S.C.C. Court 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

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

CANADIAN RADIO-TELEVISION and TELECOMMUNICATIONS COMMISSION

Interveners (Pursuant to Rule 22(3)(c)(iv))

And in the Matter of:

S.C.C. Court File No. 37897

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

AND BETWEEN:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC

Appellants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

CANADIAN RADIO-TELEVISION and TELECOMMUNICATIONS COMMISSION

Interveners (Pursuant to Rule 22(3)(c)(iv))

(*Style of Cause Continued on Next Page*)

FACTUM OF THE INTERVENER,
ATTORNEY GENERAL OF SASKATCHEWAN
(Pursuant to Rules 37 & 42 of the *Rules of the Supreme Court of Canada*)

And in the Matter of:

S.C.C. Court File No. 37748

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

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

-and-

ALEXANDER VAVILOV

Respondent

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. There are certain areas of the law where efficiency and clarity must yield to nuance and context. Standard of review is **not** one of those areas.

2. Throughout the past decade, this Court has attempted to streamline the standard of review analysis, in order to make it more accessible and efficient. Despite these efforts, confusion and inconsistency persist. It is time to simplify the analysis once and for all.

3. The Attorney General of Saskatchewan requests that the standard of review analysis be refined as follows:

   a. Legislatures may explicitly prescribe the standard of review. In the absence of an express pronouncement, all interpretations of the decision-maker's home statute should benefit from the established presumption that the standard of review is reasonableness.

   b. The presumption should be rebutted only for two exceptional categories – namely, where the tribunal must determine either the constitutionality of a statutory provision or regulation, or the jurisdictional lines between competing tribunals.

   c. If neither of these narrow categories applies, there should be no other avenue for rebutting the presumption of deference.

   d. More specifically, there should be no opportunity for a court to undertake a contextual analysis of the legislation. The contextual approach complicates judicial analysis, delays consideration of the merits of the dispute, and "can generate uncertainty and endless litigation concerning the standard of review".[1]

[1] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 at para 35, [2016] 2 SCR 293 [*Edmonton East*].

4. These proposed revisions would simplify the standard of review analysis, promote access to justice, and improve efficiency and predictability – thereby benefitting both litigants and courts.

PART II – STATEMENT OF QUESTIONS IN ISSUE

5. What is the appropriate framework for the standard of review analysis?

PART III – STATEMENT OF ARGUMENT

Complexity impedes access to justice.

6. Nuance certainly has its place in the law, but the corollary of nuance is complexity.

7. Statutory grants of authority to administrative decision-makers are intended to provide parties with "a speedier and less expensive form of decision-making".[2]

8. This legislative intention is frustrated where the merits of the dispute are overshadowed by a cumbersome and unpredictable standard of review analysis. The current complexity of the standard of review framework has significant implications for access to justice.

9. These issues are especially acute for residents of Saskatchewan. The province's population is dispersed among cities, towns, rural municipalities, First Nations reserves, and northern communities. The entire province is served by only ten superior court judicial centres that have court registries. In order to participate in court proceedings at these locations, many Saskatchewan residents (or their counsel) must travel significant distances, at significant cost.

10. Access to legal counsel can be a particular challenge in rural or remote locations. On average, the ratio of lawyers to residents in Saskatchewan is 1:818. In rural areas, however, the ratio is one lawyer for every 5,559 residents.[3] Some communities have no lawyers,

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[2] *Ibid.* at para 22.

[3] Final Report of the Legal Services Task Team For consideration by the Minister of Justice and the Benchers of Law Society of Saskatchewan, August 2018, online: http://publications.gov.sk.ca/documents/9/107840-

with the result that residents must travel to the nearest large center to access legal services. Furthermore, conflicts of interest may prevent the nearest lawyer from providing services to certain residents.[4]

11. An inability to obtain legal advice may not be such a problem in informal proceedings before administrative tribunals. However, access to justice barriers arise at the stage of deciding whether to challenge a tribunal's decision in court.

12. The current confusion regarding the standard of review makes it difficult for litigants to make informed decisions about whether to bring such challenges. As a result, unsuccessful parties with significant resources may initiate review proceedings that would have little chance of success based on an appropriately deferential standard of review.[5]

13. Conversely, parties with fewer resources may be ill-equipped to fund a challenge (or response) that requires extensive legal analysis of the standard of review.[6] Higher litigation costs also reduce the probability of challenges from those whose individual interests in the proceedings are relatively small compared to the costs of litigating a complex standard of review.[7]

14. A simplified, predictable standard of review framework is likely to decrease the number of unmeritorious appeals and judicial reviews, thereby reducing costs to litigants, and promoting the finality of administrative decisions.

