FAIR PROCESS: AN EXAMINATION OF THE USE OF AUTOMATED DECISION-MAKING SYSTEMS IN CANADIAN ADMINISTRATIVE LAW THROUGH THE CASE STUDY OF CANADIAN IMMIGRATION

by

Wei William Tao

B.A., The University of British Columbia, 2011
J.D., The University of Ottawa, 2014

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE AND POSTDOCTORAL STUDIES

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

August 2025

The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, the thesis entitled:

Fair Process: An Examination of the Use of Automated Decision-Making Systems in Canadian Administrative Law Through the Case Study of Canadian Immigration

submitted by Wei William Tao in partial fulfilment of the requirements for

the degree of Master of Laws

in Law

Examining Committee:

Asha Kaushal, Associate Professor, Peter A. Allard School of Law, UBC
Supervisor

Jennifer Raso, Assistant Professor, McGill University Faculty of Law, McGill University
Supervisory Committee Member

Abstract

As a result of fast-moving developments in artificial intelligence ("AI") tools such as machine-learning ("ML"), Canadian scholars have been engaged in a recent, concerted effort to examine how the use of automated (often also termed "algorithmic") decision-making systems ("ADMs") by public administration officials may alter traditional decision-making processes. This examination has been focused on exploring the impacts these technologies are having on foundational administrative law principles, primarily through the lens of ex post adjudication and judicial review.

This thesis continues this line of scholarship by exploring a specific problematic, how the use of ADMs by Immigration, Refugees and Citizenship Canada ("IRCC"), is altering the process of decision-making in a way that necessarily creates implications for the way external mechanisms like judicial review, are able to aid in reviewing decisions. This enquiry is driven through doctrinal method, applying a law and technology approach, and applying Michael Adler's administrative justice theories and typologies.

Tracing how decisions have shifted, I argue that failures to understand process are impacting both procedural fairness and reasonableness review. Furthermore, I argue that the ability to understand and interrogate process, as a prerequisite, requires greater transparency, accountability, and structures of *ex ante* rulemaking. I conclude with a strong recommendation for structural reform aimed at "getting it right the first time" – suggesting a starting point of procedural protections within statute, namely the *Immigration and Refugee Protection Act* and developing procedural code, inviting refinement.

Lay Summary

This thesis contributes to recent Canadian scholarship that has explored the impact of automated (algorithmic) decision making systems ("ADMs") on core Canadian administrative law concepts. Combining doctrinal, law and technology methods with administrative justice theory, this thesis describes a "process problem" with the use of ADMs by Canadian immigration officials. The impact of this problem has led to the judicial system's struggle to review ADM decisions for procedural fairness, in a way that has impacted also its lens on substantive review. However, to better explore the process problem – three pre-requisite concepts – transparency, accountability, and ex ante rulemaking must be defined and interrogated,

This paper concludes by suggesting a shift towards an administrative justice model of "getting it right the first time" and the development of procedural protections through an amended *Immigration and Refugee Protection Act* and procedural code, inviting refinement.

Preface

This thesis is the original, unpublished, independent work of the author, Wei William Tao.

Select assistance of Chat-GPT 4.0 was used for the following tasks:

- helping the author generate plain-letter understandings of AI technical terminology for brainstorming and research purposes only; and
- in generating the draft of this AI Transparency Notice.

All critical thinking, argumentation, and original contributions remain the sole work of the author, or where derived from work from previous projects (including with co-authors) cited.

Any AI-generated content has been carefully reviewed, edited, and validated to ensure academic integrity and compliance with ethical research standards of the Peter A. Allard School of Law.

The author takes full responsibility for the accuracy, originality, and intellectual merit of this work.

This project reflects the author's personal views only and not the views of any of the organizations he is professionally affiliated with or as contributed to, unless otherwise stated.

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List of Abbreviations

AA	Advanced Analytics
ADM	Automated Decision Making (also known as "Automated Decision System" or "Algorithmic Decision Making")
ADS	Automated Decision System
AI	Artificial Intelligence
AIA	Algorithmic Impact Assessment
AIP	Asylum Interoperability Project
ATIP	Access to Information and Privacy
BJ	Bureaucratic Justice
CBA	Canadian Bar Association
CBSA	Canada Border Services Agency
CCRA	Corrections and Conditional Release Act
CIMM	House of Commons Standing Committee on Citizenship and Immigration
CRES	Client Reporting and Engagement System
CSC	Correctional Services Canada
CTR	Certified Tribunal Record
CUAET	Canada-Ukraine Authorization for Emergency Travel
DADM	Directive on Automated Decision Making
DGSC	Data Governance Steering Committee
DPM	Digital Platform Modernization
DLR	Doctrinal Legal Research
DOJ	Department of Justice
FC	Federal Court
FCA	Federal Court of Appeal
FCCIRPR	Federal Courts Citizenship, Immigration and Refugee Protection Rules

FRT	Facial Recognition Technology
GBA+	Gender Based Analysis Plus
GCMS	Global Case Management System
GDPR	General Data Protection Regulation
GPT	General Pre-trained Transformer
HITL	Human in the Loop
H&C	Humanitarian and Compassionate
IEC	International Experience Canada
IFTTT	If this, then that
IRB	Immigration and Refugee Board
IRCC	Immigration, Refugees and Citizenship Canada
IRPA	Immigration and Refugee Protections Act
IRPR	Immigration and Refugee Protections Regulation
ITAT	Integrity Trends Analysis Tool
MCI	Minister of Citizenship and Immigration
MI	Ministerial Instructions
ML	Machine Learning
MPSEP	Minister of Public Safety and Emergency Preparedness
NLP	Natural Language Processing
NSTAG	National Security Transparency Advisory Group
OAG	Office of the Auditor General of Canada
PDI	Program Delivery Instructions
PIA	Privacy Impact Assessment
QA	Quality Assurance
RPA	Robotic Process Automation (also known as “Process Automation”)
RPD	Refugee Protection Division

SCC	Supreme Court of Canada
SPSS	Statistical Package for the Social Science
SRS	Security Reclassification Scale
SSA	Security Screening Automation
STS	Science and Technology Studies
TBS	Treasury Board Secretariat
TRV	Temporary Resident Visa

Acknowledgements

I want to begin by acknowledging the traditional, unceded, stolen Musqueam lands that UBC is located on and upon which this project will be housed. I grew up on the UBC campus during my formative elementary school years, did my undergraduate studies here in History and International Relations, and through this project, returned to do my Masters. My personal cyclical journey was only made possible by those who have stewarded the lands since time immemorial.

First and foremost, I want to thank Professor Asha Kaushal for her unwavering support and encouragement throughout this process. I would have given up if it were not for your guiding advice and critical eye. Your scholarship inspires and motivates me, and I needed every word of every email you sent me.

Second, I want to thank my second reader, Professor Jennifer Raso. To have someone I leaned on to develop my knowledge and foundations in this area of scholarship agree to be a second reader, is a blessing for which I am grateful. I only wish I had consulted you earlier, but do look forward to future collaborations and explorations in socio-legal theory and administrative justice.

Third, I want to acknowledge the generous funding I received from SSHRC and the Allard Faculty of Law Graduate Studies that eased the financial burden, particularly as I was drafting this thesis during what would normally be business working hours. Joanne Chung was so crucial to keeping my colleagues and I on track.

Now comes the big tent of gratitude who made this project possible.

I want to thank Professor Cristie Ford for supervising a directed research course on notice and comment rulemaking and inviting me to guest lecture which forced me to organize my ideas in ways that helped outline this paper. Your guidance inspired an important section of this paper. I thank Professor Aziz Huq for teaching an exceptional seminar that inspired me to look deeper into the counterargument for whether machines might actually be better decision-makers.

I thank Professor Petra Molnar for being a trailblazer in this space and for opening the doors for a lot of us.

I am in gratitude to several professors including, but not limited, to Gideon Christian, Paul Daly, Sean Rehaag, Teressa Scassa, Kristen Thomasen, Katie Szilagyi, Benjamin Perrin, Mary Liston, and Mireille Hildebrandt, on whose shoulders I leaned heavily on for their earlier forays into the work. As with any literature review, I am missing many others, but I thank you all for your continued refinements into this space – particularly young scholars such as Sancho McCann and Sarah Grieve whose pieces were instrumental to helping me frame my project. Several other professors at Allard and across Canada, that I took courses with or received feedback for, or chatted with were all inspirational and helped mold this thesis in some way.

Katie Schwarzmann receives my thanks for pursuing a parallel project (her brilliant Churchill Fellowship Report!) and giving me someone to chat ideas with at key junctures.

I want to thank Professor Jamie Liew, Kyle Hyndman, and Steven Meurrens for being not only exceptional mentors but having written the initial reference letters that allows this LLM journey to happen. Professor Efrat Arbel receives my thanks for encouraging phone calls recommending for me to pursue these studies.

My LLM cohort at Allard, especially the JLC – Moses, Prince, Ahmed – to me the journey was worth extra studying alongside you. I cherish the meals that fueled the times when I was questioning whether to stick with it.

My many colleagues in the Canadian Immigration and Refugee Bar, especially the co-founding members and collaborators of AIMICI – Zeynab Ziaie Moayyed, Andrew Koltun, and Lou Janssen Dangzalan, deserve my greatest thanks. Mario Bellissmo has been another mentor and champion. I am grateful for the platforms and encouragement lawyers like Mark Holthe, Deanna Okun-Nachoff, and Kamaljit Lehal gave me, and the CBA for giving me platforms to speak about the work. I wouldn't be here without the legal training I received at Larlee Rosenberg and Edelmann and Company before I pursued my own Firm. Now, Justice Peter Edelmann, led by example in showing me how "deep dives" work – one this project definitely turned into.

Without you all, I would not have even started my research into what became my thesis topic. I am also very grateful for the IMM – AIA, Gabriel Bergevin-Estable and Professor Danièle Belanger, for creating space for some exceptional conversations and funding to support my further research efforts. So many others checked in and asked how my thesis was going and

uplifted me at key points. I hope at the very least, citing career advice I received from Justice Alan Diner: “I tried.”

To my Heron Law team - thank you for allowing me the space to do this and taking on the work. There are too many to name, but my former articling student (now lawyer) and frequent co-author Karina Juma deserves a special shoutout for being a feedback backbone, particularly when I was being illogical, rambling, and left many thoughts incomplete. Tamara Yang, Caitlyn Waterhouse, Edris Arib, and Lucas Corman – thank you also for your excellent feedback on earlier drafts. I am exceptionally grateful to my summer research assistant, Rana Sarhan (law student at the University of Ottawa), for joining this project late but crucially to help me over the finish line with her critical eye and McGill guide prowess. Neha Chopra’s final look was also similarly very helpful.

I feel like I am missing a million others, but you were all in my corner so thank you.

Most importantly (last but not least), I express the deepest gratitude to my spouse, Olivia and my daughters Esmeranda and Almeria. Without their unwavering support this project would not have been possible. I owe it now to make up for the evenings and weekends spent away.

For those considering doing a Masters, running a law firm, and raising children – it is an impossible balance but like everything in my life, I have no regrets.

Dedication

To my late father, JST and my mom, QW. I owe it to you bringing me into this world and inspiring the journey. You raised LVT and I very well.

To Olivia XQY, I owe it to you for holding my hand firmly throughout.

To Esme and Alme, I owe you today and every day for allowing me to pursue this project. You are my (automated or not) future.

Chapter 1: Introduction

> *"Automated decision-making shatters the social safety net, criminalizes the poor, intensifies discrimination, and compromises our deepest national values. It reframes shared social decisions about who we are and who we want to be as systems engineering problems. And while the most sweeping digital decision-making tools are tested in what could be called "low rights environments" where there are few expectations of political accountability and transparency, systems first designed for the poor will eventually be used on everyone."*[1]
>
> **Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor***

1.1 The Fictionalized Story of Xi and Wang

Wang, a 35-year-old work permit holder in Canada, began his journey by applying for a visitor visa (also known as a "temporary resident visa" or "TRV") to see his spouse, Xi, a Canadian permanent resident living in Canada at the time. Despite Wang having attended a top 50 global university and being professionally at the forefront of transformational work in the field of AI and cancer research, he was not viewed favourably in the eyes of Canadian visa officers. His first attempt to visit Xi was thwarted by a quick refusal – his family ties in Canada to a Canadian permanent resident spouse were considered too strong to secure his return home. Undeterred, Wang re-applied, providing proof of care responsibilities for his own elderly parents and Xi's possible future plans to return to China.

Wang remembered distinctly how the Immigration, Refugees and Citizenship Canada ("IRCC") officer who conducted his interview kept pressing on whether Wang had plans to conduct sensitive research in Canada that he could transmit back to individuals or entities in China. Wang also remembered the many questions about China's economic expansion plans, military uses for his AI research, and issues he had never thought about nor even had access to in China. Fortunately, and exceptionally, given the experiences of other Chinese citizen applicants with similar backgrounds, Wang somehow passed his interview.[2] After a two-year delay and an

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[1] Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (New York: St. Martin's Press, 2018) at 17.

[2] This hypothetical fact pattern is influenced by the facts in *Li v Canada (Citizenship and Immigration),* 2023 FC 1753 [*Li*].

expensive *mandamus*[3] litigation process that nearly crippled their life savings, Wang finally reunited with Xi.

After Xi and Wang made a few trips between Canada and China, trying to maintain their two worlds and familial obligations, the couple decided to try and make their lives work in Canada for the purpose of starting a family there. They wanted their children to grow up without the hardship of intense education and competitive opportunities that had plagued their childhoods in China. Like many temporary residents in Canada, Wang was unable to find work in his advanced field, settling for a low-paying job working at a local Ontario small business employer looking to improve automation and efficiency in the testing of hearing aids. At least he had employment, and he had his wife Xi, next to him. After the birth of their first child, a daughter *unironically* named Hope,[4] the couple decided to stay in Canada and Xi submitted a spousal sponsorship application for Wang utilizing the in-Canada sponsorship process. On paper (or portal as it now was), the case was strong. They had been senior high school sweethearts, now decades-long into their relationship, and they had a child.

Unfortunately, delays during this time began to impact applications due to the shifting geopolitical circumstances (and anti-immigration sentiment) that served as further complicating barriers.[5] About three years into the sponsorship application, they received a letter from the Canada Border Services Agency ("CBSA"). The letter required Wang to attend the local office for an interview with a CBSA officer who had concerns over his past educational and work background. Despite their limited family income, Wang hired a Canadian immigration lawyer, who flagged that the law around espionage was worsening amidst Canada and China's poor bilateral relationship.[6]

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[3] For basic foundations of the writ of mandamus, see: *Apotex Inc v Canada (Attorney General)* 1993 CanLII 3004 (FCA) and *Conille v Canada (Minister of Citizenship and Immigration)* 1998 CanLII 9097 (FC), [1999] 2 FC 33.
[4] Xi and Wang combine as words to mean Xiwang, or "hope", in Mandarin Chinese.
[5] It is to be noted that this thesis project was largely completed during such a time in Canada. See Will Tao & Karina Juma, "Opinion: Canada as a history of scapegoating immigrants. Will we never learn from the hypocrisy of the past?", *The Toronto Star* (9 September 2024), online: <thestar.com/opinion/contributors/canada-has-a-history-of-scapegoating-immigrants-will-we-never-learn-from-the-hypocrisy-of/article_927f3126-6c75-11ef-9e15-5b67b6f2b241.html>
[6] I note at this stage that the story I present is an entirely anonymized, non-personalized fictional account which combines elements of published FC cases and my own matters. The issue of security screening and Chinese nationals is beyond the scope of this thesis but has been captured in other scholarship. See Preston J Lim, "Sino-Canadian Relations and the Securitization of Domestic Law" (2025) Can YB of Intl Law at 1–24.

Wang attended the interview and was against accosted with evidence that he was inadmissible to Canada under s.34(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*")[7] for espionage and was told that he would be facing an Immigration Division hearing to determine whether or not he would be allowed to stay in Canada. He was told that his sponsorship was also being refused on the grounds of an incomplete police certificate, and that he would be detained given he was a possible national security (flight and danger) risk under the *Immigration and Refugee Protections Regulations ("IRPR").*[8] Wang called Xi in a panic telling her to contact the lawyer and figure out a way to secure a Canadian bondsperson.

Forty-eight hours later, Wang was released under strict conditions, including a mandatory cellphone app that required him to submit five photos and report his GPS location each week. Wang had never been detained before and never thought such an experience would come in a country where he had always been a law-abiding resident.

After receiving the refusal, Xi immediately filed an appeal for the spousal sponsorship refusal. Just days later, and to Xi's surprise, she received an email telling her that she did not have the right to appeal and that the case would be streamlined towards a "written submission only" hearing. Their immigration lawyer advised that the only process they could pursue was a judicial review, which involved the Federal Court ("FC") reviewing whether the actions of the decision-maker, IRCC, was substantively reasonable and procedurally fair.

To their surprise, Wang and Xi's immigration lawyer also mentioned that several of the immigration decisions that had impacted them along their immigration journey may have not been made by the humans that purported to deliver them. Their lawyer highlighted the assistance (and in some cases, sole reliance) on automated decision-making ("ADM") systems (referred to, hereinafter as "ADMs") that were operating behind the scenes to support Canadian government decision-makers. Their lawyer further mentioned that these tools would be difficult to litigate because they were not well-known, were largely undisclosed, and subject to both proprietary and national security protections. The lawyer noted that courts tasked with reviewing ADM decisions

[7] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].
[8] *Immigration and Refugee Protection Regulations*, SOR/2002-227, at ss 244–246.

were not made aware of the role and impact of ADMs in altering processes with their focus largely on the reasonableness of the officer's "final" decision.

1.2 The Problem of ADMs in Canadian Administrative Law

This thesis begins with the fictionalized story of Xi and Wang. Storytelling, particularly the telling of counternarratives that distinguish from the posted, dominant narratives about the Canadian government's[9] use of technology, frames this entire project. As a first aim, this project seeks to *tell the story* of ADMs in Canadian immigration from at least one practitioner/researcher/advocate's perspective.

Wang's ordeal contains *at least* seven uses of ADM[10], beginning from the use of advanced analytics on the first TRV application to the CBSA's recently released "alternative to detention" app, ReportIn.[11] There were also various human decision-makers that participated in rendering decisions that were either influenced, impacted, or facilitated by ADM technology. Consequently, the true number of systems used, particularly when also considering the use of mostly secret/internal Robotic Process Automations ("RPAs")[12] which teeter the line between decision-maker and decision-aid, is undoubtedly much higher.

In Xi and Wang's case, this knowledge gap entrenches itself as Wang seeks to judicial review one final human decision, using an administrative law framework that does presently requires the scrutinization of the role of these ADM tools. Limited public disclosure and minimum case law have left a general knowledge gap in understanding how ADM technology

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[9] I use the terms Canadian government and Federal Government interchangeably in this thesis.
[10] These projects, which will be specified later in the thesis, cover (at minimum) the uses of: advanced analytics triage when Wang applied for his TRV, IRCC and CBSA risk flagging/security screening tools, Chinook (contested by IRCC), advanced analytics spousal sponsorship triage, CBSA's alternative to detention facial recognition app, the Immigration and Refugee Board ("IRB")'s case automation triage.
[11] Canada, Open Government, *Algorithmic Impact Assessment – Client Reporting and Engagement System (CRES)/ReportIn,* (last modified 13 November 2024), online: <open.canada.ca/data/en/dataset/eaeb269c-6ac5-4429-a5aa-1fcc07c77933/resource/15b71b6c-26f9-4f7b-99b7-90adeb495479> [CBSA ReportIn AIA]
[12] See Immigration Refugees and Citizenship Canada, ATIP Request A-2023-05333 at 119 [on file with author] [*Policy Playbook*] which states that "Automated decision systems process information in the form of input data, using an algorithm to generate an output." See also Petra Molnar, "Automating Migration: Litigating AI in Immigration and Refugee Decision-Making" in Jill Presser et al, eds, *Litigating Artificial Intelligence* (Toronto: Emond, 2021) at 213.

adapts into or shapes the Canadian administrative state and its legal frameworks. Petra Molnar, reflecting on the global trend, states that "there is a gap in the conversation around the disproportionate impact of technological experimentation on migrants and refugees without appropriate mechanisms of accountability and oversight."[13]

This thesis explores and critiques the dominantly held position of IRCC that has been adopted in leading FC decisions – that the ADM decision-making process both: (1) has not altered how decisions are made; and (2) should not be elevated in importance over the actual reasons provided by decision-makers.

IRCC, as the leading Federal Government department that has deployed these technologies, is the focus of this thesis. This thesis project is both topical and important, as Canadian immigration may serve as the "low-rights environment" for testing ADMs,[14] much like welfare[15] and criminal sentencing[16] did in the United States. This in turn gives an early window into how other Canadian public administrative bodies may utilize this technology and how courts might respond. In the immigration context, Canadian immigration officials argue that ADM can assist in making more efficient decisions, justified by claims they reflect the historical accuracy of outcomes made by human decision-makers. Issues of bias and unfairness, proponents argue, can be addressed in ADM systems in ways that are more challenging with human decisions.

While this thesis represents two years of enrollment, it is in fact nearly four years of thinking, researching, and consulting on the topic of ADMs. Very purposely, I cite previous draft papers, conference papers, blog posts, writing, advocacy, and litigation that I have contributed to in this space. I also lean heavily on the work of Canadian and global scholars who have paved the way and opened the door to this emerging area of scholarship. In a sense, this thesis seeks is both a compilation of, but also uniquely the first time where, my various strands of narrative story-telling and legal theorizing have come together.[17]

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[13] Molnar, *supra* note 12 at 210.
[14] Eubanks, *supra* note 1 at 17.
[15] This is the central focus in Eubanks' book. *Ibid.*
[16] See e.g. Jeff Larson et al, "How We Analyzed the COMPAS Recidivism Algorithm", *ProPublica* (23 May 2016), online: <propublica.org> [https://perma.cc/9SSY-NMKR].
[17] As I stated earlier, this is the first time the story of ADMs, immigration, and administrative law has been told in this much detail. Granted, I acknowledge that I am necessarily *constrained, inter alia* by factors such as this project's scope and the information made available to-date by the Canadian government.

1.3 Methodology

1.3.1 Doctrinal Methods, Law and Technology, and a Lawyer's Approach

Given this thesis project's focus on describing and evaluating foundational administrative law principles, case law, and soft law around the use of ADMs, I started by engaging Doctrinal Legal Research ("DLR")[18] as my primary methodology. As a DLR approach can require going beyond black letter law analysis, particularly in a space driven by frequent soft law and technological developments, I adopt Terry Hutchinson and Nigel Duncan's presentation of the four categories of doctrinal research,[19] applying each of them throughout the various chapters of this project.[20] These four categories are: (1) Doctrinal research, which "provides a systematic exposition to the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty, and perhaps, predicts future developments"; (2) Reform-oriented research, which "intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting"; (3) Theoretical research which "fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of rules and procedures that touch on a particular area of activity"; and (4) Fundamental research which is "designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of the law."[21] Various chapters of this thesis project engage elements of each of the above approaches.

The emerging space of "Law and Technology" further shifts the doctrinal method outside the confines of black letter law and into areas such as regulation and policy-making. Thibault

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[18] In his book, *Idea and Methods of Legal Research*, Ishwara Bhat cites S.M Jain's definition of doctrinal research: "Doctrinal research, of course, involves analysis of case law, arranging, ordering and systematising legal propositions, and study of institutions, but it does more – it creates law and its major tool (but not the only tool) to do so is through legal reasoning or rational deduction."
See Ishwara P Bhat, *Idea and Methods of Legal Research*, (New Delhi: Oxford University Press, 2023), DOI: <10.1093/oso/9780199493098.003.0005>.

[19] Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) Deakin L Rev 83 at 85.

[20] I credit a lecture from Kristen Thomasen where she shared the methodological approach she took with her doctoral thesis. See Kristen Thomasen, *Private Law & Public Space: The Canadian Privacy Torts in an Era of Personal Remote-Surveillance Technology* (PhD Dissertation, University of Ottawa Faculty of Law, 2022) [unpublished], online (pdf): <ruor.uottawa.ca/bitstream/10393/43746/1/Thomasen_Kristen_2022_Thesis.pdf>

[21] Hutchinson & Duncan, *supra* note 19, at 101–102.

Schrepel, in his working paper "Law + Technology" argues that there are a series of methodological interventions that bring together law and code in the search for greater synergy between law and technology's ability to seek the common good while reducing harm.[22] Therefore, the framing of my research as one that engages law and technology demands a more flexible doctrinal method that considers the broader context of law beyond the four corners of the page. As a result, the scholarship from those who write about the law through the prism, knowledge, and first-hand experience of computer science helped shape much of the discussions in Chapter 2 and 4. This methodological approach is particularly crucial in highlighting the gaps in understanding between technologists and lawyers that science and technology studies scholars have predicted Canadian courts will need to engage in.[23]

As this thesis developed to its end stages, it became evident that I was taking a "lawyer's approach" to evaluating legislation, regulation, caselaw, and soft law with a focus on extracting definitions, principles, and gaps through documentary analysis. I was importing the skillsets I used in litigating, advocating, and presenting on these issues and reflecting them in my research. Matilda Arvidsson and Gregor Noll remind readers of law's backstage and unofficial stories, which I have had first-hand experience in, and how this shapes my understanding of the complexity and development of law within a changing society.[24]

1.3.2 Developing a Theoretical Approach – Administrative Justice Theory

Initially, the thesis project began without the intention of adopting a specific main theoretical lens. Relying on my past scholarship which has taken a critical lens and with a primarily narrative focus, I adopted approaches from critical race theory[25] and legal

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[22] Thibault Schrepel, "Law + Technology" (2023) The J of L and Tech at Texas 1 at 2–3, 7–8, online: <ssrn.com/abstract=4115666>.

[23] See e.g. discussion in Joshua A Kroll et al, "Accountable Algorithms" (2017) 165:3 U Pa L Rev 633, online (pdf): <scholarship.law.upenn.edu/penn_law_review/vol165/iss3/3> [Kroll et al, "Accountable Algorithms"].

[24] Matilda Arvidsson & Gregor Noll, "Decision Making in Asylum Law and Machine Learning: Autoethnographic Lessons Learned on Data Wrangling and Human Discretion" (2023) 92:1 Nordic J Intl L 56, DOI: <10.1163/15718107-bja10057>.

[25] Counter-narrative storytelling is a central tenet of critical race theory and approach that I have taken in my past scholarship. See e.g. Wei William Tao, "Spouses of the Pandemic" in Colleen M Flood et al, eds, *Pandemics, Public Health and the Regulation of Borders: Lessons from COVID-19* (Abingdon: Routledge, 2024) 166, DOI: <10.4324/9781003394006>.
Tying in the section earlier, Katie Szilagyi writes about the competing conceptions of the rule of law through storytelling. See Katie Szilagyi, *Artificial Intelligence & the Machine-ation of the Rule of Law, Technology* (PhD Dissertation, University of Ottawa Faculty of Law, 2022) [unpublished] at 117–120, online (pdf): <ruor.uottawa.ca/server/api/core/bitstreams/aa808769-6039-4489-a394-b2f06b8ceaa2/content>.

consciousness[26] to inform my storytelling and my efforts to inform the public. I also situated my thesis within a general theory of administrative law, which as Paul Daly writes, refers to several core values: the rule of law,[27] good administration, democracy and separation of powers."[28] As discussed above, the initial plan was to apply doctrinal analysis to frame the context in which ADMs were being developed and applied in Canadian immigration, analyzing the current legal framework of procedural fairness, substantive reasonableness, and legality, and tracing the law's development through current case law doctrine and academic literature. In that sense I hoped to uncover how Canadian immigration's "good administration" in ADMs would be conceptualized. Parts of that initial ambition continue in this final published version.

However, as this thesis project came together and through the in-depth review and advice of my second reader, Jennifer Raso, a leading socio-legal scholar and administrative law professor in the area of digitization of government services, it became readily apparent that

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The use of fiction or fictional interlocutor provides a much-needed window into how people feel and are impacted in the law, impacted by their positionality. For more on this approach see Derrick J Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1989).

As technology shifts the legal conversations to objectivity, formalism, and even anthropomorphizing AI, it is important to continue to emphasize the role and perspectives of the humans who help build, maintain, direct, and are impacted by these systems. I engage narrative story-telling both in providing the case study in the introduction, but also in the way I tell and frame various descriptive elements within the paper, particularly in introducing relevant case law and legal developments.

[26] Peter Cane and Joanne Conaghan write that legal consciousness refers to what people do as well as say about law. It is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning-making (see Peter Cane & Joanne Conaghan, *New Oxford Companion to Law*, (New York: Oxford University Press, 2008), online (pdf): <web.mit.edu/~ssilbey/www/pdf/Legal_consciousness.pdf>).

[27] Rule of law questions and espoused values such as consistency and predictability in decision-making are addressed as they are tied to procedural fairness, but I would defer to the scholarship of Katie Szilagyi and her thorough treatment on this concept as it pertains to the realm of automation and the use of AI systems. At page 103. Szilagyi writes:

> Taken together, the Rule of Law protects us against arbitrary exercises of power, retribution, or secrecy. It not only governs behaviour, but also ensures a consistent application of legal rules and outcomes; it generates a corresponding trust in public institutions. Clear, open rules help individuals make informed choices about how to exercise their free will. While law is something that people must obey and, indeed, be ruled by, it also offers the possibility that law will guide them in their endeavours.

See Szilagyi, *supra* note 25 at 103.

[28]Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 23, online: <ssrn.com/abstract=2460264>.

indeed there was a theoretical underpinning to my analysis. She noted that in addition to sharing the story of how ADMs have come to be in Canadian immigration law, policy, and scholarship, I was also critiquing the government's internal approaches and processes. She suggested that my research engaged approaches that could be classified as part of a broader theory of administrative justice.[29]

In selecting administrative justice theory (or more appropriately, theories) as a lens, I rely on and will primarily introduce only two proposed models (often labelled as "typologies") of conceptualizing decision-making in administrative justice. I utilize the administrative justice model and these two typologies primarily to draw out the tension points within the ADM process and the process and substance discussion that frames this thesis.

i. What is Administrative Justice?

Lorne Sossin[30] writes that "[a]t its core, Administrative Justice refers to the system of decision-making of administrative agencies, boards, commissions and tribunals."[31] Michael Adler, one of the leading scholars in this space, discusses administrative justice as the "justice that inheres in administrative decision-making."[32] Citing from Jerry Mashaw, whose work in *Bureaucratic Justice* is considered the originating scholarship in this area, Adler notes that administrative justice is "the justice of routine day-to-day administrative decision making".[33] Paul Daly, more recently, has discussed the principles of administrative justice as framing the acceptability of decision-making and highlighting the matching of decision-making processes to decision-making models.[34] These definitions emphasize the role of administrative justice in looking at legal issues beyond merely an adjudicative lens and into the on-the-ground practices.

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[29] To be transparent to readers and thesis reviewers, this late discovery of administrative justice led to a restructuring of a thesis that initially was longer in length, more narrative, and much less theoretical and analytical. Among elements cut were more detailed, doctrinal, case law analysis, which I intend to include in a future case book. However, applying theories of administrative justice helped narrow my focus on examining process and revealed the tension points between process and substance that I was navigating throughout previous draft versions.
[30] Now an Ontario Court of Appeal Justice.
[31] Lorne Sossin, "Future of Administrative Justice" (2008) 21 Can J Admin L & Prac at 193.
[32] Michael Adler, "Fairness in Context" (2006) 33:4 J Law & Soc 615, online: JSTOR <jstor.org/stable/4129594> [Adler, "Fairness in Context"].
[33] *Ibid* at 615, 619, citing Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, New Haven, 1983).
[34] Paul Daly, "Artificial Administration: Administrative Law, Administrative Justice and Accountability in the Age of Machines", 2023 CanLIIDocs 1258 at 12 [Daly, "Artificial Administration"].

Leading scholars Mashaw and Adler, provide the two main models that this project examines. Mashaw's typology consists of three models of administrative justice: (1) Bureaucratic Rationality; (2) Professional Treatment; and (3) Moral Judgment. These models are presented as having different legitimating values, primary goals, structures or organizations, and cognitive techniques. The below sets out how these models differentiate from one another.

Table 18.1 Features of the three justice models

Dimension/model	Legitimating values	Primary goal	Structure or organization	Cognitive technique
Bureaucratic rationality	Accuracy and efficiency	Programme implementation	Hierarchical	Information processing
Professional treatment	Service	Client satisfaction	Interpersonal	Clinical application of knowledge
Moral judgment	Fairness	Conflict resolution	Independent	Contextual interpretation

Figure 1 - Jerry Mashaw's Three Administrative Justice Models[35]

In developing his own typology, Adler is critical of Mashaw's models: (a) failure to consider the trade-offs that "reflect the concerns and bargaining strengths of the institutional actors who have an interest in promoting each of the models; (b) ignorance of the absolute strength of the models in different situations in creating "strong" and "weak balances"; and (c) failure to consider competing policy objectives existing alongside administrative ones.[36]

Finding Mashaw's models insufficient, Adler adds three additional sets of models: (1) managerial; (2) consumerist; and (3) market. Adler's work reworks Mashaw's headings, choosing instead to examine the model type, model of decision-making, legitimating goal, mode of accountability, and mode of redress.[37] He also renames the moral judgment model as the "legal" model.

[35] Jerry L Mashaw, "Models of Administrative Justice" in Marc Hertogh et al, eds, *The Oxford Handbook of Administrative Justice* (Oxford: Oxford University Press, 2022) at 378, online: <doi.org/10.1093/oxfordhb/9780190903084.013.18> [Mashaw, "Models of Administrative Justice"].
[36] Adler, "Fairness in Context", *supra* note 32 at 624–625.
[37] *Ibid* at 622.

Table 18.2 Adler's typology of administrative justice

Model	Mode of decision-making	Legitimating goal	Mode of accountability	Mode of redress
Bureaucratic	Appling rules	Accuracy	Hierarchical	Administrative review
Professional	Applying knowledge	Public service	Interpersonal	Second opinion or complaint to a professional body
Legal	Asserting rights	Legality	Independent	Appeal to a court of tribunal (public law)
Managerial	Managerial autonomy	Standards of service	Performance indicators and audit	Publicity
Consumerist	Consumer participation	Consumer satisfaction	Consumer charters	'Voice' and/or compensation through consumer charters
Market	Matching supply and demand	Economic efficiency	To owners or shareholders	'Exit' and/or court action (private law)

Source: Adler (2006: 622).

Figure 2 - Michael Adler's Six Models of Administrative Justice[38]

Daly, analyzing primarily Mashaw's three justice model, argues that the reliance of technology can "shift the administrative justice model from professional treatment or moral judgment to bureaucratic rationality", particularly as coded decisions "automatically determine the range of possible action."[39] Daly documents this shift by reviewing three case studies of where this shift can be demonstrated, the robo-debt scandal of the Department of Home Services in Australia, the COMPAS sentencing regime in the United States, and the grading algorithm of Ofqual in the UK.[40] Daly concluded his on application of Mashaw's theories by suggesting bureaucratic rationality must aid, but not replace a professional treatment or moral judgment model.[41]

[38] Mashaw, "Models of Administrative Justice", *supra* note 35 at 382.
[39] Daly, "Artificial Administration", *supra* note 34 at 13, n 64 citing A Aneesh, "Global Labor: Algocratic Modes of Organization" (2009) 27 Sociological Theory 347 at 356.
[40] Daly, "Artificial Administration", *supra* note 34 at 14-17.
[41] *Ibid* at 18.

ii. A Focus on Adler's Model

For this thesis project, I will focus on Adler's administrative justice theory, not only to differentiate this inquiry from Daly's work, but more importantly to reflect my efforts to tie together accountability mechanisms and the process/substance relationship of ADMs. As set out earlier, Alder's work heavily emphasizes the need to bring together the tribunal's goal with how the tribunal seeks to hold itself accountable, while directly engaging the outside mechanisms available to assist. This is a crucial question when transposed into the immigration context – and how immigration officials are using ADMs, how they hold themselves accountable, and what recourse is there for those who feel that this accountability has not been delivered.

I focus specifically on Adler's first-instance, *internal dimension* of administrative tribunal decision-making, namely the importance of having front-line decision-makers be "getting it right the first time".[42] This concept seeks to ensure that decisions are made accurately at first instance – by immigration officers and policymakers who process applications and build ADMs, so as to avoid the need to bring in costly, time-consuming redress mechanisms through litigation. I also engage with the procedural and substantive challenges that are manifested in immigration's main *external*, corrective mechanism: FC judicial review. I adopt Adler's conception that "external controls need to be combined with internal controls if administrative justice is to be realized."[43] This emphasizes the need to better understand how immigration officials are developing and using ADMs. Importantly, Adler also notes that the pursuit of fairness is but one of administrative law's confluence of decision-making factors including accessibility and efficiency.[44] This tension point/trade-off between efficiency and fair process is discussed throughout the thesis.

I also note the strong role of Adler's *managerial model*, that focuses on standards of service, performance indicators and audit, with limited redress other than public disclosure.[45] Reference to where IRCC has taken a managerial approach to the ADM process, in combination with the bureaucratic shift that Daly outlines, will also be flagged at various times in this project.

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[42] Michael Adler, "The Future of Administrative Justice" in Marc Hertogh et al, eds, *The Oxford Handbook of Administrative Justice* (Oxford: Oxford University Press, 2022), at 625, online: <doi.org/10.1093/oxfordhb/9780190903084.013.32> [Adler, "The Future of Administrative Justice"].
[43] Adler, "Fairness in Context", *supra* note 32 at 619.
[44] Adler, "The Future of Administrative Justice", *supra* note 42 at 635.
[45] Adler, "Fairness in Context", *supra* note 32 at 622–623.

Adler's work on U.K. social security benefits showed a shift towards the managerial model from the predominantly bureaucratic one.[46]

As a final note, I see these modes of decision-making as representing different orientations that combine procedure and substance.[47] Judicial review is arguably both an administrative review process and a legal process, but one that ultimately exists to deliver substantive outcomes to applicants. Accuracy and efficiency, as legitimating goals, could very well form part of service standards which government departments like IRCC set – both internally and externally. The use of ADMs add new dimensions to this conversation. Furthermore, judicial review's underlying blend of bureaucratic and legal decision-making may give rise to the need to address consumer voices, which are growing louder through external mechanisms such as group litigation.[48] Like Adler, I note only trade-offs, but certainly blurred lines as to which model is being applied in any given circumstance and to whom (e.g. internally, in private guidelines or externally, through posted public messaging).

iii. The Administrative Justice's Applicability to Non-Citizens – A Tension Point

My use of this theoretical lens is not without its own needed scrutiny. While Adler discusses that the need to treat non-citizens of the state fairly as a hallmark of good government,[49] the reality and application on the ground may be different. Administrative justice theory's application within the immigration context, where there are limited rights for non-citizen participants, leaves few avenues for redress – whether through legal or non-legal public means. Canadian immigration lacks adequate complaints/professional bodies such as ombudspersons.[50] Only a limited class of applicants have a right of appeal to an administrative tribunal[51] and the ability to use publicity or to have a voice in cases where appeal is unavailable, is tied to those with power, privilege, or access to media.[52] The importance of judicial review as a mode of redress is arguably elevated for Canadian immigration applicants.[53]

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[46] Adler, "Fairness in Context", *supra* note 32 at 634.
[47] Mashaw, "Models of Administrative Justice", *supra* note 35 at 382.
[48] Adler, "Fairness in Context", *supra* note 32 at 622.
[49] *Ibid* at 615–616
[50] Efforts that have been made to try an appoint an ombudsperson for IRCC will be discussed in Chapter 4.
[51] See *IRPA*, *supra* note 7 at s 63.
[52] This paper relies on several media, as it has been an essential tool in spreading public awareness about ADMs as a societal issue, not necessarily through individual decision-making benefits.
[53] Adler, "Fairness in Context", *supra* note 32 at 622.

Within the context of procedural fairness, Kate Glover Berger writes that "the procedural demands on administrative decision-makers reflect the rights and privileges of citizens and communities that the law seeks to protect."[54] Whether non-citizens, the most impacted group by IRCC's use of ADMs, can be considered to be of core importance to our administrative justice system and provided meaningful procedural fairness, is a recurring question that lingers throughout this project.

1.4 Core Research Questions: How Has the Use of ADMs by IRCC Affected the Decision-Making Process? Is There Indeed a Concern of Elevating Process Over Substance?

The core research questions I focus on for this thesis is derived from the FC's decision in *Haghshenas,* where Justice Henry S. Brown held that in treating decisions where artificial intelligence ("AI") may have played a role in decision-making, one should not elevate process over substance.[55] From this, two key questions arise: (1) what is the context and process for ADM decisions in Canadian immigration?; and (2) is this current process fair? While I do not fully answer a subsequent third question, I do plant the seeds for considerations in my final chapter (3) how should Canadian immigration law and policy conceptualize a fair process for ADM? Applying Adler's framework and administrative justice theory, I am also interested throughout in tying IRCC's *internal* decision-making processes to *external* adjudication,[56] which has been the focus of much of current Canadian administrative law scholarship in the area.

1.5 Central Claims: A Fair Process for ADM Matters – Requires Transparency, Accountability, and Clear Ex Ante Rules

The central claim of this thesis is that the predominant narrative suggests that ADMs have not altered decision-making and have few implications on both fairness and substance is both an oversimplification and premature. Critiquing the context and process of IRCC's current use of

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[54] Kate Glover Berger, "Fair Processes for Just Outcomes: The Principles and Practices of Procedural Fairness" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context* (4th ed, Toronto: Emond Montgomery Publications, 2022) at 180.
[55] *Haghshenas v Canada (Minister of Citizenship and Immigration)* 2023 FC 464 at para 24 [*Haghshenas*].
[56] This approach is suggested by Michael Adler with respect to other countries. See Adler, "The Future of Administrative Justice", *supra* note 42 at 641.

ADMs, I argue that a fair process should be a core pursuit. A fair process not only matters as a stand-alone concept, but has unique impacts on the ability to review its written "final" reasons, as demonstrated by the challenges of reviewing boilerplate immigration decisions.

This thesis further argues that case law to-date as been ineffective at documenting and critically analyzing ADM's process, through its internal and external decision-making mechanisms. To better interrogate the question of how process is impacted, I further argue that there are three pre-requisite concepts or "requirements" for fair process: transparency, accountability, and ex ante rulemaking.

1.6 Thesis Roadmap

Chapter 2 begins with a critical analysis of the key definitions, concepts, and use cases required prior to exploring how the Canadian administrative law framework might engage with ADM technology. I take a critical lens in presenting and nuancing the relevant technological terms and legal governance frameworks for ADMs. Chapter 2 concludes, crucially, with a review of how the traditional model of decision-making in Canadian immigration has been altered with the use of ADMs that augment and replace human judgment.

In Chapter 3, I explore what a fair process looks like. I tie in existing conceptions of procedural fairness and how those concepts have been explored in the ADM context by scholars and by the courts. Next, I examine the relationship between fair process and substance, before critiquing the current focus on adjudication, the overt focus on reasons, and FC processes as hindering the ability to interrogate procedural fairness. This chapter closes with a look at the administrative law concept of legality, as a key bridge between process and substance.

In Chapter 4, I narrow in on what I perceive to be three contextual, *connective* concepts within the current analysis for ADMs, which are needed when considering a fair process. These three concepts are: (1) transparency; (2) accountability; and (3) ex ante rulemaking. I conclude this chapter by tying in these concepts to Xi and Wang's own situation, highlighting where transparency, accountability, and ex ante rulemaking could have helped them navigate their immigration process.

In Chapter 5, I bring the conversation back to administrative justice and Adler's theory. I present the benefits of Adler's "getting it right the first time" model for Canadian immigration's use of ADMs. I then make a broader recommendation for legislative reform and written procedural code. Finally, I conclude this chapter by inviting refinement, both in terms of expanding the considerations that extend beyond fairness, but also in applying different theories and methods to exploring this emerging problematic.

Chapter 2: The Concepts, Contexts, and Legal Frameworks Behind IRCC's Use of ADMs

> "Administrative law is therefore an afterthought (if it is a thought at all).
>
> Even if litigants were to use administrative law mechanisms to challenge an algorithmically-driven decision, their legal challenge may focus on issues other than the use of an algorithmic tool because they may be unaware of the degree to which such tools influenced the outcome. Administrative agencies do not publicize the extent to which they use assistive decision-making technologies. People who are impacted by these tools may thus assume that the human official with whom they met, or the civil servant who signed a decision letter, made a decision alone.
>
> This institutional opacity also impedes doctrinal evolution, as people cannot challenge algorithmic tools if they do not know these tools exist."
>
> **Jennifer Raso, *AI and Administrative Law*[57]**

This chapter begins by setting out the key concepts required for understanding and generating awareness of the problematic of how ADM shifts the decision-making process.[58] This chapter focuses on unpacking what ADMs are, how the law implicates them, and the type of use cases that are later contested (or will be contested in the future) in the Canadian administrative law context. In addition to the *external* dimension of administrative justice, this chapter also carefully focuses on the *internal* dimensions – both those "hidden in plain sight", but also those kept away from the public knowledge. As such, these terms, legal framework, and use case impacts are contested by various actors. Here too, I plant the seeds of concern that there is a lack of transparency around IRCC's various definitions and uses, an accountability issue, and a lack of clear stakeholder-driven/contributed rules. All these factors impact the process problem which the next chapter tackles.

