SCC File No: 39855

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

BETWEEN:

EARL MASON

APPELLANT

AND

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

AND BETWEEN:

SEIFESLAM DLEIOW

APPELLANT

AND

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

FACTUM OF THE INTERVENER,
AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING)
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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INDEX

PART I – OVERVIEW .... - 1 -
PART II – QUESTION IN ISSUE .... - 1 -
PART III – STATEMENT OF ARGUMENT .... - 1 -
- **A. International law is an important constraint in administrative decision making** .... - 2 -
- **B. Courts should avoid putting Canada in breach of its international legal obligations** .... - 4 -
- **C. The *Alberta Teachers* framework has no application** .... - 6 -

PART IV – COSTS .... - 8 -
PART V – ORDER SOUGHT .... - 8 -
PART VI – TABLE OF AUTHORITIES .... - 9 -
- **A. Case Law** .... - 9 -
- **B. Legislation and Treaties** .... - 10 -
- **C. Secondary Sources** .... - 10 -

PART I – OVERVIEW

1. One of Parliament's key objectives in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] is to "fulfil Canada's international legal obligations with respect to refugees," particularly those arising under the *Refugee Convention*[1] and its protocols.[2] As the *IRPA* itself makes clear, it is to be construed and applied in a manner that complies with Canada's international human rights law [IHRL] obligations.[3] And it is well established that international law forms part of the context in which statutes are enacted and that legislation is presumed to conform to Canada's international obligations.[4]

2. Clearly, interpretations of the *IRPA* must take account of and be informed by Canada's IHRL obligations. This is so whether the interpretation exercise is being done by a court or an administrative decision maker. When Canada's IHRL obligations may affect the reasonableness of an administrative decision, courts on judicial review should consider them even if they were not raised before the tribunal. A court on judicial review must not decline to consider Canada's IHRL obligations on the basis that they are a "new issue." Not only is this conclusion inconsistent with *Vavilov*,[5] it risks putting Canada in breach of its international obligations, contrary to the commitment the executive made to its treaty partners and inconsistent with the presumptive intent and express direction of the legislature.

PART II – QUESTION IN ISSUE

3. Should courts on judicial review consider Canada's IHRL obligations even when they were not raised before an administrative decision maker?

PART III – STATEMENT OF ARGUMENT

4. The Federal Court of Appeal declined to consider whether the *Refugee Convention* bore on the Immigration Appeal Division's interpretation of s. 34(1)(e) of the *IRPA*. Relying on *Alberta Teachers*,[6] it reasoned that the *Refugee Convention* was a "new issue" on judicial review.[7] It added

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[1] *Convention Relating to the Status of Refugees*, [1969] Can TS no 6 [*Refugee Convention*].
[2] *IRPA*, s 3(2)(b); *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 47 [*B010*].
[3] *IRPA*, s 3(3)(f).
[4] *B010* at paras 47–48.
[5] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].
[6] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*].
[7] *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156 [FCA Decision] at para 73, citing *Alberta Teachers* at paras 23–26.

that "certain background documents and other instruments needed to understand any international obligations are not in evidence before us."[8]

5. This Court should reject that reasoning.[9] There are three reasons why Canada's IHRL obligations should not be considered a "new issue" that cannot be addressed on judicial review. First, such a conclusion is inconsistent with the guidance in *Vavilov* that international law is an important constraint in administrative decision making. Second, declining to consider this constraint risks putting Canada in breach of its international legal obligations when this was neither the expectation of the executive nor the intent of the legislature. Finally, the "new issue" framework from *Alberta Teachers* has no application in this context.

A. International law is an important constraint in administrative decision making

6. *Vavilov* instructs that the "particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case."[10] The various constraints[11] operating on a decision maker "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt."[12] Decisions that are inconsistent with the constraints operating on a decision maker may "cause a reviewing court to lose confidence in the outcome reached" and render a decision unreasonable.[13]

7. Alongside other statutory and common law, *Vavilov* identified international law as an "important constraint" in some administrative decision-making contexts.[14] It affirmed the well-established presumption of conformity: "legislation is presumed to operate in conformity with

[8] FCA Decision at para 74.

