S.C.C. File No. 37748

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

B E T W E E N:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant
(*Respondent*)

-and-

Alexander VAVILOV

Respondent
(*Appellant)*

(*Style of cause continued on the next page)*

FACTUM OF THE INTERVENER
CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Pursuant to Rule 42 of the Rules of the Supreme Court of Canada

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. This appeal concerns the interpretation of s. 3(2)(a) of the *Citizenship Act*, and the standard of review applicable to a decision by the Registrar for Citizenship.

2. CARL confines its submissions to the role of reasons in relation to the presumption of deference extended to administrative decision-makers interpreting their home statue.

3. CARL submits that additional factors or considerations may be apposite where the decision is challenged on the following elements: a) findings of fact, mixed law and fact, or the exercise of discretion; b) a different statute or common law principle is engaged; or c) no reasons are required. These elements do not arise in the case at bar and are not addressed here.

4. CARL submits that the rule of law's commitment to a culture of justification aids in deciding when a presumption of deference in interpretation of the home statute is rebutted. A court should maintain a deferential standard of review when the decision-maker has fulfilled the duty to justify an interpretation of the home statute with responsive reasons. If the decision warrants deference according to this criterion, a reviewing court should attach weight to the decision-maker's justification for the interpretation, bearing in mind that the decision-maker's interpretation may not prevail when situated alongside a more comprehensive analysis of the statutory provision. Failure to fulfil a duty of justification rebuts a prior presumption of deference.

PART III: ARGUMENT

The label 'correctness' as a standard of review is misleading; Courts should select between deference and no deference

5. CARL submits that describing a non-deferential standard of review as 'correctness' is inapt. It suggests that one can know in advance of the interpretive exercise whether a legal provision can plausibly bear more than one interpretation. It is only by conducting the interpretive exercise that can one assess the interpretive range. CARL submits that it is better to simply ask whether or not a reviewing court should defer to a given interpretation.[1]

The presumption of deference on questions of law in the home statute should be confined to independent decision-makers.

[1] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 at para 38 [*McLean*].

6. CARL endorses the submissions of the Intervener EcoJustice that, to the extent that any presumption of deference regarding statutory interpretation exists, it should be limited to independent, quasi-judicial decision-makers.

7. CARL submits that Ministers do not attract deference when interpreting law. Just as administrative tribunals "may be seen as spanning the constitutional divide between the executive and judicial branches of government,"[2] Ministers straddle the constitutional divide between the executive and the legislative branches of government. They participate both in making law and in applying it. Fundamental to the separation of powers is the idea that elected officials who legislate are not entrusted with interpreting the laws of their own making. If they disagree with the interpretation of legislation provided by an independent judiciary, they have the power to amend legislation. The perils of deferring to law-makers' interpretation of legislation is most stark where the decision relates to a vulnerable individual or class, or engages interests that tend to be discounted or sacrificed because they are perceived as diffuse, remote, or attached to persons or entities with little political currency. The proximity of a Minister to the political branch may attract deference in the performance of tasks that are closer to the legislative end of her powers. But where a Minister must interpret and apply laws on an individualized basis in the execution of a statutory mandate, the separation of powers militates against deference to the interpretation of her own laws.[3]

8. CARL submits that administrative actors who lack independence should not attract deference in interpreting their 'home statute'. As Sullivan notes, administrative actors are embedded in regimes that can shape their perspective in both positive and negative ways:

> Their focus tends to be narrow and coloured by the concerns and possibly by the biases of their own professional culture. They may have particular interests to promote on behalf of their department or agency or they may have strong views respecting the groups or problems regulated by their legislation. This may put them into an adversarial position with other interested parties.[4]

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[2] *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52, [2001] 2 SCR 781 at para 24.
[3] *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40 at paras 97-98.
[4] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis, 2014) at 709.

9. Even if the Court does not accept this position, CARL's submission about the role of reasons remains apposite to any decision-maker benefiting from a presumption of deference in the interpretation of the home statute.