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[57] Jennifer Raso, "AI and Administrative Law" in Florian Martin-Bariteau & Teresa Scassa, eds., *Artificial Intelligence and the Law in Canada* (Toronto: LexisNexis Canada, 2021), ch 7 at 6 [Raso, "AI and Administrative Law"].

[58] This chapter draws influence from a previous conference working paper I co-wrote with Karina Juma. See Will Tao & Karina Juma, "Automated Decision-Making Systems in Canadian Immigration and Administrative Law: A Primer for What Practitioners Should Know" (2023), Working Paper v20240513 [on file with author].

2.1 Definitions and Terminology

Within the current societal hype cycle[59] and trend towards everything "AI" related,[60] it is crucial to first define the terminology required to navigate both its common and contested understandings. AI itself is a broad term, and as this chapter will shortly discuss, ADMs may or may not include AI components. IRCC defines AI, adapting the definition from tech company IBM, that AI includes "different technologies that enable computers and machines to simulate human intelligence and problem-solving capabilities, such as learning, reading, writing, talking, seeing, analyzing, making predictions and recommendations."[61] As this paper focuses specifically on ADMs rather than AI more broadly, I will necessarily narrow the definitional lens, while noting there is significant overlap.

To start, it is important to frame that as the laws and regulations around ADMs continues to develop, more legislators, regulators, and judiciary bodies will need to partake in statutory interpretation. These definitions I examine are also core to the process of ADM, which is interrogated in the next chapters. One of the major concerns of scholarly approaches to ADMs has been what Daniel Engstrom and Daniel Ho (writing in the American context) call the

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[59] Will Tao, "What is an AI Hype Cycle and How Is it Relevant to Canadian Immigration Law?" (22 February 2024), online (blog): <vancouverimmigrationblog.com/what-is-an-ai-hype-cycle-and-how-is-it-relevant-to-canadian-immigration-law/>. See also critique of overhyped AI in Kirsten Thomasen & Bianca Wylie, "Canada's focus on overhyped future threats of AI miss the harms already being perpetuated against us", *Toronto Star* (15 May 2024), online: <thestar.com/opinion/contributors/canadas-focus-on-overhyped-future-threats-of-ai-miss-the-harms-already-being-perpetuated-against/article_c290ea74-1263-11ef-89da-83d96e2c7ea6.html>.

[60] On this point, the definition of AI is also contested. The *Policy Playbook* defines AI as encompassing a broad range of technologies and approaches and is a field of computer science dedicated to solving cognitive problems associated with human intelligence. IRCC notes that AI can perform tasks such as learning, problem solving, and pattern recognition. The Organisation for Economic Co-operation and Development [OECD] recently updated their definition to read as follows "An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment. See *Policy Playbook, supra* note 12 at 55.

Sarah Grieve writes that, "AI is notoriously difficult to define. Broadly, it is described as, ''a field of computer science focused on designing systems using algorithmic techniques [. . .] capable of performing tasks that, if performed by a human, would be said to require intelligence." See Sarah Grieve, "Re-Locating Discretion Amidst Artificial Administration: An Analysis of Emerging System-Level Bureaucracies in Canada's Federal Government" (2023) 36 Can J Admin L & Prac 169 at 4.

See also OECD, *Explanatory Memorandum on the Updated OECD Definition of an AI System*, OECD Artificial Intelligence Papers, Doc No 8 (2024), DOI: <10.1787/623da898-en>.

[61] See Canada, Immigration, Refugees and Citizenship Canada, Presentation Slide Deck, June 2025 at slide 4 [on file with author] [IRCC, "Presentation Slide Deck, June 2025"].

"abstracting away from the technical and operational details of actual algorithmic tools."[62] This is common in the Canadian context also, with both scholars and courts often applying the broad term "AI" without specifying what type of technology system it is and whether it in fact has AI components.[63] As will become evident especially in Chapters 3 and 4, coming up with definitions, scrutinizing who is doing the defining, and how those definitions are applied to ADM users, are a foundational prerequisite to the refinement of the law in this area.

My approach to presenting the definitions begins with outlining what an ADM is and identifying its core components. I then explain how automated decision-making can exist as simpler rules-based systems to more complex machine learning-based ones. This shift also raises questions about the role of humans in decision-making, especially given the shift towards systems that operate without human involvement and beyond human understanding or scrutiny – so called black-box systems, which are at the heart of many forward-looking concerns surrounding fair process.

It is also important to identify at the outset, and in a way that thematically links together multiple sections of this thesis project, that the act of defining is never done as a neutral act.[64] The very choice of how to present a term (be it legally or technologically), particularly as the definitions get more granular and finite, makes it more likely for the term to take on new meaning from the perspectives of the definers themselves.

2.1.1 Automated Decision-Making Systems, Process Automation, and Algorithms

Teresa Scassa defines ADMs as "any technology that either assists or replaces the judgement of human decision-makers."[65] She explains that "these systems draw from fields like

[62] David Freeman Engstrom & Daniel E Ho, "Algorithmic Accountability in the Administrative State" (2020) 37:3 Yale J Reg 800 at 827.
[63] See discussion e.g. in *Haghshenas, supra* note 55 at para 24.
[64] Kimberle Crenshaw et al, *Critical Race Theory: The Key Writings that Formed the Movement,* (New York, The New Press, 1995) at xiii; see also Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge MA: Harvard University Press, 1998), at 11-12 and her critique of the perspective of law's neutrality and objectivity.
[65] Teresa Scassa, "Administrative Law and the Governance of Automated Decision-Making: A Critical Look at Canada's Directive on Automated Decision-Making" (2021) 54:1 UBC L Rev 251 at 260-261.

statistics, linguistics, and computer science, and use techniques such as rules-based systems, regression, predictive analytics, machine learning, deep learning, and neural nets."[66]

These tools are also referred to as Automated Decision Support ("ADS") systems, which IRCC defines as "includ[ing] any information technology designed to directly support a human decision-maker on an administrative decision (for example, by providing a recommendation), and/or designed to make an administrative decision in lieu of a human decision-maker."[67] IRCC's definition of ADMs serves a critical counterpoint to their definition of "process automation" (also called "RPA") which they view as being extractable from decision-making.[68] IRCC defines robotic process automation as "technology that mimics basic repetitive clerical actions performed by humans."[69] IRCC provides two examples of this: (1) "entering information from one system or file to another"; and (2) "simple information searches within a system."[70] IRCC also notes that RPAs do not use advanced analytics.[71]

I take a critical position towards the way IRCC has positioned and distinguished between these two concepts and what is ultimately "extractable" from decision-making to allow such a tool to be classified as an RPA. As Karen Yeung writes about automation:

> "Tasks may include sorting, scoring, ranking, visualisation, reporting and verification, intended to inform or even to automatically trigger a specific action, whether to prioritise, distribute, manipulate, admit or exclude, while the list of potential objects that may be subject to algorithmic analysis and automation is virtually infinite, including individual persons claiming eligibility for a specific governmental benefit or status, organisational tasks, packages and objects, vehicles and so forth."[72]

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[66] *Ibid.* This definition appears to have also been drawn from the *DADM* itself at Appendix A which states that Automated decision systems are, "any technology that either assists or replaces the judgment of human decision-makers. These systems draw from fields like statistics, linguistics and computer science, and use techniques such as rules-based systems, regression, predictive analytics, machine learning, deep learning, and neural nets."
See Canada, Treasury Board Secretariat, *Directive on Automated Decision-Making* (last modified 25 April 2023), online: <tbs-sct.canada.ca/pol/doc-eng.aspx?id=32592> at Appendix A [*DADM*].
[67] *Policy Playbook,* supra note 12 at 118. See also Molnar, *supra* note 12 at 213: "Automated decision systems process information in the form of input data, using an algorithm to generate an output."
[68] *Ibid* at 119.
[69] Canada, Immigration, Refugees and Citizenship Canada, *Use of technology across the department,* (last modified 18 November 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/digital-transparency-advanced-data-analytics/uses-technology.html#s3>.
[70] *Ibid.*
[71] *Ibid.*
[72] Karen Yeung, "The New Public Analytics as an Emerging Paradigm in Public Sector Administration" (2022) 27:2 Tilburg L Rev at 11, online: <doi.org/10.5334/tilr.303>.

All these tasks performed by technology can serve to manipulate, de-stabilize, and displace legal decision-making authority.[73]

As will be discussed in the next section, ADMs/ADS attract greater governance requirements and fall under the scope of the *mandatory* soft law regulatory instrument, the Directive on Automated Decision-Making ("*DADM*"),[74] whereas RPA, does not.[75] The *DADM* has broad exclusions for systems that are internal, non-client facing RPAs (decision-making aids rather than ADMs). In practice, it is heavily contested whether a process automation tool can be considered truly independent from the decision-making process.[76]

A further point to note is that ADMs themselves may or may not involve the use of AI.[77] IRCC has provided examples of non-AI ADM tools such as case management software and flowcharts.[78] Non-AI ADM tools may rely on a pre-set code or logic that remains constant over time in order to arrive at "if this, then that" ("IFTTT") conclusions.[79] One example of IRCC's usage for non-AI ADMs is for certain rules-based triage and automated eligibility findings. In these systems, human officers create the rules that utilize IFTTT decision trees.[80] This kind of sequential, rule-based logic is sometimes referred to as an algorithm, even when no AI is involved. Joshua Kroll and fellow researchers define algorithms as a "well-defined set of steps for accomplishing a certain goal."[81] Examples of use cases include search algorithms (used to

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[73] Jennifer Raso, "Displacement as Regulation: New Regulatory Technologies and Front-Line Decision-making in Ontario Works" (2017) 32:1 CJLS at 83.
[74] The *DADM* will be explored in further detail in section 2.2.2 of the thesis.
[75] *DADM, supra* note 66 at ss 5.1, 5.2.
[76] *Policy Playbook, supra* note 12 at 66.
[77] IRCC states that "[n]ot all automation solutions involve AA or Al. Many initiatives consist of automating rules created by subject matter experts. In some cases, IRCC may simply be seeking to automate some business activities that have already been done manually for years. Consequently, automating these types of activities may entail lower risks." See Canada, Immigration, Refugees and Citizenship Canada, ATIP Request 1A-2023-40145 at 226 [IRCC, ATIP Request 1A-2023-40145].
[78] Raso, "AI and Administrative Law", *supra* note 57 at 5.
[79] Mireille Hildebrandt, "Algorithmic regulation and the rule of law" (2018) Phil Trans R Soc A 376 1 at 2 [Hildebrandt, "Algorithmic regulation and the rule of law"].
[80] These specific systems, including the triage for International Experience Class ("IEC") applicants.
[81] Kroll et al, "Accountable Algorithms", *supra* note 23 at 14.

Related definitions of term explore how the 'well-defined" computational procedure takes some input value and produces some output value. See Aziz Z Huq, "A Right to a Human Decision" (2020) 106 Va L Rev 611 at 613, n 2.

See also Petra Molnar & Lex Gill, "Bots at the Gate: A Human Rights Analysis of Automated Decision Making in Canada's Immigration and Refugee System" September 2018), online (pdf): <citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf>. They argue:

retrieve data), and sorting algorithms (used to arrange a dataset in a specified order).[82] Another term that is related to, but also used alongside, "algorithms" is the term "model."[83] IRCC often refers to their ADMs using the word model, specifically, "triage models." This project will also adopt this terminology.

Interestingly, ADM is used by Canadian government officials synonymously with the term Algorithmic Decision-Making.[84] As Sancho McCann correctly points out in his excellent treatment of this matter, algorithms themselves are not new in Canadian law.[85] McCann notes that the IFTTT model of algorithms is consistent with historical practice in administrative law decision-making in areas such as tax law.[86]

> At its most basic level, an algorithm is a set of instructions, "a recipe composed in programmable steps," designed for the purpose of "organizing and acting on a body of data to quickly achieve a desired outcome." Certain algorithms, including those that use techniques like machine learning, are "trained" using a large, existing corpus of data, which allows the algorithm to classify and "generalize beyond the examples in the training set." These systems are generally designed to map an input to an output based on a set of labeled training examples. For example, training data could include a body of case law, a collection of photographs, or a database of statistics—some or all of which have been pre-categorized or labeled based on the designer's criteria. A system designed to recognize images of cars captured by traffic camera footage can therefore be trained on a body of images labelled as "contains car" (and potentially as "does not contain a car"). As the system is exposed to more data, it may improve its ability to identify cars and reduce its error rate—noting that the potential for error cuts both ways: a system may identify non-cars as cars, just as it may fail to recognize a car when one appears in a given image.

For a more detailed discussion, including reference to the commonly used "decision tree" as a type of AI "expert" system, known also as "rules-based" systems see Rebecca Williams, "Rethinking Administrative Law for Algorithmic Decision Making" (2022) 42:2 Oxford J Leg Stud 468 at 469–470.

[82] Datacamp, "What Is an Algorithm?" (28 September 2023), online (blog): <datacamp.com/blog/what-is-an-algorithm>.

[83] Noting here also, some definitional inconsistencies. See Tariq Khan, "Nine ways to implement more transparent AI" (5 February 2024), online (blog): <algolia.com/blog/ai/more-transparent-ai>. He says:

> "Model" and "algorithm" tend to be used interchangeably at times, but simple machine learning models like decision trees and even random forests are a far cry from AI algorithms like Chat-GPT. But where is the cut-off? "Models" become "algorithms" when multiple models are used together, either sequentially or in tandem, with specific rules for how information should flow from one to another."

See also Jason Brownlee, "Difference Between Algorithm and Model in Machine Learning" (19 August 2020), online (blog): <machinelearningmastery.com/difference-between-algorithm-and-model-in-machine-learning/>.

> A "*model*" in machine learning is the output of a machine learning algorithm run on data. A model represents what was learned by a machine learning algorithm.

[84] I use both terms interchangeably in this thesis.

[85] Sancho McCann, "Discretion in the Automated Administrative State" (2023) 36:1 Cambridge J of L and Jurisprudence 171 at 172-173.

[86] *Ibid.*

I argue that IFTTT, or any simple rule-based decision-making system, is not low risk or low impact, merely for not utilizing machine learning ("ML") or black box systems as described below. The ways the rules are created, the administrative justice goals and other objectives of those who are making the rules can still lead to unfair outcomes and processes. Understanding these terms and not throwing all technology under the broad moniker of "AI" becomes crucial to dissecting both the process and its fairness.

2.1.2 Machine Learning, Advanced Analytics, and Prescriptive/Predictive Analytics

What has attracted the most attention of late is the emerging technology, ML. Aziz Huq, notes that ML broadly encompasses the use of algorithms to improve knowledge or performance with experience.[87] Raso, defining the term more granularly, writes that ML is a subset of AI where a statistical model is trained using large datasets to identify patterns and make predictions from those patterns.[88] Jennifer Cobbe further notes that: "[t]he system learns and improves over time. ML systems group people based on shared characteristics rather than assessing them as individuals to determine which outcome to produce."[89] In more technical terms, Huq describes how ML can be *supervised*, where an algorithm [$f(x)$] is tasked with producing output y, for every given input x through correlational classification that optimizes performance criterion

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[87] Huq, *supra* note 81 at 613, n 3, citing from Peter Flach, *Machine Learning: The Art and Science of Algorithms that Make Sense of Data* (Cambridge University Press, 2012).

See also: IRCC definition in *Policy Playbook* at 119:

> Machine learning: A sub-category of artificial intelligence, machine learning refers to algorithms and statistical models that learn and improve from examples, data, and experience, rather than following pre-programmed rules. Machine learning systems effectively perform a specific task without using explicit instructions, relying on models and inference instead."

Grieve, *supra* note 60 at 173 defines:

> Whereas logical rules and knowledge representation that AI rely on explicitly prescribe operating rules and decisions from the computer programmer, machine learning systems identify and update these rules based on new patterns identified with new data. Machine learning operates best with vast amounts of high-quality data so it can recognize patterns.

[88] Raso, "AI and Administrative Law", *supra* note 57, at 4–5. R Williams also discusses concepts of sensitivity (true positive rates), precision (how many positives were true as opposed to false positives), negative predictive value (how many negative responses were true), and accuracy (correctly classified items). See R Williams, *supra* note 81 at 470-471.

[89] Jennifer Cobbe, "Administrative law and the machines of government: judicial review of automated public-sector decision-making" (2019) 39:4 LS 636 at 652. Cobbe defines Machine Learning as "the process by which a computer system's statistical model is automatically trained so that it can spot patterns and correlations in (usually large) datasets and infer information and make predictions based on those patterns and correlations." See *ibid* at 647.

utilizing example data or past experience, or *unsupervised*, where the algorithm develops classifications from unlabelled training data in identifying clusters, or layers of representation.[90]

One of the main uses of ML that IRCC has adopted is for their development of Advanced Analytics ("AA") models.[91] AA models are used for tasks such as risk triage and to automate approvals for the purposes of increasing productivity gains and reducing processing times.[92] IRCC defines AA as "consisting of predictive and prescriptive components that use computer technology to analyze past behaviours with the goal of discovering patterns that enable predictions of future behaviours."[93]

AA has two main subcategories: predictive analytics and prescriptive analytics. IRCC's China Advanced-Analytics TRV Privacy Impact Assessment ("PIA"), for example, defines *predictive analytics* as: "bringing together advanced analytics capabilities spanning ad-hoc statistical analysis, predictive modeling, data mining, text analysis, optimization, real-time scoring and machine learning."[94] The PIA further states that "these tools help organizations discover patterns in data and go beyond knowing what has happened to anticipate what is likely to happen next."[95] This contrasts with *prescriptive analytics* which is defined as: "advanced analytics technology that can provide recommendations to decision-makers and help them achieve business goals by solving complicated optimization problems."[96] IRCC often

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[90] Huq, *supra* note 81 at 630–633.
[91] IRCC states that it "uses advanced data analytics systems to help officers identify routine applications for streamlined processing, as well as to sort and triage applications to officers based on their level of complexity." See Canada, Immigration, Refugees and Citizenship, *CIMM – Question Period Note – Use of AI in Decision-Making at IRCC – November 29, 2022*, (last modified 28 Match 2023), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-nov-29-2022/question-period-note-use-ai-decision-making-ircc.html>.
[92] Canada, Immigration, Refugees and Citizenship Canada, ATIP Request, A-2021-06749, 000008, "Privacy Impact Assessment (PIA) Use of Advanced Analytics in IRCC Programs" (2019) at 8 [IRCC, PIA for AA].
[93] *Ibid.*
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.* See also Danielle K Citron & Frank Pasquale, ″The Scored Society: Due Process for Automated Predictions" (2014) 89:1 Wash L Rev 1 at 3, online: <digitalcommons.law.uw.edu/wlr/vol89/iss1/2>. They write:

> "Predictive algorithms mine personal information to make guesses about individuals' likely actions and risks. A person's on- and offline activities are turned into scores that rate them above or below others. Private and public entities rely on predictive algorithmic assessments to make important decisions about individuals."

emphasizes that it does not use these systems to generate refusal recommendations for its officers, suggesting it limits itself to predictive uses – as will be discussed in section 2.3 below.[97]

The real challenge with IRCC's use of AA goes to the topic of transparency, which I will expand on in Chapter 4. IRCC does not provide many details regarding the technology behind AA, relying on the blanket statement that humans will ultimately render the final decision. This makes it very difficult to assess whether these models may contain logical or data fallacies, and how those fallacies impact human decision-makers who are not aware of the system's inner workings.

2.1.3 Human out of/on the/in the Loop; Black Box

Daly sets out the important set of definitions around the "human in the loop" ("HITL"), a term that also holds importance as it is a key governance requirement set out in the *DADM* that will be explored shortly. Daly sets out that "humans can be out of the loop (and let the machines do all the work), on the loop (letting the machines do all the work unless the human decides to intervene) or in the loop (with the human making the final decision, perhaps informed by information from the machine)."[98] Katie Szilagyi expands on this, discussing how HITL is a

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[97] See e.g. Canada, Immigration, Refugees and Citizenship Canada, *Advanced Analytics to Help IRCC Officers Process Visitor Records*, (12 October 2022), online: <canada.ca/en/immigration-refugees-citizenship/news/notices/automation-visitor-records.html>. It states:

> While a new automated tool is used to help sort and process all visitor record applications, **it never refuses or recommends refusing applications. IRCC officers will always make the final decision to approve or refuse applications** [emphasis in original].

This language is repeated in the Algorithmic Impact Assessment for Visitor Records. See Canada, Immigration, Refugees and Citizenship Canada, *Peer Review by Shared Services Canada of the Advanced Analytics Triage for Visitor Record Applications - Executive Summary*, (7 October 2022), online (pdf): <open.canada.ca/data/dataset/01396e33-2c69-47e5-9381-32e717943b96/resource/75dddd64-f482-4b6e-a2e0-7f6ab35fef84/download/annex-a-vr-model-peer-review-summary-en.pdf> [IRCC, *AA-VR AIA*].

More recently, IRCC's notice has a blanket statement to the same effect for its application processing tools:

> Some tools are designed to help officers by making some decisions in the application review process for routine cases. These are decisions to approve all or part of the application. Our tools **don't refuse or recommend refusing applications** [emphasis in original].

See also Canada, Immigration, Refugees and Citizenship Canada, *How we use advanced analytics, automation and other technologies*, (last modified 18 November 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/digital-transparency-advanced-data-analytics.html>.

[98] Daly, "Artificial Administration", *supra* note 34 at 14.

hybrid and collaborative system, which defers to human operators for certain difficult decisions that are outside a system's capabilities or those for which "a computer decision is deemed societally inappropriate."[99]

In an article by Rebecca Crootof et al., titled "Human in the Loop", it is discussed how the inclusion of a HITL does not speak to the many functions that may be played by the humans by policymakers and designers of these ADM systems.[100] They argue that, in some cases, the human in the loop can serve roles that are a stand-in for accountability or instead allocates accountability away from the machine.[101] These various roles of the HITL raise contested questions about when a human may be placed in the loop, but without specification given to regulators or reviewing courts, of their actual role in achieving *accountability* goals. Accountability will also be treated conceptually in Chapter 4.

In earlier work, I have noted that there is a "noticeable silence" around the role of the HITL in the governance of ADMs in Canada.[102] The actual role of human officers vis-à-vis the technological tools has been a common question raised in peer reviews of IRCC's ADM systems.[103] IRCC's own position is that having a human involved in the process is a safeguard against procedural fairness risks, and that it is important to build in feedback loops by connecting developers to front-line officers and manually reviewing a portion of applications.[104] IRCC has provided a table where they present the spectrum of AI and human involvement in decision-making[105] (Figure 3 below). However, beyond highlighting the spectrum of ways humans and AI

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[99] Szilagyi, *supra* note 25 at 30, citing from Ian Kerr & Katie Szilagyi, "Asleep at the Switch: How Lethal Autonomous Robots Become a Force Multiplier of Military Necessity" in Ryan Calo et al, eds, *Robot Law* (Cheltenham: Edward Elgar Publishing, 2016), ch 13 at 339.
[100] Crootof et al. summarizes this argument. See Rebecca Crootof, Margot E Kaminski & W Nicholson Price, "Humans in the Loop" (2023) 76:2 Vand L Rev 429 at 487.
[101] *Ibid* at 473-474.
[102] Will Tao, "The DADM's Noticeable Silence: Clarifying the Human Role in the Canadian Government's Hybrid Decision-Making Systems [Law 432.D - Op-Ed 2]" (12 April 2024), online (blog): <vancouverimmigrationblog.com/the-dadms-noticeable-silence-clarifying-the-human-role-in-the-canadian-governments-hybrid-decision-making-systems-law-432-d-op-ed-2/>.
[103] The peer review for Watchtower (now the Integrity Trends Analysis Tool) which questions the human role in assessing the algorithms output. See Will Tao, "Filling in Three Missing Peer Reviews for IRCC's Algorithmic Impact Assessments" (8 April 2024), online (blog): <vancouverimmigrationblog.com/filling-in-three-missing-peer-reviews-for-irccs-algorithmic-impact-assessments/>.
[104] *Policy Playbook, supra* note 12 at 73.
[105] Patrick McEvenue & Michelle Mann, "Case Study: Developing Guidance for the Responsible Use of Artificial Intelligence in Decision-Making at Immigration, Refugees and Citizenship Canada" (June 2021) at 7, online (pdf): <research.aqmen.ac.uk/wp-content/uploads/sites/38/2021/06/Paper-for-University-of-Edinburgh-Workshop-on-Artificial-Intelligence-and-Border-Control-June-2021.pdf>.

may collaborate, very little is specified about the actual role, training, or processes of the human decision-maker vis-à-vis the ADMs.

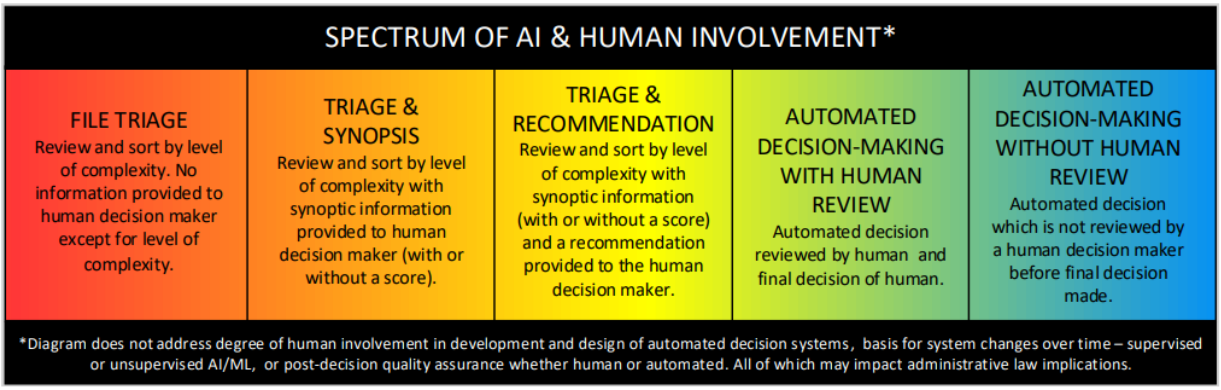

Figure 3 - McEvenue and Mann - "Spectrum of AI & Human Involvement"[106]

In recent work, Jake Goldenfein explores the Australian legal context and drawing on an example of automation in immigration applications, has discussed how the "Golden Rule", the law's implicit belief that "only humans can be intentional moral agents", is worth critically analyzing.[107] Goldenfein analyzes how the HITL "reifies" the problematic distinction between human decisions and machine decision-making in ways that focus on decision outcomes rather than the human process.[108] Goldfein also adds that the HITL can obscure the role of automation as "an expression of complex institutional prerogatives, policies and negotiations *intended* to affect different people in different ways."[109]

Overall, the work of the various scholars cited above suggest, at minimum, that IRCC's HITL justifications need to be met with more than just blind acceptance – a view that has yet to expand to, or be adopted by, the courts.

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[106] *Ibid* at 7.
[107] Jake Goldenfein, "Lost in the Loop: Who is the 'Human' of the Human in the Loop" in Gavin Sullivan, Fleur Johns & Dimitri Van Den Meerssche, eds, *Global Governance by Data* (Cambridge: Cambridge University Press, 2024) at 1–2, online: <ssrn.com/abstract=4750634>.
[108] *Ibid* at 8–13.
[109] *Ibid* at 13.

2.1.4 Black-Box Systems

Black-box systems are defined by IRCC as consisting of "opaque software tools working outside the scope of meaningful scrutiny and accountability."[110] IRCC further notes that their behaviour can be "difficult to interpret and explain, raising concerns over explainability, transparency, and human control." [111] Sarah Grieve writes that the use of black-box systems "obscures the legal choices the system made", by not allowing individuals to know how an ADM system reached a conclusion or why it functions in certain ways.[112] This term is also extended to a broader societal definition, what Frank Pasquale terms the "black box society", where the use of data in constructing personal reputations, media audiences, and financial powers are produced through inner workings that are opaque and closely guarded by private companies.[113] Both the more technical and societal definitions are important to consider as decision-making functions are increasingly delegated (outsourced) by the Canadian government to private, third-party technology companies.

IRCC has claimed it does not use black-box systems for decision-making,[114] publicly highlighting its use only for email triage. In a private presentation to a Japanese delegation seeking to learn more about AI (made public through an Access to Information ["ATIP"]

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[110] *Policy Playbook, supra* note 12 at 118.
[111] *Ibid* at 118. R Williams discusses how rules-based systems do no operate as black boxes, but ML ADMs may. See R Williams, *supra* note 81 at 483

Lucia Nalbandian discusses the counterpoint of "White Box Models" writing:

> "Whitebox Models" are completely interpretable, where their behaviour, how they produce predictions and what variables influence decision-making are entirely discernable. Two key elements of a white-box model are features that are understandable and a machine learning process that is transparent (Sciforce, 2020)."

See Lucia Nalbandian, "An Eye for an 'I:' A Critical Assessment of Artificial Intelligence Tools in Migration and Asylum Management" (2022) 10:1 Comp Migration Studies 32 at 5 [Nalbandian, "An Eye for an 'I'"].
[112] Grieve, *supra* note 60 at 175.
[113] Szilagyi, *supra* note 25 at 44 citing Benedetta Brevini & Frank Pasquale, "Revisiting the Black Box Society by rethinking the political economy of big data" (2020) 7 Big Data and Society 1, DOI: <10.1177/2053951720935146>.
[114] Canada, Immigration, Refugees and Citizenship Canada, *Advanced Analytics and automation for processing applications,* (last modified 18 November 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/digital-transparency-advanced-data-analytics/processing-applications.html> [IRCC, *Advanced Analytics for processing applications*].
See also *Policy Playbook, supra* note 12 at 90.

request), IRCC acknowledges it utilizes black-box systems for its facial recognition technology ("FRT"),[115] but has provided only limited detail and disclosure.[116]

2.1.5 Facial Recognition Technology ("FRT")

FRT is technology that identifies or confirms a person's identity by recognizing their facial features. The two common applications are to identify if the faces in two images are the same person (1:1 matching) or to search through a database of existing sets of images of faces to match to an individual (1:n matching).[117] The use of automation comes through computer vision, where computers using complex AI "automate extraction, analysis, classification, and understanding of useful information from image data."[118] There has been limited disclosure of the use of FRT by IRCC, namely the arrangements by which Passport Canada shares information with other departments pertaining to refugee travel documents.[119] Further, open-source public documents show that IRCC has developed this technology for over a decade, also utilizing it at the Port of Entry alongside partners at CBSA. IRCC has recently published a peer review with references to 2018, with a redacted line around the National Research Council's recommendation to pursue joint facial recognition technologies collaboratively.[120]

In November 2024, CBSA publicly announced its Client Reporting and Engagement System (CRES)/ReportIn app, a software tool utilizing FRT to serve as an alternative to detention for those facing removal to Canada.[121] They had been developing the tool for at least five years prior to deployment and publishing of their Algorithmic Impact Assessment ("AIA"). The ReportIn app relies on the FRT technology supplied by third-party Amazon Rekognition. Joy

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[115] Canada, Treasury Board Secretariat, ATIP A-2023-00081 at 250–270 [TBS ATIP Request A-2023-00081].
[116] IRCC, "Presentation Slide Deck, June 2025", *supra* note 61.
[117] Canada, Public Safety Canada, *Facial Recognition*, (3 July 2020), online: <publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20200708/009/index-en.aspx>. See also Facia, "1:1 Matching and 1:N Matching: Two Mechanisms for Enhanced Facial Identity Proofing" (3 June 2024), online (blog): <facia.ai/blog/1-to-1-matching-and-1-to-n-matching-two-mechanisms-for-enhanced-facial-identity-proofing/>.
[118] Amazon Web Services, "What is Facial Recognition" (last visited 15 July 2025), online: <aws.amazon.com/what-is/facial-recognition/>.
[119] Canada, Immigration, Refugees and Citizenship Canada, ATIP 2A-2024-19116 at 57.
[120] See Will Tao, "Filling in Three Missing Peer Reviews for IRCC's Algorithmic Impact Assessments" (8 April 2024), online: *Vancouver Immigration Blog* <vancouverimmigrationblog.com/filling-in-three-missing-peer-reviews-for-irccs-algorithmic-impact-assessments/>. For unredacted French version see page 7. Compare to redacted, published, peer review summary, where IRCC redacted information from the public. See IRCC, *AA-VR AIA*, *supra* note 97.
[121] CBSA ReportIn AIA, *supra* note 11 at 10.

Buolamwini's research found issues of racial and gender bias in Amazon Rekognition, namely that it generated error rates as high as 35% for darker-skinned women.[122] Indeed, racial bias concerns prompted Amazon Rekognition to recently self-impose a moratorium in the United States for use of its FRT in policing.[123] Tying it to the definition of black box, a third-party peer review of the ReportIn tool by a Canadian government department noted these black-box characteristics of this FRT tool as a hinderance in being able to assess and test the tool.[124] The discrepancy between Amazon Rekognition's treatment by U.S. government and Canadian government officials is worth further study.

When IRCC utilizes Amazon Rekognition's FRT technology, it relies on and implicitly must trust the technology of third-party technology to make decisions on its behalf. This act of outsourcing decisions to third parties, especially outside corporate entities, in a manner that places the ADM beyond the scope of the DADM's peer review process, which 2.2.2 explores, is deeply concerning. Accountability, which I will attempt to define in Chapter 4, is difficult to achieve without a meaningful way to obtain records and contest its outputs.

Adler does mention that purchasing services from non-government service providers is a *market* approach to decision-making, one grounded on a tribunal's cost-saving motives.[125] Without understanding the economics of such decisions made by IRCC and evaluating their own lessons learned and outcomes, it is difficult to evaluate the trade-offs and relative strengths that Adler suggest should be done.[126] One of the core questions here is how market approaches incorporate or evaluate the potential cost-savings associated with fairness, such as the need to review erroneous decisions through appeal, as Adler's previous work suggests is a crucial consideration.[127] The recent scrutiny around IRCC's re-scoped and partially abandoned Asylum Interoperability Project ("AIP"), a $68 million dollar automation project aimed at streamlining

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[122] See Joy Buolamwini, "Response: Racial and Gender Bias in Amazon Rekognition—Commercial AI System for Analyzing Faces", *Medium* (25 January 2019), online: <medium.com/@Joy.Buolamwini/response-racial-and-gender-bias-in-amazon-rekognition-commercial-ai-system-for-analyzing-faces-a289222eeced>.
[123] See Jeffrey Dastin, "Amazon extends moratorium on police use of facial recognition software", *Reuters* (18 May 2021), online: <reuters.com/technology/exclusive-amazon-extends-moratorium-police-use-facial-recognition-software-2021-05-18/>.
[124] See Canada, Open Government, *CRES ReportIn Peer Review Report and Response* (last modified 13 November 2024), online: <open.canada.ca/data/en/dataset/eaeb269c-6ac5-4429-a5aa-1fcc07c77933/resource/f7df9ed5-31d2-4a1f-a98f-cf1b836b5b1e>.
[125] Adler, "Fairness in Context", *supra* note 32 at 633.
[126] *Ibid.*
[127] Adler, "The Future of Administrative Justice", *supra* note 42 at 628.

and automating the information sharing process between IRCC, CBSA, and IRB, may be a good starting point for future analysis.[128]

2.2 Legal and Regulatory Frameworks for Governing AI

In the absence of an overarching legislative framework for the use of ADM systems or AI, understanding the legal and regulatory framework around the use of AI in Canadian immigration requires looking at both hard (statutes and regulations) and soft (quasi-legislative, non-binding) law instruments[129] that apply to this specialized area of administrative law. The immigration context, reflected in broad legislative powers and supported by soft law's flexibility, serves as a potential model for other administrative decision-making bodies seeking to implement ADM technology.

2.2.1 Broad Legislative Provision in the *IRPA* and a Lack of Regulation

Focusing on IRCC, the authority to use an automated decision-making system is found in *IRPA* at s.186.1(1) to (5)[130]:

> **PART 4.1 - Electronic Administration**
> **Powers**
> 186.1 (1) The Minister may administer this Act using electronic means, including as it relates to its enforcement.
>
> **Exception**
> (2) This Part does not apply to the Minister of Employment and Social Development in respect of any activity the administration of which is the responsibility of that Minister under this Act.

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[128] Priscilla Ki Sun Hwang, "$68 M Project to Secure, Revamp Canada's Asylum System Shut Down Unexpectedly, Documents Show" *CBC News* (23 July 2025), online: <cbc.ca/news/canada/ottawa/68m-project-to-secure-revamp-canada-s-asylum-system-shut-down-unexpectedly-documents-show-1.7582366>.
[129] For more on soft law and hard law, see Lorne Sossin & Charles Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines, and the Role of Law in Regulating Government" (2003) 40 Alta L Rev 867 at 869.
[130] *IRPA*, *supra* note 7 at s186.1.

While beyond the scope of this paper, the *Canadian Passport Order* SI/81-86 also has a similarly broad provision authorizing the use of automated systems for Canadian passport renewals:

> **2.2 (1)** For greater certainty, the Minister may administer this Order using electronic means.
> **(2)** For greater certainty, an electronic system, including an automated system, may be used by the Minister to make a decision under this Order.

Officer
(3) For greater certainty, any person or class of persons who are designated as officers by the Minister to carry out any purpose of this Act may, in the exercise of their powers or the performance of their duties and functions, use the electronic means that are made available or specified by the Minister

Delegation
(4) For greater certainty, a person who has been authorized by the Minister to do anything that may be done by the Minister under this Act, may do so using the electronic means that are made available or specified by the Minister.

Decision, determination or examination by automated system
(5) For greater certainty, an electronic system, including an automated system, may be used by the Minister to make a decision or determination under this Act, or by an officer to make a decision or determination or to proceed with an examination under this Act, if the system is made available to the officer by the Minister.

2015, c. 36, s. 175

At this stage, several factors of this broad legislative mandate are worth highlighting. First, subsection (4) grants a broad delegation for IRCC to use electronic systems. It is noted that subsection (5), which highlights the use of an automated system includes the use for decision or determination.

The omnibus bill which initially proposed this legislative amendment was made in 2015, well before the development and implementation of ML-based AA systems by IRCC. It has yet to be litigated, but it is certainly contestable, whether ML-based ADM systems are retroactively captured by the statute's broad definition.[131] From a regulatory perspective, there have been no regulations proposed or contemplated for the *IRPR* which interprets or specifies how broad legislation is to be operationalized.[132] As will be discussed in Chapter 5, this "regulatory lacuna" has also prevented a process of consultative feedback through pre-publication that a regulatory amendment would necessarily invite. Much of Canadian immigration law has also been framed

[131] Mario Bellissimo discusses the history of this section having arisen from an omnibus legislative amendment in *Economic Action Plan 2015 Act, No. 12* and notes that there have been no amendments or corresponding regulations regarding its use. See Bellissimo Law Group, "Brief Submitted to the Standing Committee on Citizenship and Immigration" (2024), online (pdf): <ourcommons.ca/Content/Committee/441/CIMM/Brief/BR11713740/br-external/BellissimoLawGroup-e.pdf>.
[132] To demonstrated one example of the relationship, ss 28(2)(a)(iii) of *IRPA* sets out that a permanent resident can meet their residency obligation by being employed on a full-time basis by Canadian business, whereas ss.61(1) to (3) set out the eligibility requirements for the Canadian business.

by the use (and I would argue over-use) of Ministerial Instructions ("MIs"), authorized by *IRPA*, but largely unused until 2015. The MIs allows the Minister to implement decisions, without the need to consult Parliament or write regulations, in a broad number of areas, including the creation of new programs and processes for selecting potential immigrants to Canada.[133]

In recent years, calls for legislative reform and re-writing of Canadian immigration legislation have increased, particularly as *IRPA* is now more than two decade old and automation has become a central focus.[134] For example, the Canadian Bar Association ("CBA") recently recommended as part of their submission to IRCC on legislative reform of *IRPA* to "dedicate provisions that regulate the use of AI and ADM in immigration processes based on binding principles of transparency, notice, accountability, human-in-the-loop review, regular audits and monitoring, robust training and ethical standards, and meaningful stakeholder review." [135] The CBA foresees a role of *IRPR* to operationalize the principles through "mandatory disclosures, AIAs, PIAs, and enforceable redress mechanisms."[136]

2.2.2 The *Directive on Automated Decision-Making* and the Algorithmic Impact Assessment

The *DADM*[137] and its accompanying appendix AIA currently perform the only *external* regulatory function of the use of ADM by Canadian immigration authorities. Developed through an innovative approach that brought together a cross-sector of stakeholders,[138] the *DADM* is a

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[133] Minister's Instructions are found in *IRPA* at s.14.1. Since then, the Atlantic Immigration Pilot (now program), Express Entry, and the Home Childcare Provider are examples of programs that have been created without a formal notice and comment process. See Camille De La Durantaye-Guillard, *Immigration Policy Primer*, Publication No 2020-05-E (Ottawa: Library of Parliament, 2 November 2023), online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/PDF/2020-05-E.pdf>.
See also Canada, Immigration, Refugees and Citizenship Canada, *Ministerial Instructions*, (last modified 16 August 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions.html>.

[134] *IRPA* was assented to in 2021 and came into force in 2002.

[135] The Canadian Bar Association, "Law, Technology, and Accountability: Reimagining Canadian Immigration for the 21st Century" (22 May 2025) at 17–18, online: <cba.org/Our-Impact/Submissions/Law-Technology-and-Accountability-Reimagining-Canadian-Immigration-for-the-21st-Century>.

[136] *Ibid.*

[137] *DADM*, *supra* note 66.

[138] Molnar & Gill, *supra* note 81 at 16. See also: Scassa's discussion of how the collaborative process was considered unique in bringing together "ongoing feedback and collaboration from experts around the world in data science, privacy, human rights, customer service and more. Scassa, *supra* note 65 at 266–267. However, it was acknowledged, that the process of consultation on the DADM was not fully inclusive. See *Ibid* at 257, n 60 citing Fenwick McKelvey & Margaret MacDonald, "Artificial Intelligence Policy Innovations at the Canadian Federal Government" (2019) 44:2 Can J of Communication 43 at 46.

mandatory policy instrument developed by the Treasury Board Secretariat ("TBS") that seeks to ensure that ADMs are implemented in a way that reduces risks and facilitates more efficient, accurate, consistent, and interpretable decisions.[139] It applies to any system, tool, or statistical model used to make administrative decisions or related assessments about a client (i.e., client-facing ADM systems).[140]

The *DADM* falls short in many ways. First, it does not apply to internal, non-client-facing tools, nor to projects initiated prior to the *DADM*'s introduction in April 2019. Moreover, Raso points out how the *DADM* only applies to a fraction of total algorithmically driven decisions.[141] Finally, several scholars have also critiqued the non-binding nature of the *DADM* as being largely unenforceable and subject to possible concerns over the reasonableness of the discretionary decision produced.[142]

The *DADM* itself recognizes that ADMs can create bias, lack explainability, and have *Charter*[143] compliance issues. IRCC also recognizes that the use of these systems implicates administrative law.[144] These concepts form part of the context and existing frameworks for Canadian administrative law.[145]

The AIA is a risk assessment tool, set out in the Appendix to the *DADM*. It requires Federal Government departments to assess the impact of their project against seven level impact requirements: (1) peer review; (2) notice; (3) human-in-the-loop for decisions; (4) explanation; (5) training; (6) planning; and (7) approvals."[146] Scassa describes the effects of the AIA as a

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[139] *DADM*, *supra* note 66.
[140] *Ibid*. See also Scassa's discussion on the lack of clarity on whether a decision on resource allocation or one of the outcomes of an environment impact assessment would constitute an 'external service.'. This draw parallels to Canadian immigration's use of ADMs in triage. Scassa also discusses exclusions of ADM systems already operating in test environments, and national security systems. See Scassa, *supra* note 65 at 270–271.
[141] Raso, "AI and Administrative Law", *supra* note 57 at 2.
[142] Lorne Sossin, "Administrative Law and Artificial Intelligence" in Jill Presser, Jesse Beatson & Gerald Chan, eds., *Litigating Artificial Intelligence* (Toronto: Emond, 2021), ch 4 at 207 [Sossin, "Administrative Law and Artificial Intelligence"]
[143] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[144] IRCC discusses how particular attention must be paid to ensuring procedural fairness, ensuring defensible decision making, avoiding undue or inappropriate reliance on AI, and considering appropriate criteria/information/mitigating bias. See *Policy Playbook, supra* note 12 at 41.
[145] Scassa, *supra* note 65 at 251.
[146] Daly, *supra* note 34 at 22.

"sliding scale of impact and obligation."[147] The impact assessment levels themselves are set out in Appendix B of the *DADM* and range from little to no impact, meaning the impacts are reversible and temporary, to very high impact, meaning the impacts are irreversible and permanent.[148]

As of June 2025, there have been twenty-six published AIAs in areas ranging from social benefits to criminal assessments.[149] Out of these projects, eleven have completed by IRCC, with one, ReportIn, completed by the CBSA.[150] The posting of the AIA means the project has been deployed by the relevant Government department.