[9] It is especially important for this Court to provide guidance on this issue as the Federal Court of Appeal has relied on this reasoning in at least one other case already. In *Gordillo v Canada (Attorney General)*, 2022 FCA 23, the court declined to consider submissions from three interveners relating to international law on the basis that the arguments had not been made before the tribunal—despite the fact that "the interveners were granted that status to address those very issues": para 100. It arrived at this conclusion despite acknowledging this Court's guidance in *Vavilov* that international law will operate as an important constraint in some administrative decision-making contexts: para 95, citing *Vavilov* at para 114.

[10] *Vavilov* at para 89.

[11] Notably, none of these constraints were framed as being "hard" or "soft" constraints, as described by the Federal Court of Appeal: FCA Decision at para 29. To the extent the court considered international law to be a "soft" constraint, that is clearly not the case.

[12] *Vavilov* at para 90.

[13] *Vavilov* at para 106.

[14] *Vavilov* at paras 111–14.

Canada's international obligations, and the legislature is 'presumed to comply with … the values and principles of customary and conventional international law.'"[15] The presumption "follows from the fact that to interpret a Canadian law in a way that conflicts with Canada's international obligations risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law."[16] This critical rationale for the presumption is examined further below.

8. International law is part of the modern approach to statutory interpretation, which is applicable whether a court or an administrative decision maker conducts the interpretive exercise.[17] Customary and conventional international law "form part of the context in which Canadian laws are enacted."[18] International law is especially relevant when interpreting a statute such as the *IRPA*, which expressly serves to implement Canada's international refugee protection obligations and includes a legislated presumption of conformity with the state's obligations under IHRL treaties.[19] The recent *ESA* case (where a provision of the *Copyright Act* similarly served to implement international obligations under the 1996 *WIPO Copyright Treaty*) illustrates the potential significance of international law in statutory interpretation and the importance of considering it on judicial review.[20]

9. When an international legal obligation is relevant to an administrative decision, it will operate as a constraint whether or not a specific argument on it is made to the tribunal. To illustrate the point, consider another constraint identified in *Vavilov*: a key court precedent. Where there is a "relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent."[21] If an individual failed to make submissions on a key precedent before a tribunal, a court on judicial review should surely still consider it when determining whether a decision was reasonable. Otherwise, an unreasonable decision could be upheld as reasonable despite being inconsistent with a key constraint acting on the decision maker. Likewise, if a court declines to

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[15] *Vavilov* at paras 114, 182. See also *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 [*ESA*] at para 46; *B010* at para 48; *R v Appulonappa*, 2015 SCC 59 at para 40; *Németh v Canada (Justice)*, 2010 SCC 56 [*Németh*] at para 34; *Thibodeau v Air Canada*, 2014 SCC 67 at para 113; *Office of the Children's Lawyer v Balev*, 2018 SCC 16 at para 31.
[16] *B010* at para 47.
[17] *Vavilov* at paras 118–120.
[18] *B010* at paras 47, 49; *ESA* at paras 44–45.
[19] *IRPA*, ss 3(2)(b) and 3(3)(f); *B010* at paras 47, 49; *Németh* at para 21.
[20] See *ESA* at paras 8, 49, 51, 74, 77–91, 101, 108, 111.
[21] *Vavilov* at para 112.

even consider an international legal obligation of Canada on judicial review, it risks upholding as reasonable a decision that is inconsistent with a key constraint operating on the decision maker.

B. Courts should avoid putting Canada in breach of its international legal obligations

10. Not only is the Federal Court of Appeal's approach inconsistent with *Vavilov*, it also risks interfering with the executive's prerogative over foreign affairs and subjecting Canada to international censure. This is the result that the presumption of conformity is meant to avoid.

11. It is worth considering in more detail *why* courts presume legislation to conform to Canada's international legal obligations. The answer stems from the separation of powers.

