate: two years after *Vavilov*, the Court recognized a new category for "concurrent first instance jurisdiction between courts and administrative bodies" in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association (Society of Composers)*.[68]

In section III, the Court's reasons on the selection of the standard of review will help us assess how *Doré*-type cases fit in this new framework, and whether creativity might indeed shine new light on the applicable standard of review of administrative decisions affecting *Charter* rights.

B. Performing Reasonableness Review

The second aspect of clarification the majority sought to bring is how, in practical terms, one must review an administrative decision under the reasonableness standard. Correctness review indeed needed no amplification—a court naturally knows how to "come to its own conclusions".[69] Reasonableness review, in contrast, suffered from the "Court's . . . little guidance on how to conduct reasonableness review in practice".[70] *Vavilov*, in this respect, set out "a detailed methodology which is bound to be welcomed by first instance judges required to apply the reasonableness standard".[71] It identified two types of "fundamental flaws" to look out for in an administrative decision: (1) failure of rationality internal to the reasoning process,[72] and (2) untenability in the light of the relevant factual and legal constraints.[73] The Court lays out in fair detail

65. *Ibid* at para 70.

66. See *ibid*.

67. Daly, "The *Vavilov* Framework", *supra* note 46 at 123.

68. 2022 SCC 30 at paras 22–42 [*Society of Composers*]. This new category, however, only perpetuates what pre-*Vavilov* case law had already recognized as requiring correctness review.

69. *Vavilov*, *supra* note 2 at para 54.

70. *Ibid* at para 73. See also Cottrill, "Limits of Legal Pluralism", *supra* note 62 at 183.

71. Daly, "The *Vavilov* Framework", *supra* note 46 at 125.

72. See *Vavilov*, *supra* note 2 at paras 102–04.

73. See *ibid* at para 101.

what reasonableness looks like in these two circumstances. It provides three failures of rationality and four logical fallacies which would undermine reasonableness under the first flaw, and it enumerates eight factual and legal constraints to be considered under the second flaw.[74]

The practical tools to conduct reasonableness review are accompanied by conceptual grounding: a "culture of justification".[75] In other words, the Court urges administrative decision makers to think twice before rendering a decision without reasons. This leaves the impression that the reasonableness standard is more easily met where there are reasons for a decision. Nevertheless, the Court did recall that procedural fairness does not require *all* administrative decisions to be delivered in writing.[76] Where they are not, the analysis will focus on the record as a whole to understand the decision, and in the end, on the outcome.[77] In all cases of reasonableness review, however, the Court asked courts to refrain from deciding *de novo* the issue themselves.[78]

The concurring justices argued in contrast that the practical tools of the majority increased the probability of reviewing courts dissecting administrative decisions in a line-by-line fashion.[79] However, Abella and Karakatsanis JJ's refusal to provide a list of factors leaves their alternative "suggestions for conducting reasonableness review"[80] unhelpful to the first-instance judge. They repeated the conceptual principles of "deference" and "respect",[81] added a general word on "materiality",[82] but did not give practical examples of what *is* unreasonable. The concurring justices rather give the impression that their advice was focused primarily on instances where a court should uphold a decision rather than quash it.[83] Still, their conceptual approach is not, on the balance, inherently dissimilar to the majority's take on deference.[84] In general terms, the majority

74. See *ibid* at paras 101, 108–35.

75. *Ibid* at para 2.

76. See *ibid* at para 77.

77. See *ibid* at para 137.

78. See *ibid* at para 83.

79. See *ibid* at para 284.

80. *Ibid* at para 295.

81. *Ibid* at paras 284–94, 297–99.

82. *Ibid* at para 300.

83. For example, Abella & Karakatsanis JJ set out general ways for courts to salvage cases where reasons are absent (see *ibid* at paras 302–03).

84. See Daly, "The *Vavilov* Framework", *supra* note 46 at 125. See also *Vavilov*, *supra* note 2 at para 75 (although the minority argued the opposite at para 284).

expressed that deference remains at the foundation of judicial review: "[R]easonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, . . . reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus."[85] The majority wanted to flesh out what these "relevant circumstances" were.

In the analysis of the implications of *Vavilov* for *Doré*, these practical tools of the majority will play an important role in assessing *Vavilov*'s input to *Doré*'s so-called "reasonableness review".

III. The Implications of *Vavilov* for *Doré*

The Supreme Court of Canada did not accept the *amici curiae*'s invitation to include the *Doré* framework in its "reconsideration".[86] The debate in the literature regarding *Doré*'s future under *Vavilov*, fuelled by this unstable state of affairs, is still ongoing. In situating myself in the debate, I will suppose three possible implications of the revised judicial review framework for the *Doré* framework. The first is the status quo—that is, *Vavilov* could leave *Doré* to evolve as an unaltered separate exception to the larger framework. The second is, on the contrary, that *Vavilov* could thrust *Doré* into recasting its methods and standards for review. The third is *Vavilov* providing minor touch-ups to the *Doré* framework, leaving reasonableness as the standard but providing new guidance on how it is to be assessed. I will consider how successful are the arguments for each of these implications.

A. Departure from the Status Quo

The Court's brief words in *Vavilov* on the matter of *Doré* give us a head start in our discussion. They maintain the distinction that makes *Doré* relevant:

> Although the *amici* questioned the approach to the standard of review set out in *Doré*, . . . a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it

85. *Vavilov*, *supra* note 2 at para 75.

86. *Vavilov*, *ibid* at para 57.

> is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the [*Charter*] (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* . . . Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.[87]

Otherwise put, the Court separates two kinds of *Charter* challenges: (1) those to the effect of an administrative discretion taken under a constitutionally valid statute, and (2) *Charter* challenges directly to a statutory provision. But recognizing the distinction that was squarely at the centre of the *Doré* case does not give the assurance that the framework elaborated therein is not affected by *Vavilov*'s reform. The issue in this section is precisely to evaluate how convincing the claim is that *Doré* stands unaltered following the Court's overhaul of the law of judicial review.

(i) Open-Minded Attitude Towards Prior Case Law

Vavilov does not provide the assurance that *Doré* will stay substantively the same. The key is in the last sentence of the paragraph quoted above: the sole jurisprudence that the Court does not "displace" is the long-standing practice of applying "correctness" to an administrative decision on the constitutionality of a statute.[88] Conversely, the Court did not provide any indication that the *Doré* jurisprudence should receive the same protection.[89] In view of the Court's terse wariness, it cannot be said with complete confidence that *Doré* "remains good law following . . . *Vavilov*"[90] or that "*Vavilov* must be taken . . . to affirm *Doré*".[91] The overall impression is that where an opportune case will come

87. *Ibid*.

88. *Dunsmuir*, *supra* note 11 (under which "[c]onstitutional questions" attracted correctness review).

89. David Mullan, "Judicial Scrutiny of Administrative Decision Making: Principled Simplification or Continuing Angst?" (2020) 50 Adv Q 423 at 434.

90. Lawrence David, *Stare Decisis, The* Charter *and the Rule of Law in the Supreme Court of Canada* (Toronto: LexisNexis, 2020) at 272.

91. Richard Stacey, "A Unified Model of Public Law: *Charter* Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338 at 340.

forward, the Court will ponder the extent of the "reconsideration" it wishes to operate. The door is open.[92]

What *Vavilov* provides is an attitude towards precedent—it leaves anomalies in judicial review theory in the ambit of the Supreme Court of Canada's "reconsideration and clarification". The majority believed that courts and participants in the administrative process needed "clear guidance on how judicial review is to be performed".[93] It thought that the revision of the judicial review framework was "necessary in order to bring greater coherence and predictability to this area of law".[94] The minority went as far as qualifying this attitude as "disregard for precedent and *stare decisis*".[95] Post-*Vavilov* jurisprudence of the Supreme Court imprints the same attitude, here shown in Rowe J's concurring reasons in *Ontario (Attorney General) v G*:[96]

> The Court should depart from a precedent such as *Schachter* only in "compelling circumstances" ([*Vavilov*], at para. 18). For example, a precedent can be revisited if it is "unsound in principle", "unworkable and unnecessarily complex to apply", or if it has "attracted significant and valid judicial, academic, and other criticism" (*Vavilov*, at para. 20).[97]

In the *Trinity* cases, the minority's strong call for reformation finds echoes in *Vavilov*'s concerns about incoherent precedents. The Supreme Court could not now merely cite "binding precedent"[98] as an excuse not to give attention to arguments for reconsideration. *Vavilov* gives future case law an opportunity to correct the anomalies in the *Doré* framework. Scholarly and judicial criticism will have to be dealt with.

---

92. See Jamie Chai Yun Liew, "The Good, the Bad and the Ugly: A Preliminary Assessment of Whether the *Vavilov* Framework Adequately Addresses Concerns of Marginalized Communities in the Immigration Law Context" (2020) 98:2 Can Bar Rev 388 at 401.

93. *Vavilov*, *supra* note 2 at para 5.

94. *Ibid* at para 10.

95. *Ibid* at para 254.

