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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FACTUM OF THE INTERVENER, NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES.

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

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S.C.C. Court File No. 37896

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

B E T W E E N:

BELL CANADA and BELL MEDIA INC.

APPELLANT (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT(Respondents)

-and-

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

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INTERVENERS

-and-

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)

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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)

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. These appeals provide an opportunity to consider the nature and scope of judicial oversight of administrative action, and are a continuation of the Court's work in developing "an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers."[1] The reasoning of the Court will affect self-governing professions in Canada, including pharmacy. However, none of these appeals arise in the context of a self-governing profession. The submissions of the National Association of Pharmacy Regulatory Authorities / Association nationale des organismes de réglementation de la pharmacie ("NAPRA") offer a perspective that differs from the parties and other interveners. The approach advocated by NAPRA will apply to other professional regulators, and the NAPRA submissions are therefore expressed as applicable to self-governing professions generally.

2. NAPRA respectfully submits that the Court:

a. continue the presumption of reasonableness as the standard of review in respect of interpretation and application of home statutes by self-governing professions;

b. ensure that the theory of judicial review recognizes and embraces settled legal principles that support enhanced judicial deference in the context of the exercise of delegated legislative functions by the self-governing professions; and

c. restrict the role of jurisdictional error as a category in the standard of review analysis.

B. Statement of Facts

3. The members of NAPRA regulate the profession of pharmacy and the operation of pharmacies in each province and territory of Canada. NAPRA's provincial members exercise self-governing authority delegated to them by the legislature of each province. NAPRA's intervention is supported by the Federation of the Medical Regulatory Authorities of Canada, which represents the 13 provincial and territorial medical regulatory authorities; the Canadian

[1] *Dr. Q. v College of Physicians and Surgeons of British Columbia*, [2003] 1 SCR 226, 2003 SCC 19 at para 25, *per curium*.

Council of Registered Nurse Regulators, which represents Canada's 12 registered nurse regulators; and the Ontario College of Teachers, which regulates the teaching profession in Ontario.

4. Protecting the public interest is the overarching objective of NAPRA's members. The self-governing members fulfill this objective by exercising: (i) delegated legislative functions (promulgating bylaws, codes of ethics and behavior, and standards of practice); (ii) administrative functions (registering pharmacists and pharmacy technicians and licensing pharmacies); and (iii) adjudicative functions (determining whether a pharmacist or pharmacy technician acted unprofessionally or in an unskilled manner for the purposes of imposing corrective action or discipline).

5. This exercise of legislative, administrative and adjudicative functions is subject to judicial oversight. This judicial oversight may take the form of judicial review or statutory appeal depending of the specific terms of the statutory regime in a province or territory.

PART II – POINTS IN ISSUE

6. NAPRA will address the following issues of principle:

a. whether reasonableness should be the presumptive standard of review in the interpretation and application of home statutes by self-governing professions;

b. how the reasonableness standard should be applied in the context of issues that arise in the exercise of delegated legislative functions by self-governing professions; and

c. whether jurisdictional error should continue to exist as a category in the standard of review analysis.

PART III – STATEMENT OF ARGUMENT

A. Introduction

7. Although the present state of judicial review and standard of review are often the subject of sharp judicial and academic criticism, a linear development can be discerned in the evolution of the law leading to the point today where deference through the reasonableness standard is the presumptive approach to the interpretation and application of home statutes.[2] NAPRA urges restraint in reforming the general law of judicial review to avoid undermining the certainty this Court has sought to establish in the past decade.[3] With respect to the delegated legislative functions of self-governing professions, NAPRA urges that the Court expressly integrate the approach to regulations enunciated in *Katz*[4] with the very deferential approach to the substance of other forms of delegated legislation enunciated in *Catalyst*[5] and *Green*.[6]

8. These submissions propose an effective and meaningful balance in the context of professions upon which Legislatures have conferred the privilege of self-governance.

