

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**

Intervener

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**

Intervener

AND BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

-and-

ALEXANDER VAVILOV

Respondent

**FACTUM OF THE JOINT INTERVENER, THE ONTARIO SECURITIES
COMMISSION, THE BRITISH COLUMBIA SECURITIES COMMISSION AND THE
ALBERTA SECURITIES COMMISSION**

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Orderly regulation of capital markets is complex. It requires expertise and the exercise of discretion. Provincial legislatures have assigned decision-making authority in this area to specialized administrative bodies that are staffed with industry-specific and experienced individuals. They are vested with broad powers in the public interest.
2. Consistent with *Dunsmuir*, and its attempt to clarify the approach to standard of review, Canadian courts have shown considerable deference to decisions made by these expert bodies on appeal or by way of judicial review. This standard has served Canada and its capital markets well for many years, and the joint interveners – the Ontario Securities Commission (“OSC”), the British Columbia Securities Commission (“BCSC”), and the Alberta Securities Commission (“ASC”) (collectively, “Commissions”) - submit it should continue.
3. The respective provincial legislatures (“Legislatures”), which are constitutionally competent to create administrative bodies such as the Commissions, entrusted the OSC, BCSC, and ASC with broad powers to regulate the capital markets.
4. Each of the Commissions engages in integrated activity designed to develop, express, and regulate market-related policies and decisions. The Commissions can make or recommend legally-binding rules and policy, make decisions on receipting of prospectuses, register market participants, recognize or designate market infrastructure entities (such as stock exchanges), adjudicate breaches of securities law, and make orders in the public interest. This integrated approach to regulation provides the predictability and consistency that is critical to the effective oversight of complex capital markets.
5. By statute and design, a range of options are available to the Commissions to give effect to their broad policy mandates. From an enforcement perspective, the Commissions may proceed against individuals and companies in different ways. They may initiate or recommend quasi-criminal prosecutions in the courts, where imprisonment and fines are available. They may proceed against them in the civil courts to obtain remedial and other

orders. The Commissions also have the option of proceeding against an individual or company in administrative proceedings before the Commissions' tribunals, where an interest in the public order is available. This concurrent jurisdiction provides the Commissions with the flexibility to determine the most effective remedy to achieve the purposes of securities laws: protection of investors and the fostering of fair and efficient capital markets and confidence in those markets.

6. The standard of review issue in these appeals juxtaposes, on the one hand, respect for the democratic principles underlying the Legislatures' creation of expert tribunals (such as the Commissions) that are flexible and have public interest powers; and on the other hand, the rule of law and supervisory function of the courts. The conflict has been successfully managed for many years through the application of deference by appellate and reviewing courts to Commissions' decisions. Deference has been, and must continue to be, a singular, unified concept, and not a sliding scale based on a spectrum of reasonableness. Otherwise, all that *Dunsmuir* sought to resolve with the establishment of two standards will devolve into many standards with gradations of application.
7. Concurrent jurisdiction - the fact that conduct may properly be the subject of proceedings either administratively or before the courts - should not be a determining factor in the application of the appropriate standard of review.
8. The application of the reasonableness standard of review to decisions of the Commissions' tribunals has fostered a stable and sound foundation for the proper oversight of a critical part of the Canadian economy and should continue to be applied.

B. Relevant Facts

(i) The Role of the Commissions

9. The Commissions are independent provincial government agencies responsible for regulation of the capital markets and the administration and enforcement of securities laws ("Acts")¹ in their respective province. Their public interest objectives include providing

¹ *Securities Act*, RSO 1990, c S 5 [OSA]; *Commodity Futures Act*, RSO 1990, c 20 [CFA]; *Securities Act*, RSA 2000, c S-4 [ASA]; *Securities Act*, RSBC 1996, c 418 [BCSA].

protection to investors from unfair, improper or fraudulent practices, and fostering fair and efficient capital markets and confidence in those markets.²

