

# THE GOOD, THE BAD, AND THE UGLY: A PRELIMINARY ASSESSMENT OF WHETHER THE VAVILOV FRAMEWORK ADEQUATELY ADDRESSES CONCERNS OF MARGINALIZED COMMUNITIES IN THE IMMIGRATION LAW CONTEXT

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*The Supreme Court of Canada's decision in Vavilov has modified the approach to judicial review in Canada. Does Vavilov address concerns by those representing marginalized communities in the administrative system? Grounding the discussion of this case in the immigration and refugee law context, this paper will look at positive opportunities (the good), missed opportunities (the bad) and potential issues to watch for (the ugly). First, a brief overview of the Vavilov framework will be provided. Then, the paper will provide some brief comments on the selection of the standard of review in Vavilov, specifically doing away with relative expertise (the good), the missed opportunity to revisit Doré (the bad), and confusion that might arise out of what constitutes a statutory appeal (the ugly). Third, I will assess the potential opportunities in the more robust reasonableness review (the good) in the immigration law context. Fourth, the paper will discuss how the court did not resolve the issue of how to address persistent discord adequately (the bad). Finally, I will provide my view on how the way the court addressed jurisdictional questions and the retention of relative expertise in the reasonableness review as potentially a site of messy confusion (the ugly).*

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*L'arrêt rendu par la Cour suprême du Canada dans l'affaire Vavilov a modifié l'approche relative au contrôle judiciaire au Canada. L'arrêt Vavilov répond-il aux préoccupations des personnes issues des communautés marginalisées dans le système administratif? Ancrant l'analyse de cette affaire dans le contexte du droit de l'immigration et du statut des réfugiés, l'auteure de cet article se penchera sur les occasions offertes (le bon), les occasions manquées (le mauvais) et des problèmes qui pourraient survenir (le méchant). Premièrement, on y lira une brève présentation du cadre de*

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*l'arrêt Vavilov. L'auteure fera ensuite quelques brefs commentaires sur le choix de la norme de contrôle dans cet arrêt plus précisément l'élimination du critère de l'expertise relative (le bon), l'occasion manquée de remettre en question les principes de l'arrêt Doré (le mauvais) et la confusion qui pourrait résulter de la question de savoir ce que constitue un droit d'appel statutoire (le méchant). En troisième lieu, l'auteure évaluera les occasions offertes par un examen plus rigoureux du caractère raisonnable des décisions (le bon) dans le contexte du droit de l'immigration. Quatrièmement, le lecteur y trouvera une discussion sur le fait que la Cour n'a pas réglé la question de la façon de traiter de manière adéquate le problème de la discorde persistante (le mauvais). Finalement, l'auteure exposera son opinion sur le fait que la manière dont la Cour a traité les enjeux liés à la compétence et la rétention de l'expertise relative comme critères d'examen du caractère raisonnable des décisions administratives pourrait créer une confusion des plus difficiles à clarifier (le méchant).*

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## 1. Introduction

When *Minister of Citizenship and Immigration v Alexander Vavilov*<sup>1</sup> was granted leave by the Supreme Court of Canada, counsel were informed that the appeal would be heard alongside *Bell Canada v Attorney General of Canada* and *National Football League et al v Attorney General of Canada*, instructing counsel:

The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases. To that end, the appellant and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review, and shall be allowed to file and serve a factum on appeal of at most 45 pages.<sup>2</sup>

This unorthodox instruction was followed by 27 written submissions by interveners<sup>3</sup> and a three-day hearing. This paper will examine whether *Vavilov* provides an adequate response to concerns by advocates in marginalized communities, particularly in the immigration law context. Among the 27 interveners were organizations that were conveying the effects administrative decisions have on Indigenous children, immigrants and refugees, prisoners, tenants, and those affected by environmental law.<sup>4</sup> What resulted was a 239-page decision with a consensus consisting of majority reasoning of seven judges (the Chief Justice and Justices Moldaver, Gascon, Côte, Brown, Rowe and Martin) and concurring reasonings of two judges (Justices Abella and Karakatsanis).

<sup>1</sup> 2019 SCC 65 [*Vavilov*].

<sup>2</sup> *Minister of Citizenship and Immigration v Alexander Vavilov*, 2017 FCA 132, leave to appeal to SCC granted, [37748](#) (10 May 2018), online: <<https://decisions.scc-csc.ca>>.

<sup>3</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (Factums of All Parties), online: <[www.scc-csc.ca/case-dossier/](http://www.scc-csc.ca/case-dossier/)>.

<sup>4</sup> Specifically, the interveners: Advocacy Centre for Tenants Ontario; Ecojustice Canada; Canadian Council for Refugees; Canadian Association for Refugee Lawyers; Community and Legal Aid Services Programme; First Nations Child and Family Caring Society of Canada; Parkdale Community Legal Services; Queen's Prison Law Clinic.

This paper does not provide an overall assessment as to whether or not this framework is suitable for the administrative system writ large. I leave that to my other colleagues.<sup>5</sup> I also point to others, like my colleague Anne Levesque, for example, to discuss how other marginalized communities are affected by this decision.<sup>6</sup> Instead, the aim of this discussion is to critique how this framework may play out in the specific context of immigration law, and also discuss the opportunities and shortcomings of the decision. This paper hopes to guide practitioners in how to apply the *Vavilov* framework and to invite discussion as to what we have to look forward to. I hope to add a specific perspective into discussions about administrative law, specifically the impact such decisions have on persons in the immigration law context. Given the court's willingness to receive feedback and consider academic writing on the subject leading it to justify a change in precedent, this piece hopes to help courts in the future.<sup>7</sup>

I put forward a number of caveats on my analysis below. The first is that I was co-counsel on a legal team intervening in the *Vavilov* case, on behalf of the Canadian Council for Refugees, and that I have practiced immigration and refugee law for 14 years. My perspective is informed by this experience. The second is that my analysis will be confined to the immigration, refugee and citizenship context. I recognize that there are different contexts in which my analysis may not seem applicable. Despite this, I think it is valuable to understand how administrative law is played out in a particular context to inform discussion on a wider level.

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<sup>5</sup> See e.g. Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) University of Ottawa, Faculty of Law, [Working Paper No 2020-09](#), online: SSRN <papers.ssrn.com/>; Gib Van Ert, "[International Law in Judicial Review After Vavilov](#)" (6 January 2020), online (blog): *GIBVANERT* <gibvanert.com>; Mark Mancini & Leonid Sirota, "[What Does Vavilov Stand For?](#)" (10 February 2020), online (blog): *Double Aspect* <doubleaspect.blog>; Nigel Bankes, "[Statutory Appeal Rights in Relation to Administrative Decision-Maker Now Attract an Appellate Standard of Review: A Possible Legislative Response](#)" (3 January 2020), online (blog): *University of Calgary Faculty of Law* <ablawg.ca/>; Mark Mancini, "[The Conceptual Gap Between Doré and Vavilov](#)" (2020) Dal LJ [forthcoming], online: <papers.ssrn.com/>; Mark Mancini, "[Vavilov's Rule of Law: A Diceyan Model and its Implications](#)" (2020) Can J Admin L Prac [forthcoming], online: SSRN <papers.ssrn.com/>; Gerard Kennedy, "[20 Things to Be Grateful For as Administrative Law Enters the 2020s](#)" (23 December 2019), online (blog): *Advocates for the Rule of Law* <www.ruleoflaw.ca/>; Mary Liston, Cristie Ford & Alexandra Flynn, "[Dear Administrative \(An\)Nihilists](#)" (1 June 2020), online (blog): *Administrative Law Matters* <pauldaly.openum.ca/blog/>.

<sup>6</sup> Anne Levesque, « Hors de contrôle : Les retombées de la décision *Vavilov* sur les enfants des Premières Nations » in François Larocque, Stéphanie Chouinard and François Charbonneau, eds, *Les mélanges en honneur de Pierre Foucher* (Ottawa: Presses de l'Université d'Ottawa, 2021).

<sup>7</sup> *Vavilov*, *supra* note 1 at para 9.

A brief overview of the *Vavilov* framework will be provided first. The paper will then briefly comment on the selection of the standard of review in *Vavilov*, specifically doing away with relative expertise (the good), the missed opportunity to revisit *Doré v Barreau du Québec*<sup>8</sup> (the bad), and what constitutes a statutory appeal (the ugly). Third, I will assess the potential opportunities in the more robust reasonableness review in the immigration law context (the good). Fourth, the paper will discuss how the court did not adequately address persistent discord (the bad). Finally, I will provide my view on how the way the court addressed jurisdictional questions and relative expertise as potentially a site of messy confusion (the ugly).

