THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

IMMIGRATION ISSUES IN DEPTH 2023

PAPER 1.1

Broader Application and Implications: A Federal Court (Non-IRB) Case Law Year in Review for 2023

These materials were prepared by William Tao (with the research assistance of Jessye Kilburn) of Heron Law Offices, Vancouver, British Columbia for the Continuing Legal Education Society of British Columbia, December 2023.

BROADER APPLICATION AND IMPLICATIONS: A FEDERAL COURT (NON-IRB) CASE LAW YEAR IN REVIEW FOR 2023

I. Introduction

In 2023, amidst an ever-increasing caseload, the Federal Court of Canada rendered key decisions that reflect the shifting winds of change in this area of law. In this paper, I will review a handful of Federal Court (non-Immigration and Refugee Board ("IRB")) judicial reviews with a focus on decisions that were particularly impactful in terms of application and implications for our future practice. There is necessarily both subjectivity and imperfection in my attempts at reducing dimensionality in this way.

More specifically, the cases I have selected speak to the broader application of Federal Court case law, and the broader implications they may have on policy, legislative, and practice changes that

may follow in 2024.[1] Further, the application and implication relationship with decisions is a symbiotic one, as Federal Court case law may also shift in response to these broader technological, political, and societal shifts. I have organized the chosen cases into four case studies: (1) inadmissibility and the legal test for membership for espionage; (2) the legal test for granting H&C relief under section 25 on the *Immigration and Refugee Protection Act* ["IRPA"][2]; (3) mandamus and delay as abuse of process; and (4) new technological developments.

In my attempt at classification, I have made the difficult decision of excluding cases in critical areas, such as stays of removals, pre-removal risk assessments ("PRRAs"), permanent resident refusals, and study permit refusals. To call these cases merely routine would be a disservice and ignore the nuance and principles that these cases allow us to extract. Indeed, from a pure volume perspective, an area like study permit refusals could itself be its own paper.

II. Four Case Studies and Their Broader Application and Implications

A. Case Study 1: Inadmissibility, Membership, and Espionage

In my practice and in the Federal Court's caseload this year, I have noticed an uptick in inadmissibility allegations relating to proxy membership – specifically, based on association with universities that have allegedly trained spies who go on to work in Chinese government intelligence organizations. The question of proxy membership becomes whether someone is inadmissible for membership under s. 34(1)(f) of *IRPA* for being part of a university that trains students to work at a second organization which engages in espionage contrary to Canada's interests.

1. Geng: "Overzealous", "Overreaching", and Procedurally Unfair

In *Geng v. Canada (Citizenship and Immigration)*[3], Justice Mosley dealt with an inadmissibility finding against a university professor who may have taught English to future spies at China's Luoyang Foreign Languages Institutes. According to the immigration officer, the students were trained in foreign languages before going on to work in espionage as part of the "3/PLA", a division of the People's Liberation Army (PLA) responsible for signals intelligence. The officer found that Mr. Geng's employment as a professor at the university amounted to membership in the 3/PLA.

The Court set aside the officer's decision, calling it "overzealous" and "overreaching"[4]. Part of the decision focused on the officer's unreasonable treatment of the evidence relating to whether Mr. Geng was a senior officer of the PLA and the degree of proximity between the university and

---

1 As a short disclaimer, the views shared in the policy sections and final sections of each paper are an attempt to draw from current debate and discussion on the topics I have selected to represent a voice from a private practice. To the extent that they may represent personal views or perspectives, they represent only the views of the principal author, Will Tao and neither the views of Heron Law Offices (as a firm), nor Jessye Kilburn (as a research assistant).

2 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ["*IRPA*"]

3 *Geng v. Canada (Citizenship and Immigration),* 2023 FC 773 (CanLII), <https://canlii.ca/t/jxjl6>.

4 *Ibid* at paras 66-67.

government espionage organizations. Additionally, the Court found a breach of procedural fairness on the grounds that the procedural fairness letter had not been specific enough about key evidence.[5]

Although personal engagement in espionage under s. 34(1)(a) *IRPA* was not the basis for the officer's decision, a National Security Screening Division report had suggested that Mr. Geng himself had engaged in espionage. The Court commented on this allegation in *obiter*, stating: "for future reference and greater certainty, in my view there is no merit to the notion that the Applicant engaged in espionage merely by teaching English to members of the 3/PLA who were later assigned to monitor intercepted communications at listening posts in China or abroad."[6]

2. Case on the Radar: *Xu*

In *Canada (Public Safety and Emergency Preparedness) v. Xu*[7], the Court's decision is pending on a similar but potentially distinguishable case. According to the publicly available written materials, Mr. Xu was an instructor at the People's Liberation Army Information Engineering University (PLAIEU), and the Minister alleged that his employment at a university made him a member of the 3/PLA and affiliated organizations which engaged in espionage contrary to Canada's interests. The Immigration Appeal Division (IAD) found in favour of Mr. Xu, and the Minister is now seeking judicial review.

The IAD agreed with the Minister that the PLAIEU as an institution provides material support to 3/PLA cyber espionage objectives through recruiting and training students to work in computer networks operations units but focused on Mr. Xu's personal actions and knowledge. The Minister now argues that this was unreasonable in light of case law establishing that the test for membership is not measured on knowledge, contribution, or culpability. The Minister argues that this case is distinguishable from *Geng* because it does not raise procedural fairness issues. As well, in the Minister's view, this case is different because Mr. Geng was a civilian who taught English at a languages institute, whereas Mr. Xu was a lieutenant-colonel in the PLA who taught tactical military tactics and combat command courses to students at the PLAIEU. The outcome of this case will be one to watch for.

3. Broader Application and Implications: Risk Profiling under s.34(1)(a) and Standard of Proof for s.33 *IRPA*

One of the concerns raised by legal practitioners is the potential for the reasonable grounds standard to set a very low bar for serious inadmissibility such as espionage and could be the site of risk profiling and discrimination against Applicant's based on activities that have not occurred but may occur in the future.

---

5 *Ibid* at para 73.

6 *Ibid* at para 67.

7 (IMM-1424). Jessye Kilburn attended the hearing and obtained a copy of Court filings in this matter to form the basis of the summary in this section.

Section 33 *IRPA* currently states:

> **Rules of Interpretation**
>
> The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.
>
> (emphasis added)

The espionage provision under s.34(1)(a) *IRPA* states:

> **34 (1)** A permanent resident or a foreign national is inadmissible on security grounds for
>
> **(a)** engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
>
> (emphasis added)

In the case of an individual who is risk profiled as someone who may commit an act of espionage, this section gives rise to a challenge in statutory interpretation. The provision itself under (1)(a) speaks to the present act of engaging, whereas (1)(f) highlights that the organization's engagement could be current, past, or future.