96. 2020 SCC 38.

97. *Ibid* at para 187.

98. *LSBC*, *supra* note 30 at para 59. See also Cheryl Milne, "What Does *Vavilov* Mean for Constitutional Issues in Administrative Law?", online (blog): *David Asper Centre for Constitutional Rights* <aspercentre.ca/what-does-vavilov-mean-for-constitutional-issues-inadministrative-law/>.

My claim is corroborated by the Supreme Court of Canada's specific instructions to courts on how to treat case law prior to *Vavilov*. The Court realized that its holistic revision of the framework for determining the applicable standard of review brought issues on how to treat existing administrative law jurisprudence.[99] As such, it instructed courts "seeking to determine what standard is appropriate in a case before it [to] look to [the reasons in *Vavilov*] first in order to determine how this general framework applies to that case".[100] This was not to say, the Court warned, that all prior jurisprudence would be thrown out the window. Still,

> [m]uch of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole, . . . will continue to apply essentially without modification. On other issues, certain cases—including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis—will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons. [101]

The idea is giving paramountcy to *Vavilov*'s reasons regarding past case law: what is contrary to its principles goes; what is not, stays. This gives useful advice on how the *Doré* framework must be treated. Admittedly, *Doré* is not expressly targeted in the Court's comment—no more is it comprised in the jurisprudence *Vavilov* wanted to displace altogether (e.g., cases of "true questions of jurisdiction"). Still, the approach suggests that *Doré* is not wholly protected and could be swept into the new jurisprudential drive "for future doctrinal stability".[102] The ensuing question is now to "carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach".[103]

99. See *Vavilov*, *supra* note 2 at para 143.

100. *Ibid*.

101. *Ibid*.

102. *Ibid* at para 144.

103. *Ibid* at para 18.

(ii) Anomalies in the *Doré* Framework

The *Doré* framework fails to provide clear and stable guidance to actors of judicial review. *Vavilov*'s push to resolve anomalies should then bring the *Doré* defects to reconsideration.

i. Burden of Proof

Scholars and the minority justices in *Trinity* rightfully note that the Supreme Court of Canada does not provide any guidance as to who bears the burden of providing evidence to satisfy each criterion of the *Doré* framework. This leaves it suffering from "a conspicuous and serious lacuna".[104] According to McLachlin CJ, Rowe, Côté and Brown JJ, the issue should be resolved in favour of the claimant: "[T]he onus is on the state actor that made the rights-infringing decision . . . to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society".[105] In an ordinary reasonableness review, the claimant bears the burden to demonstrate that an administrative decision is unreasonable.[106] In contrast, following *Oakes*' method, the minority brought a twofold onus approach to *Doré* cases: the claimant must provide evidence (1) that their *Charter* rights were infringed upon. When the burden is satisfied, the state actor must prove in turn (2) that this infringement was reasonable and proportionate. However, the majority did not provide such guidance. It leaves us in the strange situation where the only available advice is that "[t]he reviewing court *must be satisfied* that the decision reflects a proportionate balance."[107] It stays unclear, then, if the court just figures out the matter by itself

104. *LSBC*, *supra* note 30 at para 312 (Côté & Brown JJ, dissenting). See Sheila Wildeman, "Making Sense of Reasonableness" in Lorne Sossin & Colleen M Flood, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond, 2018) 437 at 496; Charlotte Baigent, "Undoing *Doré*: Judicial Resistance in Canadian Appellate Courts" (2020) 33:1 Can J Admin L & Prac 63 at 87.

105. *LSBC*, *supra* note 30 at para 117 (McLachlin J, concurring). See also paras 144, 206 (Rowe J, concurring), 314 (Côté & Brown JJ, dissenting).

106. See *Vavilov*, *supra* note 2 at para 100. This principle remains unchanged under *Vavilov*.

107. *Ibid* at paras 59, 80 [emphasis added]. See also *ibid* at para 313 (Côté & Brown JJ, dissenting); Baigent, *supra* note 103 at 87; Mary Liston, "Administering the *Charter*, Proportioning Justice: Thirty-five Years of Development in a Nutshell" (2017) 30:2 Can J Admin L & Prac 211 at 227.

in the abstract,[108] or if one of the parties must prove or disprove the reasonableness of the decision. In other words, the Court does not say whether the import of administrative law principles in *Doré* included the principle of the claimant bearing the onus of proof. Back in *Doré*, Abella J thought that the question of the onus fitted awkwardly to the method she was laying out. She asked rhetorically: "On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated[109] decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective?"[110] This may explain the majority's (including Abella J) silence in *Trinity* on the onus question, even when challenged on this very aspect by concurring and dissenting justices.

The issue is pressing, even though a *Doré* test does not rely on parties to provide an abundance of evidence (as one could see in a criminal trial, for example). Indeed, *Oakes* insists on putting clearly what each party must demonstrate. If the majorities' forceful statements, in *Doré*, *Loyola*, and *LSBC*, on the supposed "conceptual harmony"[111] between the *Oakes* and *Doré* frameworks are not empty, then McLachlin CJ, Rowe, Brown, and Côté JJ are right to bring into the spotlight *Doré*'s failure to address the question. It is a heavy burden to put on the claimant to provide evidence on both stages of infringement and justification.[112] Most of the arguments in a freedom of religion *Charter* challenge, for instance, will be made at the justificatory stage. Due to an avowedly broad and expansive approach, "most issues of religious freedom in Canada [are pushed] to some form of a proportionality analysis to assess whether the limit on or interference with section 2(a) interests—so easily

108. See Sancho McCann, "Finding Harmony: *Law Society of British Columbia v Trinity Western University*" (2019) 28:1 Dal J Leg Stud 95 at 100–01.

109. Justice Abella's wording here appears to imply that the framework applied only to "adjudicated decisions". *Loyola*, however, clarified that it applied to discretionary administrative decisions at large. See Léonid Sirota, "Unholy *Trinity*: The Failure of Administrative Constitutionalism in Canada" (2020) 2:1 J Commonwealth L 1 at 18 [Sirota, "Unholy *Trinity*"]; *Loyola*, *supra* note 26 at para 4.

110. *Doré*, *supra* note 1 at para 4; Fox-Decent & Pless, *supra* note 12 at 514.

111. *Doré*, *supra* note 1 at para 57; *Loyola*, *supra* note 26 at para 40; *LSBC*, *supra* note 30 at para 79.

112. See Liston, *supra* note 107 at 227; Evan Fox-Decent & Alexander Pless, "The *Charter* and Administrative Law: Cross-Fertilization or Inconstancy?" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond, 2013) 407 at 435 [Fox-Decent & Pless, "The *Charter* and Administrative Law"].

established—is justifiable".[113] That the disproportionality of an administrative decision is to be demonstrated by the claimant, then, goes against the large and liberal method which usually gave the claimant the upper hand in matters of religious freedom.[114] It is, moreover, odd for the claimant to give evidence on the administrative decision maker's balancing of *Charter* protections without the former necessarily having access to the latter's reasons or record.[115] In the *Trinity* cases, one wonders how Trinity Western University was to enter in the Law Societies' benchers' minds to know whether they "were alive"[116] to the *Charter* issues. As a result, Abella J's question quoted above loses its rhetorical force: who is better placed to provide justification that their decision is reasonable? Likely not the person whose rights have been infringed upon.

It would be contrary to *Vavilov*'s spirit for the Supreme Court of Canada to "maintain this silence, thereby failing to clarify the matter",[117] regardless of which view one takes on the issue. Although the observations above militate in favour of the minority's view in *Trinity*, more "deference-disposed" jurists could be of the opposite view and bring the aforementioned onus on the claimant's shoulders. They would, admittedly, be doomed to find improbable arguments as to why the new "culture of justification"[118] now promoted by the Supreme Court would *not* ask the state to justify why it may have violated the *Constitution Act, 1982*. Both sides, however, must agree that the current situation leaves "administrative decision-makers, those subject to their decisions and courts"[119]

113. Benjamin L Berger, "Freedom of Religion" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 763.

114. That other *Charter* rights, in contrast, give rise to greater evidentiary burdens to demonstrate the occurrence of an infringement only strengthens the argument, for the claimant then bears two heavy burdens instead of one. In some situations, inversely, "state institutions have vastly greater resources at their disposal than right-holding litigants, including greater capacity to generate and use specialist knowledge." Emma Cunliffe, "*Charter* Rights, State Expertise: Testing State Claims to Expert Knowledge" (2020) 94 SCLR (2d) 367–90 at 387. It should be noted, however, that Cunliffe writes here on the criminal law context.

115. See Baigent, *supra* note 104 at 87.

116. *LSBC*, *supra* note 30 at para 55; *LSUC*, *supra* note 29 at para 28.

117. *LSBC*, *supra* note 30 at para 312 (Côté & Brown JJ, dissenting).

118. *Vavilov*, *supra* note 2 at paras 2, 14. Already in 2014, Audrey Macklin, "*Charter* Right or *Charter*-Lite?: Administrative Discretion and the *Charter*" (2014) 67 SCLR 561 at 573.