15. Where litigants choose to proceed with court challenges, a more streamlined standard of review analysis will limit the time and cost of legal argument. This lessens the strain on

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FINAL%20REPORT%20OF%20THE%20LEGAL%20SERVICES%20TASK%20TEAM.pdf> at p. 8.

[4] *Ibid.* at p. 43.

[5] Andrew Green, "Can There Be Too Much Context in Administrative Law: Setting the Standard of Review in Canadian Administrative Law" (2014) 47 UBCL Rev 443 at p. 467.

[6] *Ibid.* at p. 476, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 133, [2008] 1 SCR 190 [*Dunsmuir*] per Binnie J, concurring. See also Green at p. 486.

[7] Green, *ibid.* at pp. 465-466.

scarce judicial resources, while also improving access to justice for the affected individuals.

The contextual approach should be rejected.

16. In *Groia v Law Society of Upper Canada*,[8] a majority of this Court held that "[e]ven where the question under review does not fit neatly into one of the four *Dunsmuir* correctness categories, 'a contextual analysis' that reveals a legislative intent not to defer to a tribunal's decision may nonetheless rebut the presumption of reasonableness".[9]

17. Subsequently, in *Canadian Human Rights Commission v Canada*,[10] this Court clarified that the contextual approach is exceptional and should be exercised sparingly. Nonetheless, the acknowledgment that the approach is available leaves open the door for litigants to argue that any given case is exceptional.

18. Saskatchewan respectfully requests that this Court abolish the contextual approach entirely.

19. Contextual analysis leaves more room for error and uncertainty, increases the risk of results-oriented reasoning, and focuses too much attention on the standard of review, rather than the merits of the dispute.[11] Furthermore, the more complex the test for determining the standard of review, the greater the potential for "mistakes or manipulation" in the application of the test by lower court judges.[12]

20. The Saskatchewan Court of Appeal decision in *Ready v Saskatoon Regional Health Authority*[13] is illustrative. In that case, the substantive issue was whether the Board of the Saskatoon Regional Health Authority could terminate a doctor from his employment, and thereby effectively revoke his practitioner privileges, without following a specific

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[8] 2018 SCC 27 *[Groia]*.
[9] *Ibid.* at para 53.
[10] 2018 SCC 31 [*CHRC*] at paras 28 and 45-47.
[11] Green, *supra*, note 5 at 450-451.
[12] *Ibid.* at p. 475; see also pp. 487 and 490.
[13] 2017 SKCA 20 [*Ready*].

regulatory framework. The three-member panel of the Court of Appeal split three ways, primarily due to differing applications of the standard of review.

21. Ottenbreit J.A. found that the appropriate standard of review was correctness. He relied on the correctness category for "true questions of jurisdiction", but alternatively, on a contextual analysis of the legislative framework. His entire standard of review analysis spanned **106 paragraphs**.[14]

22. Jackson J.A., dissenting, would have applied the presumption of deference. She found that none of the correctness categories applied, and there was no need to employ the contextual approach. Her conclusion was based on **25 paragraphs** of analysis.[15]

23. Ryan-Froslie J.A. wrote a separate judgment, in which she agreed with Jackson J.A. that the standard of review was reasonableness, but concurred with Ottenbreit J.A.'s finding (in the alternative) that the tribunal's decision was unreasonable.[16]

24. Even without quarreling with the result of this appeal, the complexity of the judicial reasoning should be troubling. In *Dunsmuir* and the cases that followed, this Court undertook to shift the focus away from the standard of review "labyrinth" and simplify the path to reviewing the merits.[17] A decade later, the standard of review analysis can still generate up to **131 paragraphs** of appellate analysis in a single case.

25. *Ready* is not the only illustration of this problem. By its very nature, the contextual approach depends on the particular legislative scheme at issue. As a result, contextual analysis may entail a detailed review of Hansard, as well tracing a legislative history that may span several decades. For example, in *Gary L. Redhead Holdings Ltd. v Swift Current*

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[14] *Ibid.* at paras 63-169.
[15] *Ibid.* at paras 251-276.
[16] *Ibid*. at paras 348-350.
[17] *Wilson v Atomic Energy of Canada Ltd*., 2016 SCC 29, [2016] 1 SCR 770 at paras 19-20.

(Rural Municipality),[18] this type of review translated to a standard of review analysis spanning **66 paragraphs**.

26. Even in cases where the presumption of deference is ultimately applied, the need to first consider the contextual approach greatly complicates the standard of review analysis.[19]

27. The current confusion is untenable – from the perspectives of both judicial resource allocation and access to justice. Rejecting the contextual approach would be a logical step toward greater efficiency, predictability and fairness.

The other aspects of the standard of review framework should also be simplified.

