

S.C.C. Court File No. 37896

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

BETWEEN:

BELL CANADA , et al.

APPELLANTS (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT (Respondents)

-and-

**CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, et
al.**

INTERVENERS

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

S.C.C. Court File No. 37748

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT (Respondent)

-and-

ALEXANDER VAVILOV

RESPONDENT (Appellant)

ATTORNEY GENERAL OF ONTARIO, et al.

INTERVENERS

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

S.C.C. Court File No. 37897

AND BETWEEN:

NATIONAL FOOTBALL LEAGUE, et al.

APPELLANTS (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT (Respondents)

-and-

**CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, et
al.**

INTERVENERS

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

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

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

BETWEEN:

BELL CANADA and BELL MEDIA INC.

APPELLANT (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT (Respondents)

-and-

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

INTERVENER

-and-

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INTERVENERS

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S.C.C. Court File No. 37748

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT (Respondent)

-and-

ALEXANDER VAVILOV

RESPONDENT (Appellant)

-and-

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INTERVENERS

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S.C.C. Court File No. 37897

AND BETWEEN:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC

APPELLANT (Appellants)

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ATTORNEY GENERAL OF CANADA

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PART I and II – OVERVIEW AND POSITION

1. The Advocacy Centre for Tenants Ontario brings the perspective and experience of low-income Canadians to these appeals. In the important matter of housing, the statute of most significance to Ontario's tenant households is the *Residential Tenancies Act, 2006*. Appeals from the Landlord and Tenant Board to the court can proceed only on questions of law. This situates our legal argument in that part of the administrative law regime where an adjudicator must decide what the various provisions of a statute in dispute actually mean.

2. These appeals re-visit the principles set out in *Dunsmuir*.¹ It is common ground that *Dunsmuir*² refreshed administrative law by reducing three standards of review to two. The Advocacy Centre for Tenants Ontario's specific focus in this matter is the issue of statutory appeals and the value that a correctness standard brings to the administration of justice and to our legal work.

3. We take no position on the facts of these appeals.

PART III – ARGUMENT

i) *Dunsmuir*

4. *Dunsmuir*³ arose in the context of a labour relations dispute. It involved a judicial review of a labour relations adjudication. This Honourable Court considered and decided the matter, taking the opportunity to reassess and clarify the “ebbs and flows of deference”⁴ for practitioners and adjudicators of administrative law across the country. It reduced three standards of review to two. Not to one.

5. The majority judgment set out an overview of the law of judicial review, its function, and its important role in upholding the rule of law. For the Supreme Court of Canada, the case represented the opportunity to develop a principled framework that would be both “coherent”

¹ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190

² *Dunsmuir*, *supra*

³ *Dunsmuir*, *supra*

⁴ *Dunsmuir*, *supra*, para. 1

and “workable” in matters of judicial review.⁵

6. The concurring judgments of Binnie J. and Deschamps J. agree with the majority in its refreshed analysis of judicial review and with the disposition of Mr. Dunsmuir’s appeal. But both Binnie J. and Deschamps J. specifically address the issue of statutory appeals as being different and distinct from what the new analysis of judicial review would represent.

7. While Justice Binnie also works his way through “law office metaphysics”⁶ that the judicial review debate engenders, he agrees that the “big tent” of reasonableness is the “going-in presumption” for the standard of review of any administrative law decision.⁷ However, he is also clear and unequivocal that the statutory appeal is different – it attracts no deference to the decision-maker and that the standard of review is correctness. He says this not once, not twice but three times in his judgment.⁸

8. For Justice Deschamps (writing also for Rothstein J. and Charron J.) any inquiry still begins with whether the question at issue is one of law, fact, or mixed fact and law. For her, “deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions”.⁹

9. In sum, statutes must mean something. The law must be correct. In the case of a statutory appeal, the last word on statutory interpretation belongs to the judiciary. *Dunsmuir*¹⁰ did not jettison the standard of correctness in matters where adjudicators or judges are called upon to determine how a section of a statute should be interpreted.

ii) **Post *Dunsmuir***

10. In 2011, a decision of the Canadian Human Rights Tribunal was appealed to the Supreme Court of Canada on the issue of whether the Tribunal made a reviewable error in awarding costs

