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Still Figuring It Out:

How the Federal Court of Appeal, Federal Court, and We as Young Racialized Advocates See *Vavilov's* Application in Immigration Cases, One Year Later

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*This paper has been written by Will Tao with the assistance of Afifa Hashimi, Articled Student, Moore Edgar Lyster LLP and Yussif Silva, Articled Student, Edelmann and Co. Law Offices, in advance of the '*Vavilov - One Year Later - Canadian Bar Association National Administrative Law Section - Law Series,*' where Will Tao is a panelist. Both are incredible advocates, researchers, and writers who will make a major impact in the Administrative Law space. I have interchangeably used "I" and "we" to try and ensure areas where I am sharing my own personal perspectives are not confused with our collective position. Yet, we are very specifically utilizing pronouns rather than the objectivity of the 'author' that too often masks the real stories of those who are impacted by administrative law.

I also thank Edris Arib, Heron Law Offices, Case Manager/Director of Operations, and Executive Director of Arenous Foundation for his helpful edits.

We Acknowledge that we live and work on the traditional, unceded territories of the Coast Salish peoples – sḵwx̱wú7mesh (Squamish), seĺílwitulh (Tsleil-Waututh), and xʷməθkʷəy̓əm (Musqueam) nations.

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Introduction

In this paper, and in the theme of the conference, I wanted to review the application of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 within the immigration context, specifically with respect to the appellate decisions of the Federal Court of Appeal and select Federal Court decisions. The purpose of this assessment is to examine how the Federal Court of Appeal and Federal Court have applied *Vavilov's* reasonableness framework, addressed procedural fairness, and where trends in post-*Vavilov* decision-making appear to be heading.

I want to recognize first the esteemed panel colleagues who were instrumental in their advocacy in *Vavilov* in helping to shape the legal tests in this area.[1] As a group of young, racialized lawyers, future legal advocates, and caseworkers in the field we are conscious of the expertise of this panel and seek only to provide experience and input where we can. Collectively, we are by no means experts nor professors, but we are the practitioners (and future practitioners) that must translate *Vavilov* to our clients and reflect on this case when we advise our immigration, refugee, and citizenship clients whether to proceed along the pathway of judicial review and what to expect.

We share the caveat that Professor Jamie Chai Yun Liew shared in her 2020 paper (and inspiration for this piece) *"The good, the bad and the ugly: A Preliminary Assessment of whether the Vavilov Framework Adequately Addresses Concerns of Marginalized Communities."*[2] Our analysis is also strictly confined to the immigration, refugee and citizenship context with a brief few comments on emerging gaps we have seen in our early stage legal careers. We recognize that this limited experience and focus may not allow us to see *Vavilov* as broadly as other administrative law experts and practitioners with years more experience and a broader range of practice areas. Yet, we remain committed to playing a role in the future of administrative law in this country.

To provide a roadmap, I will begin in **Part I** by looking at four appellate immigration cases where *Vavilov* was applied by the Federal Court of Appeal, providing commentary on the significance of this application. In **Part II,** given the limited number of cases in the Federal Court of Appeal, my colleague Yussif Silva and I examine three Federal Court decisions to see

[1] As timing would have it the Federal Court of Appeal in *Minister of Citizenship and Immigration ("MCI") et. al v. The Canadian Council of Refugees et al. A-204-20* is in hearings at the same time of the panel, no-doubt a pending decision that will continue to shape administrative law in the context of immigration.

[2] Jamie Chai Yun Liew, The Good, the Bad, and the Ugly: A Preliminary Assessment of Whether the Vavilov Framework Adequately Addresses Concerns of Marginalized Communities, *Ottawa Faculty of Law Working Paper No. 2020-08*

how this Court, where most immigration cases meet their end and/or turning point, applies *Vavilov.* In **Part III,** I look to the concerns I see arising from *Vavilov* - in particular with respect to my immigration and refugee clients, but also others who are at marginalized intersections.[3] My colleague, Afifa Hashimi, adds some very pertinent analysis about the shortcomings of administrative law looking at emerging scholarship from the United States. Finally, we will wrap up and provide conclusionary remarks in **Part IV.**

It is important not to forget at the outset that *Vavilov* is rooted in immigration law. Indeed, *Vavilov* was a citizenship case, and in many ways the decision-making process taken by the impugned registrar in that matter represents common-place, common-frustration, decision-making in an area of law being increasingly operated through hastily-drafted policy and discretionary procedures.

Our goal is not to demonstrate what we know, but rather to demonstrate where we are looking to gain knowledge - and what we are learning about the limitations and opportunities of administrative law post-*Vavilov.*

Part I: *Vavilov*'s Application in Federal Court of Appeal Immigration Cases

Since December 2019, the Federal Court of Appeal has decided four immigration cases that featured significant analysis and application of *Vavilov.* These cases are arranged by recency of decision.

a) *Subramaniam v. Canada (MCI)* 2020 FCA 202

Brief Summary

In *Subramaniam,* the Appellants sought appeal based on a certified question of whether a foreign national that was previously determined to be inadmissible pursuant to s. 34, 35 or 37 of the

[3] This paper will not go in detail to discuss intersectionality, but we encourage readers to cross-reference Dr. Brandi Blessett's work, Rethinking the Administrative State through an Intersectional Framework. Dr. Blessett discusses (at page 1) how intersectionality *"explores the ways in which identities intersect in shaping the structural, political, and representational aspects of violence against people of color (Crenshaw, 1995). While Crenshaw's analysis was specific to the experiences of Black women in the workforce, this discussion is inclusive of all intersecting identities typically pushed to the margins of society (e.g, gay men, black transwomen, English language learners). As a social science discipline and field of practice, public administration must be as concerned with the lived experiences and marginalized voices of the citizenry to the same extent that it prioritizes white perspectives and quantitative measurements."*

Immigration and Refugee Protection Act ("*IRPA*")[4] was barred from a humanitarian and compassionate grounds application under s.25(1) *IRPA* given there had been a subsequent change to the interpretation of the ground of inadmissibility.

Justice de Montigny, writing for a unanimous Court, found in the affirmative, that the foreign national was barred concluding that there is no authority in that legislation which allows an officer to exempt foreign nationals from the requirements of the *IRPA* on humanitarian and compassionate ("H&C") considerations when they have been declared inadmissible under sections 34, 35 or 37 (para 61-63).

In doing so, Justice de Montigny disagreed with the Appellant's argument around the statutory interpretation of 'is inadmissible' having been erroneously interpreted by the Application judge, dismissing as well the Appellant's argument of estoppel.

The Applicants argued, in the alternative, that s.25(1) *IRPA's* different obligations to consider an H&C application for applicants in Canada as opposed to outside Canada, merely removed the requirement that the Minister must consider the application and left room for the exercise of residual discretion (para 53).

How *Vavilov* Was Applied

The parties agreed that the applicable standard of review was reasonableness. The Appellant had previously raised an issue of true jurisdiction arguing that it had attracted the correctness standard, but reconsidered in light of the SCC's decision in *Vavilov*. Justice de Montigny recognized that an appeal form the Federal Court decision is the presumptive standard of reasonableness, as neither legislative intent nor the rule of law required a correctness review (at para 17).

It is to be noted Justice de Montigny's reference to the 'tribunal's interpretation of its home statute' a reference that is repeated in his judgment in *CARL*,[5] the second case I will look at. While referenced by the majority in *Vavilov* for the same proposition, it is one area of contention between the majority and minority positions - specifically the role of administrative expertise as it relates to the home statute deference presumption.

Justice de Montigny highlighted what he perceived as the role of the Federal Court of Appeal in this matter, namely:

> [18] I shall therefore review the decision of the Manager to refuse to consider the

[4] *Immigration and Refugee Protection Act* (S.C. 2001, c. 27)
[5] *Canadian Association of Refugee Lawyers (CARL) v. Canada (MCI)* 2020 FCA 196

> appellant's H&C application with the guidance of the contextual constraints set out in *Vavilov*, with a view to determining whether the Federal Court properly applied the reasonableness standard. In doing so, I will refrain from deciding the issue myself and focus instead on the decision actually made, to ascertain whether it falls within the range of possible outcomes.[6]

Justice de Montigny applies this focus on contextual constraints by taking into account significant policy documents, House of Commons Debates, and Backgrounders (para 27). He returns to parliamentary intent in paragraphs 56-58 of the decision.

Justice de Montigny then applies a commonly-cited line from para 128 of *Vavilov*, speaking to decision-makers not being expected to respond to every argument or line of possible analysis. Employing his earlier analysis on issue estoppel, he calls the alternative argument 'ancillary' writing:

> [59] It would certainly have been preferable for the Manager to address the appellant's alternative argument, as it was presented to him at the time. H**owever, it cannot be expected from administrative decision-makers to "respond to every argument or line of possible analysis" (*Vavilov,* at para. 128, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 25).** In the present case, the alternative argument was rather an ancillary one, and the Manager's failure to treat such issue does not make his decision unreasonable.
>
> [60] The same can be said with respect to the Manager's alleged failure to address the appellant's arguments about issue estoppel. As already noted, and as conceded by the appellant, this argument could only be entertained if one accepts that the Manager had the authority to assess the appellant's H&C application despite the previous inadmissibility finding made by the ID. Having concluded that subsection 25(1) bars an applicant who has been declared inadmissible under section 37 from H&C consideration, there was no need to canvass the interests of justice exception to the *res judicata*/issue estoppel doctrine. **When read in the context of the law and in light of the record, and taking into account the expertise and the experience of the Manager, I am satisfied that the decision was reasonable and that the reasons, although brief, reveal a "rational chain of analysis" (*Vavilov*, at para. 103).**
>
> **(emphasis added)**

[6] *Subramaniam* at para 18.

