S.C.C. File No. 39855

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

BETWEEN:

EARL MASON

APPELLANT
(Respondent)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

AND BETWEEN:

SEIFESLAM DLEIOW

APPELLANT
(Respondent)

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

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TABLE OF CONTENTS

TABS	PAGES
PART 1 – OVERVIEW	1
PART II – RESPONSE TO QUESTIONS IN ISSUE	2
PART III – ARGUMENT	2
The Intersection of the modern approach of statutory interpretation and the standard of review	2
The expertise of the administrative decision-maker is immaterial	5
The virtue of legal certainty	6
Criminal Charges	7
PART IV – COSTS	8
PART VII – TABLE OF AUTHORITIES & LEGISLATION	9

PART I – OVERVIEW

1. For many – indeed, possibly all – immigrants to Canada, the *Immigration and Refugee Protection Act*[1] is the first legislative scheme with which they will interact in earnest. It is the first contact between many new Canadians and Canadian law. The officials who apply the IRPA will, for many, be the first representatives of the government of Canada with whom they engage. Some will have help with the immigration process from lawyers and other professionals; others will not. Many will have the support of an established community in Canada who have lived the experience of immigration, but some will be largely alone in their journey to this country. The IRPA creates the legal strictures for admission to Canada as an immigrant. Whoever is tasked with interpreting it, and by whatever standard their interpretation is reviewed, future Canadians are an integral part of the IRPA's audience. Parliament is speaking to them through this Act.

2. The Social Planning Council of Winnipeg (the "SPCW"), in the programming it fosters and the research it conducts, is close to the lived experiences of newcomers to Canada settling in the Winnipeg area. The SPCW encourages this Court, in its consideration of the modern approach of statutory interpretation and its intersection with the standard of review, to keep the perspective of those immigrating to Canada, and thus interacting with the IRPA most frequently and most significantly, in mind. The SPCW submits that either standard of review, applied to an exercise of statutory interpretation, results in the same analysis.

3. This analysis is a close and non-deferential consideration of the administrative decision-maker's application of the "modern approach" of statutory interpretation. As the modern approach requires a careful construction of the text of the law, making use of its ordinary meaning, the effect of its application is one of clarity and consistency for immigrants seeking to understand the legislative framework for admission and settlement in Canada.

4. Separately, part of the fact matrix of this case is a staying of criminal charges. The nature of certain stayed charges formed the basis for denying Mr. Mason's admission to Canada.

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[1] *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

The SPCW also works with those involved in the criminal justice system. Without commenting on the specifics of Mr. Mason's case, but with a view to aiding this Court's appreciation of the context of this matter, the SPCW comments in this factum on the nature of a stay of criminal proceedings

PART II – RESPONSE TO QUESTIONS IN ISSUE

5. These submissions address the first issue identified by the Appellant Mason in respect of the interaction of the standard of review and the exercise of statutory interpretation. The submissions regarding the nature of a stay of criminal proceedings contextualize the second issue identified by the Appellant Mason, being Parliament's intentions for the interpretation of s. 34(1)(e) of the IRPA to exclude occurrences of common criminality committed (or said to be committed) in Canada.

PART III – ARGUMENT

The Intersection of the modern approach of statutory interpretation and the standard of review

6. The process of statutory interpretation known as the "modern approach" and entrenched in Canadian jurisprudence in *Rizzo v. Rizzo Shoes*[2] is well known. The decision-maker must adopt the "textual-contextual-purposive" approach to its consideration of a statute or statutory instrument. The text must be interpreted in accordance with its ordinary meaning, with the words and phrases in use in the instrument being read and understood in their appropriate legislative context, and any contextual reading of the text must cohere with the purpose of the statute or instrument in question.

7. The three parts of the approach are independent and interdependent: the textual reading, the contextual understanding, and the purpose of the law must be evaluated individually but all work together. When the statutory language is precise and unequivocal, interpretation of the text dominates the whole interpretative exercise, as this Court observed

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[2] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27.

in *Canada Trustco Mortgage Co v Canada.*[3] Precise language does not oust the application of the modern approach entirely, however; a better understanding is that the context and purpose of the legislation cannot help but align with obvious language. Where the statutory choice of words is less precise, more of a balancing exercise with context and purpose is required, but the text can never be so ambiguous as to be ignored. Whatever statutory interpretation is chosen, it must rest comfortably on the text Parliament has elected to use.

8. This Court has frequently encountered the intersection of the standard of review and the modern approach of statutory interpretation. This is nothing new. This Court's decisions in *Vavilov*[4] and *Dunsmuir*[5] were both examples consideration, on review, an administrative decision-maker's effort at interpretating legislation.