119. *Vavilov*, *supra* note 2 at para 5.

all but "guessing about precisely who must do the 'satisfying'".[120] The *Doré* framework, on this issue, cannot stay unchanged.

ii. Charter *Values*

The Supreme Court's insistence on "*Charter* values" supposedly embedded in the framework of *Doré*, *Loyola*, and *Trinity* can also be qualified as missing "clear guidance" as to justify "reconsideration" following *Vavilov*. In *LSBC*, Abella J encapsulated the principle with confidence: the *Doré-Loyola* framework arises whenever an administrative decision "engages the *Charter* by limiting *Charter* protections—both rights and values".[121] The minority in *LSBC* joined multiple authors who have pointed to the several analytical problems that the ambivalence in language between *Charter* "rights", "values", and "protections"[122] has caused ever since *Doré*.[123] Chief Justice McLachlin put it shortly: "[T]o adequately protect the right, the initial focus must be on whether the claimant's constitutional right has been infringed. *Charter* values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the *Charter*."[124] The majority offered no real reply to the criticism—unless one considers citing binding precedent a relevant reply.

The problem is that the Court's continued ambivalence in language between *Charter* rights and values causes methodological defects in the *Doré* analysis. Recall the latter's first step: determining whether a *Charte*r right was infringed

120. *LSBC*, *supra* note 30 at para 313 (Côté & Brown JJ, dissenting).

121. *Ibid* at para 58.

122. In *Doré*, Abella J used the expression "*Charter* value" thirty times and "expressive rights" eight times. She generally eschewed "*Charter* right" and "freedom of expression", although she quoted and paraphrased authors who have not. She also referred to s. 2 (b) of the *Charter*. See Audrey Macklin, "*Charter*-Lite?", *supra* note 118 at 567–68.

123. Macklin, "*Charter*-Lite?", *supra* note 118; Lorne Sossin & Mark Friedman, "*Charter* Values and Administrative Justice" (2014) 67 SCLR 391; Matthew Horner, "*Charter* Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67 SCLR 361; Hoi L Kong, "*Doré*, Proportionality and the Virtues of Judicial Craft" (2013) 63 SCLR 501; Bredt & Krajewska, *supra* note 12; See Fox-Decent & Pless, "The *Charter* and Administrative Law", *supra* note 112 at 435–37; Fox-Decent & Pless, "*Charter* and Administrative Law Part II", *supra* note 12 at 515–18.

124. *LSBC*, *supra* note 30 at para 115.

upon. Interchanging "right" and "value" at this step of the analysis—just as the majority in *Trinity* still believed could be done—is not without consequence. For a start, *Charter* values have been described as the "shadowy cousin of rights",[125] with an "unarticulated"[126] definition, an "amorphous"[127] content, and ambiguous sources.[128] Admittedly, some values are so closely tied to *Charter* rights that their scope is well defined. In *Trinity*, whether "religious freedom"[129] was a protection, a value,[130] or a right had less significance; one can instinctively associate it with the scope of "freedom of religion" written in section 2(a) of the *Charter* and amply studied in case law.[131] However, should the majority have recognized "diversity" as a *Charter* value (which is not plainly hypothetical),[132] one wonders how it could have been "balanced" with the *LSBC*'s statutory mandate, specifically—promoting diversity.[133] Without a defined scope for an identified value, a reviewing court (not to mention an administrative decision maker)[134] cannot properly evaluate whether there was an infringement or not on that very value—and even less perform a proportionality analysis afterwards.[135] Moreover, the situation where someone holds a right upon which the state infringed naturally appears to carry more weight than where someone claims an abstract *value* comes into question.[136] With judicial review putting emphasis on the litigants' standing, both from a constitutional and an administrative perspective,[137] claims that depersonalized values "are engaged" cannot coherently place themselves at the core of the *Doré* analysis. Even more worrying is that the unattached "floating-in-the-air" character of *Charter* values can counterintuitively grant a *Charter* blessing to state action, rather than

125. Wildeman, *supra* note 104 at 498.

126. Macklin, "*Charter*-Lite?", *supra* note 118 at 562.

127. Horner, s*upra* note 123 at 362.

128. See Sossin & Friedman, *supra* note 123 at 408.

129. *LSBC*, *supra* note 30 at para 60–62.

130. See Sossin & Friedman, *supra* note 123 at 418.

131. The same association could be drawn in *Doré* with the value of "expressive freedom". See Bredt & Krajewska, *supra* note 12 at 354.

132. See Sossin & Friedman, *supra* note 123 at 421; *Multani*, *supra* note 12 at para 78.

133. See *LSBC*, *supra* note 30 at para 43.

134. Macklin, "*Charter*-Lite?", *supra* note 118 at 571.

135. Bredt & Krajewska, *supra* note 12 at 353. See *LSBC*, *supra* note 30 at para 172 (Rowe J); Macklin, "*Charter*-Lite?", *supra* note 118 at 571.

136. See Macklin, "*Charter*-Lite?", *supra* note 118 at 579 (on the notion of weight).

137. Judicial review for constitutionality classically asks for the plaintiff to be "directly affected by the legislation" or to have "a genuine interest in its validity". See *Canadian Council of*

keeping it in check of its infringement on a person's rights and freedoms.[138] Taken together with the fact that selecting which *Charter* value comes into play is a highly subjective enterprise,[139] the claimant's burden of providing evidence on infringement and on proportionality becomes in effect "unwieldy and unpredictable".[140] These last two adjectives cannot be conciliated with *Vavilov*'s wishes.[141]

All things considered, there are strong and compelling reasons to complete the missing and obscure elements of the *Doré* framework. The "impact on legal certainty and predictability" cannot overweigh the "costs of continuing to follow a flawed approach",[142] where precisely this past approach fosters legal uncertainty and unpredictability. This section was not to provide an exhaustive account nor a complete solution to the unresolved issues that characterize the *Doré* framework. For instance, the point was not that *Charter* values should be eliminated from the analysis: it is that their (subordinate) role should be fully fleshed out. Authors have pointed out how *Charter* values can enhance judicial and administrative decision making by informing statutory interpretation or by clarifying the scope of a C*harter* right, for instance.[143] But even then, most agree that *Doré* and the following cases failed to establish a clear pattern for how *Charter* values should be operationalized.[144] More generally on *Doré*, while Professor Richard Stacey of the University of Toronto argues that: "*Doré* . . . gives us a blueprint for how to conduct an intelligible and transparent inquiry

---

Churches v Canada (Minister of Employment and Immigration), [1992] 1 SCR 236 at 253, 88 DLR (4th) 193. See also Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed (Cowansville: Éditions Yvon Blais, 2014) at 187. Judicial review in administrative law similarly asks for the plaintiff to either have "sufficient private or personal interest in the subject matter", or "to have a genuine interest in the issue". See *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at paras 17, 34, 33 DLR (4th) 321. See also Denis Ferland & Benoît Emery, *Précis de procédure civile du Québec*, 6th ed (Montréal: Éditions Yvon Blais, 2020), ss 923–24.

138. Edward J Cottrill, "Novel Uses of the *Charter* following *Doré* and *Loyola*" (2018) 56:1 Alta L Rev 73 at 113.

139. See *ibid* at 111–12; *LSBC*, *supra* note 30 at para 171 (Rowe J, concurring).

140. Bredt & Krajewska, *supra* note 12 at 354.

141. *Vavilov* uses the expression "*Charter* rights"—not values—when addressing *Doré* (*supra* note 2 at para 57). My analysis does not ground itself on this thin evidence of a shift.

142. *Ibid* at para 18.

143. See Fox-Decent & Pless, "*Charter* and Administrative Law Part II", *supra* note 12 at 517; Sossin & Friedman, *supra* note 123 at 425–29; Stacey, *supra* note 89 at 357.

144. See Fox-Decent & Pless, "*Charter* and Administrative Law Part II", *supra* note 12 at 517; Stacey, *supra* note 91 at 357; Sossin & Friedman, *supra* note 123 (draft a possible template for the operationalization of *Charter* values at 425-29).

into proportionality in the strict sense",[145] he still admits that "*Doré* does not reveal its logic easily".[146] Therefore, my argument is not about advocating for a clean slate, overruling everything *Doré* represents for the sake of clarity. Indeed, *Vavilov* does not promise either that the *Doré* jurisprudence will be completely revamped or that it will stay all the same. *Vavilov* merely gives the necessary push to the Supreme Court of Canada to finally answer the lingering questions dissenting and concurring justices have increasingly raised and tried to answer, starting in *Loyola* and culminating in *Trinity*.