This referral to *Newfoundland Nurses* as still good law - both speaking to decisions not needing to be perfect and reasons needing to be considered in context, is a common theme that we see throughout both Federal Court of Appeal and Federal Court immigration decisions.

Overall, there were five citations to *Vavilov* in the *Subramaniam* decision, suggesting a good level of engagement with the SCC's guidance in *Vavilov.*

b) *Canadian Association of Refugee Lawyers (CARL) v. Canada (MCI)* 2020 FCA 196

Brief Summary

This case concerns CARL's appeal and the Minister of Citizenship of Immigration's cross-appeal of Chief Justice Crampton's decision in *CARL v. MCI* 2019 FC 1126, which found that the Jurisprudential Guides (JG) issued by the Chairperson of the Immigration Refugee Board ("IRB") was validly enacted per s. 159(1)(h) *IRPR* and provided authority to issue JGs including factual considerations (paras 1-2). However, Chief Justice Crampton found that the policy notes pertaining to the JGs for Pakistan, India, and China, were unlawful and inoperative as they pressured Board Members of the Refugee Protection Division ("RPD") and Refugee Protection Division ("RPD") to adopt the Refugee Appeal Division ("RAD's") own findings on issues that went beyond the evidence specific to claimants. Chief Justice Crampton upheld the JG pertaining to Nigeria, finding that this guide emphasized each claim's specific factual circumstances, and therefore did not fetter discretion or interfere with the independent decision-making (para 3).

Two questions were certified by Chief Justice Crampton (para 4):

> 1. Does the Chairperson of the Immigration and Refugee Board have the authority pursuant to paragraph 159(1)(h) of the *Immigration and Refugee Protection Act t*o issue jurisprudential guidelines that include factual determinations?
>
> 2. Do the Jurisprudential Guides that the Chairperson issued with respect to Nigeria, Pakistan, India and China unlawfully fetter the discretion of members of the Refugee Protection Division and the Refugee Appeal Division to make their own factual findings, or improperly encroach upon their adjudicative independence?

Two further issues were added before the Court in addition to the two certified questions: first, the issue of whether the Appellant had requisite public interest standing and lastly,

whether the cumulative effects of the facts and contexts surrounding the promulgation of the Nigeria JG gives rise to a reasonable apprehension of bias"

Justice de Montigny, again writing for a unanimous Court, found on the three issues before the Court that (1) It was 'very late in the day' to challenge CARL's standing and that both the Prothonotary's decision and Federal Court's reasoning failed to show any reviewable error (para 37); (2) that the Federal Court properly interpreted the plain words of paragraph 159 (i)(h) or *IRPA* giving the Chairperson authority to issue JGs on factual issues (para 43).

After upholding the Chief Justice Crampton's finding that the Chairperson does have authority to issue jurisprudential guides that include factual determinations, a significant portion of Justice de Montigny's decision addresses and overturns the Chief Justice's finding that three of the four guides could fetter the discretion of Board Members. In doing so he finds no difference in the language of an invitation to follow the JGs versus JGs that contain mandatory language (para 84). Considering the evidence that there was no pressure or sanction on Board Members who did not follow the JGs (paras 84-85), Justice de Montigny concludes:

> [88] For all of the above reasons, I am of the view that the impugned JGs do not unlawfully fetter the Board members' independence. They simply put claimants on notice that the current existing conditions seem to suggest certain conditions in a given country, without providing a definitive assessment of the facts and without preventing claimants and their counsel from distinguishing their particular circumstances.

Similar to Justice Rennie's decision in *Brown v. Canada* 2020 FCA 130 (which we will examine next), Justice de Montigny does caution on the ultimate designation of the JGs, especially in the context of unrepresented refugee claimants (para 90) stating:

> [91] This is why the decision to designate a JG should be taken with the utmost caution. It is not for courts to devise a system whereby the risk of mistake will be, if not eliminated, at least reduced to a minimum. Adjudicative decision-makers, however, must always use their discretionary powers wisely, and strive to avoid sacrificing fairness to consistency and expediency.

How *Vavilov* Was Applied

One of the first noticeable parts of the *Vavilov* analysis was the application of the *Housen*[7] standard to the Federal Court's decision on CARL's standing. Justice de Montigny writes:

[7] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]

> [30] The parties are broadly in agreement with respect to the applicable standard of review. It is now well established that, on appeal from a decision of the Federal Court sitting in judicial review of an administrative decision, this Court must "step into the shoes" of the Federal Court, and determine whether it appropriately selected and properly applied the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47. **When, however, the Federal Court makes findings of fact or mixed fact and law on the basis of the evidence before it, rather than on a review of the administrative decision, it is the appeal framework developed in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*] that applies: *Apotex Inc. v. Canada (Health)*, 2018 FCA 147, at paras. 57-58; *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250, at para. 18.**
>
> [31] Applying this matrix, I am of the view that the first question pertaining to the Federal Court's finding with respect to the question of standing is to be reviewed on the *Housen* standard. This is clearly a decision made by the Federal Court, not the administrative decision-maker: *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, at paras. 37-39; *Canada (Attorney General) v. Rapiscan Systems, Inc.*, 2015 FCA 96, at para. 21. Since the decision to grant CARL standing is clearly a question of mixed fact and law, it ought to be reviewed on the standard of palpable and overriding error.

Justice de Montigny weighs into the question of procedural fairness, clarifying that the standard of review remains correctness. However, he appears to critique *Vavilov's* treatment of procedural fairness issues arguing the manner of how the decision was made should ultimately lie outside the realm of judicial review:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness: see *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385, at para. 33 [*Thamotharem*]; *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, [2015] 2 F.C.R. 170, at para. 34; *Wsáneć School Board v. British Columbia*, 2017 FCA 210, at paras. 22-23; *Johnny v. Adams Lake Indian Band*, 2017 FCA 146, at para. 19; *Therrien v. Canada (Attorney General)*, 2017 FCA 14, at para. 2; *El-Helou v. Courts Administration Service*, 2016 FCA 273, at para. 43; *Arsenault v. Canada (Attorney General)*, 2016 FCA 179, at para. 11; *Henri v. Canada (Attorney General)*, 2016 FCA 38, at para. 16; *Abi-Mansour v. Canada (Foreign Affairs and*

> *International Trade Canada)*, 2015 FCA 135, at para. 6; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, at paras. 33-56. **In fact, it is not at all clear to me why we keep assessing procedural fairness within the framework of judicial review, considering that it goes to the manner in which a decision is made rather than to the substance of the decision,** as Justice Binnie aptly observed in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 102. **What matters, at the end of the day, is whether or not procedural fairness has been met.**[8]

As we will see in the analysis of Federal Court decisions, Justice de Montigny's commentary has found significant favour with judges writing on the distinction between procedural fairness issues and the substantive decision being reviewed.

From my perspective, perhaps the most easily overlooked but arguably important portions of the *CARL* decision which implicate the *Vavilov* framework can be found in paras 57-69. Justice de Montigny utilizes this not only as a prelude to his position that the JGs do not fetter discretion, but also to endorse the importance of consistency of decisions. He writes:

> [68] The Supreme Court reiterated its concern for consistency in *Vavilov*. Referring to the above-quoted excerpts from *Domtar* and *Consolidated-Bathurst*, the Court found that administrative bodies may resort to guidelines and other soft law techniques to address this concern. **It even went so far as stating that a departure from longstanding practices or established internal authority without any explanation for so doing may be a badge of unreasonableness (*Vavilov*, at para. 131).**[9]
>
> **(emphasis added)**

As I will tackle in Part III, there is significant concern from the client level dealing with first-level tribunals (such as Immigration Officers and Board Members), that a push for 'consistency' and explanation for departures from 'long-standing practices and established internal authorities' might put a chill on decision-making and lead to more templated decisions and processes.

Overall, there were eight citations to *Vavilov* in the decision. Out of the four decisions reviewed, we found that decision had the greatest number of citations to *Vavilov* and from an administrative law perspective, allowed us to best trace *Vavilov's* reasonableness framework in a meaningful way.