9. The court below in *Mason* is of the perception, citing the dissent in this Court's decision in *Kanthasamy v. Canada (Citizenship and Immigration)*[6] that the tendency in such circumstances veered in the direction of the correctness standard, despite the presumption of the reasonableness standard required by *Vavilov* and the expressed intentions of this Court and other Courts. The Federal Court of Appeal's tonic to this wayward application of *Vavilov* and its antecedents is to reflect on its decision in *Hillier v Canada.*[7] and prescribe to reviewing courts an appreciation of three basic tenets: first, that a range of interpretations may be available to an administrative decision-maker in its exercise of statutory interpretation; second, that the administrative decision-maker could be better informed of the range of possible interpretations than a court, as the administrative decision-maker is an expert; and third, to paraphrase, that the legislative bodies drafting the statutes being interpreted had, as their intention, that the administrative decision-makers be the primary interpreters of their words and purposes.

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[3] *Canada Trustco Mortgage Co v Canada* 2005 SCC 54 ["*Trustco*"] at para. 10.
[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*"Vavilov"*].
[5] *Dunsmuir v. New Brunswick,* 2008 SCC 9 ["*Dunsmuir*"].
[6] *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61 at para. 112.
[7] *Hillier v. Canada (Attorney General),* 2019 FCA 44 [*"Hillier"*], as cited in *Canada (Citizenship and Immigration) v. Mason,* 2021 FCA 156 ["*Mason, Federal Court of Appeal"*] at para. 16.

10. Respectfully, the issue the Federal Court of Appeal identifies – the correctness standard in *de facto* use when the reasonableness standard is required – is unlikely to be cured by calling to mind the deference owed to an administrative decision-maker's expertise. A more likely explanation for the court below's concern that the reasonableness standard is not applied with appropriate rigor is that the modern approach and reasonableness review do not interlock as easily as this Court in *Vavilov,* and so many other courts and tribunals before and since that decision, have generally stated. Rather, reasonableness review and the modern approach hew in opposite directions.

11. The modern approach assumes, as it must, that Parliament's choice of words is deliberate and its intentions are coherent and not oblique. Parliament does not seek to be ambiguous and is deemed to act deliberately.[8] Therefore, to the extent the words of an instrument give rise to a range of interpretations, that range is, according to the modern approach, narrowed by the context of the language and the purpose of the legislation in question.

12. Review on grounds of reasonableness, however, posits that there are a range of possible interpretations an administrative decision-maker can achieve, and provided that range is within reasonable bounds – or more particularly as *per* both *Dunsmuir* and *Vavilov*, within a range of reasonable outcomes, reached by means of a process falling within the parameters of reasonable processes[9] – the administrative decision-maker can make any determination within that range without later interference by the reviewing court.

13. Therefore, the general formula of a reasonableness review of an interpretation reached by means of the modern approach ought to be this: a range of possible textual meanings can be elucidated, with each textual meaning within that range being contextually appropriate and in keeping with the legislative purpose. Such a circumstance necessitates the rejection of the presupposition that Parliament is never ambiguous. The modern approach in such a case is applied correctly, but fails in outcome: multiple textually, contextually, and

[8] *R. v. Clark,* 2005 SCC 2 at para.53.
[9] *Vavilov* at para. 83; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 12.

purposively correct statutory meanings is precisely what the modern approach hopes to avoid.

14. Any other circumstance resulting in a range of interpretations is one in which the modern approach has, by necessity, been misapplied, and the use of the modern approach by the administrative decision-maker is necessary. The modern approach is not part of a continuum of reasonable methods of statutory interpretation open to an administrative decision-maker. As the court below observes in this matter, the task facing an administrative decision-maker when interpreting legislation is one and the same as the task facing a court: the application of the modern approach.[10] Therefore, any failure to apply the modern approach is, inherently, unreasonable; and any application of the modern approach that respects the notion that ambiguity cannot be the end result of the interpretative exercise will not produce a range of outcomes to which deference can be afforded; it produces one interpretation of the statute that is at once correct and the extent of what is reasonable.

The expertise of the administrative decision-maker is immaterial

15. The special expertise of a decision-maker referenced in *Hillier* has, candidly, no more than a tangential relationship to the modern approach. The aim of the textual analysis is to discern the ordinary meaning of the words used in the instrument, not a specialist understanding which would depart from what a reasonable reader of the law would understand. Courts are as expert in semantics as any other fora.

16. The contextual analysis necessitates a broad knowledge of statutory instruments, including the various Interpretation Acts, transcending the domain of subject-matter expertise: how a phrase such as, for example, a limitations provision, or the creation of a private right of action, or the contours of a ministerial discretion, is understood in other legislation contextually informs its use in the legislation being interpreted. A court is more expert in the tool-kit of lawmaking than any administrative decision-maker. Purposive interpretation

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[10] *Mason, Federal Court of Appeal* at para. 11.

does engage an administrative decision-maker's expertise, but not entirely – again, a comparative approach is often warranted. The purpose of legislation can be understood with reference to what else, outside of the administrative decision-maker's remit, Parliament has authorized or prohibited for a similar proposed purpose.