28. Saskatchewan's remaining arguments are secondary to the central issues discussed above. They follow in summary form, in the interest of providing a complete picture of Saskatchewan's position on the standard of review framework:

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[18] 2017 SKCA 47 at paras 22-88 [*Redhead*]. Notably, the Court distinguished *Edmonton East*, despite recognizing that "little differentiates the right of appeal granted by s. 33.1 of *The Municipal Board Act* from the right of appeal considered in *Edmonton East*": *Redhead* at para 28; see also paras 75-76. *Redhead* has since been relied upon to support a correctness standard of review in a number of subsequent cases involving the same legislative scheme: *South Hill Mall Property Holdings Inc. v Prince Albert (City)*, 2017 SKCA 52 at para 15; *Corman Park (Rural Municipality) v 618421 Saskatchewan Ltd*., 2018 SKCA 29; *City Centre Equities Inc. v Regina (City)*, 2018 SKCA 43 at para 27; *Prince Albert (City) v Prince Albert Co-op Association Ltd*., 2017 SKCA 53; *Aquila Holdings Ltd. v Edenwold (Rural Municipality),* 2017 SKCA 66 at para 19; at para 9. In the first three of these five cases, the appeal was allowed and the decision of the Assessment Appeals Committee overturned.

[19] See *e.g. British Columbia (Minister of Transportation and Infrastructure) v Registrar, Victoria Land Title Office,* 2018 BCCA 288 at paras 25-51.

a. Pre-*Dunsmuir* determinations of standard of review should no longer be relied upon. The standard of review analysis prior to *Dunsmuir* was substantively different, with questions of law typically being subject to correctness review.[20]

b. Legislatures may explicitly prescribe the standard of review, and such legislative pronouncements must be respected.[21]

c. Statutory rights of appeal should not affect the deference owed to the tribunal.[22]

d. Where a tribunal considers the constitutional validity of a statutory provision, the appropriate standard of review is correctness. However, where the tribunal makes

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[20] See generally *Redhead*, *supra* note 18 at para 34.

[21] Saskatchewan endorses the submissions of the Minister of Citizenship and Immigration in Supreme Court of Canada Court File No. 37748, Appellant's Factum at para 47 [the *Vavilov* Appellant's Factum].

[22] See generally the submissions of the Attorney General of Canada in Supreme Court of Canada Court File No. 37896 and 37897 at paras 48-55 [the *Bell* Respondent's Factum]. Statutory appeals were one factor relied upon to establish a correctness standard in *Ready; Redhead*; and *Montgrand v Saskatchewan Government Insurance*, 2017 SKCA 2 [*Montgrand*]; see also *Workplace Health Safety and Compensation Commission v St-Onge*, 2018 NBCA 53 at para 13. However, Saskatchewan submits that legislators may provide a right of appeal for any number of reasons. For example, the legislature may wish to limit the scope of the Court's review to questions of law (see *e.g. The Water Appeal Board Act*, SS 1983-84, c W-4.01, s. 26(1)); or specify the procedural powers of the court on appeal (see *e.g. The Arbitration Act, 1992*, SS 1992, c A-24.1, s. 9; see also ss. 7-8); or eliminate a further right of appeal beyond the superior court level (see *e.g. Saskatchewan Medical Care Insurance Act*, RSS 1978, c S-29, s. 49.21(4)). These are not signals that the tribunal should be afforded less deference – indeed, the legislative intention may be the exact opposite.

decisions applying constitutional principles, such as balancing *Charter* rights, the standard of review should be reasonableness.[23]

e. The correctness categories for "true questions of jurisdiction"[24] and "questions of central importance to the legal system as a whole" should be abolished.[25] However, a correctness category should be maintained for issues regarding the jurisdictional lines between competing tribunals.[26]

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[23] Saskatchewan endorses the submissions of the Minister of Citizenship and Immigration: *Vavilov* Respondent's Factum at paras 64-65. For essentially the same reasons, Saskatchewan submits that deference should also be paid to a tribunal's application of issues regarding Aboriginal rights. This latter position may require a clarification of the law as set out in *Paul v British Columbia*, 2003 SCC 55 at para 31, [2003] 2 SCR 585; *Haida Nation v. British Columbia (Minister of Forests*), 2004 SCC 73 at paras 61-62, [2004] 3 SCR 511; and *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations*), 2017 SCC 54 at paras 76-77, [2017] 2 SCR 386.

[24] See generally the submissions of the Attorney General of Canada in the *Bell* Respondent's Factum at paras 37-39.

[25] This category – like that of true questions of jurisdiction – is a "slippery concept" that is vulnerable to both mistakes and manipulation: see *CHRC*, *supra*, note 10 at para 38; Green, *supra*, note 5 at para 483. Since *Dunsmuir*, this Court has rejected a liberal interpretation of the "central importance" category, and has applied it only three times: *CHRC* at para 42; but see *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 at para 17.