12. Treaty-making is an aspect of the Crown's prerogative over foreign affairs.[22] In Canada's dualist system, treaty obligations need to be implemented by domestic legislation to take direct domestic effect.[23] Importantly, however, treaties are relevant to administrative decision making whether implemented or not,[24] and Canada is bound at the international level to fulfil its international treaty obligations even when they are not expressly implemented by statute or regulation.[25]

13. Before Canada incurs a new treaty obligation, significant effort goes into ensuring that it will not find itself in default. In a useful account of the processes behind the scenes, two Department of Justice lawyers describe these efforts in detail.[26] Prior to ratification of a treaty, Department of Justice officials carefully examine its provisions and determine whether existing federal[27] laws and policies already conform to the treaty obligations or whether new legislation or

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[22] *ESA* at para 47; John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 236.

[23] *ESA* at para 47; Currie at 237. This is in contrast to customary international law, which is automatically incorporated into Canadian domestic law: *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*] at para 86. Likewise, if a treaty obligation is considered to be customary international law, it would not need to be implemented by domestic legislation to take domestic effect.

[24] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69–71; *Vavilov* at para 114.

[25] Currie at 237–38.

[26] Elisabeth Eid & Hoori Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" in O. Fitzgerald, ed, *The Globalized Rule of Law: Relationship between International and Domestic Law* (Toronto: Irwin Law, 2006) 339.

[27] Where the subject matter of the treaty involves matters of provincial or territorial jurisdiction, a similar review occurs at the provincial or territorial level, and consultations occur between the federal, provincial, and territorial level: Eid & Hamboyan at 456–57; Maurice Copithorne, "National Treaty Law and Practice: Canada" in Monroe

amendments are needed to ensure that Canada is in compliance prior to ratification.[28] They may also consider entering a reservation to the treaty.[29] If new laws are needed, Canada will only ratify a treaty once such enabling legislation has been passed:

> That way, Canada incurs no obligation until being able to perform it. The upshot is that every Canadian treaty obligation is undertaken on the strength of an executive determination that Canadian laws suffice to perform it, whether because the treaty does not require domestic performance, or existing enactments suffice to perform it, or new provisions have been enacted to do so.[30]

14. The core human rights treaties that Canada has ratified also require it to submit periodic reports of its compliance with treaty obligations to international treaty-monitoring bodies.[31] This is a "continuing obligation, which clearly suggests that implementation of human rights obligations is an ongoing requirement post-adherence."[32]

15. The presumption of conformity is judicial recognition of these executive and legislative efforts. If a court on judicial review refuses to even *consider* the impact of Canada's international legal obligations on the basis that they are a "new issue," it risks upholding as reasonable a decision that breaches those obligations. Given process of ratification described above, such a breach will almost certainly not be the expectation of the executive or the intent of the legislature. What may seem like judicial minimalism may become unintended interference in the Crown's prerogative over foreign affairs: Canada may find itself in breach of its international obligations and subject to "censure under international law"[33] simply because a court declined to consider submissions on Canada's international legal obligations.

Leigh, Merritt R Blakeslee & L Benjamin Ederington, eds, *National Treaty Law and Practice: Canada, Egypt, Israel, Mexico, Russia, South America* (Washington: The American Society of International Law, Transnational Studies in Transnational Legal Policy, No 33, 2003) at 6.

[28] Eid & Hamboyan at 456.
[29] *Ibid*.
[30] Gib van Ert, "The Domestic Application of International Law in Canada" in Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) 501 at 508.
[31] See, e.g., *International Covenant on Civil and Political Rights*, [1976] Can TS no 47, art 40; *International Covenant on Economic, Social and Cultural Rights*, [1976] Can TS no 46, arts 16 and 17.
[32] Eid & Hamboyan at 462–63.
[33] *B010* at para 47.

C. The *Alberta Teachers* framework has no application

16. The Federal Court of Appeal relied on *Alberta Teachers* in concluding that it could not entertain "new" arguments on the *Refugee Convention* on judicial review.[34] However, the "new issue" framework from *Alberta Teachers* has no application when the question is whether an interpretation of a statute is unreasonable in light of Canada's international legal obligations.