[8] *CARL* at para 35.
[9] *CARL* at para 68.

c) *Brown v. Canada (MCI)* 2020 FCA 130

Brief Summary

In *Brown,* counsel for Mr. Brown (who had already been removed by Canada) and several public interest interveners appealed on a certified question following the Federal Court's dismissal of their charter. Justice Fothergill certified the following question:

> Does the [Charter] impose a requirement that detention for immigration purposes not exceed a prescribed period of time, after which it is presumptively unconstitutional, or a maximum period, after which release is mandatory?
>
> ***Brown* at para 8.**

Justice Rennie, writing for a unanimous FCA, found that there was no infringement on sections 7, 9, or 12 of the *Charter* with respect to the detention scheme, upholding the Supreme Court of Canada's decision in *Charkaoui*. Justice Rennie found that the detention provisions in IRPA complied with section 7 and 9 of the Charter. He found that the constitutionality of IRPA was preserved by the law's requirement that detention for the purposes of removal, would no longer be facilitated if removal was no longer required (para 44). He found that the *Jordan* standard in criminal law was different from the criminal justice system, where federal and provincial and federal governments had complete control, versus immigration removal often frustrated by the receiving state (paras 48-53). Justice Rennie also found the importance of parliamentary supremacy, and no identified ambiguities or dueling interpretations that would lead to inconsistency with international law (para 58).

Justice Rennie concludes by both finding that discretion in the application of the Immigration Detention scheme, did not make the scheme and prolonged detention itself unconstitutional [in light of the non-exhaustive considerations in section 248 *IRPR* (para 74)] before giving guidance on the elements of a detention review hearing that complies with the Charter and administrative law (para 89-149).

How *Vavilov* Was Applied

Justice Rennie sets the tone of the decision with paragraphs 41-42, with an emphasis on the constraints by administrative bodies with *IRPA's* own purposes and objectives:

> [41] Citing *Roncarelli*, the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 observed (at para. 108) (*Vavilov*):
>
> […] while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst* […]. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.), at paras. 38-40.
>
> [42] The IRPA has many purposes and objectives, including ensuring the safety and security of Canadians and the promotion of international justice by denying safe harbour for criminals or those who pose a security risk (IRPA, paras. 3(1)(h), (i)). The power to detain, as set out in subsection 58(1), is one of the mechanisms by which those purposes are realized. That detention can only be ordered where it is linked, on the evidence, to one of the enumerated grounds listed in subsection 58(1) is an application of this principle. The power to detain must always remain tethered to the IRPA's purposes and objectives.

Justice Rennie then draws a quite thoughtful parallel between *Thanabalasingham*'s[10] requirement for clear and compelling reasons to depart from a previous decision, with the language of *Vavilov* - justification, transparency, and intelligibility, and 'general consistency' of the law. We found this wording to be hallmarks of immigration decisions throughout both levels of Court.

He writes at paragraph 134:

> [134] *Thanabalasingham* creates no special rule for ID reviews. The requirement to give reasons when departing from a prior decision is directed to the well-understood requirement, essential to the integrity of administrative and judicial decision making, that if there is a material change in circumstances or a re-evaluation of credibility, the ID is required to explain what has changed and why

[10] *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2004 FCA 4 (CanLII), [2004] 3 FCR 572

> the previous decision is no longer pertinent. **This reinforces the values of transparency, accountability and consistency. As was explained by the Supreme Court of Canada in *Vavilov*, the primary purpose of reasons is to demonstrate justification, transparency and intelligibility (at para. 81). To promote "general consistency", any administrative body that departs from its own past decisions typically "bears the justificatory burden of explaining that departure in its reasons" (at paras. 129-131).** Moreover, reasons are the primary mechanism by which affected parties and reviewing courts are able to understand the basis for a decision (at para. 81; see also *Canada (Public Safety and Emergency Preparedness) v. Berisha*, 2012 FC 1100, [2014] 1 F.C.R. 574 at para. 52).

While this decision is short on actual direct references to *Vavilov* (only three), the systematic way in which Justice Rennie weaves together the detention review regime with *Vavilov* provides strong justification for his decision.

d) *Canada (MCI) c. Solmaz* 2020 CAF 126

Brief Summary

In *Solmaz*,[11] the Minister of Citizenship and Immigration appealed a decision of Justice Bell in *Solmaz c. Canada (MCI)* 2019 CF 736, where Justice Bell allowed the Applicant's judicial review of an Immigration Appeal Division ("IAD") decision. In the underlying decision, the IAD refused to exercise discretionary (H&C jurisdiction) who was found inadmissible for serious criminality pursuant to s.36(1)(a) of the *IRPA* for possession of cocaine for the purposes of trafficking, contrary to s. 5(3) of the *Controlled Drugs and Substances Act* (para 3). The IAD had focused their decision on the serious nature of the offense, the more than six months Mr. Solmaz had served in preventative detention, and their belief that the chances of readjustments were low (paras 20-21). The IAD found that Mr. Solmaz presented a high potential for dangerousness (para 29) and in their conclusion focused on Mr. Solmaz's connection to a Turkish criminal organization (para 34).

Justice Bell allowed the judicial review, finding fault with the assessment of rehabilitation and specifically that the jurisprudence of the Federal Court and the IAD did not authorize the use of criminal history to assess serious criminality under s.36(1)(a) *IRPA*. Justice Bell also found that the IAD had not acted transparently in utilizing the circumstances of organized criminality

[11] It is to be noted that *Solmaz* is a French decision. The author is not fluent in French and the decision has not been translated. The author relied on his knowledge of immigration decisions and available translation resources to analyze this particular decision.

allegation, an inadmissibility for which Mr. Solmaz had not been reported, and was critical of the manner in which these issues were raised for the first time during the IAD hearing (para 43).

Two questions were certified by the Federal Court.

> [2] Tel que le permet l'alinéa 74*d*) de la Loi, la Cour fédérale a certifié, aux fins d'appel, les deux questions suivantes :
>
> 1. Est-ce que la SAI peut prendre en considération les faits qui sous-tendent des allégations criminelles pour lesquelles l'individu interdit de territoire n'a pas été condamné, lorsqu'elle exerce sa discrétion en vertu de l'alinéa 67(1)*c*) et paragraphe 68(1) de la [Loi]?
>
> 2. Est-ce que la SAI peut prendre en considération les faits qui démontrent que l'appelant est membre d'une organisation criminelle comme prévu par l'alinéa 37(1)*a*) de la [Loi] lorsqu'elle exerce sa discrétion en vertu de l'alinéa 67(1)*c*) et paragraphe 68(1) de la LIPR, si le seul rapport et référence en vertu de l'article 44 de la [Loi] à l'égard de la personne interdite de territoire, se base uniquement sur la grande criminalité en application de l'alinéa 36(1)*a*) de la [Loi]?

Of these two questions, Justice LeBlanc, writing for a unanimous court, answered only the first certified question.

Justice LeBlanc found that there was nothing in the *IRPA* that would restrict the IAD from considering evidence of withdrawn or dismissed charges as it pertained to the assessment of rehabilitation as a discretionary factor.

Justice LeBlanc finds that this discretion exists under s.67(1)(c) and s. 68(1) of *IRPA*:

> [114] Pour tous ces motifs, j'en arrive donc à la conclusion que la SAI peut, dans les limites fixées par l'arrêt *Sittampalam*, considérer les faits qui sous-tendent des allégations criminelles pour lesquelles l'individu interdit de territoire n'a pas été condamné, lorsqu'elle exerce sa discrétion en vertu de l'alinéa 67(1)*c*) et du paragraphe 68(1) de la Loi.
>
> [115] Ces limites, je le rappelle, sont les suivantes :
>
> 1. Les faits qui sous-tendent des allégations criminelles pour lesquelles l'individu interdit de territoire n'a pas été condamné ne doivent pas

servir, à eux-seuls, à établir la criminalité de la personne interdite de territoire;
2. Ils doivent reposer sur des éléments crédibles et dignes de foi et être portés à l'attention de la personne visée qui doit se voir offrir la possibilité d'y répondre; et
3. Les conclusions que le décideur en tire doivent être le fruit d'un examen indépendant de sa part et non du simple fait que des accusations ont été portées contre cette personne.

Justice LeBlanc found that the IAD had utilized the charges regarding Mr. Solmaz's domestic violence and intra-family conflict in a manner consistent with the *Sittampalam* decision (para 121) along with the evidence of the criminal organization he was allegedly a part of (para 128-132). Furthermore, on a reasonableness standard, Justice LeBlanc found that he was unable to find any error in the assessment of the H&C factors that would justify intervention of the Court (paras 135-146).

How *Vavilov* Was Applied

Out of all of the Federal Court Appeal decisions, I found the analysis in *Solmaz,* to mirror the type of reasonableness analysis taken by the Federal Court - focused more on the merits of the decision and less on the framework of review.

Indeed, Justice Leblanc begins with the standard incantation of the presumption of reasonableness applying. He writes:

> [67] J'estime que la Cour fédérale a appliqué la norme appropriée et que l'arrêt de la Cour suprême dans *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65 (*Vavilov*), rendu postérieurement au jugement de la Cour fédérale, n'a pas modifié la norme de contrôle qu'il convient d'appliquer en l'espèce. En effet, dans cette affaire, la Cour suprême a cristallisé la présomption voulant que la norme de la décision raisonnable soit la norme applicable dans tous les cas, sous réserve d'un certain nombre d'exceptions qui – et les parties n'ont pas prétendu le contraire - ne trouvent pas application en l'espèce (*Vavilov* aux para. 10 et 25).

The only other references to *Vavilov* are to the role of the Federal Court of Appeal to step into the shoes of the Federal Court (recall, the parallel language in para 30 of *CARL*) and the role of the reviewing court to replace findings of fact, baring exceptional circumstances.

