File No. 37896

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

BETWEEN:

BELL CANADA and BELL MEDIA INC.

Appellants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

Amici Curiae

AND BETWEEN:

File No. 37897

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC

Appellants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

Amici Curiae

AND BETWEEN:

File No: 37748

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant (Respondent)

- and -

ALEXANDER VAVILOV

Respondent (Appellant)

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

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FACTUM OF THE INTERVENER,
ATTORNEY GENERAL OF BRITISH COLUMBIA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Table of Contents

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Ten years ago this Court pronounced its landmark decision in *Dunsmuir v. New Brunswick*.[1] Guided by the twin pillars of democracy and the rule of law, the Court sought to simplify and clarify a body of law that had become mired in complexity. *Dunsmuir* did so by reducing the number of standards of review from three to two, and by establishing that a deferential presumption of "reasonableness" would ordinarily apply to the review of administrative-decisions.

2. In these appeals, this Court is asked to revisit these principles. Some of the problems that *Dunsmuir* attempted to resolve have resurfaced, "challenging the coherence of the standard of review analysis and the meaning of deference itself."[2] Certain observers now liken Canadian administrative law to a "barbed and occluded thicket"[3] that produces confusion for both reviewing courts and administrative decision-makers alike.

3. The Attorney General of British Columbia ("AGBC") supports *incremental* reform to the standard of review analysis. But the AGBC does not endorse a radical jurisprudential upheaval that would disrupt stable administrative practices and generate uncertainty. *Dunsmuir* got many things right: it is a "doctrinally sound" decision that "planted the right seeds".[4] If "weeds" have grown up "choking and obscuring what ought to be [a] thriving and clear"[5] body of law, then the analysis should be "pruned of some of its unduly subtle, unproductive, or esoteric features."[6]

B. Statement of Facts

4. The AGBC takes no position on the facts or merits of the appeals before the Court.

PART II: POINTS IN ISSUE

5. The AGBC advances three core submissions in these appeals:

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[1] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190["*Dunsmuir*]
[2] Lorne Sossin, "*Dunsmuir* – Plus ça change Redux" (2018)
[3] Beverley McLachlin, "Administrative Law is Not for Sissies: Finding a Path through the Thicket" (2016) 29 Can. J. Admin. L. & Prac. 127 at 127.
[4] David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (February 17, 2016).
[5] *Ibid*.
[6] *Dunsmuir*, *supra* at para. 133 (*per* Binnie J., dissenting).

a. *First*, the common law standard of review analysis should be responsive to the diverse tribunals and varying legislative schemes governing administrative decision-makers across the country. The standard of review in British Columbia, for example, is governed in part by the common law and in part by the *Administrative Tribunals Act*.[7] Canada's jurisdictional diversity can be best accommodated through a simplified standard of review analysis that establishes clear presumptions and a clear way of displacing those presumptions.

b. *Second*, reform of the standard of review analysis should be incremental. *Dunsmuir* has become a favourite target of critics, many of whom ignore its salutary features. Sweeping change to the common law is rarely desirable and almost always highly disruptive. The AGBC asks the Court to: (a) clarify that reasonableness is a single standard; (b) confirm that the presumption of reasonableness should continue to apply to questions of law arising from an administrative decision-maker's "home statute"; and (c) eliminate certain problematic categories of presumptive correctness.

c. *Third*, while legislative intent should remain the "polar star" guiding the standard of review analysis, this can best be accomplished through clear presumptions and equally clear legislative methods of displacing those presumptions. "Reasonableness" should be the presumptive starting point, which only gives way to clear expressions of contrary legislative intent or defined exceptions. Notions such as "presumed expertise" or "polycentric interests" should not be allowed to reintroduce the "pragmatic and functional" approach under the guise of a contextual reading of legislative intent.

PART III: ARGUMENT

A. Canada's diverse systems of administrative justice

6. Canada contains a vast complement of administrative tribunals operating within diverse administrative justice systems. British Columbia alone has dozens of tribunals that have been assigned specialized decision-making functions by its Legislature, as well as many more ordinary statutory decision makers, who are also subject to judicial review for substantive reasonableness and procedural fairness.

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[7] *Administrative Tribunals Act*, SBC 2004, c. 45.