> **(f)** being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).
>
> (emphasis added)

However, s.33 *IRPA's* use of language around facts that *may* occur could lead the s.34(1)(a) *IPRA* provision to be applied (in my view, overbroadly) against an individual merely for which there are reasonable grounds to believe they would commit an act of espionage in the future.

With the use of open source data, risk indicator flagging, and questions about how data feeds predictive analytics systems, one asks if a higher threshold is needed than simply reasonable grounds to believe. For example, if past data collected by Immigration, Refugees and Citizenship Canada ("IRCC") shows computer engineers from Iran who attended a particular university have had historically higher grounds of inadmissibility based on espionage, would that be reasonable enough grounds to find that they may commit espionage or would this merely be speculative. The line drawn here seems incredibly thin.

There is a strong argument that either this provision should be amended to alter the standard of proof to the civil standard used in civil proceedings and in most administrative proceedings[8] or for a Court to engage with and heed the words of the Federal Court of Appeal in *Charkaoui (Re)*[9] at paras 105-107:

> [105] In the case at bar, inadmissibility must be based, under section 33 of the IRPA, on the Minister's reasonable grounds to believe that the acts or omissions referred to in sections 34 to 37 have occurred, are occurring or, if preventive considerations are involved, may occur. It is necessary, therefore,

---

8 For full disclosure, I was part of a CILA consultative committee where Barbara Jackman proposed this idea.

9 *Charkaoui (Re)* (F.C.A.), 2004 FCA 421 (CanLII), [2005] 2 FCR 299, <https://canlii.ca/t/1jdz9>

> that a reasonable person, placed in similar circumstances and with the same facts, would arrive at the same belief. Thus, according to the cases, the "reasonable grounds" standard, applied to past or current wrongful acts, is not too minimal or weak a standard. It is sufficient.
>
> **[106] As to the preventive aspect, facts that might occur, the standard may *prima facie* seem too weak and consequently inadequate for the protection of individual rights since it is combined with a possibility, and not a probability, that the facts will occur. While it is true that the occurrence of the facts is stated in terms of possibility, the designated Judge was right in finding that there ought to be a serious possibility that these facts might occur and that this serious possibility should be assessed on the basis of reliable, credible evidence: see paragraph 128 of his decision.**
>
> [107] In fact, the situation in this case resembles that found in *Suresh*, in which the Supreme Court of Canada had to analyse the concept of "danger to the security of Canada". At paragraph 88 of the decision, the Court concludes that there **"must be a real and serious possibility of adverse effect to Canada".** In the case at bar, we are of the opinion that there must be a real and serious possibility that the injurious facts alluded to in sections 34 to 37 would occur. When the notion of "possibility" is defined and circumscribed in this way, and its existence is to be assessed on the basis of reasonable grounds, we do not think that the statutory standard adopted for preventive intervention to protect national security is unreasonable or in breach of the principles of fundamental justice.
>
> **(emphasis added)**

The current standard of proof for acceptance of evidence is in essence the same standard for issuing an arrest or search warrant, which do not align with the high stakes of immigration such as the removal of a refugee to a place of persecution or long-term family separation pending ministerial relief.

B. Case Study 2: The Right H&C Test? Comparative vs. Exceptional

The Federal Court continues to develop its s.25 *IRPA* humanitarian and compassionate (H&C) grounds case law around when it is unreasonable for an officer to require applicants to establish exceptional and/or comparatively compelling circumstances.

1. Past Precedents in Case Law

Federal Court judges have weighed in on this question in various ways over the past several years. To give a few salient examples, in the 2018 case of *Apura*[10], Justice Ahmed found that basing an H&C decision on the absence of “exceptional” or “extraordinary” circumstances was the wrong legal standard.[11] In 2019, Chief Justice Crampton held in *Huang*[12] that *Apura* was wrong in law and that an H&C applicant must demonstrate circumstances that are exceptional compared with

---

10 *Apura v. Canada (Citizenship and Immigration),* 2018 FC 762 (CanLII), <https://canlii.ca/t/ht9hw>

11 *Ibid* at para 23.

12 *Huang v. Canada (Citizenship and Immigration),* 2019 FC 265 (CanLII), <https://canlii.ca/t/hxv2r>

other applicants for permanent residence.[13] Later in a 2019 decision *Damian*, Justice McHaffie found that although s. 25(1) of *IRPA* functions as an exception, the Supreme Court majority in *Kanthasamy*[14] had rejected the use of "exceptional and extraordinary" as a heightened threshold. He also found that it was unreasonable for the officer to compare the applicant's circumstances to the rest of the population of her country of origin.[15]

2. Development of Case Law in 2023

The ongoing development of this case law has continued this year, with several decisions attempting to thread the needle to distinguish between a comparative analysis (reasonable) and an exceptionality test (unreasonable).

For example, in *Sukan*[16], Madam Justice Elliot found that while an officer can compare an applicant's experience of country conditions to others in their country of origin, it is unreasonable to then conclude that the applicant does not meet the threshold of being "exceptional."[17]

In *Bhujel*[18], Justice Strickland found that it is reasonable to compare applicants' establishment to others in Canada, and that this comparative approach does not equate to a finding that they failed to show exceptional establishment.[19]

In *Farhat*[20], Justice Régimbald agreed, while adding the caveat that "comparison must not supplant the real test, which is a contextual search for circumstances that excite in a reasonable person, in a civilized community, the desire to relieve the misfortune of another."[21]

On the other hand, in *Sharma*[22], Chief Justice Crampton has maintained that applicants must establish misfortunes that "resonate with materially greater force, relative to other applicants."[23]

---

13 *Ibid* at para 20.

14 *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61 (CanLII), [2015] 3 SCR 909, <https://canlii.ca/t/gmgsk>

15 *Damian v. Canada (Citizenship and Immigration),* 2019 FC 1158 (CanLII), [2020] 1 FCR 659, <https://canlii.ca/t/j2cx4>

16 *Sukan v. Canada (Citizenship and Immigration),* 2023 FC 45 (CanLII), <https://canlii.ca/t/jtw63>

17 *Ibid* at para 25.

18 *Bhujel v. Canada (Citizenship and Immigration),* 2023 FC 828 (CanLII), <https://canlii.ca/t/jxn86>

19 *Ibid* at para 57.