> [68] Comme cette Cour, en appel d'un jugement en matière de contrôle judiciaire, doit « se mettre à la place » de la Cour fédérale, je devrai aussi me prononcer, si je réponds par

> l'affirmative à la question principale que pose le présent pourvoi, sur la raisonnabilité de la décision de la SAI dans son ensemble, et ce, même si cette Cour n'a pas le bénéfice de la position du juge Bell sur les autres facteurs *Ribic* examinés par la SAI (*Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 1999 CanLII 699 (CSC), [1999] 2 R.C.S. 817, au para. 12; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 1998 CanLII 778 (CSC), [1998] 1 R.C.S. 982, au para. 25; *Canada (Citoyenneté et Immigration) c. Tennant*, 2018 CAF 132, au para. 9).
>
> …...
>
> [125] Comme la question du traitement qu'a fait la SAI de la preuve qui lui a été soumise en lien avec les incidents de violence conjugale et de conflits intrafamiliaux qui ont mené aux accusations en cause est éminemment factuelle, j'ajouterais, comme l'a rappelé la Cour suprême du Canada dans *Vavilov*, « qu'à moins de circonstances exceptionnelles », il n'appartient pas aux cours de révision de modifier les conclusions de fait du décideur administratif, pas plus qu'il ne leur revient « d'apprécier à nouveau la preuve examinée par le décideur » (*Vavilov*, au para. 125)[12]

There were overall six references to *Vavilov* in this decision.

e) Overall Evaluation of the FCA's Application of the Reasonableness Framework

To assess how the reasonableness framework was applied, by the Federal Court of Appeal, it is helpful to return to the elements of a reasonable decision as set out by Justice Rowe in ***Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67**:

- "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (para 31, citing *Vavilov* at para 85)
- The framework is not an invariable checklist for conducting reasonableness review and

[12] For reference, the Supreme Court of Canada stated in *Vavilov* at para 125:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": CHRC, at para. 55; see also Khosa, at para. 64; Dr. Q, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see Housen, at paras. 15-18; Dr. Q, at para. 38; Dunsmuir, at para. 53.

The Supreme Court of Canada's citation to *Housen* is telling here as well, something several Federal Court judges have also applied into their decisions on judicial reviews on questions of fact. See section

does not mandate the structure of analysis (para 34, citing *Vavilov* at para 101 and 106))

- The starting point of inquiry is through examination of reasons provided, holistically and contextually read, in order to understand the decision maker's reasoning process (para 31, citing *Vavilov* at para 97)
- The decision as a whole must be reasonable, demonstrating justification, transparency, and intelligibility (para 32 citing *Vavilov* at para 99)
- The challenging party bears the burden of satisfying the court "that any shortcomings or flaws relied on…are sufficiently central or significant to render the decision unreasonable" (para 33, citing *Vavilov* at para 100).

(emphasis added)

In the four Federal Court of Appeal decisions read, *Vavilov* appeared to be applied effectively when compared to this framework. I make this assessment not only with respect to the number of references to the decision, but also how the reasonableness framework is set up and ultimately returned to in most of the decisions. In stating this, I recognize that Federal Court of Appeal decisions in immigration tend to be longer decisions, providing more canvas, so to speak, for analysis. Perhaps the strength of the administrative law analysis is also reflective of both the complexity of the certified questions being put forth to this Court, the experience of Counsel appearing before it, and the way the Federal Court of Appeal returns to foundational principles. All four of the decisions ultimately favoured the Government's position.

I also saw a trend of the judges going beyond *Vavilov* to provide further instructive guidance in the decision. When reviewing a certified question, the Federal Court of Appeal must not only reconcile the framework of jurisprudence (which Appellant's are often trying to challenge), and as we saw in both *CARL* and *Brown,* provide instructive/cautionary guidance to the Federal Court and Tribunals below it.

f) A Brief Comment on Statutory Appeals

As set out by Professor Liew, in her paper.

> "The Court, while acknowledging that many statutes provide both appeal and judicial review mechanisms indicating two roles for courts, the Court does not provide a very nuanced discussion of how appeals and judicial reviews intersect, as in the case of immigration and refugee law, where there are appeals of judicial reviews, and not ones that flow directly from an administrative decision maker but from a reviewing court who

> has already reviewed the decision. However, they do state that not all provisions give courts an appellate function."[13]

Indeed the Supreme Court of Canada in *Vavilov* writes:

> [51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).[14]

Professor Liew points out that that s.27 of the *Federal Courts Act*[15] and s.74 of *IRPA*, creating the right of appeal to the Federal Court of Appeal on certified questions of general importance is noticeably silent from *Vavilov's* carved out exceptions.

Justice de Montigny's decision in *CARL*, applying the *Housen* standard suggests that the unique structure of appeals to the Federal Court of Appeal on certified questions will not impede the application of *Housen* where the Federal Court of Appeal sees its role as reviewing the Federal Court's decisions, rather than the Federal Court's review of the administrative tribunal's decision.

In *Solmaz*, which was rendered before *CARL*, *Housen* was not applied, leaving Professor Paul Daly to opine:

> It is also worth pondering, when considering "appeals" the position of the certified question regime in federal immigration law — on its face the ability of the Federal Court to certify a general question of law for resolution by the Federal Court of Appeal does not attract the *Housen v Nikolaisen* framework but it is nonetheless difficult in some cases to

[13] *Liew* at pages 7-8.
[14] *Vavilov* at para 51.
[15] *Federal Courts Act*, RSC, 1985, c F-7.

conduct a reasonableness review of the decision-maker's reasons because the real issue is whether the Federal Court has accurately followed appellate authority: see *e.g. Canada (Citoyenneté et Immigration) c. Solmaz*, 2020 CAF 126, at paras. 73-116). It is certain, however, that what matters here is statutory language, not the character of the decision-maker: superior court review of provincial court decisions is to be conducted under the *Vavilov* framework unless the magic word "appeal" has been used (*S.G. v G.M.*, 2020 BCSC 975, at paras. 65-84).[16]

As we will see in the analysis below, the Federal Court itself appears to also struggle with the application of *Housen*, with the Department of Justice and select Federal Court judges preferring the higher standard of review rather than Vavilov's reasonableness framework, particularly for findings of fact.

Part II: *Vavilov's* Application in Federal Court Immigration Cases

"Cette Cour souhaite réitérer les consignes de la Cour suprême du Canada à l'effet qu'en révision judiciaire ce n'est pas l'occasion de se lancer dans une chasse au trésor, phrase par phrase, à la recherche d'une erreur (Vavilov, ci-dessus, aux para 102, 284-85)."

- ***Santos De Pacas c. Canada (Citoyenneté et Immigration), 2021 CF 97*** per Justice Shore (in obiter).

Given the limited spread of four Federal Court of Appeal cases that directly engaged *Vavilov*, not to mention the high threshold by which questions are certified[17], worth examining how the Federal Court has applied *Vavilov.* In doing so, we have chosen three cases that we find are reflective of some of the more unique ways *Vavilov* has been addressed. We then return to some overall commentary on how the reasonableness framework has generally been applied.

a) *Grewal v. Canada (Citizenship and Immigration)* 2020 FC 1186

I asked my colleague Yussif Silva to suggest one case he felt best represented a unique application of *Vavilov* at the Federal Court. He suggested the decision of *Grewal.*

[16] Paul Daly, *Vavilov* Hits the Road, 04 February 2020 - https://www.administrativelawmatters.com/blog/2020/02/04/vavilov-hits-the-road/

[17] "serious questions of general importance" certified by the Court pursuant to section 74 of the Immigration and Refugee Protection Act or section 22.2 of the Citizenship Act."

Brief Summary

This case deals with the problematic usage of the "institutional expertise and experience" veil by decision-makers, even when they lack expertise on the cultural nuances of racialized applicants. The decision also emphasizes the need to provide heightened reasons to overcome a joint submission, given "the significant impact on the affected parties of an adverse determination".

The facts here are worth examining. Mr. Grewal married Ms. Kaur in India in 2017. Mr. Grewal suffers from mental health issues and the marriage was arranged by their families. As a permanent resident of Canada, Mr. Grewal sponsored his spouse's application for permanent residence in the family class, accompanied with a psychiatrist´s report about his ability to understand the marriage.

In 2018, the visa officer interviewed the couple and concluded that the application was entered primarily for the purpose of acquiring status or privilege under the act or that the marriage was not genuine (s. 4(1)(a)(b) *IRPA*). Mr. Grewal appealed to the IAD and filed another psychiatrist report. After interviewing Mr. Grewal and Ms. Kaur the Minister recommended allowing the appeal.

Tha IAD considered the joint submission but concluded that they were convinced that Ms. Kaur was "willing to accept" Mr. Grewal's intellectual disability in exchange for permanent residence; and from its conclusions that their discussions were not "of substance." Applying a western standard to evaluate the marriage of culturally Indian applicants, the IAD questioned what a person with intellectual disabilities could bring to a relationship other than an opportunity to obtain permanent residence in Canada. It largely ignores Ms. Kaur's evidence of other valued elements of Mr. Grewal's character, notably his sobriety, wisdom, and religious devoutness. (para 42) Therefore, the appeal was dismissed. Mr. Grewall filed a Judicial Review of the IAD decision.