B. The Right Standard of Review

With these general considerations in mind, I move to the more "practical" implications of *Vavilov* for *Doré*. Specifically, this section will consider how the new guidance on the selection of the appropriate standard of review might generate changes in the *Doré* approach. The latter was clearly excluded from the Supreme Court's reconsideration in *Vavilov*. Yet, because the Court adopted a categorical approach to select the standard of review, it is possible to evaluate in which category *Doré*-type issues appear to fit (and thereby which standard of review must apply). Following *Vavilov*'s method, the reasonableness standard presumptively applies to all questions on the merits of an administrative decision.[147] The only available argument to rebut the presumption is to invoke that either the *rule of law* or *legislative intent* demands the review to take place under the correctness standard. *Vavilov* does not offer an escape route out of this two-step method.[148] The task, then, will be to determine whether *Charter*

145. Stacey, *supra* note 91 at 356–57.

146. *Ibid* at 356.

147. See *Vavilov*, *supra* note 2 at para 23; Paul Daly, "Unresolved Issues after *Vavilov* II: The *Doré* Framework" (5 May 2020), online (blog): *Administrative Law Matters* <administrativelawmatters.com/blog/2020/05/06/unresolved-issues-after-vavilov-ii-the-doreframework/> [Daly, "Unresolved Issues"].

148. I recommend against using expressions which signal that the presumption "does not apply", for instance, in *Doré*-type issues. The presumption always applies; the question is whether it is subsequently rebutted. The misleading formulation may have led to Mark Mancini's second argument collapsing into his first in his article. See Mark Mancini, "*Doré* Revisited: A Response to Professor Daly" (21 May 2020), online (blog): *Double Aspect* <doubleaspect.blog/2020/05/21/dore-revisited-a-response-to-professor-daly/> [Mancini, "*Doré* Revisited"], as noted in Paul Daly, "*Doré* and *Vavilov*, A Surreply", (21 May 2020), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2020/05/21/dore-and-vavilov-a-surreply/>.

challenges to administrative discretion are to be reviewed under the presumptive reasonableness standard or under the exceptional correctness standard.

(i) Different Standards at Different Stages in the *Doré* Framework

The problem in applying the presumption in our case is that the current approach to *Doré*-type issues is not monolithic. The Court's jurisprudence shows rather that the different stages of the *Doré* analysis receive different standards of review. Although the majorities in *Doré*, *Loyola*, and *Trinity* have language to the effect that they were performing a "reasonableness review", they did not confirm that *all steps* of the analysis were subject to a reasonableness standard.

That the "preliminary question"[149] of infringement is subject to a reasonableness standard is contrary to what we observe in the Court's reasoning. In *Doré* and *Loyola*, the steps of infringement and proportionality were rather muddled together in the analysis so as to give us little help on this matter.[150] *LSBC* was more methodological: the majority dedicated a separate heading to the question of infringement (titled "Whether Freedom of Religion is Engaged").[151] When looked at independently, the section 2(a) test appearing under this section conforms squarely to the classical constitutionality test, without any aspect of deference or reasonableness.[152] At any rate, those words do not appear in the text. This pattern was already set in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* (*Ktunaxa*).[153] The case involved a minister's decision to allow a ski resort to be built in a forest regarded as sacred by the Indigenous peoples of the Ktunaxa Nation. Among the questions investigated was whether this decision infringed upon the Nation's freedom of religion and conscience under section 2(a) of the *Charter*.[154] The majority of the Court gave this succinct account of their method: "The first step where a claim is made that a law or governmental act violates freedom of religion is to determine whether the claim falls within the scope of section 2(a). If not, there is no need to consider whether the decision represents a

149. *LSBC*, *supra* note 30 at para 58.

150. See Fox-Decent & Pless, "*Charter* and Administrative Law Part II", *supra* note 12 at 512; Stacey, *supra* note 91 at 354.

151. *LSBC*, *supra* note 30 at paras 60–75.

152. See *ibid* at para 63.

153. 2017 SCC 54 [*Ktunaxa*].

154. Some aspects of the "duty to consult" issues which are dealt with in *Ktunaxa* (see *ibid* at paras 76–114) will be addressed briefly in the next subsection.

proportionate balance between freedom of religion and other considerations."[155] In effect, the majority found no infringement of section 2(a). The Court's analysis of the scope of freedom of religion did not involve any references to "reasonableness" or "deference". It plainly looked at case law, doctrine, and international instruments and applied them to the facts of the case. It gave no attention to the Minister's own assessment. A "reasonableness review" hardly occurred overall in the majority's reasons. This conclusion is corroborated by the minority's reasons in *Ktunaxa*. After judging there was an infringement to section 2(a), Côté and Moldaver JJ found that: "[The] Court's decision in *Doré* . . . [set] out the applicable framework for assessing whether the Minister reasonably exercised his statutory discretion in accordance with the Ktunaxa's *Charter* protections".[156] The concurring justices, despite explicitly applying *Doré*, only engaged in a proper reasonableness review until after they found an infringement. Much like the majority, the minority came to its own conclusions on the question of the scope of section 2(a). "Disguised correctness review"[157] is what both parties engaged in—they proceeded directly to determine how they would have interpreted the *Charter*, "instead of engaging thoughtfully with the rationale offered in support of the administrative decision".[158] Although the Court does not put it explicitly, the infringement stage of the *Doré* analysis is subject to the correctness standard—and *not* reasonableness.

The Court clearly purports to apply a reasonableness standard on the review of proportionality: "reasonableness requires proportionality",[159] wrote Abella J. However, this bold statement does not address the twofold aspect of the proportionality exercise. When an infringement is effectively at play, the administrative official first considers the statutory objectives under which he must reach a decision, then he balances these with the severity of the interference of the *Charter* protection. In practice, these two phases have a reciprocating

155. *Ibid* at para 61. In a later paragraph, the majority spoke of a "reasonable balance" (*ibid* at para 75). One author argues this latter wording implied the *Doré* framework. See VictoriaWicks, "What *Ktunaxa* can Teach us about *Doré*" (2018) 31 Can J Admin L & Prac 217 at 220.

156. *Ktunaxa*, *supra* note 153 at para 136.

157. The expression was coined by David Mullan, "The True Legacy of *Dunsmuir*—Disguised Correctness Review?" in Paul Daly & Léonid Sirota, eds, *A Decade of Dunsmuir* (Toronto: Thomson Reuters, 2018).

158. Matthew Lewans, "*Dunsmuir*'s Disconnect" (2019) 69:1 UTLJ 18–30 at 19 (describing the "hallmark of disguised correctness review"); Léonid Sirota, "*Doré*'s Demise?", (12 November 2017), online (blog): *Double Aspect* <doubleaspect.blog/2017/11/12/dores-demise/>; Paul Daly, "The Supreme Court of Canada and the Standard of Review: Recent Cases", (11 November 2017), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2020/05/21/dore-and-vavilov-a-surreply/>.

159. See *Loyola*, *supra* note 26 at para 38.

relationship, which eludes strict compartmentalization. In *Doré*, the Disciplinary Council's reasons for reprimanding the advocate dialogued with Abella J's interpretation of the requirements of the *Code of Ethics*.[160] In *Loyola*, Abella J offered a stricter separation between the assessment of the regulatory context in which the decision was made and the balance of the decision.[161] It is in *LSBC* that the boundaries were most faded. Where the Court reviewed "the extent to which the *LSBC*'s decision furthered its statutory objectives",[162] it went back and forth between its own *de novo* interpretation of the *Legal Profession Act*,[163] the LSBC's own specification of the "valid means by which [it] could pursue its overarching statutory duty",[164] and the decision's consequences on Trinity Western University's freedom of religion.

The unstructured nature of the review of proportionality makes it difficult to draw a firm conclusion on how reasonableness applies at this stage. The Court (without acknowledging it) works with a sliding scale of deference between the overlapping steps of *identifying* the statutory mandate, *considering* and *giving effect* to the statutory mandate, and *balancing* the severity of the interference with the *Charter* protection against the benefits to its statutory objectives. This may be what the reasonableness standard means in a *Doré* context—uncommonly pointing not quite to reasonableness, nor to correctness, rather following an unpredictable oscillation between deference and *de novo* analysis. Justice Abella's choice of associating proportionality and reasonableness by sheer assertion steers us into this specious halfway territory.

In summary: (1) without being acknowledged, the correctness standard applies at the *infringement* stage of the *Doré* analysis; and (2) at the *proportionality* stage, reasonableness formally applies (although, in practice, it forms a hybrid with proportionality).

(ii) Constitutional Thresholds

Nothing in *Vavilov* would justify a break from the past to lower the standard to reasonableness at the infringement stage. On the contrary, *Vavilov* brings the opportunity to formalize that correctness is the applicable standard through the "constitutional questions" category. Applying correctness to infringement

160. See *Doré*, *supra* note 1 at paras 67, 70.

161. See *Loyola*, *supra* note 26 at paras 50, 68 (although this might have been because she disagreed with the Minister's reasons for rejecting Loyola's religious education curriculum at para 79).

162. *LSBC*, *supra* note 30 at para 91.

