S.C.C. File No. 39855

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

EARL MASON

APPELLANT
(*Respondent*)

-AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(*Appellant)*

A N D B E T W E E N

SEIFESLAM DLEIOW

APPELLANT
(*Respondent*)

-AND -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(*Appellant)*

[*Style of cause continued on next page*]

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Pursuant to Rule 42 of Rules of the Supreme Court of Canada, SOR/2002-156

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PART I – OVERVIEW AND FACTS

1. This case requires this Court to determine the standard of review that applies to appeals involving a "serious question of general importance" certified under s. 74(d) of the *Immigration and Refugee Protection Act* ("IRPA").[1] The Canadian Association of Refugee Lawyers/ Association canadienne des avocats et avocates en droit des réfugiés ("CARL") takes the position that the correctness standard should apply. This Court reached this conclusion when it directly considered the certified question regime in *Pushpanathan*. Moreover, in cases involving certified questions under the IRPA, this Court has generally either explicitly applied correctness review or conducted the functional equivalent of correctness review.

2. Correctness review of certified questions is consistent with the principles outlined in *Vavilov*. In this unique and clearly defined context, an analysis of the text, context and purpose of s. 74(d) demonstrates that only the correctness standard can give "effect to the legislature's institutional design choices."[2] As such, the contrary approach to certified questions taken by this Court in *Agraira* and *Kanthasamy* should not be followed. These outliers have been the subject of significant judicial and academic commentary which criticize these decisions as under-reasoned departures from this Court's previous jurisprudence and as being inconsistent with the statutory scheme. In contrast, correctness review vindicates the true intent of Parliament in adopting the certified question regime in the IRPA as it permits appellate courts to provide authoritative answers to questions of general importance as contemplated by the statute.[3]

PART II – QUESTION IN ISSUE

3. CARL's submissions are limited to the appropriate standard of review to be applied by appellate courts to questions certified by the Federal Court under s.74(d) of the IRPA.

PART III – ARGUMENT

A. This Court's findings in *Agraira* and *Kanthasamy* are outliers—correctness review has regularly been applied to certified questions

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[1] *Immigration and Refugee Protection Act*, SC 2001, c 27.
[2] *Canada (MCI) v Vavilov*, 2019 SCC 65 at para. 36 [*Vavilov*].
[3] *Agraira v Canada (MPSEP)*, 2013 SCC 36 [*Agraira*]; *Kanthasamy v Canada (MCI),* 2015 SCC 61 [*Kanthasamy*].

4. This Court has traditionally applied correctness review to questions certified by the Federal Court as "serious questions of general importance" pursuant to s. 74(d) of the IRPA—the provision that triggers a right of appeal from a first-level judicial review. In 1998, this Court in *Pushpanathan* directly considered the standard of review applicable to such questions and concluded that the certified question regime "would be incoherent if the standard of review were anything other than correctness."[4] That conclusion was based principally on this Court's assessment of the legislative intent behind the certified question regime. This Court questioned whether an "exceptional appeal" made pursuant to a certified question would "serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board."[5] The same approach was applied in both *Chieu* (2002) and *Hilewitz* (2007), where this Court again determined that certified questions should be answered on a standard of correctness, stressing in *Chieu* that "[t]he legislative scheme […] evinces a particular concern that questions of general importance be appropriately resolved."[6]

5. In *Ezokola* (2013), while this Court was silent on the applicable standard of review, it still analyzed and answered the certified questions in that appeal in the same manner as it did in *Pushpanathan*: using the full tools of statutory interpretation and without any apparent deference to the decision-maker.[7]

6. Thus, until *Agraira* (2013), the Federal Court of Appeal understood and described its role as being to provide "a definitive answer" to certified questions – a task it described as being "the functional equivalent of engaging in correctness review".[8]

7. In *Agraira*, this Court abruptly departed from its previous approach of assessing the certified question on a correctness standard, instead determining globally that the standard of review in that case was "reasonableness." It did so despite the existence of a certified question and without reference to the previous jurisprudence prescribing correctness review. Notably, this Court in *Agraira* did not discuss the certified question regime directly in its standard of review analysis, discussing instead only "the standard of review applicable to the Minister's decision" as a whole,

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[4] *Pushpanathan v Canada (MCI),* [1998] 1 SCR 982 at paras 26, 43 [*Pushpanathan*].
[5] *Ibid.*
[6] *Chieu v Canada (MCI),* 2002 SCC 3 at para 23; *Hilewitz v Canada (MCI); De Jong v Canada (MCI),* 2005 SCC 57 at para 71.
[7] *Ezokola v Canada (MCI),* 2013 SCC 40.
[8] *Kanthasamy v Canada (MCI),* 2014 FCA 113 at para 32-33; 36.

