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
(Respondent in the Court below)

and

ALEXANDER VAVILOV

Respondent
(Appellant in the Court below)

(style of cause continued on following page)

Court File No. 37896

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

BELL CANADA and BELL MEDIA INC.

Appellants (Appellants)

and

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

(style of cause continued on following page)

Court File No. 37897

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

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC

Appellants (Appellants)

and

ATTORNEY GENERAL OF CANADA

Respondent (Respondents)

(*style of cause continued on following page)*

FACTUM OF THE INTERVENER, THE NATIONAL ACADEMY OF ARBITRATORS, ONTARIO LABOUR-MANAGEMENT ARBITRATORS' ASSOCIATION AND THE CONFÉRENCE DES ARBITRES DU QUÉBEC

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PART I. OVERVIEW

1. The Court has stated that these appeals provide the opportunity to consider "the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*"[1] ("*Dunsmuir*"). The National Academy of Arbitrators (the "NAA"), the Ontario Labour-Management Arbitrators' Association (the "OLMAA"), and the Conférence des arbitres du Québec (the "CAQ") (collectively, the "Labour Arbitrator Organizations") intervene solely on this issue, and not on the merits of these specific appeals.

2. Collectively, the Labour Arbitrator Organizations represent the vast majority of labour arbitrators in Canada's two largest provinces, as well as the national and international perspective of the NAA. The members of these organizations represent a majority of labour arbitrators operating across Canada whose decisions are reviewed by the courts using the common law standard of review.

3. Labour arbitrators are on the front lines of the administration of justice, ensuring a stable, neutral system of labour relations across Canada. A significant factor in their success is the deferential standard that has long been applied to their decisions. Judicial deference has permitted labour relations disputes in Canada that arise during the term of a collective agreement or through interest arbitration to be resolved expeditiously and with finality, causing minimal impact on stakeholders or the Canadian economy.

4. It is unsurprising that the conceptual foundation of modern judicial review can be traced to a labour case, *CUPE v. New Brunswick Liquor Corporation*.[2] There are many reasons that labour relations decisions have long been the paradigmatic category of decisions which are owed deference on judicial review. The most important reason is that labour arbitration in Canada is a unique administrative context. Its foundation and legitimacy are located in the confidence and (in virtually all cases) the consent of the parties, not in the exercise of executive power delegated and protected by the legislature. While the relationship between management and labour can frequently

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[1] *Bell Canada, et al. v. Attorney General of Canada*, 2018 CanLII 40808 (SCC) at 1; *Minister of Citizenship and Immigration v. Alexander Vavilov*, 2018 CanLII 40807 (SCC) at 1-2; *National Football League, et al. v. Attorney General of Canada*, 2018 CanLII 40806 (SCC) at 2.

[2] *CUPE v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417. While that case was a review of a Labour Board decision, many of the same justifications for deference (such as expertise) which support deference in the context of labour arbitration apply equally to other decisions affecting labour relations.

be highly adversarial, it is notable that these stakeholders agree on one thing: that the labour arbitration process works and should be shielded from undue judicial interference.[3]

5. Because of the conceptual differences between labour arbitration and other administrative contexts, if this Court elects to depart from the balance struck in *Dunsmuir* between the rule of law and legislative supremacy, it is vital for this Court to appreciate and affirm the unique context of labour relations in general and labour arbitration in particular. Upsetting the deferential standard generally applied to arbitral awards will upset the broader balance struck in labour relations since the introduction of the Wagner Act model of labour relations in Canada more than 70 years ago. While labour relations decisions are frequently the source of modern administrative law principles, the justifications for deference in the labour relations context are in some material respects different from those supporting deference in other administrative law contexts (*e.g.*, legislative supremacy). These justifications – including expertise, the confidence of the parties in the arbitration process, and the ongoing nature of the relationship between them – should continue to be respected by the courts through deference regardless of the approach to judicial review adopted by this Court in respect of other administrative decision makers.

6. Finally, a standard of review based on the effect an administrative decision has on a party should be rejected. Such an approach will foment litigation over the importance of an issue to the affected party. In the labour relations context, predictability and finality are key determinants of administrative justice. An approach to the scope of review based on the interest affected is completely unworkable in the labour relations context where disputes are between two parties, not an individual and the state, and rule of law concerns rarely arise.

