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FOXES, HENHOUSES, AND THE CONSTITUTIONAL GUARANTEE OF JUDICIAL REVIEW: RE-EVALUATING *CREVIER*

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Canadian legislatures cannot completely forbid judicial review of administrative action. This has been a matter of constitutional law since the Crevier v AG (Quebec) decision. However, Crevier framed the constitutional guarantee of review around the much-maligned concept of jurisdictional error. In Canada (Citizenship and Immigration) v Vavilov, the Supreme Court held that jurisdictional errors were no longer relevant in conducting judicial review. This leaves the content of the constitutional guarantee obscure, a problem of considerable concern given recent cases on the matter.

This article argues that the constitutional guarantee must be reframed and should be re-articulated to protect judicial review over all questions of law and correctness review on constitutional questions, specifically those relating to the division of powers. The core aim uniting these functions is the prevention of foxes in henhouses"—unreviewable administrative legal authority. This revised constitutional guarantee is consistent both with the constitutional principles underlying Crevier and with the development of the modern law of judicial review, in which questions of law are reviewed on a presumptive deferential standard under an intensity of review framework. Though this revised constitutional guarantee is open to challenge, it is a better way of specifying the supervisory jurisdiction of superior courts considering the modern law of judicial review.

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The paper tests out the new constitutional guarantee in light of two case studies: (1) the Federal Court of Appeal's Best Buy decision, which dealt with the scope of a right of appeal in light of a privative clause; and (2) the Alberta Sovereignty Act, which purports to establish a standard of patent unreasonableness for questions relating to the division of powers.

Au Canada, les assemblées législatives ne peuvent complètement interdire la révision judiciaire d'une action administrative. C'est une question de droit constitutionnel depuis la décision Crevier c. P.G. (Québec). Toutefois, l'arrêt Crevier a eu pour effet d'articuler la garantie constitutionnelle de révision autour du très critiqué concept de l'erreur juridictionnelle. Dans Canada (Ministre de la Citoyenneté et de l'Immigration) c Vavilov, la Cour suprême a conclu que les erreurs juridictionnelles n'étaient plus pertinentes dans l'instruction d'une révision judiciaire. Cela laisse la substance de la garantie constitutionnelle dans l'obscurité; un problème particulièrement préoccupant au vu des récentes affaires sur cette question.

L'auteur soutient que la garantie constitutionnelle doit être recadrée et devrait être reformulée de façon à protéger la révision judiciaire par rapport à toute révision de questions de droit ou du bien-fondé portant sur des questions constitutionnelles, plus précisément le partage des pouvoirs. Le but principal d'unir ces fonctions est d'éviter le syndrome du « loup dans la bergerie », c'est-à-dire le cas d'un pouvoir administratif légal échappant au contrôle judiciaire. Ainsi révisée, cette garantie constitutionnelle sera conforme aux principes constitutionnels sous-tendant l'arrêt Crevier et cadrera avec la modernisation du droit en matière de révision judiciaire, où les questions de droit sont révisées selon une norme de contrôle empreinte de déférence, dans un cadre fondé sur le degré de contrôle. Bien que cette garantie constitutionnelle révisée puisse être contestée, c'est un meilleur moyen de désigner la juridiction de surveillance des cours supérieures compte tenu du droit moderne en matière de contrôle judiciaire.

Cet article propose l'étude de deux affaires pour mettre à l'essai la nouvelle garantie constitutionnelle : 1) la décision Best Buy de la Cour d'appel fédérale, qui porte sur le champ d'application d'un droit d'appel à la lumière d'une disposition privative; 2) l'Alberta Sovereignty Act, dont l'intention est d'établir une norme de la décision manifestement déraisonnable pour les questions de partage des pouvoirs.

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Introduction

Canadian legislatures cannot completely forbid judicial review of administrative action. *Crevier v AG (Quebec)* held that "where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing *jurisdiction*, such provincial legislation must be struck down as unconstitutional … ."[2] Legislative insulation like this would make the administrative body beyond review or appeal on its own jurisdiction, replicating one of the key attributes of a superior court that legislatures cannot create by normal legislative act,[3] and which only exist by force of sections 96 through 100 of the *Constitution Act, 1867*.[4]

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2 [1981] 2 SCR 220 at 234 [*Crevier*] [emphasis added].

3 Only superior courts have the power to determine the limits of their own jurisdiction. See *ibid* at 237, describing this as a "hallmark" of superior court jurisdiction. Legislatures, then, cannot creates isolated bodies that opine on their own jurisdiction without colourably creating a superior court.

4 Section 96 provides that the Governor General—the federal government—shall appoint the judges of the superior courts. Section 97 provides that superior court judges shall be selected from the respective Bars of the Provinces, with section 98 entrenching that guarantee for the judges of Quebec courts. Section 99 provides for security of tenure, with judges only removable by joint address of the Senate and House of Commons. Section 100 provides for fixed salaries. These provisions have been interpreted to nourish a constitutional guarantee of independent, superior court functions. See *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at para 9 [*Quebec Reference*]; *Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714 at 728, Dickson J. For the classic case articulating

Crevier seems justifiable as a historical matter. The power of superior courts to review for "jurisdictional error" was long-established at common law.[5] Jurisdictional error was a "device" by which courts could ensure that administrators remained within statutory boundaries.[6] On the logic of *Crevier*, the constitutional guarantee tracked this well-recognized supervisory jurisdiction.

But as legal scholar David Mullan argues, "the genesis of future problems" was embedded in *Crevier*.[7] What constituted jurisdictional error was evidently a matter of considerable debate in the case itself.[8] But *Crevier* created a new problem because it tied the constitutional guarantee to this fluctuating and imprecise device. As a result, it became a distinct possibility that Canada's developing model of administrative law would simply "undercut the constitutional prescription of judicial review…" because of erosions or expansions in the concept of jurisdictional error.[9] Even at the time of its rendering, one observer declared that it would be "naïve" to suggest that *Crevier* provided any predictable rule at all.[10]

This is especially so as Canada moved from a model of administrative law predicated on jurisdictional error to one of modulating degrees—intensities—of review. In *Canada (Citizenship and Immigration) v Vavilov*, the Supreme Court jettisoned the concept of a "true jurisdictional error" attracting correctness review, moving one step further into an *intensity of review schema* in which most if not all questions of law are reviewable on a presumptive deferential standard.[11] This creates a significant problem:

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the independence of superior courts, see William Lederman, "The Independence of the Judiciary" (1956) 34:7 Can Bar Rev 769.

5 See e.g. SA De Smith, *Judicial Review of Administrative Action* (London, UK: Steven & Sons, Ltd, 1959) at 65: "[f]rom the earliest times the courts of common law had asserted a right to determine the proper jurisdiction of courts administering other systems of law and to contain them within that jurisdiction by writs of prohibition."

6 See JN Lyon, "Comment" (1971) 49:2 Can Bar Rev 365 at 369 [Lyon, "Comment"]; *Farrell v Workmen's Compensation Board*, [1962] SCR 48 at 51 [*Farrell*].

7 David Mullan, "Recalibrating the Standard of Review of Administrative Action Yet Again—A Judicial Response to a Legislative Problem?" (2019) 49:2 Adv Q 172 at 176 [Mullan, "Recalibrating"].

8 *Crevier*, *supra* note 2 at 236: "[t]here may be differences of opinion as to what are questions of jurisdiction…."

9 David Mullan, "Deference: Is it Useful Outside Canada?" (2006) Acta Juridica at 46 [Mullan, "Deference"].

10 Roderick A MacDonald, "Constitutional Law—Validity of Legislation—Privative Clause Ousting Judicial Review—*Crevier v Attorney-General for Quebec Et Al* (1983) 17 UBC L Rev 111 [MacDonald, "Validity of Legislation"].

11 *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The language of judicial review "schemata" is usefully supplied by Dean Knight, *Vigilance and*

if jurisdictional error as a concept is now in question, what remains of the constitutional guarantee?[12]

It is no surprise that, post-*Vavilov*, courts across the country have struggled with its content, raising new questions about its scope.[13] The Supreme Court recently decided a case that can be viewed as raising the problem indirectly.[14] And amid high-profile legislation adopted by the Alberta Legislature that purports to instruct courts to defer to state actors on questions pertaining to the division of powers, the scope of the constitutional guarantee should be clarified.[15]

I argue that the constitutional guarantee must be doctrinally rearticulated in a way that respects both a system of limited powers and the move to an intensity of review framework.[16] The starting point should be that the guarantee of superior court jurisdiction prohibits the creation of shadow superior courts—administrative bodies—that can opine on the scope of their *legal powers* without the prospect of review.[17] No administrator can be left as a "fox in the henhouse"[18]—completely beyond the review of the superior courts, acting *itself* as a superior court

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Restraint in the Common Law of Judicial Review (Cambridge: Cambridge University Press, 2018) at 24.

12 Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023) at 165 [Daly, *Culture of Justification*]: "[t]here is no category of jurisdictional error that allows a reviewing court to police, on a correctness basis, what Laskin described as the 'limits' of an administrative decision-maker's jurisdiction."

13 See e.g. *Canada (Attorney General) v Best Buy Canada Ltd,* 2021 FCA 161 [*Best Buy*]; *Smith v Appeal Commission,* 2023 MBCA 23 at para 39 [*Smith*].

14 *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8; *Ummugulsum Yatar v TD Insurance Meloche Monnex*, 2023 CanLII 1718 (SCC). *Yatar* concerns the circumstances under which a statutory right of appeal is an "adequate remedy" in place of an application for judicial review. Lurking in the background is whether there is a freestanding right to judicial review that exists where a right of appeal is provided.

15 See *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8, s 9(2) [*Alberta Sovereignty Act*].

16 Noel Lyon, "Is Amendment of Section 96 Really Necessary?" (1987) 36 UNBLJ 79 at 83 [Lyon, "Section 96"]: "[b]oth history and theory point to a system of government with limited powers exercised in accordance with law."

17 Interestingly, shortly before the decision in *Crevier*, Laskin CJC wrote extrajudicially that it might be appropriate to preserve judicial review over legal questions broadly, rather than just jurisdictional errors specifically. See Bora Laskin, "Comparative Constitutional Law—Common Problems: Australia, Canada, United States of America" (1977) 51 ALJ 450.

18 This turn of phrase was coined by Scalia J in *City of Arlington v Federal Communications Commission*, 569 US 290 (2013) [*City of Arlington*] and deployed in *Vavilov*. See *Vavilov*, *supra* note 11 at para 68.

with final determination over its statutory or constitutional boundaries.[19] Such a situation is arguably inconsistent with sections 96 through 100 of the *Constitution Act, 1867*, which guarantees a fixed class of superior courts with certain features that cannot be reproduced through the mere delegation of power by legislatures. This guarantee serves to prohibit the creation of islands of unreviewable administrative power, which also opens avenues of contestation for individuals aggrieved by administrative decision-making.