17. It is worth considering whether a "new issue" truly arises in such a situation. In the appeal context, this Court has explained that "[g]enuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties … and cannot reasonably be said to stem from the issues as framed by the parties."[35] Genuinely new issues can be contrasted with "issues that are rooted in or are components of an existing issue"[36] and with different arguments that are directed toward the fundamental question at issue.[37]

18. When a court is judicially reviewing a tribunal's exercise of statutory interpretation, arguments based on Canada's international legal obligations are not truly "new issues" in the sense of being "factually and legally distinct"; they are arguments addressing the same fundamental issue (the interpretation of the provision) and are relevant to the "context" stage of statutory interpretation. Indeed, *Vavilov* anticipated that cases would arise where a decision maker "fails entirely to consider a pertinent aspect of [a provision's] text, context or purpose" and explained that it falls to courts on judicial review to consider how significant that omission was.[38] International legal considerations are pertinent contextual aspects in some cases, as *Vavilov* affirmed. Even before *Vavilov*, the Court of Appeal for Ontario characterized arguments related to Canada's international law commitments as "interpretative tools to inform the court's analysis" rather than "new, standalone issues."[39]

19. Assuming a "new issue" does arise, the rationales in *Alberta Teachers* are inapposite in this context. That case noted that courts on judicial review have a "discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so."[40] It

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[34] FCA Decision at paras 72–75.
[35] *R v Mian*, 2014 SCC 54 [*Mian*] at para 30; *Quan v Cusson*, 2009 SCC 62 [*Quan*] at para 39.
[36] *Mian* at para 33.
[37] *Quan* at para 40; *Canada (Commissioner of Competition) v Secure Energy Services*, 2022 FCA 25 at para 43; *Nova Chemicals Corporation v Dow Chemical Company*, 2020 FCA 141 at paras 86–87.
[38] *Vavilov* at para 122. See also *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 52.
[39] *P.S. v Ontario*, 2014 ONCA 160 at para 18.
[40] *Alberta Teachers* at para 22.

explained that some rationales for this "general rule" are the desirability of having the administrative decision maker deal with an issue first and make its views known, the potential for prejudice to the opposing party, and the risk that the court will lack a proper evidentiary foundation to consider the issue.[41]

20. These rationales are most relevant when the "new issue" is a *factual* rather than *legal* one. Courts should be slow to resolve factual matters not put before the administrative decision maker, which the legislature has designated as the fact-finder and is best placed to weigh evidence and assess credibility.[42] Raising a new factual matter on judicial review risks causing prejudice to the other side (which may have wanted to introduce additional evidence on the factual question) and having the court decide the issue without a proper evidentiary basis.

21. In contrast, purely legal questions do not require evidence to resolve. As a result, the risks of prejudice and an incomplete evidentiary foundation do not arise. Notably, in *Alberta Teachers* itself, the Court chose to address the "new issue," explaining that it was a "straightforward determination of law" not requiring evidence or entailing any prejudice to the other side.[43] Similarly, in *Canada Post*, the Court considered an argument based on another provision of the relevant statute even though it had not raised before the tribunal.[44]

22. The meaning and content of Canada's international legal obligations are questions of law of which courts can take judicial notice.[45] The Federal Court of Appeal's concern that "certain background documents and other instruments needed to understand any international obligations are not in evidence before us"[46] was therefore misplaced. The meaning of a treaty is not a matter of fact that requires evidence, but rather a question of law. A court should interpret Canada's

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[41] *Alberta Teachers* at paras 24–26.
[42] *Vavilov* at para 125; *Canada Post* at para 61.
[43] *Alberta Teachers* at para 28.
[44] *Canada* at paras 52–53. See also *Schuyler Farms Limited v Dr Nesathurai*, 2020 ONSC 4711 at para 89, where the Court allowed submissions from an intervener on international human rights principles, despite such submissions not being made to the Board. The court noted the arguments advanced were legal arguments and that the Respondent had notice of and the opportunity to respond to the intervener's submissions.