[26] Generally speaking, a legislative intention for deference can be presumed from the fact of the legislature having granted authority to the tribunal: see the *Vavilov* Appellant's Factum at para 49. However, where the issue is **which body is the object of the delegation**, this rationale may not apply. This latter correctness category should be very much exceptional, and should apply only to questions that require an explicit, preliminary determination as to **which tribunal has the authority to make the inquiry**. An example would be a situation where a labour arbitrator must explicitly determine whether he has the authority to inquire into an employee's entitlement to workers' compensation benefits.

f. A statutory provision establishing concurrent jurisdiction between a tribunal and a court is not a signal for less deference.[27] Applying a correctness standard of review in such situations gives unsuccessful parties a greater incentive to challenge the tribunal's decision in court. This undermines the utility of the tribunal route, which is intended to give parties a more expeditious and informal alternative to court proceedings.

g. The use of "margins of appreciation" should be rejected. There should be no variation in the levels of deference afforded to administrative decision-makers.[28] Finding a narrow range of reasonable outcomes should not be permitted to become the new equivalent of correctness review.[29]

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[27] Concurrent jurisdiction was found to indicate a correctness standard of review in this Court's decision in *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; see also *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at paras 45-52, [2015] 2 SCR 3 [*Saguenay*] and *Montgrand* at paras 23-31. In *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 23-24, [2013] 3 S.C.R. 895, the presumption of deference was not rebutted where there was no concurrent jurisdiction on the same legal issue. These cases raise the possibility that different standards of review may apply to the interpretation of different provisions within the same legislation, depending on whether there is concurrent jurisdiction over the same specific legal issue. With respect, this is likely to cause unnecessary confusion.

[28] Saskatchewan endorses the submissions of the Minister of Citizenship and Immigration in the *Vavilov* Appellant's Factum at paras 53-55.

[29] A common proposal for simplifying the standard of review analysis is to move to a single standard of review of reasonableness. However, such an approach may unwittingly encourage disguised correctness review. The preliminary exercise of classifying the standard as correctness or reasonableness requires the Court to pause and ask whether the nature of the question at issue commands a single answer that must be determined by the court. Removing this pause may make it all too easy to unconsciously drift into applying a lesser "margin of appreciation" at the stage of determining the range of permissible outcomes: Green, *supra*, note 5 at pp. 493-494. While some issues may have only one reasonable outcome, such situations should be very much exceptional.

h. Questions of procedural fairness do not require a standard of review analysis in the ordinary sense. Rather, the Court should simply decide whether the procedure used by the tribunal was fair, taking into account the statutory context.[30]

PART IV – SUBMISSION ON COSTS

29. The Intervener makes no submissions as to costs, and requests that no costs be awarded against it.

PART V – ORDER SOUGHT

30. The Intervener Attorney General of Saskatchewan requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Regina, Province of Saskatchewan this 26th day of October, 2018.

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[30] Saskatchewan endorses the submissions of the Minister of Citizenship and Immigration in the *Vavilov* Appellant's Factum at para 66.

PART VI – TABLE OF AUTHORITIES

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Case Law:	**Paragraphs (in the memorandum)**
Paul v British Columbia, 2003 SCC 55, [2003] 2 SCR 585	28
Prince Albert (City) v Prince Albert Co-op Association Ltd., 2017 SKCA 53	25
Ready v Saskatoon Regional Health Authority, 2017 SKCA 20	20, 21, 22, 23, 28
Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35, [2012] 2 S.C.R. 283	28
South Hill Mall Property Holdings Inc. v Prince Albert (City), 2017 SKCA 52	25
Wilson v Atomic Energy of Canada Ltd., 2016 SCC 29, [2016] 1 SCR 770	24
Workplace Health Safety and Compensation Commission v St-Onge, 2018 NBCA 53	28

Secondary Sources:

Andrew Green, "*Can There Be Too Much Context in Administrative Law: Setting the Standard of Review in Canadian Administrative Law*" (2014) 47 UBCL Rev 443	12, 13, 19, 28
Final Report of the Legal Services Task Team for consideration by the Minister of Justice and the Benchers of Law Society of Saskatchewan, August 2018, online: <http://publications.gov.sk.ca/documents/9/107840-FINAL%20REPORT%20OF%20THE%20LEGAL%20SERVICES%20TASK%20TEAM.pdf>	10

Legislation, Statutes:

The Arbitration Act, 1992, SS 1992, c A-24.1

Saskatchewan Medical Care Insurance Act, RSS 1978, c S-29

The Water Appeal Board Act, SS 1983-84, c W-4.01