Justice McHaffie founds as follows:

a) An administrative decision that relies on the "institutional expertise and experience" (Vavilov para 93) but does not refer to evidence of such expertise is unreasonable. [paras 44-45]

b) The "culture of justification" espoused by Vavilov (paras 106,127-128) recognizes that the submission of the parties act as a constraint on administrative decision making. Therefore, the Immigration Board has a heightened burden to justify why it is departing from a joint submission or considering issues that are not in dispute between the parties. [para 32]

Justice McHaffie concluded that the IAD decision was procedurally unfair. The application for judicial review was allowed, and Mr. Grewal's appeal was sent back to the IAD for redetermination by a differently constituted panel

How *Vavilov* Was Applied

This case is an important one to read given very few procedural fairness challenges in the immigration context have succeeded since *Vavilov.* Justice McHaffie writes about the standard of review for cases of procedural fairness:

> [5] Issues of procedural fairness are not subject to review on the deferential reasonableness standard. Rather, the Court assesses whether, having regard to all of the circumstances, a fair and just process was followed: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 77. Strictly speaking, no standard of review is being applied, although the reviewing exercise is "best reflected in the correctness standard": *Canadian Pacific* at para 54, quoting *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20.[18]

With respect to the joint submission, Justice McHaffie decided that the "culture of justification" espoused by *Vavilov* (*Vavilov* at paras 106, 127-128) recognizes that the submission of the parties act as a constraint on administrative decision making. Therefore, the Immigration Board has a heightened burden to justify why it is departing from a joint submission or considering issues that are not in dispute between the parties (para 32).

The Court concluded that the IAD's decision did not adequately show that it gave serious consideration to the joint recommendation or explain with clarity why it considered there was good cause to reject that recommendation (para 36)

The decision is also memorable on how it applies institutional expertise - an issue that was at the heart of the majority/minority divide in *Vavilov.* In response to questions about these concerns raised at the hearing, the Minister argued that the IAD was simply applying its expertise in respect to arranged marriages from India, rather than undertaking a discriminatory analysis based on an intellectual disability. The Court did not accept this explanation, as there was no indication that the IAD was relying on any evidence or expertise regarding what would be accepted in an arranged marriage in regard to many of its statements. The IAD's findings on the nature of conversations in a couple, for example, referred to couples generally and made no reference to what parties to an arranged marriage were expected to discuss.

[18] *Grewal* at para 5.

To the extent that the IAD intended, as the Minister argued, to rely on its knowledge or expertise on arranged marriages in India, it did not "demonstrate through its reasons that [its] decision was made by bringing that institutional expertise and experience to bear": *Vavilov* at para 93. [45]

b) *Soni v. Canada (Citizenship and Immigration)*, 2020 FC 813 (CanLII)

Brief Overview

In *Soni*, Ms. Soni was refused a work permit, and her spouse and son their related applications, on the basis of not being able to demonstrate that she would leave Canada at the end of her stay pursuant to subsection 200(1) of the *IRPR.*

I do not want to focus on the facts of the decision too much, as this case is most notable for the way it was written and organized to apply the *Vavilov* framework.

How *Vavilov* Was Applied

To me, *Soni* is the model, 'gold standard' decision for how to apply the *Vavilov* framework in an immigration decision. The 79-paragraph decision contains twenty-seven (27) references to *Vavilov*.

After setting out the relevant facts, Justice Little addresses the Applicant's raised issues framed in *Vavilov* (para 17). In paragraphs 25-28, Justice Little not only recants *Vavilov*'s reasonableness framework, but effectively appears to preview and set up his decision. This is best demonstrated by paragraph 26:

> [26] Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov* at paras 12-13. While the reviewing court's review is robust – meaning it will be thorough and sensitive to the legal and factual circumstances in each case – it is also disciplined. Not all errors or concerns about a decision will warrant intervention. The reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov,* at para 100. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently fundamental or significant to render the decision unreasonable: para 100.

Justice Little also engages directly in the grey between procedural fairness as part of the reasonableness assessment (para 28) and the Court's obligation to ensure the process was procedurally fair (para 29).

What makes this decision truly stand out is how the *Vavilov* principles are applied in the decision. Justice Little indeed titles the analysis section (rather uniquely):

> A. *Was the Decision Unreasonable under Vavilov Principles?*

Importantly, at crucial points of the analysis, the principles of *Vavilov* are drawn upon including:

- That the Officer's reasons to not contain every point of analysis, and that level is not required by *Vavilov* and that the decision is sufficiently transparent, intelligible, and justified (para 30);
- That the reviewing court must look at the decision as a whole and not just a few lines or passages (para 34);
- That the culture of justification begins by starting with the reasons as the primary mechanism by which administrative decision-makers show that their decisions are reasonable (at para 35);
- That the decision must be responsive to those affected by it, particularly if the impact on the individual is severe (para 36);
- That the decision did not require extended reasons to comply with the requirements of justification, transparency and intelligibility in administrative law (para 38);
- That the evidence provided by the Applicant did not constrain but was considered by the decision-maker (para 57);
  That it is not the role of judicial review to reassess or re-weigh evidence (para 58);
- That this is not a case where a decision-maker ignore, fundamentally apprehended, or failed to account for evidence so as to render the decision "untenable" (para 59, 65)
- Citing the Federal Court's decision in *Iyiola* that while a visa Officer's notes may be sparse, they must nonetheless shed insight as to why the Officer refused an application (para 74)

While the Applicant in this matter was ultimately not successful, the reasoning framework as to how the decision was made, is in my opinion very effectively communicated through the *Vavilov* framework.

c) *Slemko v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 718 (CanLII),

Brief Overview

In *Slemko,* a 69-year old permanent resident of Canada and citizen of the United Kingdom, with extensive families in Canada, and was charged and pled guilty to six counts of trafficking a controlled substance. As these convictions fell under *IRPA's* serious criminality provisions, and she was sentenced to 24 months in prison, she had no right of appeal. As part of the admissibility process, a permanent resident is offered the opportunity to respond to concerns regarding their inadmissibility. Because there is no right of appeal, and the body which determines the permanent resident's inadmissibility, does not have jurisdiction to consider humanitarian and compassionate factors, this response is the only opportunity to put forth these considerations. Ms. Slemko, while detained, wrote short handwritten letters containing information about her significant family ties in Canada and lack of immediate family in the United Kingdom. She provided details about her medical condition and generic description of her employment history in Canada.

A CBSA officer completed his assessment, recommending that the matter be referred to admissibility hearing - highlighting and factoring the evidence provided. The Minister's Delegate (senior decision maker) who wrote only in hand-written notes about the "insufficient H&Cs - no letters of familial support" and that her appeal rights were lost.

Justice Walker allowed the judicial review with a focus on the lack of coherence of the Minister's Delegate's decision writing:

> [26] As a result, I find that the referral decision, when read with the officer's assessment in the subsection 44(1) report, does not reflect an internally coherent reasoning process and was not reasonable. The apparent reliance by the Minister's delegate solely on the absence of familial support letters and the delegate's failure to address a number of the important H&C factors identified by Ms. Slemko, including her length of residence in Canada and family in and outside of Canada, resulted in a decision that lacks justification (*McAlpin* at para 70; *Vavilov* at para 85).

How *Vavilov* Was Applied

Justice Walker, bucking the trend of usual trite and short reference to the presumptive standard of reasonableness and the standard of review for procedural fairness issues being correctness.

She does frame this, of course, in paragraphs 17 to 19 of the decision, commenting at paragraph 18:

> [18] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard. I have applied that guidance in my review, exercising restraint but conducting a robust review of the referral decision for justification and internal coherence (*Vavilov* at paras 12-15, 85-86, 99; see also *Canada Post Corp. v Canada Union of Postal Workers*, 2019 SCC 67 at paras 28-29).

One of the reasons this case was highlighted, other than the fact I was counsel for Ms. Slemko, is that Justice Walker applies paragraph 133 of *Vavilov,* one of 19 immigration cases that have done so.

We will note paragraph 133 of *Vavilov,* highlighting responsive justification, was considered a very important line in early analysis of the decision by the Immigration bar, as recommended by counsel who had intervened in *Vavilov*:[19]

> (g) *Impact of the Decision on the Affected Individual*
>
> [133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

It is perhaps surprising that so few references have been made to a section that appears so crucial to the application of the reasonableness framework in our area of law.

[19] Audrey Macklin & Tony Navaneelan (Intervener Counsel for CARL), MCI v. VAVILOV: A CHEAT SHEET FOR CARL 9 January 2020, at page 7.

d) Evaluating the Federal Court's Application of Vavilov's Reasonableness Framework

Overall, our analysis suggests mixed results in how the Federal Court has been applying *Vavilov.* Compared to the Federal Court of Appeal's four cases, we saw a wide range of engagement with *Vavilov*, with simple *pro forma* references to the standard of reasonableness as the default and procedural fairness falling under the correctness standard, to more robust applications. Some judges appear to have particular intellectual interests in certain areas, while in other decisions more time is spent engaging with the legal arguments of counsel rather than the application of the judicial review framework itself. However, there were some decisions such as *Soni* which we suggest create an effective framework for future immigration decisions.