20 *Farhat v. Canada (Citizenship and Immigration),* 2023 FC 1427 (CanLII), <https://canlii.ca/t/k0ssx>

21 *Ibid* at para 30.

22 *Sharma v. Canada (Citizenship and Immigration),* 2023 FC 1396 (CanLII), <https://canlii.ca/t/k0q5d>

23 *Ibid* at para 22.

3. Broader Application and Implications: Implications of Reduced Targets and an Unclear Test

The legal standard for H&C decisions will be an area to watch over the next few years, with the recently released levels plan continuing to decrease targets for H&C permanent residents[24] which may inevitably lead to more refusals.

For example, if political and policy changes align so that the proposed amnesty for out of status individuals in Canada becomes a removal program instead, one can very much foresee a rise in the number of applicants for H&C grounds. A similar impact will be felt if the thresholds to apply for permanent residency under programs such as Express Entry remain high and out of reach for the many applicants who have spent years in Canada as students and workers but are unable to obtain invitations to apply for permanent residency.

C. Case Study 3: Mandamus, Delay as Abuse of Process, and Data

1. Mandamus Cases in 2023

Mandamus cases in 2023 have focused on two factors of interest – remedies and the role of prejudice in the legal test for whether a writ of *mandamus* should be issued.

In *Farah*[25]*,* Madam Justice Go granted the judicial review of a ministerial relief application for a Somalian applicant who had been found inadmissible under s.35(1)(b) *IRPA* for being a senior official under the Siad Barre government. The Applicant had obtained a positive PRRA and as a parent to two Canadian citizens, suffered both psychological harm and family separation from loved ones in the United States and Somalia while waiting for a decision in Canada. The Minister did not explain why additional time was needed to render a decision in this case.[26] The dispute in this matter involved the timeline for resolution, as the Respondent prior to the hearing presented a plan that would have taken 150 days. Justice Go found that the proposed timeline could render a delay of up to 465 days with disclosure and 330 days without.[27] Justice Go adopted the Applicant's timeline of 120 days to render a final decision on the ministerial relief application and agreed with the Respondent's proposal for $5,000 in costs.[28]

Meanwhile in *Jahantigh*[29]*,* Justice McHaffie heard a judicial review application of an Iranian study permit applicant seeking to pursue a computer engineering PhD program in Montreal. His application as of December 2022 was delayed 38 months after initial application, and 24 months after his application was processed for "background checks." IRCC sent an 11th hour procedural fairness letter alleging security grounds, with the Court commenting that the timing could not

---

24 Government of Canada, Immigration, Refugees and Citizenship Canada - Notice – Supplementary Information for the 2024-2026 Immigration Levels Plan - Canada.ca. Online: <https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/supplementary-immigration-levels-2024-2026.html>

25 *Farah v. Canada (Public Safety and Emergency Preparedness),* 2023 FC 1354 (CanLII), <https://canlii.ca/t/k0l5h>

26 *Ibid* at para 26.

27 *Ibid* at para 24.

28 *Ibid* at paras 16, 28, 34.

29 *Jahantigh v. Canada (MCI),* 2023 FC 1253 (CanLII), <https://canlii.ca/t/k06c1>

have been coincidental.[30] The Court also did not agree with IRCC's attempt to argue that the security screening was conducted by a security partner and therefore evidence as to the cause of the delay could not be rendered.[31] Justice McHaffie found the mandamus request for continued processing moot[32], and indicated that the Court would not exercise discretion in engaging in this mootness issue[33] (applying the test in *Borowski*[34]*).* However, he held that the order requesting IRCC to decide the application was not moot.[35] Justice McHaffie rejected the Applicant's request for the application to be decided in a set time, given the procedural fairness letter[36], but instead uniquely chose to remain seized of the matter, requiring the Respondent to update the Court every 30 days until a decision is made. The Court chose not to address the costs concern until the matter was concluded.[37]

Finally, in *Chen*[38], Madam Justice Aylen dismissed the mandamus application of an international student from China who was applying for a PhD at the University of British Columbia. His study permit was submitted on 21 December 2021 and was provisionally approved in January 2022, with biometrics completed in July 2022. The Applicant made a second study permit application on 15 June 2022 and following some confusion in communication with IRCC, eventually withdrew this application. At the Court's request, an update was provided by IRCC on 9 June 2023 which indicated that the application was still undergoing security review. Meanwhile, the Applicant began the PhD program on a limited and remote basis in May 2022.[39] Madam Justice Aylen found that the issue of reasonable delay was to be addressed under the third *Apotex*[40] factor, and in exploring the legal test relied on the 2022 case of *Bidgoly*[41] to explore the three factors of this test. In addition to the length of the delay, the responsibility for the delay, and a satisfactory justification, Madam Justice Aylen also imported the requirement for the delay needing to result in significant prejudice.[42] This was also the language used by Justice Favel in *Bidgoly*.[43] Madam Justice Aylen found that notwithstanding the lack of the Respondent's explanation for the delay, the Applicant had been able to perform well in his studies thus far and that the remote time difference and anxiety did not amount to serious prejudice, in the absence of any medical

---

30 *Ibid* at para 4.

31 *Ibid* at para 5.

32 *Ibid* at paras 10-13.

33 *Ibid* at paras 14-24.

34 *Borowski v. Canada (Attorney General),* 1989 CanLII 123 (SCC), [1989] 1 SCR 342, <https://canlii.ca/t/1ft7d>

35 *Jahantigh* at para 26.

36 *Ibid* at para 28.

37 *Ibid* at paras 30-34.

38 *Chen v. Canada (Citizenship and Immigration),* 2023 FC 885 (CanLII), <https://canlii.ca/t/jz10r>

39 *Ibid* at paras 10-12.

40 *Apotex Inc. v. Canada (Attorney General)* (C.A.), 1993 CanLII 3004 (FCA), [1994] 1 FC 742, <https://canlii.ca/t/4nmr>

41 *Bidgoly v. Canada (Citizenship and Immigration),* 2022 FC 283 (CanLII), <https://canlii.ca/t/jmqk0>

42 *Chen* at paras 15-16.