7. In British Columbia, the inherent jurisdiction of superior courts to review decisions of statutory decision-makers has been substantially structured by statute. The *Judicial Review Procedure Act*[8] establishes the general procedural and remedial features of judicial review applications. Since 2004, the *Administrative Tribunals Act* ("*ATA*") has set out timelines for judicial review, and has codified standards of review, with respect to certain tribunals whose decisions are not subject to statutory rights of appeal.

8. The *ATA* provides a menu of tribunal powers that may be conferred on specific statutory decision-makers. Sections 58 and 59 of the *ATA* apply "in a judicial review proceeding"[9] and provide two different standards of review. For all tribunals with a privative clause in their enabling legislation, s. 58 sets out a deferential standard of review ("patent unreasonableness") on a "finding of fact, law or exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction."[10] Section 59, on the other hand, focusses on correctness as a standard of review. There are only four tribunals that are subject to s. 59 of the *ATA*: the Oil and Gas Appeal Tribunal, the Human Rights Tribunal, the Surface Rights Board and the Mental Health Review Board.

9. Many statutory decision-makers in British Columbia are not covered by the *ATA*. In statutory appeals, or judicial reviews where neither ss. 58 or 59 of the *ATA* apply, British Columbia courts rely upon the common law standard of review analysis as set out in this Court's decision in *Dunsmuir* and its progeny.

10. The evolution of the common law standard of review analysis directly affects the interpretation of British Columbia's existing statutory provisions delineating the roles between tribunals and courts. The AGBC has an interest in maintaining the legislature's ability to bring certainty and coherence to the standards of review applicable to provincial statutory decision-makers. This is best accomplished by having clear presumptions and a clear path for legislatures to displace those presumptions.

B. The *Dunsmuir* framework should be *reformed* but not *abandoned*

11. The AGBC favours reform of the common law standard of review analysis, but departs from those appellants and interveners who ask for sweeping changes to the

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[8] *Judicial Review Procedure Act*, RSBC 1996, c. 241.
[9] *ATA*, *supra*, s. 9.
[10] "Patent unreasonableness" was discussed in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 26.

analysis. For good reason, the common law "process of change is a slow and incremental one"[11] that emphasizes experience over doctrinal logic. An incremental approach is, in this regard, especially appropriate "where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law."[12] Relying on *Dunsmuir*, administrative tribunals and courts in British Columbia have established a body of well-settled practices and accepted standards of judicial review.

i. Reasonableness should be defined as a single standard

12. One of the issues raised by these appeals is whether "reasonableness" is a single standard of review, or instead embodies a spectrum of standards that vary according to the nature of the decision under review. In *Dunsmuir*, this Court held that "tribunals have a margin of appreciation within the range of acceptable and rational solutions."[13] Some have argued that the case law supports reviewing courts applying varying degrees of intensity covered by the "reasonableness" standard",[14] with others arguing that the case law already rejects this approach.[15]

13. The AGBC says that the proper approach to reasonableness is set out in *Alberta Teachers*, where Rothstein J. explained that reasonableness is a single standard that is applied in varying contexts:[16]

> The majority reasons in *Dunsmuir* do not recognize variable degrees of deference within the reasonableness standard of review and with respect neither do the reasons in *Canada (Canadian Human Rights Commission)*. Once it is determined that a review is to be conducted on a reasonableness standard, there is no second assessment of how intensely the review is to be conducted. The judicial review is simply concerned with the question at issue. A review of a question of statutory interpretation is different from a review of the exercise of discretion. Each will be governed by the context. But there is no determination

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[11] *Watkins v. Olafson*, [1989] 2 SCR 750 (per McLachlin J.); *R. v. Salituro*, [1991] 3 SCR 654 (per Iacobucci J.).
[12] *Bhasin v. Hrynew*, [2014] 3 SCR 494 at para. 40 (per Cromwell J.).
[13] *Dunsmuir*, *supra* at para. 47.
[14] Citing cases such as: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5 at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para. 44.
[15] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654 [*Alberta Teachers*]; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 67, at paras. 32-33; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 [*Wilson*].
[16] *Alberta Teachers*, *supra* at para. 47.

