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VIA FACSIMILE

Registry
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0J1

Dear Sir/Madam:

Re: *Minister of Citizenship and Immigration v Vavilov* – Reply on Leave Application
Court File No.: 37748

Pursuant to Rule 28, please accept this letter as the Attorney General of Canada's Reply on the leave application. Paragraph references in this letter are to the Respondent's Memorandum.

The Respondent has failed to establish that this is not a case deserving of this Court's attention. There remain issues of public importance regarding the soundness of the majority of the Federal Court of Appeal's ("FCA") approach to reasonableness review, as well as its improper use of statutory interpretation principles as a tool for judicial intervention. In addition, the majority's decision raises a significant issue regarding the integrity of Canadian citizenship and the parameters of entitlement to it.

Reply to the Respondent's arguments on standard of review

While the Respondent is correct at para 21 to state that reasonableness takes its colour from the context of the decision, this is not the same thing as the majority of the FCA applying an exacting "margin of appreciation" when assessing the reasonableness of the Registrar's decision.

A sliding scale approach is at odds with the jurisprudence of this Court holding that reasonableness is a single standard. The fact that "other appellate courts have frequently taken the same 'margins of appreciation' approach to the reasonableness standard" (para 22) itself demonstrates the need for clarification on this point. It also belies the Respondent's suggestion at para 25 that there are "no concerns about uncertainty in the courts below."

An "exacting" margin of appreciation denies reasonableness review of its deferential *raison d'être* and essentially substitutes correctness. Although the Applicant argues at para 1 that this is not a case in which "the standard of review makes or should make any difference in the result," the dissenting view of Justice Gleason in the FCA shows otherwise. There is a significant problem with applying a disguised correctness approach to statutory provisions that may rationally admit of more than one interpretation, a common occurrence in contemporary administrative law.

The Respondent has also not meaningfully addressed the factors cited by the majority of the FCA to justify applying an exacting level of review, i.e., the importance of the decision to the individual, the immigration context and the length of the reasons. These novel rationales for granting little deference have broad jurisprudential significance, but do not find support in the *Dunsmuir* framework. They merit this Court's scrutiny.

Reply to Respondent's arguments on interpretation of the *Citizenship Act*

Although the Respondent contends at paras 27-28 that the facts of this case are exceptional, he has failed to address the broader significance of the majority of the FCA's imposition of a formal, judicial-style statutory interpretation framework on administrative decision-makers. The majority's rejection of the Registrar's less technical approach to the interpretation of the statutory provision at issue will have a significant impact on administrative decision-makers and the manner in which they are required to interpret legislation more generally.

The Respondent's defence of the majority's interpretation of the relevant provision essentially reiterates the FCA's reasons without addressing the significant issues raised by the Applicant's textual, purposive and contextual analysis. This fails to establish the majority's interpretation is the only reasonable one, or that there is no issue of public importance regarding the entitlement to Canadian citizenship and the integrity of Canadian citizenship.

Although the Respondent places great contextual weight on the separate exception to citizenship by birth in s. 3(2)(c) of the *Citizenship Act*, this provision applies to employees of international organizations who expressly benefit from diplomatic privileges and immunities; it does not support the majority's interpretation of the foreign government employees specified in s. 3(2)(a). Indeed, as Gleason JA noted in dissent, "the difference in wording between paragraphs 3(2)(c) and 3(2)(a) of the Act can reasonably be read to support the interpretation of the Registrar."

Similarly, the Respondent's reliance on the *Foreign Missions and International Organizations Act* and its predecessors fails to shed contextual light on the interpretation of the provision in issue. These statutes do not deal with citizenship nor do they define the meaning of "other representative or employee in Canada of a foreign government."

Finally, the numerous hypothetical situations discussed by the Respondent in paras 36-38 undermine his contention at paras 27-28 that the interpretation of s. 3(2)(a) has limited application to other cases. Although the Respondent presents the interpretation of this provision in his hypothetical scenarios as a *fait accompli*, actual cases would undoubtedly be more complex and benefit from this Court's guidance in the present case.

In conclusion, this cases raises issues of public importance warranting this Court's intervention.

Yours truly,

Per

John Provart
Senior Counsel