10. Each of the Commissions have members that serve as a board of directors with oversight responsibilities over their organization. They also perform a regulatory function, which includes making or recommending rules and policies, and adjudicating administrative proceedings as an expert tribunal.³
11. Members are appointed to the Commissions based on their extensive skills, knowledge, experience, and background in the capital markets and securities law. They have diverse backgrounds in areas directly relevant to the functioning of the capital markets: business, accounting, corporate governance, derivatives, finance, economics, commerce, and law. This blend of legal, accounting, business, corporate and industry experience demonstrates the significant expertise that the members bring to their role of overseeing and regulating the capital markets.
12. The Commissions' functions include:
 - (a) regulating firms and individuals that are in the business of advising or trading in securities or commodity futures, and firms that manage investment funds;
 - (b) regulating reporting issuers and overseeing securities offerings in the public and exempt markets, including reviewing and receipting prospectuses filed by corporations, trusts, limited partnerships, and investment funds;
 - (c) overseeing transactions and proxy voting matters involving public companies and developing rules and policy in mergers and acquisitions and shareholder rights;

² *OSA*, *supra* note 1, s 1.1; *CFA*, *supra* note 1, s 1.1. Note the *OSA* and *CFA* set out a third mandate of “contributing to the stability of the financial system and the reduction of systemic risk”; See *Re Workum and Henning*, 2008 ABASC 719 at para 42, *aff’d Alberta (Securities Commission) v Workum*, 2010 ABCA 405; *Re Pierce*, 2016 BSSECCOM 188 at para 26; *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301 at 313–314; *Del Bianco v Alberta Securities Commission*, 2004 ABCA 344 at para 5..

³ *OSA*, *supra* note 1, ss 3.1–3.2, 143, 143.8; *ASA*, *supra* note 1, ss 11-12, 223-224; *BCSA*, *supra* note 1, ss 4, 183-184.

- (d) developing a regulatory framework for over-the-counter derivatives trading and compliance oversight of derivatives market participants;
- (e) regulating market infrastructure entities (exchanges, alternative trading systems, self-regulatory organizations, and clearing agencies), and developing policy relating to market structure; and
- (f) investigating, litigating, and adjudicating breaches of securities law and making orders in the public interest.

(ii) Integrated Regulation: Rule, Policy and Adjudicative Functions of the Commissions

13. Unlike some other administrative bodies, the Commissions have been granted a policy-making function and quasi-legislative authority to recommend or make binding rules under their constituting legislation.⁴ By delegating this authority to the Commissions, the Legislatures empowered the Commissions to use their experience and expertise to create the detailed rules necessary to regulate the capital markets. Rules made under securities laws are binding, and a person or company that contravenes a rule may be subject to enforcement action. The Commissions may also adopt policies of a non-binding nature which set out interpretations of their rules or Acts.⁵
14. In addition to the rule and policy-making functions, each of the Commissions has a long-established, integrated, and specialized administrative tribunal that carries out the regulatory function of adjudicating cases and making orders in the public interest.⁶ Public interest jurisdiction is a cornerstone of the effective regulation of the capital markets.
15. Staff of the Commissions may institute administrative proceedings for conduct contrary to the public interest and for breaches of securities laws that include: fraud, misrepresentation,

⁴ *OSA*, *supra* note 1, ss 143 and 143.8; *ASA*, *supra* note 1, s 224; *BCSA*, *supra* note 1, ss 183-184. Note that the *ASA* does not contain a provision specific to policy-making.

⁵ *OSA*, *supra* note 1, s 143.8; *BCSA*, *supra* note 1, s 188.