## 2. The Vavilov Framework

### A) The Facts

*Vavilov*, in brief, is a case about statutory interpretation of the *Citizenship Act*. Mr. Vavilov is the son of Russian spies. At issue was whether he is a Canadian citizen since he was born in Canada. Section 3(2)(a) of the *Citizenship Act* exempts children of, “a diplomatic or consular officer or other representative or employee in Canada of a foreign government” from the general rule that individuals born in Canada acquire Canadian citizenship by birth.<sup>9</sup> The Registrar found that because Vavilov’s parents were Russian spies, he fell into this exception and therefore was not a Canadian citizen. Vavilov applied for judicial review of this decision. The Registrar’s decision was dismissed by the Federal Court and allowed at the Federal Court of Appeal. The Minister of Citizenship and Immigration appealed this decision to the Supreme Court of Canada. The Supreme Court dismissed this appeal.

### B) Determining the Standard of Review

The *Vavilov* framework sets a default or presumption of reasonableness as the standard of review for all administrative decisions.<sup>10</sup> As with any presumption, one can rebut it and the Court sets out two types of situations where the standard of correctness applies.<sup>11</sup>

The first situation is where the legislation indicates that a standard of correctness applies.<sup>12</sup> The Court has identified two ways in which this

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<sup>8</sup> [2012] 1 SCR 395, 2012 SCC 12 [*Doré*].

<sup>9</sup> *Citizenship Act*, RSC 1985, c C-29.

<sup>10</sup> *Vavilov*, *supra* note 1 at para 16.

<sup>11</sup> *Ibid* at para 17, 23.

<sup>12</sup> *Ibid* at para 17, 24.

exception can be met: (1) with legislated standards of review;<sup>13</sup> and (2) the existence of the statutory right of appeal as a signal intending that appellate standards apply.<sup>14</sup>

The second situation is where “the rule of law requires that the standard of correctness be applied.”<sup>15</sup> The Court explains, “This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies.”<sup>16</sup> The *Vavilov* framework characterizes constitutional questions as, “Questions regarding the divisions of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters [that] require a final and determinative answer from the courts.”<sup>17</sup> Questions related to the *Charter* will garner a correctness standard if the question involves whether a legislative provision violates the *Charter*, but the Supreme Court did not reconsider the approach set out in *Doré* when it comes to “cases in which it is alleged that the effect of the administrative decision is being reviewed ... unjustifiably limit[s] rights under the [*Charter*].”<sup>18</sup>

The Court also stated that “the rule of law requires courts to have the final word with regard to general questions of law that are “of central importance to the legal system as a whole” and that these questions “require uniform and consistent answers.”<sup>19</sup> These questions are described by the Court as “of “fundamental importance and broad applicability”, with significant legal consequences for the justice system as a whole or for other institutions of government.”<sup>20</sup> The Court, however, cautioned that, “the mere fact that a dispute is “of wider public concern” is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue.”<sup>21</sup>

Finally, the rule of law includes questions regarding jurisdictional boundaries between two or more administrative bodies.<sup>22</sup> The Court

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<sup>13</sup> *Ibid* at paras 34-35.

<sup>14</sup> *Ibid* at paras 36-37.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at para 55.

<sup>18</sup> *Ibid* at para 57.

<sup>19</sup> *Ibid* at paras 58–59.

<sup>20</sup> *Ibid* at para 59.

<sup>21</sup> *Ibid* at para 61.

<sup>22</sup> *Ibid* at para 63.

stated, “The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions.”<sup>23</sup> Despite this category, the Court moved away from jurisdictional questions (true questions of jurisdiction or *vires*) as attracting correctness due to the difficulty courts have had in articulating the scope of questions of jurisdiction.<sup>24</sup>

The Court concluded by saying that “we would not definitively foreclose the possibility that another category could be recognized” requiring a correctness standard of review.<sup>25</sup>

### C) Reasonableness Review

The Court reminded us of the contextual analysis and factors listed in *Baker v Canada (Minister of Citizenship and Immigration)* that help determine the content of procedural fairness and the importance of reasons.<sup>26</sup> As the Court states, reasons are the “primary mechanism by which administrative decision makers show that their decisions are reasonable” and such reasons are those that, “demonstrate ‘justification, transparency and intelligibility’.”<sup>27</sup>

In reviewing reasons for a decision, one, “does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the “range” of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the “correct” solution to the problem.”<sup>28</sup> A reasonableness review also is not focused on the outcome but also on the reasoning process that led to the outcome.<sup>29</sup> Reasonableness review does not ask for a standard of perfection in the written reasons and administrative decision makers cannot be expected to deploy legal techniques the same way lawyers and judges do.<sup>30</sup> Reviewing courts must also pay “respectful attention” to the “specialized knowledge” provided in the reasons<sup>31</sup> and take care not to provide their own reasons to justify an outcome.<sup>32</sup>

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<sup>23</sup> *Ibid* at para 64.

<sup>24</sup> *Ibid* at para 65.

<sup>25</sup> *Ibid* at para 70.

<sup>26</sup> [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*].

<sup>27</sup> *Ibid* at para 81.

<sup>28</sup> *Ibid* at para 83.

<sup>29</sup> *Ibid* at para 87.

<sup>30</sup> *Ibid* at paras 91–92.

<sup>31</sup> *Ibid* at para 93.

<sup>32</sup> *Ibid* at para 96.

The Court identified two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the reasoning process; and (2) when a decision is untenable in light of the relevant factual and legal constraints.<sup>33</sup> With regards to internally coherent reasons, a reasonable decision is one where you can trace the analysis and the evidence to the ultimate decision.<sup>34</sup> Unreasonable decisions are marked by an irrational chain of analysis, where the conclusion does not follow from the analysis; or if the reasons, read with the record, do not make it possible to understand the reasoning;<sup>35</sup> and if there are clear logical fallacies (circular reasoning, false dilemmas, unfounded generalizations or an absurd premise).<sup>36</sup>

Reasonableness, is emphasized as a single standard applied to the diversity of administrative decisions, but diversity is accounted for by using contextual constraints to define what is reasonable in a particular administrative law context.<sup>37</sup> *Vavilov* identifies reasonable decisions as those justified in light of the legal and factual constraints that bear on the decision, using a number of elements to help decipher this: (a) the governing statutory scheme; (b) other relevant statutory or common law; (c) the principles of statutory interpretation; (d) the evidence before the decision maker and facts of which the decision maker may take notice; (e) the submissions of the parties; (f) the past practices and decisions of the administrative body; and (g) the potential impact of the decision on the individual to whom it applies.<sup>38</sup>

With regards to the governing statutory scheme, a reasonable decision must “comport with any more specific constraints imposed by the governing legislative scheme”<sup>39</sup> and this will depend on whether the language chosen by the legislature is “broad, open-ended or highly qualitative.”<sup>40</sup> Other statutory or common law can impose constraints, as precedents do.<sup>41</sup> The Court also provided that, “in some administrative decision making contexts, international law will operate as an important constraint” and that, “it is well established that legislation is presumed to operate in conformity with Canada’s international obligations.”<sup>42</sup>

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<sup>33</sup> *Ibid* at para 101.

<sup>34</sup> *Ibid* at para 102.

<sup>35</sup> *Ibid* at para 103.

<sup>36</sup> *Ibid* at para 104.

<sup>37</sup> *Ibid* at paras 89–90.

<sup>38</sup> *Ibid* at para 106.

<sup>39</sup> *Ibid* at para 108.

<sup>40</sup> *Ibid* at para 110.

<sup>41</sup> *Ibid* at para 112.

<sup>42</sup> *Ibid* at para 114.