which it found to be reasonableness.[9] Nor did this Court provide a direct answer to the certified questions in its judgment, describing them as being "issues incidental to [the] central issue," that being the reasonableness of the overall decision.[10]

8. In *Febles* (2014), which was decided after *Agraira*, this Court was silent on the applicable standard of review that should be applied to certified questions. Nonetheless, contrary to its approach in *Agraira*, it provided an authoritative answer to the certified question without deference to the decision maker.[11]

9. In *Kanthasamy* (2015), this Court reverted to its approach in *Agraira*. As in *Agraira,* an assessment of the certified question itself was absent from this Court's judgment. Instead, as in *Agraira*, this Court's judgment was focused solely on the reasonableness of the decision as a whole. Citing *Baker* (1999), but no other jurisprudence, the majority of this Court stated that "the appropriate standard of review is reasonableness."[12] In *Baker*, however, this Court *did* provide a definitive answer to the certified question without showing deference to the decision-maker on the question of statutory interpretation.[13] This Court in *Baker* then reviewed the application of the facts to the discretionary statutory test on a standard of reasonableness. This Court did not mention its holding in *Pushpanathan* in either *Agraira* or *Kanthasamy.*

10. Since *Kanthasamy*, this Court has decided two further appeals that arose from certified questions under the IRPA: *B010* (2015) and *Tran* (2017). Both of these cases concerned questions of statutory interpretation. In both, this Court conspicuously declined to decide the applicable standard of review – finding the interpretation failed under either standard.[14] Markedly, this Court in each appeal went on to analyze the contested provisions using the ordinary principles of statutory interpretation without showing deference on the issue. In *Tran*, in particular, this Court returned to its practice of concluding its judgment by stating the certified questions and directly answering them with a definitive yes or no.[15] Consequently, as noted by the Federal Court of Appeal in the

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[9] *Agraira*, *supra* note 3 at paras 45-50.
[10] *Agraira*, *supra* note 3 at para 3.
[11] *Febles v Canada (MCI)*, 2014 SCC 68.
[12] *Kanthasamy*, *supra* note 3 at para 44.
[13] *Baker v Canada (MCI),* [1999] 2 SCR 817 at para 75, 174.
[14] *B010 v Canada (MCI),* 2015 SCC 58 at para 26; *Tran v Canada (MCI)* 2017 SCC 50 at para 24.
[15] *Tran*, *supra* note 14 at para 56.

case at bar, this Court appears to have at least implicitly returned to resolving the issue raised by the certified question by "simply interpret[ing] and apply[ing] the legislation itself with no deference at all to administrators' interpretations," as a Court would do when applying the correctness standard of review.[16]

B. There is significant judicial and academic criticism of the *Agraira/Kanthasamy* approach

11. In the past decade, there has been "significant and valid judicial, academic and other criticism"[17] of *Agraira* and *Kanthasamy*'s application of reasonableness to the review of certified questions. Academic commentators have criticized the approach in *Agraira* and *Kanthasamy* as an under-reasoned departure from this Court's past jurisprudence,[18] flouting Parliament's intent to create a mechanism for authoritatively resolving questions of law,[19] and preventing the courts from providing uniform and consistent interpretations of legislation implementing Canada's international obligations.[20]

12. The criticism from the Court of Appeal has been equally direct. In *Kanthasamy* (2014), the Court of Appeal observed that *Agraira* "ignor[ed] the fact that the case proceeded in this Court in response to a certified question from the Federal Court […and] did not vet this Court's answer to the stated question. There is nothing in the Supreme Court's reasons in *Agraira* to explain this apparent change in approach."[21] In *Huruglica* (2016), the Court of Appeal stated that this Court's decision in "*Kanthasamy* will obviously have a tremendous impact, given that for many years, the Federal Court resorted to the certification process under subsection 74(d) to settle divergent interpretations or disagreements on legal issues of general importance."[22] Even as recently as

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[16] *Canada (MCI) v Mason,* 2021 FCA 156 at paras 10-14 [*Mason FCA*].
[17] *Vavilov*, *supra* note 2 at para 20 noting past precedents may be revisited in such circumstances.
[18] Paul Daly, "Can This Be Correct? *Kanthasamy v. Canada (MCI),* 2015 SCC 61" (11 December 2015), online (blog): *Administrative Law Matters*. Joseph T. Robertson, Q.C., "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017) 68 UNBLJ 143 at 167.
[19] The Honourable David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27 at 34.
[20] Gerald Heckman and Amar Khoday, "Once More unto the Breach: Confronting the Standard of Review (Again) and the Imperative of Correctness Review when Interpreting the Scope of Refugee Protection" (2019) 42 DLJ 49 at 62-68.
[21] *Kanthasamy v Canada (MCI), supra* note 8 at para 34-35.
[22] *Canada (MCI) v Huruglica,* 2016 FCA 93 at para 28.