43 *Ibid* at para 28.

evidence. Justice Aylen also found that UBC was not the only program for the Applicant to meet his educational objectives and there was no evidence that he could not seek accommodation. Madam Justice Aylen dismissed Chen's career concerns as speculative.[44]

This case dovetails nicely into my final case for discussion in this section, *Aboudlal*.[45]

To set the context for discussion it is important to start with *Abrametz,*[46] where the majority of the Supreme Court of Canada ("SCC") clarified the law for abuse of process in the administrative context, specifically where significant prejudice has come about due to inordinate delay. In refusing to *Jordan*ize[47] abuse of process[48] in the administrative setting, the Court set out a three-part doctrine for abuse of process - requiring the finding of inordinate delay, significant prejudice, and then an overall final assessment that considers whether the delay is manifestly unfair to a party or brings the administration of justice into disrepute. The Court highlighted numerous remedies for abuse of process, including *mandamus*. The Court found that *mandamus* can both be a remedy for abuse of process, but also for a party who believes they are facing *undue delay* and wishes to act before an abuse of process exists.[49]

Returning to *Chen,* and as I discussed in a blog published shortly after the decision,[50] it is difficult to reconcile how significant prejudice can be a mandatory part of a *mandamus* test, when the Supreme Court in *Abrametz* directs that *mandamus* can be a remedy engaged as a preventative measure before an abuse of process exists. This suggests a lower standard for prejudice may be more appropriate.

In *Aboudlal,* Justice Régimbald granted the judicial review and found an abuse of process occurred in the context of a citizenship application made by a Libyan citizen and permanent resident of Canada. The Applicant, Aboudlal applied in 2014 for Canadian citizenship. During the application process, it was uncovered that Aboudlal had not met the requisite residency days in Canada to apply. His application was suspended in 2016 and his citizenship application was refused in 2021.[51] Justice Régimbald found that even though the delay did not impair the Applicant's ability to respond and noted the Applicant did not meet the threshold for citizenship, the delay to decide and communicate the decision caused significant prejudice. This left him now ineligible to apply, being precluded until 2026 from applying due to the five-year bar.[52]

---

44 *Ibid* at para 20.

45 *Aboudlal v. Canada (Citizenship and Immigration),* 2023 FC 689 (CanLII), <https://canlii.ca/t/jx97f>

46 *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 (CanLII), <https://canlii.ca/t/jqbs7> ["*Abrametz*"]

47 *R. v. Jordan,* 2016 SCC 27 (CanLII), [2016] 1 SCR 631, <https://canlii.ca/t/gsds3>

48 *Ibid* at paras 45-48.

49 *Abrametz* at para 80.

50 Will Tao, "Chen and the Significant Prejudice Conundrum" *Heron Law Offices Blog,* (10 July 2023). online: <https://heronlaw.ca/chen-and-the-significant-prejudice-conundrum-in-temporary-resident-mandamus-cases/>

51 *Aboudlal* at paras 1-3.

52 *Ibid* at para 5.

Applying the *Abrametz* factors, Justice Régimbald found the over seven-year application process, specifically the period from after the suspension of the Applicant's citizenship application of five years, excessive. Justice Régimbald found IRCC's delay investigating and deciding the case was longer than necessary and lacked documentation in the Global Case Management System ("GCMS") notes.[53] Justice Régimbald found that a negative decision should have been received by 2016, and that failing to do so caused a disproportionate impact of a five-year bar extending to November 2026. He therefore concluded that the delay was inordinate. With respect to significant prejudice, Justice Régimbald found that this was caused by the delay in conducting the investigation, without demonstrating that they actively investigated during the application suspension period and agreed with the Applicant that they had been in essence double punished.[54]

Applying the third part of the test, Justice Régimbald concluded that the five-year delay was manifestly unfair and brought the administration of justice in disrepute, notwithstanding the Applicant's lack of clean hands.[55] Reviewing submissions from both the Applicant and Respondent, Justice Régimbald lands on setting aside the decision and directing that IRCC permit the application to be withdrawn so that he could apply at a new time of his choosing.[56]

2. Broader Application/Implications: What the *Mandamus* Data Tells Us

Based on data obtained from IRCC, I can gather a clearer picture of how *mandamus* cases have spiked with respect to total litigation.[57] While only the seventh most litigated type of file since 2018, 2022 did see the count rise significantly to the point that the last three years of *mandamus* cases make up 80% of the cases in the past five-years. *Mandamus* cases are also difficult to assess because of the high rate of resolutions prior to a Court's decision. Often during the *mandamus* case process, movement will be triggered on the file and lead to discontinuance. Indeed in 2022, 80% of all *mandamus* cases were discontinued and withdrawn at leave, with similar rates of 69.41% in 2023 (up to June 2023).

India, People's Republic of China, Iran, Nigeria, and Pakistan make up more than 50% of all *mandamus* judicial reviews filed, pointing at both volumes at visa offices (such as India) and security check processes (such as Iran and China) as major factors in these statistics. The statistics for Nigeria (where 32.32% of cases result in leave dismissal) and Vietnam (where 100% of the cases have been discontinued) lead to interesting questions about what cases are pursued to hearing and why.

---

53 *Ibid* at para 59.

54 *Ibid* at para 76.

55 *Ibid* at para 81.

56 *Ibid* at para 95.

57 Will Tao, "Mandamus Over the Years – A Stats Analysis: 2022 Spike + Increasing Discontinuance Rates" (23 August 2023), *Heron Law Offices* Blog, online: <https://heronlaw.ca/mandamus-over-the-years-a-stats-analysis-2022-spike-increasing-discontinuance-rates/> - it is to be noted that IRCC does not define 'at leave' in their data classification and it is unclear where discontinuances and consents after leave is granted are classified.

With the triaging of immigration applications likely to leave more complex applications pending human officer review, I predict delays will lead to more mandamus cases where unique remedies being sought. How delay as an abuse of process factors into the conversation will also be an interesting development to track.

D. Case Study 4: Technology Is Becoming a Problem

1. *Haghshenas* Toomanytology - Procedural Fairness and the Use of Chinook

Perhaps it is inappropriate to invent new words to describe this set of cases, but calling what has been probably the lowest point of the Federal Court's caseload this year a mere *ennealogy* would be doing a significant injustice. It is also unclear how many more cases are to come.