[45] *Nevsun* at para 97; *Turp v Canada (Foreign Affairs)*, 2018 FCA 133 at para 82; *Ganis v Canada (Minister of Justice)*, 2006 BCCA 543 at para 24; *R v Appulonappa*, 2014 BCCA 163 at para 62; *The Ship "North" v. The King*, [1906] 37 SCR 385 at 394; *Jose Pereira E Hijos SA v Canada (Attorney General)*, [1997] 2 FC 84 at paras 20–22; *Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9)*, [2013] FCA 323 (Fed Ct Aust) at paras 44, 47, 48.
[46] FCA Decision at para 74.

international legal obligations and consider their impact on an administrative decision without requiring evidence of their meaning or content.

23. The rationales identified in *Alberta Teachers* for the “general rule” against considering new issues on judicial review are therefore inapplicable when the question is the reasonableness of an administrative decision in light of Canada’s international legal obligations.

PART IV – COSTS

24. Amnesty Canada does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

25. Amnesty Canada takes no position on the outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2022.

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Dahlia Shuhaibar

PART VI – TABLE OF AUTHORITIES

A. Case Law

Case	Paragraph(s)
Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61	4, 19, 21
Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9), [2013] FCA 323 (Fed Ct Aust)	22
B010 v Canada (Minister of Citizenship and Immigration), 2015 SCC 58	1, 7, 8, 15
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817	12
Canada (Citizenship and Immigration) v. Mason, 2021 FCA 156	4, 6, 16, 22
Canada (Commissioner of Competition) v Secure Energy Services, 2022 FCA 25 at para 43	17
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65	2, 5, 6, 7, 8, 9, 12, 18, 20
Canada Post Corporation v Canadian Union of Postal Workers, 2019 SCC 67	18, 21
Ganis v Canada (Minister of Justice), 2006 BCCA 543	22
Gordillo v Canada (Attorney General), 2022 FCA 23	5
Jose Pereira E Hijos SA v Canada (Attorney General), [1997] 2 FC 84	22
Németh v Canada (Justice), 2010 SCC 56	7, 8
Nevsun Resources Ltd v Araya, 2020 SCC 5	12, 22
Nova Chemicals Corporation v Dow Chemical Company, 2020 FCA 141 at paras 86–87.	17
Office of the Children's Lawyer v Balev, 2018 SCC 16	7
P.S, v Ontario, 2014 ONCA 160	18
Quan v Cusson, 2009 SCC 62 [*Quan*] at para 39	17
R v Appulonappa, 2014 BCCA 163	22
R v Appulonappa, 2015 SCC 59	7
R v Mian, 2014 SCC 54 [*Mian*] at para 30	17
Schuyler Farms Limited v Dr Nesathurai, 2020 ONSC 4711	21
Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association, 2022 SCC 30	7, 8, 12

Case	Paragraph(s)
The Ship "North" v. The King, [1906] 37 SCR 385	22
Thibodeau v Air Canada, 2014 SCC 67	7
Turp v Canada (Foreign Affairs), 2018 FCA 133	22

B. Legislation and Treaties

Legislation or Treaty	Paragraph(s)
Convention Relating to the Status of Refugees, [1969] Can TS no 6 [*Refugee Convention*].	1
Immigration and Refugee Protection Act, s 3(2)(b), s 3(3)(f)	1, 8
International Covenant on Civil and Political Rights, [1976] Can TS no 47, art 40	14
International Covenant on Economic, Social and Cultural Rights, [1976] Can TS no 46, arts 16 and 17	14

C. Secondary Sources

Source	Paragraph(s)
Elisabeth Eid & Hoori Hamboyan, "Implementation by Canada of its International Human Rights Treaty Obligations: Making Sense Out of the Nonsensical" in O. Fitzgerald, ed, *The Globalized Rule of Law: Relationship between International and Domestic Law* (Toronto: Irwin Law, 2006) 339, 456-57, 462-63	13, 14
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