Galindo Camayo (2022), the Court of Appeal expressed its regret at the "awkward situation – the misfit between answering the certified question properly and conducting reasonableness review."[23] The Court of Appeal described the necessity post-*Kanthasamy* of posing certified questions in terms of the "reasonableness" of the decision as "effectively render[ing] the answer to the certified question mere surplusage."[24]

13. These criticisms further support the need for this Court to clarify the appropriate appellate approach to the certified question regime. Both judicial and academic commentators have noted that *Vavilov* provides the impetus and framework for doing so noting, for example, that correctness review of certified questions "would seem to gain greater credence now that the Supreme Court has held that statutory standards can have a bearing on the standard of review."[25]

C. Institutional Design Favours a Correctness Standard

14. The principles set out in the majority reasons of this Court in *Vavilov* support the application of the correctness standard to certified questions.[26] Specifically, in *Vavilov,* this Court noted that the democratic principle requires courts to respect the legislature's institutional design choices and described legislative intent as the "polar star" of judicial review when determining the appropriate standard of review.[27] In this case, an analysis of the text, purpose and context of IRPA s. 74(d) demonstrates that applying correctness review to certified questions is the only way to give effect to Parliament's design choices in creating a specialized appellate regime unique to the IRPA.

i) Text of legislative provisions supports correctness review

15. Respect for Parliament's considered choice of language supports the application of a correctness standard to questions certified under the IRPA. Section 74(d) sets out that: "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that

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[23] *Canada (MCI) v Galindo Camayo*, 2022 FCA 50, at paras 30-45 [*Galindo Camayo*].
[24] *Galindo Camayo*, *supra* note 23 at para 41-42.
[25] *Ibid*; See also, Jamie Chai Yun Liew, "The Good, the Bad and the Ugly: A Preliminary Assessment of Whether the Vavilov Framework Adequately Addresses Concerns of Marginalized Communities" (2020) 98 Can Bar Rev 398 at 403-404.
[26] *Vavilov*, *supra* note 2 at para 143.
[27] *Vavilov*, *supra* note 2 at para 33, citing *C.U.P.E. v. Ontario (Minister of Labour),* 2003 SCC 29 at para. 149.

a serious question of general importance is involved and states the question."[28] The text of this provision supports a finding that it was Parliament's intent to have definitive answers provided to questions that were certified by the Federal Court.

16. In *Vavilov,* this Court noted that the creation of a statutory right of "appeal" calls for the use of appellate standards of review, including correctness review on questions of law.[29] In making this determination, *Vavilov* was focused on Parliament's intent behind the use of the word 'appeal' in a statute to define a specific relationship between administrative decision-makers and the courts thereby displacing the common law and directing that a correctness standard of review be applied. As explained more recently by this Court: "When the legislature expressly involves the court in the administrative scheme, th[e] presumption [of reasonableness] no longer applies."[30]

17. The same logic applies to analyzing Parliament's intent in using the phrase "certifies that a serious question of general importance is involved and states the question" under s. 74(d) of the IRPA. Those words likewise demonstrate Parliament's intent to define a specific relationship between the Federal Court and the appellate court in the review of administrative decisions under the IRPA. As in *Vavilov*, this language signals an intent to displace the common-law approach to appellate judicial review – where an appellate court simply 'steps into the shoes', and duplicates the role, of the first-instance judge – and instead indicates a larger role for the Federal Court of Appeal to actually answer the certified question. Essentially, Parliament created a carefully tailored right of appeal that allows the Federal Court of Appeal to give authoritative answers to general questions about the interpretation of the IRPA. Put in *Vavilovian* terms, Parliament "has

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[28] It is worth noting that CARL is unaware of any other administrative scheme in which a right of appeal is conditioned upon the first-instance judge stating a serious question of general importance. Given this, as was the case in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*Entertainment Software Association*], where the majority found correctness was the applicable standard of review, the application of correctness review to the certified question regime under the IRPA "can be defined with precision", will be "rare", and will not alter the standard of review applicable generally under other statutes (para 39).

[29] *Vavilov*, *supra* note 2 at paras 37, 44.