B. Reasonableness should remain the presumptive standard of review in the interpretation and application of home statutes by self-governing professions

9. Courts have long recognized the role that self-governing professions assume in protecting the public interest.[7] Legislatures provide a comprehensive suite of legislative, administrative and disciplinary functions to the self-governing professions, and so recognize that self-governing professions are best placed to act independently in the multifaceted contexts of their professions. Acting under this aegis, self-governing professions have developed expertise and specialization

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[2] D.P. Jones, *Some thoughts on Essential Concepts for Re-thinking Standards of Review in Administrative Law* at pp 1-6 (forthcoming in (2018) Administrative Law Reports (6th).
[3] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII) at para. 47.
[4] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, [2013] 3 SCR 810, 2013 SCC 64 (CanLII).
[5] *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5, 2012 SCC 2 (CanLII).
[6] *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 20.
[7] *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 71 DLR (4th) 68 at paras 36 and 37; *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513, 2006 SCC 48 at para. 36.

in the exercise of their delegated functions.[8] The daily interpretation and application of the statutory regimes that govern the profession of pharmacy, or any other profession, has never been the province of the courts. With respect to matters of legal interpretation, it is important to emphasize that self-governing professions are often better equipped than a reviewing court to resolve the ambiguities and fill the voids in statutory language. The general point is this:

> Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front-line agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law.[9]

The role of the Courts has always been reserved to judicial oversight. In that oversight, deference respects principles of self-governance as established by the legislatures.[10]

10. Since *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, the Court has applied a common conceptual framework of standard of review to judicial oversight, whether by judicial review or statutory appeal.[11] The existence of a statutory right of appeal has been rejected as a stand-alone basis for correctness review.[12] The presumption of reasonableness applies regardless of the forms of judicial oversight. NAPRA supports the continuation of this approach.

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[8] *Fortin v. Chrétien*, [2001] 2 SCR 500, 2001 SCC 45 at para 17; *Sobeys West Inc. v College of Pharmacists of British Columbia*, 2016 BCCA 41, [2016] 5 WWR 1 at para 56 and 68*; Brown v Alberta Dental Assn*, 2002 ABCA 24, 100 Alta LR (3d) 325 at para 30; *Re Stout and Ontario College of Pharmacy*, [1977] OJ No. 2207, 1976 CanLII 706, (1977) 15 OR (2d) 650, at para 20; *Cox v College of Optometrists of Ontario*, [1988] 65 OR (2d) 461, 1988 CanLII 4750, [1988] OJ 1347 at paras 29-34, 48 (ON DC); *Ebert Howe & Associates v Optometric Assn. (British Columbia)*, [1985] 66 BCLR 72, 21 DLR (4th) 421 (CA), 1985 CanLII 576 at paras 23-26, 29-34; *Ritholz et al v Manitoba Optometric Society*, [1959] MJ No. 64, 21 DLR (2d) 542 (Man.C.A.) at para. 10.

[9] Cited in *National Corn Growers Assn. v. Canada (Import tribunal)*, [1990] 2 SCR 1324, 1990 CanLII 49 (SCC), at p. 1336 line j to 1337 line a, per Wilson J..

[10] For example: *Law Society of New Brunswick v. Ryan*, [2003] 1 SCR 247, 2003 SCC 20 (CanLII), at para. 40; *College of Physicians and Surgeons of Ontario v. Payne*, 2002 CanLII 39150 (ON SCDC), at paragraph 29; *Bargen v. Medical Board of Inquiry*, 2009 NWTSC 5 (CanLII), at paragraphs 37-38.

[11] [2003] 1 SCR 226, 2003 SCC 19 (CanLII) at paras 21 and 26.

[12] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47 (CanLII) at para. 28.

11. NAPRA advocates that the deferential standard of reasonableness should continue to apply as the presumptive standard of review to the interpretation and application of home statutes by self-governing professions.[13] The reasonableness standard of review should continue to apply regardless of whether judicial oversight is by way of judicial review or statutory appeal. This will respect the decision of the legislatures to create and maintain self-governing professions.[14]

C. A greater degree of deference is required in the application of the reasonableness standard of review to the exercise of delegated legislative functions by self-governing professions

12. The deference that permeates reasonableness takes on special importance in judicial oversight of the exercise of a delegated legislative function by self-governing professions. Great deference was recognized as the appropriate standard for judicial oversight of a delegated legislative function as early as 1898, in *Kruse v Johnson*.[15] Deference has remained the appropriate standard of review in the modern era, with *Kruse v Johnson* still guiding contemporary law in respect of the scope of judicial oversight of delegated legislative functions.[16]

13. Self-governing professions exercise delegated legislative functions by promulgating bylaws, codes of ethics and behavior, and standards of practice. The exercise of this delegated legislative function is central to self-governance and, in turn, to protection of the public. Choosing the course to follow requires the governing council of the profession to weigh an array of health care, practice, ethical, social, and other policy issues, which constitute a large number of interlocking and interacting interests.