⁵ *Dunsmuir, supra*, para. 32

⁶ *Dunsmuir, supra*, para. 122

⁷ *Dunsmuir, supra*, paras. 144 and 146

⁸ *Dunsmuir, supra*, paras. 123, 130, and 146

⁹ *Dunsmuir, supra*, para. 163

¹⁰ *Dunsmuir, supra*

to the complainant.¹¹

11. While the *Dunsmuir* analysis was brought to bear on the facts of the case, the distinction between judicial review and appellate review was reinforced in the judgment of Justices LeBel¹² and Cromwell:

Although both judicial review and appellate review take into account the principle of deference, care should not be taken not to conflate the two. In the context of judicial review, deference can shield the administrative decision makers from the excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise.... By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness.¹³

12. In 2015, the issue of judicial review and appellate review was conflated. In *Saguenay*, the Court decided:

Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal.¹⁴

13. The different forms of review that Justices Binnie, Deschamps, LeBel, and Cromwell had tried so clearly to delineate and separate were now merged. The Court also applied different standards of review to different parts of the administrative decision. Justice Abella was left to wonder if a complete and total undermining of *Dunsmuir* had begun.¹⁵

14. Two cases, decided by the Supreme Court of Canada in 2016, shine a new light on the

¹¹ *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 R.C.S. 471

¹² It will be recalled that Justice LeBel co-wrote the lead judgment in *Dunsmuir*.

¹³ *Mowat, supra*, paras. 30 and 31

¹⁴ *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 R.C.S. 3 at para. 38

¹⁵ *Saguenay, supra*, para. 173

Dunsmuir issues – *Wilson*¹⁶, again, in the context of labour relations and *Ledcor*¹⁷ in the context of exclusion clauses and contract interpretation.

15. Mr. Wilson, employed by the Atomic Energy Commission, was dismissed in 2009. Did he have rights pursuant to labour legislation or was his dismissal a just one? A labour arbitrator held that his dismissal was unjust. The application judge found the decision unreasonable and the Federal Court of Appeal agreed, applying the standard of correctness. While Abella J. sets out that the standard of review in this case (reasonableness) “falls easily into our jurisprudence”¹⁸ it is obvious that the judges of the Federal Court of Appeal thought otherwise, as did three of Abella J.’s colleagues on the Supreme Court.

16. While all members of the Court agreed on the disposition of the appeal, Justices Côté, Brown and Moldaver reinvigorate the standard of review debate by setting out that when there is a “narrow and distilled legal issue” to consider, the appropriate standard of review is correctness. At stake is “the rule of law and the promise of orderly governance”:¹⁹

“...deferring in this way on matters of statutory interpretation opens up the possibility that different decision-makers may each reach opposing interpretations of the same provision, thereby creating “needless uncertainty in the law [in the sense that] individuals’ rights [are] dependent on the identity of the decision-makers, and not the law”.²⁰

17. This is precisely the problem that lies at the heart of the Advocacy Centre for Tenants Ontario’s respectful submission in this case.

18. In *Ledcor*, a unanimous Court held the standard of review to be correctness because the appeal involved the interpretation of a standard form contract, the interpretation had precedential value and there was no meaningful factual matrix at play. For the Court, the matter was better characterized “as a question of law subject to the correctness standard”.²¹

¹⁶ *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29

¹⁷ *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37

¹⁸ *Wilson*, *supra*, para. 19

¹⁹ *Wilson*, *supra*, para. 84

²⁰ *Wilson*, *supra*, para. 81

²¹ *Ledcor*, *supra*, para. 4

iii) Whither Correctness?

19. Landlords and tenants require certainty in the meaning and interpretation of the relevant statutes that structure and regulate their relationship. It is a commercial undertaking for landlords who provide rental housing that also carries with it profound consequences for the people who need that housing. As Justice Carnwath observed in *Britannia Glen Cooperative Homes*, “short of losing one’s liberty, losing one’s home is as serious a matter as can be imagined”.²²

20. After litigating an issue at the Landlord and Tenant Board, appeals from the Board’s decision are permitted only on questions of law.²³ No “meaningful factual matrix” is supposed to be at play. Further, on appeal, the Divisional Court has broad powers to affirm, rescind, amend or replace the Board’s decision or order or to remit the matter back to the Board with the opinion of the Divisional Court.