A main concern of the AIA process is that it occurs by "self-assessment." Unironically, no Federal Government department has assessed their project as high or very high impact, even when they engage areas such as the use of data mining for immigration inadmissibility determinations[151] and FRT technology to facilitate removal from Canada.[152] This is within a context where FRT technology has been labelled high impact or even banned in other jurisdictions in the United States and Europe. There is also a further *transparency* concern about the public seeing only the finalized publication of the AIA. Draft AIA submissions prior to revision, previously published AIAs and non-public AIAs appear to have either not occurred or are delayed in online publications. Very few of the AIAs currently have their required component peer reviews and Gender Based Analysis Plus ("GBA+") reports made publicly available, with civil society having to fill in the gaps to inform the public about their use.[153] Unclear guidance

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[147] Scassa, *supra* note 65 at 275.
[148] *DADM*, *supra* note 66.
[149] AIAs have been released for a range of projects by IRCC, the TBS, the Public Health Agency of Canada, Employment and Social Development Canada ("ESDC"), Veterans Affairs Canada, Transport Canada, and the Royal Canadian Mounted Police. Some examples include ArriveCAN proof of vaccination recognition, reducing the employment insurance backlog, and the use of automation to support disability benefit decisions. See: Canada, Open Government, *Algorithmic Impact Assessment - Integrity trends analysis tool* [IRCC], (last modified 29 November 2023), online: <open.canada.ca/data/en/dataset/240f1dbc-a3b5-46b1-9b5f-d0d3cbec9378>.

As a final note, before publication in August 2025, it was noted that several recent AIAs were published (including those by IRCC and Passport Canada). Given the frequency in which this list changes, the number I presented merely serves as a time-stamp for the purposes of this thesis project.

[150] *Ibid.*
[151] *Ibid.*
[152] CBSA ReportIn AIA, *supra* note 11.
[153] Will Tao, "Filling in Three Missing Peer Reviews for IRCC's Algorithmic Impact Assessments", *supra* note X.

on national security systems also provides a potential lid on full disclosure of AIAs to the public.[154]

As set out by the TBS (the Canadian government department responsible for administering the *DADM*) and highlighted by leading administrative law scholars, the *DADM* was initially drafted to reflect administrative law principles. For example, the *DADM* contains notice requirements (at 6.2) such that "affected individuals" must be given a meaningful explanation of how and why a decision was made.[155] For high-impact projects (Level III or IV), the documentation would need to go into additional detail to explain how components work, how the ADM supports administrative decisions, and information about reviews, audits, and training data.[156] Raso discusses how this relates to procedural fairness, and that individuals can only meaningfully participate in administrative hearings when they have this information.[157] Daly adds that the focus on notice is tied to the procedural requirement for an individual to have a meaningful opportunity to respond.[158]

Another issue, related to the procedural fairness right to make representations, is the *DADM*'s lack of a comment (public consultation) process. Unlike the open consultation pre-publication process of a Canadian regulatory amendment, there is no comment process attached to the AIA.[159] This lack of a comment period is contrary to the best practices of AIAs as set out by Dillon Reisman et al.[160] Without a formal comment process, the peer review (as discussed earlier) becomes more important as an independent check and balance on the system's

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[154] See section titled "Approach to National Security" in Canada, Treasury Board Secretariat, Guide on the Scope of the Directive on Automated Decision-Making (last modified 18 July 2024), online: <canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/guide-scope-directive-automated-decision-making.html#toc4>.

Just as this thesis was being finalized, a colleague with whom I frequently exchange/discuss ADM and AI developments with, Ana Branduescu, co-published a paper with Renée E. Sieber where they analyze Canada's published AIAs, revealing a "design-reality" gap between literature and practice, noting the failure to consult for public input that I have also written about. See Ana Branduescu & Renée E. Sieber, "Design versus reality: assessing the results and compliance of algorithmic impact assessments" (2025) 4:64 Digital Soc, online: <doi.org/10.1007/s44206-025-00221-7>.

[155] Scassa, *supra* note 65 at 86.

[156] *DADM*, *supra* note 66 at Appendix C.

[157] Raso, "AI and Administrative Law", *supra* note 57 at 8.

[158] Daly, "Artificial Administration", *supra* note 34 at 12.

[159] *DADM supra* note 66.

[160] Dillon Resiman et al, "Algorithmic Impact Assessments Report: A Practical Framework for Public Agency Accountability", *AI Now Institute* (9 April 2018), online: <ainowinstitute.org/publication/algorithmic-impact-assessments-report-2>.

accountability.[161] Currently published peer reviews by IRCC appear as short summaries created by the government department seeking to advance the ADM, not by the reviewing organization.[162] This is despite language in a recently released peer review guide that suggests peer review summaries are suitable primarily for situations where there are security-based concerns.[163] This creates an early transparency challenge for those seeking to contest the ADMs deployment process.

In addition to requests to invited stakeholders, the TBS appears to have taken a voluntary, stakeholder survey-based approach to approving updates proposed to the *DADM*.[164] An example of how this voluntary approach creates illogical and poorly governed outcomes is demonstrated by IRCC publicly releasing, in January 2025, a peer review conducted in 2018 for their AA-TRV model AIA. This AIA itself was initially published in January 2023, two years earlier.[165]

From my perspective, the *DADM* consists of fundamental design flaws, that while facilitative of Federal Government departments implementation and development of ADM solutions, does very little to serve public governance goals. While it engages "risk", it does little to parse out the question of whose perspective the risk is to be viewed from. It is non-binding, and indeed to paraphrase IRCC's own comments represents a "low bar"[166] in governance. While productive steps are being implemented to bring in greater human rights, particularly disability,

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[161] Indeed, a key document that guides the Peer Review process. Kelly Bronson & Jason Millar, "Peer Review for Automated Decision-Making Tools Under Canada's Directive on Automated Decision-Making: A Model Peer Review Process and Recommendations for Best Practice" (2020) [unpublished, on file with author].
See also Canadian Border Services Agency, "Concept case for digital projects and draft AIA – CRES/ReportIn" (2018) [unpublished, on file with author]

[162] The informal consultation processes that have occurred with respect to both the Peer Review Guidelines and ongoing updates and reforms are not set out in the *DADM*, which requires only review of the entire *DADM* every two-years.

[163] See Canada, Treasury Board Secretariat, *Guide on the Peer Review of Automated Decision Systems* (last visited 9 March 2025), online: <canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/guide-peer-review-automated-decision-systems.html>. It states: "In cases where there are limitations on full disclosure due to security, intellectual property or privacy considerations, departments can opt to publish a plain language summary of the report instead, with clear justification provided."

[164] The author has been part of three TBS consultations, including for the Peer Review Guidelines, the Guide for completing AIAs, and the Fourth Review of *DADM*.

[165] Canada, Open Government, *Algorithmic Impact Assessment – Advanced Analytics Triage of Visitor Record Applications*, (7 October 2022), online: <open.canada.ca/data/dataset/01396e33-2c69-47e5-9381-32e717943b96/resource/4206e804-e90f-499d-8088-a8048a10e77b> [IRCC, AA-TRV AIA].

[166] IRCC, ATIP 1A-2023-40145, *supra* note 77 at 224.

perspectives – it does little to ultimately constrain the administrative bodies who may already be (in)vested in the pursuit of ADM projects, in realizing their *market* goals.

2.2.3 Regulation and Governance of IRCC ADMs

Much of the regulation of ADMs occurs by way of what I would coin as a mix of self-governance meets meta-regulation.[167] This involves the release of either private materials (often in the form of internal guidelines or training materials) or public materials (the publication of notices or provision of required disclosures to parliamentary committees or auditors). I will focus on three forms of this type of regulation/governance: (a) IRCC's Policy Playbook on Automated Decision-Support Systems; (b) Public notices and disclosures; and (c) Internal governance documents. This discussion helps further establish the backstage process that current adjudicative efforts are not being informed by.

i. Policy Playbook on Automated Decision-Support Systems

IRCC's *Policy Playbook on Automated Decision-Making Support Systems* is a core internal policy document from 2021 (hereinafter, the "*Policy Playbook*"). This document is considered IRCC's broader-based internal strategy and policy guide for the implementation and use of ADMs. The *Policy Playbook* contains a set of twelve guiding principles,[168] serving as a

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[167] See Cary Coglianese & Evan Mendelson, "Meta-Regulation and Self-Regulation" in Robert Baldwin et al, eds, *The Oxford Handbook of Regulation*, (Oxford Academic, 2010) ch 8 at 2–3, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2002755>. Here, they review various definitions of meta-regulation, including the one this paper adopts of "the state's oversight of self-regulatory arrangements."

See also Peter Grabosky, "Meta-Regulation" in Peter Drahos, ed, *Regulatory Theory: Foundations and Applications* (Canberra: ANU Press, 2017) ch 9 at 149-150, online: <jstor.org/stable/j.ctt1q1crtm.17>. He provides definition of meta-regulation as government "set of institutions and processes that embed regulatory review mechanisms into the very-day routines of government policy-making", but also a broader definition which includes activities in a wider regulatory space, under auspices of a variety of institutions, including the state private sector, and private interest groups.

[168] *Policy Playbook, supra* note 12 at 68-76 sets out the following principles:

1. The use of AI and automation should deliver a clear public benefit. IRCC should use the tools whenever it can do so, responsibly, effectively and efficiently - in that order;
2. Humans (not computer systems) are accountable for decision-making, even when decisions are carried out by automated systems;
3. Because IRCC decisions have significant impacts on the lives of clients and Canadians, the Department should prioritize approaches that carry the least risk;
4. "Black box" algorithms can be useful, but cannot be the sole determinant of final decisions on client applications;
5. IRCC must recognize the limitations of data-driven technologies and take all reasonable steps to minimize unintended bias;
6. Officers should be informed, not led to conclusions;

handbook for policy-makers and decision-makers considering implementing ADMs and examining the project lifecycle.[169] The *Policy Playbook* contains an overview of legal, policy, and ethical considerations, alongside more practical tips aimed at those deploying the technology.[170] The *Policy Playbook* provides an AIA checklist[171] and a glossary of terms, with many of the key definitions having been referenced earlier in this chapter.[172] Of note, this is an internal document and remains so even after it has been made publicly via ATIP requests and lawyer-written blogs.[173]

One of the major concerns with the *Policy Playbook* is exploring and preparing for how the public might respond to ADM systems. I would highlight here the concern of possible "gaming the system" if too much information is divulged about how the underlying algorithms and systems work.[174] The idea that there are elements of ADMs that are not meant for applicants or the concerned public, but negotiated and navigated internally sets the stage for the transparency and accountability issues explored in Chapter 4.

ii. Public Notices and Disclosures Through Audits and Committees

Currently, and as part of their public-facing notice obligations under the *DADM,* IRCC has placed numerous announcements on their website indicating that AA or automation will be

7. Humans and AI play complementary roles. IRCC should strive to sharpen the roles of each;
8. IRCC should continually adopt emerging privacy-related best practices in a rapidly evolving field;
9. IRCC should subject systems to ongoing oversight to ensure they are technically sound, consistent with legal and policy authorities, and functioning as intended;
10. IRCC must always be able to provide a meaningful explanation of decisions made on all client applications;
11. IRCC must be transparent about its use of AI. It must provide meaningful access to the system while protecting the safety and security of Canadians; and
12. IRCC's use of automated systems must not diminish a person's ability to pursue recourse.

[169] *Policy Playbook, supra* note 12 at 77–103.
[170] *Ibid* at 104–115.
[171] *Ibid* at 115–116.
[172] *Ibid* at 118–119.
[173] Canada, Immigration, Refugees and Citizenship Canada, *Policy Playbook on Automated Support for Decision-Making*, (February 2021), online (pdf): <meurrensonimmigration.com/wp-content/uploads/2021/11/A202119597-AI-Playbook.pdf>.
See Will Tao, "Guide de politique sur le soutien automatisé à la prise de décision version de 2021/Policy Playbook on Automated Support for Decision-making 2021 edition (Bilingual)" (11 May 2023), online: <vancouverimmigrationblog.com/tag/policy-playbook-on-automated-support-for-decision-making/>.
[174] *Policy Playbook, supra* note 12 at 90; See also discussion in Kroll et al, "Accountable Algorithms", *supra* note 23 at 639.

used to triage certain applications.[175] This is the primary way that applicants and the public know about the use of ADM.

Importantly, IRCC has recently published a new "transparency" page titled: *"How we use advanced analytics, automation, and other technologies."*[176] Replacing previous digital transparency disclosure, this page sets out when AA and automation are used, how the tool is used responsibly, the use of processing aids by officers, security-screening related uses, and the different use cases. It also contains key links to policy and guidance documents. These disclosures certainly provide a more *transparent* (a contested term I will examine in Chapter 4) view of tools utilized by immigration officers such as the Chinook processing tool ("Chinook") for processing temporary resident applications and the ITAT data mining tool ("ITAT") for data-mining for fraud risks.[177] The webpage also includes a table of tools currently in use by IRCC.[178] Still, there is significant concern that the information provided is both incomplete and unilaterally from a Canadian government-driven perspective, excluding more contentious and nuanced explanations – including the process by which human officers are actually utilizing these tools to assess applications.

Another forum for disclosure of ADMs use is when the House of Commons Standing Committee on Citizenship and Immigration ("CIMM") requests further information about the use of these systems or publishes a report that IRCC chooses to respond to. For example, on 24 October 2023, in a proactive disclosure, IRCC alluded to its use of ITAT:

> The Department also uses tools to identify risk patterns in live caseloads. These tools use advanced analytics along with large amounts of historical data to generate historically adverse patterns and identify potentially high risk applications. The Department launched

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[175] Canada, Immigration, Refugees and Citizenship Canada, *Advanced data analytics to help IRCC officers sort and process temporary resident visa applications*, (24 January 2022), online: <canada.ca/en/immigration-refugees-citizenship/news/notices/analytics-help-process-trv-applications.html> [IRCC, "Advanced data analytics"]; Canada, Immigration and Citizenship, *Automation to speed up processing of International Experience Canada work permits*, (last modified 7 November 2023), online: <canada.ca/en/immigration-refugees-citizenship/news/notices/automation-work-permit-iec.html>.

[176] Canada, Immigration, Refugees and Citizenship Canada, *How we use advanced analytics, automation and other technologies*, (last modified 18 November 2024), online: *Government of Canada*, <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/digital-transparency-advanced-data-analytics.html>

[177] For a good summary of this tool see Katie Schwarzmann, "The Computer Says So: Automated Recommendation-Making Tools in Immigration Systems – A Comparative Analysis between Canada, the USA, and the UK" (2024) at 32–35, online (pdf): <media.churchillfellowship.org/documents/Schwarzmann_K_Report_2023_Final.pdf>.

[178] Canada, Immigration, Refugees and Citizenship Canada, Use *of technology across the department* (last modified 18 November 2024), online: *Government of Canada* <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/digital-transparency-advanced-data-analytics/uses-technology.html>

the Integrity Trend Analysis Tool (ITAT) for broad use, beginning with the study permit caseload in January 2023.[179]

Finally, there are also third-party audits or independent bodies that may reveal information about these systems. In a 2023 report, the Office of the Auditor General of Canada ("OAG") performed an audit of IRCC for processing times in the permanent residency process,[180] part of which examined the discrepancy between Spouse-in-Canada sponsorship applications which had eligibility automated versus those which required manual eligibility assessments. This report seems to suggest only a minor discrepancy exists for processing times between ADM-triaged and non-ADM-triaged cases (See Figure 4 below).[181]

[179] Canada, Immigration, Refugees and Citizenship Canada, *CIMM - Proactive Efforts - October 24*, 2023, (last modified 5 February 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-oct-24-2023/proactive-efforts.html>.
[180] Canada, Office of the Auditor General of Canada, *Report 9 - Processing Applications for Permanent Residence - Immigration, Refugees and Citizenship Canada*, (1 September 2023), online: <oag-bvg.gc.ca/internet/English/att__e_44350.html>.
[181] *Ibid*. The author was also recently interviewed as part of an ongoing OAG audit on the international student program.

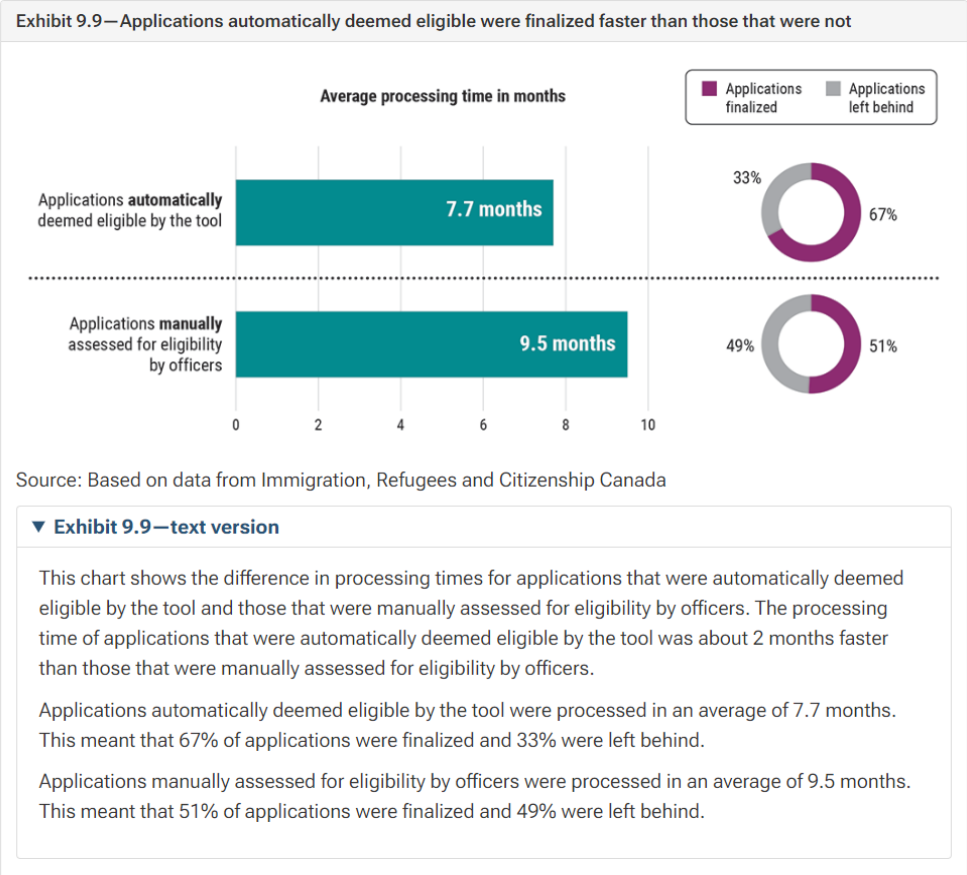

Figure 4 - Office of the Auditor General of Canada, "Report 9 - Processing Applications for Permanent Residence - Immigration, Refugees and Citizenship Canada"[182]

Civil society, including Bar Associations, non-profit organizations, and individual counsel have also been very active in increasing knowledge, auditing, and advocating in response to ADMs. Much of the disclosure is derived from ATIPs. These ATIPs are often subject to heavy redaction, non-disclosure, and delayed release[183] but can often shed light on how the

[182] *Ibid* at 135.
[183] *Access to Information Act* RSC 1985 c A-1 at ss 13–26; See also Canada, Information Commissioner of Canada, *Access at issue: The unsustainable status quo*, (7 May 2024), online: <oic-ci.gc.ca/en/resources/reports-publications/access-issue-unsustainable-status-quo>.
See also Yves Faguy, "Canada's broken access to information system", *CBA National Magazine* (29 November 2023), online: <nationalmagazine.ca/en-ca/articles/law/rule-of-law/2023/access-to-information-delays-are-eroding-our-trust-in-democracy>; Neil Moss, "CBSA's access-to-information woes continue with 12,000 requests inaccessible, requestors encouraged to resubmit", *The Hill Times* (2 June 2025), online: <hilltimes.com/story/2024/05/08/cbsas-access-to-information-woes-continue-with-12000-requests-inaccessible-requestors-encouraged-to-resubmit/420085/>.

Government operates internally and, in their efforts, to put together public messaging around the use of ADMs.[184]

iii. Internal Self-Governance

In addition to the *Policy Playbook* as a forward-looking automator's handbook, IRCC also sets out its approach to ADM and automation through internal self-governance processes which can be distinguished from the public ones explored earlier. This initiative[185] demonstrates that there is an acknowledged need for a more robust internal governance regime than the *DADM* and AIA's minimum threshold.[186] IRCC has taken a risk-based approach to its governance model, stating in their *New Governance Process* document:

> The extent of governance for a given initiative will vary depending on the level of risk associated with how technology is being used. For example, in Operations, risk often depends on the degree to which a model affects the administrative decision-making process. Some models involve instant eligibility approvals without officer review, as is occurring with the Spouse and Common-Law Partner in Canada (SPLPC) model. This is a higher-risk use case that requires heavier governance**. Other models may not have significant or any impact on administrative decisions, such as triaging client emails. In such cases, the risks are much lower and a light-touch governance is indicated. In other instances, the use of certain technologies in particular lines of business or on more vulnerable groups may present risks to human rights or reputational risks that need to be carefully weighed by IRCC.**[187] [emphasis added]

This idea of differing impact levels these tools may hold is relevant in the exploration of the administrative law framework in the next chapter, especially around procedural fairness and impact while Chapter 4 explores the role of risk as an ex ante consideration that transforms traditional adjudicative approaches.

Overall, IRCC appears to have taken advantage of the *DADM*'s loose guidance to create its own governance systems that are largely addressed *internally* and behind closed doors, subject only occasionally to outside concern and audit. Much of the effort, rather than being focused on evaluating the tool's necessity, effectiveness, and areas of improvement, appears to be

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[184] See Will Tao, "Three Ways Our ATIP'D Chinook Processing Manual Sheds Light on How Your Temporary Resident Application is Being Processed" (18 November 2021), online: <heronlaw.ca/three-ways-our-atipd-chinook-processing-manual-sheds-light-on-how-your-temporary-resident-application-is-being-processed/>.
[185] Canada, Immigration, Refugees and Citizenship Canada, "*New Governance Process for Artificial Intelligence, Advanced Analytics and Automated Decision Support Initiatives at IRCC*, obtained via IRCC, ATIP Request 1A-2023-40145, *supra* note 77.
[186] *Ibid* at 224.
[187] *Ibid* at 226.

instead aimed towards convincing the public and building trust, through limited release of information. However, I remain critical of the discrepancy in public/private facing communication and the lack of public participation in shaping these important soft law governance frameworks.

2.3 Use Cases by IRCC

2.3.1 IRCC's Rationalizations and Justifications for the Use of ADMs

Before exploring how immigration authorities are pursuing specific ADM use cases, it may be helpful to start with the question of "why." This answer differs based on whether the Canadian government presents its *external* or *internal* perspective. In their recently released public notice, the *external* perspective is presented as the use of automation to provide a better client experience. It is noted that applicants will benefit from positive decisions on routine cases, better-triaged officer expertise, identification of complex cases, and quicker responses.[188] There are also justifications provided for offering greater program integrity for the security of all Canadians.[189] With the processing aids, similarly to how they define many of their technological tools, IRCC alludes to the efficiency gains in officer processing.[190] They label the need to support and accelerate work as "modernization."[191] IRCC has written how "mass scale mobility and technological change are challenging its sustainability"[192] In their paper, Patrick McEvenue of IRCC and Michelle Mann of the Department of Justice ("DOJ") also highlight that temporary resident lines have the biggest need and provide the best data integrity.[193]

Efficiency and the ability to work through applications in greater numbers also serve as primary justifications provided in *internal* communication and documentation. However, a few additional considerations such as risk prevention (particularly with respect to anti-fraud and

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[188] IRCC, *Advanced Analytics for processing applications*, *supra* note 114.
[189] Canada, Immigration, Refugees and Citizenship Canada, *Tools that protect the security of our immigration system*, (last modified 18 November 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/digital-transparency-advanced-data-analytics/tools-security.html>.
[190] Canada, Immigration, Refugees and Citizenship Canada, *Processing aids,* (last modified 18 November 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/digital-transparency-advanced-data-analytics/processing-aids.html> [IRCC, *Processing aids*]
[191] *Ibid.*
[192] McEvenue and Mann, *supra* note 105 at 2.
[193] *Ibid* at 4.

refugee claims) and the ability to "bulk approve/refuse" applications also show up in internal discussion and documentation.[194] Less visible, but certainly underlying shifts, is the issue of cost savings.[195]

Overall, as summarized by Scassa, the multiple benefits of ADMs include reduced costs, enhanced speed and efficiency, relying both on outward client-driven, customer service goals and inward cost savings, rationalization and greater efficiency. Scassa raises the key question of whether ADM is predominantly aimed at improving the quality and fairness of decisions, or instead, cost and efficiency.[196]

While IRCC has only alluded to accuracy as a minor justification to-date, scholarship on driven-data technologies discusses the possibility of AI algorithms to "bring about more accurate, 'neutral', and reliable predictions" to overcome the issues of human bias, inconsistency, and variability.[197] This is likely because IRCC continues to defend, as discussed above, the role of the HITL as the final decision-maker and backstop to ADMs efficiency gains. One expects that as the technology improves, justifications will move in this direction.

Applying Adler's typology, one can arguably find a mix of models espousing the multi-faceted factors IRCC might consider in justifying its use of ADMs. Bureaucratic rationality's focus on accuracy and efficiency is certainly a core motivation to develop ADM technology and roll out multiple uses. At the same time, this is occurring in a managed immigration context – constrained by broader levels planning, data-based objectives, and risk indicators. The system is also placed within a legal framework that provides for adjudicative rights to challenge the procedural fairness of decisions (as the next chapter explores). The claimant's demand for (and

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[194] Canada, Immigration, Refugees and Citizenship Canada, ATIP A-2024-05384, at 191-194.
[195] IRCC's digital transparency page is silent as to cost savings. This analysis usually shows up for regulatory amendments in the Regulatory Impact Analysis Statement, but as there is none for IRCC's use of ADMs this has not been stated. However, open-source information is available which shows IRCC calculating for the IEC modernization project (noting that IRCC also has an AIA for the IEC program), cost savings of 10 full-time employees and an 800% increase in efficiency. See: Jumping Elephants, "Case Management System: Design, Development, Testing, Deployment, and Operation – Client: Immigration, Refugees and Citizenship Canada (IRCC0 and Global Affairs Canada (GAC) – International Experience Class (IEC) program" online: <jumpingelephants.ca/ircc-gac-case-management-system>
[196] Scassa, *supra* note 65 at 265.
[197] Madalina Busuoic, "Accountability in the age of artificial intelligence" in Matthew Flinders & Chris Monaghan, eds, *Questions of Accountability: Prerogatives, Power and Politics* (Bloomsbury Publishing 2023) at 3.

IRCC's guise of) individualized assessment and consumer well-being also co-exist as aims within this complicated eco-system.

2.3.2 Two Examples of IRCC's Use Cases in Action[198]

As discussed earlier, IRCC is the leading Federal government department in publishing AIAs (and therefore, deploying ADMs), representing 11 of the 26 total AIAs.[199] These projects

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[198] While this paper primarily focuses on the use of ADMs by IRCC, it is worth noting (and as presented in the hypothetical case study, that two other Federal Government departments responsible for immigration functions, Canada Border Services Agency ("CBSA") and the Immigration Refugee Board ("IRB") also use ADM and/or RPA related tools. CBSA recently released its first public AIA for an FRT-driven alternative to detention smartphone application named ReportIn. Working with Amazon Rekognition technology, this app reports to provide a more accurate and less burdensome alternative to detention for detainees facing removal from Canada. Of concern, the AIA was released publicly on 13 November 2024 (last modified 20 November 2024) and went into production the same day. As of 6 December 2024, 40 individuals were enrolled into the program.

See CBSA ReportIn AIA, *supra* note 11.

The CBSA has also released, through proactive disclosure, an AIA for a Security Screen Automation ("SSA") tool. This SSA has not been published, meaning it has either not yet been publicly deployed, or else there are national security elements that allow for this tool to remain undisclosed. This tool purports to automate part of the security screening function that once required manual human review. As will be discussed later, the use of technology in security screening remains one of the most heavily contested areas in Federal Court case law that will likely continue to face on-going interrogation.

See Canada, Canada Border Services Agency, ATIP Interim Disclosure – A-2023-18296 [on file with author].

A recent ATIP I received shows that CBSA has six draft AIAs in processing, including three on "Traveller Compliance Indicator, Dynamic Risking, and the aforementioned, Security Screening Automation".

See Canada, Treasury Board Secretariat, ATIP A-2024-02316 [on file with author].

Meanwhile, the IRB has largely focused on RPA. Of the use cases currently available. It is to be noted that the IRB faced a judicial review by the Office of Information Commissioner of Canada for an excessive extension request and failure to produce records. This was done in response to a complaint I made in 2022.

The same ATIP which presented the CBSA draft AIAs in process, indicated that an AIA titled "AI Transcription Production and Budget Efficiency Project" was determined to be out of scope for the *DADM*.

See Canada, Immigration and Refugee Board, ATIP A-2022-00784 [on file with author].
See also Canada, Treasury Board Secretariat, ATIP A-2024-02316 [on file with author].

[199] From earliest to most recent, the AIAs were published in the following order:

1. Spouse Or Common-Law in Canada Advanced Analytics (Date Published: 5 August 2021; Last Updated: 22 November 2024);
2. Advanced Analytics Triage for Overseas Temporary Resident Visa Applications (Date Published: 21 January 2022; Last Updated: 27 January 2025);
3. Advanced Analytics Triage of Visitor Record Applications (Date Published: 7 October 2022; Last Updated: 21 November 2024);
4. Automation Tools to Help Process Privately Sponsored Refugee Applications (Date Published: 16 December 2022; Last Updated: 22 November 2024);
5. Integrity Trends Analysis Tool (Date Published: 28 December 2022; Last Updated: 21 November 2024)

have all been risk scored by IRCC as "medium impact"[200] and contain similar language around the models never recommending refusal and requiring humans to render all final refusal decisions. It is important to note that of these models, ML-based AI is not used in the Canada-Ukraine Authorization for Emergency Travel ("CUAET"), In-Canada Work Permit, and International Experience Canada ("IEC") Canada models, as discussed in these three AIAs and their accompanying documents.[201]

i. Advanced Analytics Triage for Overseas Temporary Resident Visa Applications

One of IRCC's first projects in the use of ADM systems was processing overseas TRV applications.[202] Currently, the public-facing details of this program are presented through an online notice from January 2022 and a posted AIA.[203] While it is presented as one model, my understanding is that the AA-TRV ADM model began with pilots in China and India. According to the "Officer of Record Memorandums", each of those regions have different model rules,[204]

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6. Automate the review of non-complex applications for Temporary Resident Visas and Work Permits made under the Canada-Ukraine Authorization for Emergency Travel (CUAET) (Date Published: 11 January 2023; Last Updated: 20 November 2024);
7. Automated Triage and Positive Eligibility Determinations of In-Canada Work Permit Applications (Date Published: 25 September 2023; Last Updated: 22 November 2024);
8. International Experience Canada Work Permit Eligibility Model (Date Published: 7 November 2023; Last Updated: 22 November 2024).
9. Family Class Spouses and Partners Overseas Applications (Date Published: 30 May 2024; Last Updated: 22 November 2024) and
10. Passport Program Modernization Initiative (Date Published: 25 April 2024; Last Updated: 22 November 2024)
11. Administrative Activities Support Tool (Date Published: 28 March 2025, Last Updated: 28 March 2025)

See Canada, Open Government, Algorithmic Impact Assessment Records, (last accessed 14 July 2025), online: <open.canada.ca/data/en/organization/cic?collection=aia>.

[200] See also IRCC, ATIP 1A-2023-40145, *supra* note 77 at 239.
[201] See IRCC, AA-TRV AIA, *supra* note 165; See also Canada, Open Government, *IEC Work Permit Eligibility Model: GBA Plus Analysis*, (last modified 24 November 2023), online: <open.canada.ca/data/dataset/b4a417f7-5040-4328-9863-bb8bbb8568c3/resource/073492ef-c9a2-4e9c-b9f7-92f1140ce62e/download/iec-wp-eligibility-model-gba-plus-analysis-public-en-accessibility-check.pdf>.
[202] TRVs (also known colloquially as visitor visas) are obtained by those who seek to come to Canada for a visit, commonly for either a business visit, tourism visit, or to visit a family member in Canada. Visas, generally, are also required as part of any study permit and work permit approval to facilitate travel to and from Canada. Lesser known to the public, but commonly known in immigration and refugee practice, TRVs are the starting point for various permanent resident routes – be it the visitor who comes to Canada in search of study or work options, or the refugee claimant seeking protection but needing to enter Canada as visitor first.
[203] IRCC, "Advanced data analytics", *supra* note 175; See Open Government, AIA, *supra* note 149.
[204] IRCC states that for the China model there are 5 rules for identifying Tier 1 and 159 rules creates by model for identifying Tier 2 and 3. See Canada, Immigration, Refugees and Citizenship Canada, ATIP Request, A-2021-0749 at 14 [held by author].

with the posted AA triage being the model for the "rest of the world."[205] The table below, obtained via ATIP, summarizes how the models work and were developed.

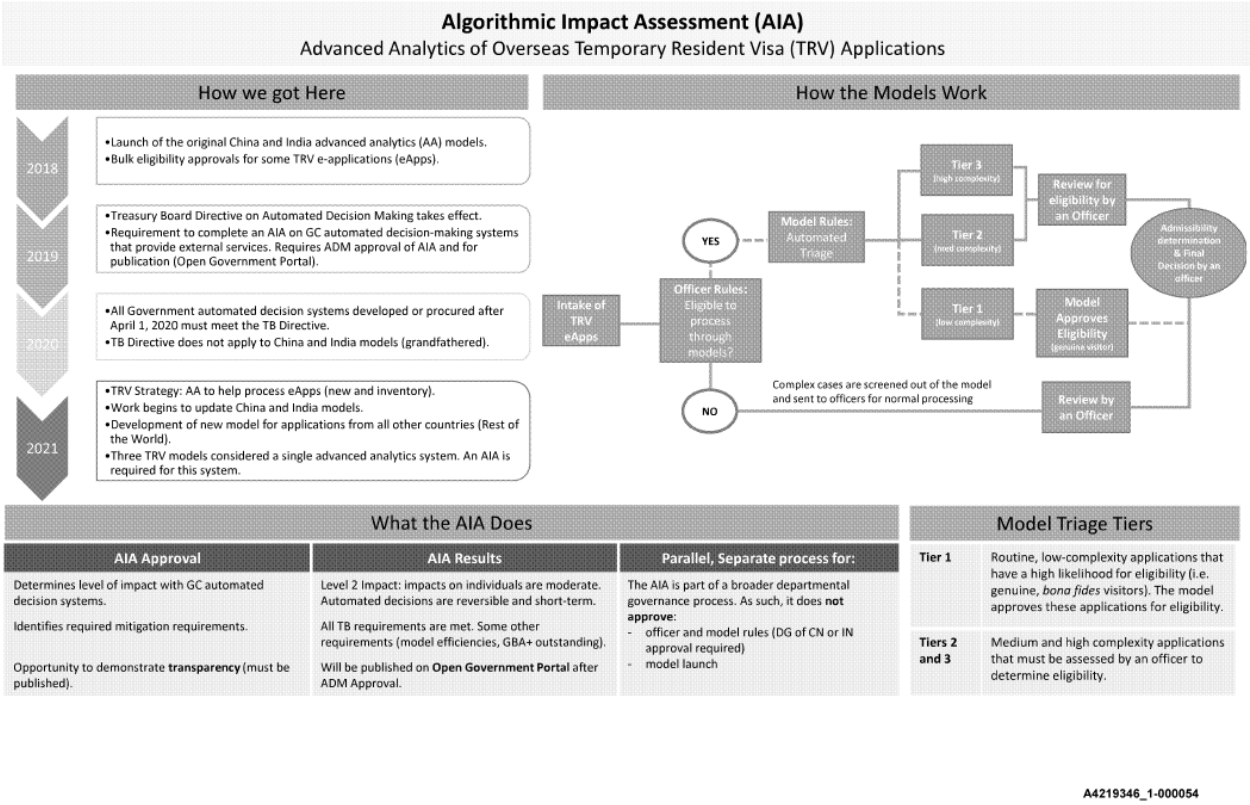

Figure 5 - Algorithmic Impact Assessment Chart for the Advanced Analytics of Overseas Temporary Resident Visa (TRV) Applications[206]

After screening out specific applications due to certain "Officer Rules" – triaging rules made by officer expertise rather through AA, this tool triages applicants by making positive eligibility determinations on what it deems as routine applications that fit the Tier 1 category. IRCC has an overall confidence threshold (approval rate) of 99% for these cases.[207] The AA-TRV tool does not make ineligibility determinations, which are tasked to human officers for Tier

[205] IRCC, ATIP Request 1A-2023-40145 *supra* note 73 at 309-325.
[206] Canada, Immigration, Refugees and Citizenship Canada, ATIP 1A-2022-23940 at 28.
[207] Canada, Immigration, Refugees and Citizenship Canada, ATIP- A-2021-0749 at 33.

2 (cases that do not meet perimeters of Tier 1 or 3) and Tier 3 files (for the China TRV model this was built off a 40% refusal rate).[208]

Human officers are responsible for the security review of all files, but Tier 1 files skip the eligibility review. Furthermore, a select group of files (10%) are selected for Quality Assurance ("QA") control[209] [through Tier 2 manual review[210]] to ensure that they are being properly assessed. The AIA confirms that the officer does not know the results of triage, yet logically, an Officer's required function on the file (i.e. the requirement to assess eligibility) would necessitate the file being Tier 2 or 3.[211] One of IRCC's major claims is that a human is required to perform admissibility review on all files and that eligibility review does not impact the required human screening for admissibility.[212]

An IRCC PIA discusses how the Model Rules are generated through the use of supervised ML.[213] Using a C 5.0 algorithm,[214] variables are organized into decision trees in order to be classified. Through branch-like segments forming an inverted tree, large-data groups are broken into smaller groups by posing an either/or scenario ("node"). Each node represents an applicant fact and the derived "leaves", represent classes of acceptance or refusal. The leaves are mutually exclusive meaning that no application could meet the conditions of more than one leaf.[215] The AA-TRV AIA, discussed earlier, also gives greater insight into the technology – namely that it was modelled and trained based on three years of labelled data from China, utilizes IBM's Statistical Package for the Social Science ("SPSS") software program, and decisions trees.[216]

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[208] Canada, Immigration, Refugees and Citizenship Canada, ATIP - A-2021-0759 at 14
[209] Lucia Nalbandian, "Increasing the accountability of automated decision-making systems: An assessment of the automated decision-making system introduced in Canada's temporary resident visa immigration stream" (2022) 10 J of Responsible Tech 100023 at 5; [Nalbandian, "Increasing the accountability of ADMs"]; McEvenue and Mann, *supra* note 105 at 5.
[210] IRCC, PIA for AA, *supra* note 92 at 35.
[211] IRCC, AA-TRV AIA, *supra* note 165 at 5.
[212] Nalbandian, "Increasing the accountability of automated decision-making system", *supra* note 209 at 3.
[213] IRCC, PIA for AA *supra* note 92 at 30-31.
[214] For a more technical look at C 5.0 algorithms and its capabilities see The Comprehensive R Archive Network, "C5.0 Classification models", online: <cran.r-project.org/web/packages/C50/vignettes/C5.0.html>
[215] IRCC, PIA for AA, *supra* note 92 at 24-25.
[216] Canada, Open Government, *Peer Review of the Temporary Resident Visa Eligibility Model* [IRCC], (last modified: 27 January 2025), online: <open.canada.ca/data/en/dataset/6cba99b1-ea2c-4f8a-b954-3843ecd3a7f0/resource/3ad57506-42ea-4916-8e5f-d06ea01e449b>.

In a previous project in collaboration with Meagan Auger, Praveen Gupta, Guanming Qiao, Xuechun Cao et al., we write, at 4:

Prior to the use of the AA-TRV tool, decisions were made with human officers conducting manual reviews of the required forms, fees, and an evaluation of both eligibility and admissibility with the assistance of technological tools.[217] I will elaborate on the differences between ADM and traditional decision-making in the next section below. IRCC states in their Advanced Analytics PIA, that it is "important to understand that the introduction of analytics is not the introduction of bulk processing" and that it was a functionality that was used for years.[218]

One point worth noting in the AIA is IRCC's assessment that individuals in this group are not particularly vulnerable, given it is their travel plans or ability to attend meetings and events that may be impacted.[219] They consider this a low-complexity business line and the applications, "lower-stakes."[220] It appears that in drafting this AIA, there was a marked lack of consideration of contexts such as individuals seeking to visit a family member or an individual arriving through a TRV in order to be able to make a refugee claim. This issue of impact becomes important in the next two chapters, as administrative case law navigates the question of how immigrants are impacted and whether ADM tools are used fairly and reasonably.

ii. Chinook

As described by IRCC, Chinook is a Microsoft Excel-based, software tool that assists an IRCC decision-maker with administrative steps to allow them to process high-volume caseloads

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> "[t]hese are analytical rules (not public) learnt from approximately three years of historical country-specific applications to identify trends, patterns, and commonalities in prior approved and refused applications. IRCC mentions use of IBM's SPSS analytics for creating Decision trees [30]8 with the C5.0 algorithm. The algorithm learns decision rules that at each node, selects the branch of rules that should be applied based on the decision using specific facts from the application. The process continues iteratively until a decision stage (leaf node) is reached. In supervised Machine Learning, the training process is done by learning patterns/or rules from historical data and is then deployed for making predictions on unseen data [31]"

See Meagan Auger et al, "Bridging Perspectives Between Computer Science and Law on Bias and Fairness in High-Impact Automated Decision-Making Systems in Canada" (April 2024) [unpublished, on file with author].
[on file with the author].

[217] For a discussion of the differences in processing see Nalbandian, "Increasing the accountability of ADM", *supra* note 209 at 3-4.
See Nicholas Lee-Scott, *Visa Gods and Algorithmic Thinking: The Evolution of Canadian Visa Officers' Work in an Age of Mass Processing* (MA Thesis, Toronto Metropolitan University, 2024) at 21–24 [unpublished], DOI: <10.32920/25193471.v1>.
[218] IRCC, PIA for AA, *supra* note 92 at 84.
[219] *Ibid* at 4.
[220] McEvenue and Mann, *supra* note 105 at 2; They write that "temporary residence applications are generally lower stakes for applicants than Permanent Residence or Citizenship applications, and certainly lower stakes than Humanitarian and Compassion ate cases or Pre-Removal Risk Assessments. *Ibid* at 4.

for overseas TRVs, work permits, and study permit applications.[221] IRCC insists that Chinook does not change the way decisions are made and merely allows an officer to view documents in Global Case Management System ("GCMS") and process applications in a more "user friendly" way.[222] Chinook launched in 2018 and expanded to all offices in July 2019. As of the date of this thesis publication, it is still being utilized for decision-making, with disclosure often made on files that the application was "processed utilizing Chinook 3+."[223] There is also some uncertainty as to how and why IRCC uses previous versions of Chinook (such as 1.5+) and how this may impact decision-making or be reflective of undisclosed internal system flaws.[224]

Chinook extracts biographical information from application forms and displays them in a spreadsheet, alongside other applicants, in a way that allows it to process hundreds of cases at a time. Module 3, IRCC's decision-maker model, displays pre-assessment notes, uses AI to generate case annotations, allows processing officers to leave working notes (to be later deleted)[225] and facilitates refusal using editable standard template refusal grounds. IRCC does not publicly discuss the possible concerns of the tool's use in "bulk processing" approvals and refusals.[226] Chinook contains modules for the pre-assessment of applications (Module 2), where Module 3's decision-maker functions allow a processing officer to render a decision more efficiently. Chinook's spreadsheets are housed separately and deleted daily and therefore do not form part of the GCMS records.[227]

Similarly to the discussion of the AA-TRV tool above, prior to Chinook, decisions were all rendered within the GCMS system requiring review of all documents uploaded into GCMS

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[221] Canada, Immigration, Refugees and Citizenship Canada, *CIMM - Chinook Development and Implementation in Decision-Making - October 24, 2023*, (last modified 5 February 2023), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-oct-24-2023/chinook-development-implementation.html> [*CIMM - Chinook*].
[222] *Ibid.*
[223] See e.g. discussion in *Farshid v Canada (Citizenship and Immigration)*, 2024 FC 1573 at para 12; *Pjetracaj v Canada (Citizenship and Immigration),* 2025 FC 103 at para 4.
[224] Zeynab Ziaie Moayyed has documented a recent shift from the use of Chinook 3+ to Chinook 1.5+, since September 2024. See Zeynab Ziaie Moayyed, "Three years ago today, the Federal Court released…" (March 2025), online <linkedin.com/posts/zeynab-ziaie-moayyed_immigrationlaw-aiinimmigration-chinook-activity-7294884920370307072-p-hF/?utm_source=share&utm_medium=member_desktop&rcm=ACoAADKu-jwBgdhoZ-rbSYm2LAMcWlDlq8MRsrc>.
[225] I am reminded here of Raso's discussion of where reasons for a particular decision may lie and how it may be found in case management software and other managerial-technical initiatives, in the 'notes' that are dispersed between offices. See Jennifer, Raso, "Unity in the Eye of the Beholder? Reasons for Decision in Theory and Practice in the Ontario Works Program" (2020) 70:1 UTLJ 1 [Raso, "Unity in the Eye of the Beholder"].
[226] Canada, Immigration, Refugees and Citizenship Canada, ATIP A-2024-05384, at 191-194
[227] *Mehrara v Canada (Citizenship and Immigration),* 2024 FC 1554 at paras 65-66 [*Mehrara*].

and a recording of all steps and decisions within that platform. While boilerplate decisions were also used in generating refusal letters, officers tended to provide at least some case-specific notes as to the grounds by which they were making decisions.