163. SBC 1998, c 9.

164. *LSBC*, *supra* note 30 at para 40.

questions in a *Doré* context respects the Court's rationale in *Vavilov*: "They are, after all, situations in which the courts ought to provide a final, definitive answer, as the application of the Constitution or the scope of *Charter* rights should not vary as between different regulatory regimes."[165] The move towards uniformity would simply classify the *Doré* infringement test as what Daly calls a "threshold question of constitutionality".[166] In other words, it is a question of whether the Constitution applies or not—a question of trigger, almost in the abstract: is there an applicable *Charter* right, what is its scope, and does the applicant's claim "fall into that scope"?[167] Applying correctness to these questions is rather uncontroversial: as Daly adds, "there is nothing novel in treating threshold questions of constitutionality as requiring correctness review".[168] Mark Mancini, PhD student at the Allard School of Law, also observes that this approach has already been adopted explicitly by the Court of Appeal for Ontario in a post-*Vavilov* decision on *Charter* rights.[169] Mancini argues nevertheless that requiring correctness at this stage "seems inconsistent with the approach in *Doré*".[170] He maintains that the case bolstered the idea "that administrators can contribute to shared constitutional meaning".[171] However, Mancini's interpretation of the *Doré* approach fails to take account of the Supreme Court of Canada's own method on threshold questions, most notably in *LSBC*. As we have seen, the majority gave no place whatsoever to the *LSBC*'s interpretation of freedom of religion at the infringement stage of the analysis. Far from being inconsistent with *Doré* on the question of constitutional thresholds, *Vavilov* will merely push

165. Daly, "The *Vavilov* Framework", *supra* note 46 at 142, n 177, paraphrasing *Vavilov*, *supra* note 2 at para 53. See also Daly, "Unresolved Issues", *supra* note 147.

166. Daly, "The *Vavilov* Framework", *supra* note 46 at 142, n 177.

167. *Ktunaxa*, *supra* note 153 at para 67. In *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, although not in a strictly constitutional context, the Supreme Court of Canada recognized a threshold question which required a correctness standard review, in contrast to further factual questions which fell under the reasonableness standard. The Court held that the correctness standard should apply to the "question concern[ing] the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the *Quebec Charter*", but not to the subsidiary questions of "whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the determination of whether it was discriminatory" (ibid at paras 49–50); *Charter of Human Rights and Freedoms*, CQLR c C-12.

168. Daly, "The *Vavilov* Framework", *supra* note 46 at 142, n 177, citing, inter alia, *Ktunaxa*, *supra* note 153.

169. See *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025; Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dal LJ 793 at 824–26 [Mancini, "Conceptual Gap"].

170. *Ibid* at 827.

for greater transparency in the Court's implicit method.[172]

An analogy with the treatment of section 35 of the *Constitution Act, 1982* reinforces the argument for applying the correctness standard at the infringement stage of a *Doré* analysis.[173] In *Vavilov*, the Court cites as requiring correctness review, "questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*, and other constitutional matters".[174] An analogy between *Charter* rights and Aboriginal and treaty rights has its limits: obviously, section 35—although part of the *Constitution Act, 1982*—is not part of the *Charter*.[175] Yet, both constitutional guarantees father similar approaches as regards the initial stage of their judicial review application. In *R v Sparrow* (*Sparrow*), the Supreme Court of Canada held that, in order to successfully invoke section 35, one must preliminarily establish the existence and scope of the Aboriginal or treaty right which is asserted.[176] If the Court means anything in *Vavilov* when it cites the "scope" of Aboriginal and treaty rights as requiring correctness review, this initial step of the *Sparrow* test must fall under correctness review. Still under section 35, in matters of the Crown's duty to consult and accommodate (DTCA), the analysis is divided into three questions: (1) the "existence or extent" of the duty to consult, (2) the process of consultation, and (3) the adequacy of consultation.[177] Pre-*Vavilov* case law already accepted that the first step must be reviewed under correctness.[178] In

172. For a similar prognosis, see Daly, "The *Vavilov* Framework", *supra* note 46 at 142, n 177.

173. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982*, 1982 (UK), c 11.

174. *Vavilov*, *supra* note 2 at para 55.

175. See Robert Hamilton & Howard Kislowicz, "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov*?" (2021) 59:1 Alta L Rev 41 at 56.

176. [1990] 1 SCR 1075 at 1095, 1099–1101, 1111–12, 70 DLR (4th) 385 [*Sparrow*]. See Halsbury's Laws of Canada (online), *Aboriginal*, "Aboriginal and Treaty Rights: General: Asserting an Aboriginal Right: *Test for Aboriginal Rights*: The Sparrow test" (IV.1.(3)(a)) at HAB-134 (2020 Reissue) (Buist). After this preliminary question regarding the existence of the Aboriginal right, the test follows on matters of justification which I will not explore here. See *Sparrow*, *supra* note 176 at 1108–10, 1112–19; Halsbury's Laws of Canada (online), *Aboriginal*, "Aboriginal and Treaty Rights: General: Asserting an Aboriginal Right: *Infringement of Aboriginal or Treaty Right*: Determining infringement" (IV.1.(3)(d)) at HAB-137, "Aboriginal and Treaty Rights: General: Asserting an Aboriginal Right: *Justification for Infringement*: Test for justifying infringement" (IV.1.(3)(e)) at HAB-138 (2020 Reissue) (Buist).

177. Hamilton & Kislowicz, *supra* note 175 at 45. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 60–63 [*Haida*].

178. See Hamilton & Kislowicz, *supra* note 175 at 45; Haida, *supra* note 177 at paras 60–63.

contrast, the more factual questions of process and adequacy have mostly been regarded as requiring reasonableness review.[179] The first steps under the *Sparrow* test and under the DTCA have in common their likeness to "threshold questions"—they ask whether specific triggers have been engaged to justify one's claim that the Constitution applies. Post-*Vavilov*, authors followed the same path to argue now that the question of the adequacy of the Crown's consultation (the third step) should as well be reviewed under the correctness standard.[180] Their reasoning is that the question of adequacy would again be a "threshold question of constitutionality".[181] The analogy is therefore the following: since the question of infringement in a *Doré* test also can only be properly categorized as a threshold question, it must equally be viewed as requiring correctness review. There is no coherent argument to lower the standard to reasonableness at this stage.

(iii) Proportionality, Legislative Intent, and the Rule of Law

The next question is determining whether *Vavilov* can also flip the standard of review from reasonableness to correctness in matters of the *Doré* proportionality exercise. The line of argument, this time, is more difficult to hold. A plain intent of *Doré* had been to introduce reasonableness review in the balance of *Charter* rights and statutory objectives. Justice Abella had considered that the "starting point [was] expertise",[182] which gave administrative decision makers "particular familiarity with the competing considerations at play in weighing *Charter* values".[183] However, *Vavilov* has excluded "expertise"as a relevant factor

179. See Hamilton & Kislowicz, *supra* note 175 at 45, 49. In *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48 [*Beckman*] the Supreme Court of Canada breaks with *Haida*'s jurisprudence and briefly states that questions of adequacy are to be reviewed under correctness. Hamilton and Kislowicz show, however, that the "dominant approach has read [*Haida* and *Beckman*] as incommensurate and treated *Beckman* as an outlier or ignored it altogether" (*supra* note 175 at 49).

180. See Hamilton & Kislowicz, *supra* note 175 at 58–59.

181. *Ibid* at 58–59. Hamilton and Kislowicz also reject potential counterarguments for questions of adequacy in DTCA to be reviewed under the reasonableness standard. One of these counterarguments imposes the reasonableness standard by analogy with *Doré*'s own imposition of the standard for *Charter* rights analysis. However, the authors' arguments against an analogy between *Doré* and the DTCA are focused on particularities in the proportionality stage of the *Doré* analysis. My argument here is strictly for the infringement stage, and so is not negatively affected by Hamilton and Kislowicz's rejection of the aforementioned counterargument.

182. *Doré*, *supra* note 1 at para 46.

183. *Vavilov*, *supra* note 2 at para 47.

to consider for selecting the standard of review.[184] The current debate in the literature is then whether *Doré*'s conceptual foundations have been withdrawn in such a way as to make a reasonableness standard unsustainable in the context. Authors argue, on the one hand, that the "Supreme Court [of Canada] has abandoned a key justification that supported its endorsement of judicial deference to administrative decisions implicating the *Charter*."[185] Daly responds, on the other hand, that "[i]nasmuch as expertise was a conceptual basis for deference in *Doré*, its removal is irrelevant, as it has simply been replaced by another conceptual basis"[186]—that is, the all-encompassing presumption of reasonableness. It follows then that "*Doré* emerges strengthened from *Vavilov*, not weakened."[187] Mancini replies that the presumption "must necessarily exclude *Doré*-type issues".[188] The heart of the debate, then, is whether the presumption of reasonableness is indeed rebutted by arguments regarding legislative intent or the rule of law.