> of the intensity of the review with some reviews closer to a correctness review and others not. [17]

14. The "margins of appreciation" interpretation of reasonableness should be definitively rejected.[18] *Dunsmuir* itself found no principled basis to distinguish between the "unreasonable" and "patently unreasonable" standards.[19] As recently expressed by Abella J. in *Wilson v. Atomic Energy of Canada Ltd.*, "calibrat[ing] reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity."[20]

ii. Questions of law involving "home statutes" should be accorded deference

15. The key controversy that has remained following *Dunsmuir* relates to the standard of review applicable to questions of law. *Dunsmuir* and many subsequent decisions have held that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."[21] This Court has confirmed that the "interpretation by the tribunal" of its home statute "should be presumed to be a question of statutory interpretation subject to deference on judicial review."[22]

16. Sound reasons of principle and policy support this deferential posture. To begin with, the deference accorded to administrative tribunals on questions of law is firmly rooted in the democratic principle. By creating specialized tribunals, legislatures have made a decision to allocate responsibility for decision-making to administrative-decision makers. They are also free to grant or revoke this authority. Tribunals inevitably spend more time with their home statutes than courts and will therefore usually have a better sense of the statute's context and purpose. In any event, statutes are frequently "susceptible to multiple reasonable interpretations."[23] Judges and lawyers often disagree about the correct interpretation of statutes. Judicial review of questions of law for correctness does not guarantee an optimum decision, but only an authoritative one.

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[17] *Alberta Teachers*, *supra* at para. 47.
[18] *McConchie v British Columbia (Superintendent of Motor Vehicles)*, 2016 BCCA 205 at para. 13.
[19] *Dunsmuir*, *supra* at paras. 39 – 42.
[20] *Wilson*, *supra* at para. 18 (per Abella J., dissenting).
[21] *Dunsmuir*, *supra* at para. 54.
[22] *Alberta Teachers*, *supra* at para. 34.
[23] *McLean*, *supra* at para. 32.

17. Deference on questions of law operates where a decision-maker is interpreting its "own statute or statutes closely connected to its function [.]"[24] Consequently, where a decision-maker is asked to answer questions of law outside of its statutory mandate, courts should continue to be the final arbiters of interpretive disputes. In this sense, the presumptive deference applicable to "home" or "closely related" statutes corresponds to the legislative allocation of responsibility, without transgressing the requirements of the rule of law. By the same token, if a legal issue is outside a "home" statute, it is more important that there be a single determinative answer for the entire legal system – something only the courts, operating on a "correctness" standard, can deliver.

18. In the vast majority of cases, it will be clear whether a question of law involves a home statute or closely-related statute. However, there will be borderline cases where a statutory decision-maker employs a legal rule, standard or principle that comes from another area of law. In some instances – such as the use of "estoppel" in the labour law context [25]– there may be no reason why an external legal standard must be applied consistently with the general law. Yet, in other cases – such with the use of "solicitor-client privilege" – the external legal rules, though referenced in a home statute, properly belong to another body of law.[26]

19. The fundamental question is whether the legislature has evinced an intention to keep the meaning of the external legal rule, principle or standard constant across different legal contexts. [27] If a question of law transcends the home statute, then the courts should review it on the basis of correctness. However, since every enactment must be interpreted in light of its own context and purpose, the presumption should favour "reasonableness", unless it is clear that divergent interpretations in different contexts would itself be contrary to the legislative purpose.

20. This approach can apply to the incorporation of concepts from the common law, equity, civil law or international law, as well as from other statutory schemes. The text, context and purpose of the scheme as a whole should be considered in determining whether

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[24] *Dunsmuir, supra,* at para. 54; *Alberta Teachers, supra* ,at para. 30.
[25] *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals,* [2011] 3 SCR 616.
[26] *Alberta (Information and Privacy Commissioner) v. University of Calgary,* [2016] 2 SCR 555.
[27] *Dunsmuir, supra* at para. 60.

the concept, as used in decisions under that statute, must continue to bear the same meaning as it does in the external legal sphere from which it was borrowed.

iii. Certain presumptive categories of "correctness" should be eliminated

21. This Court's jurisprudence recognizes that the rule of law dictates that certain legal questions—particularly those involving constitutional rules—require a single, consistent answer. To this end, the Court in *Dunsmuir* endorsed four categories where "correctness" was the presumptive standard of review: (1) constitutional questions; (2) "true questions of jurisdiction or *vires*";[28] (3) questions "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise";[29] and (4) questions "regarding the jurisdictional lines between two or more competing specialized tribunals."[30]

22. The first and fourth categories are, in reality, simply applications of the principle that the tribunal's legal interpretations are entitled to deference only when they concern its own home statute. Only the courts can claim the Constitution of Canada as their "home statute". And when it comes to jurisdictional lines, the issue is whose "home" it is – an issue only the courts can resolve.