Where a presumption of deference exists, it is subject to rebuttal where the decision-maker fails to fulfill his/her role in fostering the rule of law's culture of justification.

10. Standard of review asks this question: *should the fact that this administrative decision-maker arrived at a given interpretation tilt a court toward that interpretation?*[5] If the answer is yes, a court defers; if no, it does not.

11. Current Supreme Court of Canada jurisprudence counsels deference to most administrative decision-makers most of the time. Expertise no longer does meaningful work in selecting the standard of review. Rather, expertise is deemed to inhere across the full range of administrative actors and functions by virtue of an administrative agency's existence, thereby triggering a presumption of deference.[6]

12. CARL submits that a feasible starting point for determining whether deference is actually warranted lies in this Court's recognition that a society committed to the rule of law will promote a 'culture of justification.' As former CJC McLachlin explains:

> [S]ocieties governed by the Rule of Law are marked by a certain ethos of justification. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals ... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness.[7]

13. Cohen-Eliya and Porat offer four compelling rationales for conceiving of the rule of law in terms of justification:

> [I]t shows an attitude of respect towards the citizens affected by governmental actions; it is essential to the legitimacy of governmental authority; it facilitates

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[5] *McLean*, *supra* note 1 at para 38.
[6] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 32, citing *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748 at para 50; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 SCR 293 at para 33 [*Capilano*].
[7] Hon. Justice Beverly McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 Canadian Journal of Administrative Law & Practice 171 at 174-5.

> democratic deliberation and participation; and it furthers governmental accountability and trust between the citizens and the government.[8]

14. Three consequences relevant to the doctrine of standard of review flow from endorsing a culture of justification. First, realization of the rule of law requires all institutions and actors – from the legislature, to the executive, to courts – to internalize the rule of law's ethos of justification in the performance of their specific roles. As Stacy and Woolley explain,

> public decisions gain their democratic and legal authority through a process of public justification in which all public decision-makers offer reasons that justify their decisions in light of the constitutional, statutory and common law context in which they operate.[9]

15. Secondly, a standard of review doctrine that incentivizes administrative actors to participate in a culture of justification will advance the rule of law, and should therefore be preferred over doctrines that do not.

16. Thirdly, a primary focus of the rule of law is accountability for the exercise of public power to the legal subject over whom it is exercised. The standard of review's preoccupation with the posture of the court toward administrative actors should align and not compete with the rule of law's focus on direct accountability to the legal subject.

Responsive reasons that evince an ethos of justification validate the presumption of deference; unresponsive reasons rebut the presumption of deference.

17. CARL submits that in order to fulfil the aspiration of the culture of justification and thereby earn a court's deference, reasons must, at a minimum, explain how a decision on the disputed issue was reached in accordance with legally relevant criteria for the decision. This is distinct from compliance with the procedural duty to provide reasons under the duty of fairness.

18. CARL submits that if decision-makers *actually* justify their statutory interpretation in light of what makes sense to them given the broad policy context in which they work, then the Court

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[8] Moshe Cohen-Eliya and Iddo Porat, "Proportionality and Justification" (2014) 64 University of Toronto Law Journal 458 at 467.

[9] Jocelyn Stacey & Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74:2 Supreme Court Law Review 211 at 220.

should attach weight to that analysis through deference.[10] This Court's flexibility on the form that reasons can take preserves space for decision-makers to explain their interpretive choice without imposing upon them the onerous burden of crafting judicial-like reasons.[11]

19. CARL adopts the dictum of US Court of Appeals Justice Richard Posner that, "deference is earned; it is not a birthright."[12] This avowal befits a Canadian model of deference as respect. Decision-makers earn deference/respect to the extent that they fulfil their role in a culture of justification by providing responsive reasons that justify their assertion of power over the legal subject. As Stacey and Woolley explain,