The legislature's intent can indeed have a bearing on *Doré*-type issues, where the legislature has enacted either a specific standard of review or an appeal clause.[189] Following *Vavilov*, the National Assembly of Québec, for example, enacted legislation which demands that correctness review be applied to multiple appeals and contestations of decisions emanating from several tribunals and public administrators.[190] The generality of the provisions induces the reviewing court to show no deference to an administrative *Charter* proportionality exercise. However, because it is contingent on such statutory specific circumstances, legislative intent is an unhelpful way to look at *Doré*-type questions in general. As I explain below, the only path open to a comprehensive attack on *Doré* is the overarching *rule of law* exception.[191]

---

184. *Ibid* at paras 31, 46.

185. Sirota, "Unholy Trinity", *supra* note 109 at 45. See also Mancini, "Conceptual Gap", supra note 169; Mark Mancini, "*Vavilov*'s Rule of Law: A Diceyan Model and Its Implications" (2020) 33:2 Can J Admin L & Prac 179 at 187–89.

186. Daly, "Unresolved Issues", *supra* note 147.

187. *Ibid*.

188. Mancini, "*Doré* Revisited", *supra* note 147.

189. See *Vavilov*, *supra* note 2 at paras 35, 37.

190. See Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, SQ 2020, c 12, s 84.

191. In the recent *Society of Composers* case, the Supreme Court of Canada seems to argue that new correctness categories can be recognized where "applying reasonableness would undermine legislative intent in a manner *analogous* to the established correctness categories" (*supra* note 68 at para 32 [emphasis in original]). However, the use for the new category recognized therein is still contingent on statutory specific circumstances, as a concurrent jurisdiction between courts

The most straightforward way for a *Doré* proportionality exercise to be subject to correctness review rather than reasonableness review is to characterize the question as *constitutional* or as of *central importance to the legal system as a whole* (i.e., two of the three categories under the rule of law exception). The general rationale for the correctness standard to apply in these circumstances takes from "the unique role of the judiciary in interpreting the Constitution" and the need for courts "to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary".[192] More precisely, *Vavilov* explained that constitutional questions must receive correctness review on the basis that "the Constitution—both written and unwritten—dictates the limits of all state action".[193] Since the legislature may not "alter the scope of its own constitutional power"—nor the executive's own power—the "constitutional authority to act must have determinate, defined and consistent limits."[194] This in turn "necessitates the application of the correctness standard".[195] In parallel, general questions of law pertain to those "of fundamental importance and broad applicability, with significant legal consequences for the justice system as a whole or for other institutions of government".[196] They require "uniform and consistent answers",[197] for which the correctness standard is tailored to. Both types of questions, all things considered, can overlap—by definition, many constitutional questions are of central importance to the legal system.

The broad features which characterize the two types of questions cannot translate into a decisive conclusion on whether *Vavilov* precludes the reasonableness standard from applying in a *Doré* context. It is not enough to merely state that a *Doré* proportionality exercise is largely about *Charter* rights, which would mean that it relates to matters of the Constitution and matters of broad applicability. The mistake is to forget that *Dunsmuir*— under which *Doré* was carved as an exception—already had language similar to what *Vavilov* displays. It spoke in terms of the "unique role of [superior] courts as interpreters of the Constitution"[198] and of the necessity for questions of central importance

---

and administrative bodies can only exist where a statute allows it. What is more, legislative intent appears to be ancillary in the Court's justification for a new category in comparison with its detailed justification in the rule of law.

192. *Vavilov, supra* note 2 at para 53.

193. *Ibid* at para 56.

194. *Ibid*.

195. *Ibid*.

196. *Ibid* at para 59 [internal quotation marks omitted].

197. *Ibid* [internal quotation marks omitted]

198. *Dunsmuir*, *supra* note 11 at para 58.

to receive "uniform and consistent answers".[199] This did not stop Abella J in *Doré* from shutting out from these "correctness categories" cases where the *Charter* was involved in discretionary administrative decisions. With *Vavilov*, one can still construe the rule of law exception as applying in "very limited circumstances", only where there is a "need for judicial uniformity".[200] Under this construction, where *Vavilov* does require uniform answers to questions on infringement, it would not require such answers on the more fact-dependent matters of proportionality. Daly cannot see, for instance, why "the presence of a *Charter* right requires uniform answers to be furnished by judges in respect of decisions made in different settings by different decision-makers."[201] A disciplinary council's evaluation of the inappropriateness of a lawyer's letter cannot bear significance on the whole legal system.

The strict construction runs against the fact that *Vavilov* does not silence calls to revisit *Doré*. The Court did not repudiate (nor approve) the *amici curiae*'s suggestion that "it is the courts that must have the final say as to whether the balance struck is proportionate."[202] The rule of law could substantiate a court's efforts to prescind from mere procedural artifices of a legislator who shields *Charter* violations behind administrative discretion rather than displaying them upfront in legislation.[203] Applying correctness review entirely from infringement to proportionality would also have the benefit of generating a uniform methodology and indeed of avoiding "segmentation".[204] In practice, it would likewise correct the human rights tribunal anomaly which *Vavilov* perpetuates. That is, both before and after *Vavilov*, administrators who are unspecialized in human rights law receive an arguably equivalent amount of deference as human rights tribunals do on questions of *Charter* proportionality (on appeal). Before *Vavilov*, the appeal of a human rights tribunal's decision was assimilated to judicial review of administrative action. The tribunal benefitted as such from the same *Doré* deference as did any other administrative authority under judicial review.[205] *Vavilov* now rejected this past practice and demanded for appellate standards to apply to appeals.[206] This means that the appeal of a

199. *Ibid* at para 60.

200. Daly, "Unresolved Issues", *supra* note 147.

201. *Ibid*.

202. *Vavilov*, *supra* note 2 (Factum of the *amici curiae* at para 80).

203. See Mancini, "*Doré* Revisited", *supra* note 147.

204. That is, "parsing [administrative decisions] into discrete pieces and applying different standards of review". Daly, "The *Vavilov* Framework", *supra* note 46 at 136–37.

205. See Sébastien Sénécal & Christian Brunelle, "Le Tribunal des droits de la personne devant la Cour d'appel du Québec: Appel à plus de déférence" (2015) 60:3 McGill LJ 475 at 512.

206. See *Vavilov*, *supra* note 2 at para 37.

human rights tribunal's proportionality exercise would concern a question of mixed law and fact and, therefore, would attract the so-called "overriding and palpable error standard".[207] Yet, the latter is arguably equivalent to reasonableness,[208] with authors recently even arguing that it is *less* deferential than reasonableness.[209] In other words, human rights tribunal decisions on the balancing of *Charter* rights are met, on appeal, with an equal or lesser amount of deference than received by unspecialized administrators on the same questions, but on judicial review.[210] Should *Doré*-type issues attract correctness review instead, appeals of human rights tribunals would be treated with more deference than courts otherwise grant on judicial review of less specialized administrative decisions on the *Charter*.

I am not suggesting here that the rule of law category must or must not make room to include a *Doré* proportionality analysis—there are indeed good reasons for each argument, as expounded in the last paragraphs. But *Vavilov* does not provide us enough material to decide categorically which of the arguments wins over the other. The *Doré* framework stands on a fragile status quo—*Vavilov* neither reinforces nor weakens the claim that *Charter* review of administrative decisions *requires* the application of the reasonableness standard.[211] What the Court has given us is an indication of which ground one must stand on to justify a break from *Doré*—namely, the rule of law. However, the Court has not secured the success of an argument against *Doré*: *Vavilov* shows *how* to convince the Court to overturn *Doré*, but precisely the Court is not yet convinced, and there is no guarantee it will be.

C. New Techniques to Apply the Doré *"Reasonableness Standard"*

To investigate further possible implications of *Vavilov*, this section will assume that the reasonableness standard continues to apply at the proportionality stage

207. *Housen v Nikolaisen*, *supra* note 60 at paras 26–37.

208. See Mullan, "Judicial Scrutiny of Administrative Decision Making", *supra* note 89 at 430.

209. See Hamilton & Kislowicz, *supra* note 175 at 51–52.

210. For a recent Supreme Court of Canada case on appeal of a human rights tribunal, see *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43."[T]he [Human Rights] Tribunal's decisions may be appealed to the Quebec Court of Appeal. Because there is a statutory appeal mechanism, appellate standards apply rather than the reasonableness standard . . . The applicable standard is correctness for questions of law and palpable and overriding error for questions of mixed fact and law" (*ibid* at paras 24–25, citing *Vavilov*, *supra* note 2 at para 37 and *Housen v Nikolaisen*, *supra* note 60).

211. I therefore disagree with Daly that "*Doré* comes out strengthened from *Vavilov*". Daly, "Unresolved Issues", *supra* note 146.

of a *Doré* analysis. This move allows for an assessment of whether the new *Vavilov* method for performing reasonableness review has any impact on how one performs a *Doré* inquiry. At first sight, changes to the classical judicial review approach are bound to affect *Doré*, with its strong ties to "administrative law principles"[212] and its use of the language of "reasonableness" and "deference". The challenge is to assess how much *Vavilov* reasonableness has to add to *Doré*'s reasonableness-proportionality hybrid.