With regards to principles of statutory interpretation, the “modern principle” involves reading the statute in its entire context and in its grammatical and ordinary sense, harmoniously with the scheme and object of the Act, and the intention of Parliament.<sup>43</sup> Reasonable decisions will consider the text, context and purpose of the provision.<sup>44</sup>

Reasonable decisions will consider both the evidence and submissions by the parties before the decision maker,<sup>45</sup> as well as past practices and decisions of the administrative body. On the latter, the Court emphasized that administrative decision makers are not bound by previous decisions of the administrative tribunal in the same sense that courts are bound by *stare decisis*. That said, decision makers should be concerned with general consistency, thereby justifying why their decisions may depart from longstanding practices or established internal authority.<sup>46</sup>

Reasonable decisions also consider the impact of the decision on the affected individual; where the impact of the decision on an individual’s rights and interests are severe, the reasons must reflect those stakes.<sup>47</sup>

### **3. A Few Comments on Selecting the Standard of Review**

#### **A) A Note on Relative Expertise (The Good?)**

The Court reasoned that “relative expertise” will no longer play an important role in the selection of the standard of review due to the division on what is expertise and how it should inform the standard of review.<sup>48</sup> This is a very welcome change. The perceived expertise of an administrative tribunal should not be a shield for review or a signal for more deference.

Lorne Sossin and Colleen Flood discussed the task of considering expertise and commented “the exact matrix of a particular decision maker’s expertise would be highly subjective and pose an unacceptable danger of like cases giving rise to inconsistent approaches” with the result leading to more litigation and greater judicial interference.<sup>49</sup> Sossin & Flood discussed this concern in the context of the now defunct pragmatic and functional approach and how seeking a “coherent uniformity of

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<sup>43</sup> *Ibid* at para 117.

<sup>44</sup> *Ibid* at para 120.

<sup>45</sup> *Ibid* at paras 125–128.

<sup>46</sup> *Ibid* at para 131.

<sup>47</sup> *Ibid* at para 133.

<sup>48</sup> *Ibid* at paras 27–28.

<sup>49</sup> Lorne Sossin & Colleen Flood, “The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law” (2007) 11:54 UTLJ 581 at 591.

approach comes at the expense of engaging in complexity and context” in actually determining expertise.<sup>50</sup> Indeed, expertise was characterized by David Mullan as one of the factors in determining the appropriate standard of review that “has now itself in effect become a presumption: that where the legislature has created a special regime for the determination of rights, privileges and interests of all kinds, the adjudicator or dispenser of those rights, privileges and interests is to be treated as an institution with expertise.”<sup>51</sup> Mullan suggests “this comes close to rendering expertise a tautology in the standard of review analysis: the legislative conferral of power also amounts to a conferral or recognition of expertise.”<sup>52</sup> Further, Mullan explains the challenges of relying on expertise as a factor in determining the standard of review:

What remains puzzling in all of this is why, even absent any statutory requirements for legal qualifications, a presumption of expertise exists ... It certainly cannot be based on empirical data nor do I suspect on informed intuition. Rather, it tends to be an add-on or make-weight reason deployed in support of other and more substantial justifications for differentiating between adjudicative tribunals and Ministers ...

On the whole subject of empirical support for regarding statutory decision-makers as expert, the conduct of applications for judicial review does not lend itself easily to the assessment of actual expertise. Thus, there has generally been resistance to the filing of affidavits and other forms of evidence to either prove or disprove the expertise of particular members of panels of administrative tribunals.<sup>53</sup>

Mullan goes so far as to say that the turn to presuming expertise, “has the potential to undermine seriously the whole movement in the direction of reasonableness as the predominant standard of review.”<sup>54</sup> Further, Sossin posits, “Expertise ... may be understood from many perspectives – as being specialized knowledge, specialized experience, specialized qualifications or specialized tasks, among others. Each perspective may call for a different line of inquiry, give rise to different evidentiary problems or problems of proof, and may lead to a differently tailored degree of deference.”<sup>55</sup>

Instead of presuming or determining or contextualizing what expertise a decision maker has within a framework aimed to provide a

<sup>50</sup> *Ibid* at 591–92.

<sup>51</sup> David Mullan, “Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen” (2013) 42:1&2 *Adv Q* 1 at 7.

<sup>52</sup> *Ibid* at 7–8.

<sup>53</sup> *Ibid* at 9.

<sup>54</sup> *Ibid* at 10.

<sup>55</sup> Lorne Sossin, “Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law” (2003) 27 *Adv Q* 478 at 492.

uniform approach to judicial review, the Court in *Vavilov* removes the factor of expertise entirely from the equation. This is to be applauded.

In the immigration and refugee law context, defining what is expertise has been problematic. While the Immigration and Refugee Board (IRB), for example, may be seen as an expert tribunal because it deals solely with immigration and refugee matters, advocates refute this.<sup>56</sup> Many members who are appointed to the IRB do not have past experience in immigration and refugee law, or even law for that matter. While some members acquire expertise over time, it is unclear how we measure this. For many of us, it is perplexing that such a body could be characterized as expert when in some cases, decision makers are not. This observation is not confined to the immigration law context. As EcoJustice Canada argued in their memorandum of fact and law, decision makers in the environmental law context were described as “rarely experts”.<sup>57</sup>

Recent public stories in the media about decision makers at the Refugee Protection Division (RPD) of the IRB provide harsh and extreme examples of how we cannot take for granted that a decision maker may not have expertise or exemplify it. One news story involved a refugee claimant whose claim is based on sexual assault and domestic violence.<sup>58</sup> During her hearing in April 2019, the refugee claimant was asked, “If he really wants you to be gone, why doesn’t he just kill you?” and “why spend all these years, just, like harassing you?”<sup>59</sup> The claimant’s refugee claim was rejected because the IRB Member found she was not credible.<sup>60</sup> The line of questioning was described by her lawyer as an “egregious violation” of the Tribunal’s guidelines set out for cases involving allegations of sexual assault and domestic abuse.<sup>61</sup> Sharry Aiken commented that when the guidelines are applied properly, they are effective in helping decision makers make fair decisions, but she also stated that despite the IRB’s significant efforts to improve its hiring policies and to overhaul its training procedures, there remain ineffective adjudicators at the IRB who lack the

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<sup>56</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ([Memorandum of Fact and Law of Intervener, Parkdale Community Legal Services](#)), online: <[www.scc-csc.ca/case-dossier/](http://www.scc-csc.ca/case-dossier/)>.

<sup>57</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ([Factum of the Intervener Ecojustice Canada Society](#)) at para 9, online: <[www.scc-csc.ca/case-dossier/](http://www.scc-csc.ca/case-dossier/)> [Ecojustice Factum].

<sup>58</sup> Brian Hill & Jamie Mauracher, “[Refugee judge asks woman why her husband wouldn’t ‘just kill’ her](#)”, *The Globe and Mail* (27 November 2019), online: <[globalnews.ca/news/](http://globalnews.ca/news/)>.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

competency needed to properly apply the law or the guidelines.<sup>62</sup> One lawyer, Preevanda Sapru, spoke of the ineffective measures taken by the administrative tribunal to deal with problematic approaches to decision making, stating this means that it “systemically creates trauma” for vulnerable claimants having to go through multiple hearings and denials of refugee protection.<sup>63</sup>

Following the initial media story, it was subsequently reported that the decision was appealed to the Refugee Appeal Division (RAD) wherein another administrative decision maker found issues with how the IRB Member questioned the claimant.<sup>64</sup> Despite this, lawyers are calling for an independent body that complaints can be made to,<sup>65</sup> perhaps akin to the Canadian Judicial Council. In response, the IRB has spoken with the Member and indicated it is establishing a team of decision makers with specialized training to decide gender-based claims. One lawyer commented that this is not good enough and that the impugned decision maker should be removed from his position to “promote faith in the administration of justice”; adding, that this Member would have received training in the past and that “it is neither sufficient nor effective to purport that a decision-maker who expresses such extreme biases can be given sensitivity training to redress them.”<sup>66</sup> Audrey Macklin opined that the IRB has “long hid behind” its obligation to preserve the independence of adjudicators as a way of avoiding its responsibility for dealing with their bad behaviour. More specifically, she has said that the IRB “interprets the scope of its jurisdiction as narrowly as it possibly can to deny that it possesses authority to deal with the complaints before it.”<sup>67</sup> She went further to state that there are some decision makers, past and present, who are ideologically opposed to the idea that Canada has an obligation to protect asylum seekers and who lack the empathy needed to adjudicate at the IRB.<sup>68</sup>

This is not an isolated incident. Another story reported about a different member of the IRB. In this news report, the Member stated that it “does not make sense” that a woman would keep a child conceived by

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Brian Hill & Jamie Mauracher, “[Calls for change at refugee board after woman asked why husband didn’t ‘just kill’ her](#)”, *Global News* (28 January 2020), online: <[globalnews.ca/news/](http://globalnews.ca/news/)>.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

rape, reigniting calls for an independent body to oversee administrative decision makers.<sup>69</sup>

These recent public reports provide normative understanding on two aspects of administrative decision making in immigration law. First, expertise is difficult to measure and cannot be taken for granted in an administrative tribunal, even if decision makers have a specific mandate involving one area of law. Second, even where there are measures in place to guide decision makers (i.e. guidelines and training), there is still the need for a robust judicial review to ensure decisions are made fairly. In some cases, we should not blindly trust that things will sort itself out within an administrative tribunal and leave an impacted individual with a poor decision. The courts and tribunals are mechanisms to ensure that marginalized persons are treated fairly. In this sense, the majority got it right in *Vavilov* by removing a faith-based approach to deference because of presumed expertise of decision makers where there is no assurance of such.