[30] *Entertainment Software Association*, *supra* note 28 at para 30.

intentionally chosen a more involved role for the courts"[31] in creating the certified question regime.[32] This institutional design choice should be respected by the courts.

ii) Purpose of legislative provisions supports correctness review

18. In terms of purpose, correctness review on certified questions vindicates the understanding parliamentarians had of the certified question regime.[33] The regime was hotly debated in committee and defended by the Associate Deputy Minister of Justice as providing an additional "level of appellate review…in those cases where serious questions of law arise", as opposed to factually suffused cases raising no significant legal issue.[34] Indeed, this Court determined in *Pushpanathan* that the legislature's intent in adopting the certified question regime can only be coherently achieved if the Federal Court of Appeal "is permitted to substitute its own opinion for that of the Board in respect of questions of general importance":

> [The certified question regime] would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" (emphasis added). The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable?[35]

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[31] *Vavilov*, *supra* note 2 at para 46.
[32] See also *Entertainment Software Association*, *supra* note 28 at paras 29-31.
[33] See e.g. *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paras 13-19 where the Court of Appeal used legislative history to ascertain Parliament's purpose in enacting a section of the *Canada Transportation Act*.
[34] House of Commons, Legislative Committee on "Bill C-86, An Act to amend the Immigration Act and other Acts in consequence thereof", 41:3, vol 3 at 14:61-14:62 (E Bowie).
[35] *Pushpanathan*, *supra* note 4 at para 43: this Court went further to suggest that the same reasoning would warrant the Federal Court likewise applying correctness review to questions of general importance. While CARL's position is limited to addressing the applicable standard of review for certified questions before the Court of Appeal based on Parliament's institutional design choices,

iii) Context of statutory scheme supports correctness review

19. The certified question is part of a specialized statutory scheme that Parliament has established to address the unique structure of the IRPA. Under the IRPA, there are multiple independent and parallel authorities which are charged with interpreting and applying the same provisions of the legislation. There are: two separate Ministers (the Minister of Citizenship and Immigration and the Minister of Public Safety); a government department (Immigration, Refugees and Citizenship Canada); an autonomous agency directly answerable to a Minister (the Canada Border Services Agency)[36]; as well as the independent Immigration and Refugee Board (IRB), Canada's largest administrative tribunal. Various civil servants and office holders in these bodies interpret the IRPA in decisions made inside and outside Canada in decision-making environments that fluctuate from the quasi-judicial divisions of the IRB to resource constrained overseas visa officers with the "pressures to produce a large volume of decisions every day."[37]

20. In many of those spheres, each decision-making body may come to its own reasonable but different interpretation of the IRPA even though they are each interpreting the same provision. Take, as an example, inadmissibility for serious criminality under s.36(1)(a) of the IRPA. Where it is applied to a permanent resident, the IRB is the ultimate administrative decision-maker tasked with interpreting and applying the provision; where it is applied against a foreign national in Canada, CBSA is the ultimate administrative decision-maker; and where it is applied against a foreign national outside of Canada, IRCC is the ultimate administrative decision-maker.[38] Each of these decisions can only be challenged by way of judicial review—there is no other authority which can ensure cohesive decision making between these disparate decision makers. Without the ability to get an authoritative determination through the Courts, this decision making context raises the spectre of "conflicting statutory interpretations" and "discord [that] could persist indefinitely",

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it does not preclude a finding that correctness should also be applied to certain determinations made by the Federal Court.

[36] *Canada Border Services Agency Act*, SC 2005, c 38, s 6.
[37] *Patel v Canada (MCI)*, 2020 FC 77 at paras 15, 17.
[38] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 44(2); *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 228(1)(a).

something this Court has recently observed is anathema to the rule of law.[39]

21. Under such a scheme, it is understandable that Parliament would want to have key legal issues disposed of authoritatively by the courts. Funneling certified questions to the Federal Court of Appeal for authoritative resolution provides a means to resolve conflicting interpretations between these different decision-makers, to eliminate discord, and to ensure that Canadian immigration law will apply consistently. This practice also reflects the unsuitability of administrative decision-makers in high-volume settings and/or with minimal legal training (e.g. overseas visa officers) having to engage in complex statutory interpretation. Moreover, it is responsive to the undesirability of individuals caught up in matters as serious as deportation, refugee protection and family reunification being subjected to differing interpretations of the law depending on the identity of the decision-maker.