21. Low-income Ontarians are assisted in their legal matters by community legal clinics across the province. In matters of criminal injuries compensation, social assistance or landlord and tenant adjudication, for example, these citizens appeal to the courts on questions of law to have the meaning of the various statutory provisions affecting their lives clearly interpreted and consistently applied.²⁴

22. Section 14 of the *Residential Tenancies Act, 2006* provides that a “no pets” provision in a tenancy agreement is void. Will it always be void even when a landlord could make a reasonable case that it should not be void in a particular instance?

23. The *Residential Tenancies Act, 2006* is replete with clear notice provisions. If a landlord errs in the count because one of the months is February, will the notice be voided? Always? Not always?

²² *Britannia Glen Co-Operative Homes v. Indie Singh and Kuntie Singh* (2 December 1996), Brampton A4279/96 (O.C.G.D) [Book of Authorities of the Intervener, Tab A]

²³ *Residential Tenancies Act, 2006*, S.O. 2006, c. 17, s. 210

²⁴ *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C. 24, s. 23, *Ontario Works Act*, 1997, S.O. 1997, c. 25 Sched., A, s. 36(1), *Ontario Disability Support Program Act*, 1997, S.O. 1997, c.25, Sched. B, s. 31(1)

24. In the case of elevator breakdown in a multi-story apartment building, it was agreed that many elderly, sick and disabled tenants were denied access to a working elevator for ninety-six days in one year. Section 20, the repair and maintenance provision of the *Residential Tenancies Act, 2006*, was in dispute.

25. It was decided that the landlord had behaved reasonably during the outage and that the decision of the Board not to award any abatement of rent was a reasonable one. Factors beyond the landlord's control contributed to the repair delays. Because the standard of review applied was one of reasonableness, the result of the case was that the tenants, who paid their rent faithfully for a service that was not provided to them, received no abatement, adjustment or reduction in rent. See *Onyskiw*.²⁵

26. When a developer temporarily re-housed a tenant during the re-development of her complex, he inserted a termination clause in the new tenancy agreement setting out that the tenancy would be terminated when the complex was ready to be re-occupied. Pursuant to section 37(4) of the *Residential Tenancies Act, 2006* such termination clauses are supposed to be void.

27. When, after years, the eighty-five year old tenant declined to return to her old, but transformed, apartment building, it was decided that it was the landlord who was being reasonable and not the tenant. The termination clause in the new tenancy agreement was not voided and she was evicted pursuant to a standard of reasonableness. See *Asboth*.²⁶

28. Two decisions of the Divisional Court further illustrate the problem. Both cases involve the tenants objecting to the landlord taking photographs of their units pursuant to the landlord's right of entry set out in s. 27 of the *Residential Tenancies Act, 2006*. In one case, the landlord took photographs to obtain evidence in a repairs dispute with the tenant; in the other, the landlord took photographs to prepare the unit for sale.

29. In *Nickoladze*,²⁷ the Court's first determination involved the standard of review with the Court finding that as the matter arose as a question of law, the standard of review was

²⁵ *Onyskiw v. CJM Property Management Ltd.*, 2016 ONCA 477

²⁶ *Morguard Residential v. Asboth*, 2017 ONSC 2502

²⁷ *Nickoladze v. Bloor Street Investments/Advent Property Management*, 2015 ONSC 3893

correctness. It went on to find that the reason for the photographs being taken was relevant and that it could be considered by the board. Given this, nothing arose from the determination that could be considered an error of law. The appeal was dismissed.

30. Nine months later in *Juhasz*²⁸, where the landlord wanted to take photographs of the unit in order to list it for sale, the Divisional Court found that the standard of review was reasonableness because the Board was interpreting its home statute. That tenant succeeded in her appeal because the Board had made a fundamental error in law interpreting s. 27 – entry did not include taking photographs.

31. In the next case that considers the taking of pictures by a landlord, what will s. 27 mean? We just do not know.

32. In his plea for clarity and certainty, Justice Binnie observes that litigants will hesitate to go to court to seek redress for perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. A litigant “should be able to seek judicial review without betting the store or the house on the outcome”.²⁹

33. Ontario tenants always “bet” their homes on the outcomes because a reasonableness standard and a factual matrix is commonly applied to the matters that give rise to their disputes. Clear statutory provisions are being interpreted differently depending on the facts, the adjudicator or the judge, notwithstanding that their statutory appeals only proceed on questions of law.

34. While *Dunsmuir*³⁰ was meant to bring fairness and coherence to the administrative justice process, low-income people who rely on myriad statutes that provide them with a statutory right of appeal are being denied these things.

