# BOOK REVIEW

## Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law*

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## I. Introduction

In his book, *A Culture of Justification: Vavilov and the Future of Administrative Law*, Paul Daly takes on the monumental task of explaining the development of judicial review in Canadian administrative law. The author aims to "explain and place in historical context the Supreme Court of Canada's decades-long struggle to bring coherence to Canadian administrative law, describing the new framework elaborated in *Vavilov*[1] and discuss the likely legacy of the *Vavilov* decision."[2] Overall, Daly achieves his stated goal. He sets out a high-level synopsis of the history and evolution of administrative law in Canada, which helps make sense of the landmark *Vavilov* decision and its achievements. The book also positions us well to predict future developments in this complex area of law. Daly's book would be helpful to anyone trying to gain a broader understanding of administrative law and understand the meaning and future directions of the law of judicial review post-*Vavilov*.

The arc of Daly's book is logical and straightforward. In the first chapter, Daly describes the historical development of judicial review of administrative decisions. His description looks at the jurisprudence, as well as some of the basic theoretical concepts through which readers can understand the evolution of judicial review, as discussed below. While the overview of the early history provided in the first chapter is cursory, Daly's analysis deepens as it approaches *Vavilov*. The second chapter focuses on the period between the 1970s and 2008, during which the Court issued the

1 *Canada (Minster of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].

2 P. Daly, *A Culture of Justification*: *Vavilov and the Future of Administrative Law* (UBC Press, 2023) at p 4.

*Dunsmuir* decision.[3] At the close of the second chapter, Daly addresses *Dunsmuir* and its doctrinal structure. This is followed by a critical analysis of *Dunsmuir* and its jurisprudential progeny (what scholars sometimes refer to—for better or worse—as "the *Dunsmuir* decade") in the third chapter.

The foundations of administrative law explored in the first three chapters of Daly's book ground the fourth chapter, which describes the *Vavilov* decision. Daly calls the *Vavilov* decision the "big bang" which, aside from being a tidy bit of hyperbole, indicates that *Vavilov* marks a break with the past and the beginning of a new line of jurisprudence. Daly explains the changes introduced by *Vavilov,* which both preserved and augmented what came before. Daly discusses how trial and appellate courts in Canada have taken up and implemented the new *Vavilov* framework in the fifth chapter. This offers an excellent summary and initial evaluation of the changes made by *Vavilov* and whether the decision achieved the clarity and simplicity that the Court was looking for. The sixth and final substantive chapter is forward-looking: Daly discusses some of the questions that *Vavilov* did not resolve, which will need to be addressed by the judiciary. This final chapter forecasts future developments in administrative law and judicial review, in terms of both scholarship and future litigation.

## II. Daly's Argument

Daly does much more than simply describe the doctrinal terms of the evolution of judicial review in Canada. He also offers a set of terms and concepts that work as a 'key' to help unlock and make sense of the doctrine and its evolution. This theoretical key is laid out in the

3 *Dunsmuir v New Brunswick*, 2008 SCC 9.

first two chapters. There are two elements identified by Daly.[4] First, there are three core concepts at the heart of the law of judicial review: jurisdiction, deference, and legislative intent.[5] Second, and perhaps more importantly, Daly describes three "fault lines" that mark the attitudes of judges and lawyers regarding the evolving principles of administrative law: deference/non-deference, form/substance, and reason/authority.[6] These binary attitudes are used to explain different postures and decisions taken at different times in the course of the development of the law of judicial review. The three core concepts and the three fault lines are deployed throughout the book to comment on different decisions and stages of development in the evolution of judicial review.

Daly argues that in the early phase of administrative law the courts took a highly formalist approach to the authority of administrative decision makers. This early approach centred on the jurisdiction of administrative agencies and the courts. In the second phase, the early formalist approach was inverted. This turn began with the Supreme Court of Canada *CUPE v NB Liquor* decision, which shifted attention away from questions of jurisdiction and prescribed a judicial posture of deference toward administrative decision makers.[7] According to Daly, the *Dunsmuir* decision completed the inversion.[8]

Daly argues that *Dunsmuir* failed because its reasons vacillated between the fault lines described earlier. It was "neither firmly

4 Daly at p 17.

5 Daly at pp 31-36.

6 Daly at pp 36-39.

7 *CUPE v NB Liquor Corp.*, [1979] 2 SCR 227, 97 DLR (3d) 417.

8 Daly at p 64.

formalist nor firmly substantivist in its approach to the standard of review." [9] The Court's approach to the application of the reasonableness standard in *Dunsmuir* was poorly designed, which led to it being applied in a "slipshod" way. Subsequent courts would sometimes prescribe deference and yet still embark on a probing and critical analysis of the decision.[10] In short, "the combination of a presumption of deference with heavy reliance on authority rather than reason in the application of the reasonableness standard was poorly designed, leading to morally suboptimal outcomes."[11]

With this as the background, Daly argues that the Court in *Vavilov* sought to rectify the deficiencies in the approach to judicial review set out in *Dunsmuir*. *Vavilov* achieved simplicity and clarity regarding the selection of the standard of review by crystalizing a categorical approach. The categorical approach rides on the back of a "wafer thin" idea of institutional design, which is fundamentally a formal and authority-based conception of the will of the legislature, [12] according to Daly. He argues the categorical approach can create absurdities when distinguishing the role of the courts in judicial review versus appellate review (when there is a statutory right of appeal).[13]