I want to note that doing away with relative expertise as a factor is not a nod to viewing judges as “experts” more than, or relative to, administrative decision makers, nor to suggest that there are no challenges that exist within the judiciary and judicial appointments. The focus on this discussion is whether expertise of an administrative decision maker should be considered, let alone presumed, when determining the standard of review.

Finally, while the majority in *Vavilov* seemed to remove the contextual analysis in the selection of the standard of review, many of the contextual elements were just shifted into the framework for a reasonableness review. For example, while relative expertise does not help decide what standard of review we should use, the Court has now asked reviewing courts to consider it in assessing whether a decision is reasonable.<sup>70</sup> This aspect will be discussed further below.

## **B) A Note on Doré (The Bad?)**

The Supreme Court of Canada, in *Doré*, provided the framework by which to assess whether an administrative decision violated a person’s *Charter* rights.<sup>71</sup> This framework has been criticized for extending a deferential

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<sup>69</sup> Brian Hill & Jamie Mauracher, “[Refugee adjudicator says woman’s choice to keep baby means rape never happened](#)”, *Global News* (11 February 2020), online: <[globalnews.ca/news/](http://globalnews.ca/news/)>.

<sup>70</sup> *Vavilov*, *supra* note 1 at paras 72, 92–93.

<sup>71</sup> *Doré*, *supra* note 8.

approach to tribunal Members and lessening *Charter* protections in the administrative law context.<sup>72</sup>

In my opinion, the Court missed an opportunity to revisit the framework in *Doré*, given that it altered the *Dunsmuir v New Brunswick* framework.<sup>73</sup> Despite this, the Court in *Vavilov* opened the door to revisiting the *Doré* framework, and upcoming *Charter* challenges will test how wide this door can be opened.<sup>74</sup> The Court acknowledged that constitutional questions attract the correctness standard and that these questions include those “regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters.”<sup>75</sup> However the Court also stated:

Although the *amici* questioned the approach to standard of review set out in *Doré* ... a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the [*Charter*] (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker’s enabling statute violates the *Charter*.<sup>76</sup>

It remains to be seen whether courts will draw this line between effect (referring to *Charter* values as factors to assess reasonableness against) and statutory violation (reviewing the impact on *Charter* rights on a standard of correctness). This division may seem difficult to distinguish in reality and should be done away with. Perhaps a return to the approach taken by the majority in *Multani v Commission scolaire Marguerite-Bourgeoys* is appropriate. This is an approach where section 1 of the *Charter* is the dominant approach to evaluating whether the administrative decision can be justified.<sup>77</sup>

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<sup>72</sup> See e.g. Evan Fox-Decent & Alexander Press, “The Charter and Administrative Law Part II: Substantive Review” in Collen Flood & Lorne Sossin, eds, *Administrative Law in Context* (Emond Publishing, 2017); Victoria Wicks, “What Ktunaxa can teach us about *Doré*” (2018) 31:2 Can J Admin L & Prac 217; Christopher Bredt & Ewa Krajewska, “*Doré*: All That Glitters is Not Gold” (2014) 67 SCLR 339; Audrey Macklin, “Charter Right or Charter Lite? Administrative Discretion and the Charter” (2014) 67 SCLR 30.

<sup>73</sup> [2000] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*].

<sup>74</sup> *Vavilov*, *supra* note 1 at paras 55–57.

<sup>75</sup> *Ibid* at para 55.

<sup>76</sup> *Ibid* at para 57.

<sup>77</sup> 2006 SCC 6.

Advocates may want to push hard for a return to having questions related to the *Charter* be considered constitutional questions. Relegating some *Charter* questions into reasonableness review has, in my view, diminished not only the ability of persons to access their *Charter* rights in administrative law settings, but has also reduced access to a more robust assessment that others, outside the administrative law context, garner when they turn to the *Charter* for remedies.

### **C) A Note on Statutory Appeals (The Ugly or an Opportunity?)**

My colleague Paul Daly raises an interesting question of how the Federal Court of Appeal should review decisions in an appeal on certified questions of law.<sup>78</sup> This question is especially relevant in the immigration law context given that immigration decisions can be judicially reviewed, when leave is granted, at the Federal Court and thereafter appealed, where a certified question is granted, to the Federal Court of Appeal.

It is true that the Federal Courts are “statutory courts”—that is, they are created by federal statute and have only the jurisdiction conferred on them by that statute” and that “[c]onstitutionally the authority to create the Federal Courts lies in Parliament by virtue of s. 101 of the *Constitution Act, 1867*.”<sup>79</sup> Describing the Federal Courts as statutory, however, is not sufficient since the Federal Courts hear both judicial reviews and appeals, and the *Federal Courts Act* (“FCA”) provides distinct pathways for both.<sup>80</sup> For example, while section 75 of the *Immigration and Refugee Protection Act* (“IRPA”) specifies that any decision or determination made under IRPA can be subject to judicial review under the Federal Court,<sup>81</sup> section 64 of the *Telecommunications Act* provides that a decision of the Canadian Radio and Telecommunications Commission (“CRTC”) can be appealed to the Federal Court of Appeal.<sup>82</sup> These two statutes demonstrate judicial reviews and appeals are distinct modes of challenging a decision with different procedural requirements.<sup>83</sup>

In my opinion, I do not view an appeal to the Federal Court of Appeal as a true statutory appeal. While an appeal to the Federal Court of Appeal

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<sup>78</sup> Daly, *supra* note 5 at 25.

<sup>79</sup> Craig Forcese, “Making a Federal Case Out of It: The Federal Court and Administrative Law” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) at 526.

<sup>80</sup> See e.g. *Federal Courts Act*, RSC 1985 c F-7, ss 18, 27 [FCA].

<sup>81</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 75 [IRPA].

<sup>82</sup> *Telecommunications Act*, SC 1993, c 38, s 64(1).

<sup>83</sup> Forcese, *supra* note 79 at 531.

is found in statute, the appeal is not as of right. Further, it is an *appeal of a judicial review* at the Federal Court and one that is granted only after leave is sought on a certified question. The *Vavilov* decision, however, provides little guidance on how statutory appeals of a judicial review should be treated. The Court did not turn its mind to this intersection of appeal and judicial review and potentially opens the door for wider judicial discussion about what kind of appellate oversight the appellate courts have over the first-instance courts conducting judicial review.

Like my colleagues, I will be interested to see how the courts interpret what constitutes a statutory appeal given that the Court stated, “There is no convincing reason to presume that legislatures mean something entirely different when they use the word “appeal” in an administrative law statute ... Accepting that the word ‘appeal’ refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression[.]”<sup>84</sup> The Court acknowledged that many statutes provide both appeal and judicial review mechanisms, indicating two roles for courts.<sup>85</sup> However, 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 appeals of judicial reviews are possible; or in other words, appeals that flow from a court that has reviewed the decision of an administrative decision maker. The Court does acknowledge that some statutory provisions give courts an appellate function: “Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *FCA*, 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[.]”<sup>86</sup> The Court does not mention section 27 of the *FCA* which outlines “Appeals from Federal Court”<sup>87</sup> or section 74 of *IRPA*, which states:

Judicial review is subject to the following provisions:

(d) subject to section 87.91, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.<sup>88</sup>

The Court, in using statutory appeals as a default indicator for correctness review, then leaves some questions unanswered and provides opportunities for counsel, especially in the immigration law context, to ask for more

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<sup>84</sup> *Vavilov*, *supra* note 1 at para 44.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* at para 51.

<sup>87</sup> *FCA*, *supra* note 80.

<sup>88</sup> *IRPA*, *supra* note 81.



appellate oversight and to widen the application of the certified question regime in the immigration law system.