> Deference as respect imposes obligations on administrative decision-makers just as much as it insists on respectful deference from courts…. And when administrative decision-makers earn the respect of the courts through the practice of giving adequate reasons, courts maintain the rule of law by protecting the citizenry from arbitrary public decisions.[13]

20. In *Baker*, the Court adopted Dyzenhaus's proposition that, "[d]eference as respect requires not submission but a respectful attention to the reasons offered *or which could be offered* in support of a decision."[14] However, Dyzenhaus provided the following critical corrective to his account of deference to reasons *'which could be offered'*:

> That claim was made before the Supreme Court had found a duty to give reasons. And with that duty in place, all that the judges need scrutinize are the actual reasons. But those reasons must justify the interpretation the officials have of the law when they claim to be acting.[15]

21. In other words, deference to reasons that 'could be offered' only arises where no duty to give reasons exists, or in exceptional cases where the failure to fulfill the duty is excusable or

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[10] *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 49.
[11] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 40 [*Baker*].
[12] *Kadia v. Gonzales*, 501 F. 3d 817 (7th Cir 2007) at 821.
[13] Stacey & Woolley, *supra* note 9 at 220.
[14] *Baker*, *supra* note 11 at para 65, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford UK: Hart Publishing, 1997) 279, at 286 [emphasis added].
[15] David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Review of Constitutional Studies 87 at 113 [emphasis added].

otherwise rectified by the agency.[16] CARL submits that, *contra* this Court's ruling in *McLean*,[17] statutory interpretation arguments subsequently raised by government counsel on judicial review and appeal do not merit deference on the basis that they could have been – but were not – advanced in the actual reasons for decision. A prerequisite to deference to an administrative decision-maker bound by the duty to give reasons is the direct provision of responsive reasons to the party or parties affected, and not conveyed later to a court via litigation counsel's arguments.

22. Where a decision turns on a contested interpretation of law, the modern approach to statutory interpretation supplies the method for choosing among competing interpretations, regardless of the standard of review.[18]

23. A practical obstacle to deferring to a legal interpretation on the basis of reasons offered is that many administrative decision-makers lack the skill set to perform judicial-like statutory interpretation, and sometimes even admit it.[19] CARL submits that this does not excuse them from providing responsive reasons that demonstrate the expertise they are deemed to possess.

24. CARL concedes that that it is unrealistic to expect all decision-makers who apply law to routinely use the full array of interpretive techniques available under the modern approach to statutory interpretation. It is equally unrealistic to expect judges to refrain from using those same techniques, which are familiar to them and which are argued before them by counsel on review. These may include legislative history, canons of construction, common law principles, comparative and international law, *Charter* values, etc.

25. Rather than expecting tribunals to replicate judicial techniques of statutory interpretation in order to merit deference, CARL proposes that a pragmatic approach that advances the culture of justification asks whether the decision-maker's reasons display the distinctive aptitude that the Court ascribes to them. This Court has endorsed Mullan's observation that that, "in many instances, those working day to day in the implementation of frequently complex administrative schemes

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[16] *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5, at para 29; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* [2011] 3 SCR 654, at paras 22-29.
[17] *McLean*, *supra* note 1 at para 72.
[18] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895.
[19] *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 SCR 289 at para 14; Transcripts of Cross-Examination of Sophie-Marie Lamothe, 15 October 2015, at 15-17, 37, 40 (Respondent's Record, Tab 7 at 114-16, 136, 139).

have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime."[20] This Court regards this type of experience as enabling decision-makers to "provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work."[21]

26. Where decision-makers do not explain to the person affected how they have deployed their expertise, or familiarity with the broad policy context, in arriving at their interpretive choice, they do not meet the minimum standard required by the rule of law's ethos of justification.

27. This does not mean that the decision must be set aside. It does mean that the Court should not defer. The Court should perform its task of statutory interpretation with careful attentiveness to all arguments, but without 'putting a thumb on the scale' in favour of the outcome reached by the decision-maker. Non-deferential review allows for the possibility of more than one interpretation, but it does not accord any special weight to the decision-maker's preference.