PART II. POSITION ON THE QUESTIONS ON APPEAL

7. The Labour Arbitrator Organizations support a disposition of the stated issue on these appeals – *i.e.*, the nature and scope of judicial review of administrative action – which affirms the deference typically afforded to decisions in the labour relations context generally and the labour arbitration context specifically.

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[3] Hence the reason the OLMAA and CAQ have chosen to retain a management-side and union-side firm to represent them. The NAA has retained a neutral.

PART III. STATEMENT OF ARGUMENT

8. In what follows, the overarching submission of the Labour Arbitrator Organizations is that the legitimacy and authority of labour arbitrators is found in the trust and confidence of the parties, and the jurisdiction of labour arbitrators is generally conferred by the terms of a collective agreement. If this Court is to depart from a presumptively deferential approach to judicial review in the years since *Dunsmuir*, due regard must be given to the fundamental differences between labour relations and other administrative contexts.

A. The justifications for deference in labour relations matters

9. The appropriate scope of judicial review of most administrative action is to be found at the intersection of two foundational constitutional principles: the rule of law and legislative supremacy.[4] On the one hand, "all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution."[5] This principle points towards less deference, as it is the role of the courts to police the executive and ensure it is not exceeding the limits imposed on it by the legislature. On the other hand, Parliament and the legislatures should be as free as possible from judicial interference "to create various administrative bodies and endow them with broad powers."[6] This principle militates towards greater deference in circumstances where the legislature has signalled its intention that the executive make a particular decision or perform a specific function. It is in the tension between these two foundational principles that the scope of review of most administrative decision-makers resides.

10. However, the conceptual justifications for judicial deference towards labour arbitrators are in some material respects quite different from the justifications offered in *Dunsmuir*. In one of Chief Justice Laskin's seminal decisions – his concurring reasons in *Volvo Canada Ltd. v. U.A.W., Local 720* ("*Volvo*") – the Chief Justice offered the following justifications for deference when reviewing arbitral awards, which should continue to guide this Court's approach to the review of arbitral awards today:

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[4] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 27, [2008] 1 S.C.R. 190.
[5] *Ibid.*, at para 28.
[6] *Ibid.*, at para 27.

> Certainly, in the field of labour-management arbitration, which is an ongoing process and not the episodic process under which the common law rules of review have developed, there is a good case for affirming a hands-off policy by the Courts on awards of consensual arbitrators, subject to bias or fraud or want of natural justice and, of course, to jurisdiction in the strict sense and not to the enlarged sense which makes it indistinguishable from questions of law. At least this should be so where specific questions of law are referred. In other cases of a reference to consensual arbitration, the approach to review ought also to be marked by caution in light of the fact that the parties to a collective agreement have thereby established their own legislative framework for the regulation of the work force engaged in the enterprise, have designated their own executive and administrative officers to apply the agreement on an ongoing basis and have provided for their own enforcement machinery to resolve and, if need be, to effect a final and binding settlement of all differences arising under the terms of the agreement.[7]

11. In this passage, there are several critical insights concerning the conceptual justifications for deferential review of arbitral awards that are strikingly different from those underpinning the review of other administrative decisions identified in *Dunsmuir*.

12. First, labour arbitrators have legitimacy because they have the confidence of the parties to a collective agreement, not because they have authority granted to them by the legislature. As a majority of this Court held in *C.U.P.E. v. Ontario (Minister of Labour)*, a labour arbitrator finds his or her authority in the "trust and confidence" of the parties who appointed the arbitrator, and his or her jurisdiction in the terms of the collective agreement, i.e. a private contract, not a statute.[8] These important distinctions have been obscured somewhat by the jurisprudential turn towards what has become a presumptively deferential standard of review for almost all administrative decisions, including those of statutory decision makers.