Constructing doctrine with this starting point in mind requires us to answer two questions on which this paper focuses. The broader commitment of the constitutional guarantee—the prevention of illegal arrogation of power—can help us to answer these questions.[20] The first question is whether it is only questions of law that are reviewable, or whether some broader class of factual errors, previously classified as "jurisdictional," are also reviewable.[21] I suggest that our constitutional order need not accord special status to questions of jurisdiction.[22] A plausible expression of the constitutional guarantee means that it should protect review on *all* questions of law, and jurisdictional error should be discarded once and for all for the purposes of the constitutional guarantee. While it will always be difficult to distinguish between issues of law and fact, the constitutional guarantee should closely track to legal questions, with only a slight exception for cases where findings are made without any evidence, which is a recognized error of law.[23]

The second question is whether any questions of law call for the constitutional guarantee to protect a specific intensity of review, beyond the promise of reviewability. Indeed, there are good reasons to say that

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19 *Reference re Amendments to the Residential Tenancies Act (NS),* [1996] 1 SCR 186 at para 73; *Quebec Reference, supra* note 4 at para 62.

20 As Beetz J said in *Syndicat des employes de production du Quebec v CLRB,* [1984] 2 SCR 412 at 444 [*Syndicat*]: in relation to judicial review of administrative action and constitutional review "[t]he power of review of the courts of law has the same historic basis in both cases, and in both cases it relates to the same principles, the supremacy of the Constitution or of the law, of which the courts are the guardians."

21 This is fundamentally the dispute in *Best Buy*, in which the Federal Court of Appeal majority translated the concept of jurisdictional error into a conclusion that the constitutional guarantee, under the modern law of judicial review, protects judicial review for a range of factual questions. See *Best Buy*, *supra* note 13.

22 Mullan, "Recalibrating", *supra* note 7 at 190.

23 Bruce Bowman, "Judicial Review 'No Evidence'" (1984) 14:2 Man LJ 195 at 198: "[t]he findings of fact on no evidence is an error of law. However, the question remains as to within which of the two categories of error 'no evidence' falls. The weight of authority favours the proposition that 'no evidence' is an error going to jurisdiction. However, there is authority which states that 'no evidence' is an error of law on the face of the record."

this is the case, reasons that are rooted in the same concern for preventing the illegal arrogation of power. In fact, these reasons take on greater force in this context. It has long been recognized that legislatures cannot oust or "limit" judicial review for constitutionality. Doing so could permit, without the promise of independent review, the arrogation of extra-constitutional power by provinces or the federal government.[24] This distorts the framework of government laid out in the *Constitution Act, 1867,* at a systemic level. Here, the consequences of ousting or limiting are greater than in the case of an administrator acting under a specific statute. Provinces cannot, through the delegation of power, limit judicial review for constitutionality of administrative acts, lest an administrative actor arrogate to itself power it cannot hold. This is why *Vavilov* insists on correctness review—any distortion at all in the distribution of powers would undermine its exclusive and specific assignment of powers.[25] Accordingly, the superior courts' role to interpret those powers cannot be limited by a legislative act.[26]

In Part I, I outline the constitutional supervisory jurisdiction and the specification of that jurisdiction through the *scope of review* and *intensity of review* schemata, suggesting that *Vavilov* is best described as a framework consistent with the latter approach. In Part II, I suggest that courts should move beyond "conceptual morass" of jurisdictional error entirely.[27] This is because it distorts the relevant constitutional principles while being an ill-fit in an *intensity of review* framework. In Part III, and drawing on examples, I articulate the revised constitutional guarantee. I argue that (1) legislatures must preserve review over questions of law; and (2) legislatures are foreclosed from limiting judicial review of constitutional determinations by administrators. Both components of the constitutional guarantee are rooted in the same overarching principle: legislatures cannot create islands of power that can arrogate to themselves statutory or constitutional authority without the prospect of adequate review in the superior courts.[28] I defend this interpretation against several contrary arguments: namely (1) that this revised guarantee is disrespectful of precedent and the role of legislative sovereignty; and (2) that the reasonableness standard of review itself is constitutionalized after *Vavilov*.

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[24] *Amax Potash Ltd Etc v The Government of Saskatchewan*, [1977] 2 SCR 576 at 591 [*Amax*]; *Vavilov, supra* note 11 at para 56; Lyon, "Section 96", *supra* note 16 at 83.

[25] The exclusivity of the division of powers has been recognized in recent literature. See Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225.

[26] *Vavilov, supra* note 11 at para 53.

[27] Noel Lyon, "Comment" (1980) 58:3 Can Bar Rev 646 [Lyon, "CUPE Comment"].

[28] These functions are united is well-accepted in the cases and authorities. See *Syndicat*, *supra* note 20 at 444. See also, Lyon, "Section 96", *supra* note 16; De Smith, *supra* note 5 at 7.

Part I: Constitutional Principles and Schemata of Judicial Review

I begin by identifying the constitutional principles that support a guarantee of judicial review over some class of questions. In this part, I suggest that within the Supreme Court of Canada's cases is an embedded rationale for the protection of a judicial review jurisdiction in superior courts. If Parliament or the legislatures jointly or severally could create statutory "courts" that are not reviewable in the superior courts, there would be no independent arbiter over the exercise of public powers, with the incentive for administrators to arrogate powers without the prospect of correction. This restriction on legislative power, embedded in sections 96 through 100 of the *Constitution Act, 1867*, has historically been specified through the concept of jurisdictional error. However, with the introduction of an *intensity of review* framework, the guarantee should now be expressed through that schema.

A) Constitutional Principles

There is debate about the intentions and principles underlying sections 96 through 100 of the *Constitution Act, 1867*.[29] Nonetheless, it is worth exploring how the Supreme Court has understood the constitutional framework that might support a guarantee of judicial review. While sections 96 through 100 may reveal many conflicting values, they also reflect certain contingent commitments to a superior court system, independently constituted, and separated if imperfectly from certain types of political power. The end effect of this commitment is an avenue for those aggrieved by administrative power to challenge exercises of that power under the law, and a limitation on the exercise of power by legislatures.

One must begin with the constitutional text.[30] It is true that section 96, taken individually, merely vests an appointment power in the superior courts. At first blush, this would rule out a reading of the constitutional text that discloses a guaranteed power of judicial review over administrative action, let alone over questions of law. Nonetheless, sections 96 through 100 are only understandable against the backdrop of

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[29] Paul Daly, "The Remarkable Evolution of Section 96 of the Constitution Act, 1867" (5 November 2015) online: *Adminstrative Law Matters* <www.administrativelawmatters.com/blog/2015/11/05/the-remarkable-evolution-of-section-96-of-the-constitution-act-1867/> [perma.cc/S52Z-4THM].

[30] This approach to interpretation was solidified by the Supreme Court's decision in *Quebec (Attorney General) v 9147-0732 Quebec Inc*, 2020 SCC 32 at para 11 [*Quebec Inc*]. Though a *Charter* decision, *Quebec Inc* seems to announce a general rule about constitutional interpretation.

a system of parliamentary sovereignty in which legislatures are limited by an entrenched constitution containing, in this case, a division of powers. Put this way, starting with the text assists us in understanding what the *Constitution Act, 1867* aims to accomplish in guaranteeing a class of superior courts with certain characteristics. But this guarantee should be read against the backdrop of other recognized principles of the law, including the separation of powers, which permits the delegation of power but also guarantees that "the task of interpreting, applying, and stating the law falls primarily to the judiciary."[31]

As a constitutional matter, and within broad limits, it is acceptable for Parliament and the legislatures to delegate power to subordinate actors.[32] At least one aspect of this power is textually prescribed. Under section 92(14) of *the Constitution Act, 1867,* provinces have exclusive power to legislate in relation to the matter of administration of justice in the province. This power not only permits the establishment of provincial statutory courts, but also the delegation of judicial and legislative power to provincial administrative actors nested within a valid regulatory regime.[33] This power has become quite important, especially as the administrative state developed into a legitimate aspect of modern government.

Nonetheless, the power to delegate to administrative decision-makers is contained within what the Court has called an "exception" to the textually enshrined power of provinces (and the federal government) to delegate power pursuant to the constitutional heads of power.[34] Some of the restrictions on the delegation of power are implicitly included in sections 96 through 100 of the *Constitution Act, 1867*.[35] These provisions contain certain protections for superior courts of inherent jurisdiction. Section 96 preserves a federal appointment power over judges of the superior courts; section 99 provides that the judges of the superior courts hold office during good behaviour, a form of tenure protection; and

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[31] *Quebec Reference, supra* note 4 at para 46.

[32] See e.g. *In re George Edwin Gray,* [1918] 57 SCR 150 [*Gray*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Reference*].

[33] See *Tomko v Labour Relations Board (NS) et al*, [1977] 1 SCR 112 at 120.

[34] The fact that sections 96 through 100 of the *Constitution Act, 1867* apply to both the provinces and the federal government was clearly established in *McEvoy v Attorney General for New Brunswick et al*, [1983] 1 SCR 704.

[35] These provisions, in addition to extensive examination in the case law, have also been examined by scholars. See Paul Daly, "Section 96: Striking a Balance Between Legal Centralism and Legal Pluralism" in Richard Albert, Paul Daly, and Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 84–102; Gilles Pépin, *Les tribunaux administratifs et la Constitution: Étude des articles 96 à 101 de l'AANB* (Montreal: Les Presses de l'Université de Montréal, 1969) 78–81; John Willis, "Section 96 of the British North America Act" (1940) 18 Can Bar Rev 517.

section 100 fixes the salaries of superior court judges. These provisions form an exception to the power of delegation "by entrusting to the federal government the task of appointing the judges who will sit on the superior courts."[36] Of course, while the Court has specified these functions for sections 96 through 100, there is and always has been vibrant debate about the conflicting values underlying the constitutional guarantees.[37]

Even considering these conflicting values, the constitutional text arguably discloses that superior courts have certain characteristics and functions. Judges of superior courts are *appointed by the federal government*; this "implicitly denies the provinces the power of bestowing upon those courts which are presided over by judges they appoint the jurisdiction of the courts described [in section 96]."[38] There are guarantees associated with the *independence* of superior courts—particularly related to security of tenure and financial security.[39] Finally, since these constitutional provisions were designed to mirror the supervisory jurisdiction of courts in England, a key characteristic of superior courts of law is their *inherent jurisdiction*.

As an aside, it is obvious to raise the problem of the federal courts at this juncture. The federal courts are, themselves, statutory courts created by the federal government under section 101 of the *Constitution Act, 1867,* which grants power to the federal government to establish "additional Courts for the better Administration of the Laws of Canada."[40] The federal courts, as statutory courts, lack inherent jurisdiction, and are restricted by the *Federal Courts Act* to cases involving the interpretation and application of federal law.[41] Put this way, it could be argued that there is nothing special about the federal courts—in fact, this appears to be the gist of the Supreme Court's opinion in *Windsor (City) v Canadian Transit Co,* where Justice Karakatsanis questioned whether it is even possible for the federal courts to grant declarations of constitutional invalidity.[42]

Nonetheless, there are good reasons in the judicial review realm to conclude that the *Federal Courts Act* should be interpreted not to lead to an unconstitutional result: the practical insulation of federal decision-makers from meaningful review.