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[13] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47 (CanLII), at paras 22 and 29.
[14] *National Corn Growers Assn. v. Canada (Import tribunal)*, [1990] 2 SCR 1324, 1990 CanLII 49 at p. 1335 at lines f to h; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII) at para. 27 to 30.
[15] *Kruse v Johnson*, [1898] 2 QB 91 at pp 99-100. [Book of Authority, Tab 1].
[16] *Green v Law Society of Manitoba*, [2017] 1 SCR 360, 2017 SCC 20, at para 66; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 (CanLII), at paragraphs 59 to 61, 63 and 68 (leave to appeal refused 2016 CanLII 41773 (SCC)); *Ebert Howe and Assoc. v. B.C. Optometric Assn.*, 1985 CanLII 576 (BC CA), at para 23; *Chiropractors' Association of Saskatchewan v. Simpson*, [2001] S.J. No. 107, 2001 SKCA 22 at paras 50 and 51.

14. Legislative authority to make policy choices provides a sound reason for the court "to show a more deferential stance", reflecting the principle of "polycentricity", which is at the core of the legislative function and which has always been a basis for deference.[17] Creation of policy through the exercise of a legislative function is not something that lends itself to a correctness review, because that would invite the judicial branch to make the policy choices that the Legislatures have delegated to self-governing professions, and for which the courts are ill-suited.

15. Recently, this Court has adjusted the reasonableness standard applicable to the exercise of a delegated legislative function, recognizing that there is "extensive latitude" in the factors that can be considered in the exercise of a delegated legislative function.[18] Today, a bylaw, code or standard enacted by a self-governing profession will be set aside only if it "is one no reasonable body informed by the relevant factors could have enacted."[19] This degree of deference is sound judicial policy. It is consistent with the decisions of Legislatures to establish self-governing professions and to confer delegated legislative authority. It avoids undue interference by courts with the discharge of legislative function delegated to self-governing professions.[20] However, it still leaves open the potential for an attack based on "jurisdiction" that can all too readily undermine the deference that should properly be accorded to the adoption of bylaws, codes and standards by self-governing professions. Therefore, NAPRA requests that the Court consider the impact of its work upon the issue of jurisdiction and *vires* in the context of delegated legislation by self-governing professions.

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[17] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 1998 CanLII 778 (SCC), at paragraph 36.
[18] *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5, 2012 SCC 2 (CanLII), at para 30; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 53; *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, at para. 20; *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)* 2018 SCC 22 at para. 9.
[19] *Green v Law Society of Manitoba*, [2017] 1 SCR 360, 2017 SCC 20, at paras 20 and 22.
[20] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII), at paragraph 27.

D. How the Court should narrowly restrict 'jurisdictional error' if it continues to exist as a category in standard of review analysis

16. Historically, the phrase 'jurisdictional error' has been applied to a wide range of errors, in order to permit judicial intervention despite a broad privative clause. More recently, the Court has asked whether true questions of jurisdiction should continue to exist in the standard of review analysis or whether it is time to "euthanize the issue."[21] If "true questions of jurisdiction" survive as a basis for correctness review after these appeals, NAPRA submits that they should be restricted to the narrow question of whether a statutory decision maker has the delegated legislative authority to act. NAPRA submits that the unquestioned constitutional protection afforded judicial review by superior Courts today mitigates the need for a broad range of errors to be characterized as jurisdictional.

17. It may be difficult to "euthanize the concept of jurisdiction entirely" in administrative law. Jurisdiction is the foundational principle of Canadian administrative law. Statutory decision makers derive authority either by express grant or necessary implication.[22] It necessarily follows that, for all statutory decision makers, there is a point at which it is possible to exceed their powers. For example, a discipline tribunal of a professional body may have quorum fixed by constituent legislation. If that tribunal acts without the quorum, it has acted outside jurisdiction. This is described here as a matter of *vires* to emphasize its narrowness.