13. Unlike the vast majority of administrative tribunals, labour arbitrators are in most cases consensually appointed.[9] Even in the limited circumstances in which they are not consensually appointed, arbitrators have the confidence of the parties because of their expertise in labour relations.[10] Consistent with decades of jurisprudence, the majority in *Dunsmuir* specifically identified labour relations as the example of an area in which decision makers develop expertise in a "discrete and special administrative regime".[11] This is indisputable. Labour arbitrators are experts in labour relations and the law of the workplace. They typically have legal training and

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[7] *Volvo Canada Ltd. v. U.A.W., Local 720,* [1980] 1 S.C.R. 178 at 203, 99 D.L.R. (3d) 193.
[8] *C.U.P.E. v. Ontario (Ministry of Labour)*, 2003 SCC 29 at para 109, [2003] 1 SCR 539.
[9] *Ibid.*
[10] *Ibid.*, at para 110.
[11] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 55, [2008] 1 S.C.R. 190.

lengthy careers working in labour relations prior to becoming arbitrators. If they do not, the labour arbitrator is unlikely to be appointed by the parties or added to lists of arbitrators maintained by government. Frequently, arbitrators are experts in a specific workplace or a particular collective agreement, having been appointed under the terms of that agreement itself or because they are regularly called upon by the parties to keep the industrial peace.

14. Second, and relatedly, because labour arbitrators are resolving private disputes with jurisdiction generally conferred on them pursuant to a collective agreement, the rule of law and legislative supremacy considerations underpinning the review of statutorily-grounded administrative action are not apt considerations when determining the appropriate scope of review of arbitral awards. Arbitrations are private tribunals. A labour arbitrator is not a manifestation of the executive that is limited by statutory jurisdiction which can be exceeded, thereby raising rule of law concerns.

15. In other words, there is no tension between the foundational principles identified in *Dunsmuir* when reviewing a labour arbitration decision, or at least the tension is significantly attenuated. Rather, the foundational jurisprudential principle at play in the labour arbitration context is the respect and deference that courts afford to parties who privately order their own affairs. In most circumstances, the parties have designed the machinery through which disputes will be resolved, and that decision and machinery should be respected by the courts.

16. This respect should extend to include respect for the processes freely chosen by the parties to resolve disputes. It is important that the procedures chosen by the parties – which can vary from traditional adjudication, including expedited arbitration, to mediation/arbitration processes – are not interfered with by the courts simply because they do not conform with judicial models of decision making.[12] It is not for the courts to second guess processes contractually agreed to through or under the terms of a collective agreement.

17. While frequently called upon to interpret statutes (in which case the arbitrator is bound by judicial interpretations of the statute), the source of the arbitrator's jurisdiction is the collective

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[12] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 24-25, [2011] 3 S.C.R. 708; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at para 15, 125 D.L.R. (4th) 583 (Iacobucci, Sopinka and La Forest JJ., dissenting, but not on this point).

agreement.[13] They interpret and apply the collective agreement according to what for many years has been referred to as the common law of the workplace.[14] Arbitrators' decisions are not subject to *stare decisis*, and while other arbitral decisions may be persuasive, they are not binding.[15] In this respect, labour arbitrators do not pronounce on questions of law of general importance to the development of the law; they make decisions affecting only the immediate parties, and an arbitrator is free to make a decision differently in another case where there is a compelling reason to depart from a prior holding.[16]

18. While this Court may decide to shift the balance between the rule of law and legislative supremacy struck in *Dunsmuir*, the tension between these two values simply does not arise with the same force in the unique context of labour arbitration. The Labour Arbitrator Organizations submit that if the Court is to depart from *Dunsmuir* this critical conceptual difference must be reflected in any change to the scope and nature of judicial review.

B. ***The labour relations context is unique***

19. In addition to the differences between the source of a labour arbitrator's authority, and that of a statutory decision maker, the passage quoted above from Chief Justice Laskin's reasons in *Volvo* also points to important differences respecting the labour relations context itself which militate in favour of deference.

20. Judicial deference in the labour relations context is appropriate because of the ongoing nature of the relationship between the parties under a collective agreement, when contrasted with the types of disputes that arise before other administrative tribunals or the courts. Because of the ongoing, living relationship between the contractual parties, in instances where resolution is not possible through agreement, the parties favour final decisions, determined through expeditious proceedings. Protracted disputes and uncertainty have a corrosive effect on the collective bargaining relationship. It is for this reason that parties to a collective agreement "have provided

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[13] *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 SCR 230 at 251, 102 D.L.R. (4th) 609.
[14] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 76, [2013] 2 S.C.R. 458.
[15] *Ibid.*, at para 79.
[16] *Ibid.; Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at paras 42-46, [2011] 3 S.C.R. 616.