⁶ *OSA*, *supra* note 1, s 127; *ASA*, *supra* note 1, s 198; *BCSA*, *supra* note 1, s 161.

market manipulation, false or misleading disclosure, and illegal insider trading.⁷ Where liability is established, Commissions' panels have the power to make protective orders in the public interest that impose sanctions on the person found to have violated securities law (e.g., director and officer bans, cease trade orders, disgorgement and administrative penalties).⁸

16. Commissions' panels also conduct hearings on other regulatory matters, including compliance with the regime governing the conduct of take-over bids and issuer bids, reviews of decisions made by staff of the Commissions, as well as reviews of decisions of self-regulatory organizations, exchanges and clearing agencies.⁹
17. As is evident from these varied functions, the Commissions are authorized to make a wide array of decisions under securities law. This is reflected in the definition of "decision" found in each of the Acts: "decision means, in respect of a decision of the Commission or a Director, a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act or the regulations."¹⁰ In making decisions, the Commissions interpret and apply their respective home statutes, as well as regulations, rules, and policies they created and developed. The operation is integrated and cohesive.

(iii) Appeals from Decisions of the Commissions

18. In Ontario, there is a statutory right of appeal from final decisions of the OSC to the Superior Court of Justice (Divisional Court).¹¹ Appeals from the decisions of the Divisional Court are to the Court of Appeal for Ontario, with leave. Appeals from the decisions of the ASC and BCSC are to their respective courts of appeal, although leave is required in British Columbia.¹²

⁷ *OSA*, *supra* note 1, ss 76, 122(1), 126.1, 126.2, 127; *ASA*, *supra* note 1, ss 147(3), 194, 221.1; *BCSA*, *supra* note 1, ss 57.2, 155, 161, 168.1.

⁸ *OSA*, *supra* note 1, s 127(1); *ASA*, *supra* note 1, ss 198, 199; *BCSA*, *supra* note 1, s 161.

⁹ *OSA*, *supra* note 1, ss 21(5), 21.1(4), 21.2(3), 104; *ASA*, *supra* note 1, ss 63(3), 64(6), 67(6); *BCSA*, *supra* note 1, s 27.

¹⁰ *OSA*, *supra* note 1, s 1(1); *ASA*, *supra* note 1, s 1(n); *BCSA*, *supra* note 1, s 1(1).

¹¹ *OSA*, *supra* note 1, s 9(1).

¹² *ASA*, *supra* note 1, s 38; *BCSA*, *supra* note 1, s 167(1).

19. Since 2001, there have been approximately 76 appeals of decisions of the Commissions. In the vast majority of these appeals, a standard of reasonableness was applied to the review.

(iv) Prosecutions and Applications Before the Courts

20. Securities legislation grants the Commissions the discretion to choose the forum most appropriate for effective enforcement. In addition to the administrative protective orders described above, the OSC and ASC have the authority to investigate and initiate prosecutions in the provincial courts for contraventions of securities laws and to obtain punitive orders such as fines and imprisonment, or both.¹³ In Ontario, a proceeding of this nature can only be commenced with the consent of the OSC.¹⁴ The BCSC also has the authority to investigate contraventions of securities laws, but it must refer matters to provincial Crown counsel for charge approval and prosecution in the provincial courts.¹⁵
21. The Commissions may also bring civil proceedings in the superior courts for remedial orders. Remedies include the rescission of any transaction entered into by a person or company relating to trading in securities, damages, restitution, and disgorgement.¹⁶

PART II – QUESTION IN ISSUE

22. What principles should govern the standard of review that applies to the review of administrative decisions?

PART III – ARGUMENT

A. Reasonableness Standard Applies to a Specialized Administrative Body

23. *Dunsmuir* sought to bring clarity and balance to the world of administrative law and review standards. Properly applied, it ought to have brought closure to the debate about review standards in this area.

¹³ *OSA*, *supra* note 1, ss 122(1); *ASA*, *supra* note 1, s 194.

¹⁴ *OSA*, *supra* note 1, s 122(7).

¹⁵ *BCSA*, *supra* note 1, s 155.

¹⁶ *OSA*, *supra* note 1, s 128; *ASA*, *supra* note 1, s 197; *BCSA*, *supra* note 1, s 157.