23. The other two categories have proven unhelpful. No satisfactory definition of questions of "true" jurisdiction has materialized in the case law.[31] While this Court has left the "door open to the possibility"[32] of such a question arising, it has simultaneously questioned "whether the category of true question of jurisdiction exists", and found itself "unable to provide a definition of what might constitute a true question of jurisdiction".[33] It is now time to shut the door permanently, and to thereby simplify the analysis.

24. "Questions of central importance to the legal system" have likewise evaded easy definition. *Dunsmuir* defined this category as encompassing those "questions [that] require uniform and consistent answers."[34] The Court has occasionally found this category applicable,[35] but has more commonly held that it is not engaged.[36] In the AGBC's view, the

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[28] *Dunsmuir*, *supra* at para. 59.
[29] *Dunsmuir*, *supra* at para. 60.
[30] *Dunsmuir*, *supra* at para. 61.
[31] *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 SCR 485.
[32] *Alberta Teachers*, *supra* at para. 34.
[33] *Alberta Teachers*, *supra* at paras. 35 & 42.
[34] *Dunsmuir*, para. 60.
[35] *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 SCR 3.

real issue is not whether a question is of "central importance" to the legal system, but whether it is a question of the interpretation of a "home" or "closely related" statute.

25. Countless cases wend their way through our legal system burdened by intractable disagreements over the standard of review.[37] The consequence is a system of judicial review that is "burdened with undue cost and delay."[38] Recently, in *Wilson v. Atomic Energy of Canada Ltd.*, Justice Abella expressed concern about this very problem, decrying the fact that so much of the "parties' factums" and lower court decisions "were occupied with what the applicable standard of review should be".[39] Abella J. went on to observe that the gravity of the situation "directs us institutionally to think about whether this obstacle course is necessary or whether there is a principled way to simplify the path to reviewing the merits."[40]

26. The AGBC submits that, while correctness review should continue to play a limited role in the standard of review analysis, this Court should eliminate the "true jurisdiction" and "questions of general importance" categories. These categories are conceptually unwieldy and provide counter-productive opportunities for litigation. Absent some compelling justification, the remaining two correctness categories balance concerns about the rule of law, and contribute to the fair and efficient system of administrative justice.

C. Legislative intent should be determined by applying strong presumptions

27. The presumption that the "reasonableness" standard applies on judicial review is only a presumption. Within constitutional boundaries, the legislature can dictate the standard of review. There is no constitutional impediment to the legislature choosing to apply a "correctness" standard of review. The fundamental objective of the administrative law standard of review analysis is to determine legislative intent. At the same time, the search for this intent when it is not clearly expressed should not be allowed to complicate the analysis unduly.

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[36] *Nor-Man, supra; Canadian Human Rights Commission, supra; McLean, supra; Communications, Energy and Paperworkers Union of Canada, supra; Wilson, supra.*
[37] Robert Danay, "Did *Dunsmuir* Simplify the Standard of Review? An Empirical Assessment"
[38] *Dunsmuir, supra* at para. 133.
[39] *Wilson, supra* at para. 20.
[40] *Ibid.*

28. The singular challenge posed by the existing standard of review jurisprudence is not so much ***whether*** legislative intent is a primary consideration, but ***how*** reviewing courts should go about ascertaining it. Given that the legislatures of this country are well aware of *Dunsmuir* and the presumption of reasonableness, the AGBC says that this should be a strong presumption. While there should not be a magic grammatical formula required of a legislature to rebut this presumption, it makes sense to require a clear indication of legislative intent to substitute a different standard of review.

