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The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov?* Part 2

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Case Commented On: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII)

In our last post, we laid out some background on how the standard of review applies in cases involving the Crown's constitutional duty to consult and accommodate (DTCA) Indigenous peoples. We argued that the changes brought by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) with respect to statutory appeals – where a statute provides that a government decision may be appealed to a court – might allow legislatures to insulate the decisions of the executive by subjecting them to a "palpable and overriding error" standard of review rather than a reasonableness standard. In this post, we look at the other, more common kind of case that arises in administrative law: judicial scrutiny of government decisions through an application for judicial review. Here, the standard of review analysis differs.

In applications for judicial review, *Vavilov* establishes a general presumption that the standard of review for an administrative decision will be reasonableness (at paras 23–32). However, it also carves out some exceptions to this presumption, in which the standard of review will be correctness. The relevant exception for this post is for questions regarding "the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*" (at para 55). Important ambiguities persist about what this means for the DTCA. On one hand, DTCA litigation does not determine Aboriginal rights. The DTCA was designed to apply where the Crown considered an action that could impact an Aboriginal right that had not yet been adjudicated. Though it was later extended to established rights, it remains a procedural duty on the Crown rather than an Aboriginal right *per se*). If this is the case, this would suggest that the correctness exception does not include DTCA issues. On the other hand, the DTCA is a constitutional obligation understood as a limit on the exercise of sovereignty; it shares much in common with the other issues to which *Vavilov* applies the correctness standard. We argue that the logic supporting the existence of the constitutional exception in *Vavilov* also supports the application of the correctness standard to a broader range of DTCA issues than is currently the practice. This post considers how *Vavilov* may have changed considerations of judicial reviews arising in DTCA contexts.

DTCA Pre-*Vavilov*

As mentioned in our previous post, the consensus view of how the standard of review applies to DTCA cases is, as Dwight Newman puts it, "to consider the determination of the triggering of consultation based on the correctness of any decision on that issue, and to consider the carrying out of consultation based on a reasonableness standard, with appropriate deference part of that

reasonableness analysis" ("The Section 35 Duty to Consult" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution*, (New York: Oxford University Press, 2017) 349 at 363). Though *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) has frequently been cited as authority for this position, the now consensus view was far from inevitable following *Haida.* There, the Court did not clearly distinguish between the *process* and *adequacy* of consultation, giving rise to an important ambiguity in the doctrine. While *Haida* held that "[t]he process [of consultation] itself would likely fall to be examined on a standard of reasonableness" (at para 62), it did not opine on the standard to be applied to questions of adequacy of consultation – that is, whether the Crown's constitutional obligations were adequately discharged. *Haida* itself spoke only to process, and subsequent cases and commentary elided the distinction, often reading process and adequacy as synonymous. As a result, not only the determination of whether the process designed to carry out consultation was sufficient to meet the Crown's legal obligations is reviewable on a reasonableness standard, but whether those obligations were actually met. These are, however, distinct concepts. The process of consultation speaks to whether the procedures and means of consultation were designed in such a way that they *could* permit sufficient consultation to occur. Adequacy of consultation speaks to whether the Crown's consultation as actually carried out was sufficient to discharge its constitutional obligations to consult and accommodate. In *Haida,* for example, the Court noted that "[w]here the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose" (at para 60, emphasis added). The Court could not review the process, as one had not been established, though it could, and of course did, make a determination as to adequacy. In *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153 (CanLII), the FCA held that the Crown's consultation *process* was designed in such a way that following that process *could* sufficiently discharge the duty to consult (at paras 513–556; see also David Wright's ABlawg post). Yet, the Crown had nonetheless failed to *adequately* consult owing to problems in carrying out that process (*Tsleil-Waututh* at para 557). The two concepts are clearly distinct, even if they can be difficult to hold apart at times.

Haida cannot, then, be understood as explicit authority for the proposition that adequacy of consultation ought to be reviewable on a reasonableness standard. The best argument in favour of a reading of the case that implicitly adopts this view is the Court's application of "[g]eneral principles of administrative law", under which, at the time, questions of mixed fact and law were to be reviewed on a reasonableness standard (*Haida* at paras 60-61). Because questions of discharging the duty to consult will always involve the application of law to facts, adequacy can be said to be reviewable on a reasonableness standard under those general principles. The counter-argument, based on *Haida* alone (we will return to the impact of *Vavilov* below), is that the question of adequacy is a threshold question speaking to the constitutionality of the Crown's conduct. Particularly where the Crown is in the position of reviewing the adequacy of its own consultation, it seems potentially problematic for the courts to provide broad deference to Crown determinations of the constitutionality of its own conduct. Despite this latent ambiguity concerning the related yet distinct concepts of scope, adequacy, and process, the parameters of the standard of review in DTCA contexts appear relatively settled. We turn next to whether *Vavilov* portends any changes to this.