22. Indeed, implementation of the statutory scheme would likely be greatly hindered if there were no mechanism for providing authoritative interpretations of the legislation. This is apparent in instances of administrative decision-makers treating and applying the first interpretation of a statutory provision found to be reasonable by an appellate court as being the *definitive* interpretation – regardless of whether the court indicated that the provision is open to other

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[39] While *Vavilov* held that "persistent discord *within* an administrative body" is insufficient to warrant correctness review (*supra* note 2 at para 72, emphasis added), the case at bar presents the real possibility of persistent discord *between* various administrative bodies – two Ministers, an autonomous agency, and an independent tribunal – all equally tasked with interpreting the same statute. This scenario is more analogous to *Entertainment Software Association, supra* note 28, where this Court found that the existence of two bodies tasked with interpreting the same statute – in that case, a tribunal and a court at first instance – necessitated correctness review. In both *Entertainment Software Association* and the case at bar, "the more methodologically rigorous reasonableness review developed in *Vavilov* cannot adequately deal with an inconsistency in statutory interpretation" because each body may reach a different reasonable interpretation and is not required to defer to the other, leading to "discord [that] could persist indefinitely" (at para 38).

reasonable interpretations.[40]

23. The Federal Court of Appeal in the case at bar acknowledged the unworkability of the immigration legislative scheme without a mechanism that is capable of addressing the "prospect of dueling administrative interpretations…and all the uncertainty, inconsistent application and unfairness that might result."[41] The Court of Appeal attempted to address this problem by resorting to the reference provision set out at s. 18.3 of the *Federal Courts Act* which allows a "federal board, commission or other tribunal" to refer any question or issue of law to the Federal Court for a hearing and determination.[42] However, resorting to this general provision in the *Federal Courts Act* to resolve such issues is both untenable[43] and unnecessary. Parliament has provided a specifically tailored mechanism for this purpose in the IRPA itself – the certified question regime – which, if reviewed on a standard of correctness, allows for an authoritative answer to be obtained upon judicial review.

PART IV and V – SUBMISSION ON COSTS AND ORDER SOUGHT

24. CARL does not take a position on the outcome of the appeal. CARL does not seek costs and requests that no costs be ordered against it.

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[40] See e.g. *Arnold v Canada (MPSEP),* 2016 CanLII 70642 (CA IRB) at para 13; *Fasulo v Canada (MPSEP),* 2016 CanLII 84665 (CA IRB) at para 7. *Bao v Canada (MPSEP),* 2017 CanLII 19157 (CA IRB) at para 8. *Gomez v Canada (MPSEP),* 2017 CanLII 23033 (CA IRB) at para 9 which were decisions made by the ID after the Federal Court of Appeal in *Canada (MPSEP) v Tran,* 2015 FCA 237 found reasonable the ID's determination that "a term of imprisonment" included conditional sentences. Until that judgment was overruled by this Court, the ID and IAD routinely applied the Court of Appeal's interpretation without engaging in additional analysis despite the Court of Appeal specifically noting that it was "obviously open" to decision makers "to adopt another interpretation" given that "there may clearly be other defensible interpretations" (para 87).

[41] *Mason FCA*, *supra* note 16 at para 77.

[42] *Mason FCA*, *supra* note 16 at para 77; *Federal Courts Act*, RSC 1985, c F-7, s 18.3(1).

[43] The Chairperson of the IRB has no statutory authority to refer a question to the Federal Court (IRPA, s. 159). An individual member could potentially refer a question, but can't be compelled to do so, as this would be a violation of the common law principle of adjudicative independence (*Canadian Association of Refugee Lawyers v Canada (MCI)*, 2020 FCA 196 at para 78).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF SEPTEMBER, 2022

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22.	*Patel v Canada (MCI*), 2020 FC 77	19
23.	*Pushpanathan v Canada (MCI),* [1998] 1 SCR 982	4, 18
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	HANSARD SOURCES	**REFERRING PARA(S)**
1.	House of Commons, Legislative Committee on “Bill C-86, An Act to amend the Immigration Act and other Acts in consequence thereof”, 41:3, vol 3 – 18, 14:61-14:62	18

	SECONDARY MATERIALS	REFERRING PARA(S)
1.	Gerald Heckman and Amar Khoday, "Once More unto the Breach: Confronting the Standard of Review (Again) and the Imperative of Correctness Review when Interpreting the Scope of Refugee Protection" (2019) 42 DLJ 49	11
2.	Jamie Chai Yun Liew, "The Good, the Bad and the Ugly: A Preliminary Assessment of Whether the Vavilov Framework Adequately Addresses Concerns of Marginalized Communities" (2020) 98 Can Bar Rev 398	13
3.	Joseph T. Robertson, Q.C., "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017) 68 UNBLJ 143	11
4.	Paul Daly, "Can This Be Correct? *Kanthasamy v. Canada (MCI),* 2015 SCC 61" (11 December 2015), online (blog): *Administrative Law Matters*.	11
5.	The Honourable David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27	11