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36 *Quebec Reference, supra* note 4 at para 44.

37 See footnote 36.

38 *Seminaire de Chicoutimi v La Cite de Chicoutimi,* [1973] SCR 681 at 686.

39 Lederman, *supra* note 4.

40 See *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at paras 14–15 [*Windsor*].

41 RSC 1985, c F-7.

42 *Windsor*, *supra* note 40 at paras 70–71.

A way to think through this problem is to consider what Parliament did, exactly, when it adopted the most recent iteration of the *Federal Courts Act*.[43] Before the *Federal Courts Act* was enacted, Parliament did not have the power to completely oust judicial review according to *Crevier,* and before that, the common law. The *Federal Courts Act* was a systematic attempt to specify and codify the judicial review function—previously inherently existing in the section 96 courts—to permit a streamlined review of federal decision-makers.[44] Even if the Federal Court is just a statutory court with no constitutional footing at all,[45] consider what may happen if Parliament could completely oust review in the federal courts. Litigants seeking to challenge federal administrative action would be forced to go to the section 96 courts. This, in effect, would be directly contradictory to the text and purpose of the *Federal Courts Act*, which is aimed to streamline and unify the review of federal administrative bodies. In this case, an interpretation of the *Federal Courts Act* that prevents this result would conform with the aims of sections 96 through 100 of the *Constitution Act, 1867*, but more importantly, it is a plausible interpretation of Parliament's intent when it enacted the *Federal Courts Act.*[46]

This aside, the judicial review function derived from the *Constitution Act, 1867* gives life to what the Supreme Court said about the superior courts in *Toronto (City) v Ontario (Attorney General)*.[47] There, the Court related the text of sections 96 through 100 of the *Constitution Act, 1867* to the unwritten constitutional principles of the rule of law and judicial independence.[48] As the Court has articulated, the rule of law provides that "relationship between the state and the individual is regulated by law"[49] or otherwise, that there must be oversight over the exercise of public legal powers.[50] On this theory, the courts are protected by section 96 are "primary guardians of the rule of law" and as a result, are best suited to "resolving disputes over the division of powers … and ensuring

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43 *Best Buy, supra* note 13.

44 I acknowledge that the majority opinion in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] may imply something different. Nonetheless, the choice in *Khosa* to read the *Federal Courts Act* as only contemplating grounds, rather than standards of review, does not change my basic point.

45 There may be something constitutionally significant about the federal courts in that they were created by a power with its source in the *Constitution Act, 1867* itself: Specifically, section 101 of the *Act*. I cannot address the merits of this point here.

46 See Paul Daly, "Legal Coherence Versus Legal Certainty" in Matthias Klatt, ed, *Constitutionally Conforming Interpretation* (New York: Bloomsbury Publishing, 2023).

47 2021 SCC 34.

48 *Ibid* at para 55.

49 *British Columbia v Imperial Tobacco Canada Ltd,* 2005 SCC 49 at 58.

50 *Quebec Reference, supra* note 4 at 49, citing to David Phillip Jones, "A Constitutionally Guaranteed Role for the Courts" (1979) 57 Can Bar Rev 669 at 675.

that government actions do not conflict with the fundamental rights of citizens."[51] Their place is constitutionally protected to ensure a forum in which individuals can challenge the exercise of legal powers.[52] If litigants cannot challenge decisions of statutory bodies on basic questions of legality, decision-makers could extend their statutory powers beyond those embedded in the law. In this way, the rule of law principle prevents the fox-in-the-henhouse syndrome by warranting that individuals will have an independent forum in which to challenge the exercise of legal powers.

This principle crystallizes in a rule: the provinces and the federal government, together or separately, cannot create statutory bodies that mimic superior courts.[53] The creation of potentially countless "courts"—statutory administrative bodies—would abridge the system of limited powers implied by sections 96 through 100 of the *Constitutional Act, 1867*. These potentially countless courts would have two important knock-on effects. First, they would deprive the superior courts of constitutional jurisdiction that the Court's precedents clearly recognize. Swaths of administrative power would be beyond review, reducing the supervisory jurisdiction to an empty shell—formally present but substantively denuded. Second, they would create an unconstitutional effect, by denying individuals the prospect of review over questions of law in a putatively independent forum. By preventing the free reorganization of the superior courts, sections 96 through 100 end up preserving an independent forum—imperfect as it is—for the challenge of administrative action under the law by those affected by it. [54]

B) Scope of Review and Jurisdictional Error

Though these are the constitutional principles supporting the supervisory jurisdiction, they do not answer a key question: how is this supervision doctrinally specified? Historically, there are two schemata of review that performed this task in Canada: the *scope of review schema* and the *intensity of review* schema. While I do not aim to cover the waterfront in this review—others have done this admirably—I do aim to identify the key features of each schema.

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51 *Ibid.*

52 *Quebec Reference, supra* note 4.

53 *Quebec Reference*, *supra* note 4 at paras 54, 66. See also confirmation of this point, in various ways, in *Reference re Adoption Act*, [1938] SCR 398 at 414; *Labour Relations Board of Saskatchewan v John East Iron Works Limited*, 1948 CanLII 266.

54 There is, of course, the separate question of whether these provisions achieve their purposes. See Roderick A Macdonald, "The Proposed Section 96B: An Ill-Conceived Reform Destined to Failure" (1985) 26:1 C de D 251.

The first system of review is a *scope of review* schema.[55] As professor Dean Knight indicates, a scope of review system is based on the concept of reviewability. Under this reviewability rubric, "the power to intervene is cast in categorical terms,"[56] with decision-makers and courts each having exclusive spheres of authority.[57] This creates the consequence that the issue at hand "is either subjected to correctness style review or it is treated as being a matter for the decision-maker and not subject to review."[58] In this way, the key lightning rod of a scope of review system is the distinction between intrajurisdictional errors of law, protected from review, and jurisdictional errors of law, which are not.

The theory of jurisdictional error—and its distinction between intrajurisdictional and jurisdictional errors of law—plausibly maps to the constitutional principles of legislative sovereignty and the rule of law. In its purest form, jurisdictional error guaranteed that "all was dark as far as reviewing courts were concerned" within jurisdiction.[59] The Supreme Court in the heydays of jurisdictional error sometimes restrained itself from reviewing decisions purportedly within jurisdiction.[60] This form of judicial deference can be seen as a gesture to parliamentary sovereignty, and the unquestioned right of legislatures to invest power in decision-makers. But "jurisdictional limits were policed by the courts, sometimes jealously," exercising the accepted function of the courts to police the statutory boundaries of administrative decision-makers.[61]

When privative clauses became more commonplace, the scope of review schema was deployed by courts to arguably defeat the plain meaning of those clauses. Courts in Canada took the position that a privative clause could only protect decisions taken within jurisdiction; if a decision disclosed an error going to jurisdiction, the decision was a nullity, and could not be protected by a privative clause. This was because

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55 Knight, *supra* note 11 at 34.

56 *Ibid* at 50.

57 Paul Daly, "The Struggle for Deference in Canada" in Mark Elliott & Hanna Wilberg, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (London, UK: Hart Publishing, 2015) 297 at 299 [Daly, "Deference"].

58 Knight, *supra* note 11 at 50.

59 Daly, "Deference", *supra* note 57 at 300. Later, at common law, courts also exercised a power to review for intrajurisdictional "errors of law on the face of the record." See *R v Northumberland Compensation Appeal Tribunal, Ex Parte Shaw*, (1952) 1 All ER 122; *Alberta Board of Industrial Relations et al v Stedelbauer Chevrolet Oldsmobile Limited*, [1969] SCR 137.

60 See *Labour Relations Board v Traders' Service Ltd,* [1958] SCR 672; *Bakery and Confectionary Workers International Union of America, Local 468 v White Lunch Ltd,* [1966] SCR 282.

61 Daly, "Deference", *supra* note 57 at 300.

of an imputed intent to the legislatures: legislatures could not intend to delegate power to a statutory body, limited by its enabling statute, while also placing those limits beyond review.[62]

A good snapshot of how this binary of jurisdiction functioned is contained in *Farrell v Workmen's Compensation Board*.[63] The case concerned a question at the heart of a labour board's authority: whether an injury arose during or in the course of employment. This question was ostensibly insulated from judicial review by a privative clause. Justice Judson held for the Court that the issue was "unquestionably within the jurisdiction of the Board" and even if there was an error, the privative clause was effective to prevent judicial review.[64]

Taken literally, the theory of *Farrell* confers considerable scope of action to legislatures and administrators while respecting the power of the courts to opine definitively on statutory boundaries.[65] In this sense, one could say that the doctrine possesses "structural coherence".[66] Legislatures are free to insulate administrative power from review, and even in absence of that insulation, administrators are free to err within jurisdiction (exclusive, perhaps, of an error of law on the face of the record). The judicial review function is directly tied to the statutory limits erected by the concept of jurisdiction, such that judicial intervention is only appropriate in the face of a jurisdictional error. The legislative choice to delegate and insulate is respected within jurisdiction, and the courts police the boundaries of the delegation through the device of jurisdictional error.

The *practice* of jurisdictional error, however, was quite different. In a series of cases in the 1970s, the Supreme Court followed British law and classified nearly all questions of law as jurisdictional questions.[67] And even as an intensity of review framework began to develop, courts exercised significant power, under the guise of jurisdictional error, to exercise review power over factual and evidentiary issues. While it had been the case that findings based on "no evidence" were "jurisdictional",[68] in this era, the Supreme Court also signaled that an error occurred when

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62 See *Woodward Estate v Minister of Finance,* [1973] SCR 120 at 127; *Toronto Newspaper Guild v Globe Printing Company*, [1953] 2 SCR 18 at 23, Kerwin J.

63 *Farrell*, *supra* note 6.

64 *Ibid* at 49.

65 As we shall see, reality was more complex.

66 Mark Elliott, *The Constitutional Foundations of Judicial Review* (London, UK: Hart Publishing, 2001) at 24.

67 *Anisminic Ltd v Foreign Compensation Commission,* [1969] 2 AC 147 [*Anisminic*], followed *in Metropolitan Life Insurance Co v International Union of Operating Engineers*, [1970] SCR 425 at 435.

68 De Smith, *supra* note 5 at 86. See also Bowman*, supra* note 23.

"the evidence, viewed reasonably, is incapable of supporting a tribunal's finding of fact."[69] While this sort of language had been used to refer to jurisdictional error,[70] read literally, it also supports a broader review function that extends beyond a determination of "no evidence" into an analysis of reasonableness.[71] Understood in this way, the practice of jurisdictional error became a self-referential justification for the exercise of judicial review.

C) Intensity of Review

A system of judicial review premised on an *intensity of review* schema operates differently. It accords no special status to jurisdictional errors of law, rendering most legal questions presumptively reviewable according to modulating standards of review.