Starting from Justice Brown's decision in *Haghshenas*[58], there have been eight other cases on essentially identical facts. In six of these cases, the Applicants (through the same counsel) argued in the context of C-11 and C-12 LMIA-exempt work permit refusals that both the decisions rendered, and the Officer's use of Chinook were unreasonable and procedurally unfair. These cases are:

- *Raja v. Canada (Citizenship and Immigration)*, 2023 FC 719, - Ahmed J.[59]
- *Khosravi v. Canada (Citizenship and Immigration)*, 2023 FC 805, - Grammond J.[60]
- *Ardestani v. Canada (Citizenship and Immigration)*, 2023 FC 874, - Aylen J.[61]
- *Zargar v. Canada (Citizenship and Immigration)*, 2023 FC 905, - McDonald J.[62]
- *Shirkavand v. Canada (Citizenship and Immigration)*, 2023 FC 1022, - McDonald J.[63]
- Jamali v. Canada (Citizenship and Immigration), 2023 FC 1328 - Little J.[64]

The Applicants' arguments made in these cases are a bit hard to decipher in reviewing the decisions, but they amount to a position that a high degree of procedural fairness was owed to these applicants, that the Officer's challenged the credibility of the applicants and applied prejudicial reasoning.

In two other cases, Chinook arguments were not pursued:

- *Shidfar v. Canada (Citizenship and Immigration)*, 2023 FC 1241, - Go J.[65]

---

58 *Haghshenas v. Canada (Citizenship and Immigration),* 2023 FC 464 (CanLII), <https://canlii.ca/t/jwhkd>

59 *Raja v. Canada (Citizenship and Immigration),* 2023 FC 719 (CanLII), <https://canlii.ca/t/jxfdq>

60 *Khosravi v. Canada (Citizenship and Immigration),* 2023 FC 805 (CanLII), <https://canlii.ca/t/jxn8b>

61 *Ardestani v. Canada (Citizenship and Immigration),* 2023 FC 874 (CanLII), <https://canlii.ca/t/jxzb1>

62 *Zargar v. Canada (Citizenship and Immigration),* 2023 FC 905 (CanLII), <https://canlii.ca/t/jxxpc>

63 *Shirkavand v. Canada (Citizenship and Immigration),* 2023 FC 1022 (CanLII), <https://canlii.ca/t/jzcvg>

64 *Jamali v. Canada (Citizenship and Immigration),* 2023 FC 1328 (CanLII), <https://canlii.ca/t/k0l5d>

65 *Shidfar v. Canada (Citizenship and Immigration),* 2023 FC 1241 (CanLII), <https://canlii.ca/t/k05tz>

- *Koshteh v. Canada (Citizenship and Immigration)*, 2023 FC 1518 - Pallotta J.[66]

In the most recent decision of *Koshteh,* the Applicant attempted to argue that there was unreasonable delay, that the failure to disclose GCMS notes was a breach of procedural fairness, that the Applicant had a legitimate expectation to be treated the same as other applicants, and that the decision was arbitrary.[67]

The fact that nine cases received leave but then all were dismissed on essentially identical fact patterns is concerning in the context of a Court that is undergoing significant delays in determining leave and setting hearing dates. It is not a stretch to say this is an inefficient use of judicial resources, while also highlighting Justice Aylen's comment in *Ardestani* that the Applicant's attempt to re-litigate and transformed the process into an examination of discovery constituted an abuse of the Court's processes.[68]

However, ignoring all this, these cases do highlight a growing concern from applicants that Chinook-decisions are difficult to challenge through Federal Court processes. Unfortunately, none of these nine cases included any affidavit evidence introducing how Chinook works in practice. Indeed, in *Haghshenas,* there was also no indication that the decision even utilized Chinook processing.

Chinook, for those not as familiar with the term, is a digital processing tool utilized by IRCC to process and render decisions on immigration applications. IRCC's position is that this tool neither changes the traditional decision-making process nor utilizes artificial intelligence ("AI").[69] What it does is to extract the information of an application and place it into an excel or cloud-based spreadsheet so an Officer is able to process applications in bulk, on the basis of shared characteristics and without the need to review all the supporting documents and details in GCMS.[70] This has led to major efficiency gains for IRCC and template refusals for applicants.[71]

Justice Brown is factually correct in stating that Chinook decisions are made by a visa officer and not by software.[72] Indeed, the reference to AI is more suitably attached to IRCC's use of advanced analytics models which currently automate approvals and not refusals. Justice Brown's decision was adopted by other judges who found similarly that there is no evidence that the use of Chinook is a breach of procedural fairness.

---

66 *Koshteh v. Canada (Citizenship and Immigration),* 2023 FC 1518 (CanLII), <https://canlii.ca/t/k165k>

67 *Ibid* at para 5.

68 *Ardestani* at para 10.

69 IRCC, "CIMM — Chinook Development and Implementation in Decision-Making – February 15 & 17, 2022" (last modified: 10 May 2022). Online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-feb-15-17-2022/chinook-development-implementation-decision-making.html>

70 Will Tao, "Why the 30-Year Old Florea Presumption Should Be Retired in Face of Automated Decision Making in Canadian Immigration" (26 July 2023). Online: <https://vancouverimmigrationblog.com/why-the-30-year-old-florea-presumption-should-be-retired-in-face-of-automated-decision-making-in-canadian-immigration/>

71 IRCC, *supra* note 69.

72 *Haghshenas* at para 24.

However, a combination of the technology, automation (AI or not), and algorithms (such as advanced analytics or machine-learning) used can have impacts on how Officer's make decisions, and I submit that it should not be treated as a blanket immunity from interrogation as Justice Brown heavily suggested. Such an approach fails to consider both how these processing tools work, but also the potential of the way the tools inform the Officer to fetter discretion or reinforce automation or algorithmic bias. In short, the Court has yet to be presented with a full picture of how these tools work, and as such should express caution in making larger pronouncement going beyond the record. This cautious approach was also highlighted by Justice Little in *Jamali.*[73]

Indeed, IRCC's has openly acknowledged that process automation tools and automated decision-making systems (ADMs) can often be hard to distinguish from each other.[74] From our own research to-date, process and substance are indeed, inextricably intertwined. Justice Grammond's statement in *Khosravi* probably comes closest to where I land on the use of these tools. He writes:

> I note that Ms. Khosravi's application was "processed with the assistance of
>
> Chinook 3+". I do not know if the shortcomings outlined above result from the use of this tool. I will simply say that the use of assisted decision-making tools does not relieve officers from the duty to fully consider an application, most importantly the study plan. If the use of such a tool gives the officer a truncated vision of the application, the resulting decision may well be unreasonable.[75]

Unfortunately, the Applicant's best foot forward on Chinook and ADMs has yet to be heard by the Court but we hope in 2024, there can be greater clarity and transparency to allow the Court to engage in a more substantive way with concerns over IRCC's use of technology.