18. However, jurisdiction is an inherently nebulous concept that tempts litigants and judges to return to a broad understanding of jurisdiction as justification for correctness review, contrary to this Court's jurisprudence.[23] At its heart, the difficulty is constraining reviewing courts from too readily identifying issues as true questions of jurisdiction and stepping in to override the

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[21] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para 41; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 [2011] 3 SCR 654, 2011 SCC 61 at para. 33, 34 and 88.
[22] *ATCO Gas v. Alberta Energy Utilities Board*, 2006 SCC 4; [2006] 1 SCR 140 at paras 38 and 51; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 at para 62; *Roncarelli v. Duplessis*, [1959] SCR 121 at p. 140.
[23] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at paras 31 to 41.

decisions of statutory decision makers, usurping the role granted to them by the legislature. The broad delegation of authority to self-governing professions to protect the public interest requires considerable caution in the exercise of judicial oversight, particularly on the basis of a "true question of jurisdiction" and particularly in the context of delegated legislation.

19. While "jurisdiction" may survive as a foundational concept, the Court should continue to vigorously apply the admonition from *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp.* that "courts… should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[24] Particular care must be taken to ensure that, in the context of a challenge to delegated legislation, a *vires* analysis is not coloured by inquiry into the underlying "political, economic, social or partisan considerations" or in the case of a self-governing profession "the practice, ethical, social, and policy issues" underlying the delegated legislation.[25] The test for *vires* must not include an inquiry into the merits of the delegated legislation.[26]

20. NAPRA submits that judicial oversight of the exercise of a delegated legislative function should be undertaken through an analytical approach that expressly integrates the narrowly focused *vires* approach to regulations adopted by the Court in *Katz*[27] with the reasonableness standard of review for delegated legislation developed and applied in *Catalyst*[28] and *Green*.[29] There is no conceptual reason why regulations made under statutory authority should be treated differently than other forms of delegated legislation made under statutory authority.

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[24] *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation,* [1979] 2 SCR 227, 1979 CanLII 23 at page 233.
[25] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care),* [2013] 3 SCR 810, 2013 SCC 64 (CanLII), at paragraph 28.
[26] *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)* 2013 SCC 64, [2013] 3 SCR 5 at paragraphs 24 to 28.
[27] *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care),* [2013] 3 SCR 810, 2013 SCC 64 (CanLII).
[28] *Catalyst Paper Corp. v. North Cowichan (District),* [2012] 1 SCR 5, 2012 SCC 2 (CanLII), at paras 18 to 30.
[29] *Green v. Law Society of Manitoba,* [2017] 1 SCR 360, 2017 SCC 20 (CanLII), at paras 20 to 25.

21. There are two stages to the proposed integrated analysis, the first focussed on *vires* and the second on standard of review.

a. Stage 1 — A narrowly restricted *vires* assessment that does not consider the substance of the delegated legislation:

i. the challenged bylaw, code or standard and its enabling statute must be interpreted using a “broad and purposive approach”;

ii. the presumption of validity must apply. This means that the approach to interpretation must strive to reconcile the delegated legislation with its enabling statute so that, where possible, the delegated legislation is construed in a manner which renders it *intra vires*; and

iii. the inquiry must not involve assessing the policy merits of the delegated legislation to determine whether they are "necessary, wise, or effective in practice” and is not an inquiry into the factors that underlie the delegated legislation (e.g. the practice, ethical, social, and policy issues that are at issue in professional self-governance).

b. Stage 2 — The application of the reasonableness standard of review that reflects and integrates the highly deferential approach enunciated in *Katz*, *Catalyst* and *Green*:

i. to be unreasonable the motives behind the delegated legislation must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose; and

ii. to be unreasonable the impugned bylaw, code or standard must be one that no reasonable body informed by the relevant factors could have enacted.

E. Conclusion

22. Legislatures have given self-governing professions broad authority to act to protect the public through a broad range of functions. Recognizing deference as the presumptive standard of review appropriately balances the legislative will with adherence to the rule of law that is the constitutional imperative of judicial review. The critical importance of deference in the area of delegated legislation requires the Court to reconcile the approach in *Katz* with that in *Catalyst* and *Green.* In the final analysis, this requires a very restrictive approach to challenges based on *vires* and a very deferential approach to the substance of any delegated legislation.

PART IV – COSTS

23. NAPRA does not seek costs, and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

24. NAPRA takes no position on the resolution of the three appeals in NFL (37897), Vavilov (37748) and Bell Canada (37896), nor does NAPRA take any position on the application of the standard of review to the facts of these appeals. NARPA seeks the right to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of October, 2018.

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-and-

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PART VI – TABLE OF AUTHORITIES

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