It is to be noted leave rates have diminished significantly,[20] but so too (anecdotally) have early stage consents and resolutions. It is difficult to say still what the impact of *Vavilov* has been on the judicial review process from a pure reading of case law at the Federal Court, which we found still largely focus on facts over form.

e) The Challenges with Procedural Fairness

Most Federal Court judges have found that the standard of review for issues of procedural fairness is still correctness. In *Ntamag*, Associate Chief Justice Gagne found:

> [7] With respect to the issue of procedural fairness, since the Supreme Court is silent on the topic (*Vavilov*, para 23) – it is fair to conclude that the previous jurisprudence still applies. Therefore, if the Court finds that the duty of procedural fairness owed to the Applicant was breached, it should quash the decision.

Silence perhaps has been replaced by increased pushback. Six Federal Court decisions have since followed *CARL* FCA not only re-affirming procedural fairness issues attracting a correctness standard, but also suggesting procedural fairness issues should properly be extracted out of the

[20]January to December 2020 Leave Grant Rates appear to show only 5.5% of non-refugee cases and 16.5% of refugee cases were granted leave. https://www.fct-cf.gc.ca/en/pages//about-the-court/reports-and-statistics/statistics-december-31-2020#cont The author is currently in the process of communicating with the Federal Court to clarify whether cases where consents were reached factor into these extremely low rates.

standard of review analysis.[21] As summed up by Justice Norris in *Asanova v. Canada (Citizenship and Immigration)*, 2020 FC 1173 at para 25.

> That being said, invoking a standard of review is somewhat beside the point here. At the end of the day, what matters "is whether or not procedural fairness has been met" (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. Rather, the role of this Court is to determine whether the proceedings were fair in all the circumstances. In other words, "whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific* at paras 54-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

Our early observation is that this seems to be a rejection of the Supreme Court trying to shift procedural fairness issues directly into the reasonableness framework but perhaps also highlighting that the silence has indeed created uncertainty. One of the consequences is that a higher threshold may be set for procedural fairness issues, with Federal Court judges prefering to frame the issue in terms of reasonableness given the ultimate purposes of the reviewing court.

f) Insufficiency/Inadequacy of Reasons

Prior to *Vavilov*, arguments in immigration matters regarding the insufficiency or inadequacy of reasons, were often dismissed with the application of the Supreme Court's decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 [Newfoundland and Labrador Nurses' Union], where the Court found:

> [14] Read as a whole, I do not see Dunsmuir as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in Dunsmuir when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[21] See: e.g. *Hailu v. Canada (Citizenship and Immigration)*, 2021 FC 15 (Roussel J.) at para 11; *Ambroise c. Canada (Citoyenneté et Immigration)*, 2021 CF 62 (McHaffie J.) at para 7; *Harms-Barbour v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 59 (Roussel J) at para 20.

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (Dunsmuir, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.

A review of Federal Court jurisprudence suggests that *Vavilov* did not displace *Newfoundland Nurses*, rather it clarified, simplified, and gave further legs to this position a reasonable decision needs only to be an acceptable one, not a perfect one.

In the Federal Court decision of *Laifatt v. Canada (Citizenship and Immigratio*n), 2020 FC 365, Justice Ahmed writes:

> [15] As for the adequacy of reasons, the Applicant submits that this issue of one of procedural fairness and thus should be reviewed on a correctness standard. The Applicant relies on a few cases for the proposition that the adequacy of reasons is an issue of procedural fairness—however, I note that these cases pre-date *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII) [*Newfoundland Nurses'*].
>
> [16] In *Newfoundland Nurses'*, the Supreme Court clarified that adequacy of reasons is not a stand-alone basis for quashing a decision. The reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. Any challenge to the reasoning/result of the decision should be made within the reasonableness analysis (*Newfoundland Nurses'* at paras 15, 20-22; cited by *Sebastio v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 803 (CanLII) at para 20). Post-*Vavilov*, the same principles apply.

> **[17] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).[22]**
>
> **(Emphasis added)**

Justice McVeigh, in *Canada (Citizenship and Immigration) v. Mattu,* 2020 FC 890, argues that *Newfoundland Nurses* is in fact bolstered by *Vavilov*:

> [31] A judicial review is not a line-by-line treasure hunt for errors but rather the decision should be approached as an organic whole (*Irving Pulp & Paper v CEP, Local 30,* 2013 SCC 34 at para 54.) A reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15 ("*Newfoundland*")). At paragraph 14 of the *Newfoundland* decision, the SCC says: "I do not see Dunsmuir as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision…It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the results fall within a range of possible outcomes" (at para 14).
>
> [32] The recent Supreme Court of Canada decision of *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65, **has not changed this, and in fact bolsters it slightly:**
>
> > [94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. **This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency.** Opposing parties

[22] *Laifatt* at paras 15-17.

> may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.[23]
>
> **(Emphasis added)**

As a common trend, several Federal Court decisions uphold *Newfoundland Nurses* as good law, and indeed have tied the principle to various other *Vavilov* principles.[24] Several Federal Court decisions also emphasize that the adequacy of reasons still holds some complexity. As discussed earlier, the silence on procedural fairness but the benefit of the correctness standard will still encourage Applicants to try and frame arguments as procedurally unfair. We suspect the Court to continue to push back and apply the more robust reasonableness analysis. An example of this occurred in *Zhu*, when Justice Favel wrote:

> [12] Despite the parties' submissions to the contrary, the adequacy of the Officer's reasoning goes to the substantive reasonableness of the Decision. A decision-maker's reasoning may affect both the substantive reasonableness and the procedural fairness of a decision (see *Vavilov* at para 81). However, the way that the Applicant has framed his "procedural fairness" argument, claiming that the Decision lacked "justification" and that it was "not possible to understand why the Officer rejected the Applicant's experience", indicates that it is an argument against the substantive reasonableness of the Decision. This is the same type of language used in *Dunsmuir*, and now *Vavilov*, to describe an unreasonable decision (see *Vavilov* at para 81).[25]

[23] *Canada (Citizenship and Immigration) v. Mattu*, 2020 FC 890 at paras 31-32.
[24] See e.g. *Jean Philippe v. Canada (Citizenship and Immigration)*, 2021 FC 48 at paras 8, 35 citing *Vavilov* at para 128; *Sandhu v. Canada (Citizenship and Immigration)*, 2020 FC 1021, at para 5; *Zhu v. Canada (Citizenship and Immigration)*, 2020 FC 980, at para 12, 35 citing *Vavilov* at para 81, 86; *Ntamag v. Canada (Immigration, Refugees and Citizenship), 2020 FC 4*0,, at para 16, citing *Vavilov* at paras 77, 119, 136-137; *Singh v. Canada (Citizenship and Immigration)*, 2020 FC 350, at para 37, citing *Vavilov* at para 102.
[25] *Zhu* at para 12

g) A Brief Comment on the Application of *Housen* in the Federal Court

Six Federal Court immigration and refugee judicial review decisions since *Vavilov* have cited *Housen.*

In *Sivalingam v. Canada (Public Safety and Emergency Preparedness),* 2020 FC 1078**,** Justice Southcott preferred applying the standard of reasonableness to factual inferences and resulting findings of fact, writing:

> [24] The Applicant submits that the above issues are all reviewable on a standard of reasonableness. While the Respondent agrees that the Decision itself is reviewable on that standard, it submits that the standard of "palpable and overriding error," described in *Housen v Nikolaisen,* 2002 SCC 33, applies to the Court's review of factual inferences and resulting findings of fact by the Officer. The Respondent relies on *Aldarwish v Canada (Citizenship and Immigration),* 2019 FC 1265 [*Aldarwish*], at paragraphs 24 to 30, for this distinction.
>
> [25] The Applicant notes that *Aldarwish* was decided prior to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*], which confirmed reasonableness as the presumptive standard of review of administrative decisions. I will apply the reasonableness standard prescribed by *Vavilov* to the present matter. However, I also note that, to the extent the Respondent is arguing that an even less deferential standard should apply, I would reach the same conclusion on the outcome of this judicial review, even if applying such a standard.

In *Elamin v. Canada (Citizenship and Immigration),* 2020 FC 847, Justice Grammond, a noted academic prior to his judicial career, applied the *Housen* standard on questions in a refugee matter relating to adverse credibility factual findings. He writes:

> [9] Mr. Elamin's application for judicial review challenges credibility findings. It has been said time and again that factual findings, in particular credibility findings, are the preserve of the initial decision-maker. While this was initially justified by the decision-maker's ability to observe the demeanour of the witnesses on the stand, institutional reasons are now invoked to prevent appeal and judicial review from becoming a replay of the initial hearing: *Housen v Nikolaisen*, 2002 SCC 33 at paragraphs 15-18, [2002] 2 SCR 235. With respect to judicial review, the Supreme Court of Canada recently stated, in *Canada (Citizenship and Immigration) v Vavilov,* 2019 SCC 65, at paragraph 125 [*Vavilov*], that "the decision maker may assess and evaluate the evidence before it and

> that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings." The Federal Courts have applied these principles in a long line of cases, including *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315; *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*].