24. Reasonableness – the standard of review currently applicable to virtually all Commissions’ decisions - provides a stable and predictable platform for the exercise of administrative and adjudicative authority by these specialized administrative bodies. The Commissions have an integrated market role, carrying out both rule and policy-making function along with adjudicative responsibilities. Application of reasonableness to these functions manages the conflict between legislative choice over regulation and the rule of law. Courts have ultimate oversight responsibility, but deference recognizes the expertise of the Commissions and the integrated nature of their capital market roles and decisions. So long as the Commissions exercise their policy, regulatory and adjudicative functions within the mandate granted them by statute, their decisions will withstand scrutiny.
25. It is axiomatic that securities regulation is complex. The Commissions are highly specialized administrative bodies, granted authority and discretion by the Legislatures to carry out their public interest mandate. This discretion is especially important in the regulation and oversight of today’s sophisticated and rapidly-evolving capital markets. For example, the growth of the fintech financial services sector continues to result in new types of investment instruments (such as, cryptocurrency offerings) as well as new digital platforms connecting investors with companies seeking to raise capital. These innovations require regulatory oversight. Commissions are staffed, and members appointed, based on their education, relevant experience, and recognized expertise. Their experience and skill sets must be current and adaptive to keep pace with the capital markets.
26. Commissions’ decisions have historically and almost invariably received deference on review. With this deference standard, Commissions are able to apply their specialized expertise and consider the broader regulatory implications of their decisions to the capital markets.
27. This Court has specifically recognized the role of the Commissions as a “specialized tribunal with a wide discretion to intervene in the public interest”, the protection of which is “a matter falling within the core of its expertise.”¹⁷ This public interest jurisdiction is a

¹⁷ *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 49.

cornerstone of effective regulation as it permits the Commissions to apply their expertise and experience to the issue at hand and respond flexibly to developments in the capital markets. Wide discretion allows the Commissions to issue a broad range of public interest orders to respond to events such as proxy contests, hostile take-over bids, and the 2008 asset-backed commercial paper crisis. Commissions may respond to misconduct (e.g. insider trading or false disclosure) by issuing preventative orders, such as orders prohibiting individuals from acting as officers and directors of corporations.

28. Predictability and consistency in rule-making and the application of these rules are critical to the orderly regulation of complex systems like capital markets. Indeed, in part, that is what the Legislatures sought to achieve in creating the Commissions and giving them responsibility for regulating this sphere of economic activity in the first place. A change in the deference historically accorded to Commissions could impact the orderly regulation of the capital markets and the predictability that market participants depend on.

B. Concurrent Jurisdiction Does Not Rebut the Presumption of Deference

29. Concurrent jurisdiction is not the determining factor in assessing the appropriate standard of review applicable to administrative decisions.¹⁸
30. Securities misconduct can be prosecuted administratively or quasi-criminally in the courts. The choice of forum gives the Commissions the flexibility to cater the regulatory response to the circumstances of the case. The mere prospect of concurrent jurisdiction does not detract from the specialized expertise of the Commissions' tribunals, or from the integrated approach to adjudication.
31. In *Saguenay*, both the human rights tribunal and the courts had jurisdiction to determine whether the appellant's Quebec Charter rights had been breached. The complainant brought his complaint before the tribunal. This Court concluded that deference should be given to the tribunal, and held generally that reasonableness is the proper standard where a specialized administrative tribunal applies the law to the facts.¹⁹ The Court considered both

¹⁸ *Mouvement laïque Québécois v Saguenay (City)*, 2015 SCC 16 at para 43 [*Saguenay*]; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 23-24 [*McLean*].

¹⁹ *Saguenay*, *supra* note 18 at para 43.