Speaking generally, an intensity of review framework explicitly calibrates the intensity of review based on "various constitutional, institutional, and functional factors."[72] Under this schema, the factors that drive the judicial review function are more transparent, and arguably more complex. As Knight argues, "[q]uestions of legitimacy cannot be solved on *a priori* basis and must be confronted in individual cases."[73] Nonetheless, one feature of an intensity of review framework is a meaningful expansion of the questions that are reviewable. In theory, under this framework, "no power—whether statutory or under the prerogative—is any longer inherently unreviewable."[74] One can contrast this position with the concept of jurisdictional error, under which entire swaths of legal questions are theoretically beyond the scope of judicial review.

In Canada, up until the late 1970s, the British approach to jurisdictional error and privative clauses essentially mirrored the Canadian approach.[75] Divergence appeared when Canadian administrative law began its move to a system based on intensity of review. The first, major step in this regard

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69 *Lester (WW) (1978) Ltd v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 SCR 644 at 669, McLachlin J; *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487.

70 For example, in *Re McInnes and Simon Fraser University* (1982), 140 DLR (3d) 694 (BCSC), McLachlin J noted that a decision can be upheld on the basis that there is evidence that "reasonably" supports the conclusion. She went on, however, to say that this phrasing does not permit the evaluation of evidence.

71 Bowman, *supra* note 23 at 197.

72 Knight, *supra* note 11 at 147.

73 *Ibid* at 167.

74 *Ibid* at 153.

75 Daly, "Deference", *supra* note 57 at 301.

was *CUPE v NB Liquor*.[76] Justice Dickson held that an intrajurisdictional error of law could only be corrected on review, in the presence of a privative clause, when it is "patently unreasonable" in nature.[77] At the same time, *CUPE* contained a caution: courts should be loath to brand a question as jurisdictional "that which may be doubtfully so."[78] Accordingly, the only intrajurisdictional errors of law that could be reviewed were those that rose to a patently unreasonable standard, so that the question was taken out of the protection of any privative clause.[79] Such errors would be classified as "jurisdictional" in nature.[80] Otherwise, absent such an error, questions of fact and evidence typically fall within the jurisdiction of an administrative decision-maker.[81]

Put this way, one innovation of *CUPE* was a relocation of respect for legislative delegation in an intensity of review schema. *CUPE's* major move was the introduction of language of intensity of review—*reasonableness*—in the consideration of jurisdictional error. This is clear by running *CUPE* through the orthodox approach to jurisdiction, contained in *Farrell.* On that account, Justice Dickson was not required to look for a "patently unreasonable" error—in *CUPE*, the decision at issue was within the jurisdiction of the board, and protected by a privative clause, which would be beyond review altogether if one followed *Farrell*.[82] Instead, *CUPE* suggested that certain errors admittedly within jurisdiction, and theoretically beyond review, are reviewable on the patent unreasonableness standard. It made reviewable errors that previously were not, but conditioned that review with language of reasonableness.[83] In this way, *CUPE* traded non-reviewability for a modulating standard of review.

Eventually, the move to an intensity of review system reduced the jurisdictional error approach to a thin residue on the edges of the law

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76 [1979] 2 SCR 227 [*CUPE*].

77 *Ibid* at 237.

78 *Ibid.*

79 *Ibid.*

80 This point was recognized somewhat later. See *Bibeault v McCaffrey,* [1984] 1 SCR 176 at 184.

81 CUPE*, supra* note 76 at 233.

82 See Roger Carter, "The Privative Clause in Canadian Administrative Law, 1944–1985: A Doctrinal Examination" (1986) 64:2 Can Bar Rev 241 at 260: "[g]iven the privative clause, is it not fair to say that under the pre-1979 decisions the case should have stopped at that point, with the application for certiorari being dismissed?".

83 *Ibid* at 261. It is true, of course, that the change in *CUPE* also limited review if compared to the position held in *Anisminic.* See *Anisminic*, *supra* note 67. It made questions that previously would be reviewed on a correctness standard (under the *Anisminic* approach) reviewable on a patent unreasonableness standard.

of judicial review. The cause of this was the general idea that deference could be afforded to administrative decision-makers even in absence of a privative clause.[84] This had two implications for the way jurisdictional error would be understood for the purposes of the constitutional guarantee. First, determining the "jurisdiction" afforded to a decision-maker would no longer be conceived as a matter of reviewability. Rather, it would be a function of the so-called "pragmatic and functional analysis," which set out several factors to calibrate the intensity of review.[85] Applying these factors, courts were asked to locate a particular intensity of review for the decision under review on a spectrum of patent unreasonableness, reasonableness, or correctness. On this theory, a jurisdictional error is simply "descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis."[86] This approach continued through the *Dunsmuir v New Brunswick* era, where a jurisdictional error—if it could ever be identified—would lead to a correctness review.[87]

Secondly, privative clauses simply became signals for deference rather than mechanisms to completely or partially oust review of any kind. As Justice Rothstein points out in *Canada (Citizenship and Immigration) v Khosa*, "[r]ather than being viewed as the express manifestation of legislative intent regarding deference, the privative clause was now treated simply as one of several factors in the calibration of deference."[88] Justice Rothstein seems to describe this move as a matter of constitutional avoidance: "[s]tandard of review developed as a means to reconcile the tension that privative clauses create between the rule of law and legislative supremacy."[89] Giving effect to privative clauses would quite obviously run into the constitutional boundaries established in *Crevier,* and so courts simply read down privative clauses as non-binding signals of deference.

These two pressures—the move away from jurisdictional error toward intensities of review, and the downgrading of privative clauses—characterized the development of the so-called "standard of review" analysis in *Dunsmuir* in its progeny. The standard of review analysis eliminated the patent unreasonableness standard of review entirely, reasoning that there were only two standards of review: reasonableness

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84 A precursor to this occurred *in Alberta Union v Provincial Employees, Branch 63 v Board of Governors of Olds College*, [1982] 1 SCR 923. Later, see *Pezim v British Columbia (Superintendent of Brokers),* [1994] 2 SCR 557.

85 See *UES, Local 298 v Bibeault,* [1988] 2 SCR 1048 at para 122; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 [*Pushpanathan*].

86 *Pushpanathan, supra* note 85 at para 28.

87 2008 SCC 9 at para 59 [*Dunsmuir*].

88 *Khosa*, *supra* note 44 at para 92.

89 *Ibid* at para 74.

and correctness. Following *Pushpanathan v Canada (Minister of Citizenship and Immigration)*,[90] jurisdictional errors fell into a category warranting correctness review, though in later cases, majorities of the Court questioned whether such questions existed at all.[91]

Vavilov completed the shift to a framework resembling an intensity of review schema. It concluded that there should no longer be a category of jurisdictional error attracting correctness review.[92] In turn, it expressed serious reservations about whether jurisdictional questions could be identified at all, reasoning that the function of jurisdictional error could be expressed through a rigorous application of the reasonableness standard on questions of law.[93] Along with the eradication of the category of jurisdictional error, *Vavilov* also left no role for privative clauses at all.[94]

This review indicates that one thread connecting the various eras of Canadian administrative law is the move to a system in which questions of law are reviewed according to different intensities of review, rather than a binary standard of reviewability. Nonetheless, and as we shall see, there are still meaningful issues that will pertain to questions of reviewability. But the line between intrajurisdictional error and jurisdictional error no longer holds, nor does it justify the court's exercise of the constitutional supervisory jurisdiction.

Part II: The Problems with Jurisdictional Error

As an intensity of review schema developed, two problems became evident with jurisdictional error. First, jurisdictional error has an *inflationary tendency* that can eventually erode the theoretical basis for its existence and the constitutional basis of judicial review. Second, it is an *ill-fit* in a system fundamentally premised on intensity of review, where most questions of law are reviewable according to different standards of review.

A) Inflationary Tendency

The concept of jurisdictional error can be conceived in different, sometimes conflicting ways. At its narrowest, legal scholar DM Gordon's so-called "pure theory of jurisdiction" simply means the "authority to

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90 *Pushpanathan, supra* note 85.

91 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61 at para 34; *Canada (Canadian Human Rights Commission) v Canada (Attorney General),* 2018 SCC 31 at para 37.

92 *Vavilov, supra* note 11 at para 65.

93 *Ibid* at paras 66–67.

94 *Ibid* at para 49.

decide."[95] The theory might include questions akin to those that relate to a court's jurisdiction, such as whether it has territorial jurisdiction, or whether a person is "amenable to the tribunal's jurisdiction."[96] These preliminary questions of jurisdiction are separate from other, run-of-the-mill questions of law that a decision-maker may be entrusted to decide.[97]

But because of the inflationary tendency of the concept of jurisdictional error, Mullan soundly contends that despite Gordon's "rejection of the wider theories of jurisdiction … he is not completely prepared to acknowledge a tribunal's authority to err at all and to function in complete disregard of the empowering legislation."[98] Perhaps because such an acknowledgement "is difficult to accept completely and impossible to justify historically, save in relation to the highest court in the land," Gordon "admits of exceptions and by opening the door to jurisdictional error even minutely he raises all the problems of the jurisdictional theory…."[99] In this sense, law professor Noel Lyon was justified in saying that"[t]he inadequacy" of the jurisdictional error model "is evidenced by the array of judicial devices for broadening or supplementing the concept of jurisdiction."[100] These devices expand the concept of jurisdictional error into an "overworked beast of burden," one that justifies judicial intervention in cases that do not directly engage errors that pertain to the statutory boundaries of administrative action.[101]

The inflationary tendency of jurisdictional error is perhaps best represented in the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission*.[102] Faced with a privative clause purporting to oust judicial review, preventing the decision from being "called in question in any court of law," a unanimous House of Lords concluded that the clause did not protect review on jurisdictional grounds. The effect of the broad approach to jurisdiction introduced in *Anisminic*, according to some commentators, was the complete erosion of the distinction

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95 DM Gordon, "The Relation of Facts to Jurisdiction" (1929) 45 Law Q Rev 459; DM Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931) 47 Law Q Rev 386 [Gordon, "Observance of Law"]. See also De Smith, *supra* note 5 at 66.

96 See David Mullan, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada—A Mitigating Plea" (1972) 10:2 Osgoode Hall LJ 440 at 443 [Mullan, "Jurisdictional Fact"].

97 Gordon, "Observance of Law", *supra* note 95 at 476.

98 Mullan, "Jurisdictional Fact", *supra* note 96 at 444. See also De Smith, *supra* note 5 at 68.

99 Mullan, "Jurisdictional Fact", *supra* note 96 at 444.

100 Lyon, "CUPE Comment", *supra* note 27 at 651.

101 *Ibid* at 647.

102 *Anisminic, supra* note 67.

between jurisdictional and non-jurisdictional errors of law.[103] This was "an unprecedented decision in a constitutional system whose foundation stone is Parliamentary supremacy."[104]

Indeed, despite justifying itself as a tool that tracked the limits of delegated power, jurisdictional error became an all-purpose device for the review of administrative decisions, even on questions of fact and evidence.[105] This was especially problematic as the administrative state developed into a legitimate and desirable aspect of modern government. The legislative intent to delegate powers to these actors—unquestionable from a constitutional perspective—was arguably stymied by the inflationary approach to jurisdictional error.