2. Project Quantum and Risk Indicators

Facts and Procedural History

In *Kiss*[76], the Applicants in the related proceedings were Hungarian citizens who had their electronic travel authorizations ("eTAs") cancelled before coming to Canada, preventing them from boarding their flights to Canada from Budapest, Hungary. The Applicants challenged both the authority of the Officer to cancel the eTAs under *IRPA* and alleged the decisions were discriminatory.[77] Canada Border Services Agency ("CBSA") were trained to detect indicators that travellers may be misrepresenting their purpose of travel. In both cases, at least one indicator was that the hosts (inviters) of the Applicants were successful Roma refugee claimants.

---

73 *Jamali* at paras 42-43.

74 Will Tao, "Guide de politique sur le soutien automatisé à la prise de décision version de 2021/Policy Playbook on Automated Support for Decision-making 2021 edition (Bilingual)" – see pages 66, 104, 118, 119 of Policy Playbook where this is discussed. Online: <https://vancouverimmigrationblog.com/tag/policy-playbook-on-automated-support-for-decision-making/>

75 *Khosravi* at para 12.

76 *Kiss v. Canada (Citizenship and Immigration),* 2023 FC 1147 (CanLII), <https://canlii.ca/t/jzwtx>

77 *Ibid* at para 1.

In both cases, an airlines "Budsec" employee notified a CBSA Liaison Officer in Vienna, Austria who made the decision to cancel eTAs based on multiple indicators.[78]

In seeking declaratory relief, the Applicants argued that the indicators were discriminatory pursuant to s.15 of the *Charter*[79] for targeting Hungarian-Roma travellers and argued as well that the indicator breached international human rights law, indicating in the litigation that they wished to curb this practice.[80] The Respondent, Minister, agreed with the procedural unfairness and unreasonableness of the decision and acknowledged that the association with refugees was not a sufficient justification to cancel the eTAs. The Minister disputed that this indicator was a sole, or even primary groundand opposed the granting of declaratory relief, given the access of ordinary administrative law remedies.[81]

As an interesting procedural note, in *Kiss,* the Minister had applied in writing for judgment setting aside the Officer's decision on the grounds of procedural fairness, remitting the matter back to a different decision-maker for redetermination. The Minister's motion was dismissed for judgment by Madam Justice Heneghan.[82] Then the Attorney General of Canada [AGC] also brough a motion, presumably at the Certified Tribunal Record stage, for non-disclosure of a portion of the Officer's reasons. This motion was later largely denied with some exceptions.[83]

The Kisses were initially assisted by Dr. Gábor Lukács, an advocate for air passenger rights. The Kisses attempted a motion in writing to appoint him as a special advocate pursuant to s.87.1 of the *IRPA* or as a security-cleared *amicus*. This was denied.[84]

The second *Szép-Szögis* judicial review commenced shortly after, and both applications went through a series of motions to produce further and better Certified Tribunal Records ("CTRs").[85]

During the production of the CTR records, redacted CTRs were transmitted to the Applicant's new counsel Benjamin Perryman and in the process, Dr. Lukács was able to manipulate the document to reveal the redacted information. The Minister then had to bring motions for interlocutory relief to safeguard the redacted information to prevent the disclosure of information.[86]

For those interested in the matter, Dr. Lukács appealed the Court's orders to prevent dissemination to the Federal Court of Appeal ("FCA"). The FCA dismissed the appeals and upheld

---

78 *Kiss* at paras 6-18.

79 The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <https://canlii.ca/t/ldsx> [the "*Charter*"].

80 *Kiss* at para 3.

81 *Ibid* at para 4.

82 *Ibid* at para 20.

83 *Ibid* at paras 21, 23.

84 *Ibid* at para 22.

85 *Ibid* at paras 22-27.

86 *Ibid* at paras 28-30.

the procedural fairness of the Court's interlocutory motions and refused to engage in an analysis of the *Charter* issues of freedom of expression raised by Dr. Lukács.[87]

A whole slew of other procedural motions – to seek an out of Court examination of the Officer, and to amend applications to bring a constitutional challenge to the CBSA's worldwide program followed.[88]

Ultimately, two issues were raised on judicial review: (1) whether the Officer lacked legal authority to cancel the eTAs?; and (2) whether the IOfficer's decision was discriminatory.[89]

Justice Fothergill's Decision

In addressing the first issue raised by the Applicants, Justice Fothergill was not persuaded that the Officer conducted a legally unauthorized examination, given the decision was made by an employee of Air Canada not the CBSA.[90] As such an action did not constitute an examination, and because CBSA liaison officers are authorized to cancel eTAs, the Court did not find that the Officer's lacked statutory authority to cancel the eTAs.[91]

On the second issue, after reviewing the extensive evidence from the Applicant showing both the application of similar exclusionary policies in other jurisdictions and information about Canada's border strategy and details of the eTA program (including a previous project called SARA), the Court was still not convinced. Justice Fothergill found that the evidence did not permit reliable conclusions about either the numerical extent of the issue nor that the program CBSA utilized was targeted at Hungarian-Roma applicants.[92] He found the burden was on the Applicants to demonstrate that the indicators amounted to discrimination in law and that they failed to do so.[93] He declined both to weigh in on the issues of international human rights violation and the Applicants' *Charter* argument.[94]

Finally, in terms of remedies, Justice Fothergill refused to issue declaratory relief, repeating again that the evidence did not establish the existence of a coordinated program of CBSA to refuse travellers abroad solely on their Roma ethnicity or their association with Roma refugee claimants in Canada.[95]

---

87 *Lukács v. Canada (Citizenship and Immigration),* 2023 FCA 36 (CanLII), <https://canlii.ca/t/jvklz>

88 *Kiss* at paras 31-34.

89 *Ibid* at para 35.

90 *Ibid* at para 45.

91 *Ibid* at para 47.

92 *Ibid* at para 48-73.

93 *Ibid* at para 74.

94 *Ibid* at para 75-76.

95 *Ibid* at para 80.

The Court ultimately rejected two proposed questions for certification raised by the Applicant.[96]

Implications

This case is notable for the sheer messiness of where litigation over the use of risk indicators (whether AI driven or not) is likely going. It is worth noting that in the entire decision, there was no mention of Project Quantum, the actual name of the CBSA program which (since the decision) has made it to the media's attention.[97]

In terms of procedural details and depth of evidence, including academic reports cited (Benjamin Perryman himself being a professor of law), this case is as robust as I have seen. It is hard to imagine how the Applicant could have obtained protected national security data regarding the statistics behind Project Quantum. Furthermore, what if Project Quantum was not only applied to Hungarian Romas but also several other "high risk" countries? What if the program more broadly applies to citizens of several "high risk" countries but statistically pulls more Romas off the plane than for other groups?