Chinook has received the most attention out of all tools, having been covered in media reports as well as cited in various parliamentary studies as an issue of concern.[228] Much of the concern has been aimed at Chinook's internal development without public consultation, the fact that it was released only through strategic litigation efforts of the DOJ[229], and the unclear link to the use of AI. Various Parliamentary Committees have highlighted perceived stakeholder concerns.[230] IRCC also proactively offered to perform an AIA and GBA+ report on Chinook.[231] As of the date of this thesis publication, these documents have not been released publicly and IRCC has expressed some concern with the initial data obtained which suggests some discrepancy in outcomes.[232]

IRCC's own position is that Chinook and Cumulus,[233] as tools that summarize existing information into a more user-friendly interface, are out of scope for the AIA and their governance model.[234] Whether the triage itself is merely an RPA or indeed part of an ADM decision-making function should continue to be interrogated. While exploration of the tool is beyond the scope of this paper, there appears to be a direct correlation between the risk indicators appearing in Chinook's Module 3, the management system of Chinook Module 5, and the use of ITAT – an IRCC risk and inadmissibility data-mining tool.[235] Furthermore, IRCC has only just released information on its new transparency pages disclosing the potential use of ADMs in the

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[228] Canada, Immigration Refugees and Citizenship Canada, ATIP Request A-2022-78235 at 12, citing House of Commons, Standing Committee on Citizenship and Immigration, "Differential Treatment in Recruitment and Acceptance Rates of Foreign Students in Quebec and in the Rest of Canada" (May 2022) (Chair: Salma Zahid), online: <ourcommons.ca/documentviewer/en/44-1/CIMM/report-8> [CIMM Report 8]; House of Commons, Standing Committee on Citizenship and Immigration, "Promoting Fairness in Canadian Immigration Decisions" (November 2022) (Chair: Salma Zahid), online: <ourcommons.ca/DocumentViewer/en/44-1/CIMM/report-12/>.
[229] DOJ lawyers represent the Federal Government departments, such as IRCC and CBSA. They are also known as Respondent's Counsel or Lawyers for the Minister (Minister of Citizenship and Immigration ("MCI") or the Minister of Public Safety and Emergency Preparedness ("MPSEP") for IRCC and CBSA, respectively.
[230] CIMM Report 8, *supra* note 228.
[231] *Ibid.*
[232] Canada, Immigration Refugees and Citizenship Canada, ATIP, A-2022-78235 at 15.
[233] Cumulus was a tool proposed to replace Chinook, starting with the processing for sponsorship applications.
[234] IRCC, ATIP Request 1A-2023-40145 *supra* note 73 at 225.
[235] This was alleged by the Applicant in *Mehrara*, but the Court found risk indicators were not relevant to the Applicant's matter.

generation of case annotations, which previously were not mentioned in public disclosure notices.[236] Another example of the blurred line between ADMs and RPAs is revealed in feedback given by the TBS to IRCC that the implementation of risk flags in Module 5 in Chinook may constitute ADM.[237]

Publicly available information about triage-only tools such as Chinook and Cumulus[238] are also subject to redactions and consists of posted information by IRCC as part of CIMM proactive disclosure.[239] ATIP requests have been unable to paint a complete picture of Chinook's operation.[240] Of late, Chinook has been heavily litigated and contested. In the next chapter, this litigation history will be traced through several important cases, as for the time being it offers the most likely lens to how Courts might treat arguments made around the use of technology and the impact on procedural and substantive review.

A final contextual factor worth noting is that IRCC is currently in the process of reducing the functionality of GCMS with their move to a new Digital Platform Modernization ("DPM"). The proposal is for a two-way centralized portal to replace GCMS, through which immigration applicants would have access to notes on their file.[241] With tools such as Chinook already moving case processing away from GCMS, it is uncertain the extent to which future applicants will be able to have adequate access to information about file triage and documentation around the specific notes and concerns officers might hold.

2.4 How Has the Use of ADM Shifted IRCC's Decision-Making Process?

Whether technology is used merely as an RPA or as an ADM (as the Canadian government has tried to classify), I argue, as Raso and several scholars have, that the course of decision-making is altered. Borrowing a conceptual distinction first developed by my colleague Zeynab Ziaie Moayyed, traditional immigration decision-making (which she coins the "Traditional Model") involves decision-makers reviewing documents before weighing the

[236] Canada, Immigration, Refugees and Citizenship Canada, *Processing aids*, *supra* note 101.
[237] TBS ATIP Request A-2023-00081, *supra* note 116 at 230.
[238] Canada, Immigration, Refugees and Citizenship Canada, ATIP file 1A-2022-69073 at 6–7.
[239] CIMM – Chinook, supra note 222.
[240] Numerous attempts have been made to obtain internal Chinook training guides and materials
[241] IRCC, "Presentation Slide Deck, June 2025", *supra* note 62.

evidence against *IRPA's* legal and *IRPR's* regulatory requirements before rendering a final decision.[242] For a temporary resident visitor like Wang, for example, they must meet the requirement of s.29 of the *IRPA,* demonstrating the ability to leave Canada at the end of their authorized stay. Section 179 of the *IRPR* provides further considerations, such as the requirement to hold a passport, meet requirements of the class, and not be inadmissible.

Decisions to approve and refuse were, prior to the advent of ADMs, based on a review of applicants' application materials and the officer entering justifying notes into the GCMS system of record. For those applicants who were refused, a meaningful redress to administrative review through reconsideration requests were available.[243] Cases where facts or law was erroneously stated could often be administratively reconsidered by the officer upon a submission of a formal request.

With the new model of decision-making, which Ziaie Moayyed labels the human plus ADM model (or the "H+ADM" Model), various technology tools aid and augment human decision-making.[244] Considering the role of advanced analytics to shuffle certain applications out of the responsibility of human decision-makers to decide, and to flag others for further scrutiny based on particular algorithmic triage rules, it is an oversimplification to argue, as IRCC has, that this has no impact on decision-making. A HITL might overall approve or refuse the case, but tools like Chinook which allow these decisions to be made in bulk, or for others to be referred for more comprehensive risk or security review, fundamentally alter the Traditional Model. Whereas before there was a clearer line of reporting between local engaged staff, program assistants, and officers who would endorse final decisions, now technology is directing who is to perform what tasks and constraining the scope of possible decisions.[245] As the next section will demonstrate, unfortunately the change in process has not been adopted as core context by courts

[242] Zeynab Ziaie Moayyed, "Fact Or Fiction: The Reality of Litigating Decisions Made by Automated Decision-Making Systems", (Conference Paper for "Pixels and Precedents: Tackling Tech-Driven Immigration Decisions in Court" at 2025 CBA National Immigration Section Conference, 2025) at 3.
[243] *Ibid*.
[244] *Ibid* at 4.
[245] This will be explored later in Chapter 3, when exploring the limitations of a reasons first approach to reviewing ADM.

that have been unwilling to revisit the core presumption of Canadian immigration law which finds that an officer has considered all relevant material.[246]

Ultimately, the H+ADM model has led to applicants (both temporary resident and for most permanent resident categories) receiving template refusals that provides little to no disclosure that technology was utilized in processing their cases. Applicants who seek to file ATIPs to try and obtain these notes, face a time-consuming and delayed process,[247] and find that sensitive information and triaging details have been redacted. Many times, they receive merely another layer of further boilerplate reasons.

Another challenge with assessing the process itself, is its constant change. Just as this thesis project was being finalized, on 30 July 2025, IRCC began a pilot process by which they would inform applicants of the reasons for refusal in letters provided alongside template refusal letters.[248] These letters, called "Officer Decision Notes" or "ODN" for short, are essentially a copy of the last entry that would generally be found in GCMS containing an immigration officer's final decision – for example that an individual has strong family ties inside Canada and therefore has not demonstrated they will leave Canada at the end of their authorized.

However, in the way that these decisions are delivered, there is no time stamp, Chinook disclosure, or other processing notes provided. IRCC's motivation for changing this process was an attempt to dissuade ATIPs and address the number of Federal Court filings. While, in theory, these systems may reduce some administrative burden, the overall quality and detail of the reasons provided will ultimately determine whether this change is a positive one.[249] However, when contextualized alongside IRCC's efforts to introduce a DPM portal (as discussed above) which aims to deplatform and reduce the functionality of GCMS,[250] it is growing increasingly

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[246] See *Florea v Canada (Minister of Employment and Immigration)*, 1993 CarswellNat 3983, [1993] FCJ No 598 (FCA) at para 1 [*Florea*]. See also Will Tao, "Why the 30-Year Old Florea Presumption Should Be Retired in Face of Automated Decision Making in Canadian Immigration" (26 July 2023), online (blog); <vancouverimmigrationblog.com/why-the-30-year-old-florea-presumption-should-be-retired-in-face-of-automated-decision-making-in-canadian-immigration/>.
[247] Canada, Information Commissioner of Canada, *Access at issue: The unsustainable status quo,* (7 May 2024), online: <oic-ci.gc.ca/en/resources/reports-publications/access-issue-unsustainable-status-quo>.
[248] Canada, Immigration, Refugees and Citizenship Canada, *Explaining application refusals: Officer decision notes*, (last modified 29 July 2025), online: *Government of Canada* <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/officer-decision-notes.html>.
[249] See my comments in Polly Nash, "Canada: IRCC adds officer decision notes to visa refusals" *The Pie* (31 July 2025), online: <thepienews.com/canada-ircc-adds-officer-decision-notes-to-visa-refusals/>.
[250] *Ibid.*

likely that immigration applicants may have limited participatory rights, a core of the procedural fairness that the next chapter will further explore.

Finally, and a key policy context, which Adler reminds is of key importance to administrative justice,[251] it is necessary to contextualize the shifting of process. I argue that it has shifted to much more of a managed immigration system with a focus on bureaucratic efficiency. Canadian immigration has experienced a surge of temporary resident application since COVID, prompting the Federal Government to aim to reduce the number of temporary residents to 5% of Canada's population.[252] In this sense, with the target already in mind, it is clear the policy directive is to reduce the number of approved applicants, which would divert away from the individualized assessment many immigration applicants may hope for.

[251] Adler, "Fairness in Context", *supra* note 32 at 624.
[252]Canada, Immigration, Refugees and Citizenship Canada, *2025-2027 Immigration Levels Plan*, (last modified 24 October 2024), online: <canada.ca/en/immigration-refugees-citizenship/news/2024/10/20252027-immigration-levels-plan.html>.

Chapter 3: The Process Problem: How ADM Decisions Frustrate Procedural Fairness and Reasonableness Review

"Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally..."

***Baker* at para 67**[253]

"…what is reasonable in a given situation will always depend on the constraints imposed by legal and factual context of the particular decision under review."

***Vavilov* at para 90**[254]

This chapter focuses on connecting the last chapter's discussion of how IRCC's use of ADMs and related technologies has altered decision-making to a better understanding of fair process in Canadian administrative law. I begin by tracing a statement made by Justice Henry S. Brown in *Haghshenas* to questions that ask about how fairness is treated in Canadian administrative law and how ADMs may not only complicate this issue but also provides the basis for critical research projects such as this one. Finally, I explore the challenges of adjudicating, through judicial review, the issue of a fair process and how reasonableness review may obscure this. What emerges from this chapter is the recognition of key gaps in the analytical framework necessary to both assess and achieve a fair process.

3.1 *Haghshenas* – the Problem of Elevating Process over Substance

The *Haghshenas* Ennealogy, a term I coined in a previous paper,[255] is a set of cases brought forward primarily by one counsel who attempted to argue that the use of Chinook was unreasonable and procedurally unfair.[256] Ironically, the first of these cases, *Haghshenas,* was rendered in a decision involving a C-11, LMIA-exempt entrepreneur work permit,[257] where it

[253] *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*].
[254] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].
[255]Wei William Tao, "Broader Application and Implications: A Federal Court (Non-IRB) Case Law Year in Review for 2023" (10 January 2024) at 11, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=4668394> [Tao, "Broader Applications and Implications"].
[256] *Haghshenas, supra* note 55 at para 4.
[257] *Ibid* at para 2.

was uncertain whether Chinook was even used.[258] Justice Brown's decision was notable as it was the first effort to engage with the impact that technological AI tools could have on officer decision-making in immigration.

The applicant, Majid Haghshenas, was a 33-year-old citizen of Iran who received a refusal of his C-11 entrepreneur[259] work permit application.[260] The application was refused on the grounds that the intended employment, namely the business plan, was deficient.[261] Haghshenas argued that the decision was procedurally unfair and unreasonable. He also argued that the decision was unreasonable due to a lack of nexus to his individual circumstances and was based on extraneous considerations.[262] After spending some time setting out the standard of review, Justice Brown found that the decision had some input assembled by AI (although did not define this term), and emphasized in the same paragraph that judicial review should be looking at the record and written decision (reasons) in applying *Vavilov's* reasonableness framework. Justice Brown writes:

> I agree the Decision had input assembled by artificial intelligence, but it seems to me the Court on judicial review is to look at the record and the Decision and determine its reasonableness in accordance with *Vavilov*. Whether a decision is reasonable or unreasonable will determine if it is upheld or set aside, whether or not artificial intelligence was used. **To hold otherwise would elevate process over substance.**[263] [emphasis added]

In a sense, Justice Brown classified the use of AI, at least in the context of the alleged augmented use in Chinook, as merely a procedural issue that did not contribute to the substantive nature of the decision. This was perhaps an inevitable outcome, given the lack of an evidentiary record to support the applicant's position. However, the certainty with which Justice Brown made this finding comes off in my perspective as premature.

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[258] The decision rendered did not include disclosure of Chinook. Applicant's Record in *Haghshenas v Canada* (*Citizenship and Immigration)* IMM-2915-22 dated 18 May 2022 [on file with author].
[259] Canada, Immigration, Refugees and Citizenship, *Business owners seeking only temporary residence – [R205(a) – C11] – International Mobility Program*, (last modified 27 May 2025), online: <canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/entrepreneurs-self-employed-seeking-only-temp-residence-r205-c11.html>.
[260] *Haghshenas, supra* note 55 at paras 2–3
[261] *Ibid* at paras 3, 32.
[262] *Ibid* at para 4.
[263] *Ibid* at para 24.

The concerns of Justice Brown over the lack of evidence and unwillingness to consider process issues were raised in numerous follow-up cases, notably argued by the same counsel and utilizing primarily identical arguments.[264] Most of these decisions endorsed Justice Brown's approach of viewing Chinook as merely a tool used by a human decision-maker, with several noting that there was a lack of evidence supporting the Chinook arguments. Justice Little, in *Jamali,* noted that the Applicant's efforts to describe Chinook's lack of human input and effective oversight were speculative.[265]

But given Chapter 2's discussion of how traditional decision-making is altered, how should administrative law and the courts review an ADM process for fairness? With decision-making processes also informed by custom, institutional practice, and informal influences that operate within an organization,[266] how should ADM's unique characteristics be evaluated against the backdrop of what is fair?

This chapter first explores how procedural fairness has been conceptualized in law before transitioning to the question of how procedural fairness problems have been framed around ADM more generally. I reflect here on the unexplored nature of applying *Baker's* contextual factors. I then shift with a discussion of how process and substance are linked and how adjudication and the mechanisms of judicial review have been unable to address this issue. I conclude this chapter by suggesting the area of legality potentially serving as a connecting concept.

3.2 How is a Fair Process Defined?

In this section, I will explore fair process, framing it through a chapter by Kate Glover Berger in the aptly titled book *Administrative Law in Context*. Glover Berger sets out that fair process is synonymous with procedural fairness and unfairness considered as poor procedure.[267] Procedural fairness is a contextual consideration, varying depending on the administrative body and the type of decision to be made. This has been established by the leading case of *Baker*,

[264] See discussion in Tao, "Broader Applications and Implications", *supra* note 256 at 11.
[265] *Jamali v Canada (Citizenship and Immigration),* 2023 FC 1328 at paras 42-43.
[266] Glover Berger, *supra* note 54 at 179.
[267] *Ibid* at 178.

including a five factor analysis I will apply later to ADMs.[268] Glover Berger cites also that fairness must be in all circumstances, but notes that competing contextual circumstances often complicate how to assess the procedural fairness owed.[269] Glover Berger cites Roderick Macdonald who wrote that there is "no single universal feature of a fair process."[270] She notes that a fair process is also considered to be desirable in the yielding off high quality decisions.[271]

Glover Berger then traces the landscape and roots of procedural fairness in Canadian law, from the two branches of natural law – *audi alteram partem* ("hear the other side") and *nemo judex in sua causa* ("no person can be the judge in their own case")[272] to the development of a spectrum of procedural fairness rights. This spectrum ranges from the low-end notice that a decision will be made, to a higher set of procedures that may more closely reflect civil or criminal trials.[273] She writes about the legal consequences of fairness, namely that unfair decisions cannot stand. She links procedural fairness to the rule of law and access to justice concerns through institutional procedural design. Glover Berger links the rights of participants to the barriers in securing rights of participation and therefore to substantive justice. She also connects rule of law to accountability, a concept I will explore later, where procedural fairness and the requirement for justification interlock.[274]

Importantly, Glover Berger also traces the sources of procedural fairness. She notes it arises from statute, regulation, as well as soft law instruments such as rules and guidelines.[275] She highlights Canadian immigration's unique context, where the IRB is enabled by statute with broad discretion to tailor procedures.[276] Later, referencing *Baker*, Glover Berger notes that the common-law context is answered by looking at first, whether the duty of fairness is triggered, and second, what the duty entails, applying the *Baker* contextual factors.[277] Glover Berger

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[268] *Ibid* at 178.
[269] *Ibid* at 181.
[270] *Ibid* at 188, n 57 citing Roderick Macdonald, "A Theory of Procedural Fairness" (1981) 1 Windsor YB Access Just 3.
[271] Glover Berger, *supra* note 54 at 181.
[272] *Ibid* at 181.
[273] *Ibid* at 182.
[274] *Ibid* at 186–187.
[275] *Ibid* at 190–201
[276] *Ibid* at 192.
[277] *Ibid* at 199–206

identifies as specific procedures for procedural fairness, the provision of notice that a decision made, the opportunity to participate through a hearing, and the provision of reasons.[278]

Glover Berger's earlier discussion of procedural fairness being tied to the concepts of citizen enfranchisement and decision-maker flexibility[279] are particularly crucial as this paper transitions into a discussion of ADMs and the changing nature of stakeholder and user participation. Specifically, I see the flexible nature of the duty of procedural fairness and the aims of enfranchising citizens,[280]creating tensions where Canadian citizenship may be enfranchised by restrictive immigration measures. To put it another way, if the administrative body's definition of fairness is tied to efficiency goals or if they view the Canadian public as the citizens concerned, the use of ADMs to risk flag and triage may be justifiable through the language of fairness. Glover Berger also talks about flexibility with regard to the need to consider the investments of "time, money, and public resources" needed to achieve administrative justice.[281] Do immigrants, for whom immigration has been framed as a privilege, truly benefit from these aims of procedural fairness? Or is this conception of procedural fairness merely aimed toward the growing interests of the State?

3.3 Fair Process and How Procedural Fairness Concepts Apply to the ADM Context

3.3.1 Notice Giving

One of the most discussed issues in the procedural fairness context of ADMs is giving adequate notice to the applicant that this technology is being used in decision-making. Daly writes that administrative decision-makers typically require providing some kind of hearing to the individual impacted, involving notice and comment and the providing the right to introduce evidence.[282] Citing the *DADM*, Scassa points out that disclosure requirements from low and medium-impact projects involve only plain language notices, and it is only the high or very high-

[278] *Ibid* 206–210.
[279] *Ibid* at 188–190.
[280] *Ibid* at 189.
[281] *Ibid* 190.
[282] Daly, "Artificial Administration", *supra* note 34 at 7; See also Scassa, *supra* note 65 at 286.

impact decisions (of which there have been none) that bring the requirement to release actual details, reviews, and audits of the system.[283]

Several scholars have critiqued the current application of the notice requirement as it pertains to ADM governance. Daly questions whether this provision of notice is indeed coupled with a meaningful opportunity to respond.[284] Drawing out the contours, Raso argues that a fair hearing must allow a decision-maker to take account of both or all sides of a matter, but notes the uncertainty remains about what this standard requires when humans *and* algorithmic tools appraise evidence.[285]In her article, Raso draws the rich example (paralleling the prison incarceration cases that will briefly be introduced later in this chapter) of Mr. Stewart, an incarcerated individual who is subject to one or more actuarial tools, but is unaware of how those tools generate risk scores and the standards against which he is to be evaluated. Given its use in predictive decision-making, Raso asks how Mr. Stewart may effectively lead counterevidence against the tool.[286] Moreover, Daly has argued that placing a HITL itself may not be a full response to procedural fairness concerns. He writes that the human would need to fully understand why and how the machine came to a particular conclusion and whether the human decision-maker had the authority to change the decision.[287]

To reiterate, in the immigration context, other than the disclosure of the use of Chinook within GCMS notes, there is no disclosure (proactive or through litigation) of when other ADM tools are used. There is no disclosure, for example, of where an ADM may benefit a subset of applicants or to flag (or not flag) risks for an individual. The basic public notices that are posted, as discussed in Chapter 2, appear to give only partial or Canadian government-favourable information about its general, rather than individualized uses. Furthermore, the *DADM* has lowered the bar on disclosure in a way that has impacted an individual's ability to challenge the decisions made against them. Various AIAs have continued to use human intervention as a defence to procedural fairness, without specifying the role, knowledge or training of the front-line individual.[288] The robust internal checks, balances, and considerations for approvals of

[283] Scassa, *supra* note 65 at 286.
[284] Daly, "Artificial Administration", *supra* note 34 at 8.
[285] Raso, "AI and Administrative Law", *supra* note 57 at 9.
[286] *Ibid* at 8.
[287] Daly, "Artificial Administration" *supra* note 34 at 9.
[288] See e.g. CBSA ReportIn AIA, *supra* note 11 at page 6 where it states:

IRCC ADM projects are not visible to impacted persons, stakeholders, or academics looking to study the systems.[289]

3.3.2 Right to Be Heard and Knowing the Case to Be Met

The right to be heard is related to the natural justice right of a fair hearing and the opportunity to present one's case. Sossin writes that "AI may make it far easier for a more diverse set of parties to convey their position to administrative decision-makers more effectively,"[290] possibly bridging the gap for unrepresented parties and the duty of fairness to ensure effective participatory rights in decision-making.[291] Sossin argues that AI can also be a game changer for knowing the case to meet.[292] He sees the potential for "self-represented applicants who lack legal sophistication, to be able to go through searchable databases of prior decisions, information rates on success, and types of admissible evidence."[293]

Sossin's foresight has been operationalized in the Canadian immigration context. For example, technology has allowed online social networks of applicants to work and collaborate with each other online in forums to "decode" the delays and changes on their immigration applications. Through shared knowledge they are able to navigate previously inaccessible procedures, often without legal support. This has led to shared discoveries, such as the ability to

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> "All submissions will undergo 100% human oversight. This approach ensures that human judgment and discretion are applied to the results, **promoting accountability and accuracy** in the system's operation" [emphasis added]

[289] When document have been obtained that explore the *DADM* approval process, those emails show urgent deadlines and questionable rationalizations. For example, the AIA for the Spouse-in-Canada triage was approved by a TBS team member covering for a vacation leave. A second example shows a TBS team member contesting the use of triage bins (a core function of ADM tools) but receiving an outlier example from IRCC of the need to triage diplomats separately from other applicants as justification. See Canada, Immigration, Refugees and Citizenship Canada, ATIP Request A-2021-00816 at 34-38 [held by author]. See also: TBS, ATIP Request A-2023-00081, *supra* note 115 at 238-242.

[290] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 195.

[291] *Ibid* at 196.

[292] *Ibid.*

[293] *Ibid.*

inspect source code of their client status trackers and electronic applications[294] but also the potential concerns of the use of Generative AI tools.[295]

The *DADM* currently does not include any discussion about a right to a hearing.[296] As Scassa writes, it was replaced with a "right to a human decision maker" and that again, this threshold kicks in only on high and very high-impact decisions.[297] As discussed in Chapter 2, as of the publication of this thesis, the initiating department has self-rated every one of their projects at low or medium risk, which has the effect of exempting the higher disclosure requirements. Scholarship has also shed light on how the traditional ability to "make full and fair response" might apply differently in an ADM context. Raso similarly raises questions about the forum of electronic hearings and the ability to "hear" both sides when algorithms are used. She argues that administrative law doctrine may "need to evolve to guarantee face-to-face hearings where vital rights and interests are at stake."[298]

Given IRCC's remedy appears to be re-opening and remitting the decision for human review,[299] the requirement of a HITL will carry on for high-impact assessments but I share Crootof and Goldenfein's concern that it requires further scrutiny. Too often, a HITL is automatically assumed to be an effective guardrail without further interrogation into their actual functionality, training and resourcing. The term "guardrail," which this project adopts throughout, has itself been heavily scrutinized.[300]

Finally, on the issue of knowing the case to be met, the use of ADMs has led to significant information asymmetries between applicants and decision-makers. Even if front-line officers are not given full details of how these tools work or the algorithms behind them, they are

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[294] The incidents I am referring to have been cited in Chinese social media circles in the Chinese language, but for a more accessible example, see examples of post on Reddit by a software engineer who figured out the points on how Express Entry application were removed as a result of a policy change.
See r/canadaexpressentry, "I Checked CRS Score's Source Code…" (March 2025), online: <reddit.com/r/canadaexpressentry/comments/1jgq5y4/i_checked_crs_scores_source_code_as_a_software/>.
[295] This has attracted concern of the FC. See Canada, Federal Court of Canada, *NOTICE TO THE PARTIES AND THE PROFESSION The Use of Artificial Intelligence in Court Proceedings* (7 May 2024), online (pdf): <fct-cf.ca/Content/assets/pdf/base/FC-Updated-AI-Notice-EN.pdf>.
[296] Scassa, *supra* note 65 at 288.
[297] *Ibid* at 287.
[298] Raso, "AI and Administrative Law" *supra* note 57 at 9.
[299] Canada, Immigration, Refugees and Citizenship Canada, ATIP A-2021-52517 at 109.
[300] Woodrow Hartzog et al, "Against AI Half Measures" (Paper delivered at the WeRobot Conference, University of Windsor, 2025) at 3 discuss the "guardrail theater" as a system that offers little more than lip service to the important limitations they are meant to impose.

delivering decisions, *en masse,* to applicants who know even less and are assuming and relying on IRCC's statements that a fulsome, case-by-case right to be heard and make submissions is still being provided.[301]

3.3.3 Bias and the Complication of Automation Bias

The principles of procedural fairness also recognize a right to an independent[302] and impartial adjudicator.[303] Most of the concerns around ADM tools regard the impartiality of a decision-maker relying on the tools, or the tool itself serving as a decision-maker. If there is a lack of impartiality, this may engage the test for reasonable apprehension of bias, namely "what would an informed person, viewing the matter realistically and practically and having thought the matter through, conclude."[304] Looking at the plain language of the text itself, it is very noticeably "human," speaking about informed persons and their thinking, a sentient aspect that machines (and embodied AI)[305] currently lack.

There is debate about how effectively the *DADM* currently addresses the issue of bias. The concern is that AI-driven ADM systems create and exacerbate existing biases. Apurva Vohra, in her recent master's thesis, examines the issues of bias that occur when deploying AI and related technologies in migration governance. Vora aptly ties in, referring to the work of Ruha Benjamin[306], that these tools are curated by system designers who reflect society's interest to maintain the status quo, disguised and normalized through coded systems of oppression.[307] Meanwhile, Canadian administrative law scholarship has lacked depth and attention towards

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[301] McEvenue and Mann, *supra* note 105 at 7.
[302] As Scassa writes, independence is a thorny issue when talking about government procurement and the ability of the Government to tweak, to improve, or to alter performance. These issues certainly arise in the context of tools such as ReportIn where the technology belongs to Amazon and is black box. See Scassa, *supra* note 65 at 280.
[303] Scassa referring to Laverne Jacobs, writes that independence "refers to the tribunal's ability to decide matters free of inappropriate interference or influence", whereas an *impartial* decision-maker, "listens to both sides of an argument and is not influenced by extraneous considerations, which can raise a reasonable apprehension of bias." See *ibid* at 279–280,
[304] This oft-quoted test is set out by the SCC in the 1978 case of *Committee for Justice and Liberty et al v National Energy Board et al.,* 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 667.
[305] Embodied AI "refers to the integration of artificial intelligence into physical systems, enabling them to interact with the physical world." See NVIDIA, "What is Embodied AI?", (accessed on 03 June 2025), online: <nvidia.com/en-us/glossary/embodied-ai/>
[306] Ruha Benjamin, *Race after Technology: Abolitionist Tools for the New Jim Code* (Cambridge: Polity Press, 2019) at 82.
[307] Apurva Vohra, "Social order in the age of artificial intelligence: the use of technology in the migration governance and decision-making" (LLM Thesis, University of British Columbia, 2023) at 19–22, online: <open.library.ubc.ca/collections/ubctheses/24/items/1.0437225>.

racial bias issues, focusing instead on the ways ADMs generally impact current, non-racialized concepts of bias. There are two areas that Canadian scholars have raised as core concerns: *first,* how machine decision-makers may impact the assessment of both individualized and institutionalized (systemic) bias and *second,* the issue of automation bias.

Setting the context, Scassa describes the *DADM*'s approach to bias as unique because "it interrogates systemic bias of the entire algorithmic decision-making process," whereas "courts assess the bias of human decision-makers, based on whether the decision-maker has an interest in the outcome of the case."[308] In this sense, Scassa sees the potential of systemic bias being addressed in the *DADM* in ways courts may be unable to do. Raso, also looking at procedural design, suggests that systemic bias concerns are raised by the very design of algorithmic devices that "may never be responsive enough to an individual's circumstance to appear 'open minded'."[309] Sossin writes on the importance of an open mind as it pertains to impartiality, "whether its pecuniary conflicts of interest, pre-existing relationships with the party (or parties), published views on the subject matter, or other factors may be indicia of a reasonable apprehension of bias."[310]

Sossin discusses how AI is "immune to conventional threats to bias" as in the abstract, an algorithm has no basis to treat individuals differently based on "preconceived stereotypes of misconceptions of irrelevant factors such as pre-existing relationships, how a person presents or is addressed, person's cultural socio-economic, religious, racial or gender bias."[311] Sossin acknowledges, however, that algorithms learns from data that may already import bias (neighbourhoods, city, impact of poverty) and be therefore unable to distinguish between good and bad data.[312] This finding is also reflected by Grieve, who writes, reflecting on the immigration regime:

> "One of the dangers of automation in the immigration context is that AI assumes the future will reflect the past, thus integrating past values, biases, and assumptions within IRCC decisions. Automation can exacerbate past patterns of bias and discrimination,

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[308] Scassa, *supra* note 65 at 283; Grieve, *supra* note 60 at 186.
[309] Raso, "AI and Administrative Law", *supra* note 57 at 11. See also Cobbe's reminder that ML's very nature is to train on large data sets that categorize individuals based on shared characteristics rather than as individuals, to draw insights and produce outcomes. See Cobbe, *supra* note 89 at 652.
[310] Sossin, "Administrative Law and Artificial Intelligence" *supra* note 142 at 195.
[311] *Ibid* at 197.
[312] *Ibid* at 197.

particularly among vulnerable groups that have historically been subject to oppression and discrimination."[313]

Moving to a discussion of automation bias, more specifically, Szilagyi further explores the definitional nuance between automation bias and *automation complacency.* She highlights that automation bias occurs when users rely on imperfect automated decision-making processes, which can lead to both *omission errors* —things that are missed—and *commission errors*—things that are done improperly—due to inappropriate reliance on the automated system."[314] Meanwhile, automation complacency occurs when "people interacting with an automated system are forced to perform multiple tasks simultaneously, increasingly relying on the automated system instead of their own instincts."[315]

For Daly, the *DADM* does not address the risk of automation bias.[316] Raso argues that the automation bias, as a form of individual bias, should be treated in the same manner as a pecuniary or personal interest in a case.[317] Raso draws concerns that algorithmic tools that are deemed "objective" may entrench bias at an incredible scale and lightning speed. She notes that system-wide bias that may not fit our current rule against bias doctrine.[318] Scassa adds that "an ultimate human decision maker is much less of a safeguard if both that decision maker and the courts that sit in review of his or her decision are affected by automation bias."[319] Sossin, citing Jesse Beatson, discusses how "reasonable apprehension of bias may flow from the inclusion of irrelevant considerations depending on the nature of data on which algorithm relies or the introduction of a policy bias, such as winnowing the number of successful applications for a discretionary benefit."[320]

This last concern is particularly relevant in Canadian immigration, where it is unclear how algorithms are adjusted to policy changes regulating the number of applicants to be accepted

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[313] Grieve, *supra* note 60 at 193.
[314] Szilagyi, *supra* note 25 at 58. Cobbe defines *automation bias* as occurring when, "human are more likely to trust decisions made by machines than by other people and less likely to exercise meaningful review of or identify problems with automated decisions." See Cobbe, *supra* note 90 at 641.
[315] Szilagyi, *supra* note 25 at 58, 380.
[316] Daly, "Artificial Administration", *supra* note 34 at 22.
[317] Raso, "AI and Administrative Law", *supra* note 57 at 11.
[318] *Ibid* at 12.
[319] Scassa, *supra* note 65 at 281.
[320] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 198.

each year through mandatory Federal Government immigration levels planning.[321] It also complicates the assessment of automation bias, as it is difficult to isolate who the bias should be assigned to, if there are system-level bureaucrats who set the standards that front-line decision-makers are to adhere to. What may seem like reliance on poorly designed systems from the perspective of potential immigrant applicants may instead be intended outcomes generated by augmented human/ADM decision-making.

As of the date of this publication, neither the terms *automation bias* nor *automation complacency* have received a single reference in any published Canadian case law, despite the proliferation of ADM decisions in spaces like immigration.[322] However, relevant policy governance documentation, as demonstrated by a recent peer review for the AA-VR AIA, is beginning to acknowledge automation bias, and recognize the propensity of decision-makers to be overly reliant on automated systems.[323]

Reiterating a more solutionist position, Sossin argues that there is the potential to algorithmically enhance decision-makers in removing human biases and subjectivity from their decisions, to ensure similar cases are treated consistently and coherently.[324] Recall the earlier discussion of IRCC's rationalizations and justifications, and my prediction that this may be a core position taken as the technology improves.

This more positive view of ADM's potential is also espoused by numerous American scholars, such as Huq, who claim human biases may be even more of a black box than machine biases, for which inputs can be calibrated.[325] Rebecca Williams writes that while the use of historical data may replicate data bias, it does not necessarily mean machines will end up being "more biased" given the certainty of biased outcomes inherent in ADMs and the ability to

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[321] Canada, Immigration, Refugees and Citizenship, *Canada's immigration levels*, (last modified 4 November 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/mandate/corporate-initiatives/levels.html>.
[322] Based on search on canlii.org using search terms "automation bias." Scassa writes automation bias is "the tendency of humans to rely upon the perceived *scientific* neutrality and objectivity of machine-based outputs – might undermine their impartiality as decision-makers." See Scassa, *supra* note 65 at 281
[323] Canada, Open Government, *Peer Review by Shared Services Canada of the Advanced Analytics Triage for Visitor Record Applications - Executive Summary*, (7 October 2022) [IRCC], online (pdf): <open.canada.ca/data/dataset/01396e33-2c69-47e5-9381-32e717943b96/resource/75dddd64-f482-4b6e-a2e0-7f6ab35fef84/download/annex-a-vr-model-peer-review-summary-en.pdf>.
[324] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 196.
[325] Huq, *supra* note 81 at 643-644.

measure it.[326] However, Rebecca Williams does note that the scaled up nature of ADMs could have a propensity to create more errors, but she sees this as creating a greater onus to identify and correct them.[327]

As Sossin best sums up, "AI holds the promise of both enhancing and undermining each of these pillars of fairness in administrative decision-making."[328] I concur with his finding that AI has the potential to be a "helpful and legitimate tool" but "to the extent it binds decision-maker to views or findings or impairs a party's ability to know and respond to the case they must meet, or is based on implicit forms of bias in the data," it may breach procedural fairness.[329] Within the Canadian immigration context, challenges are posed by the low procedural fairness rights owed to many of the individuals currently subjected to ADM systems, as section 3.5.1 will explore.

Specific to the immigration space, IRCC recognizes and acknowledges the potential for bias in its ADM systems, pointing out that it can exist in a variety of ways – in data, through human involvement, and in various stages of design and development.[330] They are also encouraged by the potential of AI to mitigate human biases and to be leveraged against bias.[331] In its *Policy Playbook*, IRCC states that it recognizes the limitations of data-driven technologies and that it must take reasonable steps to minimize unintended bias.[332] They acknowledge, similar to Sossin and Grieve's earlier analysis, that biases could exist in longstanding practices, the challenges of applying group information on the individual level, and the threat of replicating and 'hardwiring' historical bias.[333]

On the surface, there appears to be an inherent disconnect between bias being a high standard legal test for reasonable apprehension of bias and what appears to be the certain, almost accepted, co-existence of bias[334] inherent in ADM systems. The necessity of the decision-maker

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[326] R Williams, *supra* note 81 at 485.
[327] *Ibid* at 486.
[328] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 195.
[329] *Ibid* at 198–199.
[330] McEvenue and Mann, *supra* note 105 at 9.
[331] *Ibid.*
[332] *Policy Playbook*, *supra* note 12 at 71.
[333] *Ibid.*
[334] See e.g. Hartzog et al, *supra* note 300 at 12-14.

demonstrating an open mind and being "right-minded"[335] does not fit neatly into the context of pre-programmed ADMs or decisions importing rules from other similar cases. However, accusations of decision-maker bias in the immigration context, particularly post-*Baker*'s high watermark decision, have been largely unsuccessful, frequently failing for issues such as lack of evidence, the late timing, and the seriousness of the allegations.[336] Will ADM systems encourage courts to be more flexible in addressing bias claims, or instead will systemic bias and automation bias be treated with a different set of considerations and thresholds?

Another further conversation still missing in the context of bias that has yet to be fully tackled, particularly in Canadian scholarship, is the one around how technologists, sociologists, and lawyers view bias differently and the impact they may have on the development of ADMs. In a project completed as part of my LLM coursework, alongside a team of computer science graduate students, we explored how the foundations of technical bias, particularly of error reduction, clashed with the law's more ameliorative view of bias as discrimination. Our project found that when it comes to computer science's acknowledgment of the tension between group fairness and individual fairness,[337] broad ranging terminology and nuanced understandings stood in stark contrast to the law's self-protective, "one-size-fits-all" view on bias. Movement on legal bias concepts, therefore, must also recognize how data concepts – such as data bias, representativeness, quality and accuracy – impact decision-making outcomes.[338]

Drawing experiences from that project, I find that scholarship's recent engagement with *automation bias*, may need to be extended even further and deeper into more nuanced explorations of *algorithmic bias* that explore issues (and potential human involvement) for issues such as drift, rule conflict, and geo-risking.[339] Busuioc writes also about *selective adherence,* where, related to the term confirmation bias, officers may defer selectively to when "algorithmic

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[335] *R v S (RD),* 1997 CanLII 324 (SCC), [1997] 3 SCR 484 at paras 35-36.
[336] See e.g. *Bidassa v Canada (Citizenship and Immigration),* 2022 FC 242 at paras 13–15; *Alvarez v Canada (Public Safety and Emergency Preparedness),* 2022 FC 185 at paras 46–50**.**
[337] As Rueben Binns defines: "on one hand group fairness ensures some form of statistical parity (e.g. between positive outcomes, or errors) for members of different protected groups (e.g. gender or race) [18]. On the other hand, individual fairness ensures that people who are 'similar' with respect to the classification task receive similar outcomes. See Reuben Binns, "On the Apparent Conflict Between Individual and Group Fairness.", In Conference on Fairness, Accountability, and Transparency (FAT), (January 2020), online: <doi.org/10.1145/3351095.3372864>
[338] Auger et al, *supra* note 216 at 5–7.
[339] *Ibid* at 6.

recommendations confirm their priors, beliefs or biases."[340] She writes that proper investigations will be needed into how civil servants, as "users" require the understanding and scrutinization of the algorithmic systems they are using.[341]

Highlighting the various scholarship perspectives reveals a conversation that is ultimately incomplete and still in its infancy. There is also an important, underexplored, relationship between bias and discrimination – bringing in Canadian constitutional and human rights law.[342] Any future consideration of ADM bias will inevitably need to expand its process considerations beyond merely technology and administrative law.

3.3.4 Under-Explored Area – Applying *Baker*'s Procedural Fairness Contextual Factors to the ADM Problematic

While most Canadian administrative scholars have also used the *Baker* procedural framework as a starting point for analyzing the ADM context, I argue that a more robust "return to first principles" is needed to exploring how ADMs might apply.[343] The procedural fairness framework set out by the Court in *Baker* explores five, non-exclusive considerations with a heavy emphasis on the context of decision-making.[344] In this section I apply each contextual factor to ADMs, bringing in new questions and considerations to the procedural fairness discussion. These factors are used to determine the nature and extent of the duty of procedural fairness owed in a particular case.

Under the *first factor* examines the nature of the decision made and process followed when making it, namely whether the decision being made reflects a judicial decision and requires a higher level of procedural fairness.[345] I argue that algorithmic systems (particularly decision

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[340] Busuioc, *supra* note 197 at 8.
[341] *Ibid* at 9.
[342] A future research study might look at how automation bias might be treated under various human rights codes or the *Charter* with respect to delineating lawful and unlawful discrimination. Immigration-based discrimination claims against IRCC have been brought before human rights tribunals. See e.g. *Attaran v Citizenship and Immigration Canada*, 2023 CHRT 27 where the complainant alleged discriminatory practices in the respondent's processing of the complainant's application to sponsor his parents for immigration.
[343] The procedural fairness analysis of these scholars will be examined in Chapter 5.
[344] The Court notes that this list is non-exhaustive and that there may be other important factors that are important to the duty of fairness. The Court emphasizes in summary; "values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision. See *Baker*, *supra* note 254 at para 28.
[345] *Ibid* at para 23.

trees) do reach (pronounce) judgments in ways that mirror binary judicial decisions in terms of ultimately approving/rejecting (allowing/dismissing). At the very least, it is uncomfortable applying the analysis of process, function, and nature to a machine making pre-determined decisions about immigration applicants.[346]

Under the *second factor* of exploring the nature of the statutory scheme for language around procedure*,* the *IRPA*'s silence around ADMs and the broad authorization granted to immigration officers overlooks any reference to procedural concerns. The lack of remedies, such as appeal rights, available in the context of ADM decisions suggests a higher level of procedure fairness is required.[347] On the other hand, IRCC would argue that ADM is primarily being used in investigative, fact-finding, and preliminary decisions given the HITL, thereby attracting lower procedural fairness.[348]

Under the *third factor* of importance of the decision to persons impacted requiring greater procedural fairness, individual immigrant applicants are being directly impacted by ADM decisions, but the nature of that impact is heavily contested (as section 3.5.1 will explore in more nuanced detail). For now, it is worth noting that IRCC often suggests, consistent with legal presumptions, that temporary residents are not significantly impacted by ADMs and are generally owed little procedural fairness.[349] Consider the contrast, in *Baker,* where Justice L'Heureux-Dube makes poignant comments on the impact of humanitarian and compassionate ("H&C") grounds immigration decisions (which are made by temporary residents seeking permanent residence in Canada), writing at paragraph 15:

> In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals'

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[346]Glover Berger, *supra* note 54 at 204, citing *Baker*, *supra* note 253 at para 23.
[347] The Court explores *second,* the nature of the statutory scheme, along with other surrounding indications. Where no appeal procedure is provided, and further requests cannot be made, the content of the duty of fairness should be higher. *Ibid* at para 24. See also commentary of Raso, "AI and Administrative Law", *supra* note 57 at 8 that "statutes seldom include procedural requirements."
[348] Glover Berger, *supra* note 54 at 204 citing *Baker*, *supra* note 253 at para 25.
[349]The Court's *third* factor is the importance of the decision to individuals or individuals affected. The greater the impact, the more stringent the procedural requirements will be. This formulation is re-iterated as well in the *Vavilov's* substantive framework, bringing it in as well into reasonableness review. See *Baker, supra* note 253 at para 25.

> lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.[350] (emphasis in original)

The critical uncertainty on when an immigration decision is said to have a significant impact on persons is a recurring tension point in this project, but it is worth reiterating as Chapter 2 sets out, that IRCC currently does not use ADMs to assess H&C grounds. The *Baker* framework does not give a clear sense of whether an area such as temporary residence, where ADMs are being used, is therefore necessarily rendered lower impact.

The challenge of determining the level of procedural fairness owed is made even more complex through applying Baker's *fourth* factor, legitimate expectations. The legitimate expectations of the person challenging the automated decision are often difficult to gauge, because the use of ADMs is either not disclosed or disclosed only in terms of its favourable benefits. This, in turn, may diminish, or render incomplete, claims to those legitimately held expectations. Justice L'Heureux-Dubé's commentary on the circumstances surrounding promises or regular practices that may be unfair if backtracked or deviated is particularly applicable to ADMs considering constantly shifting tools and technology that alter the elements, steps, and humans involved in decision-making.[351] In short, with the way ML learning tools are meant to improve over time and experience, as Huq has highlighted, current practices may be impossible to pin down. Furthermore, as Chapter 2 explored, external commitments and justifications made publicly through AIAs may not reflect the internal debates and governance discussions occurring behind closed bureaucratic doors. Legitimate expectations may ultimately be more difficult to establish, particularly with opaque ML and black-box ADMs than traditional rules-based decision-making.