Vavilov and DTCA Cases: Judicial Review Applications

The few judicial review applications that proceeded after *Vavilov* have tended to continue following the conventional approach of applying correctness to questions of scope and reasonableness to questions of process and adequacy (see here and here). We suggest that *Vavilov* is more ambiguous in its impact on judicial review applications than the cases make it out to be: the reasoning supporting the existence of the "constitutional exception" in *Vavilov* may in fact support a reconsideration of the standard of review in DTCA cases. Part of the ambiguity is owing to the SCC's choice of terms in describing the constitutional exceptions in *Vavilov.* The court referred to determinations concerning the "scope of Aboriginal and treaty rights" as attracting a correctness standard on review. It is not clear whether this phrase includes the DTCA or is referring to Aboriginal rights more strictly speaking. On one hand, the "scope of Aboriginal and treaty rights" can be understood as a restatement of the status quo or conventional approach. Since *Haida* there has been no question that a determination of the scope (i.e. "extent", the depth of consultation required) of the DTCA is reviewable on a correctness standard. All other consultation issues are reviewable on a reasonableness standard. While *Vavilov* is silent on matters other than scope, one might presume that the court would have spoken to those issues if it wished to change them.

On the other hand, the problem with this interpretation is that "Aboriginal and treaty rights" and the DTCA are two clearly distinct concepts. It is difficult to see how the stated exception could refer to the DTCA, both because "Aboriginal and treaty rights" is a verbatim clause from section 35 with a clearly defined meaning and because the DTCA was designed to apply specifically where those rights are "being seriously pursued in the process of treaty negotiation and proof" (*Haida* at para 27). That is, it arises prior to a recognition of a right at Canadian law. While we acknowledge there may well be arguments in favour of calling the DTCA a right – the right to be consulted as correlative of the Crown's duty – "Aboriginal rights" under section 35 is something of a term of art and they are generally considered distinct from the DTCA.

There are reasons supporting either reading of the "scope of Aboriginal and treaty rights" as it pertains to the DTCA, and it is worth noting that lower courts have thus far considered the phrase as inclusive of the DTCA (though there has not been any reasoned consideration, that we know of, about this). In either case, *Vavilov* is silent on much of the consultation framework, inviting us to consider whether the approach to DTCA should change in light of the new regime.

So we are left with two reasonable interpretive options. Under the first, the *Vavilov* exception was meant to refer to the DTCA, in which case the decision settles the question of scope but is silent on adequacy and process, leaving those to be worked out. Under the second, the case is silent on the DTCA, in which case the question is whether that silence suggests the status quo is intended to continue or whether there is something implicit in *Vavilov* that augurs for a change in approach. The central question is whether issues arising under the DTCA, including questions of scope, adequacy, and process, are the *type of constitutional questions* for which some deference may be afforded administrative decision-makers, or whether they are the type that must receive a "a clear and constitutionally correct answer" (*Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 (CanLII) at para 103 (*Mikisew Cree #2*)), giving rise to a correctness standard. Assessing this requires consideration of whether the DTCA, or any

dimension of it, is analogous to, consistent with, or otherwise included within "[q]uestions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state" or "other constitutional matters" (*Vavilov* at para 55). One might say that pursuing this argument goes against one of the main thrusts of *Vavilov*, which was to cast the exceptions to the reasonableness presumption narrowly. However, as we now argue, the reasoning supporting the exception from the presumption of reasonableness for the sake of the rule of law in *Vavilov* supports the inclusion of the DTCA in the exception in some form.

Division of Powers, Separation of Powers, and Questions of Jurisdiction

The SCC has consistently held that questions of federalism are to be reviewed on a correctness basis since at least 1998 (*Westcoast Energy Inc v Canada (National Energy Board)*, 1998 CanLII 813 (SCC), [1998] 1 SCR 322 at paras 40–42). Might the reasoning supporting this holding also support correctness review for DTCA issues? Part of the challenge in assessing this question is that the SCC has never explained precisely *why* division of powers issues are subject to the correctness standard. *Vavilov* relies on *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), which in turn relies on *Westcoast Energy* and *Nova Scotia (Workers' Compensation Board) v Martin* 2003 SCC 54 (CanLII), but the closest any of these cases come to an explanation is *Dunsmuir*'s reference to the "unique role of s. 96 courts as interpreters of the Constitution" (at para 58).