3. Chief Justice's Obiter in *Sharma* on Data Analytics

Returning to the earlier case of *Sharma* we discussed in the H&C section, one comment in *obiter* by the Chief Justice Crampton raises some interesting questions.

In *Sharma,* the Respondent Minister expressed concerns that the medical expert, Dr. Pilowsky, was not reliable and credible, reciting the Applicant's evidence, was not subject to validation, and crossed the line into advocacy.[98] Chief Justice Crampton noted the similarity between language in Dr. Pilowksy's past reports, although interestingly, did not cite a specific case where this was found.[99] A simple search in CaLII shows Dr. Pilowsky does appear in hundreds of IRCC cases, including many which appear to impugn her evidence and findings, but none where the Court expressed concerns over plagiarism.

Chief Justice Crampton then writes:

> Instead of inviting the Court to discount Dr. Pilowsky's evidence based on generalized aspersions, the Respondent may wish to conduct more rigorous analysis to support its submissions. Given the recent evolution of data analytics, this may not be a particularly significant burden.[100]

There is much to be unpacked in this *obiter* comment, but it does appear to be notice given by the Federal Court to parties of the existence of technologies (such as AI-based anti-plagiarism technology) and that either it will be used or is already being used. If the Court's comment on Dr. Pilowsky cannot be traced to a past decision, do they have their own internal

---

96 *Ibid* at paras 84-92.

97 Nicholas Keung, "How AI is helping Canada keep some people out of the country. And why there are those who say it's a problem" *Toronto Star,* (2 June 2023). Online: https://www.thestar.com/news/canada/how-ai-is-helping-canada-keep-some-people-out-of-the-country-and-why-there/article_ea4dc715-debf-50e1-94c2-fda48a91dd09.html

98 *Sharma* at para 32.

99 *Ibid* at para 33.

100 *Sharma* at para 34.

technology/resource to support this finding? Is the Court embracing judicial analytics as well in this nudge towards data analytics and how does that open the door for the parallel concerns (for example) that judicial decisions or certain judges are rendering like decisions? What if parties to the litigation themselves starting do so. The Federal Court's soon to be released "AI Notice" should start giving us some ideas on where this conversation is heading.[101]

4. Broader Application and Implication: Procedural Fairness in the Use of Automated-Decision Making ("ADM") Systems

The use, upgrade, and availability of new technologies raise a whole slew of issues with respect to application and implications. Given we are dealing with only non-IRB cases, we have not engaged in facial recognition technology, another area of burgeoning interest. We also know very little about the ways in which technology (such as AI) is being used in the security context. Indeed, national security is an exempted ground to the need to perform an Algorithmic Impact Assessment ("AIA") before introducing automated decision-making systems ("ADMs").[102]

However, we know that immigration is at the foreground of these systems. IRCC has published 7 out of 12 available AIAs and automates decision (utilizing machine learning) in areas as diverse as temporary resident visas, work permit extensions, and spousal sponsorship applications (among others).[103]

Through information released by the immigration department and through Access to Information requests, the immigration bar has learned that applicants to Canada sometimes trigger "risk flags" in the system without knowing it. Many have procedural fairness concerns about this practice, but so far, we have had little guidance from the Court.

With tools known as Chinook and Integrity Trends Analysis Tool, applications are searched for patterns of data that match criteria for worldwide "risk indicators" or region-specific "local word flags". Visa offices around the world can enter flags in the system to identify "observed trends" such as high numbers of falsified documents by a certain company. These flags are changing constantly and are not publicly disclosed because of program integrity concerns.

Decision makers are instructed to record steps taken in response to a risk flag and often to consult with an internal Risk Assessment Office or Unit. However, risk flags are usually not disclosed to an applicant if they file for judicial review or make an access to information request. Reviewing courts are not privy to the risk flags either.

---

101 Foror full disclosure, I am a member of the AI Working Group of the Federal Court and have co-founded a working group called AIMICI to look into these issues.

102 This is stated in the *AIA* and per conversation I have had with the Treasury Board Secretariat is self-declared and determined by the administrative tribunal seeking to implement the AI>

103 "The Algorithmic Impact Assessment (AIA) is a mandatory risk assessment tool intended to support the Treasury Board's Directive on Automated Decision-Making. An approved AIA from the Treasury Board Secretariat is required prior to a Federal Body deploying an automated-decision-making system. See: Canada, Algorithmic Impact Assessment tool (Ottawa: modified 25 April 2023). Online: https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/algorithmic-impact-assessment.html#toc3-1

In our view there are procedural fairness arguments related to the fact that risk flags are not disclosed to the applicant.

The overall test, as recently articulated by the Federal Court of Appeal, is whether "the procedure was fair having regard to all of the circumstances" and "whether the applicant knew the case to meet and had a full and fair chance to respond."[104]

The courts have recognized that procedural fairness rights owed to temporary resident applicants are at the lower end of the spectrum – nonetheless, there is still a procedural fairness obligation for the decision maker to notify an applicant about genuineness-related concerns and allow an opportunity to respond[105]. The case law carefully distinguishes genuineness concerns (e.g., fraudulent documents, veiled credibility findings) from concerns about the sufficiency of evidence (which do not attract a procedural fairness right to know and respond).

One concern is that reasons for decision may *state* that the application was refused for insufficient evidence when in fact a risk flag and genuineness concern also form part of the backdrop, without the applicant ever knowing or being able to respond.

Another concern is that even if concerns are disclosed to an applicant, not enough detail is given. For example, if an application is risk flagged because of an 'observed trend' about a pattern of fraudulent documents from other applicants, and if the officer wants to explicitly refuse the application on grounds of fraudulent documents or misrepresentation, a procedural fairness letter will probably be sent, and the applicant will be able to respond. However, in many cases, the concerns in the procedural fairness letter are so vague that the applicant does not know why their document is considered fraudulent – in other words, the information that led to the fraud-related flag is not disclosed to the applicant, nor is the fact that the concern arose from an automated system (as opposed to a decision maker's observation). An applicant may have difficulty knowing the case and being able to respond.

A third concern is that seeing a risk flag may create conscious or unconscious bias in the decision maker's mind, even if the decision is ultimately made on other grounds; however, unconscious bias is a notoriously hard argument to succeed on in judicial review (e.g., *I.P.P.*[106], where the Court rejected a bias argument against a decision maker who accepted zero percent of the refugee claims he heard).