Finally, the *fifth* factor, the consideration of agency procedure and expertise is perhaps subject to the most scrutiny.[352] As discussed earlier, statute imposes no limitations on procedural

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[350] *Ibid* at para 15.
[351] *Fourth,* the Court explored the legitimate expectations of the persons challenging the decision. Specifically, if a claimant holds a "legitimate expectation that a certain procedure will be followed, that this procedure will be required by the duty of fairness." See *Ibid* at para 26.
[352] *Fifth,* the Court explores what procedures the duty of fairness takes into account with respect to the agency's own choices, the statue's authorizing of the decision-maker's procedural choices, and their expertise. See *ibid* at para 27.

choice. Yet, the institution's choice of procedure and expertise is precisely what is uncertain with ADMs dispersal of decision-making, including reliance on third-party software and designers. The baseline questions of "should ADMs even be used?" or "should ADMs be banned in a certain area?" will factor in, but without access to internal records, these questions will be difficult to interrogate. However, as ADMs hollow out and abdicate the expertise traditionally held by decision-makers, replaced by algorithmic recommendations of unknown provenance, what deference is choice of procedure owed, particularly under correctness review?

Beyond the five *Baker* procedural fairness factors, it is also unclear where the test for procedural fairness currently stands. Subject to a few notable exceptions, most recent decisions have preferred the FCA's summary in *CPR*[353] of fairness regarding all the circumstances,[354] over a detailed multi-factored analysis. Does an "all circumstances" approach implicitly allow for ADM's process efficiency and national security justifications to be entered in as primary considerations for fair process? Or will decision-makers still return to *Baker*'s principles and look at how ADMs facilitate or frustrate each contextual factor?[355] How judges approach case law in coming years, especially as more ADMs are used, will provide future evidence of Canadian administrative law's direction and approach.

3.4 Fair Process Impacts Substantive Justice

One of the challenges of Justice Brown's holding in *Haghshenas* is that it took as a starting point and assumption, that process and substance were separate enquiries. Glover Berger writes that "it is somewhat misleading to suggest a concern with procedure is not also a concern with substance; the two are intimately, and indeed inextricably knitted together."[356] If a fair process impacts the substance of a decision, then Justice Brown's concern about elevation of process over substance may need to be reframed as exploring how an ADMs process may impact the substance of a decision.

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[353] *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69.
[354] *Ibid* at para 54.
[355] For example, Justice Battista in the recent decision of *Ali v Canada (Public Safety and Emergency Preparedness),* 2024 FC 1085 involving FRT did a very thorough *Baker* contextual factor analysis in paras 20-28.
[356] Glover Berger, *supra* note 54 at 213, n 200 citing the decision of Justice Stratas in *Bergeron v Canada (Attorney General)* 2015 FCA 160.

3.4.1 Court's Blurring of Procedural Fairness and Reasonableness in *Vavilov*

While *Vavilov* has undoubtedly been helpful in developing a robust reasonableness framework for analyzing administrative decisions, it has been decidedly less helpful in helping to understand the review of procedural fairness issues. First, as several colleagues have written about,[357] there is no clear pronouncement on the standard of review for procedural fairness issues. Courts have either interpreted this to mean that correctness is the best standard reflecting procedural fairness review,[358] or that procedural fairness issues are not amenable to standard of review and that an unfair decision must be set aside.[359] The reasonableness standard has been found to apply to questions of mixed fact and law involving a higher tribunal's review of a lower tribunal's finding on procedural fairness.[360]

The SCC in *Vavilov* takes *Baker's* contextual factors, such as the impact of the decision on individuals concerned[361] and the review of decisions in the absence of reasons,[362] and treats them under the new reasonableness framework. In its defense, the Court does, in the discussion of performing reasonableness review, attempt to bring together procedural fairness and substantive review. The Court writes that the duty of procedural fairness, as the duty to give reasons for its decision, will impact how a court performs reasonableness review.[363] Furthermore, Glover Berger writes that fairness is at the heart of the culture of justification.[364] She highlights the *Vavilov* court's holding in this section, between the provision of reasons and legitimacy, with captures both procedural fairness and substantive reasonableness.[365]

It is important to draw on the early work of David Dyzenhaus and Evan Fox-Decent writing about the evolution of procedural fairness review through SCC jurisprudence.[366] Writing about legality (as part of the rule of law), they argue that its requirements "imposes a duty of

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[357] See analysis of this in Paul Daly, "An Update on Administrative Law: The Supreme Court of Canada in 2022", 2022 CanLIIDocs 4251 at 26–27, online: <canlii.ca/t/7n0wm>.
[358] *Asif v Canada (Citizenship and Immigration),* 2025 FC 1326 at para 8.
[359] See e.g. *Zahrebelnyi v Canada (Citizenship and Immigration),* 2025 FC 1338 at para 10, citing *Vukaj v Canada (Citizenship and Immigration),* 2025 FC 1037 at paras 10–16.
[360]See e.g. *Imafidon v Canada (Citizenship and Immigration)*, 2023 FC 1592 at paras 19–25.
[361] *Vavilov*, *supra* note 254 at paras 133-135.
[362] *Ibid* at paras 136-138.
[363] *Ibid* at para 76.
[364] Glover Berger, *supra* note 54 at 186.
[365] *Ibid.*
[366] David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v. Canada" (2001) 51 UTLJ 193.

fairness that is substantive, unless on review, the executive can offer a justification why, in a particular administrative context, it is not unfair that there be no hearing, no reasons for decision and so on."[367] Writing shortly after the release of the *Baker* decision, Dyzenhaus and Fox-Decent also raise the challenge of setting the appropriate contours for future judicial review of process, given that process implicates also review of substance and that within that distinction, there is need to maintain deference as respect.[368]

However, in contrast to the richness in which Dyzenhaus and Fox-Decent draw the development of the previous case law on procedural fairness, analyzing the fine-line navigation between process, substance, and legality leading up to *Baker,* I see *Vavilov's* analysis on procedural fairness both thrift and falling short.

3.4.2 Two Immigration Examples Where Process Impacts Substance in the ADM context

To demonstrate where process and substance are blending in ADM decisions, I provide two examples below of issues the *Vavilovian* framework would currently view and interrogate under reasonableness review, which may conceal the process and procedural fairness-based nature of the needed enquiry.

i. Boilerplate/Bulk Decision-Making Problem

The Cambridge Dictionary defines boilerplate language as "text that can be copied and used in legal documents or in computer programs, with only very small changes."[369] Similarly, the Merriam-Webster dictionary adds that "boilerplate is standardized text, formulaic or hackneyed language."[370]

The boilerplate problem has emerged in several cases following *Haghshenas.* Justice Grammond, writing in *Safarian,* highlights that the use of boilerplate is not itself objectionable, but noted that the court must be satisfied that the officer actually turned their minds to the facts of the case.[371] Justice Diner also ties this into the *Vavilovian* concept of responsive justification,

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[367] *Ibid* at 240.
[368] *Ibid* at 242.
[369] Cambridge Dictionary, *Cambridge Dictionary*, (last visited 13 August 2025) sub verbo "boilerplate", online: <dictionary.cambridge.org/dictionary/english/boilerplate>.
[370] Merriam-Webster, *Merriam-Webster Dictionary*, (last visited 14 July 2025) sub verbo "boilerplate", online: <merriam-webster.com/dictionary/boilerplate>.
[371] *Safarian v Canada (Citizenship and Immigration)*, 2023 FC 775 at para 3.

noting in *Shirazi Nezhad* the failure to grapple with key contradictory evidence.[372] The concern about boilerplate has also recently extended to applicant submissions, with Justice Grammond finding in *Rezvani Gilkolaei* that the use of boilerplate refusal to address an applicant's boilerplate materials was not unreasonable.[373]

Taken in isolation, boilerplate reasons might appear not to be a process problem, or at the least one easier to address through a look at the substantive reasonableness of a decision. Officers are rendering decisions using generic reasons not reflective of the facts that were before them. Decisions that do not demonstrate responsive reasons to submissions are unreasonable.[374] Yet, this oversimplified conception can mask the ways in which the boilerplate decision was generated in the first place, which implicates the decision to treat certain application subsets in bulk.

Bulk is defined by the Merriam-Webster dictionary through an adjective meaning "being in large quantities or not divided into separate units."[375] The term "bulk data" has gained prominence amidst scholars employing AI-based computational tools to extract data from courts and decision-makers for further processing.[376] Bulk considerations do not necessarily manifest itself in reasons, but rather the processes chosen to treat a population subset in a particular way. Applications may be either bulk approved or bulk refused based on an extracted characteristic (or a set of extracted characteristics) in the input data. These are related to the officer rules or the advanced analytics-based rules explored in Chapter 2.

These decisions may very well be delivered to the applicant through the language of boilerplate refusals or other bulk treatment (delays, referrals to further review, procedural fairness letters, etc.). However, bulk decision-making may be the root procedural cause for boilerplate's substantive symptoms.

The challenges of boilerplate have also been taken on by administrative scholars studying these systems. Raso, reviewing the reasonableness framework, examines the additional concerns

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[372] *Shirazi Nezhad v Canada (Citizenship and Immigration)*, 2024 FC 1747 at paras 7 and 14.
[373] *Rezvani Gilkolaei v Canada (Citizenship and Immigration)* 2025 FC 194.
[374] *Vavilov, supra* note 254 at para 127.
[375] Merriam-Webster, *Merriam-Webster Dictionary*, (last visited 13 August 2025) sub verbo "bulk", online: <merriam-webster.com/dictionary/bulk>.
[376] Sean Rehaag, "Luck of the Draw III: Using AI to Examine Decision-Making in Federal Court Stays of Removal" (2023) Osgoode Digital Commons, online: <digitalcommons.osgoode.yorku.ca/all_papers/352/>.

that the use of algorithmic decision-making might add. She discusses how boilerplate language may itself be insufficient proof of a decision being unreasonable, but if the algorithmic-driven tool is treated as a decision-maker this may lead to examinations beyond the officer's written reasons.[377] She highlights situations where the tools themselves may disregard evidence.[378] She also draws on concerns of boilerplate as a "cover" for the reasoning process of algorithmic tools.[379] In earlier work, Raso points out the concern of "thin" outward reasons that may "diverge significantly from the internal rationales that underlie a decision.[380] Drawing back to the work of Raso's empirical research examining Ontario Works front-line decision-makers, she also brings in the consideration that the "true" reasons may be dispersed between offices and may be found within several technological tools, physical folders, data entries and notes.[381] Again, while a *Vavilovian* reasonableness analysis may likely take on several of these points as legal and factual constraints imposed on the decision-maker,[382] so too would a *Baker* analysis looking at the choice of procedure by the decision-maker and a scrutiny of the individual and group fairness of processes which generated the bulk, boilerplate, decisions.[383]

ii. Logical Fallacies

In *Vavilov,* the Court, treating the consideration under the umbrella of the reasonableness framework, references how logical fallacies are an example of irrational decision-making.[384] Indeed, ADM decisions do carry the same human fallacies that the Court flags – circular reasoning, false dilemmas, unfounded generalizations, and absurd premises,[385] – but also add unique fallacies and biases from statistics, data science, and ML. These biases can be based on the data itself, the algorithms, or the interpretation of the data. [386] However, at the same time

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[377] Raso, "AI and Administrative Law", *supra* note 57 at 13.
[378] *Ibid* at 14.
[379] *Ibid.*
[380] Raso, "Unity in the Eye of the Beholder", *supra* note 225 at 22–33.
[381] *Ibid* at 19.
[382] *Vavilov, supra* note 254 at paras 105–135.
[383] *Baker, supra* note 253 at para 26.
[384] *Vavilov, supra* note 254 at para 104.
[385] *Ibid.* It is to be noted that the Court does not define or provide examples of any of these fallacies.
[386] Some of these included confirmation bias, causation bias, cherry picking, sampling bias, representative bias/survivorship bias, automation bias, algorithmic bias, hasty generalizations, data dredging fallacy, overfitting, post-hoc fallacy, and gambler's fallacy, among others. See Geckoboard, "Data fallacies" (last visited 3 June 2025), online: <geckoboard.com/best-practice/statistical-fallacies/>.
See e.g. these two articles on data science fallacies: Fatih Emre Ozturk, "Logical Fallacies in Data Science (Part I)", *Medium* (5 March 2023), online: <medium.com/@ozturkfemre/logical-fallacies-in-data-science-part-i-

ADMs can also help arguably avoid those same errors, by grounding decisions in traceable formal logic or even auditing through national language processing ("NLP") – a subset of AI that enables computers to understand and communicate with the human language[387] – to identify fallacy patterns.[388]

However, due to a lack of transparency and blurred lines of accountability, the tracing and assessment of this rationality/irrationality will be challenging for courts to take on. Courts may also not be motivated to take the challenges on, as doing so may result in holding administrative decision-makers to the "formulistic constraints and standards of academic logicians."[389] But as decision-making becomes increasingly black box, the requirement to interrogate formulas and logic rather than merely the words on the page, may become inevitable. The use of ADMs, particularly ML-based systems, may make it difficult to determine whether a decision "adds up," especially as the fallacies are more complex to trace.[390]

IRCC's own Peer Review Summary for the Visitor Record Triage,[391] flags an example of logical fallacy – a concern known as *overfitting,* "an undesirable, machine learning behavio[u]r that occurs when the machine learning model gives accurate predictions for training data but not for new data."[392] Here efforts to match the outcomes with the predictive model generated become more important to the decision-maker than actually generating accurate predictions. It is unclear at this stage whether overfitting arguments could be effectively raised, without access to

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e8b4595fb8a2>; Fatih Emre Ozturk, "Logical Fallacies in Data Science (Part II)", *Medium* (19 March 2023), online: <medium.com/@ozturkfemre/logical-fallacies-in-data-science-part-ii-d85f6b959c52>.

See also e.g. Anna Bashkirova & Dario Krpan, "Confirmation bias in AI-assisted decision-making. AI triage recommendations congruent with expert judgments increase psychologist trust and recommendation acceptance" (2024) 2:1 Computers in Human Behaviour: Artificial Humans 1. This paper is on the confirmation bias of AI recommendations.

[387]IBM, "What is NLP?" (last visited 08 August 2025), online: <ibm.com/think/topics/natural-language-processing>

[388] Callistus Ireneous Nakpih & Simone Santini, "Automated Discovery of Logical Fallacies in Legal Argumentation" (2020) 11:2 Intl J of Artificial Intelligence and Applications 37.

[389] *Vavilov, supra* note 254 at para 105.

[390] This is in response to the Court's comments that the decision maker's reasons should be reviewed with an eye to whether it "adds up." *Ibid* at para 105.

[391] Canada, Immigration, Refugees and Citizenship Canada, *Peer Review by Shared Services Canada of the Advanced Analytics Triage for Visitor Record Applications - Executive Summary* (7 October 2022), online (pdf): <open.canada.ca/data/dataset/01396e33-2c69-47e5-9381-32e717943b96/resource/75dddd64-f482-4b6e-a2e0-7f6ab35fef84/download/annex-a-vr-model-peer-review-summary-en.pdf>.

[392] Amazon, "What is Overfitting?" (last visited 3 June 2025), online: <haws.amazon.com/what-is/overfitting/>. See also definition of overfitting in Szilagyi, *supra* note 25 at 28, n 153 which states: "…one of the key problems arising in ML programming is overfitting, which refers to a tendency for the learner to align itself too specifically to the training data."

adequate data and the technical expertise needed to make and evaluate such claims. It is even more unclear how administrative law principles would view a potential fairness argument that the model was biased against an individual on this basis.[393] IRCC's inclusion of a HITL, alongside non-disclosure of the use of tools that may overfit data, could also effectively make this fallacy difficult to uncover in the first place.

Importantly, this is the type of process error that may not reveal itself in any substantive outcome. The reasons for refusal will likely still state their boilerplate or even fact-specific grounds. This would, again, leave applicants without the ability to understand the process by which data inputs, rules, and human decision-making combined to render the final decision. Audits and reviewing parties may need access to both underlying source data and even the technological tools themselves to reveal these flaws. It is difficult, at this stage, to see a reviewing FC (in the immigration context) engage in this type of analysis of procedural review. Judicial review also poses a challenging platform for this review, as section 3.5.3 will discuss.

3.5 Current Challenges of Utilizing Adjudication to Review for Fair Process in ADMs

The challenges around the process/substance blur are not the only ones when it comes to seeking a fair process through adjudication. I will explore three other limitations of adjudication: (1) the grey area around the issue of immigration and impact on the individual (in assessing the level of procedural fairness owed); (2) the overemphasis on written reasons more generally; and (3) the processes of FC judicial review.

3.5.1 Grey Area Around Immigration's Impact Context and the Additional Layer of ADMs

The context of impact of a decision on an individual immigration is already a complicated one, even without the contemplation of ADMs.

The SCC in *Vavilov,* applying the reasonableness framework, described the use of the singular form "individual" rather than plural, "individuals" looking at the persons impacted.

[393] See also Cobbe, *supra* note 90 at 653–654 where she discusses the rule against bias and how ADMs can encode bias because of issues in the training data and undiscovered model flaws. She also expresses interest in the active work of reducing bias in ML.

Citing *Baker,* the Court reiterates that an individual is entitled to greater procedural protection when there is the potential for significant impact or harm.[394] The Court holds that concerns about arbitrariness are more acute in cases where decisional consequences particularly severe and harsh.[395] The Court draws an immigration example again, this time about the potential hardship of deportation in the context of issuing a removal order.[396]

Similarly, the SCC in *Mason,* rendered after *Vavilov,* ties this to the impact on persons concerned to the life-changing consequences of the immigration process.[397] Justice Côté, dissenting on the selection of the standard of review, references that the "interpretation and enforcement of immigration law determines whether a non-citizen can work in Canada; can live together as a family with their spouse and children in this country; can remain in the community that has been their home since childhood; or can be deported to persecution or torture."[398] This draws parallels to the analysis of Justice L'Heureux-Dubé in *Baker* that was presented in the last chapter when speaking to the importance of the decision for a H&C applicant.[399] It also heightens the importance of setting clearer boundaries on how to adjudicate impact beyond a mere tie to temporary and permanent resident status.

In their recent intervention in *Pepa*[400]*,* the intervener Canadian Association of Refugee Lawyers highlighted, citing Justice Wagner's holding in *Wong*[401], that "[t]he severe and personal consequences and fundamental interests" impacted by removal.[402] The Canadian Association of Refugee Lawyers write, in their factum before the SCC:

> "People who are to be deported may experience any number of serious life-changing consequences. They may be forced to leave a country they have called home for decades. They may return to a country where they no longer have any personal connections, or even speak the language, if they emigrated as children. If they have family in Canada, they and their family members face dislocation or permanent separation."[403]

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[394] *Vavilov, supra* note 254 at para 133.
[395] *Ibid* at para 134.
[396] *Ibid.*
[397] *Mason v Canada (Citizenship and Immigration),* 2023 SCC 2 at paras 76, 81 [*Mason*].
[398] *Ibid* at paras 155–156 *per* Côté J. (dissenting opinion).
[399] *Baker, supra* note 253 at para 47.
[400] *Pepa v Canada (Citizenship and Immigration)* SCC File No. 40840 [*Pepa*].
[401] *R v Wong*, 2018 SCC 25 [*Wong*].
[402] CARL Intervener's Memorandum in *Pepa,* at para 20.
[403] *Wong, supra* note 402 at para 72.

Yet immigration is also founded on case law, pre-dating *Vavilov*, which assigns low procedural fairness rights to temporary residents, and even permanent residents, by presumption.[404] Courts have also rejected, for example, the arguments that study permit applicants are necessarily severely impacted or prejudiced by decisions and delays on their applications.[405] The FCA's holding in *Cha*[406] distinguishing between rights and privileges (seemingly in conflict with Dyzenhaus and Fox-Decent's finding that *Baker* removed the rights/privileges procedural fairness distinction[407]) still finds its way into many immigration decisions. Justice Décary writes, for the unanimous Court:

> General considerations on the object of the statute and the intention of the legislature
>
> [23] Immigration is a privilege, not a right. Non-citizens do not have an unqualified right to enter or remain in the country. Parliament has the right to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. As a result, the Act and the Regulations treat citizens differently than permanent residents, who in turn are treated differently than Convention refugees, who are in turn treated differently than other foreign nationals (*Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84, at paragraph 57; *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at pages 733 and 734; *Medovarski v. Canada (Minister of Citizenship and Immigration); Estaban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 (CanLII), [2005] 2 S.C.R. 539, at paragraph 46). It is fair to say that compared to other types of non-citizens, foreign nationals who are temporary residents receive little substantive and procedural protection throughout the Act.

Adding more complexity to the discussion is whether ADMs add further net-negative or net-positive impact. As Karen Yeung writes: "[t]he outputs produced by these socio-technical systems, particularly when deployed in 'rights-critical' contexts to determine how a person is

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[404] See Justice Brown in *Chaudhary v Canada (Citizenship and Immigration),* 2024 FC 102 at para 32 where he states that visa application not raising substantive right issues as foreign nationals having "no unqualified right to Canada", therefore the procedural fairness owed is low. He cites pre-*Vavilovian* decisions such as *Bautista v Canada (Citizenship and Immigration)*, 2018 FC 669 at para 17, *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 782 at para 9, and *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 10.
[405] See e.g. *Arodu v Canada (Citizenship and Immigration),* 2024 FC 1476 and *Chen v Canada (Citizenship and Immigration),* 2023 FC 885.
[406] *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126.
[407] Dyzenhaus & Fox-Decent, *supra* note 366 at 194.

treated by the state, can have significant and profound adverse impacts for their lives and those of their families."[408]

Justice Battista's 2024 decision in *Ali,* building off the FC's 2022 decision in *Barre*[409]*,* does serve a potential high watermark for drawing in procedural fairness and tying in the potential heightened impacts of an immigration decision on the individual seeking judicial review.

Similar to *Barre,* Ali involved an individual who had status as a protected person vacated on the basis that he had misrepresented his identity, including their citizenship.[410] The Refugee Protection Division ("RPD's") decision was based on comparing photographs, again about the perceived similarities between the applicant and a Kenyan student alleged to be the applicant.[411] During the vacation proceedings, the applicant made multiple efforts to seek disclosure of the techniques used to locate and compare photographs. The Minister's Counsel first denied that facial recognition software was used, stating it was done through a manual process. Later, an affidavit was filed from a CBSA investigator noting that a confidential manual investigative technique was used that "had taken photos from the GCMS, the London Regional Medical Office, and/or Primary Inspection Kiosks."[412] The overt emphasis by the Minister on the use of a manual process, rather than acknowledging or revealing any use of ADMs, is revealing here.

The RPD then denied requests from the applicant seeking further information about the methodology used to obtain and compare photographs.[413] It found it sufficient that the Minister had provided assurance that no facial recognition software was used. Justice Battista found, applying the *Baker* factors, that a high degree of procedural fairness was owed, particularly due to the impacts of revoking a protected person's status from those who had been previously found

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[408] Yeung, *supra* note 73 at 11–12.
[409] *Barre v Canada (Citizenship and Immigration)*, 2022 FC 1078 (CanLII), [2023] 1 FCR 275. I encourage readers to refer to Daly's discussion of *Barre* and why he also called this case a high watermark for the effectiveness of judicial review. Justice Go found that "the decision-maker had offered inadequate reasons for refusing to inquire into the Minister's alleged use of facial recognition software". See Daly, "Artificial Administration", *supra* note 34 at 23.
[410] *Ali, supra* note 356 at para 1.
[411] *Ibid* at para 9.
[412] *Ibid* at para 15.
[413] *Ibid* at para 16.

to be fearing persecution in their countries of origin.[414] Justice Battista writes, after applying the *Baker* test in full:

> [27] Overall, considering the contextual factors identified in Baker for determining the content of procedural fairness, I find that refugee vacation proceedings require a high level of procedural fairness. **This includes a full opportunity for refugees to challenge the evidence supporting the request to vacate status, which in turn entails the provision of information to refugees regarding the source and methodology used to obtain the evidence being used against them.**
>
> [28] Applying these procedural standards to the present case, I find that the RPD breached the Applicant's right to procedural fairness. **The RPD breached procedural fairness when it denied his request for further information about the source and methodology used by the Minister in obtaining and comparing the photographs, thereby blocking the Applicant's attempts to test the reliability of the evidence being used against him.** The RPD also breached procedural fairness by accepting without further examination statements by counsel for the Minister that no facial recognition technology was used and the photographs were discovered and compared manually.[415] [emphasis added].

Justice Battista aptly highlights the refugee/refoulement sensitive environment elevating the level of scrutiny/disclosure needed in response to the Minister's bare assertion of the systems being "manual." I will note here that this is an example of the Minister (IRCC) attempting to rely on a HITL as a blanket justification, a concern that I engaged earlier in this thesis. Justice Battista found that given the procedural fairness contexts of vacation proceedings, the applicant, Ali, was entitled to more than an assurance that FRT was not utilized and that there was a disclosure obligation on the Minister to provide meaningful disclosure, including information that is only to the advantage of the applicant.[416] Justice Battista also distinguished the case from another of the same name in *Ali*[417], where *only* an assurance was sought that FRT was not used, rather than a request for disclosure of source and methodology.[418]

Ali furthers *Barre's* findings with an explicit request for more procedural fairness. Still, I query the basis for the treatment differences between a visa applicant (who must somehow piece together their own affidavit to try and tell a narrative of what Canadian immigration authorities

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[414] *Ibid* at paras 21–24.
[415] *Ibid* at paras 27–28.
[416] *Ibid.*
[417] *Ali v Canada (Public Safety and Emergency Preparedness*, 2024 FC 466.
[418] *Ibid* at para 36.

are doing), with the case of a protected person who appears entitled to proactive disclosure, upon request. The in-reality line between refugee claimant or protected person, and a visitor (who may themselves, need a temporary resident visa to be an inland refugee claimant) is thin.

While not directly cited by Justice Battista, I see *Ali* furthering the *May,*[419] *Khela,*[420] and *Ewert*[421] pre-ADM "algorithm" set of cases, which is situated in the *habeus corpus/*prison context. These cases occur in what would be deemed a higher rights environment, outside of the context of judicial review, but most importantly, from my perspective, are based on statutory duties under the *Corrections and Conditional Release Act ("CCRA")*[422] building in disclosure and accuracy requirements. In the absence of statutory rights and with common-law somewhat eager to maintain the low procedural fairness owed label to immigrant applicants outside of the refoulement/refugee context, it will be worth tracing future decisions. In the next chapter's discussion of accountability, I return to this question in terms of the possible longer-term impacts generated by ADMs.

3.5.2 Limitations of the Current Reasons First Analysis of ADMs and a look at *Mehrara*

Administrative law has been the primary lens through which scholars have examined ADMs, focusing largely on the lens of judicial review. The review of decisions in administrative law involves courts examining the fairness of processes undertaken by the administrative tribunals (decision-makers), as well as the reasons provided, within a broader lens of whether those steps met the requisite standards of legality. As Daly sets out, paraphrasing the SCC's own finding in *Dunsmuir,* judicial review is how the courts control government, and ensure that administrative decision-makers stay within the boundaries of the law.[423] In the context of immigration, this involves filing applications to the FC, most often in the context of negative decisions or delayed decisions.[424] If a FC judge properly certifies a question of serious

[419] *May v Ferndale Institution,* 2005 SCC 82.
[420] *Mission Institution v Khela,* 2014 SCC 24 [*Khela*].
[421] *Ewert v Canada,* 2018 SCC 30 (CanLII), [2018] 2 SCR 165 [*Ewert*].
[422] *Corrections and Conditional Release Act,* SC 1992, c 20.
[423] As the SCC sets out in *Dunsmuir*, "[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority." See *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 28.
[424] See *IRPA, supra* note 7 at ss 72(1)–(2) for scope of judicial review under Canadian immigration legislation.

importance,[425] decisions can be reviewed by the FCA. Even rarer, if leave is granted, the SCC may choose to weigh in on an immigration case.[426]

The core exercise of administrative judicial review can be largely conceived as the examination of reasons. As the SCC in *Mason* highlighted:

> [59] When an administrative decision maker is required by the legislative scheme or the duty of procedural fairness to provide reasons for its decision, the reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable" (*Vavilov*, at para. 81). The purpose of reasons is to "demonstrate 'justification, transparency and intelligibility'" (para. 81). Reasons are "the means by which the decision maker communicates the rationale for its decision" (para. 84). This Court emphasized that "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (para. 86 (emphasis in original)).[427]

However, not all scholars believe that a focus on the reasons created by case law is the only lens through which to view Canadian administrative law, and some posit that it provides an incomplete perspective. For example, Raso writes that decisions provided by tribunals and Courts with reasons often represent a small portion of administrative decision-making and administrative law. She highlights the importance of internal directives, guidelines, and exercises of discretion as other sites of administrative law decision-making. Moreover, she also argues that a focus merely on written reasons and justifications may overlook other mechanisms that constrain a broad range of administrative actors.[428]

Specifically in the immigration space, published decisions of the FC represent only a small percentage of total immigration decisions made. Of the immigration decisions that are filed in FC, despite compromising 75% of the FC's inventory in 2024[429], only a small number are

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[425] These are "serious questions of general importance" certified pursuant to section 74(d) of the *IRPA* or section 22.2 of the *Citizenship Act,* RSC 1985, c C-29.
[426] For example, the SCC did not render a decision on an immigration case in 2024 but did hear the case of *Dorinela Pepa v Minister of Citizenship and Immigration*, 2024 CanLII 10157 (SCC) [*Pepa*] in late 2024. The decision has since been published, see *Pepa v Canada (Citizenship and Immigration),* 2025 SCC 21. Since *Vavilov* was released in December 2019, the SCC has only heard a handful of immigration cases: *Mason, supra* note 397; *Canadian Council for Refugees et al v Minister of Citizenship and Immigration et al,* 2021 CanLII 129759 (SCC).
[427] *Mason*, *supra* note 397 at para 59.
[428] Jennifer Raso, "Responsible AI: Binaries that Bind" (2024) 69:4 McGill LJ 1.
[429] Canada, Federal Court of Canada, *Statistics (December 31, 2024),* (accessed on 03 December 2025), online: *Federal Court of Canada* <fct-cf.ca/en/pages//about-the-court/reports-and-statistics/statistics-december-31-2024#cont>.

adjudicated to final decision. Most filed cases are denied leave (without reasons) or discontinued, due to consent of the parties or abandonment.[430] There are also cases, particularly in the immigration context, where a right to judicial review may not yet be available, such as where interim decisions are made prior to a final decision, for which there is no further appeal or relief.[431]

When it comes to applying the reasonableness framework itself, the analysis to-date has also not explored the fundamental question of how reasons come to be generated. Much of the academic literature in the realm of applying the reasonableness framework to ADMs has focused merely on the requirement for reasons giving.[432] Sossin writes that while all aspects of *Vavilov* come into play in AI-assisted administrative decision-making, the area likeliest to feel the impact will be a requirement for reasons.[433] Highlighting decisions where there are no reasons or reasons may be inadequate, Daly writes that automated decisions that are made by machines will struggle to provide individualized reasons, making them "vulnerable to high-intensity rationality review."[434] The earlier discussion of boilerplate essentially is a reflection of this problem. Daly writes that ML is unlikely to provide reasons which will withstand intensive judicial scrutiny, turning again to the need for downstream human involvement. He points out the difference between mass claims with standardized reasons versus areas where decision-makers cannot reach judgment without exercising discretion or judgment. However, in this context, Daly argues that a HITL may not be as effective because of the ex post facto rationalizations that they may provide.[435] Cobbe flags a similar concern that public bodies will try and retrospectively justify why ADMs cannot provide reasons or argue that the provision would be difficult or onerous.[436] Finally, the scholarship of Busuioc is helpful in tying how traditional expertise, whereby experts

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[430] See Canada, Immigration, Refugees and Citizenship Canada, Research and Data Branch, *DPU-24-1208 – RTS000000024502: CR-23-0814 - (OLD: CR-23-0386) - IRCC's Statistics on Judicial Reviewed Decisions of IRCC by Country of Citizenship (and other disaggregating factors if possible)* [unpublished, on file with author].
[431] This is often referred to as a the "prematurity principle", see *Rodas Tejedas v Canada (Public Safety and Emergency Preparedness),* 2025 FC 214 citing *Oberlander v Canada (Public Safety and Emergency Preparedness)*, at paras 22-27.
[432] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 200. Note that Raso, "AI and Administrative Law", *supra* note 57 at 9-10 ties this, as *Baker* also does, the procedural requirement that may attach to some form of written reasons, noting that the procedural requirement for reasons has substantive ends. She notes that "the right to reasons here might be an area for doctrinal evolution or statutory intervention."
[433] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 200.
[434] Daly, "Artificial Administration", *supra* note 34 at 10.
[435] Daly, "Artificial Administration", *supra* note 34 at 10–11.
[436] Cobbe, *supra* note 89 at 648.

would articulate and justify their reasons, may be altered by opaque, complex AI algorithms, that may entrench systemic bias and influence algorithm decisions and recommendations.[437] In essence, scholars examining reasonableness are all alluding to a more inextricable tie between process and reasons, one I demonstrated through the aforementioned boilerplate/bulk and logical fallacy examples.

To understand how courts have struggled with reviewing ADM decisions, and been demonstrably more risk averse with reviewing process, it may be useful to look at the FC's 2024 decision in *Mehrara*.

Mehrara, involved a case of an Iranian study permit applicant and her dependent child son. Justice Battista quite quickly found the decision to be unreasonable, both for failing to address the issue of family ties represented by the spouse's applicant in rendering an unreasonable assessment of the principal applicant's purpose of visit in light of the evidence she had provided about her previous self-employment.[438] Justice Battista did not engage much in the concerns about the potential boilerplate nature of Chinook decisions, although found the officer's refusal decision to be not responsive and silent to the facts submitted to the decision-maker.[439]

The core of the decision is focused on the procedural fairness claims made by Mehrara.[440] As the expert affiant in this case, my affidavit served as the core piece of evidence that the applicant attempted to rely on to demonstrate the decision was procedurally unfair.[441] There were concerns, something that will be highlighted again in my later discussion of the barriers posed by judicial review as a remedial mechanism in section 3.5.3, regarding the admissibility of my expert affidavit and the attempt to introduce new evidence.[442] While, Justice Battista did find some parts of the expert affidavit argumentative,[443] he did eventually accept the

[437] Busuioc, *supra* note 197 at 4.
[438] *Mehrara, supra* note 227 at paras 34–37.
[439] *Ibid* at para 38.
[440] *Ibid* at paras 2, 18.
[441] *Ibid* at paras 27–32.
[442] *Ibid* at para 28.
[443] *Ibid* at para 32.

expert affidavit as meeting the test set out in *Access Copyright,*[444] primarily in helping the Court understand the technology used by administrative decision-makers.[445]

In rejecting the procedural fairness arguments raised by Mehrara,[446] Justice Battista found, first, that there was no reason to displace the presumption that a decision maker had considered all evidence and reiterated the lack of a need to analyze each piece of evidence. While not citing the *Florea* presumption directly,[447] Justice Battista essentially reaffirmed that the presumption that an officer considered all materials must be the starting point for judicial review.[448] This decision, to be critical, did not engage further beyond reaffirming the importance of maintaining this presumption, even in the face of technology which, as Chapter 2 demonstrated, limits and reduces consideration of relevant inputs. To be fair to Justice Battista, the argument against the *Florea* presumption was also not a core of the counsel's argument on procedural fairness.

On the issue of an incomplete CTR that had been alleged by the applicant, Justice Battista found that there had not been a motion for production filed and that Chinook's role in the decision-making process was not relevant to the alleged errors.[449] In doing so, Justice Battista endorsed Justice Ahmed's finding in *Raja,*[450] that Chinook was not intended to process, assess evidence or make decisions on applications.[451] Finally, Justice Battista dismissed arguments regarding the deletion of working notes, concerns over the use of risk indicators, and concerns around the omitted nature of spreadsheets.[452] He found that the working notes were more akin to Post-It notes documenting the Officer's thought process, that the use of risk indicators did not arise in this present case, and that the spreadsheet information appeared to be consistent with what was in the GCMS notes.[453]

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[444] *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22.
[445] *Mehrara*, *supra* note 227 at para 29.
[446] I note also that Ziaie Moayyed, whose work I have cited earlier, was counsel for *Mehrara*.
[447] *Florea*, *supra* note 246 at para 1.
[448] *Ibid* at paras 46–47.
[449] *Mehrara, supra* note 227 at paras 48–50.
[450] *Raja v Canada (Citizenship and Immigration),* 2023 FC 719 at para 30.
[451] *Mehrara, supra* note 227 at paras 48–55.
[452] *Ibid* at paras 65–66.
[453] *Ibid* at paras 56–59.

Justice Battista concluded that there had been no fettering of discretion, the CTR record was not incomplete, and that there was a lack of connection between the involvement of Chinook at the errors made by the Officer.[454]

However, Justice Battista did end his decision with language, which coupled with earlier concerns about an incomplete CTR, that gives a sense of an opening door to the future of challenging and litigating the use of technology by the Federal Government. He writes:

> [69] However, while I have found the record to be complete for the purposes of reviewing this decision based on the nature of the error, the reasons of the Officer, and the current evidence regarding the function of Chinook, this may not be the case in other judicial reviews of applications processed using processing technology, particularly in applications where risk indicators are present. For this reason, the Respondent's systematic daily deletion of all material generated by processing technology may not reflect best practice. **The growing recognition that the exercise of public power must be justified, as articulated in *Vavilov* and affirmed in *Mason*, would be hollow without a basic understanding of how the exercise of that power occurs.**[455] [emphasis added]

The justification of exercises of public power, along with comments on IRCC's practice of deleting materials generated by technology, brings to heart the core rule of law concern around judicial review being a restraint on the exercise of public power.[456] The Majority in *Vavilov* highlighted this tension, writing at paragraph 14:

> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

For the purposes of the core argument, the *Mehrara* decision raises questions around process transparency, asking how one can even challenge a decision without a record reflecting how the decision was actually made, an issue Chapter 4 will examine more closely.

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[454] *Ibid* at paras 67–68.
[455] *Ibid* at para 69.
[456] See also Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Lorne Sossin & Colleen Flood eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2013) 39.

3.5.3 Limitations in Judicial Review Itself to Uncovering Process Concerns

In the *Mehrara* decision, as discussed above, Justice Battista appears sympathetic to the difficulties that may be implicit in the applicant challenging the tribunal's non-disclosure of records by way of a motion.[457] This issue of non-disclosure of the CTR was also experienced by applicants in *Li* and *Kiss,*[458] two cases situated in the securing screening context. In both cases, there were redactions to the CTR placed in front of the FC. In *Li,* Chief Justice Crampton *unilaterally* held that the non-disclosed materials irrelevant.[459] This was done without challenge by the applicant. In *Kiss,* the accidentally disclosed materials in the record were later sealed by a DOJ motion.[460]

Daly has identified three limitations of judicial review in automated administrative decision-making.[461] First, he highlights that the scope of judicial review is limited. Where technology is only providing positive decisions (like in Canadian immigration) there will be nothing to judicially review. Furthermore, the use of technology to direct scarce enforcement resources would largely be unreviewable, given no concrete steps to sanction are taken. Only where a particular group is being targeted, proof of which is difficult to procure, will cases possibly attract judicial intervention.[462]

Second, judicial review is only based on the record. Daly foresees that a great deal of relevant information regarding technology will not be before the decision-maker and therefore the court. Daly highlights Canadian immigration's use of technology to low-complexity temporary resident visas and sponsorship applications but maintains that it is difficult to know how humans downstream are influenced, for example by confirmation or automation bias (concepts I have explored earlier). Daly cites to situations where officers may only be assigned high-complexity cases that they may scrutinize or reject.[463] Raso also notes the barriers to

[457] *Mehrara, supra* note 227 at para 21–24.
[458] *Kiss v Canada (Citizenship and Immigration),* 2023 FC 1147.
[459] *Li, supra* note 2 at paras 9–11.
[460] *Kiss, supra* note 458 at para 29.
[461] Daly, "Artificial Administration", *supra* note 34 at 24–25.
[462] *Ibid* at 24.
[463] *Ibid* at 24.

contesting the front-line decisions (the most common site of algorithmic innovation) through judicial review yet points out that administrative law doctrine is an important "vantage point."[464]

Still, as Scassa notes, judicial review of administrative law decision-making will not be eliminated by the DADM and the AIA. Rather, Courts will need to adapt their approach to the changing circumstances that ADM situations provide, including tackling the complex problems of reasonableness and fairness that earlier sections have documented.[465] She concludes, that the "[e]xclusive reliance on judicial review places an undue burden on individuals to identify and successfully challenge decisions whose flaws may lie in the design and implementation of complex systems rather than the problematic choices of human decision makers in specific cases"[466]

Another challenge in investigating process are the timelines involved in judicial review. In the context of the UK's judicial review process, Cobbe discusses how a three-month time limit is problematic, given the complexity of ML systems, quantities of data, and time needed to assess a decision.[467] This judicial review process is even shorter in Canada. Section 72(2)(b) of *IRPA* sets out that an Application for Judicial Review must be made within 15 days for decisions arising from inside Canada and 60 days for decisions arising outside Canada.

Rule 9 Reasons[468] often merely contain only the officer's final decision, which for many temporary decisions contains very little on top of the boilerplate reasons that were provided for refusal. Occasionally, there will be entries provided for in the GCMS documenting previous individuals and assessments, but any role of ADMs or of the results of triaging are normally not contained in the initial Rule 9 Reasons for which leave decisions are based on. The onus then shifts to the applicants to perfect the Applicant's Record within 30 days.[469] Any efforts to introduce any information about ADMs by the applicant must be done via affidavit, which is subject to the strict limitations set out by the FCA in *Access Copyright*.[470] Just as in *Mehrara,* the

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[464] Raso, "AI and Administrative Law", *supra* note 57 at 14.
[465] Scassa, *supra* note 65 at 297.
[466] *Ibid* at 296.
[467] Cobbe, *supra* note 89 at 641.
[468] This is more technically known as Rule 9 of the *Federal Courts Citizenship Immigration and Refugee Protection Rules* SOR/93-22 [*FCCIRPR*].
[469] *Ibid* at Rule 10(1)(b).
[470] *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22 at para 20.

affiant's expertise (if it is an expert affidavit), impartiality, or attempts to introduce new evidence is often contested.[471]

Section 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*[472] sets out the rules requiring disclosure for a certified tribunal record ("CTR").[473] While this CTR is supposed to contain a copy of all relevant documents that are in the possession or control in the tribunal, the question of whether the model's rules or audit trail (to provide just two examples) would fall under this requirement is subject to interpretation.

Applicants will be required to pursue these requests through motions for production of evidence,[474] often blindly or with limited evidence as to what might have been redacted – even if such searches might not be fruitful or subject to cost orders if unsuccessful. As Daly has written, there is also no "duty of candour" in the Canadian judicial review process as to disclosure of these records.[475] ATIP requests may be helpful to include in affidavits in support of these motions, but with delays (leaving them often outdated) and heavy redaction, they are of limited effectiveness, as the *Mehrara* case demonstrated.

Section 87 of the *IRPA,* meanwhile, provides for non-disclosure applications to be made by the DOJ.[476] These are becoming increasingly common in security-related cases and occurred

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[471] *Mehrara*, *supra* note 227 at para 13.
[472] *FCCIRPR*, *supra* note 468.
[473] *FCCIRPR* at Rule 17 specifically states:

> Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:
> **(a)** the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,
> **(b)** all relevant documents that are in the possession or control of the tribunal,
> **(c)** any affidavits, or other documents filed during any such hearing, and
> **(d)** a transcript, if any, of any oral testimony given during the hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review,
> and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.

[474] *Mehrara, supra* note 227 at paras 21-23
[475] See Paul Daly's three-part blog series on the duty of candour, especially Paul Daly, "The Prospects for Candour in Canada: Why a Limited Record is Problematic" (23 March 2025), online (blog): <administrativelawmatters.com/blog/2023/03/23/the-prospects-for-candour-in-canada-why-a-limited-record-is-problematic/>. It is possible that Court processes like the Duty of Candour in the UK, contributed to the Home Office's efforts to settle the Foxglove challenge to the discriminatory visa algorithms, knowing the potential risk of disclosure through litigation. See also Molnar, *supra* note 12 at 212; Katie Schwarzmann, *supra* note 177 at 11, 17. See also: Foxglove, "Home Office Says It Will Abandon Its Racist Visa Algorithm After We Sued Them" (4 August 2020), online: <foxglove.org.uk/2020/08/04/home-office-says-it-will-abandon-its-racist-visa-algorithm-after-we-sued-them>.
[476] *IRPA*, *supra* note 7 at s 87.

specifically in the *Kiss* and the application of Project Quantum. In cases such as these, judges may be reticent to engage the security certificate process and the appointment of special advocates.[477] Meanwhile in *Li,* similar to the fictional case study of Wang and Xi, it is unclear what exact technology tool (if any) contributed to the flagging of Chinese nationals for security concerns. This may lead to courts like the FC accepting, with limited scrutiny, that certain redacted information might not have been "not relied upon" in making the final decision.[478] Yet this ignores the possibility of selective adherence. How the Court views AI – as merely one of many human and non-human aids, or as a decision-maker – itself may shape the level of scrutiny and complication it is willing to engage into peer behind the process.