There are two specific problems created by the broad approach to jurisdiction that relate to legislative sovereignty, represented as the constitutional right to delegate power. Mark Elliott calls these the problems of *passive* and *active artificiality*.[106] The idea of passive artificiality refers to the difficulty of maintaining "that the broad grounds of review derive straightforwardly from the will of Parliament, particularly in light of the detailed and complex nature of certain grounds."[107] Essentially, under the guise of jurisdictional error, it is open to courts to identify errors as "jurisdictional," and open to review. Because this framework is nested in a scope of review system, many of these errors—which, again, may not relate to the statutory boundaries of a decision-maker—will be decided *de novo* by the court. The result is an expansion of judicial review authority and a removal of power from the legislature to specify freedom of action for the decision-maker.

The problem of active artificiality also serves to raise doubts about the broad theory of jurisdictional error. Active artificiality refers to the approach of the concept of jurisdictional error to privative clauses. Under that approach, Elliott points out that English courts "effect judicial review in spite of a legislative enjoinder which, on a literal reading, is

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[103] Paul Daly, "Divergence and Convergence in English and Canadian Administrative Law," in Michael Ramsden & Swati Jhaveri, eds, *Indigenizing Administrative Law* (Cambridge: Cambridge University Press, 2020).

[104] Bernard Schwartz, "*Anisminic* and Activism—Preclusion Provisions in English Administrative Law" (1986) 38:1 Admin L Rev 33.

[105] Mullan, "Jurisdictional Fact", *supra* note 96. The invitation to review factual errors was generated by the doctrine of so-called "jurisdictional fact," which permitted review of factual matters said to be part-in-parcel of the tribunal's jurisdiction. This, too, was a result of an inflated view of jurisdictional error.

[106] *Ibid*.

[107] *Ibid*.

to the contrary." [108] In British legal scholar Paul Craig's words, "[i]f the rationale for judicial review is that the courts are thereby implementing legislative intent this leads to difficulty where the legislature has stated in clear terms that it does not wish the courts to intervene with the decisions made by the agency."[109] If the concept of jurisdictional error is justified by the delegation of power, then there must be some effect—absent constitutional objection—given to this exercise of legislative sovereignty. Without a sufficient and explicit constitutional rationale furnished for this broad assertion of judicial review authority, the theory of jurisdictional error has no answer for clauses purporting to oust review.

Is this result inevitable? The relentless engine of expansion embedded in jurisdictional error is likely attributable to the difficulty of distinguishing between questions of jurisdiction and questions of law in administrative settings. Superior courts that have the inherent power to opine on the limits of their jurisdiction are not, strictly speaking, creatures of statute. This is in direct contrast to administrative decision-makers, whose power to act is totally enabled and limited by a constating statute.[110] It is comparatively easier to keep a clean distinction between jurisdictional and non-jurisdictional questions when it is possible to identify a "core" of superior court powers, derived from their inherent jurisdiction. In that context, jurisdictional questions are "clear and preliminary," directly pertaining to well-established concepts of subject matter or personal jurisdiction.[111] This is not so where all powers—"jurisdictional" or not—are derived from statute.[112] In that case, the line between jurisdictional and non-jurisdictional errors is not administrable—and it becomes theoretically possible to describe everything an administrative decision-maker does as dealing with its "jurisdiction" and attracting review. [113]

This problem is perhaps best represented in the development and expansion of jurisdictional error, even after *CUPE*. After *CUPE* was rendered, the Supreme Court did not take its advice that questions of fact

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[108] *Ibid* at 30.

[109] Paul Craig, "Ultra Vires and the Foundations of Judicial Review" (1998) 57 Cambridge LJ 63 at 68.

[110] *Vavilov*, *supra* note 11 at para 108.

[111] Lyon, "CUPE Comment", *supra* note 27 at 647.

[112] *Ibid* at 648. See also *City of Arlington*, *supra* note 18: "their power to act and how they are to act is authoritatively prescribed by [the legislature], so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."

[113] This was put well by Rothstein J in *Nolan v Kerry (Canada) Inc,* 2009 SCC 39 at para 33. "Administrative tribunals are creatures of statute and questions that arise over a tribunal's authority that engage the interpretation of a tribunal's constating statute might in one sense be characterized as jurisdictional."

and evidence would be beyond review.[114] Instead, still caught in the trap of jurisdictional error, the Court characterized as jurisdictional an ever-broader category of questions of fact.[115] It is on this basis that one can assert that questions of fact, assessed under a reasonableness standard, are protected by a constitutional guarantee of judicial review. But this only speaks to the inflationary tendency of jurisdictional error as a reason to discard the concept and seek a definition of the constitutional guarantee that avoids the expansion.

B) Ill-Fit

The second fundamental problem with jurisdictional error is its *ill-fit* in the current system of judicial review, premised on intensity of review. *Vavilov*'s final elimination of the distinction between intrajurisdictional and jurisdictional errors of law meant that jurisdictional questions would be treated the same as all other questions of law, under a presumptively deferential standard. Mullan puts the ill-fit problem starkly: "[t]he Supreme Court's changing and narrowing of the criteria for the identification of what constitutes a jurisdictional question undercut the constitutional prescription of judicial review for jurisdictional error."[116]

In two important ways, the doctrinal content of "jurisdictional error" is obscure, providing no resources for judges to explain and apply it in cases implicating the constitutional guarantee of judicial review. First, *Vavilov* provides that, at best, "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute."[117] The modern law of judicial review provides no tools to make this distinction. Attempting to "retcon" the content of jurisdictional error into the modern law of judicial review directly contradicts the wisdom contained in *Vavilov*: the difficulty in identifying jurisdictional questions had a negative impact on litigants.[118] A court that concludes that the reasonableness standard on these questions is justified must retain the broad concept of jurisdictional error, in all its expansiveness. This sits uncomfortably with an intensity of review framework.

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114 *CUPE*, *supra* note 76 at 233.

115 See Elliot, *supra* note 66.

116 Mullan, "Deference", *supra* note 9 at 46.

117 *Vavilov, supra* note 11 at para 66.

118 *Ibid* at para 67. Of course, there are situations in which it will be impossible to avoid assigning content to the concept of jurisdictional error. For example, some statutes provide rights of appeal on the grounds of "law and jurisdiction." In such cases, as a matter of statutory interpretation, courts will need to determine the meaning of the term "jurisdiction" as Parliament would have understood it at the time. See *Canadian National Railway Company v Emerson Milling Inc*, 2017 FCA 79 at paras 17–18.

Second, legislative language is a principal constraint that conditions the intensity of review, rather than the nature of the question as "jurisdictional". This difference is important because it has constitutional implications. Under an intensity of review system endorsed in *Vavilov*, there is nothing special about jurisdictional questions to which courts must grant special attention. What matters is Parliament's expression of the degree of deference specified by the legislative language. As the Court says, "[e]ven where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of reasonable interpretations open to the decision-maker—perhaps limiting it to one."[119] Under this theory, what matters is the relative breadth of legislative language circumscribing administrative authority over so-called "jurisdictional questions", not the existence of these questions themselves.

Part III: The Constitutional Guarantee

Thus far, I have suggested that a move to an intensity of review framework, coupled with the constitutional principles at stake, suggest that the concept of jurisdictional error should no longer form the core of the constitutional guarantee. This leaves the important question of how to specify the constitutional guarantee of review. As I note, given the relevant constitutional principles, the constitutional guarantee can be specified in a two-fold manner. In (A), I outline how the constitutional guarantee of review protects reviewability on questions of law, dealing with the counter-arguments pertaining to legislative sovereignty/precedent and the role of reasonableness review. In (B), I suggest that the guarantee of judicial review should be intensified in cases where constitutional questions are raised, particularly questions pertaining to the division of powers.

A) Reviewability on Legal Questions

It is true that the law of judicial review has largely moved beyond the scope of review system that delineates the jurisdiction of decision-makers and courts in categorical terms. However, the reviewability of administrative decisions remains a preliminary concern that courts cannot escape, even in a system of intensity of review. Courts, for example, generally decline to review decisions in which litigants have not exhausted internal administrative remedies.[120] Some questions, by their nature, are not

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119 *Vavilov, supra* note 11 at para 68.

120 See *CB Powell Limited v Canada (Border Services Agency),* 2010 FCA 61 at para 30.

reviewable because they lack a public character.[121] In these cases, questions of reviewability cannot be ignored, even in an intensity of review system.

Questions of reviewability should also not be ignored when the legislature, in clear terms, seeks to oust or condition review in some way. Yet *Vavilov* does just this. While emphasizing the importance of "institutional design choices", and giving effect to rights of appeal, it offers no definition for the role of privative clauses in Canada's constitutional order.[122] And yet privative clauses that purport to oust review must mean *something,* especially since legislative language and design choices are given prominence in *Vavilov*. Privative clauses, by their plain language, relate to questions of reviewability. While legislatures can and do speak in the language of intensity of review—specifying a particular standard of review—they also sometimes speak in stronger language, purporting to oust review to varying extents. Put differently, the legislative choice to affect the intensity of review is one thing; the choice to affect the amenability of a particular question to review is another.

Of course, there are different sorts of preclusive provisions, all of which raise different constitutional stakes. Some deprive courts of the power to grant certain remedies; others bar completely the ability for a matter to be open to question or review in a court.[123] No matter what, the gist of these provisions is a denial of power to a superior court—that it would otherwise have—to review or ameliorate illegal administrative action. These clauses should be examined carefully considering the constitutional guarantee of judicial review.

When legislatures properly attempt to oust review, how should the constitutional guarantee respond?

Without the device of jurisdictional error—and if all questions of law are fundamentally the same—it is possible to conceive of the constitutional guarantee as applying to *all* legal questions. This argument was advanced, pre-*Crevier*, by Lyon. For him, the device of jurisdictional error was "confusing to the point where neither judges nor lawyers can give a clear account of the law of judicial review in Canada."[124] Its fatal flaw was that, through its historically Byzantine "procedural niceties," the concept had become disconnected from its conceptual origins: the "simple" idea that nobody can act without legal authority.[125] Lyon suggests that the task is to

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121 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 14.

122 *Vavilov, supra* note 11 at para 49.

123 Carter, *supra* note 82 at 245.

124 Lyon, "Comment", *supra* note 6 at 369.

125 Lyon, "CUPE Comment", *supra* note 27 at 647.

"translate the proposition into particulars for administrative law, but this time avoiding the concept of jurisdiction."[126]

Whether this can be done depends on whether the revised constitutional guarantee, applying to all legal questions, (a) is consistent with the constitutional principles governing this area; and (b) pragmatically fits within an intensity of review framework.