28. Other options for dealing with unresponsive reasons may be available, but are often less satisfactory. Returning the case to the original decision-maker to furnish responsive reasons is usually inefficient and costly to the parties.

29. Alternatively, a court that imputes reasons to a decision-maker is not deferring, but instead doing the job for the decision-maker. It defeats the expeditious resolution of disputes by requiring parties to litigate in order to glean from opposing counsel's arguments putative reasons that the decision-maker did not supply. It also erodes a culture of justification by incentivizing decision-makers to *not* provide responsive reasons. It communicates that decision-makers can simply let a deferential court retrofit legally defensible reasons to support their outcome.[22]

30. CARL submits that hinging deference on the responsiveness of decision-makers' actual reasons communicates a crucial rule of law message: an administrative decision-maker who subscribes to a culture of justification will attract deference, and their decision will be subject to a

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[20] *Capilano*, *supra* note 6 at para 33, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 Canadian Journal of Administrative Law and Practice 59 at 9.
[21] *Ibid*, citing *McLean*, *supra* note 1 at para 31, and *National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1336.
[22] Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52 Alberta Law Review 799, at 817-18; Sheila Wildeman, "Making Sense of Reasonableness" in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context*, 3rd Edition (Toronto: Emond Publishing, 2018) 437 at 473-476.

reasonableness standard of review. An administrative decision-maker who does not fulfill that responsibility will not attract deference. This message promotes the participation of administrative actors as partners in advancing the culture of justification.

31. CARL supports the position that the Registrar in the case at bar would not be entitled to presumptive deference because she is not an independent decision-maker. However, CARL offers her reasons as illustrative of unresponsive reasons that should rebut a presumption of deference. The reasons (supplied by the Analyst) do not situate the proffered interpretation within the larger policy context of citizenship attribution, or in an account of the purpose of s. 3(2)(a) of the *Citizenship Act*. The reasons derive the meaning of s. 3(2)(a) entirely from an isolated and uncontextualized moment in the drafting history of the provision. When asked about the purpose of excluding certain foreign employees under s. 3(2)(a) of the *Citizenship Act*, the Analyst replied "I went to find the policy intent behind this section … and I did not find it and I'm not a lawyer."[23] The reasons do not demonstrate the field sensitivity or familiarity with the policy context of the *Citizenship Act* that underwrites a presumption of deference. They do not earn the Registrar deference from a court.

A reasonable interpretation aligns with the best construction of statutory purposes and applicable legal norms.

32. Even where deference is appropriate, this Court has frequently emphasized that deference is neither submission nor abdication. The decision-maker's articulation of statutory purpose, policy objectives, or values is neither unassailable nor determinative. Respectful attention to a decision-maker's articulation of the policies or values promoted by a given interpretation of the legislative scheme does not relieve a reviewing court from considering the validity of the decision-maker's articulation of statutory purposes, policy context and implications of the intended interpretation in light of additional principles of statutory interpretation and wider norms of the legal system, including domestic and international human rights.

33. Statutory provisions may yield more than one interpretation, but the modern principle of statutory interpretation offers no guidance on how much support in text, context and purpose will make a given contender reasonable. The method is directed at enabling a decision-maker to select

[23] Transcripts of Cross-Examination of Sophie-Marie Lamothe, *supra* note 19 at 139.

the ‘best’ interpretation, not to identifying reasonable versus unreasonable interpretations.

34. CARL submits that in assessing multiple potential interpretations under a deferential standard of review, a court should be alive to what Wildeman calls *the normative dimensions of interpretation*: “judgment calls about the likely effects of a given interpretive decision and the relative importance of the values and interests engaged by alternative interpretations.”[24] These dimensions should be incorporated into statutory interpretation, and not perceived as supplements or competitors with the ‘ordinary tools’ of statutory interpretation.