²⁸ *Juhasz v. Hymas*, 2016 ONSC 1650

²⁹ *Dunsmuir, supra*, para. 133

³⁰ *Dunsmuir, supra*

35. In the Advocacy Centre for Tenants Ontario’s respectful submission, “where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is appropriate”.³¹

iv) Conclusion

36. The significance and the importance of the administrative justice system in the lives of ordinary and regular Canadians cannot be overstated. Many depend on the administrative justice system for the necessities of life. It is the place to which many Canadians must turn for the enforcement or vindication of their rights on a broad range of everyday matters. For many, it means food and shelter.³²

37. When legal disputes arise and these Canadians make their arguments to a board or tribunal on the legal meanings of the statutory provisions that give rise to their disputes (and their deprivations) they are entitled to more than simply a hearing. They are entitled to a correct interpretation of the various statutory provisions in dispute that will provide them (and the others who come after them) with understanding, transparency, certainty, and predictability. The argument that a correctness standard promotes judicial economy is an obvious one.

38. Further, if these correct and consistent interpretations give rise to injustice or unintended consequences, legislatures can act.

39. Canada’s commitment to “peace, order and good government” is grounded in the rule of law. Good government involves delegation of some decision-making to administrative or juridical officials who must interpret correctly the statutory framework in which they operate. When they do not, the courts must act to restate or re-instate the consistent or correct application of the legislation. This legitimizes government. This legitimizes the judiciary. People cannot live and operate in some free-floating landscape of uncertainty, speculation, and doubt. It erodes trust. It erodes the commitment to being law-abiding. It erodes the rule of law.

³¹ *Wilson, supra*, para. 89

³² R. Ellis, *Unjust by Design* (Vancouver: UBC Press, 2013) para. 2 at page 2 [Book of Authorities of the Intervener, Tab B]

40. Statutory appeals on questions of law should attract the correctness standard of review. Statutes have to mean something to the people whose lives are regulated by them and for their advocates to have to fight for them on a daily basis.

PART IV: COSTS

41. The Advocacy Centre for Tenants does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

42. The Advocacy Centre for Tenants seeks the permission of this Honourable Court to present brief oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS, 18th day of October 2018



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PART VI – TABLE OF AUTHORITIES

CASE LAW

CASES	PARAGRAPH(S)
1. <i>Dunsmuir v. New Brunswick</i>, [2008] 1 SCR 190, 2008 SCC 9	2, 4, 6,7, 9, 11, 13, 14, 32, 34,
2. <i>Britannia Glen Co-Operative Homes v. Indie Singh and Kuntie Singh</i> (2 December 1996), Brampton A4279/96 (O.C.G.D)	19
3. <i>Onyskiw v. CJM Property Management Ltd.</i>, 2016 ONCA 477	25
4. <i>Morguard Residential v. Asboth</i>, 2017 ONSC 2502	27
5. <i>Nickoladze v. Bloor Street Investments/Advent Property Management</i>, 2015 ONSC 3893	29
6. <i>Juhasz v. Hymas</i>, 2016 ONSC 1650	30
7. <i>Canada (Canadian Human Rights Commission) v. Canada (Attorney General)</i>, [2011] 3 SCR 471, 2011 SCC 53	10
8. <i>Mouvement laïque québécois v. Saguenay (City)</i>, [2015] 2 SCR 3, 2015 SCC 16	12
8. <i>Wilson v. Atomic Energy of Canada Ltd.</i>, [2016] 1 SCR 770, 2016 SCC 29	14, 15, 16, 34
9. <i>Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.</i>, [2016] 2 SCR 23, 2016 SCC 37	14

SECONDARY AUTHORITIES

ARTICLES / REPORTS	PARAGRAPH(S)
10. R. Ellis, <i>Unjust by Design</i> (Vancouver : UBC Press , 2013)	36

LEGISLATION

STATUTORY PROVISIONS	SECTION (S)
11. <i>Residential Tenancies Act, 2006</i>, S.O. 2006, c. 17	14 , 20 , 27 , 37(4) , 210(1)
12. <i>Compensation for Victims of Crime Act</i>, R.S.O. 1990, c. C. 24	23
13. <i>Ontario Works Act, 1997</i>, S.O. 1997, c. 25 Sch. A	36(1)
14. <i>Ontario Disability Support Program Act, 1997</i>, S.O. 1997, c.25, Sch. B	31(1)