On the constitutional side of the equation, at least some of the Court's authorities suggest that the argument is not a stretch. In the *Reference re Remuneration of Judges of the Prov Court of PEI* and the *Reference re Secession of Quebec*, the Court endorsed the proposition that "the exercise of all public power must find its ultimate source in a *legal rule*."[127] When a decision-maker acts "*in the absence of legal authority*, the decision maker transgresses the principle of the rule of law."[128] Superior courts, to this end, historically had primary responsibility to ensure that the exercise *of public powers is consistent with the law*.[129] In *Dunsmuir*, the Court cited *Crevier* for the proposition that it is "the courts' constitutional duty to ensure that public authorities *do not overreach their lawful powers*."[130] And in the *Reference re Code of Civil Procedure (Que), art 35*, the Court notes that the superior courts "have the power *to review exercises of public power for legality* and to ensure that citizens are protected from arbitrary government action."[131]

What is notable about the highlighted passages is their focus on legal authority *broadly* rather than jurisdiction *narrowly*. In at least some of its cases, the Court signals that the constitutional guarantee is related to the ideas of law or legal authority generally, rather than the more specific category of "jurisdictional" errors specifically. At least in the above passages, it is quite possible to simply swap out the term "lawful powers" and replace it with "jurisdiction", and vice-versa.

None other than Chief Justice Laskin—author of *Crevier*—seemed to suggest that this was so in extrajudicial writing shortly before *Crevier* was released. In discussing the problem of judicial review over administrative acts, Chief Justice Laskin appeared to mix—at least at an abstract level—questions of law and questions of jurisdiction. For him, both categories of questions engaged the supervisory jurisdiction:

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126 *Ibid* at 648.

127 [1997] 3 SCR 3 at para 10; [1998] 2 SCR 217 at para 71 [*Quebec Secession Reference*] [emphasis added].

128 *Dunsmuir, supra* note 87 at para 29.

129 *Quebec Reference*, *supra* note 4 at para 47.

130 *Dunsmuir, supra* note 87 at para 29 [emphasis added].

131 *Ibid* at para 51.

> On the administrative agency side of the problem under discussion, it is obvious that such agencies cannot escape making determinations of law in the course of their regulatory or quasi-judicial operations, and to deny them such leeway would weaken considerably their utility. *The reasonable compromise here is to deny them unreviewable authority to make such determinations, and equally to deny them power to determine finally the limits of their jurisdiction* [emphasis added].[132]

Chief Justice Laskin's point is reflected in the case of *Attorney General (Que) et al v Farrah*.[133] In that case, the issue was the establishment of a Transport Tribunal, comprised of provincial judges, which was given a standalone appellate function over a Transport Commission on questions of law. A provision of the statute provided exclusive jurisdiction to the Commission to hear and dispose of any question of law on appeal.[134] Writing for a majority, Justice Pratte found that the problem with this institutional arrangement was its bestowal "on the Transport Tribunal the jurisdiction to rule on questions of law in appeal from the decisions of the Commission."[135] This is a problem because the power to review and correct such errors of law "committed by the Commission within its jurisdiction and which in the absence of both the privative clauses and the right of appeal to the Transport Tribunal could have been corrected by the Superior Court …."[136] For Justice Pratte, this was a transfer of "part of the inherent supervisory authority that was vested in the Superior Court at the time of Confederation."[137] The holding in *Farrah* can be expressed, then, without the concept of jurisdiction. Even Chief Justice Laskin, who more clearly drew a boundary between questions of jurisdiction and law,[138] saw the insulated power in *Farrah* as a "meshing both of jurisdiction and power, giving it the form and authority of a [section] 96 Court."[139]

Farrah and Chief Justice Laskin's extrajudicial comments show how the line between jurisdiction and law is blurred at best, but also how these concepts have the same aim: preventing the arrogation of legal authority by those entrusted to apply the law. Whether the constitutional guarantee is expressed as pertaining to jurisdiction or legal authority, sections 96 through 100 of the *Constitutional Act, 1867* erect a rampart to the insulation of administrative decision-making from curial review on legal grounds. If a decision-maker could opine on their jurisdiction without the prospect of external correction, it would offer "temptations which not all

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132 Laskin, *supra* note 17.
133 [1978] 2 SCR 638 [*Farrah*].
134 *Ibid* at 647.
135 *Ibid* at 655.
136 *Ibid.*
137 *Ibid.*
138 *Ibid* at 643, concurring.
139 *Ibid* at 646.

would be able to resist."[140] The fox-in-the-henhouse syndrome is a result of this potential temptation. The same worry exists if a decision-maker could opine, without the prospect of external correction, on questions of law.

While *Farrah* can be justified on the grounds that the case involved a detached *appellate* authority, a first instance authority with a free-standing power to decide questions of law without review would raise the same problem, owing to the same meshing of power.[141] Even if the first instance authority has power to decide other questions, the power to make free-standing legal conclusions would still, potentially, exist. Isolating administrative power in this way assumes that administrators can opine conclusively on the boundaries of the law, but this is difficult to assert if sections 96 through 100 of the *Constitutional Act, 1867* guarantee an independent judicial class with a supervisory function over questions of law.[142] This reading ensures that the "final interpretation"—but not the only one—is "an inherent duty of independent superior courts of justice."[143] As Lyon argues, the fact that a legislature established a statutory decision-maker, bound and limited by the law, was a significant choice for the purposes of sections 96 through 100 of the *Act*.[144]

This leads to the observation that, perhaps, it is no big loss to discard the concept of jurisdictional error and replace it, simply, with the ideas of law or legal authority. This conclusion is stark and can be challenged on two fronts.

Precedent poses the first substantive challenge. It has never been the case that all questions of law are reviewable, either as a common law matter or as a constitutional matter.[145] The reason for this is the principle of legislative sovereignty. Privative provisions, absent clear constitutional objection, must mean something: and so, within constitutional limits, "[i]f a power of a Superior Court to review or set aside an award or decision of a special tribunal can be taken away by Act of Parliament, it seems to me that the words in this Statute ought to be held to do it."[146] Put this way,

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140 De Smith, *supra* note 5 at 7.

141 See *Attorney General of Quebec v Grondin,* [1983] 2 SCR 364 at 386.

142 See *Martineau and Sons Limited v. City of Montreal*, [1932] AC 113; Lyon, "Section 96", *supra* note 16 at 79.

143 Lyon, "CUPE Comment", *supra* note 27 at 650.

144 *Ibid* at 652.

145 Peter Hogg, "Is Judicial Review of Administrative Action Guaranteed by the British North America Act?" (1976) 54:4 Can Bar Rev 716 at 725; Macdonald, "Validity of Legislation", *supra* note 10 at 135. See also *Farrah, supra* note 133 at 643.

146 *Kelly v Sullivan*, [1877] 1 SCR 3 at 44.

the precedents arguably protect the ability of legislatures to oust review on some questions of law.

If the constitutional guarantee can now be read to question privative clauses on legal questions altogether, what remains of the concept of legislative sovereignty? That principle in the law of judicial review has simply been relocated. Under an intensity of review system, legislatures signal in the relative breadth or narrowness of statutory language the degree of deference owed in the interpretation of law. In so doing, *Vavilov* recognizes that, in absence of legislative specification, courts must begin with a presumption of reasonableness review because "Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers."[147] This exercise of constitutionally-granted legislative power entails a certain correlative posture on the part of reviewing courts to grant deference.[148] In this way, the principle of legislative sovereignty has a different—but no less important— bite in an intensity of review framework, absent a signal otherwise.

One can view the move from *Crevier* and jurisdictional error to this proposed revised constitutional guarantee in the form of a *trade*. As seen in *CUPE*, the Court traded non-reviewability on some matters for reviewability under a deferential standard. This same trade can now be made more explicit under *Vavilov*. Under the jurisdictional error model, courts could review jurisdictional errors, and did so based on correctness style review.[149] The notion of a modulating degree of scrutiny—or deference on legal questions—is anathema to a model of jurisdictional error.[150] But under the intensity of review model, courts have traded non-reviewability—a form of judicial deference—for a presumptive standard of reasonableness review, which is another form of judicial deference.

A good example of how the constitutional guarantee can work is contained in *Canada (Attorney General) v Best Buy Canada Ltd.*[151] The problem in *Best Buy* was whether a particular institutional arrangement—a right of appeal on questions of law, but a privative clause ousting review otherwise—nonetheless precludes a litigant from attacking an administrative decision on the basis of an unreasonable factual error.[152] The *Best Buy* majority endorsed the proposition that because the administrative law framework previously in force required a jurisdictional

147 *Vavilov, supra* note 11 at para 24.

148 *Ibid.*

149 Knight, *supra* note 11 at 50.

150 *Ibid* at 36.

151 *Best Buy*, *supra* note 13.

152 *Ibid* at paras 117–118.

error to warrant intervention, "patently unreasonable decisions were characterized as instances where an administrative decision maker exceeds its jurisdiction."[153] Since patently unreasonable errors of fact constituted jurisdictional error, courts could review such errors even in the face of a privative clause.[154]

But on the revised constitutional guarantee, the arrangement in *Best Buy* would be legitimate. Note that the constitutional problem arises in this case because of the specific institutional arrangement at issue in *Best Buy*: the combination of a right of appeal on questions of law and the presence of a privative clause barring review otherwise. This situation is different than the one before the Supreme Court in Yatar, where the question is whether a right of appeal (absent a privative clause) is an appropriate remedy that litigants must pursue in place of judicial review. Since the constitutional guarantee of judicial review attaches to questions of law, it is sufficient for a legislature to provide for resolution of those issues through an appeal right over those questions.[155] One can view this institutional arrangement as "channeling" judicial review.[156] As Paul Daly writes, at least some courts in the common law world have signaled a more generous position towards provisions which provide for legal review in a superior court but merely condition that review by limitation periods or leave requirements.[157] While restrictions on the sorts of questions a court can answer treads closer to substantive limitations that impact the constitutional guarantee, such partial restrictions are legitimate over questions of fact and evidence. As noted above, the constitutional guarantee ensures that no legal authority is completely beyond review.

This raises a key practical problem: how does one identify a question of law? It is a well-regarded rule that rights of appeal are not to be narrowly restricted, perhaps because they channel rather than exclude judicial review.[158] Accordingly, courts are able to review alleged errors

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153 *Ibid* at para 78.

154 *Ibid* at para 71.

155 Even on the orthodox theory of jurisdiction, this seems so, because questions of jurisdiction are simply a subset of questions of law for the purposes of a right of appeal. See *PEI v Egan*, [1941] SCR 396 at 399; *Farrah, supra* note 133 at 658, Pigeon J.

156 See Paul Daly, "Channeling or Excluding Judicial Review of Administrative Action" (12 September 2018), online: *Administrative Law Matters* <https://tinyurl.com/yn8a4ptj> [perma.cc/P3U5-PDQB]; Paul Daly, "Three Aspects of Anisminic" (29 November 2018), online: *Administrative Law Matters* <https://tinyurl.com/bd9wuxj4> [perma.cc/8PFR-BK5A].

157 See e.g. *Smith v East Elloe Rural District Council*, [1956] AC 736; *Tannadyce Investments Ltd v Commissioner of Inland Revenue*, [2011] NZSC 158. .