29. Before *Dunsmuir*, the Court stated that legislative intent was the "touchstone" or "polar star" of judicial review,[41] and attempted to give effect to legislative intent through the highly contextual "pragmatic and functional approach".[42] *Dunsmuir* marked a departure from this contextualist orientation by commencing the analysis with a presumption of reasonableness, which was only then to be followed by consideration of contextual factors.[43] Despite recognizing that contextualism had "misguided courts in the past,"[44] the Court in *Dunsmuir* stated that "[t]he analysis must be contextual."[45]

30. More recent jurisprudence has grappled with the continued role of contextualism in determining legislative intent, and whether, in turn, contextual factors are capable of rebutting the presumption of reasonableness. This year, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, a majority of this Court held that "[e]xceptionally, the presumption [of reasonableness] may also be rebutted where a *contextual inquiry* shows a clear legislative intent that the correctness standard be applied."[46]

31. Two problems emerge from the uncertain status of contextualism in the case law: one pragmatic and the other doctrinal. The pragmatic problem is that contextual assessments have proven time and again to be unmanageable. In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*,[47] Karakatsanis J. (writing for the majority) observed

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[41] *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para. 149.
[42] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 29 *et seq*.
[43] *Dunsmuir, supra* at para. 61.
[44] *Ibid*., at para. 63.
[45] *Ibid*., at para. 64.
[46] *Canadian Human Rights Commission, supra* at para. 28 [Emphasis added].
[47] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R 293 at para. 35

that: "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review." The fact is that most disappointed litigants believe their case falls within the "exception". In consequence, despite this Court's efforts in *Dunsmuir* to limit contextual considerations, lawyers and courts continue to expend significant time, money, and intellectual energy shadowboxing with the "pragmatic and functional approach."

32. A related problem of principle arises from a lack of clarity concerning the relationship between legislative intent and the contextual considerations. Although the "presumption of reasonableness" must be rebuttable (or else it is not a presumption), it is unclear why rebutting this presumption involves identifying considerations external to the statutory scheme. Legislative intent, in other statutory contexts, is primarily derived from an examination of the words of the statute and the scheme of the Act.[48]

33. While the "modern rule" does not impose a specific textual formulation, it is important to recognize that many administrative schemes have developed in the context of the *Dunsmuir* standard of review analysis. A legislature that wishes to depart from the *Dunsmuir* presumptions can do so quite easily: a privative clause, statutory right of appeal, or a scheme such as British Columbia's *ATA*, would provide a clear signal of legislative intent. The list of contextual considerations referenced in *Dunsmuir*—such as "the nature of the question, the tribunal's statutory purpose, and the expertise of the tribunal"[49]—are simply too abstract and artificial to be capable of determining legislative intent.

PART IV: COSTS

34. The AGBC seeks no costs and asks that no costs be awarded against him.

PART V: ORDER SOUGHT

35. The AGBC respectfully requests an order granting his counsel leave to make 10 minutes of oral submission at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26 OCTOBER 2018

Micah B. Rankin
Counsel for the Intervener,
Attorney General of British Columbia

[48] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21.
[49] *Dunsmuir, supra* at para. 64.

PART VI: TABLE OF AUTHORITIES

Cases	**Paras.**
Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, [2011] 3 S.C.R. 654	11, 13, 15, 23
Alberta (Information and Privacy Commissioner) v. University of Calgary, [2016] 2 SCR 555.	12, 18
Bhasin v. Hrynew, [2014] 3 SCR 494	11
C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539	29
Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339	12
Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31	30
Catalyst Paper Corp. v. North Cowichan (District), [2012] 1 S.C.R. 5	12
Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190	1 -3, 4, 5(b), 9, 11, 12, 14, 15, 17, 21, 24, 25, 28, 29, 33
Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., [2016] 2 S.C.R 293	31
Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 SCC 10	12
McLean v. British Columbia (Securities Commission), [2013] 3 S.C.R. 67	12
Mouvement laïque québécois v. Saguenay (City), [2015] 2 SCR 3	24
Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, [2011] 3 SCR 616.	18
Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982	29
R. v. Salituro, [1991] 3 SCR 654	11
Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27	32
United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 SCR 485	21
Watkins v. Olafson, [1989] 2 SCR 750	11

PART VII: RELEVANT STATUTES

Administrative Tribunals Act, SBC 2004, c. 45

1 In this Act:

"tribunal" means a tribunal to which some or all of the provisions of this Act are made applicable;

…

58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.