for their own enforcement machinery to resolve and, if need be, to effect a final and binding settlement of all differences arising under the terms of the agreement."[17]

21. Each decision of a labour arbitrator is subject to judicial review. However, the practical reality is that parties rarely seek review of these decisions. In part, this is because of the high degree of deference that has long been afforded to labour arbitration decisions. In even greater part, it is because the parties recognize that final and binding decisions rendered by experts through expeditious proceedings are of central importance to stable, productive, ongoing collective bargaining relationships. Lowering the deferential common law standard of review afforded to administrative decisions – thereby inviting more judicial review of labour arbitration awards – threatens to upset the balance of labour relations in Canada. Upsetting that balance will not only have an impact on the immediate stakeholders; it will also have a potentially negative impact on industries and the Canadian economy as a whole as parties engage in economic warfare rather than resolving their disputes through effective arbitration processes.[18]

22. A grievance arbitration mechanism that produces final and binding decisions is at the very heart of the balance struck between labour and management in the Wagner Act model of labour relations which dominates Canadian labour law. [19] Grievance arbitration during the term of a collective agreement is part of a historical compromise between labour and management, reflected in labour relations statutes across the country. In exchange for a union foregoing any stoppage of work during the term of a collective agreement, the union is afforded the opportunity to submit disputes concerning the interpretation, application, administration or alleged violation of a collective agreement to a consensually appointed, neutral arbitrator (or board of arbitration chaired by a neutral) who will render a decision that is final and binding on the parties. That process is of such fundamental importance to labour relations that it is recognized by statute. For example, in both Ontario[20] and Québec,[21] absent a freely negotiated arbitration mechanism providing for final

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[17] *Volvo Canada Ltd. v. U.A.W., Local 720,* [1980] 1 S.C.R. 178 at 203, 99 D.L.R. (3d) 193.

[18] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 at para 17, [2003] 2 SCR 157.

[19] *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27 at para 60, [2007] 2 SCR 391.

[20] *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 48.

[21] *Labour Code,* C.Q.L.R., c. C-27, s. 100.

and binding determination of disputes, such a clause will be imposed by statute or arbitration will be statutorily mandated.

23. In these circumstances, and given the demonstrated and long recognized expertise of labour arbitrators, the Labour Arbitrator Organizations submit that this Court should continue to afford a very high degree of deference to labour arbitration decisions. The alternative, quite simply, is a broken system of labour relations, and potentially thousands more cases brought before the already overburdened courts. The parties to a collective agreement generally have trust and confidence that in most cases arbitral awards are defensible, even if they do not agree with a particular outcome. By eliminating or lowering the deference owed to arbitrators, this Court will incentivize parties to prove that they are right, rather than encouraging the parties to accept decisions, which is the best way to preserve the ongoing, harmonious relationship in the workplace.

C. *The impact of the decision should not govern the appropriate standard of review*

24. In one of the appeals before this Court – *Vavilov v. Canada (Citizenship and Immigration)* ("*Vavilov*") – the Federal Court of Appeal held that it was appropriate to apply the reasonableness standard in "a more exacting way" where "the interests of the individual are high (affecting the court's sensitivity to rule of law concerns)".[22] In addition to the fact that, for the reasons above, rule of law concerns do not apply with the same force in the labour relations context, the Labour Arbitrator Organizations urge this Court to reject this approach to determining the standard of review as unworkable. This Court has already rejected the idea that the reasonableness standard should be applied along a spectrum, and for good reason.[23]

25. It is critically important to stakeholders – both in the labour relations context and otherwise – that the standard of review be predictable and promote finality. While decisions affecting someone's working life have been recognized by this Court and others as being of fundamental importance to them,[24] and so to for employers, there is obviously a diversity of decisions that labour arbitrators are called upon to make, ranging from reimbursement for work-related travel to the termination of someone's employment, from workplace training to workplace safety, and

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[22] *Vavilov v. Canada (Citizenship and Immigration)*, 2017 FCA 132 at para 36, 52 Imm. L.R. (4th) 1.

[23] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras 59, 108, [2009] 1 S.C.R. 339.