Finally, the DOJ holds the lever which allows them to unilaterally direct when litigation ends, including pursuing motions for directed judgment. By offering settlement, applicants obtain the re-opening of their file (often with an opportunity to supplement new evidence) but are denied their day in court. However, given the long delays, excessive costs, and uncertainty as to what a judge might decide, most applicants will choose to accept a settlement. There are some exceptions, such as unique situations where applicants may have been through repeated litigation, have a major legal matter or a constitutional challenge that they wish to resolve. Increasingly, decisions are also being refused again. This is either done with better reasons (often through eventual human intervention) or increasingly with the same technology-derived boilerplate/summaries that led to the refusal in the first instance. This has led to the endless merry-go-rounds that *Vavilov* was concerned about ending.[479]

Overall, from an administrative justice perspective, judicial review as an *external* mechanism to hold front-line decision-makers to account has not had a "radiating" effect.[480] But process issues with ADMs are having a direct impact on the FC's immigration caseload, with the 75% of caseload figure discussed earlier. Year on year, the FC is being forced to render more decisions, particularly on non-refugee immigration matters, which is suspected to the direct result of the increasing use of ADM. As a result, new guidelines have had to be introduced in

[477] *Kiss, supra* note 458.
[478] *Li, supra* note 2 at para 11.
[479] *Vavilov, supra* note 254 at para 142; See also commentary of Justice Sadrehashemi in paras 38–42 in *Mundangepfupfu v Canada (Citizenship and Immigration),* 2022 FC 1220.
[480] Adler, "The Future of Administrative Justice", *supra* note 42 at 633.

2025, threatening costs against repeat mandamus claimant, as well as shortening hearings and limiting submission length for applicants in temporary resident judicial reviews.[481]

The impact, from an administrative justice perspective, has been a further move towards bureaucratic rationality and managerialism from both IRCC and the courts administrative functions, with applicants seeking processes and remedies more reliant on the legal and consumer models.

3.6 Legality as the Bridge Between Process and Fairness, Administrative Law and Administrative Justice

The principle of legality states that "administrative decision-makers must act on the basis of statutory authority and remain within the limits of that authority."[482] Daly examines the principle of legality through the decision of *Ewert,* explored in the last chapter, with respect to statutory language around the need for information used to be as accurate, up-to-date, and complete as possible.[483] As discussed earlier, IRCC views legality as one of the three major legal administrative law issues that impact ADMs (alongside reasonableness, and fairness).[484] Dyzenhaus and Fox-Decent write that "a principle of legality constrains all acts of public power in a society governed by the rule of law is independent of any claim that judges must be able to enforce that principle against a government determined to escape it."[485]

An oversimplified way to think about legality, reflective of the Canadian government's current stance, is that broad legislation sets no limits. This perspective is challenged by several scholars. Cobbe's expanded definition of ADM's lawfulness requires examining factors such as meaningful human oversight, competence, and access to data.[486] Raso argues that the rule against delegation, even where the statute is silent, may apply where the decision-maker choses to

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[481] Canada, Federal Court of Canada, *Amended Consolidated Practice Guidelines for Citizenship, Immigration and Refugee protection hearings* (20 June 2025), online: <fct-cf.ca/Content/assets/pdf/base/2025-06-20_Consolidated-Immigration-Practice-Guidelines.pdf>.
[482] Daly, "Artificial Administration", *supra* note 34 at 4.
[483] *Ibid* at 4–5.
[484] McEvenue and Mann, *supra* note 105 at 6.
[485] Dyzenhaus & Fox-Decent, *supra* note 366 at 240.
[486] Scassa*, supra* note 65 at 287 citing Jennifer Cobbe writes:

> "the use of ADM would be lawful where a nominated decision-maker can show that they have exercise meaningful oversight of the decision, rather than just a token gesture; that they the authority and competence to change the decision/ and that they have considered all of the relevant data."

delegate the decision to an algorithmically-generated tool to generate rather than inform decisions.[487] It is worth noting here, again, that the legislation permits ADM, but was silent (and remains silent) as to the use of ML and black-box systems. To this end McCann submits that there is an assumption of expertise behind the legislature's delegation to decision-makers, and as such, administrative officers "must not let themselves be displaced from their central position."[488] It is unclear if this presumption of expertise can be carried to legislation that never contemplated ADMs expanded scope.

Legality constrains both process and substance yet has largely been overlooked and indeed – from an administrative justice perspective – traded-off for the bureaucratic and managerial modes of decision-making that IRCC is hyper-focused on. While, like Adler, I do not believe fairness is inherent only in one stand-alone model,[489] it is difficult to see fairness, particularly through the lens of legality, when reviewing the governance regime that was presented in Chapter 2. In Chapter 5, I begin to make recommendations to help move the needle forward on fairness through legality.

[487] Raso, "AI and Administrative Law," *supra* note 57 at 12.
[488] McCann, *supra* note 85 at 192–193.
[489] Adler, "Fairness in Context", *supra* note 32 at 630.

Chapter 4: What Fair ADM Process Requires: the Underexplored Context/Concepts of Transparency, Accountability, and Ex Ante Rulemaking

"The pressing problems of administrative of law are going to be problems with the reach of public power. They will be problems to do with whether public legally enforceable standards of accountability apply to the bewildering range of quasi-public and allegedly private institutions and bodies which are competing to take over the tasks of the administrative state."

David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy"[490]

"As courts begin to address procedural fairness in ADM, they will need to think critically not just about how such principles should be adapted to the particular context before them, but also about how code, procurement and practice have already shaped and influenced these principles"

Tessa Scassa, "Governance of ADM"[491]

"[I]f accountability requires seeing a system well enough to understand it…. Using transparency for accountability begs the question of what, exactly, is being held to account."

Mike Ananny and Kate Crawford: "Seeing Without Knowing: Limitations of the Transparency Ideal and its Application to Algorithmic Accountability"[492]

"Understanding AI systems and ultimately holding them accountable requires understanding the relationships which underpin these systems and where the different components of these systems (algorithms, code, platforms, people, etc.) intersect."

Woodrow Hartzog et al., "Against AI Half Measures" (2025) [unpublished draft], WeRobot Conference Paper 2025 [493]

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[490] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (1997) 279 at 283 [Dyzenhaus, "The Politics of Deference"].
[491] Scassa, *supra* note 65 at 298.
[492] Hartzog et al, *supra* note 300, n 43 at 10 citing Mike Ananny & Kate Crawford, "Seeing Without Knowing: Limitations of the Transparency Ideal and Its Application to Algorithmic Accountability," (2016) 20:3 New Media and Society 973 at 982, online: <doi.org/10.1177/1461444816676645>.
[493] Hartzog et al, *supra* note 300 at 22.

In this chapter, I identify and explore three additional administrative law concepts that have not been adequately discussed and represent a gap in both current Canadian case law and scholarship. The ongoing failure to address these concepts may serve as a barrier to the development of Canadian administrative law's capacity to address ADMs, namely its procedural fairness.

The first two areas, transparency and accountability, are considered "core principles of administrative law" by the *DADM* itself.[494] Scassa labels the terms "transparent" and "accountable" as aspirational values.[495] Ex ante rulemaking, a third consideration I bring to the table, captures a shift from adjudication and reflects the changing nature of technology to front-end guardrails, rules, and policies being pursue by applicants, governments, and even courts.

These three concepts – transparency, accountability, and ex ante rulemaking have a direct impact on the decision-making and review process. I label them "pre-requisites" to fair process. To visualize this, consider the analogy of administrative law decision-making process itself, as a governance regime around the legality and legitimacy of driving down a given road.

Without having access to decision-making's key signs and lanes, without understanding the roles, responsibilities, and liability arising from decisions made on the road, and without recorded and accessible documentation of the general rules that govern the road – the review of any incident or accident would be hardly feasible.

Similarly, I argue that without sifting through the divergent definitions and requisite level of transparency required of ADM decisions and from ADM decision-makers, conversations around its justification, intelligibility, and its overall fairness are necessarily hampered. "Justice must be done, but must also be seen to be done," as Lord Hewart, then Lord Chief Justice of England in the case of *Rex v. Sussex Justices,*[496] put it, in a quote the SCC has adopted in numerous Canadian decisions.[497]

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[494] See header to *DADM, supra* note 66.
[495] Scassa, *supra* note 65 at 269.
[496] *Rex v Sussex Justices,* [1924] 1 KB 25.
[497] *Wewaykum Indian Band v Canada* 2003 SCC 45 at para 66; *R v S (RD), supra* note 335 at para 110.

It is acknowledged that it is an ongoing source of contestation whether an ADM is more or less difficult to scrutinize than a non-transparent human one.[498] On one hand, ADM can generate or operate on logically flawed premises that may not be readily apparent to those engaged in decision-making or review, but from another perspective may leave a possible audit/decision-making trail that a human decision-maker may not be able (or willing) to generate. As this chapter explores, the concept of transparency runs up against concerns about its desirability, particularly from the Federal Government's perspective.

Finally, without defining accountability, nor understanding how ADMs may disperse accountability between new actors or through new technical definitions,[499] the question of whether these tools can be accountable is left unanswered. Is accountability a realistic participant in a new Canadian administrative law framework? What are the mechanisms needed to address accountability in the specific context of ADMs? How might accountability be operationalized in the immigration context?

With ex ante rulemaking, Canadian immigration's focus on soft law mechanisms, such as ministerial instructions and the ADM's focus on risk prevention and prediction, manifest in ways that may transform and limit access to adjudication.

I will examine each of these three concepts in greater detail below, introducing first how they implicate the decision-making process, before exploring a subset of issues that make exploration of these concepts challenging.

In making a case for these three areas of further interrogation, this chapter will also attempt to bring together the *internal* and *external* dimensions of administrative justice, highlighting definitional and process issues that may need to be addressed through enhanced procedural design – which I begin to do in Chapter 5.[500]

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[498] Huq, *supra* note 81 at 636, 640.
[499] Raso writes that it is important to trace how the algorithmic tools function together with officials, agencies and others to disperse authority. Jennifer Raso, "Digital Border Infrastructure and the Search for Agencies of the State" in Fleur Johns et al, eds, *Global Governance by Data: Infrastructure of Algorithmic Rule* (Cambridge University Press, 2024) at 3 [Raso, "Digital Border Infrastructure"].
[500] Glover Berger, *supra* note 54 at 178.

4.1 Transparency

4.1.1 Transparency, Fair Process, and Definitional Challenges

As explored earlier in this paper, transparency is a core *Vavilovian* reasonableness concept, alongside the related concepts of intelligibility and justification.[501] It was also referenced as a core principle alongside fairness and in discussion of the usefulness of reasons by the SCC in *Baker*.[502] In *Baker,* the Court held that two procedural fairness principles, the individual entitlement to fair procedures and open decision-making, are examples of transparent practices in an administrative context.[503] It was the SCC in *Dunsmuir* that first set out that "reasonableness is concerned mostly with the existence of justification, *transparency* and intelligibility within the decision-making process."[504] From a practical perspective, the requirements of notice and a right to a hearing are difficult for ADMs to envision without, at minimum, disclosure of what tools have been used in the decision-making process.

Pertaining to Canadian law, the concept or definition of transparency has yet to be adequately addressed. The Merriam-Webster dictionary defines transparency as:

> "**a:** free from pretense or deceit **:** frank
> **b**: easily detected or seen through **:** obvious
> **c:** readily understood
> **d:** characterized by visibility or accessibility of information especially concerning business practices[505]" (emphasis in original)

As touched on earlier, the *DADM* requires minimum transparency in providing notice before rendering decisions. This is done through public information regarding the use of ADMs, as well as by providing a meaningful explanation after the decision is made. Engaging Sossin's concerns of proprietary information, the *DADM* provides for both safeguards to transparency in the protection of core components and safeguards for the release of source codes.[506] However, in neither *Vavilov* nor the *DADM* is transparency (or the level of required transparency) defined. A

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[501] *Vavilov, supra* note 254 at paras 81, 86, 94, 98–99, and 127.
[502] *Baker, supra* note 253 at paras 38, 44.
[503] *Ibid* at para 44.
[504] *Dunsmuir, supra* note 423 at para 47.
[505] Merriam-Webster, *Merriam-Webster Dictionary*, (last visited 3 June 2025) sub verbo "transparent", online: <merriam-webster.com/dictionary/transparent>.
[506] *DADM, supra* note 66 at ss 6.2.4–6.2.7

parallel definition provided by the TBS may provide some insight. They write, as part of the Government of Canada's *Trust and Transparency Strategy*:

> **Transparency:** The government makes available relevant information on policies, programs, services and decisions in a complete, accurate and timely manner – while protecting privacy, security and confidentiality – so the public can access, understand and monitor the activities and decisions of government. In short, the public has ready access to information they want and need.[507]

Pierre Bernier, in the "Encyclopedic Definition of Public Administration,"[508] discusses several roots and origins of transparency. Calling it a relationship value that applies to all spheres of human activity, Bernier cites the OECD definition of transparency as "an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale, data and information related to monetary and financial policies, and the terms of agencies' accountability, are provided to the public in a comprehensible, accessible, and timely manner."[509] Transparency, which *Dunsmuir* traces in terms of access to reasons for actions and their purposes, is also about the communications which underlie them. Bernier writes that transparency is linked to concepts of integrity and accountability, and another *Dunsmuir/Vavilovian* concept of intelligibility, providing additional documentation referring to "the voluntary disclosure of information that shapes, structures or contributes to attitudes, behaviours, actions or discourse, for the purpose of ensuring that they are totally intelligible."[510] Bernier highlights that transparency itself has evolved alongside societal demands and the role of technology.[511]

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[507] Canada, Treasury Board Secretariat, *Government of Canada Trust and Transparency Strategy* (last modified 27 February 2024), online: <canada.ca/en/government/system/government-wide-reporting-spending-operations/trust-transparency/government-canada-trust-and-transparency-strategy.html>.
[508] Pierre Bernier, "Transparency" in L Côté and J-F Savard, eds, *Encyclopedic Dictionary of Public Administration* (2012) sub verbo "transparency", online: <dictionnaire.enap.ca>.
[509] *Ibid* at n 1 citing from OECD, *Algorithm*, OECD Glossary of Statistical Terms (2005), online: <stats.oecd.org/glossary/detail.asp?ID=4474>.
[510] Bernier, *supra* note 508 at 1.
[511] Bernier cites the evolution of transparency measures, beginning from the *first generation's* 'standards and rules' to the *second generation's* 'targeted transparency 'focusing on the production, communication and dissemination of impact, to the *third generation*'s 'Transparency 2.0,' based on the role of technology in facilitating transmission of information and interaction. Bernier's discussion allows for examining transparency as a constantly evolving principle, that much like regulation, will need to evolve alongside technical change. See Bernier, *supra* note 510 at 6–7.

Alexander Buhmann and Christian Fieseler cautions that ADMs may not be routinely and easily accessed for public scrutiny, due to proprietary, technical and procedural factors.[512] They distinguish between *prospective transparency* (the "how"), which informs users about the data processing, working of systems up front, and how an AI system reaches a decision in general with the *retrospective transparency* question (the "why"), which refers to post hoc explanations and rationale.[513] Buhmann and Fieseler emphasize that the "why" explanations are most helpful to end-users, to provide information about why a particular course was taken, and that the "how" questions are more helpful to AI system developers.[514] However, from my perspective the "how" questions around trust, reliability, and robustness are becoming of increasing interest to a public barred in their efforts to litigate around the "why."[515]

Returning to the definitional point, it is important to consider that the technological aspects and understandings of transparency are becoming increasingly relevant as the conversation shifts to ADMs and how it may impact the ability to understand and interrogate process. For example from a technologist perspective, Kroll writes that transparency is often framed as a burden placed on system creators and controllers.[516] Concerns over transparency have led to developments such as design transparency in the technological realm, which has been defined by Kroll as making system source documents and code available, or through abstracted disclosures such as impact assessments.[517] It is worth noting, given the conscious choice to arrange the examination of this chapter into transparency and accountability as two separate concepts within administrative law, that other scholars have separated the concept of AI transparency into the constituent parts of explainability/interpretability, governance, and accountability.[518]

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[512] Alexander Buhmann & Christian Fieseler, "Towards a deliberative framework for responsible innovation in artificial intelligence" (2021) 64 Tech in Society 1 at 2.
[513] *Ibid* at 3.
[514] *Ibid.*
[515] See discussion of the challenges of judicially reviewing automated decisions in Paul Daly, "Artificial Administration", *supra* note 34 at 23–26.
[516] Joshua A Kroll, "Outlining Traceability: A Principle for Operationalizing Accountability in Computing Systems" (Paper delivered at the FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency, 2021) Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency 758 at 3 [Kroll, "Outlining Traceability"].
[517] *Ibid* at 4.
[518] George Lawton, "AI Transparency: What Is IT and Why Do We Need It?" (10 September 2024), online: <techtarget.com/searchcio/tip/AI-transparency-What-is-it-and-why-do-we-need-it>; Hannah Wren, "What is AI transparency? A comprehensive guide" (18 January 2024), online (blog): <zendesk.com/blog/ai-transparency/>.

4.1.2 Is Full ADM Transparency Even Desirable?

One of the first concerns is asking the question of whether transparency itself can be achieved in ADM. Can ADM systems be transparent? Is transparency indeed desirable?

i. Arguments for ADM Transparency Being Desirable

Several scholars discuss the potential benefits of the transparency ideal. For instance, Scassa argues that transparency is itself an aspect of the rule of law. Citing Zalnieute et al., she further writes that "transparency requires publicity about the operation of the state and that individuals can access legal rules and administrative decisions."[519] Moreover, Oswald discusses the benefits of transparency in informing debate and making automated tools more understandable to community, agency, and front-line workers.[520]

Other scholars see ADMs themselves playing a role in promoting administrative law transparency. Engstrom and Ho suggest that the issues of transparency and reason-giving may have a role in new algorithmic governance. They argue that ADMs can "provide a richer and yet unexplored set of frames for assessing and resolving accountability dilemmas."[521] As an example, they suggest "prospective benchmarking,"[522] a process to compare outcomes between AI-assisted and human (status quo decisions) in a forward-looking, transparent, and accountable manner.[523]

For Buhmann and Fieseler, the challenge is in achieving transparency (or as they call it AI opacity) through stakeholder engagement.[524] They argue for stakeholder participation by developing an interested critical audience, developing strategies around multi-stakeholder engagement, and developing procedural norms for public communication to enable "collective truth tracking."[525] Overall, Buhmann and Fieseler suggest that greater transparency will lead to

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[519] Scassa, *supra* note 65 at 288.
[520] Marion Oswald, "Algorithm-assisted decision-making in the public sector: framing the issues using administrative law rules governing discretionary power" (2017) 375:2128 Phil Trans R Soc 1 at 4.
[521] Engstrom & Ho, *supra* note 62 at 827.
[522] Engstrom & Ho set out that the core idea of "prospective benchmarking" is that "when agencies adopt an AI decision making tool, they should subject it to *benchmarking* relative to a random hold-out set of cases that undergo conventional human review." *Ibid* at 849.
[523] *Ibid* at 849–853.
[524] Buhmann & Fieseler, *supra* note 512 at 3.
[525] *Ibid.*

greater accountability and a more deliberative approach, all while acknowledging the accessibility challenges of information exchange.[526]

Sossin also sees potential benefits in ADMs helping to automatically redact and protect sensitive personal information that is not relevant to administrative decision-making. He further notes the role of ADMs in potentially resolving the trade-off between privacy and transparency that individuals are concerned about. [527]

ii. Arguments for ADM Transparency Being Undesirable and Unachievable

Other scholars have been markedly more critical about the possibility of transparency being both a desirable and achievable ideal. Cobbe writes that transparency in practice may be difficult to obtain as deep learning models can be difficult to explain, due to issues surrounding algorithmic opacity. She writes that algorithmic systems may stay opaque for three reasons (or "types"), including where there is intentional opacity (the non-release of a system's decision-making process for proprietary reasons), where there is illiterate opacity (where a system's decision-making can only be understood by technical experts), and intrinsic opacity (where humans cannot comprehend a system's decision-making process – such as where there are black-box systems).[528] Szilagyi, citing James Grimmelmann, adds that software systems can frequently regulate "without any meaningful transparency into their operative processes", to the point where even experts may be unaware.[529] This concern around the inability of even experts to understand systems, let alone laypersons, is a common concern – one that should extend to the adjudicative context of lawyers and the courts.

Sossin argues that the excessive focus on transparency is based on the disclosure of source code, arguing instead, citing Robert H. Sloan and Richard Wartner, that what is needed is something closer to *consumer transparency*, the readily ascertained costs and benefits of

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[526] *Ibid* at 3–4. In their four communicative principles for responsible AI, Buhmann and Fieseler recommend that to achieve algorithmic accountability and a deliberative process, there needs to be open forums that are equally accessible and facilitative argument, that those who participate need to have as much as information as possible about the issues at stake, that all arguments must be included (multivocality), and that the concerns and suggestions put forth are accurately taken into account.

[527] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 206.

[528] Cobbe writes that "significant further research is required to determine whether and how best to legally mandate ADM transparency in some form, as well as to develop tools for exercising meaningful review." See Cobbe, *supra* note 89 at 638–639.

[529] Szilagyi, *supra* note 25 at 88 citing James Grimmelmann, "Regulation by Software" (2005) 114 Yale LJ 1719 at 1723.

participating in the system.[530] This determination, in turn, requires that users genuinely understand the process and the basis for decision-making.[531] Sossin notes that the degree of transparency will necessarily be circumscribed, particularly where proprietary concerns are present.[532] Daly adds that "[c]ommon law courts have tended to respect considerations of commercial secrecy when weighing up disclosure obligations."[533]

I am less confident that a consumer transparency lens can be imported into the relationship between the State and the immigrant applicant, within the asymmetrical relationship between the State and immigration applicant that this paper has presented. The cost and benefit analysis associated with a *market* model approach to decision-making, lies solely with the government in their decision whether to employ certain ADM systems, but to the applicant it represents a necessary cost, with the deferred benefit of hoping to secure immigration status with the assistance of technological processing. There is also the inherent cost associated with having to rebuild processes or correct errors.

The search for costs and benefits itself is a barrier for individuals subject to ADM systems. Hartzog et al., citing Kate Crawford and Mike Ananny, discusses the potential of transparency to burden individuals by forcing them to "seek out information about a system, to interpret that information, and determine its significance."[534] This is reflective of the experience of clients, navigating the many technological portals required to submit applications, obtain immigration documents, and check the status of ongoing applications. Consumer transparency is also based on a false presumption of accessibility to information to make an informed decision in an easily comparable way and have real alternatives, which do not exist in the Canadian immigration context where applicants are told which portal they must submit applications through.[535]

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[530] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 197.
[531] *Ibid.*
[532] *Ibid* at 201.
[533] Daly, "Artificial Administration", *supra* note 34 at 9.
[534] Hartzog et al, *supra* note 300 at 9.
[535] *Ibid* at 9. See especially the list of Kate Crawford and Mike Ananny's ten limitations of the transparency ideal as summarized by Hartzog et al. See *ibid* at 9–10.

IRCC has streamlined nearly all its applications online (including for refugees and caregivers), with only temporary resident permit applications and limited exceptions for disability for paper-based applications.

From a technical perspective, Kroll has argued that transparency on its own is neither necessary nor sufficient because the decision-making process as a whole must be sound. He recommends focusing instead on fostering answerability and accountability for agents who create and control ADM systems when designing governance mechanisms for these systems.[536] In response to those who argue that source code should be revealed as part of transparency efforts, Kroll argues that ML is "ill-suited to source code analysis because it involves situations where the decisional rule itself emerges automatically from the specific data under analysis, sometimes in ways that no human can explain."[537] Kroll contends that full transparency will not be possible in many of the cases humans care about, due to the need for opaqueness or where disclosure of data may be undesirable or even legally barred. He provides examples such as tax returns and secondary screening at airports, where system opacity may be required to prevent tax cheats and terrorists from gaming the system.[538] Kroll et al. further argue that the disclosure of rules themselves does not clarify which rules were used nor address the incorporation of sensitive private information.[539] Relevant to our review, Kroll et al. discuss how disclosed rules would lead to inundated requests from those seeking to audit to know how the rules were applied in their individual cases,[540] particularly given the role and value of randomness.[541]

From an immigration policy perspective, IRCC itself holds concerns about gaming the system if too much information is shared about the operation of systems.[542] Indeed, Lucia Nalbandian discusses the difficulty of having participants even willing to meet her to interview about the AA-TRV model, with over 89% of those she approached declining to participate, with 33% declining for fear of sharing confidential information.[543] This thesis earlier explored how part of IRCC's solution for this issue was to ensure front-line officers do not have access to the rules by which the ADM works. This is in sharp contrast to McEvenue and McMann's

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[536] Joshua A Kroll, "Accountability in Computer Systems" in Markus Dubber et al., eds., *The Oxford Handbook of Ethics of AI* (New York: Oxford University Press, 2020), ch 9 at 193–194.
[537] Kroll et al, "Accountable Algorithms", *supra* note 23 at 638.
[538] *Ibid* at 639; Scassa discusses the perspective of Michael Karlin (a senior bureaucrat who helped develop the *DADM* framework) who noted the conflict between increased transparency allowing for individuals to challenge Government decision-making, but releasing too much information about systems, opening the potential to fraud against the Government. See Scassa, *supra* note 65 at 289-290
[539] Kroll et al, "Accountable Algorithms", *supra* note 23 at 639.
[540] *Ibid*
[541] *Ibid* at 641. See also Hartzog et al, *supra* note 300 at 9 citing Ananny & Crawford, *supra* note 492 at 980.
[542] *Policy Playbook*, *supra* note 12 at 75, 90.
[543] Nalbandian, "Increasing the accountability of ADMs", *supra* note 209 at 2.

suggestion that a clear, transparent explanation should be provided to decision-makers about "how the AI solution works, what it reviews, and why it is flagging certain aspects of the file to the decision-maker" to ensure they are contextualizing the flags and using them appropriately.[544] This further gives rise to concerns about blanket explanations of HITL, if it is unclear what knowledge they do have in performing their roles and in operating ADMs.

Overall, the current position of Canadian immigration officers and policy-makers as it pertains to ADMs seems to be one where transparency, particular process transparency, is not viewed as desirable.

4.1.3 Transparency's Treatment in *DADM* and in Canadian Administrative Law

Transparency has also been built into several of the governance mechanisms explored in Chapter 2. For example, the TBS has also recognized within its own *DADM* that there is public interest in transparency, by means of notice of when automation will be used and in the need for explainability.[545] Scassa, noting transparency as a key heading in the *DADM*, references the relationship between transparency of the underlying technology and maintaining the integrity of the system.[546] The Canadian government attempts to address these concerns by relying on auditing and testing. However, as demonstrated in Employment and Social Development Canada's peer review for ReportIn, barriers exist in the ability of an outside Federal department to test Amazon's black-box proprietary software used in the initiating department's ADM.[547]

Recent ADM tools also engage the additional transparency challenge of national security and national security exemptions. There are provisions within the *DADM* itself that allow for national security systems to be dealt with internally as well as for key transparency measures, such as publishing an independent peer review to be reduced to a summary where national security is engaged.[548] IRCC has taken the position that all of its current peer reviews can be

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[544] McEvenue and Mann, *supra* note 105 at 8.
[545] Statistics Canada, *Responsible use of automated decision systems in the federal government* by Benoit Deshaies, (Ottawa: Statistics Canada, last modified 1 December 2021), online: <statcan.gc.ca/en/data-science/network/automated-systems>.
[546] Scassa, *supra* note 65 at 289-290.
[547] Canada, Open Government, *CRES ReportIn Peer Review Report and Response* (last modified 13 November 2024), online: *Government of Canada* <open.canada.ca/data/en/dataset/eaeb269c-6ac5-4429-a5aa-1fcc07c77933/resource/f7df9ed5-31d2-4a1f-a98f-cf1b836b5b1e>.
[548] Canada, Treasury Board Secretariat, *Guide to Peer Review of Automated Decision Systems* (2024), online: <canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/guide-peer-review-automated-decision-systems.html>.

published as summaries, without providing any evidence as to how they engage national security systems. Molnar and Gill find that the use of algorithms in immigration and refugee matters in a manner that forms a nexus with issues of national security could lead to input data and source code being classified in ways that make it difficult to scrutinize.[549] This could also explain why many AIAs, such as CBSA's AIA on SSA are heavily redacted and have not yet come to the public attention, despite being in development for many years.[550]

NSTAG released a report in 2024 looking at the impacts of these AI technologies on the digitization of security.[551] Having previously taken a position that predictive analytics and decision support systems are critical elements of national security and intelligence capacities, they specifically note in this report how the increased capabilities have offered "significant productivity and service improvement in high volume activities like immigration (IRCC) and border inspection (CBSA)."[552] Specific to transparency, the NSTAG report acknowledges that tensions between transparency and security arise from technological complexity, legal and policy frameworks governing national security efforts, and the types of openness efforts the Canadian government is pursuing.[553] The two main challenges the NSTAG highlighted with the use of AI were: (1) the interaction between improving black-box systems, decreasing explainability/loss of internal visibility; and (2) bias, privacy intrusion, and misrepresentation.[554]

It appears that at least in the Canadian administrative law context, transparency is still considered desirable. As an example, Daly, in reviewing a recent Ontario Supreme Court decision in *Harold the Mortgage Closer Inc. v. Ontario (Financial Services Regulatory Authority, Chief Executive Officer),*[555] noted that the Court made a "very strong judicial statement in favour of transparency" describing in terms of access to information about how public power is exercised.[556] However, one is left reading *Vavilov,* and *Dunsmuir* before it,

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[549] Molnar & Gill, *supra* note 81 at 18; See also Molnar, *supra* note 12 at 214.
[550] Canadian Border Services Agency, ATIP Request A-2023-18296 (Interim Release) [held by author].
[551] Canada, National Security Transparency Advisory Group, *The Digitization of National Security: Technology, Transparency & Trust* (2024), online: <publicsafety.gc.ca/cnt/rsrcs/pblctns/nstag-gctsn-dgtztn-ntnl-scrt-2024/index-en.aspx> [NSTAG].
[552] *Ibid.*
[553] *Ibid.*
[554] *Ibid.*
[555] *Mortgage Closer In v Ontario (Financial Services Regulatory Authority, Chief Executive Officer)*, 2024 ONSC 4464.
[556] Paul Daly, "Administrative Law in 2024" (2025) University of Ottawa, Faculty of Law, Working Paper No 2025/01 at 56-57, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5012293>.

wanting clearer pronouncements on the perimeters of transparency. The introduction of ADMs challenges an overly simplistic view of transparency as consisting merely of the provision of officer's written reasons, requiring a more concerted look into both who the "officer" is, what is "written," and what forms the basis of the reasons. The earlier conversation in Chapter 3 showed the linkages of the process with the reasons.

Another challenge that administrative law will face when addressing transparency is the *Vavilovian* tension point between the types of implicit, holistic and contextual, publicly available policies and guidelines that might drive decision-making.[557] In *Vavilov,* the emphasis appears to be on the importance of the information to be made public, but ignores the compelling need for this to be kept private or internal instead. In cases such as *Kiss* and *Li,* this need for non-disclosure was accepted by the courts, without much reference to procedural unfairness. Without transparent disclosure, there may be barriers to the ability to assess rationality, to reveal a rational chain of analysis that can be traced within the decision.[558] However, the more difficult challenge, as the *Baker* analysis highlighted in 3.3.4 demonstrates, in looking at the fundamental choices made by the tribunal and the implications for fair process.

4.1.4 Alternatives to Technical Transparency May Provide Greater Process Transparency

The difficulty and desirability of transparency's technical definition have led to the exploration of potential alternatives (or enhancements) to transparency. As Hartzog et al. write, "[t]ransparency means different things to different actors in the complex assemblages that constitute AI systems,"[559] requiring those differences to be set out and vetted. Canadian courts have yet to consider these terms, but each of them provides a way to re-conceptualize transparency in ways that may alter the pathway of future administrative law.

Procedural regularity, for example, requires the decision-maker to prove to the public that decisions were made under an announced set of rules, standards, and practices consistently applied and verifiable in each case.[560] This can be done through techniques such as software verification,

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[557] *Mason, supra* note 397 at para 60, citing *Vavilov, supra* note 254 at paras 94, 97.
[558] *Mason, supra* note 397 at para 65, citing *Vavilov, supra* note 254 at paras 103-104.
[559] Hartzog et al, *supra* note 300 at 7.
[560] Kroll et al argue *procedural regularity*'s definition of proving to the public that decisions were made under an announced set of rules, standards, and practices consistently applied in each case. See Kroll et al, "Accountable Algorithms", *supra* note 23 at 637–638. Kroll et al note that procedural regularity is a baseline requirement for ADM governance, further adding that procedural regularity requires that "each participant will know that the same procedure was applied to her and that the procedure was not designed in a way that disadvantages her specifically."

cryptographic commitments, zero knowledge proofs, and fair random choices. Kroll describes both the ex ante benefits of publishing commitments in advance of decisions and ex post ability for subjects to be certain that the certified policy was actually used in practice.[561] This could have benefits for transparency while at the same time addressing concerns of the possible gaming of the system.[562] Procedural regularity, notwithstanding the technical barriers, seems like the type of tool that could replace the type of non-disclosure, redactions, or blind-trust statements found frequently in Canadian immigration (such as in *Ali* and *Li* with respect to explanations for undisclosed reasons and processes).

Traceability is another alternative for transparency. It is a framework for understanding a computer system through the process by which it was designed and developed.[563] It relates to transparency, as the development process and outcome must be tied through auditability of methods of system creation and operation and requires legibility of key records.[564] Traceability requires making designs transparent through testing/auditing, allowing for reproducible external/stakeholder verifications, requiring human understanding and input, as well as ensuring system auditability.[565] Traceability's strength comes in bringing together technical,

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See *ibid* at 656. Kroll et al suggest technical tools for procedural regularity, include: (1) software verification – techniques for mathematically proving software's properties through analysis of code or software extraction to match proof with specifications; *ibid* at 662-665; (2) cryptographic commitments – digital equivalent to a sealed document that binds the committer to the object being committed that is used to lock in secrets and assertions; *ibid* at 665-668; (3) zero knowledge proofs – a cryptographic tool (part of a cryptographic commitment) that proves a decision-maker actually used a particular policy, without revealing *how* or the policy itself; *ibid* at 668-669. and (4) fair random choices – verifying the fairness in the randomness used in computer systems to demonstrate consistency in the goal for which randomness was deployed.

[561] *Ibid* at 673.

[562] Kroll et al also discuss what this may mean for a government agency or organization, which may help address many issues currently hampering transparency and concerns around gaming the system:

This means a government agency or other organization can commit to the assertions that (1) the particular decision policy was used and (2) the particular data were used as input to the decision policy (or that a particular outcome from the policy was computed from the input data). The agency can prove the assertions by taking its secret source code, the private input data, and the private computed decision outcome and computing a commitment and opening key (or a separate commitment and opening key for each policy version, input, or decision). *Ibid* at 667.

[563] Relating traceability to accountability, Kroll writes:

> "In other words, traceability relates the objects of transparency (disclosures about a system or records created within that system) to the goals of accountability (holding the designers, developers, and operators of a computer system responsible for that system's behaviors and ultimately assessing that the system reflects and upholds desired norms)."

Kroll calls traceability "a kind of transparency," but one that does not directly answer the question of the system's existence and the scope of outputs and operations. See Kroll, "Outlining Traceability", *supra* note 516 at 9.

[564] *Ibid.*

[565] Kroll outlines that traceability's requirements as: (1) design transparency – making design choices made by system designers available to system stakeholders or through testing/auditing; (2) reproducibility – making operation of the system's behaviour reproducible to allow for external stakeholder verification; (3) operational record-keeping – keeping records of behaviour to allow for inquiry by stakeholders or oversight entities or vesting this in a third

organizational, and policy-level tools.[566] Traceability holds automated systems accountable by ensuring "they comport with applicable, *contextually* appropriate social, political and legal norms.[567] One of the major concerns with traceability is addressing the gap between the "lofty goals of principles and documents and the behaviour of algorithmic systems in practice."[568]

Finally, there is the emerging field of *Explainable AI or "XAI"*, one of several properties that may be used to classify trust in AI systems.[569] While definitions defer (as is a major concern I raise shortly), they can be examined as a set of principles that reflect society's call for a rationale, ultimately a "good explanation" from an AI system. The National Institute of Standards and Technology defines a good explanation as one that is (1) human-centered; (2) understandable to people; (3) correctly reflects the system's processes for generating outputs; and (4) explains when it is operating outside designed conditions.[570] They link these principles directly to four principles for Explainable AI, which they portray in the following figure:

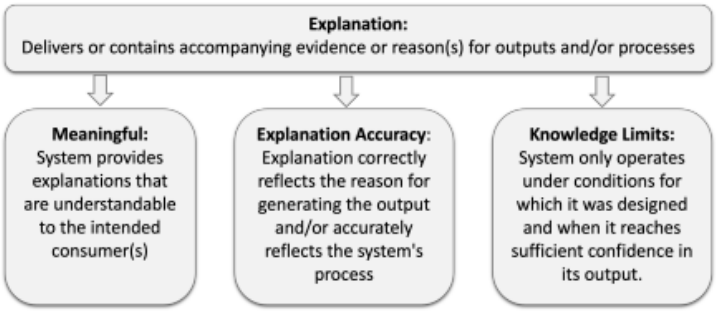

Figure 6 - Four Principles of Explainable Artificial Intelligence [571]

XAI rose because of the need to provide explanations for black-box models.[572] With Canadian immigration authorities currently not using black-box models, other than FRT and

party such as an oversight entity or an independent data trust; (4) human understanding – ensuring human understanding of technology, of AI's errors, in collaboration with machines, and in communicating with operators and affected humans; and (4) auditability – ensuring that records are amenable to review and critique, and assessment, through design and governance. See *Ibid* at 5–6.

[566] *Ibid* at 6.

[567] *Ibid* at 10.

[568] *Ibid* at 9.

[569] National Institute of Standards and Technology, *Cybersecurity Framework Profile for Ransomware Risk Management*, NIST Internal Report 8312 (Gaithersburg, MD: National Institute of Standards and Technology, 2021), online: <nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8312.pdf> [NIST].

[570] NIST at 1–2.

[571] *Ibid* at 10.

[572] Vikas Hassija et al, "Interpreting Black-Box Models: A Review on Explainable Artificial Intelligence" (2024) 16 Cognitive Computation 45, online: <doi.org/10.1007/s12559-023-10179-8> at 51.

ATIP triage,[573] XAI has not yet become part of the current Canadian administrative law lexicon. The techniques used in XAI that are considered as alternatives to full transparency often seek to simplify post hoc explanations for predictability, either to understand the model globally or through predicting individual instances.[574]

4.1.5 Challenges with the Implementation of Transparency Alternatives

While appearing to hold potential, there are also challenges for decision-makers and for judges reviewing administrative decisions to incorporate these transparency alternatives, therefore constraining their current efficacy as administrative law solutions. I will summarize these challenges in three points.

First, these alternatives are still technically complex for those outside the technology industry, including most legal experts. While many of the above techniques are aimed at allowing for greater human understanding, baseline technical expertise will still be required to evaluate its efficacy and tie it into procedural fairness. Whether it is front-line decision-makers who are not trained or shielded from the technical aspects, or courts still grappling with their technological competency and approaches, this expertise cannot be presumed at this stage. However, as technology develops, it is foreseeable that these terms and operations might become second nature, much like Internet Protocol and web functions are today. The ability of stakeholders to adapt (or be forced to adapt) to technology, as the COVID experience demonstrated, may be a recent, largely positive, parable but I am still concerned that the tools explored above go beyond competent, working-level capacities to learn, adapt, and apply.[575] The potential of black box technology to render ADMs even less traceable or understandable is certainly a foreseeable risk.

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[573] TBS, ATIP A-2023-00081, *supra* note 115, at 250-270.

[574] These tools include LIME (Local Interpretable Model-agnostic Explanations) and SHAP (SHAPley Additive Explanations). See Zoumana Keita, "Explainable AI - Understanding and Trusting Machine Learning Models" (10 May 2023), online: <datacamp.com/tutorial/explainable-ai-understanding-and-trusting-machine-learning-models>.

[575] See discussion of Technology and Access issues in Canadian Immigration during COVID-19 in House of Commons, Standing Committee on Citizenship and Immigration, “Promoting Fairness in Canadian Immigration Decisions” (November 2022) (Chair: Salma Zahid), online: <ourcommons.ca/DocumentViewer/en/44-1/CIMM/report-12/>., Standing Committee on Citizenship and Immigration, “Immigration in the Time of COVID-19: Issues and Challenges” (May 2021) (Chair: Salma Zahid), online (pdf): <ourcommons.ca/Content/Committee/432/CIMM/Reports/RP11312743/cimmrp05/cimmrp05-e.pdf>.

Second, it is unlikely that the Canadian government will be willing to invest in these types of safeguards, especially when not required by statute or procedural code. There are enough current protective mechanisms – through national security classifications, access to information barriers, and the judicial review process that this paper examined – which suggest these extra steps will not be deemed necessary or urgent. It may need to be a court, or a written statutory obligation that eventually binds or at least alters the evidentiary standard/burden on applicants claiming against ADM systems.[576]

Third, as discussed earlier in this section, there is no clear definition for transparency (generally) in Canadian administrative law. There is certainly no indication that administrative law will require technical transparency or the requirement for XAI. Canadian administrative law, likely through scholarship first, will need to do a deeper exploration of the roots of transparency as an underlying administrative law principle.[577] Only after this is done can questions such as who is being held to the level of transparency and to what standard be addressed. It is through this elevated context, that technical transparency can be viewed as a potential court-established expectation or remedy and tied directly to process.

4.2 Accountability

4.2.1 Why a Fair ADM Process Must be an Accountable One

Accountability, as the various definitions this thesis project will explore below, is innately tied to process. First, as explored earlier in discussion of procedural fairness, accountability is considered foundational to the rule of law, that those who wield public power are held accountable when they act unlawfully,[578] which in turn is a key requirement of a fair process. Recall the earlier discussion of Dyzenhaus and Fox-Decent on legality as accountability to law in Canadian administrative law.[579] One of the shortcomings of the current administrative law

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[576] Mireille Hildebrandt talks about the GDPR's role in reversing legal burden of proofs when processing personal data is involved. See Mireille Hildebrandt, "Qualification and Quantification in Machine Learning: From Explanation to Explication" (2022) 16:3 Sociologica 3 at 41 [Hildebrandt, "Qualification and Quantification in Machine Learning"].
[577] As part of research for this project, the term "transparency" was noted up on CanLII. Review of cases do not demonstrate any major trend, until the use in *Baker* and more significantly, *Dunsmuir.*
[578] Glover Berger*, supra* note 54 at 185
[579] Dyzenhaus & Fox-Decent, *supra* note 366 at 240.

framework for ADM is ADM's strong reliance on the terminology of accountability, a term that has been, in my opinion, *under*-defined in past administrative case law. Indeed, in *Vavilov,* only one reference is made to reasonableness review not being a "rubber-stamping" process that is a means of sheltering administrative decision-makers from accountability.[580]

Accountability, as an administrative law concept, has not received any reference in key Canadian immigration decisions. In the European context, Busuioc has done important work to tie the concept of accountability to legitimacy, which in turn requires bureaucratic expertise, the ability to leverage that expertise into decision-making through discretion, and effective institutional accountability mechanisms.[581] Through my discussion below, I invite the reader to consider how to better incorporate accountability into Canadian administrative law and what benefits this may have for both the *internal* and *external* dimensions of the decision-making process.

4.2.2 Accountability's Many Definitions and Interpretations

The Merriam-Webster dictionary sets out accountability as having two definitions, one which sets out the concept of answerability – that a subject should give an account for their actions – and a second regarding the capability to be explained.[582] Accountability has also been presented as taking place in three tiers: (1) as a political ideal or "icon";[583] (2) as a specific set of normative commitments;[584] and (3) as an empirical phenomenon on the concrete level.[585] The third level seeks to apply the normative commitments of the first two into application on a relational level and is the focus of this project.