#### 4. A Robust Reasonable Review (The Good?)

On the face of the decision, the majority appeared to show deference to administrative decision makers. The decision makes great efforts to explain that the judiciary should avoid unduly influencing administrative decision makers, that courts should respect the authority of the administrative decision maker, and that judicial review should be informed by a respect for the Legislature's choice to delegate decisions to the administrative state.<sup>89</sup> *Vavilov* certainly resembles the long struggle to strike a balance between responsive, flexible, fair and useful intervention, and ensuring the administrative state can function expediently, efficiently, with costs in mind, and respecting the choice of legislatures.<sup>90</sup> While the Court pays lip service to deference, as will be discussed below, the framework for reasonableness review adds some heft that is useful for those in the immigration and refugee law context.

##### A) Reinforcing Procedural Fairness in *Baker* and Calling for Robust Reasons

*Baker* is a seminal case in not only administrative law, but immigration law.<sup>91</sup> The case concerned a Black woman with Canadian-born children who had worked as a caregiver in Canada for some time but, for various reasons, had not secured permanent residence status. She applied for permanent residence on humanitarian and compassionate grounds under section 25(1) of *IRPA* but was denied, and the officer's notes provided disturbing rationale for refusing to grant the application.<sup>92</sup> The Supreme Court elevated the importance of considering the best interests of a child in assessing such immigration applications and also provided the foundational framework for how to assess whether a decision was undertaken in a procedurally fair manner.

The Court in *Vavilov* pointed to the principles espoused in *Baker* to inform how a reasonableness review is to be conducted, particularly those related to providing reasons. The majority stated: "the requirements of the duty of procedural fairness in a given case—and in particular, whether that duty requires a decision maker to give reasons for its decision—will impact

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<sup>89</sup> *Vavilov*, *supra* note 1 at paras 12–14.

<sup>90</sup> See e.g. *ibid* at para 29.

<sup>91</sup> *Baker*, *supra* note 26.

<sup>92</sup> See Constance Backhouse, *Clair L'Heureux-Dubé: A Life* (Vancouver: UBC Press, 2017), c 35, which examines the racial dimensions of the *Baker* decision.

how a court conducts reasonableness review.”<sup>93</sup> The decision reminds us of the importance of the *Baker* contextual analysis, which considers a number of factors to decide the content of procedural fairness.<sup>94</sup>

In tying the reasonableness review framework with the procedural fairness requirement to provide reasons, the Court has elevated not only the necessity or rationale for reasons, but also the quality of those reasons in judicial review. Indeed, the Court put it this way: “a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome.”<sup>95</sup> The prominent role that reasons play in this decision will, one hopes, lead to positive developments in the way that decision makers convey their decisions. For example, the Court states, “The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process.”<sup>96</sup> Indeed, this approach discourages reviewing courts from filling in the blanks, guessing or implying what the decision maker relied on to justify the outcome.<sup>97</sup> This is a clear move away from the Supreme Court’s approach in *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association* and *Agraira v Canada (Public Safety and Emergency Preparedness)* where consideration of “the reasons that *could be offered*” was acceptable.<sup>98</sup> Counsel can point to this more rigorous approach to call for more nuanced reasons and to discourage reviewing courts from supplementing, reading-in or speculating as to what reasons the decision maker relied on.

## **B) The Default of Reasonableness: A Thin Conception of Correctness**

### **1) Catching up with Reality: The Default of Reasonableness**

The default of reasonableness will not seem unfamiliar to immigration law practitioners. In fact, the first few post-*Vavilov* judicial reviews coming out of the Federal Court seemingly have taken this approach and do

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<sup>93</sup> *Vavilov*, *supra* note 1 at para 76.

<sup>94</sup> *Ibid* at para 77.

<sup>95</sup> *Ibid* at para 87.

<sup>96</sup> *Ibid* at para 80.

<sup>97</sup> One case from the Federal Court of Appeal has reinforced *Vavilov*, finding that we cannot presume the decision maker considered everything in the record and that there is now a higher standard for intelligibility and justification than before: *Farrier c Canada (Procureur general)*, 2020 CAF 25.

<sup>98</sup> 2011 SCC 61 at para 54 [*Alberta Teachers’ Association*]; 2013 SCC 36 at para 58 [*Agraira*] [emphasis added].

not look different from decisions preceding *Vavilov*.<sup>99</sup> At times, neither lawyers nor decision makers spend much time on the applicable standard of review and have, as a matter of practicality, acted as if reasonableness is the default in many situations. The Court in *Vavilov* acknowledged this as well.<sup>100</sup> The choice to remove the contextual analysis from the front end (the selection of the standard of review),<sup>101</sup> in my view, was practical given the difficulties in conducting the analysis, but also the reality that many practitioners simply did not bother with the analytical obstacle course.

## 2) A Welcome Move Away from “Range of Possible Outcomes”

While the majority stated, “Reasonableness review is methodologically distinct from correctness review,”<sup>102</sup> the framework they set out adds heft to the way reasonableness review has been conducted in the past. The Court should be lauded for moving away from the approach that *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*<sup>103</sup> encouraged, where decision makers would be satisfied with the reasonableness of a decision if it was simply “in the range of possible outcomes.”<sup>104</sup> This test fortified a deferential approach, especially if one could imagine possibilities that are remote or unlikely. The benchmark of “possibility” left very little to be considered unreasonable. As the Court in *Vavilov* explained, “It is not enough for the outcome of a decision to be justifiable.”<sup>105</sup>

The Court should be commended for bringing more scrutiny back towards the decision and its accompanying reasons, gently coaxing reviewing courts to pay “respectful attention” to the reasons.<sup>106</sup> As Daly discusses, however, it is unclear what the test will be, and thus whether it will use the language of “justifiable, intelligible and transparent” or “serious shortcomings.”<sup>107</sup> A quick survey of recent decisions from the Federal Court shows an encouraging trend that courts are picking up

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<sup>99</sup> See e.g. *Cruz v Canada (Citizenship and Immigration)*, 2020 FC 22; *Adnani v Canada (Citizenship and Immigration)*, 2020 FC 21; *Soultani Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12; *Williams v Canada (Citizenship and Immigration)*, 2020 FC 8; *Lin v Canada (Citizenship and Immigration)*, 2020 FC 34; *Ntamag v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 40.

<sup>100</sup> *Vavilov*, *supra* note 1 at para 25.

<sup>101</sup> *Ibid* at para 47.

<sup>102</sup> *Ibid* at para 12.

<sup>103</sup> 2011 SCC 62.

<sup>104</sup> *Vavilov*, *supra* note 1 at para 83.

<sup>105</sup> *Ibid* at para 86 [emphasis in original].

<sup>106</sup> *Ibid* at para 84.

<sup>107</sup> Daly, *supra* note 5 at 33.

the language of “justifiable, intelligible and transparent”,<sup>108</sup> with just a few referring to the terms “serious shortcomings” in the same phrase as “justifiable, intelligible and transparent” in quoting *Vavilov*.<sup>109</sup>

### 3) The Element: Other Statutory or Common Law, especially International Law

The Court discussed the role international law will play in constraining decision makers. As described above, the Court stated that legislation is presumed to operate in conformity with Canada’s international obligations and that this places a constraint on administrative decision makers. Undoubtedly, in the immigration and refugee context, Canada’s obligations under the *Refugee Convention*,<sup>110</sup> *Convention Against Torture*<sup>111</sup> and other instruments will feed the contextual content of how decisions in the immigration scheme are made.<sup>112</sup>

The Court in *Vavilov*, however, reinvigorates the *Baker* approach, where the consideration of the best interests of the child was informed by international law, to consider not just the international legal commitments Canada has codified in legislation, but also the underlying principles and values not implemented in statute. In referring to international law as a constraint on the administrative decision maker, the Court in *Vavilov* points to *Baker* wherein the Court stated that even in the absence of codification, international principles and values play a role in informing the contextual approach to statutory interpretation and judicial review.<sup>113</sup> Quoting Ruth Sullivan, the Court provided, “[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.”<sup>114</sup> Counsel should take note that when pointing to international law, values and principles not yet codified are salient constraints especially in decisions involving statutory interpretation.

<sup>108</sup> See e.g. *Lin*, *supra* note 99; *Cruz*, *supra* note 99; *Adnani*, *supra* note 99.

<sup>109</sup> *Soultani Kanawati*, *supra* note 99; *Williams*, *supra* note 99.

<sup>110</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

<sup>111</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>112</sup> Gerald Heckman, “Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?” (2003) 15:2 Intl J Refugee L 212.