Dunsmuir and *Rogers* and the issue of concurrent jurisdiction and held that the question of whether or not the administrative body has exclusive jurisdiction is not determinative of the applicable standard of review.²⁰

32. This Court’s finding in *Rogers* has injected unnecessary uncertainty into the determination of the appropriate standard of review for securities administrative cases. *Rogers* was limited to its facts and was not meant to derogate from the approach to the standard of review set out in *Dunsmuir* (and endorsed in *Saguenay*).²¹ The majority stated, “Nothing in these reasons should be taken as departing from *Dunsmuir* and its progeny as to the presumptively deferential approach to the review of questions of law decided by tribunals involving their home statute...”.²²
33. It is noteworthy that the Copyright Board in *Rogers* was not assumed to have more expertise than the courts in applying the *Copyright Act*.²³ In contrast, panels of the Commissions (generally three members) can be filled with the industry-specific expertise relevant to the issues in question. Chartered Accountants have experience and expertise to consider financial disclosure and accounting issues, broker/dealers have experience and expertise to consider trading related issues, and MBAs or corporate lawyers have experience and expertise to deal with securities, corporate and disclosure issues. As this Court stated in *Cartaway*, “[t]he courts also have less expertise than securities commissions in interpreting their constituent statutes given the broad policy context within which securities commissions operate.”²⁴

C. Conclusion

34. The Commissions seek this Court’s confirmation of the importance of preserving the deference afforded to the decisions of administrative bodies interpreting their home statutes. The presumption of deference and application of a reasonableness standard of

²⁰ *Saguenay*, *supra* note 18 at paras. 43 and 46.

²¹ *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 19 [*Rogers*]; *Saguenay*, *supra* note 18 at para 46.

²² *Rogers*, *supra* note 21 at para 19.

²³ *Rogers*, *supra* note 21 at para 15.

²⁴ *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 46.

review to those decisions have for years fostered a stable and sound foundation for the proper oversight of a critical component of the Canadian economy, and should continue to be applied.

PART IV – COSTS

35. The Commissions do not seek costs and request that no costs order be made against them.

PART V – RELIEF SOUGHT

36. The Commissions request permission to present oral argument to the court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of October 2018.

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PART VI – TABLE OF AUTHORITIES

Case Law		Pinpoint (paras unless noted)
1.	<i>British Columbia (Securities Commission) v McLean</i>, 2013 SCC 67	23-24
2.	<i>Brosseau v Alberta Securities Commission</i>, [1989] 1 SCR 301	pages 313-314
3.	<i>Cartaway Resources Corp (Re)</i>, 2004 SCC 26	46
4.	<i>Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)</i>, 2001 SCC 37	49
5.	<i>Del Bianco v Alberta Securities Commission</i>, 2004 ABCA 344	5
6.	<i>Mouvement laïque québécois v Saguenay (City)</i>, 2015 SCC 16	43, 45, 46
7.	<i>Re Pierce</i>, 2016 BSSECCOM 188	26
8.	<i>Re Workum and Henning</i>, 2007 ABASC 719	42
9.	<i>Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada</i>, 2012 SCC 35	15, 19
Legislation		Pinpoint
10.	<i>Commodity Futures Act</i> , RSO 1990, c 20	1.1
11.	<i>Loi sur les contrats à terme sur marchandises</i> , LRO 1990, c C.20	1.1
12.	<i>Securities Act</i> , RSA 2000, c S-4	1(n) , 11 , 12 , 38 , 63(3) , 64(6) , 67(6) , 147(3) , 194 , 197 , 198 , 199 , 223 , 224
13.	<i>Securities Act</i> , RSBC 1996, c 418	1(1) , 4 , 27 , 57.2 , 155 , 157 , 161 , 167(1) , 168.1 , 183 , 184 , 188
14.	<i>Securities Act</i> , RSO 1990, c S.5	1(1) , 1.1 , 3.1 , 3.2 , 9(1) , 21(5) , 21.1(4) , 21.2(3) , 76 , 104 , 122(1) ,

		122(7) , 126.1 , 126.2 , 127 , 128 , 143 , 143.8
15.	<i>Loi sur les valeurs mobilières</i> , LRO 1990, c S.5	1(1) , 1.1 , 3.1 , 3.2 , 9(1) , 21(5) , 21.1(4) , 21.2(3) , 76 , 104 , 122(1) , 122(7) , 126.1 , 126.2 , 127 , 128 , 143 , 143.8