We should admit that *Vavilov* does not explicitly indicate how its guidance on the performance of reasonableness review applies to judicial review of administrative decisions affecting *Charter* protections. Moreover, talk of "proportionality" is wholly absent from the reasons for judgment. Indeed, proportionality and reasonableness, although they share some similarities, are usually taken to be two separate conceptual approaches.[213] However, *Vavilov* has developed a framework which "accommodates all types of administrative decision making".[214] The new approach claimed

> [to account] for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt.[215]

Vavilov also asserted that "reasonableness is a single standard that accounts for context",[216] citing *LSBC* in support. Assuming the Court still holds on to its bold assertion that, in a *Doré* context, "reasonableness requires proportionality", we are to conclude that the scope of the updated method to perform reasonableness review is large enough to encompass a *Doré* analysis. Taking the Court's overall discourse to be minimally coherent, I will seek to show how one can translate to a *Doré* context some of the tools and guidelines *Vavilov* lays out for general use in the performance of reasonableness review. However, we should address two

212. *Loyola*, *supra* note 26 at para 3; *LSBC*, *supra* note 30 at para 79.

213. See Iryna Ponomarenko, "Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law" (2016) 21 Appeal 125.

214. *Vavilov, supra* note 2 at para 11; Mullan, "Judicial Scrutiny of Administrative Decision Making", *supra* note 89 at 430–31.

215. *Vavilov*, *supra* note 2 at para 90.

216. *Ibid* at para 89, title of section III.C.

points of tension between *Doré* and *Vavilov*'s guides before going any further.

(i) Reweighing and Expertise

The first tension stems from *Vavilov*'s admonition that reviewing courts must refrain from conducting a *de novo* analysis, thereby "reweighing and reassessing the evidence considered by the decision maker".[217] We have already seen, however, that the Supreme Court of Canada conducted its own assessments of the regulatory contexts in review of the proportionality of the decisions in *Doré*, *Loyola*, and *Trinity*. Moreover, the whole point of a *Doré* inquiry is for a court to verify whether the right balance has been struck. Several authors have noted that this inevitably asks for a reweighing of some kind.[218] Nevertheless, we should not conclude that this tension arises from *Vavilov* alone. As we gather from the majority's citations, this warning against "reweighing" in reasonableness review predates *Doré*.[219] *Vavilov* merely perpetuates the ongoing incoherence in the Court's jurisprudence.

The second tension relates again to the controversial concept of expertise in an administrative setting. On the one hand, *Vavilov* gives the *Doré* framework the opportunity of making use of its statements on how administrative decision makers supposedly are experts in hands-on resolution of *Charter* cases. Indeed, when performing a *Vavilov* reasonableness review, judges should now "be attentive to the application by decision makers of specialized knowledge, *as demonstrated by their reasons*".[220] On the other hand, *Vavilov* referred to its deeply divided jurisprudence "on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis".[221] The majority did not purport to give definitive

217. *Ibid* at paras 83, 125 [internal quotation marks omitted].

218. See Macklin, "*Charter*-Lite?", *supra* note 118 at 580; Fox-Decent & Pless, "*Charter* and Administrative Law Part II", *supra* note 12 at 513; Alexander Pless, "Judicial Review and the *Charter* from *Multani* to *Doré*" in Peter Oliver & Graham Mayeda, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron / Principes et pragmatisme : Essais en l'honneur de Louise Charron* (Markham: LexisNexis, 2014) at 316–18.

219. The majority cites *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras 41–42; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64; and *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55.

220. *Vavilov*, *supra* note 2 at para 93 [emphasis added].

221. *Ibid* at para 27.

answers to all these questions. Nevertheless, it did decline to grant decision makers the presumption of blanket expertise by sheer administrative status, as it had been envisaged by Abella J in *Doré* and in post-*Dunsmuir* case law generally.[222] What we gather from expertise's now-diminished role is that expertise needs to be *demonstrated* for it to bear weight in a reasonableness review. Ascribing value only to evidence-based claims of expertise gives due attention to the intuition that a disciplinary council of lawyers' evaluation of *Charter* violations has more weight than one of a local zoning board.[223] The benefit of human rights law expertise cannot be blindly granted. However, this requires a case-by-case analysis which is reminiscent of the pre-*Dunsmuir* pragmatic and functional test.[224] At the time, Professor David Mullan, noted administrative law scholar, had pointed out that the exercise of assessing expertise "depend[ed] on a combination of considerations, most of which involve conjecture, not scientific inquiry by the courts".[225] If indeed *Vavilov* pushes courts to evaluate the extent of an administrative body's expertise, further guidance from the Supreme Court of Canada will be necessary for judicial review not to fall back in the tracks of past failures.

What is certain is that expertise is to be demonstrated in the administrative official's reasons. To be sure, *Vavilov* reasserted that "reasons are not required for all administrative decisions."[226] Nevertheless, it elevated the expectations by magnifying the various benefits of the presence of formal reasons in an

222. See David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action - The Top Fifteen" (2013) 42:1–2 Adv Q 1 at 7–8; Liew, *supra* note 90 at 397.

223. See Peter A Gall, "*Dunsmuir*: Reasonableness and the Rule of Law" (6 March 2018), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2018/03/06/dunsmuir-reasonableness-and-the-rule-of-law-peter-a-gall-qc/>. "As [Supreme Court Justice Gerald] Le Dain once cautioned me . . ., not all labour boards are chaired by Paul Weiler. And the reason why Paul Weiler's labour relations decisions were entitled to deference was not only that they were a product of expertise, but that they demonstrated that expertise" (*ibid*).

224. See *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 33, 160 DLR (4th) 193; Mark Mancini, "The Dark Art of Deference: Dubious Assumptions of Expertise on Home Statute Interpretation" in Paul Daly & Léonid Sirota, eds, *A Decade of Dunsmuir* (Toronto: Thomson Reuters, 2018) 83 at 85.

225. David Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17:1 Can J Admin L & Prac 59 at 71.

226. *Vavilov*, *supra* note 2 at para 77.

administrative context.[227] The majority, back in *LSBC*, had disregarded the fact that the Law Society's decision was "completely devoid of any reasoning".[228] It had appealed to David Dyzenhaus and *Dunsmuir*'s suggestion that reasonableness review required "a respectful attention to the reasons offered or which could be offered in support of a decision".[229] The majority was willing to leave administrators alone granted they give vague indicia of "being alive" to *Charter* issues in a *Doré* context.[230] *Vavilov* has now displaced this indulgence. A reviewing court cannot "provide reasons that were not given, nor . . . guess what findings might have been made or . . . speculate what the tribunal might have been thinking".[231] For one thing, the absence of reasons will preclude an administrative decision maker from claiming the benefit of expertise in *Charter* issues. But given the constitutional stakes, it comes across as overall even more improbable, after *Vavilov*, for a court not to altogether "lose confidence in the outcome reached"[232] in a decision which infringes upon *Charter* rights without any reasons to support it.

(ii) Tools and Guidelines to Assess Reasonableness and Proportionality

Not all of *Vavilov*'s tools and guidelines to conduct reasonableness review generate tensions with *Doré*'s hybrid between reasonableness and proportionality. For instance, it appears natural to import *Vavilov*'s general vigilance about a "failure of rationality internal to the reasoning process".[233] It strikes as self-evident that an intellectually honest reasonableness review cannot ignore "clear

227. The process of drafting reasons encourages decision makers to carefully examine their own thinking, which in turn facilitates meaningful judicial review (*ibid* at paras 80–81). See also Katherine Hardie, "Deference after the Trilogy: What Is the Impact of a 'Culture of Justification'?" (2020) 33:2 Can J Admin L & Prac 145 at 156; Paul Daly, "One Year of *Vavilov*" (2020) Ottawa Faculty of Law Working Paper 2020–34, online: <papers.ssrn.com/abstract=3722312> at 6.

228. *LSBC*, *supra* note 30 at para 299 (Côté & Brown JJ, dissenting).

229. *Ibid* at para 56, quoting *Dunsmuir*, *supra* note 11 at para 48 [emphasis in original]; Hasan Dindjer, "What Makes an Administrative Decision Unreasonable?" (2021) 84:2 Mod L Rev 265 at 269, n 25.

230. *LSBC*, *supra* note 30 at para 55.

231. *Vavilov*, *supra* note 2 at para 97, quoting *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11; Sirota, "Unholy Trinity", *supra* note 109 at 29.

232. *Vavilov*, *supra* note 2 at para 106.

233. *Ibid* at para 101.

logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise",[234] even in a *Doré* context. The majority's call to look out, in formal reasons, for the rationality of the decision maker's "chain of analysis"[235] finds an echo in Abella J's language intimating which thought processes should accompany a balancing exercise.[236] An *Oakes* test, in parallel, does provide space for a court to scrutinize if the state has shown "a causal connection between the infringement and the benefit sought on the basis of reason or logic".[237] Incorporating *Vavilov*'s advice on this aspect of reasonableness review furthers the objective of *Doré* being able to "work the same justificatory muscles"[238] as an *Oakes* analysis. It is an uncontroversial but beneficial addition to the framework.