<sup>113</sup> *Baker*, *supra* note 26 at paras 69–71.

<sup>114</sup> *Ibid* at para 70, quoting Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Butterworths, 1994) at 330 [emphasis added].

#### 4) The Element: Impact of the Decision on the Affected Individual

The Court's prominent use of the *Baker* principle to consider affected individuals, and to help inform the context under which the decision is made, is not only welcome but praiseworthy. Putting the spotlight on the affected individual in the reasonableness review framework will encourage more "responsive justification" to the potentially harsh consequences (including deportation, risk of persecution, torture and death, and family separation) that persons face in the immigration and refugee law context.

This aspect should be emphasized by litigants in the immigration law context. The Court borrows directly from *Baker*, specifically stating:

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 intent. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.<sup>115</sup>

The Court went further to state, "failure to grapple with such consequences may well be unreasonable" and that administrative decision makers have a "heightened responsibility" to consider the consequences of their decisions when they have power over the lives of vulnerable people.<sup>116</sup> Indeed, the Court referred to *Chieu v Canada (Minister of Citizenship and Immigration)* as an example.<sup>117</sup>

### 5. An Unprincipled Approach to Consistency and Persistent Discord (The Bad?)

#### A) Vavilov Dismissing Persistent Discord

The Court stated, "[I]n our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review."<sup>118</sup> In my opinion, I fail to see how the act of delegation, alone, shields the state from a more substantive review, especially in the realm of statutory interpretation. This posture speaks to the Court's profound faith in the administrative system.<sup>119</sup>

<sup>115</sup> *Vavilov*, *supra* note 1 at para 133

<sup>116</sup> *Ibid* at para 134–35.

<sup>117</sup> 2002 SCC 3 [*Chieu*].

<sup>118</sup> *Vavilov*, *supra* note 1 at para 30 [emphasis in original].

<sup>119</sup> Peter A Gall, "Problems with a Faith Based Approach to Judicial Review" (2014) 66 SCLR (2d) 183.

At the heart of the dispute in *Vavilov* was the meaning of a particular statutory provision. This is not an uncommon problem facing administrative decision makers. Indeed, in the immigration law context, advocates have often sought the guidance of the Supreme Court of Canada and the Court has resolved issues related to statutory interpretation by giving a single answer to the meaning of a single provision.<sup>120</sup>

Persistent discord is not a hypothetical situation. For example, currently there is a long-standing disagreement among decision makers, tribunal members and judges alike, about the meaning of a number of statutory phrases in the definition of being a “refugee” as: “unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries” (or the concept of state protection) in section 96 of *IRPA*;<sup>121</sup> and “risk not faced generally” in section 97 of *IRPA*.<sup>122</sup>

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<sup>120</sup> See e.g. *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40.

<sup>121</sup> See *Flores Zepeda v Canada (Citizenship and Immigration)*, 2008 FC 491 at paras 17–18, where Justice Tremblay-Lamer looks at two lines of case law for the democracy presumption in Mexico. See also *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250; *Varadi v Canada (Citizenship and Immigration)*, 2013 FC 407; Jamie Chai Yun Liew, “Creating Higher Burdens: The Presumption of State Protection in Democratic Countries” (2009) 26:2 *Refuge* 207. See the following putting forth the test as “adequate”: *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 at para 7, 99 DLR (4th) 334 (QL); *Lakatos v Canada (Citizenship and Immigration)*, 2012 FC 1070 at para 14; *Konya v Canada (Citizenship and Immigration)*, 2013 FC 975 at para 34; *Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at para 41. See these cases for the test as “effective”: *EYMV v Canada (Citizenship and Immigration)*, 2011 FC 1364 at para 16; *Balogh v Canada (Citizenship and Immigration)*, 2014 FC 771 at paras 13, 58-63; *Buri v Canada (Citizenship and Immigration)*, 2014 FC 45 at para 62; *Stark v Canada (Citizenship and Immigration)*, 2013 FC 829 at paras 10–14; *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 at para 12; *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 at para 5; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 at paras 35–37; *Orgona v Canada (Citizenship and Immigration)*, 2012 FC 1438 at para 11; *Jaroslav v Canada (Citizenship and Immigration)*, 2011 FC 634 at para 75; *EB v Canada (Citizenship and Immigration)*, 2011 FC 111 at para 9; *Kovacs v Canada (Citizenship and Immigration)*, 2010 FC 1003 at paras 63–66; *Csurgo v Canada (Citizenship and Immigration)*, 2014 FC 1182 at para 26; Jamie Chai Yun Liew, “Denying Refugee Protection to LGBTQ and Marginalized Persons: A Retrospective Look at State Protection in Canadian Refugee Law” (2017) 29 *CJWL* 290.

<sup>122</sup> See *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at paras 40–45, which discusses the divergent lines of authority. The following are cases that resemble the spectrum of interpretation of the term: *Prophète v Canada (Citizenship and Immigration)*, 2008 FC 331 at para 23; *Cius v Canada (Citizenship and Immigration)*, 2008 FC 1 at para 25, 27; *Paz Guiffara v Canada (Citizenship and Immigration)*, 2011 FC 182 at paras 30–32; *Servellon Melendez v Canada (Citizenship and Immigration)*, 2014 FC 700 at para 42; *Galeas v Canada (Citizenship and Immigration)*, 2015 FC 667 at para 48 compare *Mehmood v Canada*, 2016 FC 1392 at para 9; Jamie Chai Yun Liew, “Taking It Personally:

*Vavilov* does not provide a coherent answer to the problem of “persistent discord” or divergent lines of authority when it comes to the very problem it had before it, namely statutory interpretation. On this point the Court stated:

[71] The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law’s meaning comes to depend on the identity of the decision maker[.]

[72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc ...*, this Court held that “a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals” ... That said, we agree that the hypothetical scenario suggested by the *amici curiae*—in which the law’s meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence—is antithetical to the rule of law. In our view however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight, of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to “legal incoherence” and require a court to step in is not obvious. Given the practical difficulties, this Court’s binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

Within these two paragraphs, the Court acknowledges “legal incoherence” as a rule of law problem but nevertheless dismisses this problem as “the price to pay for the decision-making freedom and independence” of administrative decision makers. The Court seems to think that this is a “hypothetical” problem when that Court was presented with situations that were not speculative or theoretical, including the examples expressed above.<sup>123</sup> The Court’s answer to this “hypothetical” was that we can review the issue under a reasonableness standard and that court intervention

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Delimiting Gender Based Refugee Claims Using the Complementary Protection Provision in Canada” (2014) 26 CJWL 300.

<sup>123</sup> *Vavilov*, *supra* note 1 at para 72.

is warranted where “internal discord” becomes “serious, persistent and unresolvable”. The Court explains, in *Vavilov*:

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the “correct” interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue[.] [I]t would serve no useful purpose in such a case to remit the interpretive question to the original decision maker[.][emphasis in original]

[132] As discussed above, it has been argued that correctness review would be required where there is “persistent discord” on questions of law in an administrative body’s decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body’s decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

## **B) Waiting for Discord to Be Serious, Persistent and Unresolvable**

In my opinion, this approach in *Vavilov* is not only problematic, but unprincipled. First, the Court’s reasoning in paragraphs 71 and 72 (reproduced above) shows little respect for how administrative decisions have an enormous impact on people’s lives. Whether or not refugee status is conferred, for example, can be a life-changing decision for the claimants involved. Yet, the Court seems to tell such persons that they must tolerate the chance that such decisions could be subject to many different kinds of interpretations; that the impact of the decision on such persons does not matter as much as the “freedom and independence” that administrative decision makers enjoy.

I do take seriously the Court’s point of view that such internal discord could be resolved under a reasonableness standard. Indeed, this is possible, but the first two paragraphs in the *Vavilov* framework, unintentionally perhaps, infuse an unwanted test that guides when courts should intervene. In particular, by stating, “the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the



resulting situation would amount to “legal incoherence” and require a court to step in is not obvious”, courts are invited to ask applicants to prove serious and persistent discord to attract court intervention, despite the Court’s desire to move away from this kind of analysis.<sup>124</sup> Indeed, Daly seems to agree in stating, “There is the ever-present possibility that clever counsel will band together to create databases of decisions which can subsequently be brandished as evidence of administrative inconsistency requiring justification on the part of the decision-maker concerned.”<sup>125</sup> I can admit that I am part of that “band of clever counsel” and we have already been gathering cases, as evidenced above, but wish such an expansive response was not the test that we need to meet.