Daly, citing Anne Davies, presents accountability for administrative lawyers as being the practice of putting in place processes of setting yardsticks of desired practice, ensuring accounting of activities to a competent authority, measuring the accounting against the yardstick,

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[580] *Vavilov, supra* note 254 at paragraph 13.
[581] Busuioc, *supra* note 197 at 2.
[582] Merriam-Webster, *Merriam-Webster Dictionary*, (last visited 14 July 2025) sub verbo "accountable", online: <merriam-webster.com/dictionary/accountable>. Similarly, Busuoic, *supra* note 341 at 2 states that accountability is about "holding power to account."
[583] Athanasios Psygkas, "Accountability" in Peter Cane et al, eds, *The Oxford of Comparative Administrative Law* (Oxford University Press, 2020) at 444–445.
[584] *Ibid* at 446.
[585] *Ibid* at 447.

and imposing consequences for failure to meet the yardstick.[586] A different definition of legal accountability, from Europe's General Data Protection Regulation ("GDPR"),[587] provides both a broader, but also less abstract, definition in the context of personal data.[588] It states that accountability is a data controller's responsibility and compliance with a series of personal data responsibilities including lawfulness, fairness, transparency, accuracy, integrity, and confidentiality along with a few more targeted technical definitions.[589]

Given the earlier examination of transparency, it is worth noting the linking of these concepts, with Sossin arguing that accountability is "direct transparency between decision-makers and affected parties."[590] Sossin draws attention to the role of technology in possibly highlighting contextualized information and guidance that is unique to a party's circumstances, allowing individuals to see that "justice is done."[591] Hartzog et al. further note that merely seeing into these systems is not enough, and that "we must be capable of understanding the as assemblages and changing them when they do not align with our values."[592] Engstrom and Ho, citing Kroll et al.'s work in "Accountable Algorithms", similarly take a critical view of the relationship between transparency and accountability, writing that "perfect transparency may not yield accountability, if viewed as the rendering of decisions that are fully legible to data subjects or surfacing all of a system's flaws.[593] Kroll et al. find that "accountability is feasible, even when details of a computer system are not fully known or must be kept secret."[594]

Accountability is also defined as a requirement for the rule of law,[595] which in addition to the Szilagyi definition explored earlier, has been set out to require accountability of all persons, institutions, and entities to laws that are publicly promulgated, equally enforced and

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[586] Daly, "Artificial Administration", *supra* note 34 at 18–19. I note here, however, the Courts guidance to reviewing Courts not to fashion their own yardsticks and then use the yardstick to measure the administrator's decision. See *Vavilov, supra* note 254 at para 83 citing *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 28.
[587] EU, *General Data Protection Regulation*, [2016] OJ, L 119/1, online: <eur-lex.europa.eu/eli/reg/2016/679/oj> at article 5 [GDPR].
[588] *Ibid* at Article 5.
[589] *Ibid.* See the definitions specifically of: Purpose limitation, data minimisation, storage, limitation.
[590] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 205. Compare with Hartzog et al. who argue that transparency does not produce accountability on its own. See Hartzog et al, *supra* note 300 at 7–12.
[591] *Ibid.*
[592] *Ibid* at 7.
[593] Engstrom & Ho, *supra* note 62 at 825.
[594] Kroll et al, "Accountable Algorithms", *supra* note 23 at 642.
[595] See e.g. discussion in Monika Zalnieriute et al, "The Rule of Law and Automation of Government Decision-Making" (2019) 82:3 Mod L Rev 1 at 4–5.

independently adjudicated.[596] Raso furthermore speaks to "accountability mechanisms, specifically, statute and policy reforms, and creative institutional design, that may impact administrative law and the role of automated decision-making system.[597] As Grieve discusses, concepts such as the aforementioned transparency and accountability are not concerns in the private sector – where the technological tools may be increasingly derived from.[598]

Sossin (citing Frank Pasquale) talks about the accountability issue not being removed as long as humans and algorithms mix.[599] He argues that for legal automation to truly respect the rule of law, it must be the "rule of persons, not machines," and the "Rule of Law, not men." Pasquale argues that "without attributing algorithmic judgments and interpretations to particular persons and holding them responsible for explaining those judgments, legal automation will undermine basic principles of accountability."[600]

It is also necessary to engage in the technically-aimed definition of accountability that Kroll formulates. As I have discussed in other work,[601] Kroll's definition of accountability encompasses "a relationship that involves reporting information to that entity and in exchange receiving praise, disapproval, or consequences when appropriate."[602] Kroll's definition adds further support to the earlier summary of Daly's critique of the limitations of judicial review/adjudication. Accountability must be accessible to those for whom ADM systems render negative outcomes, but also those whom it may privilege or benefit without adequate justification for their differential treatment. While I do not purport to provide my own definition at this stage, I adopt a broader context of accountability which encompasses a broader sense of

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[596] The 'rule of law' … refers to a principle of governance in which all persons, institutions and entities, public and private … are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standard." See United Nations, "What is the Rule of Law?" (last visited 14 July 2025), online: <un.org/ruleoflaw/what-is-the-rule-of-law/>.
This language is repeated in *The rule of law and transitional justice in conflict and post-conflict societies*, UNSC, 2004, UN Doc S/2004/616, online: <digitallibrary.un.org/record/527647?ln=en&v=pdf#files>.
[597] Raso, "AI and Administrative Law", *supra* note 57 at 14.
[598] Grieve, *supra* note 60 at 175.
[599] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 196
[600] Frank Pasquale, "A Rule of Persons, Not Machines: The Limits of Legal Automation" (2019) 87:1 Geo Wash L Rev 1 at 16, at 4-5.
[601] Will Tao, "Colliding Concepts and an Immigration Case Study: Lessons on Accountability for Canadian Administrative Law from Computer Systems" (5 April 2024), online (blog): <vancouverimmigrationblog.com/colliding-concepts-and-an-immigration-case-study-lessons-on-accountability-for-canadian-administrative-law-from-computer-systems-op-ed-1-for-law-432-d-course/>.
[602] Kroll "Accountability in computer systems", *supra* note 538 at 184, 186–187.

responsibility and reject the justification that ADMs automation of only low-risk cases before humans take over processing, resolves accountability concerns.[603]

Defining accountability and giving it a clear legal meaning and constraining boundaries, will be crucial, particularly if the terminology rolls into a reasonableness analysis framework. As the SCC writes in *Vavilov*, there is a direct correlation between the need for a "reasons first" approach and the perception of rubber stamping as a shelter from accountability.[604] Yet, some care needs to occur as well in the defining process. Similarly to transparency, accountability does not have a central root source in Canadian administrative law explaining its meaning, and academic scholarship on the concept is largely dated pre-*Vavilov* or occurring in a comparative global context.[605] The term has been held, in a comparative administrative law context, to be its "central obsession," but also fear of its overuse "diluting its analytical utility and thus obscure more than elucidate."[606]

A good starting point for how to frame an approach to accountability before applying it to ADMs is to start with Mashaw's six foundational questions that frame an accountability regime. Mashaw states these questions as:

> (1) *who* is accountable;
> (2) *to whom*;
> (3) *for what* is the person accountable;
> (4) *through what processes* is accountability ensured;
> (5) *by what standards* will the conduct be assessed; and
> (6) *what are the potential effects* if these standards are not met[607]

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[603] This differs from the definition taken by Daly, "Artificial Administration, *supra* note 34 at 1. I also would be remiss not to reference Mark Bovens' often-quoted definition within circles of accountability, which states that accountability is "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences." See Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13:4 Eur L J 447 at 450, online: <doi.org/10.1111/j.1468-0386.2007.00378.x>

[604] *Vavilov, supra* note 254 at para 13, citing *Mason*, *supra* note 397 at para 63.
See also Hartzog et al write that accountability mechanisms are "often treated as being synonymous with audits, assessments, certifications, and similar procedural compliance requirements." Hartzog et al, *supra* note 300 at **1.**

[605] See e.g. David Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law", in Hugh Corder, ed, *Global Administrative Law: Innovation and Development* (Juta: Clarendon Press, 2009) at 3–31 [Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law"].

[606] Psygkas, *supra* note 583 at 444.

[607] *Ibid* at 447, citing Jerry L Mashaw, "Accountability and Institutional Design: Some Thoughts on the Grammar of Governance" in MW Dowdle (ed.), *Public Accountability, Designs, Dilemmas and Experiences*. Cambridge: Cambridge University Press (2006) at 118.

Questions about how procedural design is to be implemented and fairness built in will largely depend on the answers to these questions and the definition of accountability adopted.

4.2.3 How is Accountability Operationalized in ADM?

Specific to ADMs, Mashaw's fourth question about accountability mechanisms is a crucial one. Raso also explores the broader question of how program accountability can be delivered by decision-makers. She asks:

> How might "digital government" ensure meaningful public participation in decisions that impact individual and collective interests? How might administrators guarantee these decisions are made by sufficiently responsive decision makers who *can* be held responsible for their decisions? And, finally, how might agencies ensure that these decisions are supported by compelling evidence rather than statistical inferences?[608]

Raso, alongside Victoria Adelmant, explores through the concept of legal accountability's bureaucratic mechanisms – such as conventional legal tools, internal review procedures, external court challenges, and rights claims, which they argue are ill-suited to the dispersed forms of public administration that digitization produces.[609] Raso and Adelmant argue that the introduction of system designers working in digital governments may not be subject to the same accountability techniques and requirements to serve the public good. They also discuss the diffusing of practical responsibility widely making it difficult for outside bodies to name and hold a body responsible.[610]

Sossin raises an important question of who is accountable for the role of technology and AI specifically.[611] Bringing in an immigration example, Sossin presents a fact pattern of immigration and refugee decision-makers not having access to a risk assessment tool, and those who program the tool's ML algorithms not being held responsible for errors arising from the data

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[608] Raso, "AI and Administrative Law", *supra* note 57 at 15. Raso, writes that administrative law "remains the tool that is most often used to hold border authorities accountable for their actions", yet writing also that "contemporary administrative law may be ill-equipped for this task if we take the *infra*-legalities of digital borders seriously." See Raso, "Digital Border Infrastructure", *supra* note 499 at 2.

[609] Jennifer Raso & Victoria Adelmant "Bureaucracy" in Jenna Burrell, Ranjit Singh & Patrick Davison, eds, *Keywords of the Datafied State* (New York: Data & Science, 2024), online: <ssrn.com/abstract=4792578>.

[610] *Ibid* at 9.

[611] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 206. Raso asks a similar question in the intro to her paper – "how administrative law ought to conceptualize algorithmic tools: should it approach them as a forceful policy, a uniquely persuasive source of evidence, or as though they are an additional decision maker?" She also asks when it comes to algorithmic decision-making, "who or what decides"? In this way, the level and chain of accountability is directly related to the tools and their function. See Raso, "AI and Administrative Law", *supra* note 57 at 1.

they have provided.[612] Sossin posits what might occur if the algorithms themselves begin to learn in untraceable ways. He suggests needing to address the issue of personhood for algorithmic decision-makers.[613]

From this conversation, the importance of having specific accountability mechanisms or ADMs becomes apparent. In the last chapter, when exploring remedies, Daly's position was that the current accountability mechanisms for ADMs of hard law, soft law, and judicial review were insufficient and unappealing.[614] Others have found accountability embedded in certain parts of the soft law guidance of the *DADM*, with Scassa suggesting that accountability could also be addressed through reasons requirements and through periodic reviews of system outputs to scan for bias and other inappropriate outcomes."[615] The following section delves further into possible operationalization of and forms of accountability mechanisms, relevant to the Canadian immigration and ADM context.

i. Responsive, Well-Informed, and Accurate Decision-Making

In this sense, accountability is also tied directly to a responsive decision-maker exercising discretion. A core tenet of Canadian administrative law and delegated decision-making is that there is no such thing as absolute/untrammelled discretion.[616] In the immigration context and examining IRCC's AA-TRV model, Nalbandian applies Thomas Schillemans' definition of accountability as "how well-considered or how accurate a decision is."[617] The gold standard decision, Nalbandian summarizes, is one that "weighs all the relevant facts, values and norms, in a comprehensive way."[618] This draws parallels to the earlier discussion of the reasonableness framework and responsive justification that has been explored in several earlier chapters.

In her paper, Nalbandian applies the six attributes that comprise Schillemans' "Calibrated Public Accountability" model to the difference in traditional human decision-making and the use of the AA-TRV. Nalbandian finds that while there may be accountability for the process and outcomes, other areas of the system "cannot be held accountable in the same manner as a human

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[612] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 206.
[613] *Ibid* at 207.
[614] Daly, "Artificial Administration", *supra* note 34 at 25.
[615] Scassa, *supra* note 65 at 296.
[616] *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC) at 140; *Vavilov, supra* note 254 at para 108.
[617] Nalbandian, "Increasing the accountability of ADMs", *supra* note 209 at 2.
[618] *Ibid* at 3, citing Thomas Schillemans, "Calibrating Public Sector Accountability: Translating Experimental Findings to Public Sector Accountability" (2016) 18:9 Public Management Review 1400.

decision-maker, as it cannot be asked or expected to justify its actions."[619] Nalbandian takes some care in walking through how the AA-TRV model works[620] and focuses her attention on the Director General who both approves the rules, and takes on the decision-making function for the eligible files.[621] She finds that there is unclear information about how they are involved for those applicants who are unsatisfied with the decision and seek recourse. She finds that overall accountability is insufficient, complicated by allocation, and generally unclear.[622]

I revisit here again how IRCC's position that accountability should only lie with refused final decisions ignores the multiple stages by which a decision is made and as well as the accountability owed when not privileging a group of applicants or subjecting them to further human review based on a machine's output.

Decisional accuracy (or more simply "accuracy") is another term that emerges in relation to ADMs and accountability. The capturing and explicit statutory language of accuracy is especially pertinent, given the issues the usage of this term created in *Ewert,*[623] which suggests that legislatures would contract themselves to a high standard of accountability by including this requirement. Whether ADMs can provide more "accurate" decisions is itself a heavily contested area of study.[624] There is also a concern about whether accuracy should be the universal measure to compare ideal decision-making against. Rebecca Williams, providing an example of ML classification in the detection of sun shapes and the rejection of light bolts, emphasizes that accuracy is the measure of overall system performance, but other metrics might be more important.[625] For example, in a system flagging for fraud, sensitivity (true positives) may be the most important factor, as opposed to its specificity or precision.[626]

Practically, and as it pertains here, the concerns of "overfitting" that have been raised in Chapter 3 may be related to the accuracy challenges with using simple decision trees (a

[619] Nalbandian, "Increasing the accountability of ADMs", *supra* note 209 at 6.
[620] *Ibid* at 4–5.
[621] *Ibid.*
[622] Nalbandian, "Increasing the accountability of ADMs", *supra* note 209 at 6–7.
[623] *Ewert, supra* note 421 at para 32.
[624] R Williams writes that there is "naturally no inherent reason why ML ADM should be less accurate than the human it augments or replaces, quite the contrary." See R Williams, *supra* note 81 at 485.
[625] *Ibid* at 472.
[626] *Ibid* at 471.

potentially easier-to-explain and use model) as opposed to models such as random forests, which are known to provide more accuracy.[627]

A final challenge at this stage, from a technical perspective, is randomness. Kroll et al. specify that randomness is essential to many computer systems but creates challenges for accountability. Randomness helps prevent "gaming the system'" to make it difficult to predict auditability or obscure secret information.[628] Randomness creates reproducibility and verifiability issues that make the assessment of accuracy challenging.[629] From a judicial review perspective, it would be difficult to see a court reviewing decisional accuracy, particularly utilizing a reasonableness framework, given the range of possible outcomes and metrics that are likely justifiable. It would be more likely to challenge the decision on procedural fairness, but without some sort of accountability onus placed on decision-makers to provide accurate information, competing administrative justice interests would likely gravitate towards continued non-disclosure and silence.

ii. Explainable and Interpretable Decisions

Another potential measure for accountability is explainability.[630] The *DADM* provides a broad explanation mandate for medium to very high-impact projects:

> "In addition to any applicable legal requirement, ensure that a meaningful explanation is provided to the client with any decision that results in the denial of a benefit or service, or involves a regulatory action. The explanation must inform the client in plain language of:
>
> - the role of the system in the decision-making process;
> - the training and client data, their source, and method of collection, as applicable;
> - the criteria used to evaluate client data and the operations applied to process it;
> - the output produced by the system and any relevant information needed to interpret it in the context of the administrative decision; and
> - a justification of the administrative decision, including the principal factors that led to it.

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[627] Random forests combine the output of multiple decision trees to facilitate more accurate decisions. See IBM, "What is random forest" (last visited 4 June 2025), online: <ibm.com/think/topics/random-forest>.
[628] Kroll et al, "Accountable Algorithms", *supra* note 23 at 654.
[629] *Ibid* at 656.
[630] Explainability is treated by Scassa as existing between the right to be heard and right to reasons (which she labels as principles of fairness). She ties it, citing Zalnieriute et al., *supra* note 595, to transparency around state operations and individual access to legal rules and administrative decisions. I treat it under the accountability heading, given my earlier treatment of transparency focusing on desirability of disclosure. See Scassa, *supra* note 65 at 288-289

> Explanations must also inform clients of relevant recourse options, where appropriate.
>
> A general description of these elements must also be made available through the Algorithmic Impact Assessment and discoverable via a departmental website."[631]

Scassa notes the conflation between a right to an explanation with the right to reasons, highlighting the differences between the two. The former requires the human decision-maker to explain how they reached their decision, the latter is to provide an explanation for the ADMs reliance on data, and the weight assigned to algorithms.[632] Cobbe also emphasizes the importance of distinguishing explanations for *how* a decision was made (explainability) and reasons *why* it was made (reasons).[633] Cobbe highlights the serious issue of inexplicability of opaque ML, and the importance of producing "useful means for non-technical reviewers to understand how a decision was made, much less why it was made."[634] Cobbe points out how a court's focus on reasons, and the public bodies' justifications for why reasons cannot be provided or may be too onerous to provide, may serve as an motivation to use ADMs as a way of escaping accountability.[635]

Explainability also runs into challenges with both the breadth and depth of the meaningful explanation provided. Even though there have been medium impact ADM projects as of June 2025, the wording "with any decision that results in the denial of a benefit or service or involves a regulatory action" found in the *DADM*[636] appears to have evaded the positive eligibility determinations or risk-flagged files in the immigration space, where humans downstream take over the admissibility, and therefore "final" decisions. Baseline transparency and disclosure of the use of the systems, appears to be a currently unfulfilled condition precedent of explainability.

It is also worth noting to conclude this chapter, and continuing a common theme of this thesis, that the definition of e*xplainability* is itself heavily contested. Contrary to what Scassa and Cobbe assert, Gilpin et al. write that explainability is the "model's ability to summarize the

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[631] *DADM supra* note 66 at s 6.3.2.
[632] Scassa, *supra* note 65 at 292–293.
[633] Cobbe, *supra* note 89 at 648.
[634] *Ibid.*
[635] Leilani H Gilpin et al, "Explaining Explanations: An Overview of Interpretability of Machine Learning" (Paper delivered at the 5th IEEE International Conference on Data Science and Advanced Analytics, DSAA, 2018), online: <arxiv.org/abs/1806.00069>.
[636] *DADM, supra* note 66 at Appendix C.

reasons for neural network behaviour, gain the trust of their users, or produce insights about the causes of their decisions."[637] Gilpin et al. note that explainability is often used interchangeably with interpretability, but advocates for the terms to be distinguished.[638] Interpretability, they comparatively define, is the "science of comprehending what a model did (or might have done)."[639] Gilpin et al. find that explainable models are interpretable by default, but that not all interpretable models are explainable.[640] Adam Hare attempts to explain the difference of explainability and interpretability to laypersons, by comparing an *ex post* explanation for a grade provided by a professor with areas that could have been improved, but the unclear assignment of the weight of the factors as applied (explainable - knowing *why,* but not *how*) compared to the provision of a marking rubric for calculations, but without explanations for the criteria (interpretability - knowing the *how,* but not the *why*).[641] Hare appears to reverse Scassa and Cobbe's definition by instead defining explainability as the ex post reasons provided, and interpretability, as the ability to know the model's ex ante rules.

Bradley Henderson brings the *how* and *why* together as interpretability, writing:

> "Interpretable ML tools are those such as the linear regression models referred to above, where developers and well-informed users are likely to understand the tools' underlying 'reasoning' for specific outputs, including which features those AI tools considered and the weights (or importance) that those tools assigned to the features. In other words, interpretable AI tools are those in respect of which a human can understand their underlying logic, and the relationship of that logic to the tools' outputs."[642]

To Henderson, "explainable" AI is where secondary algorithms generate post-hoc rationalizations for the black-box (unexplainable) counterparts.[643] Henderson emphasizes that explainable ML tools currently only approximate primary tool predictions in ways that may be misleading and inaccurate.[644] He also highlights the lack of robust and accurate explainable ML

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[637] *Ibid* at 1.
[638] *Ibid.*
[639] Gilpin et al, *supra* note 635 at 1.
[640] *Ibid.*
[641] Adam Hare, "Explainable vs Interpretable AI: An Intuitive Example", *Medium* (8 April 2020), online: <medium.com/swlh/explainable-vs-interpretable-ai-an-intuitive-example-6baf8fc6d402>.
[642] Bradley Henderson, "Maintaining Legitimacy: Artificial Intelligence, Automated Decision-Making, and Reasonableness Review" (2023) at 6 [unpublished, pre-print available], online: <https://ssrn.com/abstract=4934424>.
[643] *Ibid* at 23. See also this similar definition adopted by Cynthia Rudin, "Stop explaining black box machine learning models for high stakes decisions and use interpretable models instead" (2019) 1 Nature Machine Intelligence 206 at 206–215.
[644] Henderson, *supra* note 644 at 12.

and notes that at best they provide after-the-fact approximations of a primary algorithm's processes.[645] Henderson cites the Federal Government's *Guidelines on Service and Digital*[646] which highlights the desirability of interpretability as a link between the explanation provided and how an AI tool reached its result.[647] The *DADM* itself cites "interpretable decisions made pursuant to Canadian law" as a primary objective.[648]

Related to accountability's possible operationalization as interpretability in the Canadian immigration context, Molnar suggests that procedural fairness in the immigration in the context, may mandate officers to fulfill specific tasks, such as recording, retaining, and making available adequate notes for certain applications.[649] These seem akin to clearly setting out the "marking rubric" and are related to the need for audit trails that the *Policy Playbook* also discusses.[650]

Considering the deletion of the materials generated by processing technology discussed by the Court in *Mehrara,*[651] it is unclear whether this branch of accountability is currently being

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[645] *Ibid* at 22.
[646] Canada, Treasury Board Secretariat, *Guideline on Service and Digital*, (last modified 10 January 2024), online*: Government of Canada* <canada.ca/en/government/system/digital-government/guideline-service-digital.html.>
[647] Henderson, *supra* note 644 at 12.
[648] *DADM, supra* note 66 at s 4.1.
In a less technical way, this appears to be the way Daly also defines these terms, writing:

> **"*Second***, machine learning can be further broken down into two additional categories: explainable and interpretable. Where machine learning is interpretable, the system develops identifiable rules that humans can understand. The systems used by Immigration, Refugees and Citizenship Canada are an example (though the department does not disclose the rules to prevent 'gaming' of the systems). Explainable machine learning involves the generation of a human explanation for the machine's 'thought process' through a parallel system: this is highly artificial and seeks to reconstruct a machine learning process that by its very nature is opaque [**emphasis in original**]."
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> Paul Daly, "Artificial Intelligence and Administrative Tribunals" in Matthew Groves & Yee-Fui Ng, eds, *Automation in Public Governance: Theory, Practice and Problems* (Oxford: Hart Publishing, forthcoming 2025) [unpublished, archived at SSRN] at 5, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=5041097> [Daly, "Artificial Intelligence and Administrative Tribunals"].

Stressing that it is importance of interpretability over explainability, Daly writes:

> "Explainable AI involves the use of a separate system to provide a plausible explanation of the outcome reached by a machine: it does not describe – because it is impossible to do so – how exactly an outcome was arrived at but offers a reconstruction of the decision-making process in terms comprehensible to a human. Interpretable AI, however, generates decision rules that humans can readily understand."
>
> *Ibid* at 23.

[649] Molnar, *supra* note 12 at 227.
[650] *Policy Playbook, supra* note 12 at 75.
[651] *Mehrara, supra* note 227 at para 69.

practiced in either the *how* or the *why* form, whichever way they are conceived. The differences (or similarities) between interpretability and explainability are the source of much literature in AI and ML research.[652] Yet, the context created by this definitional confusion (much like the definitions of accountability, transparency, and concepts like bias (explored earlier) will lead to misalignment between technologists, lawyers, and policymakers.

Given the proximity of these related terms to potential claims for a context-specific procedural fairness "right to reasons" and the third head of the reasonableness snake – "intelligibility,"[653] it is crucial that some common ground is reached, particularly as tools shift to utilize more complex opaque, black-box technology. Again, consider here how much decision explainability is process dependent and brings together strands of substantive reasons with the procedures and processes used to generate them.

ii. Contestable Decisions

Mireille Hildebrandt, in numerous pieces about ADMs and the shift from text-driven law to code-driven law, discusses the importance of contestability.[654] She emphasizes the requirement for these systems (rules, policies, and mechanic translations), to be at some point contestable in a court of law.[655] She suggests they should be contestable on two bases:

> "1. The decision is based on legal conditions that do not apply because the system got the facts wrong; and
>
> 2. The decision is wrong based on an incorrect interpretation of relevant legal norms."[656]

Relevant to the earlier discussion of explainability and the *justification* prong of *Vavilov*, Hildebrandt notes that "*justification* is not equivalent to an *explanation*, the latter which serves as

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[652] Ričards Marcinkevičs & Julie E Vogt, "Interpretable and explainable machine learning: A methods-centric overview with concrete examples" (2023) 13:3 WIREs Data Mining and Knowledge Discovery 1 at 2, online: <doi.org/10.1002%2Fwidm.1493>.
[653] Intelligibility in AI has also been linked to explainability. See e.g. recommendation 40 in UNESCO, *Recommendation on the Ethics of Artificial Intelligence* (Paris: United Nations Educational, Scientific and Cultural Organization, 2022) (UN, UNESCO), online: <unesdoc.unesco.org/ark:/48223/pf0000381137>.
[654] Hildebrandt, "Algorithmic Regulation and the Rule of Law", supra note 79 at 2–3.
[655] Mireille Hildebrandt*, Law for Computer Scientists and Other Folk* (Oxford: Oxford University Press, 2020) at 267 [Hildebrandt, *Law for Computer Scientists and Other Folk*].
[656] Hildebrandt, "Algorithmic regulation and the rule of law", *supra* note 79 at 3.

a means to make the decision contestable as to its justification."[657] She ties contestability to a legal obligation to explain the ADM's basis, for example, profiling, and ties this to the rule of law.[658]

Referencing Kaminski and Urban's recent scholarship in this area, Hildebrandt notes the argument around contestability does not need to be framed around ex ante and ex post rights to information, but rather more simply, that "those targeted by ADMs must be given sufficient information *to contest the relevant decision without having to take a course in computer science.*"[659] Kaminski and Urban discuss how "contestability relies on transparency—just as due process requires notice, in addition to an opportunity to be heard."[660]

Accountability, offered through contestability as a mechanism, therefore directly relates to this part of the *Dunsmuir* test as well. A culture of justification, justifying rationality and fairness to citizens, is rendered meaningless without some sort of accountable relationship towards those impacted by ADM decisions.[661]

This project has already explored, through looking at case law and the judicial review process in the last chapter, some of the substantive and procedural barriers to challenging ADM decisions. Nalbandian draws attention to the additional vulnerability of immigrants and asylum seekers to challenge unfair practices regarding the use of technology. These include language barriers, differences in legal systems in foreign countries, and navigating privacy-related issues.[662] The NSTAG in their report also recognizes this challenge, writing:

> "While Canadians broadly support efforts to protect national security, and indeed are concerned when lapses emerge, they also expect government to be accountable both for how threats are addressed and when they are not. As part of the dialogue with Canadians, Government should be transparent about the measures in place to ensure accountability and what kinds of appeals mechanisms are available in the event of complaints. Complaints and appeals mechanisms should be well understood, accessible and operate in a timely and transparent manner."[663]

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[657] Hildebrandt, *Law for Computer Scientists and Other Folk, supra* note 655 at 267. Hildebrandt discusses the importance of justification in administrative law, required for every decision and action, especially where the effects may be detrimental. See Hildebrandt, "Qualification and Quantification in Machine Learning", *supra* note 576 at 40.
[658] *Ibid* at 38.
[659] *Ibid* at 40.
[660] Margot E Kaminski & Jennifer M Urban, "The Right to Contest AI" (2021) 121:7 Colum L Rev 1957 at 1979.
[661] *Vavilov, supra* note 254 at paras 2, 14.
[662] Nalbandian, "An Eye for an 'I'", supra note 111 at 20.
[663] NSTAG, *supra* note 551.

Contestability's desirability as an accountability mechanism links directly to judicial review and adjudication. Katie Szilagyi also ties in contestability to the rule of law, writing "[c]ontestability, then, might just serve as a key feature of legal process, offering a prophylactic against overzealous or underinclusive perspectives on law's extent."[664] However, as this paper has explored, the practical and rules-based challenges of judicial review contain significant barriers to contestability in law, and even more so in attempting to raise concerns over longstanding administrative norms that may no longer accord with the use of ADMs.

iii. The Existence of Effective System Oversight

Oversight can exist at several levels. Starting with the human individual, the inappropriate delegation of a decision to an ADM can lead to the escape of accountability.[665] Writing within the European context, Cobbe discusses meaningful oversight as being more than a "token gesture", one that allows for authority and competence to change decisions and consideration of all the evidence. Cobbe argues that it is important to question whether the use of ADMs to advise may truly exercise meaningful oversight in the face of concepts such as automation bias.[666] In the immigration context, oversight is unclear and should be treated as requiring more than merely QA processes to test whether decisions made post-ADM match historical human decisions.

With respect to ADMs themselves, there is a lack of meaningful oversight in the *DADM* as a governance tool. The only mention of the word oversight is in a brief reference to the purpose of the AIA.[667] Other than through the TBS's efforts to engage in a review and feedback with the initiating department, there cannot be said to be a meaningful oversight role. Peer reviews, currently all from other Canadian government departments, do not cite oversight as a purpose.[668] This is despite Bronson and Millar's "Peer Review for Automated Decision-Making Tools Under Canada's Directive on Automated Decision-Making" explicitly recommending oversight as part of the fifth high-level recommendation to the Canadian government to "develop

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[664] Szilagyi, *supra* note 25 at 101.
[665] Cobbe, *supra* note 89 at 645.
[666] *Ibid* at 646.
[667] *DADM, supra* note 66 at Appendix A, definitions.
[668] Canada, Treasury Board Secretariat, *Guide for Peer Review of Automated Decision Systems*, (last modified 07 January 2025), online: *Government of Canada* <canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai/guide-peer-review-automated-decision-systems.html#toc2>.

clear accountability policies for peer review, establishing, among other details, who is responsible for the proper oversight of peer review."[669]

Third-party oversight is the final consideration here.[670] Daly recommends a watchdog approach, as a fourth "integrity" branch of government. He foresees the watchdog as having both bark and bite, to develop codes of practice and ethical standards, but also to roam in an inquisitorial manner.[671] Daly also suggests the watchdog have some form in law, to give binding enforcement mechanisms currently absent from soft law instruments.[672] In his recent paper, "Artificial Intelligence and Administrative Tribunals," Daly adds that a sufficiently robust oversight process must be in place for administrative tribunals, particularly when they engage in legal rights and obligations.[673] Daly also links the increasing complexity of the technology used with the greater need for human oversight and extensive oversight mechanisms.[674] Finally, Daly raises the question of where the oversight could be appropriately ex post, to review the appropriateness of triage decisions.[675]

Presently, there is a lack of oversight over Canadian immigration authorities. The recommendation for an ombudsperson made by the CIMM Committee Report 8[676] has yet to be acted on, with the plan shifted to seek an internal ombudsperson in light of racialized tensions among IRCC employees and staff.[677] CBSA oversight, which at the time of this thesis project has already received Royal Assent, will need to determine if its incoming independent review and

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[669] This is the guiding academic study which formed the basis of the TBS's Peer Review process and guidelines. See Kelly Bronson & Jason Millar, "Peer Review for Automated Decision-Making Tools Under Canada's Directive on Automated Decision-Making: A Model Peer Review Process and Recommendations for Best Practice" (2020) at 5 [unpublished, on file with author].
[670] Kroll et al, "Accountable Algorithms", *supra* note 23 at 70–71 also discussed in the U.S. context the oversight role traditionally performed by courts and enforcement agencies, and how technical tools can allow for more direct oversight compared to traditional legal oversight methods.
[671] Daly, "Artificial Administration", *supra* note 34 at 26.
[672] *Ibid.*
[673] Daly, "Artificial Intelligence and Administrative Tribunals", *supra* note 650 at 10.
[674] *Ibid* at 11–12.
[675] *Ibid* at 14.
[676] See especially recommendation 29 in House of Commons, Standing Committee on Citizenship and Immigration, "Differential Treatment in Recruitment and Acceptance Rates of Foreign Students in Quebec and in the Rest of Canada" (May 2022) (Chair: Salma Zahid), online: <ourcommons.ca/documentviewer/en/44-1/CIMM/report-8>. For full disclosure, the author testified as a witness for this Report.
[677] Canada, Immigration, Refugees and Citizenship Canada, *IRCC Ombudsperson Office Feasibility Study: Draft Report*, (2023), online (pdf): <vancouverimmigrationblog.com/wp-content/uploads/2024/12/IRCC-Ombudsperson-Feasibility-Study-Draft-Report-Pages-from-2A-2023-44707-FINAL-3.pdf>.

complaints body will be content to handle complaints about algorithmic bias and unfairness.[678] Where complaints may be directed at the black-box system housed by third-parties holding Federal Government contracts and proprietary information, the ability to bark and bite might be muzzled. As Cobbe writes (albeit in the UK context), "administrative law has so far been reluctant to impose public law standards on private organizations providing contracted-out services."[679]

v. Efforts to Engage Statute/Policy Reform/Creative Institutional Design

As alluded to earlier, Raso recommends that we remain "attentive to other accountability mechanisms such as statute and policy reforms, and creative institutional design."[680] From my perspective, there can be no accountability without legislative statutes (or at the bare minimum, a statute) that attempts to at least recognize the need for procedural safeguards in ADMs. If Canadian immigration legislation continues to provide broad authority, does not specify the key definition or safeguards, nor outline permissible/non-permissible uses, it will do little to serve accountability goals. The reality of the *Vavilovian* context of review is that it continues to support providing vague, discretionary powers in legislation to create a context of flexibility for the use of ADM tools.

Policy, particularly the *DADM*, must be reformed to ensure that it provides meaningful explanations, is interpretable and contestable, and offers at least baseline transparency, starting with an effective system of public notice and comment. One challenge to policy reform, as set out by McEvenue and Mann is that there is a two-way street between IRCC considering the risk

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[678] See also Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2022 (assented to 31 October 2024).
See also Canada, Public Safety Canada, *Legislation to Create Enhanced Independent Review Body for the RCMP and the CBSA Receives Royal Assent* (1 November 2024), online: <canada.ca/en/public-safety-canada/news/2024/11/legislation-to-create-enhanced-independent-review-body-for-the-rcmp-and-the-cbsa-receives-royal-assent.html>.

See also Canadian Civil Liberties Association, "Long Overdue Review and Complaints Body for Canadian Border Services and Mounties Welcomed by Rights Advocates" (12 November 2024), online: <ccla.org/criminal-justice/long-overdue-review-and-complaints-body-for-canadian-border-services-and-mounties-welcomed-by-rights-advocates/>.

[679] Cobbe, *supra* note 89 at 649.

[680] See also similar finding from Law Commission of Ontario ("LCO") who writes that "[t]he LCO has concluded that "accountable AI" depends on a mix of law reform tools and strategies, including front end regulation, substantive law reform, enhanced due process protections, and innovative initiatives to improve access to justice." Law Commission of Ontario, "Accountable AI" (June 2022), online (pdf): Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2022/06/Accountable-AI-reduced-size.pdf.>

to clients (and applicants) and the risk to the Canadian population.[681] Policy primarily aimed at Federal Government goals of efficiency and risk reduction can serve to further increase accountability, perhaps to a certain line of reporting or for a certain set of consequences but could do so at the expense of others. In this case, migrants who are subject to the tools and whose information may be required to allow the tools to continue to grow or improve, may find themselves left out of the accountability relationships and dialogue.

Institutional design, on the other hand, may capture system design that encourages concepts such as contestability.[682] Hildebrandt discusses legal by design (LbD) as an area of "techno-regulation" where technology is deliberately designed or engineered to "induce or inhibit" and enforce or preclude certain types of behaviours."[683] Creative institutional design, while welcome to challenge status quo approaches, can also serve to obfuscate adjudicative options, shift law ex ante, and perhaps frustrate or avoid administrative law review.

An example of this in the immigration space, which has also been a pattern that has accompanied recent technological developments in immigration, is to use "invitations to apply" or "rankings" or "upfront thresholds" to determine who is even eligible to apply.[684] Those not selected or excluded (possibly on some predictive analytics ground) will not even be able to make an application and therefore have access to adjudicative options. Like policy, creative institutional design depends on the ultimate aims of the Canadian government and their delegated system designers, and whether they serve (or instead move away) from accountability goals. Again, when discussing system design, it is crucial for proposals to be centred around process and the efforts of building in procedural fairness safeguards.

4.2.4 Who Should ADM Systems Be Accountable To?

A final question that should be raised, related to the point just made around a two-way balance, is the question of "to whom should systems be accountable." This is related to the articulation of "procedural administrative law." Dyzenhaus writes that "procedures are designed

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[681] McEvenue and Mann, *supra* note 105 at 23.
[682] See e.g. discussion of 'contestable design' as "system design that encourages and allows iterative human engagement in a system's evolution and deployment" in Kaminski and Urban, *supra* note 660 at 1965, n 27.
[683] Hildebrandt, *Law for Computer Scientists and Other Folk*, *supra* note 655 at 267.
[684] See e.g. Canada, Immigration, Refugees and Citizenship Canada, *Ministerial Instructions Respecting the Express Entry System*, (11 March 2025), online: <canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions/express-entry-application-management-system/current.html>.

to assure accountability both to the delegating authority and to those affected by the decisions, with the assurance guaranteed ultimately by the institution of judicial review."[685]

A system allowing for the seeing of justice as being done viscerally or bringing to the surface the system's flaws may appear accountable to the end user but may be antithetical to internal or public accountability goals that focus more on preserving national security and safety.[686] As Dyzenhaus aptly predicted in his 1997 piece and related to the ways ADMs are being implemented outside of statute, "one of the factors that makes the new political context of administrative law so problematic is that the new power holder will often not get their power directly from any statutory instrument, but, much more likely, through a contract with a branch of government."[687] The involvement of a third-party proprietor such as the Amazon that may be the purveyor of black-box technology may elicit different reporting requirements or fiduciary duties that may need to necessarily sacrifice public accountability. Accountability actors may hold disparate interests, be in different parts of the AI lifecycle, and ultimately not see the need nor owe accountability to each other.[688] Lawyers may also play an important role in placing demands for algorithmic accountability. As Jill R Presser et al. claim, "such accountability will be a reality only if lawyers are able to perform their advocacy functions properly and if courts are able to effectively exercise their monitoring and reviewing role in the interests of justice."[689]

A crucial question that threads through the work of Cobbe, Kroll, and others is how the non-technical expert[690] or layperson will be considered in any accountability mechanism that is produced. When shifting to the persons impacted, specifically, one strips away the knowledge of legal processes and policy that judges, bureaucrats, and lawyers are well-attuned to. The shift to ADM, by reducing responsiveness/accuracy, erasing explainability, and making it more difficult

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[685] Dyzenhaus, "Accountability and the Concept of (Global) Administrative Law", *supra* note 605 at 4.
[686] Also see concept in Hartzog et al, of the "veneer of accountability." See Hartzog et al, *supra* note 300 at 4. Hartzog discusses the work of Alicia Solow-Niederman who writes "[a]lgorithmic grey holes can occur when layers of procedure offer a bare appearance of legality, without accounting for whether legal remedies are in fact available to affected populations." See *ibid* at 10, citing Alicia Solow-Niederman, "Algorithmic Grey Holes" (2023) 5:1 J of L & Innovation 116 at 116, 118. online: <scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1023&context=jli>.
[687] Dyzenhaus, "The Politics of Deference", *supra* note 490 at 285.
[688] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 206.
[689] Jill R Presser, Jesse Beatson & Kate Robertson, "Tactical Challenges and Practical Considerations in Litigation AI" in Jill Presser, Jesse Beatson & Gerald Chan, eds, *Litigating Artificial Intelligence* (Toronto: Emond, 2021), ch 6 at 231.
[690] Kroll discusses the release of source code for computer systems as illegible to nonexperts. See Kroll et al, "Accountable Algorithms", *supra* note 23 at 638.

for self-represented litigants to contest could negatively impact accountability goals. The reality is that the dispersion of accountability may also serve to remove evidence that grounds the responsive justification and impact on persons of a decision.[691] In times of political shift, where doors close and security tightens, is it simply up to decision-makers to adjust the algorithms to assist in achieving those goals in ways that downplay? Does accountability require providing on-going evidence, through monitoring and auditing, that statements made in AIAs pre-deployment remain true, in operation?

The response and impact of algorithmic harm may linger beyond the original decision. Raso draws the example of the *Khaniche*[692] decision, where an Algerian applicant was denied entry to Canada as a visitor and faced challenges, although ultimately succeeding, in judicially reviewing the decision made to allow him to leave Canada and return him to Algeria.[693] Raso posits the effects of algorithmic violence on his future, perhaps even the flagging of Khaniche as a future risk or impacts on his brother,[694] even as he was successful in challenging the underlying decision. The *Kiss* case referenced earlier is a perfect example of how this may recreate accountability issues, with perhaps the true source of the unreasonable decision and ongoing harm, being the systems that deemed proximity to Roma families that claimed refugee status as a risk. Even more abstractly, one's fate may be determined not by even one's family members but simply based on shared characteristics or a set of factors (such as marital status or citizenship) which generates the risk level triage.

A final complication to the question of who ADM systems should be accountable to is the various objectives that *IRPA* sets are varied and often competing.[695] For example, at various times security interests may weigh more important than other goals such as a family reunification or economic benefit. The economic benefits of immigration may also shift as a lever, to times when less immigration is deemed economically beneficial. The Federal Government's accountability goals may be tied to ensuring the effective management of this system. How then

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[691] *Mason, supra* note 397 at para 81.
[692] *Khaniche v Canada (Public Safety and Emergency Preparedness),* 2020 FC 559.
[693] *Ibid;* Raso, "Digital Border Infrastructures"*, supra* note 499 at 10–16.
[694] *Ibid* at 18.
[695] See *IRPA*, *supra* note 7 at s 3(1)–(3).

should discretionary and shifting objectives of immigration be built into code? Can one also defer decision-maker expertise in this specific context?

One way this question may need to be reframed is to more thoroughly interrogate whether the vertical, top-down, accountability that Canadian administrative law currently rests on is effective. Is an approach that aims to isolate responsibility for a decision to one decision-maker to affect a remedy to one impacted person, drawing from *Vavilovian* language, ultimately a correct lens for evaluating ADMs? The outcomes of ADM, as Raso writes, are co-created by diverse actors and in ways that extend beyond law, policy, and technology regulation.[696] Alder's research which finds that, in the context of U.K. social security benefits, computerization generated little evidence that a "top-down" type of accountability is being matched by an increased emphasis on the legal and consumerist models that embody "bottom up" orientations may serve as a good lessons learned for Canadian immigration.[697]

4.3 Ex Ante Rulemaking

4.3.1 What is Ex Ante Rulemaking and How is it Linked to Fair Process

The challenges that have been identified with the ex post adjudicative lens, which has been the focus of the paper until now, also raise questions about whether adjudication is the most appropriate forum to address the issues that arise with governing ADMs.[698] Raso writes:

> "The greatest risk going forward is that **conventional administrative law thinking will continue to sidestep the complex dilemmas posed by algorithmically-driven decision-making**. This risk will materialize if we continue to prioritize judicial review as the primary governance mechanism."[699] [emphasis added]

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[696] Raso, "Digital Border Infrastructures", *supra* note 499 at 19.
[697] Adler, "Fairness in Context", *supra* note 32 at 634.
[698] Andrew Green also explains that adjudication tends to get more attention in administrative law, rules, and soft law are critical to the operation of the administrative state. Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond, 2022), at 126.

See discussion in which Williams nuances this, by stating (in the European context), that "the aim of judicial review as a 'judge over your shoulder' is intended to provide positive *ex ante* guidance, as well as challenging conclusions *ex post.*' She discusses how increasing lawfulness and legality can increase public confidence and trust, suggesting the interrelation of *ex ante* and *ex post* processes. R Williams, *supra* note 81 at 480

[699] Raso, "AI and Administrative Law", *supra* note 57 at 14. Raso's earlier work discuses also the limitations of a judicial review-based approach, does not capture front-line decisions and overlooks the very day contexts where

Indeed, areas of emerging interest in rulemaking around ADMs include how to put front-end guardrails, such as codes of conduct, governance policy, consulting with the public, and providing sufficient notice and comment. Kroll et al., sharing the technologist perspective, write that technologists and computer scientists tend to focus on ex ante approaches aim to establish that the decision process works as expected, whereas governance structures are aimed and understanding ex post approaches examine once decisions have been made, including addressing key issues such as review and oversight.[700] Judicial review, as we have explored, does seem to reach into both expectations of decision-making process, but through the lens of ex post review of how decisions were made. Yet, it does reveal a common thread in both technology and law, of setting out the under-explored ground rules that lie outside of broad authorizing legislation and restrictive judicial review processes that this thesis project has explored.