While noting the higher standard, Justice Grammond does allow the judicial review stating:

> [10] Nevertheless, credibility determinations are not immune from review. In *Vavilov*, at paragraph 126, the Supreme Court stated that "The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it." Moreover, the decision-maker must explain its credibility findings in "clear and unmistakable terms:" *Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236 at paragraph 6. If the reasons are inadequate, they may well "fail to reveal a rational chain of analysis or […] reveal that the decision was based on an irrational chain of analysis," which renders the decision unreasonable: *Vavilov*, at paragraph 103.
>
> [11] Thus, I must analyze the challenge to the RAD's credibility determinations with great circumspection. Nevertheless, I have concluded that the findings made in this case cannot stand. This is one of the few cases in which this Court must strike down a decision because of unreasonable credibility findings.

It is to be noted that one particular Federal Court judge was responsible for four decisions citing *Housen* - one stay of removal, and three judicial reviews.

In *Adekola*, a stay case, Justice Annis emphasized "*Vavilov* imposing a strict non-interventionist approach to the judicial review of questions of facts similar to the standard imposed on appellate courts" (para 16).

In *Saka v. Canada (Citizenship and Immigration)*, 2020 FC 991, Justice Annis emphasized the role of the Court not to re-weigh evidence, writing:

> [6] … Applicants must demonstrate that exceptional circumstances apply which would permit the reviewing court to interfere with factual findings and inferential findings based on the evidence that was actually before the decision-maker. This would include where the decision maker has not taken the evidentiary record and the general factual matrix that bears on its decision into account…

He reaches a similar conclusion in *Zhang v. Canada (Citizenship and Immigration)*, 2020 FC 927 writing at para 77:

> [77]....Prohibiting the reweighing of evidence effectively reapplies the patently unreasonable, palpable, or clear error tests to fact-finding assessments, without stating that it is not a reasonableness standard. The majority Court in *Housen* indicated in the clearest of terms, particularly at paragraphs 21 to 22, that reweighing the evidence is a form of impermissible reasonableness analysis, and is an insufficiently strict standard for the review of facts. The examination to determine whether there is some probative evidence to support the fact is a different exercise from that of analyzing the evidence anew to see whether the factual finding was reasonable. *Housen* applied that same distinction to the step of drawing an inference from the facts...

In *A.B. v. Canada (Citizenship and Immigration)*, 2020 FC 19 reconciling *Vavilov* with *Housen* in a decision written just a month after *Vavilov* was released, Justice Annis writes:

> [29] The Court further noted at paragraph 125 in *Vavilov* in referencing *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235, at paras. 15-18 [*Housen*] that appellate courts' deference owed to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review. The *ratio decidendi* of *Housen* at paragraphs 22 & 23 that appellate courts are not to reweigh the primary evidence to substitute their conclusion for that of the decision maker in the drawing of an inferred fact, would similarly apply to inferences drawn by administrative tribunals.

All four matters were dismissed.

Reviewing these decisions, gives rise to the belief that the pre-*Dunsmuir* third 'patently unreasonable' standard may itself still have supporters on the Federal Court bench who prefer certainty and simplicity of a *Housen* factual review over a more robust reasonableness analysis.

Part III: The Future - How Does Vavilov Affect Access to Justice for Marginalized and Racialized Communities

With the outstanding scholarship already in this area of the law, we move to the question of where do we go from here? Perhaps in doing so we can also tie up some loose ends from the topics of the panel discussion.

a) Remedies - Brief Comment on the Relationship Between Vavilov and Doré

In her paper, written shortly after the release of the *Vavilov* decision, Jamie Chai Yun Liew, was critical of Vavilov's silence on Doré writing:

> Advocates may want to push hard on the door to call for a return questions related to the Charter to be considered constitutional questions. Shoving some Charter questions into reasonableness review has, in my view, diminished not only the ability of marginalized persons access to their rights under the Charter, but also reduced access to a more robust assessment that others, outside the administrative law context, garner whenever they turn to the Charter for remedies. In this way, if you are asking for Charter protection in an administrative law context, that protection is dampened or harder to grasp given the deference shown to decision makers.

Cheryl Milne, of the University of Toronto's Asper Centre, recently wrote a blog post *What Does Vavilov Mean for Constitutional Issues in Administrative Law?* engaging as well on this question, raising several uncertainties on questions such as whether *Charter* interpretations fall under *Vavilov's* reasonableness framework and who bears the onus of demonstrating reasonableness.

So far, there has not been a meaningful attempt to challenge the interpretation of Doré in the immigration context since *Vavilov.* In our review, thus far, two cases: (1) an Immigration Division matter, *Taino,*[26] where a Charter breach was found in a release decision (subsequently overturned by the FC with no reference to Doré) [27]and (2) the Federal Court's stay of removal case in *Revell.*[28] Neither case engaged in a standard of review analysis with respect to the *Charter* issues raised.

b) The Fear of Artificial Intelligence and Templated Decisions

There is a real concern in the realm of Canadian immigration and refugee law that the Government has made small but visible steps to converting decisions away from human officers and to Artificial Intelligence-based decision-makers. Such a system would significantly reduce costs and the efficiency of immigration officers, particularly when assessing overseas visa applications, where demand is often high and refusal rates correspondingly low.

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[26] *Taino v Canada (Citizenship and Immigration)*, 2020 CanLII 23912 (CanLII) at para 82.
[27] *Canada (Public Safety and Emergency Preparedness) v. Taino*, 2020 FC 427 (Diner J.)
[28] *Revell v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 716 (CanLII) (Shore J.) at para 18.

With *Vavilov* providing the 'roadmap' so to speak to render a reasonable decision and Courts appearing to be uncomfortable weighing into standalone procedural fairness issues, could we see more tribunals curate template decisions that withstand review.

Canadian Immigration Lawyer Mario Bellisimo has written about this potential:

> Predictive analytical tools built on biased data sets have the potential to offend procedural fairness, given in particular that they may not be impartial as required by the leading Supreme Court of Canada decision in Baker. Even where an immigration official ultimately renders the final decision on a study permit application, it may be argued that the individual relied on or was influenced by an initial or proxy decision made by biased technology. This argument similarly applies to DOJ counsel and IRCC legal analysts who rely on research and legislative data produced by a predictive analytic tool. This final point is particularly important, given that discretionary decision making may be ultimately displaced from front-line immigration officials. Can an immigration applicant fully participate in the decision-making process moving forward?[29]

This is a question that will need to be closely examined in the future.

Another trend is the possibility of an 'administrative chill' in the kind of positive disagreement within case law that eventually leads to political decision-makers resolving the issue by changing administrative law and policy.

If 'internal consistency' and avoiding internal discord become the norm of reasonableness review, you may see more Tribunals in immigration be unwilling to apply discretion, preferring to follow existing frameworks and uphold problematic decisions. I am currently litigating one such matter where the Federal Court's decision in *Gill v. Canada (MCI)* 2020 FC 33, a decision containing what appears to be on the face, problematic statutory interpretation, has been applied by several IAD tribunals in an almost automatic manner, likely in fear of the type of divergence, I submit, that can also be healthy in a functioning democracy.

Decisions in many areas of immigration law have become more *pro forma* since *Vavilov*, which hinders the ability of those affected in many cases to truly understand or seek remedy.

c) A Lack of Justification - Federal Court Leave Decisions

[29] Mario Bellissimo, *Legal and Practical Challenges to Individual Assessments of Study Permit Applicants,"* Law Society of Ontario, 27th Immigration Law Summit, at page 15.

For one, Federal Court judges are not required to issue reasons for why the standard for a leave decision, 'an arguable case for leave,' is met or not met. In the context of low leave rates, does the culture of justification need to extend to leave decisions themselves?

d) Where Does the Administrative State Fall Short?

"Intersectionality as a framework for the study, practice, and teaching of public administration is a disruption of the norm. The willingness of public administration, as a field, to embrace inclusive perspectives, ideologies, and methodologies is an alternative tool to combat the cruel, inhumane, and in some cases deadly consequences persons with intersecting and marginalizing identifies face when dealing with state actors and institutions. Moreover, a public administration discipline that does not interrogate or challenge policy actions and administrative decisions that are unjust is complicit in the marginalization of vulnerable people and communities across society."

- **Brandi Blessett, Ph.D.,** *Rethinking the Administrative State through an Intersectional Framework*[30]

Where does *Vavilov* leave racialized applicants and practitioners?

Although *Vavilov* has caused shifts in administrative law analysis that may be positive, the administrative state still has shortfalls that could result in negative effects. Professor Jamie Chai Yun Liew has identified some potential shortfalls or areas of concern: a weakened concept of the rule of law that places great faith in administrative decision-makers, and inconsistency that may have a disproportionate burden on applicants.[31] Professor Liew provides this commentary: "For some statutory interpretation questions, we should not have to wait for administrative decision makers to create discord or put the burden on applicants to demonstrate dispute, especially when such interpretations have profound impact on the lives of marginalized communities."[32]

The administrative state's current shortfalls are not unique to the post-*Vavilov* state of the law—some scholars have drawn attention to a longstanding lack of attention on the impact of administrative law on marginalized communities and called for more critical analysis.