### C) The Rule of Law Demands Aiming for Consistency

The Court, in its analysis, seems to downplay two things. First, discord in jurisprudence does not manifest from just one rogue decision maker needing to justify why there is a departure from previous administrative decisions.<sup>126</sup> In the immigration law context, one could characterize certain issues as fitting into different camps of many different decision makers. Second, the Court has spoken about the fact that administrative decision makers do not need to follow decisions by their fellow administrative decision makers as courts must do with *stare decisis*. While consistency can be encouraged, nothing holds administrative decision makers to a single interpretation of a particular provision unless a court has ruled on the matter. Indeed, this Court and others have also discussed the dangers in engaging in activities that could be seen as fettering the discretion of the decision maker.<sup>127</sup> Further, as discussed above, with examples from the IRB, sometimes efforts by a tribunal to resolve problematic findings by decision makers may not lead to substantive changes.

Further, in paragraphs 124 and 132 (reproduced above), the Court ultimately allows for some statutory interpretation questions to be reviewed on a correctness basis, without explicitly saying so. In my opinion, it was not useful for the Court to shield its view under the veneer of reasonableness when it does think that some issues should be subject

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<sup>124</sup> *Ibid* at para 72 [emphasis added].

<sup>125</sup> Daly, *supra* note 5 at 21.

<sup>126</sup> Indeed, the Court seems to be aware of how there could be persistent and diverging viewpoints by referencing *Domtar v Quebec*, [1993] 2 SCR 756, 105 DLR (4th) 385 [*Domtar*].

<sup>127</sup> See e.g. *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 30; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299; *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126; *Shuttleworth v Ontario (Safety, Licensing Appeals and Standards Tribunals)*, 2019 ONCA 518.

to not only court intervention, but a single determination so as to put the discord to rest. The Court is not unfamiliar with this approach, even in the immigration law context.<sup>128</sup>

More than creating a veiled correctness approach here, the Court fails to give a sense of when a reviewing court should do this. Is the threshold when persistent discord is so bad that we need to do something about it? What conditions need to be met to call for a single reasonable interpretation? In my opinion, the Court still does not provide a satisfactory answer to these questions. This will be the subject of much litigation and even more confusion.

I do take comfort in the fact that the reasonableness review framework calls for attention to be paid to the impact decisions have on affected individuals, and to consider international law obligations as a good indicator in immigration and refugee law as to where we can find the single reasonable interpretation. Despite this, I think that we, as advocates, will have our work cut out for us given that the Court has, in a sense, elevated the test for the court's intervention with the words "serious, persistent and unresolvable." In my opinion, the Court weakens the concept of the rule of law by relegating such questions to the corner of deference and has great faith in administrative decision makers. In some contexts, faith is not enough. Indeed, as stated by Ecojustice Canada, some administrative decision makers are "hostile" to the policy or legal principles behind environmental statutes.<sup>129</sup>

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. In a sense, the courts are asked to take a back seat until things get so bad that they perk up on the bench and say enough is enough. Consistency is not only a desirable feature in decision making but helps build confidence in the integrity of the system.<sup>130</sup>

I do recognize my view invites criticism that the turn to a correctness approach places too much faith in the courts and that it is not the court's role to fix structural problems in an administrative system; especially

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<sup>128</sup> *Tran, supra* note 120; *Ezokola, supra* note 120.

<sup>129</sup> Ecojustice Factum, *supra* note 57 at para 9.

<sup>130</sup> H Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984) 8 Dal LJ 435 at 446; Suzanne Comtois, "Le contrôle de la cohérence décisionnelle au sein des tribunaux administratifs" (1990) 21 RDUS 77 at 77-78. See also David Mullan, "Natural Justice and Fairness — Substantive as well as Procedural Standards for the Review of Administrative Decision Making?" (1982) 27 McGill LJ 250.

those related to how decision makers are trained (or not), how guidelines are implemented, how decision makers may be overworked, and how they have to manage unrepresented persons. As discussed above, however, even where there are efforts and measures in place, sometimes poor decisions are made. Individuals, especially where the stakes are high, should not be subjected to poor decisions in the milieu of disarray, and then left waiting for administrative legal actors to sort themselves out before a real remedy is possible. Given that the Court recognized the impact a decision has on an individual as an important constraint, the courts should be able to step in where an administrative tribunal cannot provide the quality and kind of decision an individual deserves. In this sense, yes, I do have more faith in the system where the courts play a more active role.

Further, I also acknowledge that Justice L'Heureux-Dubé, in *Domtar*, espoused the principle that decisions of administrative tribunals remain decisive, commenting that it is “relatively rare” for litigants to challenge on the ground of alleged inconsistency, and pointed to the legislature as the place to resolve conflict.<sup>131</sup> I find this reasoning unpersuasive. First, a decisive decision that is life changing for an individual is small comfort when it can be seen as arbitrary or completely at odds with other similarly situated circumstances. Second, as provided earlier, there are divergent lines of authority regarding current issues before decision makers. Litigants and counsel are consistently asking for particular interpretations, thus these situations are not “relatively rare.” Finally, dialogue between the legislature and the courts is part of our legal fabric; where a legislature chooses not to provide legislative clarity—or even amend or bring forth legislation that can be interpreted to violate international human rights—the courts should respond, including in the administrative legal realm. Marginalized communities often have little to no power when it comes to influencing legislatures.

As discussed, the Court is not unfamiliar with the concept of providing a single determinative answer for an interpretation of a provision. Accordingly, the courts should be encouraged to embrace this role since legal interpretation is in their constitutional wheelhouse, as provided for in the Constitution.<sup>132</sup> It is perhaps important to remind the courts that we are not talking about any administrative decision, but how administrative actors are *interpreting law*. The rule of law, in my opinion, requires a more robust, judicial role for the courts to safeguard against arbitrariness borne out of a storm of preferences by administrative decision makers in the realm of legal interpretation. Indeed, as Mary Liston wrote, “The principle

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<sup>131</sup> *Supra* note 125.

<sup>132</sup> *Crevier v Quebec (Attorney-General)*, [1981] 2 SCR 220, 127 DLR (3d) 1; *Canada (Attorney General) v McArthur*, 2010 SCC 63.

of the rule of law is animated by the need to prevent and constrain arbitrariness within the exercise of public authority.”<sup>133</sup>

The rule of law should not just look at the practical manner of managing administrative decision makers but work towards the ideal of ensuring that all people subject to administrative decisions can expect to be subject to the same legislative interpretation. The litmus test should be, “Why should persons be subject to arbitrary and inconsistent understandings of a particular interpretation?” It seems counter to the purpose of respecting the legislature’s intent if various diverging interpretations are floating around and being implemented by the legislature’s delegates. The rule of law calls for predictability, finality and coherence, which can only be achieved by having effective oversight of these interpretations of law by the courts. This mandates a correctness standard on interpretation. Having said this, putting forth a correct interpretation does not mean that the courts can ignore what administrative decision makers have said on the matter. Rather “the task of interpreting and applying the law is a shared one.”<sup>134</sup>

Given the new reality *Vavilov* presents, counsel should try to argue that interpreting contested statutory wording fits into the rule of law exception and attracts a correctness standard, especially since the Court has admitted that the list of categories is not finite. In the immigration law context, pointing to international legal obligations pushes this question into one where a correctness review is warranted.

I would also advise that should the courts face submissions under a reasonableness standard, and if applicants are able to provide evidence of persistent discord, counsel should emphasize the impact that the disagreement has on affected individuals. In the immigration and refugee law context, this includes the harsh consequences of persecution, torture, and death. Finally, I would point to how international law, in this context, demands a single answer to the interpretation of refugee law and that we should not wait for divergent lines of authority to form before getting it right.

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<sup>133</sup> Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Emond Montgomery Publications, 2013) at 40.

<sup>134</sup> Chief Justice Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998-1999) 12 Can J Admin L & Prac 171 at 185-89.