17. Subject-matter expertise, and the deference that accompanies it, is for the application of complex laws to complex facts. Those administrative decision-makers who weigh expert evidence, evaluate technical concepts, and oversee multi-faceted domains of private activity (for instance, the regulation of the capital markets, the airwaves, and nuclear power) are to be held accountable, to borrow the court below's term[11] in judicial review, but not have their expertise usurped. The application of the modern approach of statutory interpretation, as with questions of jurisdiction, is not of a piece with this type of analysis.

The virtue of legal certainty

18. The modern approach is not, of course, strict textualism; but its application does reinforce the importance of a close and natural reading of the text. This Court in *Trustco* affirmed this feature of the modern approach by recognizing the interpretative primacy of unequivocal statutory language.[12] Returning to the court below's consideration of *Hillier*,[13] the third basic tenet is that Parliament is aware, and intends, for an administrative decision-maker to be the interpreter of the legislation within its jurisdictional remit. This point is uncontroversial, save that the regulator or administrative decision-maker is not the only "audience" for the law, nor are they the main one.

19. For every one consultation of the IRPA by a tribunal tasked with doing so, one may safely assume many more consultations of the IRPA, intermediated by some means or not, by prospective newcomers to Canada. This idea – that the laws speak primarily to those subject to them – is why the "ordinary" meaning of the text is desired in the modern approach: the law must be intelligible to those who use it most. Clarity and certainty – in

[11] *Mason, Federal Court of Appeal* at para. 17.
[12] *Trustco* at para. 10.
[13] *Mason, Federal Court of Appeal* at para. 16.

the present case, in the eyes of newcomers to Canada with limited exposure to parliamentary purposes and statutory contexts – are virtues. Put differently, close reading of the text serves as "fair notice" of the law to those expected to abide by it. This idea has some academic consideration[14] but is relatively unexplored in Canadian jurisprudence. Nevertheless, the proposition that the law should be clear to those subject to it is not inherently unreasonable or surprising.

Criminal Charges

20. For indictable offences, the laying of an information commences the criminal process. An information is an accusation sworn by a peace officer and received by a justice.[15] The peace officer must have "reasonable grounds" to believe an indictable offence has been committed to lay an information[16]**.** A sworn summary of evidence accompanies the information when it is presented to a justice, and if the information is received as laid, the justice then proceeds to take such steps as are necessary to arrange the accused's first appearance in court.[17] Anyone accused in an information is "charged" with a criminal offence.[18]

21. Prior to plea, the Crown has an unfettered discretion to withdraw an information.[19] and the Crown may enter a stay proceedings at any time after an information is laid.[20] The entry of a stay vacates the proceedings entirely.

22. Therefore, at the time the stay is entered, the sole consideration of the merits of the information laid against an accused is the receiving of that information by a justice as set out in sections 507 and 508 of the Criminal Code. The receiving of the information is not

[14] "Textualism as Fair Notice" (2009) 123 Harvard Law Review 542.
[15] *Criminal Code,* RSC 1985 c C-46 ["Criminal Code"], ss. 507, 508, 788, 789.
[16] Criminal Code at s. 504.
[17] Criminal Code at ss. 507-8.
[18] *R. v. Kalanj*, [1989] 1 S.C.R. 1594, at p. 1607.
[19] *R v McHale* 2010 ONCA 361 at paragraph 32.
[20] Criminal Code at s. 579.

a substantive evaluation of an accused's guilt. The evidence an accused might rely on at trial is unknown to the justice and, by virtue of the stay, is not considered unless the proceedings are subsequently recommenced. No reasons are required of the Crown as to why a stay is entered.

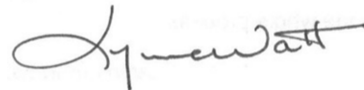
23. The structure of criminal proceedings as set out in the Criminal Code is a complete and holistic juridical framework for addressing accusations of acts of criminality in this jurisdiction. Within that structure, there is no scope to draw a conclusion of fact from a stayed criminal proceeding. Without commenting on the facts of Mr. Mason's case, and acknowledging that the incongruousness of the Criminal Code and the IRPA may be of no moment to Parliament's intentions in respect of each, it nevertheless would be incongruous with the complete juridical framework of criminal procedure in Canada if, in the context of the IRPA, stayed criminal charges carry such significant and lasting legal consequences as exclusion from Canada.

24. Those accused of acts of criminality will, naturally, rely on a stay of proceedings to resume the ordinary conduct of their lives. Newcomers to Canada who are involved in criminal proceedings would, in effect, require an acquittal at trial to negate the risk that the nature of the charges against them alone could constitute grounds of inadmissibility. The process to demand a trial could see the accused in criminal proceedings seeking *mandamus*, if grounds are available, to compel their own continued prosecution. In the context of the administration of the criminal justice system, this outcome would be untenable.

PART IV – COSTS

25. The SPCW asks that no costs be awarded for or against it.

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



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PART VII – TABLE OF AUTHORITIES

Case Law:	**Paragraph References (to Memorandum)**
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