How can correctness review for division of powers and separation of powers questions be explained? We start by noting that the concern grounding correctness review here is distinct from that which grounds correctness review for "general questions of law of central importance to the legal system as a whole", which can be understood as motivated by a concern for consistency in the system. Paul Daly argues otherwise, claiming that the *Vavilov* exception to reasonableness "is engaged only where a 'final and determinate' judicial interpretation is necessary to ensure 'consistency'" ("Unresolved Issues after *Vavilov* II: The *Doré* Framework" (6 May 2020), online (blog): *Administrative Law Matters*, quoting *Vavilov* at para 53). The paragraph to which Daly refers provides that correctness review is justified for the range of constitutional questions listed above and for "questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies." For the SCC, correctness review is justified because it "respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary" (*Vavilov* at para 53). There are really two justifications here: (1) preserving the role of courts as constitutional interpreters and (2) ensuring consistency for the sake of the rule of law. While both justifications may be at play in some cases, they may also operate independently. Not all questions of central importance to the legal system, such as solicitor-client privilege (see *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 (CanLII) at para 26), have a constitutional status. Conversely, concerns about the division of powers can be very specific, and not really concerned with questions of consistency. For instance, in cases where division of powers questions arise as to whether a particular entity or employee falls under federal or provincial jurisdiction for the purposes of determining which labour and employment legislation applies, courts undertake a "functional analysis" (see *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*,

2010 SCC 45 (CanLII) at paras 13–22). This makes for highly specific decisions, focused squarely on the particular facts of each case. The analysis in one case is not likely to have broad precedential value, but correctness review nonetheless applies.

In other words, correctness review is justified for division of powers and separation of powers questions not only for the sake of consistency, but also by the need to ensure that legislatures and executive actors exercise only the amount of sovereignty allocated them by the Constitution. Though there is no reasoning in *Vavilov* on this point, this justification supports the inclusion of section 35 issues in the exception to the presumption of reasonableness review. The "scope of Aboriginal rights" ought to be understood as stemming from the same concerns that arise from the division of sovereignty among the legislatures and among the branches of government. Aboriginal rights are sourced, as the SCC has recognized, in the prior occupation of the territory by organized societies with their own laws; in other words, Aboriginal rights stem from Indigenous peoples' "pre-existing sovereignty over the territory of Turtle Island" (Richard Stacey, "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" (2018) 68:3 UTLJ 405 at 408). Section 35, the SCC has held, represents a promise to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" (*Haida* at para 20).

The "rights" that section 35 recognizes and affirms reflect pre-existing Indigenous sovereignty and law. They are shaped by the body of intersocietal law – both customary and positive – that developed through the interaction of these pre-existing systems with incoming European legal systems (see *R v Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507 at para 31). At common law, Indigenous legal orders survived the assertion and acquisition of Crown sovereignty through the doctrine of continuity. As such, they act as a limit on Crown sovereignty, both by protecting a sphere of activities from legislative and executive encroachment and by recognizing a variety of distinct legal orders that the Crown is constitutionally bound to respect.

This was put clearly by the Supreme Court in *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 at 1106, when it cited Professor Noel Lyon's statement that "[s]ection 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown." Section 35 provides the courts with the authority to supervise the Crown's actions to ensure they are consistent with the rights "recognized and affirmed" in section 35. Further, it signals a willingness of the Court to question "sovereign claims" of the Crown, a notion that goes beyond merely supervising exercises of authority to questioning the Crown's claims to sovereign authority over Indigenous peoples. Thus, as Justice Rosalie Abella wrote nearly 30 years later, "[i]n *Sparrow*, the Court found it impossible to conceive of s. 35 as anything *other than* a constitutional limit on the exercise of parliamentary sovereignty" (*Mikisew Cree #2* at para 86).

That this is not merely the type of restriction that any individual right places on the Crown under a liberal constitution or bill of rights is clear when we consider Justice Ian Binnie's notion of "merged sovereignty" in *Mitchell v MNR,* 2001 SCC 33 (CanLII). Binnie J wrote in a concurring opinion at para 127:

> The modern embodiment of the "two-row" wampum concept, modified to reflect some of the realities of a modern state, is the idea of a "merged" or "shared" sovereignty. "Merged sovereignty" asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners … If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort.

In these ways, the ongoing reality of Indigenous sovereignty limits the attributes or extent of Crown sovereignty. Justice Abella captured this clearly in *Mikisew Cree #2* (dissenting on another point):

> while the *Charter* defines a sphere of rights for individuals that are protected from state action, the majority of the Constitution, including s. 35, allocates power between governing entities, such as the division of powers between the provincial and federal governments, or the separation of powers between the branches of government. In the same way, s. 35 defines the relationship between the sovereignty of the Crown and the "aboriginal peoples of Canada". (at para 88)

While this explanation may well explain the inclusion of "the scope of Aboriginal and treaty rights" in the rule of law exception, it does not yet provide a principled answer to the question about whether the DTCA should be included. For this we turn back to a point of divergence and a road-not-taken in the DTCA jurisprudence.