## 6. Jurisdictional Questions and Relative Expertise (The Ugly?)

### A) Jurisdictional Questions

The Court preserved one kind of jurisdictional question as a category that could be reviewed under the correctness standard: “[Q]uestions regarding the jurisdictional boundaries between two or more administrative bodies.”<sup>135</sup> Specifically, the Court provided:

The rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions.<sup>136</sup>

In the immigration law context, this can lead to bizarre results in a behemoth of a system where there are many administrative decision makers in different bodies. Decisions can be made by several different Ministers: the Minister of Immigration, Refugees and Citizenship; the Minister of Public Safety and Emergency Preparedness; and the Minister of Border Security and Organized Crime Reduction. In terms of delegates, there are several, including: the IRB and its various entities—the Refugee Protection Division (RPD), Refugee Appeal Division (RAD), Immigration Division (ID), Immigration Appeal Division (IAD)—the Canada Border Services Agency (CBSA); Immigration, Refugees and Citizenship Canada (IRCC); and the Registrar (as in the case of *Vavilov*). In making decisions, there is sometimes an interaction or overlap, and decisions made by one administrative actor will certainly affect the decision made by another.

Two examples of the interplay between these different administrative bodies illustrates the difficult questions that may arise. The first example involves finding a person inadmissible to Canada. Under section 44(1) of the *IRPA*, an officer with the CBSA may prepare a report setting out why a person should be inadmissible, sending this to the Minister of Public Safety and Emergency Preparedness.<sup>137</sup> In general, if the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the ID of the IRB for an admissibility hearing.<sup>138</sup> The ID conducts an admissibility hearing and decides whether the person is

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<sup>135</sup> *Vavilov*, *supra* note 1 at para 63.

<sup>136</sup> *Ibid* at para 64.

<sup>137</sup> *IRPA*, *supra* note 81, s 44(1).

<sup>138</sup> *Ibid*, s 44(2).

inadmissible, issuing a removal order against that person, if applicable.<sup>139</sup> An inadmissible person can then apply for discretionary relief from the Minister.<sup>140</sup>

In this scenario, we see at least three different administrative actors making decisions, at different points, that ultimately affect the final decision of whether a person is inadmissible. Could one decision by one actor be challenged on the basis that it is affecting someone else's jurisdiction, since in this case every decision ultimately impacts the decision of the administrative decision maker down the line?

The second example concerns the eligibility of a person to make a refugee claim in Canada. In general, section 100(1) of the *IRPA* delegates to officers (at ports of entry and inland offices) to “determine whether the [refugee] claim is eligible to be referred to the Refugee Protection Division” of the IRB.<sup>141</sup> Section 101(1) sets out the reasons for finding a person ineligible.<sup>142</sup> Subsection 101(1)(c.1) prevents a person from making a claim in Canada if they have made a claim in a country with which Canada has an information sharing agreement (Australia, New Zealand, United Kingdom, United States). Subsection 101(1)(3) refers to the *Canada-US Safe Third Country Agreement*<sup>143</sup> and prevents a person coming to Canada from the United States via inland and ports-of-entry from making a refugee claim. These eligibility provisions engage a number of actors, including CBSA officers at ports-of-entry, IRCC officers at inland offices, both of whom conduct an intake of information and then interview of persons; and the RPD of the IRB, which ultimately schedules the refugee hearings. In these scenarios, does the conduct of CBSA and IRCC officers affect decisions made by the RPD in whether a person should be scheduled for a hearing?

In these examples, these questions can also be asked: How does one assess the boundaries between two administrative decision makers? How do we assess whether a decision made by one affects another's jurisdiction,

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<sup>139</sup> *Ibid*, s 45(d).

<sup>140</sup> *Ibid*, s 42.1; See also *Agraira*, *supra* note 98.

<sup>141</sup> *Ibid*, s 100(1).

<sup>142</sup> *Ibid*, s 101(1).

<sup>143</sup> In July 2020, the Federal Court of Appeal in *Canadian Council for Refugee v Canada*, 2007 FC 1262 found that the Safe Third Country Agreement (STCA) violates the section 7 *Charter* rights of refugee claimants, but suspended its declaration of invalidity of the STCA for a period of 6 months. The Government of Canada announced it has filed an appeal to this decision with the Supreme Court of Canada. The STCA thus remains in effect at the time of writing: see Public Safety Canada, “[Government of Canada to appeal the Federal Court decision on the Safe Third Country Agreement](#)” (21 August 2020), online: *Public Safety Canada* <[www.canada.ca/](http://www.canada.ca/)>.

thus meriting a correctness standard? The Court, in carving out this category of jurisdictional question, does not solve the problem that existed before of “what is the scope of a jurisdictional question?” In my opinion, the same problem identified by Justice Gascon that “the concept of “jurisdiction” ... is inherently “slippery”” still exists. As the Court in *Vavilov* stated, “[I]n theory, any challenge to an administrative decision can be characterized as “jurisdictional” in the sense that it calls into question whether the decision maker had the authority to act as it did.”<sup>144</sup> This category, in my opinion, will invite advocates to ask courts to define what the boundaries are to try to sort out whether the questions before them fit into this category and, therefore, merit a correctness standard of review.

## **B) Relative Expertise in Reasonableness Review**

As discussed above, the Court did away with the contextual analysis of expertise in the selection of the standard of review, but relative expertise did not completely disappear. *Vavilov* retains this aspect in determining whether a decision is reasonable. As discussed above, however, giving an administrative body the façade of relative expertise is problematic given that there are a variety of experiences, training, and capabilities attributed to a given decision-maker. Aside from the difficulty of deciding whether an administrative tribunal actually has expertise, how this factor plays into whether a decision is reasonable will be interesting post-*Vavilov*.

Using the previously discussed example of whether a person is eligible to make a refugee claim, the Federal Court has struggled with how to characterize the expertise of a front-line officer. In *Wangden v Canada (Minister of Citizenship and Immigration)*, for example, Justice Mosley struggled with the CBSA officer’s role to conduct an expeditious and straightforward screening process when the officer was confronted with the task of, ultimately, having to conduct legal interpretation regarding what the US immigration status of “withholding of removal” was, and then interpret whether this was akin to “Convention refugee” in Canadian legislation.<sup>145</sup> Justice Mosley found the officer’s decision reasonable despite the fact that legal experts provided submissions that “withholding of removal” is legally not the same as “Convention refugee.” Here, Justice Mosley seemingly finds border officials as having legal interpretation expertise equivalent to that of trained legal professionals. In *Aghazadeh v Canada (Public Safety and Emergency Preparedness)*, Justice Gleeson is confronted with a similar issue where she acknowledges that front-line immigration officers cannot be expected to engage in detailed

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<sup>144</sup> *Vavilov*, *supra* note 1 at para 66.

<sup>145</sup> 2008 FC 1230.

consideration of an individual's status in another country, due to their screening role. She reasoned: "It would also open the door to front-line officers engaging in the very analysis that the IRPA mandates the RPD, with its specialized expertise, to perform."<sup>146</sup> In *Aghazadeh*, the impacted individuals had "subsidiary protection" status from Hungary. Justice Gleeson found that the officer's interpretation that such persons are Convention refugees is unreasonable. Here, however, she seems to lean on the fact that the officers were not experts in legal interpretation. As this is a site of future litigation, it will be interesting to see how courts grapple with the expertise pinned by counsel on both sides. How a court characterizes a decision maker, in relation to others within their administrative sandbox, may be a site of messy confusion.

## 7. Conclusion

There is much to like in the *Vavilov* decision from the perspective of those working in immigration law. There is a much more robust reasonableness standard of review that demands attention to the individual and how they are affected, and a strong reminder that we have international obligations to meet. These elements are strong indicators that reviewing courts ought to take a more engaging review of the decisions before them. The importation of some principles from procedural fairness and *Baker* are helpful guidelines for building useful reasons and keeping a decision maker focused on how to justify their decision. Throwing away the perception of relative expertise as a proxy for deference is a positive development, but aspects of relative expertise are now relevant in the reasonableness review.

There are also some aspects that are problematic. In my view, the Court misses an opportunity to deal with the issue of "persistent discord" in a principled way, and to revisit the current approach to reviewing decisions that invoke the *Charter*. Finally, there are three areas I think may cause great confusion: the jurisdictional boundary category, relative expertise in a reasonableness review, and what qualifies as a statutory appeal.

Overall, I think *Vavilov* provides some practical ways in which courts can review decisions of administrative tribunals, which in turn provides tools to advocates of migrants. However, I would not call it a triumph or an ideal approach. Instead, I would say that it avoids taking a principled stance on statutory interpretation and, in some ways, diminishes the principles of the rule of law by allowing reviewing courts to continue to act as a bystander, watching as some people stumble perilously through the administrative legal system. I hope I am proven wrong.

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<sup>146</sup> 2019 FC 99 at para 44.