Vavilov can also provide helpful guidance on the technicalities of a proportionality exercise. *Doré*, *Loyola*, and *Trinity* all failed to give instructions to courts and decision makers on the crucial steps of *identifying* and *considering* the statutory objectives.[239] The Court's new warning to administrative officials to "comply with the rationale and purview [of their governing] statutory scheme"[240]—without disregarding or rewriting the statutory text[241]—constitutes the first step in filling this gap. The majority's invitation was precisely to distinguish "precise and narrow" from "broad, open-ended or highly qualitative" language, both ending in respectively lesser or greater flexibility in interpretation.[242] What is more, the exercise is to be done according to the

234. *Ibid* at para 104.

235. *Ibid* at para 103.

236. See *Doré*, *supra* note 1 at paras 55–58 (where she used the following verbs: the decision maker *balances*, *asks himself*, and *considers*). But see *Loyola*, *supra* note 26 at paras 4, 6, 79 (where Abella J used a more depersonalized language). See also *LSBC*, *supra* note 30 at paras 55, 79–82, 85, 104 (where the majority oscillated between both types of language).

237. *RJR-MacDonald*, *supra* note 39 at para 153; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48; Halsbury's Laws of Canada (online), *Constitutional Law (Charter of Rights)*, "Limitation of Rights: Reasonable Limits: The *Oakes* Test: Rational connection" (III.3.) at HCHR-21 (2019 Reissue) (Newman).

238. *Doré*, *supra* note 1 at para 5; *Loyola*, *supra* note 26 at para 40, Abella J; *LSBC*, *supra* note 30 at para 82.

239. See Justin Safayeni, "The *Doré* Framework: Five Years Later, Four Key Questions (And Some Suggested Answers)" (2018) 31:1 Can J Admin L & Prac 31 at 45.

240. *Vavilov*, *supra* note 2 at para 108 [internal quotations omitted].

241. See *ibid*.

242. *Ibid* at para 110.

modern principle of interpretation.[243] One who seeks to determine the scope of statutory objectives in a *Doré* context certainly can use the Court's advice on when to opt for a strict or a large interpretation of legislation.[244] This was squarely one of the debates in *LSBC*, where the majority picked out that the *LSBC* was to act "in the public interest".[245] Justices Côté and Brown, conversely, were careful "not to overstate the objective of any measure infringing the *Charter*",[246] much like the Court had advised elsewhere in an *Oakes* context.[247] For them, the LSBC's objective was only to "ensure that individual applicants are fit for licensing".[248] We cannot be sure which side would triumph according to *Vavilov*'s new methods—but precisely, they would have put forward the issue as especially relevant in a reasonableness review. Likewise, the Court's invitation to regard statutory and common law constraints as relevant factors in a reasonableness review can effortlessly slide into a *Doré* analysis. A reviewing court could not find reasonable an administrative official's decision that "fail[s] to explain or justify a departure from a binding precedent"[249] in which the objectives of the same statute were interpreted. Similar departure from "internal precedent"[250] would as well need to be justified.

Comparable comments on common law, statutory, and precedent constraints can be made *mutatis mutandis* to the balancing exercise per se. In determining the severity of the infringement (to balance it with the relevant statutory objectives), the reviewing court should also take note of *Vavilov*'s reminder that a "decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it".[251] Correspondingly, the reviewing court will have to make sure the decision maker took meaningful account of the "central issues and concerns raised by the parties".[252] In a *Doré* context, the court's review will inevitably turn on whether the administrative decision has provided a justification which "reflect[s] the

243. See *ibid* at para 118 [internal quotations omitted].

244. The difference in language between "statutory objectives" and "governing statutory scheme" is too thin for *Vavilov*'s teachings not to be applied to the *Doré* framework.

245. *LSBC*, *supra* note 30 at para 47.

246. *Ibid* at para 322.

247. *RJR-MacDonald*, *supra* note 39 at para 144.

248. *LSBC*, *supra* note 30 at para 293.

249. *Vavilov*, *supra* note 2 at para 112.

250. *Ibid* at para 131.

251. *Ibid* at para 126.

252. *Ibid* at para 127.

stakes"[253] of the presumed *Charter* infringement: "the principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention."[254] A reasonable balance could not be struck where the decision maker has not taken the claims and evidence of a disproportionate impact seriously.

If *Doré* lacked the helpful guidance *Vavilov* now provides on how to perform judicial review, it may be because case law in general had shed little light on what was a reasonable decision. Consider *Dunsmuir*'s only advice on the matter:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[255]

In his concurring reasons in *Dunsmuir*, Binnie J had already noted that, although he agreed with the above summary, "what [was] required . . . [was] a more easily applied framework into which the judicial review court and litigants [could] plug in the relevant context."[256] *Vavilov* provides us with the tools Binnie J had in mind. Admittedly, they are not wholly tailored for a *Doré* analysis. Yet, I have shown how the translation from one framework to the other is workable in many respects.

IV. Conclusion

I have argued that the *Doré* method of judicial review will not sit unaltered in front of *Vavilov*'s principles. The latter have sharpened our outlook on the former's deficiencies, which today cannot logically stand without reconsideration. The extent of the implicated change, however, is yet to be

253. *Ibid* at para 133.

254. *Ibid*.

255. *Dunsmuir*, *supra* note 11 at para 47. This paragraph was cited around 8,300 times by other documents listed on the CanLII database, making it the case's most cited paragraph as of March 12, 2022.

256. *Ibid* at para 151.

determined. The least *Vavilov* could bring to *Doré* is recognition that some methodological shortcomings persist and need to be dealt with in some way. Harnessing the *rule of law* exception, a skillful barrister might take a step further and convince a majority of the Supreme Court of Canada to deploy a full and assumed correctness review with regard to administrative *Charter* violations. The new composition of the Court might support the claim. Both in *Loyola* and in *Trinity*, the balance of the majority stayed on one vote, and as of July 1, 2021, Abella J, a front-runner in *Doré*-type issues who fiercely disagreed with the majority in *Vavilov*,[257] retired from the Court.[258] If the barrister's feat nevertheless fails, *Vavilov* can still bring the remaining reasonableness review to generate meaningful and methodical scrutiny by providing practical guidelines for courts to follow.

The preceding synthesis adopts a court-centric point of view of judicial review theory. However, we must not forget that judicial review always stems at first from an administrative process which has gone wrong in some way. The primary concern of the law of judicial review cannot be with those "second order questions regarding the appropriate standard of review to the exclusion of first order questions regarding 'the who, what, why and wherefor of the litigant's complaint on its merits'".[259] The nomenclature of "reasonable", "reasonable *simpliciter*", "correct", "proportionate", or whatnot is not what ultimately matters. We have seen in *Doré* that the Court can sometimes mislead us in using one of these adjectives to encompass the meaning of two or even three others. These words must be fleshed out to have any meaning for the administrative officials' day-to-day decision making. For instance, if we are to ask of them to consider *Charter* rights, then we must provide clear guidance as to how exactly the *Charter* operates at a discretionary level. Officials who understand the stakes themselves will be in a better position to justify and explain a decision to the affected individual, who in turn will be less likely to seek court intervention. If administrative decision makers have lost the benefit of blanket human rights law expertise *Doré* had previously granted them, they cannot be expected now to be experts in judicial review theory. *Vavilov's* tools for examining the

257. Furthermore, "Abella J voted to apply the reasonableness standard in every instance that the Court identified a standard of review in 2016–18. Thus, as a practical matter, she has all but eliminated the correctness standard from her own approach". See Robert Danay, "A House Divided: The Supreme Court of Canada's Recent Jurisprudence on the Standard of Review" (2019) 69:1 UTLJ 3 at 10 (fig 4), 15, n 71.

258. See Supreme Court of Canada, News Release (19 February 2021), online: <decisions.scc-csc.ca/scc- csc/news/en/item/7074/index.do>.

259. Lewans, *supra* note 158 at 30, quoting *Dunsmuir*, *supra* note 11 at para 154.

reasonableness of the decision are certainly useful to the first-instance judge; but even more so, they will serve administrative decision makers in evaluating how to write their formal reasons, how to interpret their home statute, how to ensure their reasoning is appropriately laid out, and so on. In shifting back the courts' role to true and predictable scrutiny of administrative decisions, *Vavilov* provides *Charter* right-holders with the hope that the intricacies of abstract court-centric administrative law theories will no more stymie genuine claims for the remedy of a breach of the Constitution. The Supreme Court of Canada's push might reposition *Doré* in a more comfortable, *balanced* position between administrative and constitutional judicial review—that is, where it initially claimed to stand. In doing so, the Court might adopt its former Chief Justice's skeptical warning in *LSBC*: "[R]elying on the language of 'deference' and 'reasonableness' in this context may be unhelpful".[260] This may mean to gently dismiss some of *Doré*, *Loyola*, and *Trinity*'s jurisprudence.

260. *LSBC*, *supra* note 30 at para 118.