In his 1985 paper *"The Rise and Ruse of Administrative Law and Scholarship"*, Professor Allan C. Hutchinson of Osgoode Hall Law School of York University encouraged legal scholars to expand the scope of their analysis:

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[30]Brandi Blessett, Ph.D., *Rethinking the Administrative State through an Intersectional Framework*, (undated) https://www.maxwell.syr.edu/uploadedFiles/conferences/minnowbrook/papers/brandi-blessett-rethinking-the-administrative-state-through-an-intersectional-framework.pdf

[31] Liew at page 423.

[32] Liew at page 423.

> To concentrate so much time and attention on the courts is to reinforce the mistaken belief that the courts lie at the heart of the legal and political process. Such misdirected activity diverts necessary talents away from the critical scrutiny and improvement of other modes of bureaucratic control. Moreover, the academic preoccupation with judicial review insulates and shields the real sources of bureaucratic maladministration from sustained exposure and eradication. A combination of theory and action is demanded.[33]

Since then, legal scholars and practitioners have engaged in theory and action, but some say that more critical analysis is needed. As Bijal Shah (Associate Professor at Arizona State University Sandra Day O'Connor College of Law) argues in *"Toward a Critical Theory of Administrative Law"*, "administrative law is missing a robust tradition of critical legal studies."[34] Although administrative law has a significant impact on some of the most marginalized among us, whose lives can be completely transformed or upended by an Immigration and Refugee Board or human rights tribunal decision, there is a lack of attention on the human impact of this. In the United States, Shah says that projects seeking to highlight the human experience of administrative law, focusing on implications on marginalized communities, are often devalued on the basis that they are "marginal" to administrative law. Far from being marginal, this analysis is critical and central – it can help us identify and better understand gaps and how to better serve all who are impacted by the administrative state, including marginalized communities.

We can look to the work of Shah and others in the United States for guidance on how to deepen our critical analysis of Canadian administrative law post-*Vavilov*.

e) Looking to the South for a Critical Perspectives

I can't think of a single component of administrative design that isn't ripe for a richer critical perspective.

– ***Bijal Shah***

At a certain point in time, we will need to engage and reconcile clients who see the administrative state scrutinizing them, refusing them and putting barriers, only for a judicial review process to emphasize that a review of this decision or process is not a treasure hunt for mistakes. The administrative state does not impact individuals equitably, and this is true not only in Canada, but also in the United States. Scholarship from the south provides critical perspectives

[33] Allan C. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48:3, Mod L Rev at page 340.
[34] Bijal Shah, "Toward a Critical Theory of Administrative Law", Symposium on Racism in Administrative Law, Yale J on Reg (30 July 2020).

that shed light on the deficiencies in the administrative law and legal scholarship in Canada and the impact of this on racialized communities.

Shah's *"Toward a Critical Theory of Administrative Law"* from the Yale Journal on Regulation's 2020 Symposium on Racism in Administrative Law[35] is an illuminating starting point for exploring the need for critical theory in administrative law. In it, she critiques current administrative law scholarship in the United States for lacking critical legal analysis and invites fellow administrative law scholars to explore a nuanced critical approach. She encourages analysis that views critical theory as internal to administrative law, rather than a separate subject.

Other pieces from this symposium also provide critical perspectives that are useful to Canadian administrative law. In *"Decolonizing Chadha,"* Professor Rebecca Bratspies brings to light the racial subtexts in leading American administrative law cases, pointing out the dangers of excluding this key racial context from decisions in the name of legal neutrality. Bratspies asserts that this exclusion is a political choice that standardizes the perspective of privileged white middle-class men as "value-free, objective and neutral."

Bratspies draws upon Kimberlé Crenshaw's concept of "perspectivelessness mode" in legal analysis. Crenshaw describes this concept in *"Toward a Race-Conscious Pedagogy in Legal Education"*: "Dominant beliefs in the objectivity of legal discourse serve to suppress the conflict by discounting the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political, or class characteristics".[36]

Bratspies asserts that this is a persistent problem in administrative law, in courts and in classrooms: "Students are introduced to administrative law not as the frontline of social struggle, but as a highly technical, arcane field whose purpose is to apply neutral, *a priori* rules."[37] Bratspies' critical perspective reminds us of the dangers of excluding social and racial context in administrative decision-making and analysis – it can obscure systemic injustice and keep us from seeing the impact of the administrative state on marginalized communities.

Critical analysis that includes social and racial context is essential to fully understand administrative law's gaps and shortfalls. One framework that has been used in American administrative law scholarship is Critical Systems Thinking (CST). In *"DACA Through the Critical Systems Thinking (CST) Lens: Unpacking Racialization in Administrative Law"*, Professor Raquel Muñiz employs a CST lens to examine a key US Supreme Court decision about DACA. Muñiz explains CST and its utility in administrative law scholarship:

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[35] Rebecca Bratspies, "Decolonizing Chadha", Symposium on Racism in Administrative Law, Yale J on Reg (28 July 2020).
[36] Kimberlé Crenshaw, ""Toward a Race-Conscious Pedagogy in Legal Education" (1988) 11:1, Nat'l Black LJ at page 2.
[37] Bratspies, *supra.*

> A critical tenet in CST is the identification of the boundaries that social actors draw to bound their systems, which allows for a critique of the boundaries, and to identify which elements are centered, excluded, or marginalized (i.e., neither included nor excluded) in the system.[38]

Muñiz's application of CST to administrative law highlights the fact that the legal system is seen as neutral, value-free, and autonomous, and CST challenges this. Muñiz criticizes the US Supreme Court's colourblind perspective and avoidance of the word "racism" or "racist" in the DACA decision, asserting that the Chief Justice's approach "consistently marginalized and "othered" recipients".[39] Regarding the DACA case and two other key US Supreme Court decisions regarding immigration, Professor Ming Hsu Chen points out the US Supreme Court's failure to acknowledge race as the defect in rationale for exclusionary measures.[40] Muñiz says that legal decision-makers create and apply law in various social contexts, and consideration of the human impacts of these laws is also imperative. Muñiz asserts that CST provides a way forward: "CST gives us hope for a tomorrow in which the laws and policies are crafted by those who are at the margins of the system but the demographics suggest will soon be at the center."[41]

Drawing this critical lens to our current context, perhaps *Vavilov* did not give direct rise to a set of facts that lent itself well to critical analysis or arguments on the racialized nature of Canadian immigration law. Still, it is our hope that given *Vavilov's* own silence in addressing how administrative law may have a disproportionate impact on marginalized immigrant communities, that this will be re-examined and re-centred in cases moving forward.

Just as *Vavilov* provides language that directs a reasonable decision to consider the context of a decision-maker's reasons, the policies and constraints which affect the analysis, similar care should be placed in the impact decisions have on individuals (para 133 of *Vavilov*) and the socio-economic context by which this may impact whether a decision is reasonable and fair. We find hope in several Federal Court of Appeal and Federal Court decisions we have reviewed for this paper, suggesting this social impact has not been lost on those writing decisions that may have broad, far-reaching impacts beyond academic circles.

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[38] Raquel Muñiz, "DACA Through the Critical Systems Thinking (CST) Lens: Unpacking Racialization in Administrative Law", Symposium on Racism in Administrative Law, Yale J on Reg (18 August 2020).
[39] Muñiz, *supra.*
[40] Ming Hsu Chen, "Race Masked in Colorblind Administrative Procedures" (20 November 2020), online: The Regulatory Review <https://www.theregreview.org/2020/11/02/chen-race-masked-colorblind-administrative-procedures>.
[41] Muñiz, *supra.*

Part IV: Conclusion: *Vavilov, One Year Later*, in Our Eyes

"Vavilov has pretty much a line for every outcome." - Yussif Silva, Edelmann and Co. Law Offices

To put it simply: we are still figuring it out. This is perhaps a non-conventional way to present our position alongside panels of experts, but this is the reality. *Vavilov* has left us with a clear checklist of what to inform our clients, but the academic analysis needs to be framed by the on the ground analysis. Most of our clients cannot afford the legal costs of the judicial review process, will truly never understand how this process works, and even if they are able to engage - be subject to a non-transparent leave process and a framework of ever-changing goalposts. Access to justice asks us to do more, racialized and marginalized clients as us to explain how this whole system works in practice.

Applying *Vavilov* meaningfully, means not only limiting discussions to academic circles but also creating accessibility for the communities for which these decisions impact. Our review of Federal Court of Appeal jurisprudence appears to highlight some common themes - that this Court is applying *Vavilov* in a robust way. More discrepancy exists at the Federal Court level, where various decision-makers have applied different sections of *Vavilov,* ultimately with a bit less of the framework, we presume was envisioned by the Supreme Court. We also see the schism of concerns over issues such as procedural fairness and how to distinguish between a substantive review of a decision.

Finally, administrative law has gaps, disconnects, and there are issues on the horizon that may bring concern to the very communities we seek to assist as it pertains to *Vavilov. Vavilov* will ultimately need to speak to these communities, reflect, it is to be accepted as a true, reasonable, framework for justification.