35. CARL submits that an important indicator of an unreasonable interpretation is that it undermines or is otherwise inimical to attaining the statutory purposes, policy goals and wider legal norms applicable to the regulated field. For example, in *Caimaw v. Paccar of Canada Ltd.*,[25] the dissent found that the BC Labour Relations Board’s interpretation of a labour relations statutory provision was not defensible as a valid expression of a policy choice by the administrative tribunal. Rather, the effect of the Board’s interpretation was to defeat the statutory objective of creating a stable scheme of industrial relations. Wilson J concluded:

> I cannot agree with La Forest J., therefore, that one interpretation of the Code is as reasonable as the other, that it is a matter of choosing between equally viable "policy choices". Far from it. One is completely consistent with the concept of freedom and equality of bargaining power between the parties and the paramount role of the collective bargaining process in labour dispute resolution. The other is completely inconsistent with and inimical to both. It is on that basis that I would find that the decision of the Board was "patently unreasonable"…[26]

36. CARL submits that *C.U.P.E. v. Ontario*[27] illustrates a similar approach, *albeit* in the context of discretion. This Court ruled that the policy goal of legislation enabling a minister to appoint arbitrators was to promote industrial peace in the health sector by replacing the right to strike or lock-out with compulsory arbitration. Achieving that statutory purpose required arbitrators with experience and broad acceptability to the parties. The majority ruled that appointing retired judges as a class to arbitration boards “had the effect of frustrating the very legislative scheme under which the power is conferred,”[28] and was thus patently unreasonable.

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[24] Wildeman, *supra* note 22 at 460.
[25] *Caimaw v. Paccar of Canada Ltd.,* [1989] 2 SCR 983.
[26] *Ibid* at 1026; see also dissent of L’Heureux-Dubé J., at 1026-1046.
[27] *C.U.P.E. v. Ontario,* 2003 SCC 29, [2003] 1 SCR 539.
[28] *Ibid* at para 174.

37. CARL reiterates that an interpretation unsupported by responsive reasons will not merit deference. CARL further submits that an interpretation supported by responsive reasons will be unreasonable where it does not advance the purposes and objectives of the statutory regime or is incongruent with the wider set of legal norms governing the field of regulation. In immigration, refugee and citizenship law, these norms include domestic and international human rights law.

38. CARL submits that where a court endorses a given statutory interpretation as reasonable, it is unrealistic to expect a front-line decision-maker to subsequently depart from that interpretation, even if another interpretation is hypothetically or potentially reasonable. In functional terms, it will almost certainly operate as a precedent for administrative decision-makers governed by that statute. This does not reject the insight that a statutory provision may bear more than one defensible meaning; nor does it make deference irrelevant. In our proposed model a court that defers will give distinctive (but not determinative) weight to the decision-maker's interpretation as an integral part of the interpretive process; where it does not defer, no such weight will be afforded. That is the difference that deference should make where a question of statutory interpretation is at issue.

PART IV and V: COSTS AND ORDER SOUGHT

39. CARL does not seek costs and requests that no cost order be made against it. CARL requests permission of this Honourable Court to present oral arguments at the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th day of OCTOBER, 2018

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PART VI – TABLE OF AUTHORITIES:

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10	*National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 SCR 1324	**25**

19	Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52 *Alberta Law Review* 799, at 817-18	**29**
20	David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 *Review of Constitutional Studies* 87 at 113	**20**
21	Hon. Justice Beverly McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 *Canadian Journal of Administrative Law & Practice* 171	**12**
22	David J Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *Canadian Journal of Administrative Law and Practice* 59	**25**
23	Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Edition, Markham, ON: LexisNexis, 2014.	**8**
24	Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74:2 Supreme Court Law Review 211	**14, 19**
25	Sheila Wildeman, "Making Sense of Reasonableness" in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context*, 3rd Edition, Toronto: Emond Publishing, 2018	**29, 34**

S.C.C. File No. 37748

SUPREME COURT OF CANADA

B E T W E E N:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

-and-

Alexander VAVILOV

Respondent

FACTUM OF THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS

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