III. Conclusion: Where Is the Federal Court Case Law Going In 2024?

I have **three bold predictions** about where Federal Court case law is going in 2024. I will briefly expand on them.

---

104 *Ahmed v. Canada (Citizenship and Immigration),* 2023 FC 72 (CanLII), https://canlii.ca/t/jv0bc at para 5.; *Canadian Pacific Railway Company v. Canada (Attorney General),* 2018 FCA 69 (CanLII), [2019] 1 FCR 121, https://canlii.ca/t/hrgf2 at paras 54-56.

105 *Iyiola v. Canada (Citizenship and Immigration),* 2020 FC 324 (CanLII), https://canlii.ca/t/j5pvc at para 16.

106 *I.P.P. v. Canada (Citizenship and Immigration),* 2018 FC 123 (CanLII), https://canlii.ca/t/hrjrg.

1. **Data-based decision-making and automation (both AI and non-AI) will increase as points of contention;**

I believe 2024 will see ramped up efforts to litigate the use of data-based decision-making in immigration at the Federal Court. This could come in many forms. As mentioned earlier, the Federal Court is in the process of drafting an AI Notice to the Profession to regulate the use of AI, including Large Language Models ("LLMs") in court submissions. Parties that utilize AI software may have to issue a disclosure notice about how software was used, which could be grounds for the Court to examine for example if submissions are being copied and pasted *pro forma.* One can foresee this having an application, for example in an argument for costs or perhaps in a legal test involving *clean* hands. The most likely grounds for dispute will likely be in (1) cases which argue that the use of ADMs has created delay; and (2) cases that continue to argue software and technology that truncate refusals. I suspect also that AI's usage will also extend far beyond merely IRCC to CBSA and the IRB.

From the private bar perspective, how do we challenge algorithmic decisions? Federal Court judicial reviews serve as a general barrier to the disclosure of new evidence, and CTRs will either exclude this disclosure or else. Actions to challenge ADMs would be complicated by the fact IRCC is currently automating approvals and not refusals.

Another final concern is whether these new forms of data – being able to predict a judge's biases and outcomes based on statistical analysis will transform the way cases are argued.[107] These types of arguments may also require creating more robust rules and procedures. The reasonable apprehension of bias test may need to be reframed moving forward if data is able to capture and highlight these biases with greater precision.

2. **Efforts will be made to reduce the backlog of Federal Court cases and hearings;**

With the Federal Court highlighting the rise in the number of cases in their recent report to the Bench and Bar Committee and acknowledging they are unable to meet statutory timelines[108], it seems inevitable that something must give.

There are rumblings of paper-based disposal of post-leave applications. However, such a decision would create obvious concerns as to who would get hearings and who would be denied hearings. Others have argued that the issue needs to be addressed at the front-end by IRCC, perhaps in creating an 'administrative processing'/mandatory reconsideration process before refusal. However, such a change would be such a drastic shift from the status quo and would likely be viewed as an effort to take away access and the right to judicial review in a way that clashes with legislative intent.

Any attempts to limit judicial review for a certain population or group, could also ignore the complexity that a visitor visa application - could be for someone with significant ties to Canada

---

[107] See e.g., Jena McGill and Amy Salyzyn, "Judging by the Numbers: Judicial Analytics, the Justice System and its Stakeholders" (2021) *44:1 Dal LJ 249*; Sean Rehaag, "Luck of the Draw III: Using AI to Examine Decision-Making in Federal Court Stays of Removal (11 January 2023)." Refugee Law Lab Working Paper (11 January 2023), Osgoode Legal Studies Research Paper No. 4322881, Available at SSRN: <https://ssrn.com/abstract=4322881> or <http://dx.doi.org/10.2139/ssrn.4322881>

[108] I reviewed the Federal Court of Canada, "Chief Justice's Update – October 24, 2023", IMM Bar Liaison Committee PowerPoint to inform this finding.

and a humanitarian purpose - and in a sense have a greater impact than a permanent resident application for someone with limited ties to Canada. Procedural fairness would have to be carefully safeguarded in any proposed move. All of this is occurring as well in a larger context where Applicants are becoming more aware and competent with immigration processes and may wish to rely on tools to assist with self-represented litigation, just as judicial review.

3. The Federal Court's Responsiveness Is Crucial During These Political Times

Immigration is inevitably political. Policy is slowing shifting in immigration from one of open doors and promised pathways to a direction of prudence and pragmatism. The statistical pyramid funnel from temporary residency to permanent residency is being interrogated, alongside the potential causal linkages to issues such as health care, housing, and food security.[109]

While systems are developed and built to presumably built to curb intake and slow down temporary residence numbers, the stagnation of permanent resident spaces will still lead to the need to both refuse temporary and permanent resident applications. Political attitudes towards immigration, largely borne from public opinion polls[110] and the work of economists[111], will also shift societal attitudes.

I would caution that this renders it even more important that the Federal Court take a responsive, communicative approach in delivering decisions – particularly towards the migrants who may face the increased post-decision political consequences – such as more expedient removals or stricter enforcement.

To me, how the Federal Court writes decisions in a manner that balances efficiency and explicability, and in responsive dialogue with the imperfections, discretion, and malleability inherent in administrative law will define greater success in 2024.

---

[109] See e.g. Wa Lone, "Canada caps immigration target amid housing crunch, inflation", *Reuters,* (1 November 2023), online: https://www.reuters.com/world/americas/canada-keeps-immigration-target-unchanged-next-2-years-amid-housing-crunch-2023-11-01/; Diane Francis, "Diane Francis: Immigration pushing housing, health care to the breaking point", *Financial Post,* (24 June 2023). Online: https://financialpost.com/diane-francis/trudeau-immigration-housing-health-breaking-point; Sarah Law, "Nearly all free food service users at Lakehead University in Thunder Bay are international students", *CBC,* (27 October 2023). Online: <https://www.cbc.ca/news/canada/thunder-bay/food-insecurity-international-students-thunder-bay-1.7006004>

[110] See e.g., Keith Neuman, "Public Opinion about Immigration & Refugees", *Environics* (23 October 2023). Online: <https://www.environicsinstitute.org/projects/project-details/public-opinion-about-immigration-refugees>

[111] See e.g. The Hub Staff, "Canadians are turning against immigration. Labour economist Mikal Skuterud on how to reform the system and reverse this trend", *The Hub,* (13 November 2023). Online: <https://thehub.ca/2023-11-13/canadians-are-turning-against-immigration-labour-economist-mikal-skuterud-on-how-to-reform-the-system-and-reverse-this-trend/>