158 See the opinion of Justice Pigeon in *Farrah, supra* note 133 at 658, outlining this orthodox rule. Perhaps this explains the result in *Pringle v Fraser*, [1972] SCR 821, in

of fact "made in absence of any supportive evidence."[159] This is a well-recognized error of law, and was an error of jurisdiction, at any rate.[160] Nonetheless, there may be cases where distinguishing between questions of law and fact are difficult, as it is in other areas of law.[161] While I cannot purport to solve this problem here, the basis of the constitutional guarantee of judicial review is limited to questions of law, which means that judicial specification of the guarantee in distinct cases should closely track this basis. This means that, as above, only cases where there is truly "no evidence" supporting a conclusion would warrant identifying a factual question as one pertaining to the constitutional guarantee. If any evaluation is required of the factual issues to identify a legal problem, the court will stray from the basis of the constitutional guarantee. The bar, then, is extremely high. Absent such an egregious error, the constitutional guarantee attaches to questions of law, which would mean a legislative regime like the one in *Best Buy* constitutional.[162]

A second criticism of this position can be stated succinctly. Perhaps it is the standard of review of reasonableness *itself* that has been constitutionalized. This is implicitly endorsed in *Best Buy*,[163] and as Daly suggests—relying on *Vavilov*—reasonableness review on questions beyond law and jurisdiction is the core of the constitutional guarantee of judicial review.[164] Daly suggests that because *Vavilov* framed reasonableness review on legal questions as fulfilling a "constitutional duty," it is the reasonableness standard itself that is protected after *Vavilov*.[165] Mullan agrees that this is a possibility in the post-*Vavilov* world. For Mullan, perhaps the constitutional guarantee could be reframed, alongside the

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which the Supreme Court held that the Immigration Appeal Board had exclusive appellate authority that ousted certiorari in provincial superior courts. This result was reached without consideration of the *Federal Courts Act*, which just recently came into force. If the Federal Court could exercise supervisory jurisdiction in this case, the loss of superior court *certiorari* powers is less concerning because review can be "channelled" into the Federal Court. This only supports the Federal Court's constitutional position.

159 *Schuldt v The Queen*, [1985] 2 SCR 952.

160 *Ibid*. See also, Bowman, *supra* note 23.

161 See Daniele Bertolini, "Unmixing the Mixed Questions: A Framework for Distinguishing Between Questions of Fact and Questions of Law in Contractual Interpretation" (2019) 52:2 UBC L Rev 345.

162 It is important to note that the problem in *Best Buy* arises because of the specific institutional regime it implements: a right of appeal on questions of law with a privative clause barring all other review. This problem does not arise, as *Vavilov* suggests, when there is only a right of appeal, it does not "on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply." See *Vavilov, supra* note 11 at para 52. See also the result in *Smith, supra* note 13.

163 *Best Buy*, *supra* note 13 at para 118.

164 Daly, *Culture of Justification*, *supra* note 12 at 169.

165 *Ibid* at 167.

broader move to an intensity of review framework, as being fundamentally "about reasonableness."[166] Articulating the constitutional guarantee in this way would lead to a broader right to seek judicial review over all manner of questions dealt with under the reasonableness standard. It would also neatly align the content of the constitutional guarantee with developments in Canadian administrative law that highlight the intensity of review framework.

While this conclusion is plausible, it is too far afield from the theoretical basis for the constitutional guarantee of judicial review in the first place, nor does *Vavilov* necessarily lead to the conclusion that reasonableness review itself is constitutionally guaranteed. It is true that reframing a constitutional guarantee of judicial review for present purposes involves some element of "historical analogy" and that this form of analogical reasoning is quite "flexible."[167] This is why a constitutional guarantee of judicial review on questions of law is still a plausible expression of the underlying basis of the constitutional guarantee articulated in *Crevier*. While that guarantee was focused on the concept of jurisdiction, the theoretical trappings of the concept arguably distorted the basis of the guarantee. That basis had always been, as noted in *Farrah*, concerned with the legal boundaries of administrative action. A constitutional guarantee on questions of law, then, approximates the basis of the historic constitutional guarantee, creating some semblance of continuity despite the development of the law of judicial review.

The idea that reasonableness review on all questions is guaranteed, however, would be a step further than what historical analogy should allow. This is because it would suggest that the conceptual basis of the constitutional guarantee—that it attaches to some species of legal questions—could no longer be expressed this way. The argument deployed in *Best Buy* would require an acceptance of the flawed, inflated jurisdictional error approach that embraces so-called "jurisdictional facts," viewing such errors as part of the artifically-expanded core of superior court powers. But this approach, as we have seen, is unconnected to the conceptual basis of judicial review that is concerned with the review of legal powers. Put differently, it cannot be that underlying changes in the law fundamentally change the conceptual basis of the constitutional guarantee. That would be the result of constitutionalizing reasonableness review. Indeed, it would mean that legislatures could not limit review on questions of fact at all, entailing a move far away from the conceptual basis of the constitutional guarantee in the first place.

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166 Mullan, "Recalibrating", *supra* note 7.

167 Lederman, *supra* note 4 at 1171.

Notably, *Vavilov*'s description of the reasonableness standard as a "constitutional duty" was in the context of describing reasonableness review *on questions of law*.[168] The Court says that: "[a] proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority…"[169] This is a signal that *Vavilovian* reasonableness, though a single standard, creates different constraints depending on the decision under review. On questions of law, *Vavilov* provides certain tools that administrators must deploy, and instructs courts on how to properly defer when those tools have been adequately deployed.[170] Put this way, there is something special about questions of law, even under the reasonableness standard. This, again, is reflected in *Vavilov*'s holding on rights of appeal. There could be different ways of specifying this review, but the review itself is constitutionalized—not the standard.

It is true that this leads to a disjoint between the constitutional guarantee and the reasonableness standard—put differently, the constitutional guarantee is narrower than the normal standard of review that is applied by courts on judicial review. This imperfection, such as it is, is the price to pay for fidelity to the conceptual basis of the constitutional guarantee. Yet any plausible constitutional guarantee must at least attempt to connect to this basis.

B) Correctness Review on Certain Questions

The only question left is whether the Constitution supports a stricter standard of review in any case. In most cases, the promise of reviewability will be sufficient to ensure that administrators do not transcend statutory power. In other cases, though, even reviewability is not enough. This is because the consequences of inconsistent legal interpretations in certain cases are so great that they warrant correct answers. This is particularly so on questions pertaining to the division of powers. [171] If legislatures are permitted to mandate judicial deference on such questions, they may be able to evade the exclusive division of powers, which requires bright lines and consistent interpretation. This evasion is another manifestation of

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168 *Vavilov*, *supra* note 11 at para 67.

169 *Ibid.*

170 *Ibid* at para 119.

171 I focus my comments here on issues pertaining to the distribution of powers—constitutional issues, as outlined in *Vavilov, supra* note 11 at para 55. *Vavilov* also notes that the correctness standard applies to other categories of questions. *Vavilov*, para 53. I do not address whether the constitutional guarantee attaches to these questions, but there may be good reason to consider that the role of superior courts on these questions should be constitutionally protected, as well.

the evil towards which the constitutional guarantee is directed: the illegal arrogation of power.

In a sense, this aspect of the constitutional minimum of judicial review is less obscure and more well-accepted. It has long been the case that administrative decision-makers cannot make final and unreviewable determinations of constitutionality.[172] Specifying the constitutional guarantee with this in mind requires clarifying how legislation can limit judicial review and allow the arrogation of power, distorting the division of powers.[173] In this context, errors transcend particular statutes, affecting the order of the federation, and warranting an increase in the intensity of review. Why is this so? Here again, the role of the superior courts in the constitutional pattern takes centre stage. In the *Quebec Reference*, the Supreme Court notes the superior courts play a central role in the consistent application of the law across the country, particularly on matters pertaining to the distribution of powers.[174] This statement mirrors a long-held understanding of constitutional law. On that point, the Court's decision in *Amax Potash* is significant: "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."[175] Part of this accepted duty means that there is an "inability of the provinces to *limit* judicial review of constitutionality."[176] Since superior courts are the only independent umpires of the limits of constitutional action, provinces or the federal government cannot attempt to colourably extend their authority by sheltering their exercises of power from potential scrutiny. If this is the case, one might expect provinces or the federal government to arrogate power to themselves, undermining the exclusive division of powers.

This intensification of the standard of review, as noted above, is motivated by the same concerns underlying the constitutional guarantee of review that prescribes reviewability on questions of law. As Beetz J so

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172 *Crevier*, *supra* note 2 at 236. I explored some of these issues along with co-authors in Mark Mancini, Léonid Sirota & Maxime St-Hilaire, "Opinion: The likely constitutional fly in Alberta's Sovereignty Act ointment" (last modified 16 December 2022), online: *National Post* <https://tinyurl.com/27jy2bcm> [perma.cc/Y6VJ-CPKC].

173 I focus my comments here on issues pertaining to the distribution of powers—constitutional issues, as outlined in *Vavilov, supra* note 11 at para 55. *Vavilov* also notes that the correctness standard applies to other categories of questions. *Vavilov*, para 53. I do not address whether the constitutional guarantee attaches to these questions, but there may be good reason to consider that the role of superior courts on these questions should be constitutionally protected, as well.

174 *Quebec Reference, supra* note 4 at para 39.

175 *Amax*, *supra* note 24 at 590.

176 *Ibid* at 591 [emphasis added].

eloquently said in *Syndicat des employes de production du Quebec v CLRB*, these two functions are related to the judicial duty to pronounce on the law limiting decision-makers.[177] In each case, the permission of illegal authority would, in essence, create bodies that act as superior courts, determining their own constitutional or statutory jurisdiction.

Modern administrative law supports this principle. *Vavilov* tells us that a legislature "cannot alter the scope of its own constitutional powers through statute," "[n]or can it alter the constitutional limits of executive power by delegating authority to an administrative body."[178] While it is true that the legislature can specify the standard of review of administrative action, it can only do so in situations where giving effect to that intent is not precluded by the rule of law.[179] Indeed, as renowned constitutional scholar Peter Hogg suggests, it was never possible for legislatures to oust review over questions of constitutionality, with judicial review over such questions constitutionally protected.[180]

This raises the question of what it means for a province to limit judicial review for constitutionality. One takeaway from *Vavilov* is that the authority to act under the *Constitution Act, 1867* must be subject to consistent and defined limits, interpreted conclusively by the independent judiciary.[181] In an intensity of review system, the question is whether it is constitutional for a legislature to specify a standard of review other than correctness for a question pertaining to the division of powers. Putting aside the authority of *Vavilov*—which seems to implicitly if not explicitly reject this proposition—the ability of a province to limit judicial review for constitutionality through the mandate of a deferential standard of review is tantamount to ousting review altogether.[182] As we shall see, this is especially so if provinces adopt deferential standards that compel courts to let clearly *ultra vires* action to stand, under a patent unreasonableness standard of review.

What is the rationale behind this rule for the purposes of the constitutional guarantee? Consider a province that wishes to oust review over division of powers questions entirely—for example, a privative clause which suggests that a Board's determination, even over questions of constitutional jurisdiction, is beyond review. Such a provision would have the effect of permitting a legislature to potentially extend its constitutional

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177 *Syndicat*, *supra* note 20.