In *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53 (CanLII)*,* the Court held at para 48:

> In exercising his discretion under the *Yukon Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness … In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes? (emphasis added)

This framework would seem to adopt a deferential stance towards processes of consultation while applying a correctness standard to the question of whether consultation on the basis of that process was sufficient to discharge the Crown's constitutional obligations. As the Federal Court noted in *Nunatsiavut v Canada (Attorney General)*, 2015 FC 492 (CanLII), this "could be understood to suggest that the correctness standard applies when assessing whether the Crown's efforts were adequate to meet its duty to consult" (at para 107). The question following *Beckman* was whether it aligned with *Haida* and the interpretation *Haida* had been given in the lower courts or whether it signalled a change in the law. The few lower court cases that addressed

Beckman substantively (see here and here, for example) favoured the continuity of the *Haida* standards and its subsequent interpretation and application. These cases either interpret *Beckman* and *Haida* as consistent, distinguish *Beckman* on the facts, or find grounds to ignore *Beckman*. The most frequent trend in the case law was for the court to proceed as if *Beckman* changed nothing.

The SCC, for its part, has largely ignored *Beckman,* relying on the same four paragraphs and basic parameters from *Haida* as lower courts. In *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations),* 2017 SCC 54 (CanLII), for example, the Court held:

> The Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference: *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 62. The chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable. (at para 77)

Thus, while the decision in *Beckman* suggested a different approach, the case was cast as an outlier, either an error or gesture better left ignored. As a result, in the lead up to *Vavilov* the standard of review in DTCA cases was largely settled, even if some ambiguity on some central doctrinal questions persisted. The reasons supporting the existence of the constitutional exception in *Vavilov,* however, suggest revisiting *Beckman*'s approach.

The key move in *Beckman* is that Justice Binnie and the majority identify the *adequacy* of consultation as a threshold question of constitutionality that must be reviewed on a correctness standard. Much as section 35 rights must be understood as placing a limit on Crown sovereignty, including acts of both executive and legislative authority, the DTCA can be framed in the same way. In a practical sense, the DTCA was designed as a fetter on absolute Crown sovereign authority and as a means of including Indigenous peoples in decision-making processes where Aboriginal rights may be impacted. From a theoretical perspective, the duty to consult provides an avenue through which a deficient Crown sovereignty – one asserted over Indigenous peoples on the basis of the doctrine of discovery and hierarchical conceptions of peoples and legal orders – can be remedied through judicial supervision of Crown exercises of sovereignty (see Ryan Beaton's article on this point). If section 35 is to meet its higher aspirations as the foundation of a "generative constitutional order," negotiated forms of shared political authority must be "supported by the judiciary's role in enforcing the honour of the Crown, and holding the Crown accountable where that standard is not met" (Justice Abella's reasons in *Mikisew Cree #2* at para 87).

Given this, the stakes of adequate consultation are high: it is one process through which constitutional authority and jurisdiction are worked out, and it plays a legitimating function in seeking to mitigate the effects of the most colonial features of Canada's Constitution. Further, it is a direct instantiation of the honour of the Crown which attaches to all exercises of Crown authority. It is, in short, a process through which the Crown's legally and morally dubious assertion of sovereignty *over* Indigenous peoples can, hopefully, be put on the road to

rehabilitation in a reformed constitutional order. What does this mean, then, for the standard of review in respect of the adequacy of consultation? The distinction between correctness and reasonableness is described in *Vavilov* as whether the Court would substitute its own decision for that of the administrative decision-maker. The Court should be able to substitute its own decision on the adequacy of consultation given the high stakes and consultation's role in mediating constitutional disputes. It may well be that a court has ample room on a reasonableness review to ensure adequate consultation has occurred, but the signals the judiciary sends through the choice of standard of review are important, particularly when the decision-maker is not a delegated body, but the Crown itself. In such cases, the executive is in the position of assessing the adequacy of its own consultation. There, deference on questions of adequacy can give the appearance of permitting unilateral Crown decision-making, undermining the Court's position as a neutral arbiter, and raising questions of constitutional legitimacy.

What does this analysis look like in practice? Again, *Beckman* provides guidance. In line with Justice Binnie's comments excerpted above, the adequacy of consultation establishes a threshold for assessing the constitutionality of the Crown's conduct. Once it is determined that the Crown acted within its constitutional bounds (i.e. that it adequately consulted), subsequent decisions (e.g. the issuing of a licence or permit) would be reviewed on a reasonableness standard. *Vavilov* requires that federalism questions be reviewed on the higher standard to ensure the integrity of the constitutional order and legitimacy of constitutional rule. The adequacy of consultation, on this view, raises these same concerns. The *Haida* framework, which was expressed in *obiter* and on the basis on administrative law principles that have now been subject to several attempted overhauls, ought to be expressly reconsidered. In particular, the view that adequacy must attract a reasonableness review on account of the view that consultation involved questions of mixed fact and law is not dispositive when considered in the context of the constitutional exception in *Vavilov.*

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