Regarding the application of the reasonableness standard, Daly was much more optimistic about the standard set in *Vavilov*. *Vavilov* clarified that reasonableness is fundamentally deferential in orientation and focused on reason. In a way, the formal *yin* of the

9 Daly at p 63.

10 Daly at pp 85-89.

11 Daly at p 82.

12 Daly at pp 95-96.

13 Daly at pp 96-104.

standard of review analysis is balanced by the substantive *yang* of the application of the reasonableness standard. The former is formalistic and authority-based while the latter is deferential and reason-based. The framework provided by the Court for conducting a judicial review of an administrative decision on the reasonableness standard places the reasons of the decision maker front and centre. This change, according to Daly, has undoubtedly strengthened judicial review and raised the bar for administrative decision makers.[14] The "lower courts have heard one of the messages of *Vavilov* loud and clear: the need for a decision maker to demonstrate responsive justification in order to gain deference."[15] This produces a positive "culture of justification."[16] A reasonable decision is not only justifiable, but it also must be *justified*. This irons out several troubling features of the *Dunsmuir* jurisprudence, including the particularly irksome dictum that instructed courts to give deference to the reasons that were *or could have been* offered by an administrative body, which effectively enabled courts to defer to an administrative decision maker even where they did not provide reasons to justify their decision.[17]

The structure provided by *Vavilov*, in Daly's view, represents a compromise reached by the judges on the Court who would fall on either side of the deference/non-deference, reason/authority, and form/substance fault lines.[18] Daly argues that these fault lines remain in the *Vavilov* decision, saying that the compromise merely "papers

14 Daly at pp 105-112.

15 Daly at p 130.

16 *Vavilov* at para 14.

17 Daly at pp 77-82.

18 Daly at pp 95, 119-121.

over" them. He also notes that the compromise reached in *Vavilov* has its limits, which can be seen in some of the ways that the decision enables greater judicial intervention. The two examples he gives are the strictness of applying reasonableness review to issues of statutory interpretation[19] and the discretion given to the judiciary not to remit a matter back to the decision maker if it fails reasonableness review.[20]

On balance, however, Daly seems supportive of the majority decision in *Vavilov*, arguing that "[a]s long as the correctness categories are narrowly confined and the standard of reasonableness is applied in the inherently deferential manner set out by the majority, *Vavilov* is better suited to contemporary judicial review, with its broad reach into all aspects of public administration, than the hands-off approach. If some decision makers have to up their game, so be it."[21]

The judicial output of the lower courts following *Vavilov* bears this out. *Vavilov* has, indeed, simplified the selection of the standard of review and provided clear guidance for conducting reasonableness review. Although the compromise struck in the new framework is not perfect—there are numerous doctrinal and theoretical questions and tensions that Daly raises throughout his analysis—it seems to be working fine for now. In Daly's words, "[t]he compromise between form and substance, deference and nondeference, and reason and authority *has held so far*."[22]

19 Daly at pp 112-116, 130-132.

20 Daly at pp 117-119, 150-151.

21 Daly at p 120.

22 Daly at p 153, emphasis added.

## III. Response to Daly's Description, Analysis, and Argument

Overall, Daly's work is excellent. In particular, his book provides a clear and accurate description of administrative law in Canada. His story gives expression not only the doctrines but also the attitudes and commitments at play in the jurisprudence. The core concepts and "fault lines" that he uses as a key to understanding the law of judicial review are faithful to and accurately portray the dominant narrative in the administrative law scholarship and jurisprudence. If anything, Daly is perhaps *too* faithful to this dominant narrative, which may have a detrimental effect on how the story unfolds into the future.

My primary criticism of Daly's book is that at times it seems to be working at cross-purposes. While he encourages us in the concluding chapter to support *Vavilov*,[23] at times he appears to undermine the stability and clarity that *Vavilov* brings. Daly explained in great detail how the law of judicial review prior to *Vavilov* was a revolving door of failed frameworks. Attitudes and camps emerged amongst the judiciary. These differing camps assailed each other through their decisions. At times, there was even a sense of judicial revolt.[24] This helps us understand the mess that the Court set out to clean up in *Vavilov*. The fact that *Vavilov* may just have succeeded, albeit imperfectly, is impressive. This is echoed in Daly's words: "[w]hatever one's personal views about where administrative law should be placed in relation to the form/substance, deference/nondeference, and reason/authority fault lines, it is clear that with *Vavilov*, the Supreme Court of Canada may have achieved what many observers thought would be impossible, namely,

23 Daly at pp 177-180.

24 Daly at pp 89-91.

developing a stable general framework for Canadian administrative law."[25] Despite its glowing endorsement, Daly's discussion of *Vavilov*, as well as his discussion of the jurisprudence that has subsequently applied the *Vavilov* framework, insists on tracing the old terms of the debate and the old fault lines into the new terrain that *Vavilov* established. By doing so, Daly unfortunately preserves these old rivalries and risks allowing them to continue to frustrate the law of judicial review.

But Daly would seem to want to have it otherwise. His closing words in the book encourage us all to support *Vavilov.* Although some may disagree with the compromise reached in *Vavilov*, this may be our best chance to entrench a framework for administrative law that can provide a durable solution to what previously seemed unsolvable.[26] We would do well to heed Daly's advice, to put behind us the old gripes and issues that divided the courts and the scholarship, and step into something new.

25 Daly at p 178.

26 Daly at p 180.