The consideration of ex ante factors may complicate, seek to avoid adjudication, or create new considerations for how fairness mechanisms are embedded. Before exploring and differentiating how such ex ante factors have worked in Canada, it is worth briefly comparing the operation of ex ante rulemaking to the lens of adjudication. To do so, it is first important to define the terms "rules" and "soft law." Rules are more commonly referred to as "regulations" in the Canadian context. In *Auer,* the SCC rejected the Court of Appeal's attempt to distinguish between "true regulations" derived from parliament's consultative processes and bylaws, rules, and regulations made by administrative tribunals and municipal governments, writing:

> [43]… "Regulations 'derive their validity from the statute which creates the power, and not from the executive body by which they are made'" (Canadian Council for Refugees, at para. 51, citing Reference as to the Validity of the Regulations in relation to Chemicals, 1943 CanLII 1 (SCC), [1943] S.C.R. 1, at p. 13).[701]

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government with hybrid human-technological decision-making systems, particularly through policy and procurement. See Raso, "Unity in the Eye of the Beholder", *supra* note 225 at 15.

See also Robert Thomas writing in the U.S. context:

> "Nonetheless, there have long been concerns that a court-focused approach misses much of the action, not least the basic nuts and bolts of how administrative systems operate in practice and develop over time. Only a small number of administrative decisions are ever challenged by way of judicial review. The focus on courts and judicial reasoning tends to overlook other non-legal influences on administrative behaviour."

Robert Thomas, *Administrative Law in Action: Immigration Administration* (Oxford: Hart Publishing, 2022) at 3.

[700] Kroll et al, "Accountable Algorithms", *supra* note 23 at 702.

[701] *Auer v Auer*, 2024 SCC 36 [*Auer*].

Soft law, as opposed to rules, is developed by administrative decision-makers, but is not legally binding.[702] It comes in many forms, including ministerial instructions, guidelines, codes, manuals, directives, and training materials – and increasingly in the immigration space, ministerial instructions, even online websites and notices.[703] It does not require a statutory basis, although some legislation specifically provides for guidelines.[704] Glover Berger highlights that "under the *Immigration and Refugee Protection Act,* the governor in council is broadly authorized to making regulations dealing with procedures, and the minister of citizenship and immigration is authorized to proposed regulations to the House of Commons on a range of matters including procedure."[705]

In the Canadian immigration context (and in the Canadian regulatory regime more generally), there have been recent shifts away from fulsome processes that engage stakeholders to online "Reddit-style" platforms where feedback provided is not meaningfully taken into account.[706] Stakeholders themselves are finding that the technological feedback processes are not effective and feel bypassed in the regulatory proposal process.[707] Recent immigration regulatory amendments have acknowledged little to no consultation with relevant stakeholders prior to key regulatory amendments impacting in high-impact areas such as the cancellation of visa documents, not following apparent guidance.[708] Rendering matters more challenging in the

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[702] Green, *supra* note 698 at 106.
[703] Sossin & Smith, *supra* note 129 at 871.
[704] Green, *supra* note 698 at 111–112.
[705] Glover Berger, *supra* note 54 at 192.
[706] See discussion of this type of public consultation engagement in Cristie L Ford, "Regulation as Respect" Law & Contemp Probs [forthcoming], at 136, 141–142, online: <ssrn.com/abstract=4568511>; See also: example of reddit style commenting in the proposed amendment of removing the citizenship oath, including significant backlash and criticism of the Government's immigration policy more generally.
See Canada, Government of Canada, *Canada Gazette, Part I, Volume 157, Number 8: Regulations Amending the Citizenship Regulations (Oath of Citizenship)*, (25 February 2023), online: <gazette.gc.ca/rp-pr/p1/2023/2023-02-25/html/reg1-eng.html> [*Gazette P1 V157*].
[707] Canada, Treasury Board Secretariat, *What we Heard: Report on Regulatory Modernization* (last modified 9 March 2023), online: <canada.ca/en/government/system/laws/developing-improving-federal-regulations/regulatory-evaluation-results/what-we-heard-report-regulatory-modernization.html>.
[708] Several recent Government consultations have elicited little to no feedback on areas that would be considered high impact, many with either no comments, a few irrelevant comments, or flooded comments. See: e.g. a regulatory review of the authority to issue removal orders, streamlining decisions away from the independent Immigration Division tribunal. The only posted comment focused on the right of entry of persons with disabilities. Of the 30 stakeholder organizations notified, only one unnamed organization provided comments. Those comments were also not posted.

immigration context, the Minister of Citizenship and Immigration is empowered through statute to proceed by MIs[709], without the need to seek regulatory of legislative change, in several key matters such as the creation of new programs or processes for assessing applications.

4.3.2 The Challenges with Guidelines in the Immigration Context

Immigration authorities rely on guidelines to render several decisions. Some of these guidelines are derived from legislation which delegates, for example to the IRB, authority to issue its own rules and guidelines.[710] IRCC has increasingly relied upon soft law such as websites containing the processing instructions around post-graduate work permits. These instructions, often involving constantly changing website pages, have been accepted by the FC as being more than mere guidelines and having precedential legal force that must be followed and for which there can exist, possibly no discretion to reach a different outcome.[711] However, on the more positive front for the use of these soft law tools, guidelines – for example IRB's

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See Canada, Government of Canada, *Canada Gazette, Part I, Volume 157, Number 46: Regulations Amending the Immigration and Refugee Protection Regulations*, (18 November 2023), online: <gazette.gc.ca/rp-pr/p1/2023/2023-11-18/html/reg1-eng.html>.
A few recent cases highlight an even greater concern, that public consultations are not taking place and/or being potentially misrepresented as having occurred.

In a recent consultation on the proposed regulation on expanding the right to cancel immigration documents, IRCC states:

> "No public consultations were held on these proposed regulatory amendments in advance of the prepublication process; however, Canada's air industry and selected tourism associations were informed of IRCC's intention to propose changes through regulation."

See Canada, Government of Canada, *Canada Gazette, Part I, Volume 158, Number 24: Regulations Amending the Immigration and Refugee Protection Regulations (Cancellation of Immigration Documents)*, (15 June 2024), online: <gazette.gc.ca/rp-pr/p1/2024/2024-06-15/html/reg1-eng.html>.

[709] MIs are found in *IRPA* at 14.1. Since then, the Atlantic Immigration Pilot (now program), Express Entry, and the Home Childcare Provider are examples of programs that have been created without a formal notice and comment process.

MIs were initially created to set caps and implement level plans, the *Budget Implementation Act,* SC 2008, c 28 which has been expanded to give the Minister's new powers to implement immigration programs and exemptions.

The Government of Canada's Immigration Policy Primer explains that Ministerial Instructions are not statutory instruments, they are not subject to the same regulatory consultation and publication requirements.
See Durantaye-Guillard, Camille De La, *Immigration Policy Primer*, Publication No 2020-05-E (Ottawa: Library of Parliament, 2 November 2023), online (pdf): <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/PDF/2020-05-E.pdf>.

[710] See *IRPA, supra* note 7 at s 161(1).
[711] See Justice Mactavish's decision in *Nookala v Canada (Citizenship and Immigration),* 2016 FC 1019 which has been adopted in several subsequent FC decisions revolving IRCC's PGWP Program Delivery Instructions.

Chairperson's Guideline 9 on Sexual Orientation and Gender Identity and Expression[712] have factored significantly into decisions on judicial review being overturned as unreasonable for tribunal members having failed to consider these distinct issues.[713]

Guidelines have also been found to possibly fetter discretion. Sossin has written about the *CARL v. Canada* decision,[714] where Chief Justice Crampton found that the adjudicative independence in the context of "jurisprudential guides" outlining situations in certain countries interfered with decision-makers independence and was invalid.[715] Chief Justice Crampton found that the guidelines may have the impact of pressuring independent decision-makers to make particular factual findings or attenuating their impartiality, making it more difficult to make their own findings.[716] Sossin writes:

> "To the extent that it enhances accessibility, consistency, and clarity in administrative decision-making, like other forms of soft law, it serves a helpful and legitimate tool to be employed by administrative decision-making bodies in ways that are transparent to those affected by the decision. However, to the extent that it binds decision-makers to views or findings that impairs a party's ability to know and respond to the case they must meet, or is based on implicit forms of bias in the data on which an algorithm relies, AI may well constitute a breach of a decision-maker's duty of procedural fairness."[717]

This is made much more complicated in the immigration context for ADMs, because the non-binding *DADM* represent for applicants the only possible guardrail to counterbalance IRCC's overbroad legislative mandate. These guidelines may serve a function akin to IRB's guidelines to remind decision-makers to consider factors that lie outside of the legislative mandate and perhaps as a legal constraint. Within this context, there will certainly be calls for statutory amendments, clearer regulation, or at the very least, more binding guidelines. Indeed, the CBA has recently written IRCC to ask for a legislative and regulatory framework of ADMs.[718]

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[712] Canada, Immigration and Refugee Board of Canada, *Guideline 9: Proceedings Before the Involving Sexual Orientation and Gender Identity and Expression*, (last modified 17 December 2021), online: <irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>.
[713] See e.g. *Mohammed v Canada (Citizenship and Immigration),* 2023 FC 956. See also similar discussion of IRB's guidelines for vulnerable persons in Glover Berger, *supra* note 54 at 192-193.
[714] *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration),* 2019 FC 1126 ["CARL"].
[715] Sossin & Smith, *supra* note 129 at 198–199.
[716] *Ibid* at 199, citing CARL, *supra* note 714 at paras 92-95
[717] *Ibid* at 199.
[718] CBA, *supra* note 136 at 14–15.

Daly has, in a recent paper, developed an analytical framework based on "imperative language, detail and precision, and the intended effects on third parties."[719] One of the ways in which procedural fairness rights may interact with these soft law guidelines in immigration is through the previously explored doctrine of legitimate expectations. If the scrutiny around ADM forces the incorporation of binding guidelines into regulation, or if the guidelines themselves give directed assurance to procedural steps to be followed, arguments may be made that there is a breach of procedural fairness based on legitimate expectations. If those guidelines are ignored or not applied by decision-makers in a transparent way, this could give rise to concerns over the reasonableness of the review in light of relevant factual and legal constraints. It is clear at this stage that neither the DADM nor any non-binding AI framework policy will serve as this binding guidance.

4.3.3 Is an Ex Ante Shift Desirable? Consequences of a Soft Law/Risk-Based Approach

Taking a regulatory approach to the issue of ADMs may also shift the focus away from adjudication to efforts to introduce up-front rules and guidelines to avoid or divert the need to adjudicate and rather encourage up-front efforts to meta-regulate or avoid risk. This approach may be more efficient and place less constraint on already overburdened/underfunded courts[720] and other resolution bodies. Such an approach may also force a shift away from usual adjudicative frameworks that this paper has explored, to new ones around regulatory approaches.

An important side of the debate over ex ante systems is the work of the late Ian Kerr, who warned that the development of predictive technologies and probabilistic techniques promising efficiency and reliability may be justification for a "jurisprudential shift from our current *ex post facto* systems of penalties and punishment to *ex ante* preventative measures."[721] Kerr was concerned about the altered path of law between retributive and restorative models and future actual justice, particularly the impact on social justice and obfuscating the citizen's legal standpoint.[722] Kerr warned that due process, as a prerequisite site for legal prediction would

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[719] Daly, "Artificial Administration" *supra* note 34 at 214.
[720] Ryan Tumilty, "Federal Court facing funding crisis as immigration backlog grows, chief justice warns", *The National Post* (13 March 2024), online: <nationalpost.com/news/politics/federal-court-funding-crisis>.
[721] Ian Kerr, "Prediction, pre-emption, presumption: The path of law after the computational turn" in Mireille Hildebrandt & Katja de Vries, eds, *Privacy and Due Process After the Computational Turn* (London: Routledge, 2013) 91 at 92.
[722] *Ibid* at 92–93

suffer, with law making pre-emptive predictions about individuals. Kerr defines these as predictions that "do not assess an individuals' actions but whether the individual should be permitted to act in a certain way."[723] Kerr uses the example of a no fly list, which unironically draws parallels to the *Kiss* case recently cited, that pre-empts and prevents the harm, with prediction replacing the need for proof.[724] Citing the work of Danielle Citron, Kerr explains how the right to be heard, participation, and transparency are thwarted as the public gets eroded from the rulemaking process.[725] Based on what has transpired from the parallels of the immigration context and ADM rulemaking, Kerr's "prediction" appears to have come true.

In the Canadian immigration process, this may not necessarily mean the process of refusing applicants but instead utilizing ex ante systems to prevent individuals from the benefits of the routine process, through triage, or to reject an application as incomplete, using a tool such as Cardinal. There is also the increasing possibility, with the sub-delegation of key decision-making functions to third parties, for what Andrew Green details as the principal-agent problem. One can foresee for example, where tools operate in black-box environments and are dependent on third-party tech companies, how interests and instructions may not necessarily align.[726] Furthermore, the possibility of regulatory capture in rulemaking also increases the confluence of factors that may make tracing the context of the overriding purpose of a regulatory object a more complex and contested process.[727]

From the above, it appears that a conclusion can be made around a regulatory lacuna existing in Canadian immigration and administrative law. This has been created by a lack of regulation over ADMs, mirroring shifts seen in the immigration regulation space more broadly. *Vavilov*'s analytical framework, as we explored, gives rise to incentivizing broad legislative mandates for the use of ADMs and regulatory aversion. The immigration regime reflects this, lacking written regulations and policies that clarify how the broad authorization is to apply in practice. The reliance on the *DADM* as the source of rulemaking creates a distinct challenge for judicial review of Government action. Many decisions made by these ADMs will either not be justiciable or subject to whether a certain guideline or website instrument was properly followed.

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[723] *Ibid* at 92.
[724] *Ibid* at 106.
[725] *Ibid* at 110.
[726] Green, *supra* note 698 at 108–109.
[727] *Auer, supra* note 701 at paras 53–54.

Cobbe, writing in the U.K. context, highlights how the judicial review of individual decisions (which she deems "bureaucratic judicial review") begins to blur into the review of policies, given the nature of the processes and choices of the ADM system.[728] While judicial review processes may differ, this is consistent with courts being asked to take a closer look at how guidelines function, possibly crystallize, and guide decision-making.[729]

Ultimately, I see regulatory and soft law developments as a shifting context that may also serve to be, itself, a legal constraint. They will, however, bring along, their own set of practices and remedies that may push the bounds of traditional administrative law. This in turn will engage key administrative law concepts such as legitimate expectations, fettering discretion, and internal/external practices that this project has raised as contested areas.[730]

4.3.4 Bringing Together Ex Ante and Ex Post Approaches – Future Process Alteration Utilizing Data and Legal/Judicial Analytics

As alluded to in Chapter 2, IRCC's ADM systems already contain ex ante rules, which are altering the arc of decision-making by impacting triage processes and risk assessments, among other areas. The use of this data, and its emerging application through ex post legal and judicial analytics, will directly impact a court's process of reviewing ADMs.

From the outset, it is important to acknowledge the starting point of data being a barrier particularly for applicants and claimants attempting to prove a breach of procedural fairness or a *Charter* violation. Numerous immigration cases have failed on either the scarcity of data or applicant's counsel's lack of access to data. Meanwhile, the DOJ lawyers are able to use the data they collect and hold from the immigration applicants (which goes unscrutinized) to deny the existence of differential outcomes or inequities.[731] In my requests to IRCC, specific to the issue

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[728] Cobbe, *supra* note 89 at 41.
[729] In the immigration context, see e.g. *Chen v Canada (Citizenship and Immigration),* 2024 FC 767 where I was counsel in an unsuccessful judicial review over the Government's post-graduate work permit guidelines.
[730] Raso, "AI and Administrative Law" *supra* note 57 at 6 provides a potential of administrative law being inputted into soft law factors writing: "Procurement policies and contracts could include criteria for algorithmic tools, including disclosure about how and where these tools operate and which datasets they rely upon."
[731] See e.g. *Begum v Canada (Citizenship and Immigration),* 2018 FCA 181 where Government data was procured to show a lack of differential outcome for female sponsors disproportionately impacted by IRCC's Minimum Necessary Income ("MNI") requirement. The FCA was ultimately persuaded by this data more than the social science evidence provided by the Appellants. I have written in other work around the challenges of the Federal Government's data-based narratives and how they may be presented in ways that obscure the multiple layers of

of ADMs, I have been told that data cannot be made available for my requests to better understand how ADMs triage.[732] Other data sets received have contained major gaps (errors) or require cleaning, actions difficult to do without access to raw, applicant-level data. IRCC itself, in seeking to audit Chinook, received data that showed discrepant outcomes and chose not to publish this data in exchange for doing further enquiries.[733] Indeed, the data concerns likely explain why no final GBA+ report has been published for Chinook.

A second way data manifests (more qualitatively) is in the Federal Government's justifications, such as in IRCC's published peer review for the AIA for the AA-TRV model. IRCC writes about their use of sampling, modelling, re-training, and reproducibility in published AIAs. Still with only brief explanations, for example on the choice to maintain decision tree models, it is difficult for outside reviewers to understand IRCC's rationalization, consider non-ADM alternatives, and critically evaluate the ADM system as a whole.[734]

New developments in analytics, particularly the development of tools (including those ML-driven ones), have allowed for key data insights to be made about legal decisions. Legal analytics, as defined by Jena McGill and Amy Salyzyn,[735] involves the mining of data contained in case documents and docket entries and then aggregating that data to provide previously unknowable insight into the behaviour of individuals, organizations, and the subjects of lawsuits."[736] Judicial analytics, as a sub-category, applies these technologies to judges and judicial decision-making.[737] Judicial analytics has been banned in some jurisdictions, while in others, there is discussion of its regulation for permissible and impermissible use. Salyzyn and McGill highlight both the challenges of what they deem as "mainstreamed" or "public use" insight into judging and the work of judges.[738] McGill and Salyzyn draw attention to the possible

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narratives that intersect. See Wei William Tao, "Spouses of the Pandemic: Data, Racism, and Mental Health" in Colleen M Flood et al, eds, *Pandemics, Public Health, and the Regulation of Borders* (Abingdon, UK: Routledge, 2023) 355, online: <taylorfrancis.com/chapters/oa-edit/10.4324/9781003394006-19/spouses-pandemic-wei-william-tao>.

[732] Statistical Reporting Group, Research and Data Branch, "RE: CR-24-0602 - Approval and Refusal Rates by A2SCTriage Assignment, RC number, and Visa Office (2019 to present)" (17 October 2024) via email [communicated to author].

[733] Canada, Immigration, Refugees and Citizenship Canada, ATIP Results A-2022-78235, at 15-19.

[734] Canada, Open Government, "Peer Review of the Temporary Resident Visa Eligibility Model", *supra* note 216.

[735] Jena McGill & Amy Salyzyn, "Judging by the Numbers: Judicial Analytics, the Justice System and its Stakeholders" (2021) 44:1 Dal LJ 249 at 254.

[736] *Ibid* at 254.

[737] *Ibid* at 255.

[738] *Ibid* at 252.

concerns both in the current limitations of existing tools – largely the same issues I have run into, but also in the potential risks and benefits as it pertains to the public, judges themselves, and to lawyers and the legal profession.[739] I see this as a bridge between ex post review (auditing) and ex ante regulation, as the ability of these tools to predict or foresee outcomes implicates the upfront guardrails that must be placed to regulate their use.

Some of the concerns that McGill and Salyzyn flag which may be applicable to the ADM process include the possibility of reasonable apprehension of bias being more visible to the public and the increase of the practice of judge shopping.[740] Specifically, judges may also find their competence questioned.[741] For example, if cases are hypothetically being triaged based on the level of immigration knowledge[742], adding technological considerations may be another complicating factor. Because technology is becoming the core of immigration decision-making, reviewing immigration decisions may require a certain level of expertise. If that expertise is centralized in only a few judges as opposed to the judiciary as a whole, there is a greater possibility of more discrepant and inconsistent decisions. Judicial analytical tools can be utilized to try and frame these lines of case law and avoid or promote the framing of certain arguments around technology. While in immigration cases, the assignment of judges is usually not known until just prior to the hearing, savvy counsel can still adjust strategies last-minute in ways where published decisions will be most directly impacted.

Positively, the public may be given greater insight into the quality of information of the tool's output, which will increase general public literacy. This aligns with some of Sossin's earlier comments on the benefits of AI. For judges, education and statistics on their decision-making may help with education and the rendering of better decisions. In this sense, these tools could improve responsiveness and correct for biases.

Sean Rehaag brings the application of judicial analytics into the immigration realm, through his use of computational methods (and publishing of open-source code) in his recent

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[739] *Ibid* at 263–277.
[740] *Ibid* at 264.
[741] *Ibid* at 266.
[742] Several of the Court's recent appointees were practicing Canadian immigration and refugee lawyers before they were appointed. For example, of the ones I am personally aware of Justice Michael Battista, Justice Angus Grant, Justice Lobat Sadrehashemi, and Justice Avvy Y.Y Go were immigration lawyers. Justice Alan Diner was also an immigration lawyer, having been appointed in 2014.

paper the *Luck of the Draw III.* Here, Rehaag developed a ML model to scrape the FC website and analyze the outcomes in stay of removal cases.[743] Rehaag found that there were major variances in stay grant rates across judges, controlling for possible factors such as time and case type, as well as variance between the city where the underlying judicial review was first filed.[744] Among issues Rehaag flags, citing earlier work by Molnar, is that resource inequities exist between the DOJ, which is developing their own bulk data models, and the applicant's side, which faces challenges in even accessing and processing bulk data.[745] Rehaag is able to leverage GPT-3, but is critical of the barriers posed, for example by the FC only providing stay decisions to CanLII, and CanLII having terms of use that prevent bulk access.[746]

While the FC's current position is not to use AI tools without public disclosure and consultation,[747] one can see the potential utility for various forms of the tools. RPAs could assist with tasks such as summarizing facts, generating transcripts, or automating registry tasks. ADMs and pattern detecting AI tools, if taken a step further might have the ability to enforce concerns over non-compliance with the Guidelines around Generative AI and its own error auditing. Perhaps one can imagine even a greater role – as a way to respond to the Government's own use of ADMs in underlying decision-making.

To provide a concrete example of where this may be relevant, consider the case of an Iranian applicant who is refused on boilerplate language, about their family ties and their ability to leave Canada at the end of their authorized stay. Treated individually, this applicant's decision likely engages a review of the reasonableness and responsiveness to the submissions made by the applicant (as reviewed earlier in the *Vavilov* context). If the context were to change, and it was statistically proven or demonstrated that all applicants of this individual's age, marital status, country of citizenship, city or town of residence, financial profile, or education institute were being refused through a specific process by a specific decision-maker, group fairness and procedural fairness (likely attracting the correctness standard) may be the more relevant

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[743] Rehaag, *supra* note 376.
[744] *Ibid* at 110–114.
[745] *Ibid* at 84, n 37.
[746] *Ibid* at 83.
[747] Canada, Federal Court of Canada, *Interim Principles and Guidelines on the Court's Use of Artificial Intelligence* (20 December 2023), online: <fct-cf.ca/en/pages/law-and-practice/artificial-intelligence>

framework. Indeed, one of the major challenges with judicial review, as earlier explored, is the court's inability to see decisions as not merely retail but part of a bulk or group decision-making which engages principles of group fairness.

Both IRCC, through the development of predictive analytics tools to predict litigation outcomes, and applicants, through the use of private software to try and predict case outcomes, are engaged in efforts to try and leverage ex ante approaches alleviate ex post challenges.

From another perspective, reviewing judges with the tools to ask, inquire, and present the data case to back up their analysis can serve potential positive benefits for procedural fairness. This is aligned with Sossin's belief that qualitative and quantitative data can support continuous improvement for administrative justice bodies.[748] This raises a pertinent question, one that I argue serves as post potential future constraint and context. Will judges who are engaged in the judicial review of ADM decisions, now powered with judicial analytics tools and facing their own potential statistical audits rely more on data analytics and ensuring consistent rulings than navigating the stickiness between reasonableness and procedural fairness review? Or will judges who continue to use reasonableness and procedural fairness frameworks continue to view ADM as merely a process irrelevant to the final human decision?

I find the data output which may serve as connecting the "missing dots on the page"[749] is a key factor that may impact the efficacy of the current administrative law framework to the application of ADMs and the effective interrogation of fair process. Applicants themselves, including third-party businesses are beginning to advertise the ability to predict and prescribe outcomes.[750] It seems inevitable that eventually, a FC judge's review of an ADM's system output will need to engage evidence and arguments surrounding the data that when in and the data that the system generates. How this data interrogation occurs within a procedural fairness challenge (and if correctness is the lens the FC will take) will be important to track in future decisions.

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[748] Sossin, "Administrative Law and Artificial Intelligence", *supra* note 142 at 205.
[749] *Vavilov, supra* note 254 at para 97, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11.
[750] See e.g. ApplyBoard, "Improve Students' Chances of Study Abroad Success with the Canadian Visa Calculator" (1 June 2022), online (blog): <applyboard.com/blog/canadian-visa-calculator-launch>.

4.4. How Transparency, Accountability, and Ex Ante Rule Making Impacted Xi and Wang's Process

Stepping back into Xi and Wang's matter briefly and focusing on one use of automation, the security screening process, one can see how these three areas apply in practice as "pre-requisites" to the ability of Wang to pursue arguments to the reasonableness, fairness, and legality of the decision. The use of the technologies, for example how the many bodies used automation or RPAs in screening was not (and still is not) readily apparent. Whether it was Chinook Module 5 used by IRCC or the SSA tool used by CBSA (if it is indeed already being piloted internally) that flagged Wang's matter in the first instance, is unclear. There are no written reasons for this process, as the security screening led only to delay and eventually the decision of an inland officer to arrange for human intervention. But how that intervention occurred and whether automation bias, for example, was created by the process is not transparent.

The question of accountability is therefore also left largely unanswered. The various immigration officials were arguably being accountable to the Canadian public but demonstrated little accountability to the interests and impacts on the persons concerned. Xi and Wang did not receive an explanation, cannot interpret, nor were given reasons that alluded to how technology may have contributed to the decision made. For Xi and Wang, their inability to appeal and contest, and their lack of choice but to comply or proceed with the steps imposed is telling.

As counsel, I might want to challenge the fairness of the internal processes that led to the case being triaged by the many decision-makers in negative ways. I am limited to the judicial review process and its internal constraints. Furthermore, without access to the ex ante directives and guidelines (or even bare minimum disclosure) that led to decision-making path, I am unable to contest the Federal Government's use. My only recourse are ATIPs that are subject to delay and heavy redaction or data requests that are likely to come back incomplete or sanitized. I am forced to scrutinize the reasons under the assumption of individualized, human, treatment. The unspoken reality that both myself and my client know is that the process is not fair.

Chapter 5: A Focus on Right First Time – Recommendations and an Invitation for Refinement

"Policy-makers, academia, and the public are being forced to reckon with fundamental normative ideas around what constitutes intelligence, how to manage and regulate new systems of cognition, and who should be at the table when designing and deploying new tools that can be used to either dismantle or reinforce the status quo"

Petra Molnar, Automating Migration[751]

5.1 Developing a "Getting it Right the First Time" Approach to ADMs

Having explored how transparency, accountability and ex ante rulemaking are all requirements for areas where future exploration of fair process is needed, this chapter begins to take a step back and examine the bigger picture. The FC's backlog of cases, worsened by ADM's poor provision of reasons, signals that decisions are not being made "right first time."

The *external* dimension legal adjudication branch is being forced to address these errors and indeed, in many cases, the courts guidance is not being applied by first-instance decision-makers. Cases that are sent back for redetermination and refused again (and often repeatedly) with repeat boilerplate reasons creating the "merry-go-round" issue, burdening both courts and administrative tribunal.[752] This *"wrong again, Xth time"* model continues to perpetuate administrative justice challenges. To avoid the strain on the courts, it appears apparent that IRCC must provide a greater focus on internal governance, but importantly also allow public stakeholders to participate in this collective fair process-building.

As Adler mentions, this requires a focus on decisional accuracy, defined as "collecting relevant information and then applying the appropriate legal rules or standards to produce a decision that corresponds with facts and is well reasoned and robust."[753] I would caution IRCC not to over-rely on future GPT technology to deliver surface-level accuracy through the façade of individualized reasons. I would instead focus on informing public stakeholders (including applicants and courts) and building greater buy-in on the necessity for efficiency and integrity-increasing practices. While some applicants with greater knowledge of the systems may create

[751] Molnar, *supra* note 12 at 228.
[752] See also *Singh v Canada (Citizenship and Immigration),* 2022 FC 1643 at para 40.
[753] Adler, "Future of Administrative Justice", *supra* note 42 at 625.

"gaming the system" concerns, a potential benefit are the subset of applicants who will be able to re-evaluate their decisions to apply and possibly be subject to the negative consequences of ADMs. Furthermore, as the administrative burdens lessen with potentially less applicants due to policy shifts, IRCC may need to further update and justify its approaches and rationalize potential shifting practices towards more individualized assessments.

However, as alluded to earlier, the competing objectives of *IRPA* may serve as a further barrier to what a "right first time" model looks like in Canadian immigration, as the system continues to entrench Adler's managerial approach model. Immigration law and policy in Canada is constrained by processing targets, historical data inputs, and increasingly even the number of employees due to workforce adjustments[754] that have had to limit the number of potential HITL. Contextualizing this alongside geopolitical influences and increasingly shifting objectives towards security as a primary concern,[755] right first time may be more synonymous with reducing bad actors and keeping deemed "higher risk" applicants on the other side of the Canadian border, than serving the fairness needs of non-citizens.

5.2 Unique Consideration of the Immigration User Experience

A common thread through this thesis is definitional tension in understanding key technological and administrative law terms that impact the context and ultimately the nature of procedural fairness rights. They are, at their core, contested elements. How HITL is viewed, transparency's desirability, and the role of accountability towards system integrity and national security are just a few of these tension points. In this sense, how these issues are viewed depends on the "user".

The first problem that arises when considering the "user" is to realize, much like the definition challenges that have been documented throughout this thesis is specifying who the user is. Indeed, Adler in his recent work has updated his six normative models of administrative

[754] Public Service Alliance of Canada, "PSAC files policy grievance to halt layoffs at IRCC" (6 March 2025), online: <psacunion.ca/psac-files-policy-grievance-halt-layoffs-ircc>.
[755] See for description of security screening processes, IRCC, "SECU – Immigration Security Screening – A Trilateral Program – August 28, 2024" (last modified 24 December 2024), online: <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/secu-august-28-2024/immigration-security-screening-trilateral-program.html>

justice, replacing consumer with user and centering the claimant's preferences as a legitimating goal through the accountability mechanism of co-production with technologists.

Table 30.3 Six Normative Models of Administrative Justice (Updated Version)

Model	Mode of Decision-making	Legitimating Goal	Mode of Accountability	Mode of redress
Bureaucratic	applying rules	accuracy	hierarchical	administrative review
Professional	applying knowledge	public service	interpersonal	second opinion or complaint to a professional body
Legal	asserting rights	legality	independent	appeal to a court or tribunal (public law)
Managerial	managerial autonomy	improved performance	performance indicators and audit	none, except adverse publicity or complaints that result in sanctions.
User	meeting users' needs	users' preferences	co-production between claimants and IT staff	design of new prototypes
Market	maximising profit	economic efficiency	contractual	'exit' from contract and/or court action (private law)

Figure 7 - Adler's Updated Six Normative Models of Administrative Justice[756]

The reality is that ADMs indeed have multiple users, ranging from the client/person subject to the ADMs final decision, who must navigate their cases through government ADMs, to the front-line decision-maker who must apply the technology alongside their retained discretion. There is also the Federal Government department itself which has approved the ADM project, but may be disconnected from its technology-developing agents and contracted third-party businesses.[757] This is not to mention the role of reviewing courts, and the actors (such as lawyers for applicants and the government) that participate in the decision-making and review processes. Each of the actors will bring their own perspective and various interests (including pecuniary) to the table when it comes to their views of these tools. Drawing in the third *Dunsmuir* concept,

[756] Adler, "The Future of Administrative Justice", *supra* note 42 at 639.
[757] For detailed discussion of principal-agent problem and capture in government delegation and consultation see A Green, *supra* note 698 at 109–110. As far as I am aware a study has not been done of how these issues are altered in the context of hybrid decision-making and ADMs.

with the increasing complexity of these systems, what appears *intelligible* to one party, might be deeply inaccessible and incomprehensible to another.

Considerations in this ADM space (to-date) have disproportionately focused on the State's perspective or the front-line decision-makers who represent the State. Therefore, the conversation has been focused on the perceived and difficult to contest process benefits of ADM, namely reduced costs, enhanced speed and efficiency.[758] I argue for a shift in focus towards the individual on whom ADM systems are tested and implemented – the end users to whom ADM systems must be accountable – not only for their unintended harms, but also for any unearned benefits they may produce.

On the consequences end, consider the power differential between the individual subject and the State when it comes to the use of these technologies. On the ground, one party is controlling the decision whether to use and subject the individual to the use of technology. Only the State controls the choices of technological procurement and when the details of the technology are to be shared or protected. Only the State has access to the soft law policy to approve the project, without the individuals impacted being at the table. Finally, in terms of legal remedy and mechanisms, the state's ability to control the materials that enter the application record, through rules of the FC, for example, exceeds the applicant's ability to bring them forward. The immigrant applicant end user often has no choice and must consent to the application of technology as a requirement for applying for, obtaining, or remedying their immigration situation.

Some of the systemic consequences may also be hidden as technology provides solutions for those it views as low risk and privileges them. Applicants may be able to enter Canada quicker, have their temporary resident, permanent resident, and citizen applications decided quicker, and not be subject to comprehensive screening processes. Where a majority benefits from approvals and faster processing times, based on historical data or perceived privileges, it could overshadow the narrative of the minority who the system delays and rejects.

It would be perhaps apt to refer back to Kroll et al.'s call for collaboration between computer scientists, policymakers, and indeed lawyers to figure out how to reconcile the

[758] Scassa, *supra* note 65 at 264–265.

technical equivalent definitions and shifting treatment of administrative law terms.[759] Rebecca Williams, too, states that: "it will be vital for courts to have a detailed grasp of the technical matters as well as legal doctrine in order to answer them from a manner which provides helpful guidance for those operating the systems as well as necessary protection for those subject to them."[760] Cobbe, writing in a U.K. context, similarly discusses how administrative law needs to respond to ADM in a way that "makes sense" from both a legal and technical point of view.[761]

Transparency, accountability, and ex ante rulemaking are all tied to the consistency and equality goals of the rule of law.[762] With the need for administrative decision-making to be consistent with the rule of law, the judicial review process serves as an important supervisor of this foundational principle.[763]

Extrapolating from this identification of different user perspectives, one might see in the use of ADMs as a dispute between: (1) Canadian Government authorities who are increasingly reliant on technology as a solution, motivated by both bureaucratic models around accuracy and efficient, and managerial concerns on maintaining consistent outcomes; (2) increasingly tech-critical immigration applicants (and their counsel) who see a lack of recourse in legality and increasingly challenging administrative review processes; and (3) tech-neutral[764] judges still trying to situate or orient to the ways process impacts substance, and how humans and technology truly interact.

In this sense, and bringing back our initial critique, it is difficult to build out the immigrant applicant as a true prioritized user, but perhaps future models need to centre on

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[759] Kroll et al, "Accountable Algorithms", *supra* note 23 at 695-705.
[760] R Williams, *supra* note 81 at 485.
[761] Cobbe, *supra* note 89 at 637.
[762] Szilagyi, *supra* note 25 at 13, n 52 citing Zalnieriute et al., *supra* note 595 at 4–5.
[763] In *Khela, supra* note 420 at para 37, the Court writes:

> [37] This being said, there are, from a functional standpoint, many similarities between a proceeding for habeas corpus with certiorari in aid and a judicial review proceeding in the Federal Court. After all, "judicial review", "[i]n its broadest sense", simply refers to the supervisory role played by the courts to ensure that executive power is exercised in a manner consistent with the rule of law (Farbey, Sharpe and Atrill, at pp. 18 and 56). This is also the purpose of habeas corpus, if distilled to its essence (see generally, Farbey, Sharpe and Atrill, at pp. 18 and 52-56).

[764] See especially Hartzog et al's discussion of the Neutrality Fallacy or the "Inevitability Narrative" in Hartzog et al, *supra* note 300 at 4.

focusing on their missing voice in the process, and their limited redress and contestability of ADM decisions.

5.3 Recommendation – Building Procedural Fairness Safeguards into ADM Legislation/Procedural Codes to Support Legality

While the primary focus of this paper has been on identifying the process problem and tracing its potential scope – I do not think it is too preliminary to make one strong recommendation in support of the legality gap identified in Chapter 3. I make this recommendation noting it is not a panacea, and that the issues I identified in the last chapter around transparency, accountability, and ex ante rulemaking do not cease to exist following my suggested implementation. However, I believe it does further the "getting it right the first time" approach and address some of the challenges of redress posed by the ADM regime suffering from weak legal governance, and the upwards pressure this has placed on stakeholders and courts. On the surface, it may seem counterintuitive to seek a proposal of "more law" to solve the FC's backlog, but clarity would help clarify the Court's role in reviewing for the process and substance of administrative decisions.

The current *IRPA* provision does not provide for any clear indication (let alone consideration) of where procedural fairness is factored in. By factoring in requisite procedural fairness principles, such as minimum disclosure or access to audit trails, either into the statute itself or through accompanying regulations, all parties would be clearer on how immigration decisions are made. It would also set clearer legitimate expectations for applicants so that they can reconcile the processes which led to generating potentially negative end results. The needed ex ante regulation that guides users could be better defined with legislation and regulation shaping the contours. Another supplementary step is to possibly build a clearer procedural code with minimum rights granted to those subject to ADMs.[765] However, I argue that unless it takes on some overriding constitutional force, the specific context may make an immigration applicant/user's code different than other codes or general codes that may be developed around ADMs/AI.

[765] Glover Berger, *supra* note 54 at 195.

It appears, however, that the Canadian government prefers developing internal mechanisms through soft law that offer more procedural flexibility. Even providing for notice and comment to the public or a list of banned uses of ADMs has proved a significant barrier. Adler's work on the impacts of internal administrative review processes on effectiveness is worth considering, as too is the debate on an external ombudsperson.[766] That being said, with resource constraints and work force adjustments, it is more likely that further technological efficiency solutions will be pursued in ways that may continue to push process and fairness concerns to the sidelines.

Finally, I am also very mindful, as Daly sets out, that the best way to move law forward is usually considered to be incremental on a case-by-case basis that seeks coherence rather than through a wholesale reform approach.[767] Given statute already exists and the foundation for a procedural code would be existing soft law instruments such as the *DADM* and IRCC's *Policy Playbook,* I suggest that my approach would be a coherent one.

5.4 An Invitation for Refinement and New Contextual Considerations Which Impact Process

There are many areas where potential developments may be (and are) occurring that could further interact with the administrative law system.[768] Paraphrasing Raso, the growing gulf between legal scholarship and institutional realities, particularly between public law theory and administrative practice, is of deep concern to me.[769] Various opinions exist about both the speed (and stability) of AI technology, growth, who the regulators are, and how they can keep up.[770] Regardless of the answers to these questions, it is hard to foresee a world where the public use of ADMs is not being adjudicated and is not subject to judicial review. Further refinement that I

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[766] This recommendation came out of CIMM Report 8, *supra* note 228.
[767] Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law"* (UBC Press, 2023) at 93–94.
[768] I note also here that I draw inspiration from Raso's summary of risks, opportunities, and key gaps, see: Raso "AI and Administrative Law", *supra* note 57 at 14-16.
[769] Raso, "Unity in the Eye of the Beholder", *supra* note 225 at 3.
[770] See e.g. William Aspray & Paul Doty, "Does Technology Really Outpace Policy, and Does It Matter? A Primer for Technical Experts and Others" (2023) 74:8 J of the Assoc for Information Science and Tech 885. See also Tom Wheeler, "The Three Challenges of AI Regulation" (15 June 2023), online: <brookings.edu/articles/the-three-challenges-of-ai-regulation/>.

would suggest would include parsing out in greater detail the relationship between different technological modes of decision-making. Other ideas would be to use computational methods to track how outcomes have shifted and truly pursue a mixed-methods approach by including interviews with lawyers and autoethnography to document where theories and practices may converge or diverge.

5.5 Shifting Processes, Shifting Contexts

This chapter has suggested that the course of Canadian administrative law as it pertains to ADM will be defined largely by what administrative law chooses to embrace and what, perhaps, it may choose to instead view as over-scoped. The process problem must be embraced and not put aside for a focus only on generating better substantive reasons. The improving technology will likely achieve that goal, regardless of intervention. While the increasing number of substantive considerations will necessarily serve as either relevant context or as factual/legal constraint on ADM decisions, they are also the product of shifting processes. Shifting processes alongside developing governance of ADMs in Canada will necessarily generate uncertainty. Some may argue that we are in a necessary "testing out phase" where ad hoc rationalization and justification are inevitable prices to pay for ADMs eventual adoption of greater coherence, consistency, and objectivity.[771] Yet how much procedural fairness is the legal governance regime willing to sacrifice (or traded-off) in the search for this improved system?

Overlooking or ignoring that the use of ADMs is fundamentally shifting the rules of the game, altering the Canadian government's choices around legislative intent, and increasingly the desirability of soft law, guidelines, and risk-based predictions, may lead to a fundamental and irreconcilable disconnect with the core concepts of Canadian administrative law. What will be the role of the normative framing that blurs and impacts how one brings into decision-making and the review of decision-making? As resource pressures are placed on Courts to render more decisions, with fewer resources, will the default starting point necessary start with technology as a solution?

[771] David Stratas David, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 59.

Perhaps what is needed most, replicating work that has been done into accessible and interpretable AI, is tracing and scrutinizing out how administrative law's *desiderata*[772], namely its normative values and perspectives, will impact future procedural design decisions.

[772] Marcinkevičs & Vogt, *supra* note 652 at 2.

Chapter 6: Conclusion

This thesis has explored and analyzed how the use of ADMs in Canadian immigration has altered decision-making processes, both in terms of the *internal* dimensions of how immigration decisions are being made, and how *external* mechanisms are able to review for process. I demonstrated that process is inextricable from substance, and that there are both barriers and opportunities in studying this relationship in pursuit of a fair process.

Beginning with the second chapter, I set the groundwork for the argument by providing key definitions related to ADMs, exploring how ADMs are currently being governed – more broadly and in immigration more specifically – before turning to how Canadian immigration authorities have used ADMs. This section emphasized the importance of defining key terminology around ADMs, particularly to move beyond abstract "AI" dialogues to examine how these tools work *in situ* and are being deployed and justified with new decision-making processes. Linking the technology to the broad legislative framework of the *IRPA* and the non-binding *DADM* setting few limits on its use and governance, I framed the actual use of these tools by IRCC in areas such as automation eligibility and risk flagging. I concluded the chapter by distinguishing between traditional decision-making and human decision-making with the aid or augmentation of ADMs, revealing a shift towards managerial and bureaucratic models of administrative justice.

In the third chapter, I narrowed in on the process problem. I first discussed the importance of a fair process more generally, grounding it in Kate Glover Berger's excellent article setting out the boundaries and considerations of procedural fairness. I next moved to an analysis of the unique procedural fairness concerns that have been raised by scholars and courts in the context of ADMs, as well the barriers to adjudicating existing processes posed by administrative law and judicial review mechanisms. I find that the goal of legitimacy, a concept that raises many questions in the ADM context, serves as a potential connector between process and substance.

The fourth chapter explored three Canadian administrative law concepts that tied to the pursuit of a fair process: transparency, accountability, and ex ante rulemaking. This chapter finds that in both these instances, there is a need to trace, define, and operationalize the terms in a way that guides process-related inquiries. Transparency represents a difficult area for ADMs, with

scholars split on the feasibility and desirability of transparency and possible alternatives. Challenges lie in reconciling between technical transparency and the reconciliation of issues such as national security that obfuscate the conversation surrounding transparency. On the issue of accountability, one of the primary findings was that the many various definitions of accountability are either very technical or government-facing in ways that may not benefit immigration applicants seeking recourse from an ADM. Ex ante rulemaking, meanwhile, reflects the growing interest in a system of safeguards and risk prediction that both threatens adjudication but also provides opportunity for governance structures that may broaden Canadian administrative law's reach. Data, specifically legal and judicial analytics, is an area that may bring together both ex ante and ex post approaches as applicants and institutions (as well as lawyers and courts) gather valuable insight into how decision-making inputs may impact outputs.

The final chapter of the thesis looked forward to how to aim for a fair process, through a "getting it right the first time" approach that focuses on the immigrant applicant as a user perspective. I made a recommendation towards embedding fairness more explicitly in statute, regulation, and procedural code, before inviting refinement and suggesting future areas of research.

This thesis, at the core, can be summed as three calls to action. *First,* I call for much-needed clarity around the process problem created by ADMs. The process needs to be made more transparent, with accountability mechanisms identified, and the ex ante rules of the road clear to all stakeholders. *Second,* this thesis calls for a focus on "getting it right the first time", looking closely at administrative justice theories and how they may further implicate the *internal* and *external* dimensions of decision-making processes within the context of technological development. *Third,* this thesis calls for refinement. Canadian administrative law scholarship can take this crucial work forward – bringing and applying new methods and theories, lockstep with (or at least less behind), emerging technological developments which will continue to alter ADMs.

To provide at least an interim ending to this thesis: Xi and Wang's story is still in progress. Wang is still waiting for permanent residence, having for the time being avoided deportation as the FC sent back his matter for reconsideration by a new officer. Their second

child was born, a daughter named Shizai.[773] They are in Canada, albeit still in limbo, with no more clarity than when they started about the technology that has impacted their lives as immigrants.

[773] Mandarin for the word: reality

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