[24] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27at paras 82-83, [2007] 2 S.C.R. 391.

everything in between. It would fracture the delicate balance between labour and management if parties were encouraged to litigate the standard of review in every case based on the importance of a decision to one or both parties.

26. It is the role of the expert arbitrator – not the reviewing court – to weigh and balance the relevant factors, including the impact of a decision on the interests of the parties. If the Court in *Vavilov* was suggesting that certain categories of decisions should be reviewed on a more exacting standard, then in the labour context termination cases would be an obvious example of such a category. However, in a termination case, when scrutinizing the employer's decision to terminate someone's employment, the arbitrator will consider, among many other factors, the impact of reinstatement on the employer, including whether the relationship is irreparably damaged; the impact of upholding the dismissal on the employee, such as whether he or she is the sole breadwinner or unlikely to be able to find work due to age, industry or location; and the impact on the union.[25] In essence, the Federal Court of Appeal is inviting the reviewing court to re-weigh these considerations under the guise of the interest affected, which is not reasonableness review at all as it is currently understood.

27. In addition, the categorical approach is not helpful if the rationale for its application is to ensure that all decisions which affect vital interests are subject to heightened scrutiny. The categories of decisions that affect a party meriting increased scrutiny cannot be determined in advance. For example, a job competition grievance in which a union grieves the fact that a member did not secure a position with a 15% salary increase may affect a member who wants to use the extra income towards a recreational property differently from a member who is a single mother who would use the salary increase to save for her child's education.

28. Applying a spectrum of standards would mean that the same interpretive exercise could produce different standards depending on the impact of a particular decision on a particular party. Certainty and predictability will be replaced by conflict over the degree to which a particular decision affects a particular party. Whether or not the Federal Court of Appeal's approach has superficial analytical appeal as a description of what some courts have done when faced with

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[25] *William Scott & Co. v. C.F.A.W., Local P-162*, [1977] 1 Can. L.R.B.R. 1 at paras 9,12, [1976] 2 W.L.A.C. 585 (BC LRB) (Weiler).

decisions affecting an individual's vital inerests, condoning this approach would be disastrous from a practical perspective; it foments litigation in the courts at the expense of predictability and finality.

29. Predictability and finality are two of the values which underpin administrative justice in Canada. While this is particularly true in the labour relations context for the reasons above, it is not only true in that context. We inhabit a country in which the justice system is suffering from a crisis of accessibility. One response to that crisis has been the expanding scope of the administrative state, and alternatives to litigation in the courts. To adopt what would in practice be an *ad hoc* approach to determining the applicable standard of review by gauging it against the interests of an affected party would compound these problems, and undermine these rationales for administrative justice.

30. Applying such an approach would be even more complicated and disruptive in the labour relations context where the dispute is not between the state, on the one hand, and an individual, on the other. If adopted, the approach would require a judicial determination of the impact on both affected parties, labour and management, and in some cases also the individual grievor. While an issue may be equally important to all affected parties, it is foreseeable that some issues would be of vital importance to one and of less moment to the other. In these circumstances, it is unclear what standard of review should apply. The Federal Court of Appeal's approach is unworkable, and is particularly so in the labour relations context, and should be rejected.

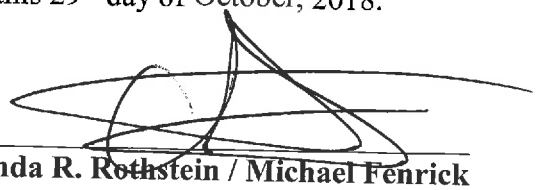
PART IV. POSITION ON COSTS

31. The Labour Arbitrator Organizations take no position on costs of these appeals, and ask that no costs be awarded against them.

PART V. ORDER SOUGHT

32. The Labour Arbitrator Organizations take no position on the disposition of these appeals. The Labour Arbitrator Organizations seek 10 minutes of oral argument at the hearing of the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of October, 2018.



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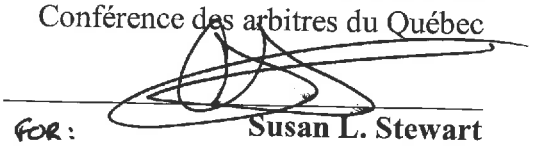

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TABLE OF AUTHORITIES