178 *Vavilov*, *supra* note 11 at paras 55–56.

179 *Ibid* at para 23.

180 Hogg, *supra* note 145 at 720; Lyon, "Section 96", *supra* note 16 at 83.

181 *Vavilov*, *supra* note 11 at paras 55–56.

182 *Ibid* at para 35. Courts are bound to respect legislative indications of the standard of review "within the limits imposed by the rule of law."

authority to act beyond what is permitted under the division of powers. The mechanism for doing this—ousting or limiting access to the courts—therefore must be questioned under a system of government where the powers of each order of government are limited. To prevent distortions, and for constitutional limits to be effective and consistent across provincial boundaries, the courts must "police the distribution to prevent usurpation by a legislative body of powers which do not apply to it."[183]

A good example that raises a situation where the constitutional guarantee would insist on strict judicial review is the *Alberta Sovereignty within a United Canada Act*.[184] The *Alberta Sovereignty Act* does not completely oust judicial review. Instead, it seeks to limit review "of a decision or act of a person or body under this Act" to a patent unreasonableness standard.[185] In its operative provisions, the *Alberta Sovereignty Act* empowers Ministers and the Cabinet, on the strength of a legislative resolution, to direct provincial entities in respect of a specific "federal initiative" that the Legislature—in its resolution—believe is unconstitutional.[186]

Whatever the merits of political constitutionalism in the context of rights, different questions arise when legislatures attempt to assert authority that may transgress the division of powers. It is conceivable, as Geoff Sigalet and Jesse Hartery argue, that each of order of government is "not required to implement and enforce the laws or programs of another order of government."[187] But as they point out, it would be a different proposition to oust the jurisdiction of the courts on matters relating to the division of powers. While, in the former case, the provinces are ostensibly acting within their own scope of authority, in the latter case they aim to insulate actions from review, potentially sheltering acts that violate the exclusive division of powers. Therefore, they conclude that the *Sovereignty Act* "can only be constitutional if it permits the province to exercise

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183 Hogg, *supra* note 145 at 720.

184 *Alberta Sovereignty Act*, *supra* note 15.

185 *Ibid*, s 9(2).

186 See *ibid*, s 4(1)(c). A "federal initiative" is defined in the statute as follows: "federal initiative" means a federal law, program, policy, agreement or action, or a proposed or anticipated federal law, program, policy, agreement or action."

187 Geoffrey Sigalet & Jesse Hartery, "Opinion: The Alberta Sovereignty Act appears to be constitutional" (1 December 2022), online: *The Hub* <https://tinyurl.com/y3mx25h5> [perma.cc/S5MS-QNUU]. See also Jesse Hartery & Geoffrey Sigalet, "Opinion: Alberta's Sovereignty Act is constitutional but it needs nuance" (8 December 2022), online: *The National Post* <https://tinyurl.com/2waztc4n> [perma.cc/AN4F-8W4M] [Hartery & Sigalet, "Alberta's Sovereignty Act needs nuance"], citing Johanne Poirier, "The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020) 94 SCLR 85.

existing powers under our federal system. If it offends these principles in its application, then the courts will be justified in intervening."[188]

The Alberta *Sovereignty's Act* adoption of the patent unreasonableness standard prevents the courts from doing just this. Here, the Alberta Legislature purports to limit judicial review not by ousting review but by limiting it unacceptably. This is because of the character of the patent unreasonableness standard.[189] It requires courts to uphold administrative decisions so long as they do not disclose immediate or obvious errors.[190] In practice, this means courts cannot probe the decision to reveal errors or distortions within it.[191] This requirement was a major factor for the Supreme Court when, in *Dunsmuir*, it eliminated the patent unreasonableness standard completely. Since patent unreasonableness requires "parties to accept an irrational standard simply because…the irrationality of the decision is not clear *enough*,"[192] the rule of law would be imperiled; it would require clearly illegal decisions to stand.[193] Applying this to the context of the *Alberta Sovereignty Act,* the patent unreasonableness standard would mandate a court letting stand a provincial attempt to exercise powers beyond those contemplated in the division of powers, so long as that attempt is not "obvious."

To be sure, *Dunsmuir* only stated the common law position, and patent unreasonableness remains enshrined in some provincial statutes.[194] Moreover, one could argue that *Vavilov* presents only a "thin" definition of the rule of law, potentially permitting patent unreasonableness review as a legislated standard.[195] But even in British Columbia, where the patent unreasonableness standard lives on, the Court of Appeal has concluded that the standard of review for constitutional questions is correctness,

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188 See Hartery & Sigalet, "Alberta's Sovereignty Act needs nuance", *supra* note 187. See also <https://tinyurl.com/2waztc4n> [perma.cc/UG4U-H8TJ]. See also "Is the Alberta Sovereignty Act Constitutional?" (26 October 2022), online: *Policy Options* <https://tinyurl.com/3rdx2nh4> [perma.cc/HZP2-Z2EG].

189 See Paul Daly, "Patent Unreasonableness After Vavilov" (2021), online: *CanLII* <https://canlii.ca/t/t2hc> [perma.cc/JW43-DPCP] [Daly, "Patent Unreasonableness"]; Connor Bildfell, "Reasonableness as a Constitutional Floor: Is the Standard of Patent Unreasonableness Inconsistent with the Rule of Law?" (2020) 33:2 Can J Admin L & Prac 229.

190 *Dunsmuir, supra* note 87 at para 37.

191 *Ibid.*

192 *Ibid* at para 42 [emphasis in original].

193 Bildfell, *supra* note 189.

194 See e.g. *Administrative Tribunals Act*, SBC 2004, c 45, s 58(2)(a) [*ATA*].

195 Daly, "Patent Unreasonableness," *supra* note 189 at 2.

relying both on the *Administrative Tribunals Act* and *Vavilov*.[196] And the point remains: the definition of the rule of law in *Vavilov* contemplates correctness review for questions of law requiring consistent answers, which patent unreasonableness review directly prevents.

Inconsistent interpretations of the division of powers by the provinces imperils the orderly operation of the federation, blurring the exclusive division of powers. The consequences of this are greater at the level of constitutional law than in the normal operation of distinct statutes, warranting correctness review.[197] The rule of law requires an order of positive law by which people can plan their affairs, embodying a more general principle of "normative order."[198] In absence of an independent umpire under the division of powers to consistently enforce the division of powers,[199] it is possible that the Alberta Legislature—through its delegation of power—can arrogate powers to itself by impinging on legitimate federal "initiatives" that, under the law, may be constitutionally valid. The risk is mutual encroachment by an order of government on another, abridging the structure of government embedded in the *Constitution Act, 1867*. If there is any such distortion in the division of powers, the role of the superior courts is engaged to ensure that the division is enforced consistently, preventing this arrogation. Whether the courts in fact do this with predictability is a separate but important question.

What does the *Alberta Sovereignty Act* reveal about the constitutional guarantee? For one, it represents another manifestation of the core problem with which sections 96 through 100 of the *Constitution Act, 1867* are concerned: foxes-in-henhouses, with the constitutional authority of the courts heavily restricted or ousted completely. In this way, this aspect of the constitutional guarantee is connected to the reasoning supporting judicial review over questions of law in general. If courts are bound by a legislated, deferential standard of review on constitutional questions, they would be forced to accept an illegal arrogation of power by an order of

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196 See e.g. *Brown Bros Motor Lease Canada Ltd v Workers' Compensation Appeal* Tribunal, 2022 BCCA 20 at para 33. This was a case where the legal decisions of the Workers Compensation Appeal Tribunal, protected by an exclusive jurisdiction and strong privative clause, were subject to a patent unreasonableness standard on other questions of law. *ATA*, *supra* note 194, s 52(a). Nonetheless, the Court reads the *ATA* to exclude the constitutional question. *ATA*, s 58(2)(c). And it relies, in support, on *Vavilov*, *supra* note 11 at paras 55–56.

197 This is the theory implied by *Vavilov* when it accepts deference on normal questions of law but carves out a requirement for correctness review in relation to questions, like constitutional questions, that transcend statutes.

198 *Quebec Secession Reference*, *supra* note 127 at para 71.

199 Hogg, *supra* note 145 at 720.

government. To grant one order of government the power to do this at the expense of another's without the prospect of external correction risks undermining the orderly operation of the federation, a requirement of a definition of the rule of law that mandates a coherent order of positive laws.[200]

Correctness review on important questions of law relating to the Constitution is also consistent with the development of an intensity of review framework. Questions relating to the Constitution, as noted above, implicate other state actors and the constitutional capacities of provinces and the federal government. Distortions in the division of powers should, for that reason, be avoided. This provides a justification for an intensifying of the standard of review when the consequences for the systemic administration of justice are great. Indeed, this conclusion dovetails with the justifications offered for correctness review under the *Vavilov* framework. For example, it is when constitutional principles are implicated that the *Vavilov* Court modulates the intensity of review. When a right of appeal is provided—indicating a contrary to legislative signal—correctness review applies. Similarly, when a legislature attempts to limit judicial review for constitutionality, it implicates the rule of law and the systemic consistency of the division of powers. This warrants, under the intensity of review framework, correctness review, since the rule of law demands such a standard.

Conclusion

I have argued that the constitutional guarantee of judicial review requires re-articulation after *Vavilov*. Since *Crevier,* the metes and bounds of that guarantee have centred around jurisdictional error. But given the principled and practical problems with jurisdictional error after *Vavilov,* a new constitutional guarantee should be articulated. I have aimed at providing such a definition, focused on preventing the arrogation of power that could arise from unreviewable determinations of law.

Throughout, I addressed concerns that this definition of the guarantee underpowers legislative sovereignty. But as I have noted, the move to an intensity of review system grants a different set of tools for operationalizing the constitutional guarantee. No longer forced into the "narrow alley of jurisdiction with its disastrous dichotomy of correct and incorrect answers," the constitutional guarantee can be specified through intensities of review.[201] As *Vavilov* suggests, a presumptive reasonableness

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200 *Quebec Secession Reference, supra* note 127.

201 Lyon, "Comment", *supra* note 6 at 379.

standard on most questions of law is designed to explicitly recognize a legislature's choice to delegate power. The cost of this—to put it in raw terms—is that all legal issues must be reviewable.

While the Canadian Constitution does not disclose a strict, tripartite separation of powers, it does protect a class of courts that exercise supervisory functions over administrative functions. The distinction and separation between the judiciary and the legislature is constitutionally relevant. In giving effect to that separation, the constitutional guarantee I have outlined aims to respect the legislative delegation of power while recognizing that the supervisory jurisdiction over questions of law and constitutionality provides a forum—imperfect as it is—for challenging government acts. This age-old forum provides individuals a right to challenge "usurpations of jurisdiction by inferior tribunals," in superior courts, which is "the very foundation and the irreducible minimum of judicial review."[202] Recognizing its centrality to our constitutional order in administrative law is an important step in the post-*Vavilov* development of Canadian administrative law.

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202 De Smith, *supra* note 5 at 7.