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, CANADIAN BAR ASSOCIATION

(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

1. Judicial review represents the point of intersection between effective government and the rule of law. The nature and depth of that review is therefore a matter of obvious importance to our legal system. It governs how – and, most importantly, explains why – the judiciary interferes with decision-making by the executive.

2. The current state of the law on standard of review is unsatisfactory. A number of unresolved issues continue to distract lawyers and reviewing courts from the merits of cases. The standard for reviewing administrative decision-making requires further simplification; however, this pursuit of simplicity cannot ignore important rule of law values like predictability, consistency and finality.

3. The Canadian Bar Association ("CBA") submits that incremental changes which preserve the operating principles distilled in *Dunsmuir* – deference, context, legislative supremacy and the rule of law – would benefit lawyers and reviewing courts. By recognizing that courts and administrative decision-makers contribute to, and are also confined by, the rule of law, the Court has an opportunity to reaffirm the purpose of judicial review in our culture of justification. Substantive review insists that administrative decision-makers act within the limits of the law. Reviewing courts demand nothing more. Both, however, must provide reasoned justifications for their actions. The effect of this institutional dialogue between the executive and the judiciary is an administrative state that is not just effective, but also grounded in the rule of law.

4. Deferential review, which insists on reasoned justifications from both administrative decision-makers and reviewing courts, is consistent with predictability, consistency and finality. Courts continue to have the last word. Modern judicial review simply acknowledges that the court is no longer the sole and exclusive caretaker of the law in Canada. Administrative decision-makers also have a legitimate role in interpreting and applying the law in our constitutional order.

PART II – QUESTIONS IN ISSUE

5. The CBA takes no position on the merits of these appeals. As a national representative of legal professionals in Canada, the CBA intervenes only to assist the Court in its reconsideration of the nature and scope of judicial review of administrative action.

PART III – STATEMENT OF ARGUMENT

A. Unresolved issues in the standard of review analysis and the need for simplification.

6. According to *Dunsmuir,* deference is presumed when administrative decision-makers interpret familiar statutes. This presumption is rebutted when the question at issue falls into one of the "categories" of correctness review, such as "true questions of *vires*."[1] This Court has also said that context may sometimes displace the presumption of deference.[2] While this categorical approach appears straightforward, a number of important questions remain unanswered:

(a) do true questions of *vires* exist?

(b) when do contextual circumstances displace deference?

(c) what is the difference in practice between reasonableness and correctness review?

7. A lack of clarity on these issues and others has created room for needless argument. Instead of focusing on the merits of their cases, lawyers and reviewing courts have instead devoted considerable effort to these preliminary matters: identifying the types of questions, searching for contextual circumstances, and picking the applicable standard. The actual legal question in dispute has been lost in this "thicket."[3] The time has come for the Court to clear a path forward to the substantive outcome that is actually under review.

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[1] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59 [*Dunsmuir*].

[2] *Ibid.* at para. 64.

[3] Rt. Hon. Chief Justice Beverley McLachlin, "'Administrative Law Is Not for Sissies': Finding a Path through the Thicket" (2016) 29 Can. J. Admin. L. & Prac. 127 [McLachlin, "Finding a Path"].

8. For example, the existence of a "true question of *vires*" has been openly questioned.[4] In *Alberta Teachers*, Rothstein J. observed that these questions would be "narrow" and "exceptional."[5] To date, this forecast has proven correct: no litigant before the Court has successfully isolated a true question of jurisdiction from a question of law that falls within the authority of the impugned decision-maker. More recently, Gascon J. has written that the existence of true questions of jurisdiction "has long been doubted."[6] Notwithstanding these doubts, this category for review has been left open.

9. The jurisprudence has also given little direction as to when legislative context will rebut the presumption of deference. *Dunsmuir* was unequivocal that "[t]he analysis must be contextual."[7] However, questions have arisen as to the relative importance of context because "simplicity requires that the contextual approach play a subordinate role."[8] The Court has also placed less emphasis on what many consider to be signals of legislative intent. For example, reasonableness has been applied notwithstanding the presence of a certified question under the *Immigration and Refugee Protection Act*[9] and notwithstanding the presence of a statutory appeal for questions of law or jurisdiction.[10] In other cases, however, context has been found to rebut the presumption of deference.[11] To date, there has been no clear explanation why context displaces

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[4] See e.g. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2018 SCC 31 at para. 41 [*Canadian Human Rights Commission*].

[5] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 at para. 34 [*Alberta Teachers*].

[6] *Canadian Human Rights Commission, supra* note 4 at para. 41.

[7] *Dunsmuir, supra* note 1 para. 64.

[8] *Canadian Human Rights Commission, supra* note 4 at para. 45.

[9] See e.g. *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61 at para. 44.

[10] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47.

[11] See e.g. *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 35-36 [*Tervita*].

deference in some cases and not in others.

10. Finally, the distinction between reasonableness and correctness review has proven difficult to discern. In practice, the "juggling act"[12] for lawyers and reviewing courts has continued. The only difference after *Dunsmuir* has been the number of balls in the air.[13] But rather than begin its analysis with the justification provided by the administrative decision-maker, the Court has sometimes been criticized for applying "disguised correctness" – undertaking its own analysis of the issue and then measuring the administrative outcome against its judicial one.[14] On its face, this type of review is inconsistent with "deference as respect."[15] According to Professor Dyzenhaus, deferential review is supposed to begin with an inquiry "into the relationship between the official's reasons and his or her conclusion."[16] The proper starting point for lawyers and reviewing courts therefore remains unclear.

11. The combined effect of this uncertainty has been to frustrate the objective identified in *Dunsmuir*: "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case."[17] A simpler standard of review analysis is therefore required. By focusing on the principles underlying – instead of the categories for undertaking – judicial review,

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[12] *Miller v. Newfoundland (Workers' Compensation Commission)* (1997), 154 Nfld. & P.E.I.R. 52 at 58 (Nfld. S.C. (T.D.)).

[13] *Ibid.*

[14] See Hon. Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's L.J. 27 at 7-8 [Stratas], and David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action—The Top Fifteen!" (2013) 42 Advocates Quarterly 1. While traditionally confined to academic circles, this criticism has also been expressed by some members of the Court. See *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 177, per Karakatsanis, Gascon and Rowe JJ.

[15] *Dunsmuir, supra* note 1 para. 48. See also Stratas, *ibid.* at 7-8.

[16] David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev. Const. Stud. 87 at 109 [Dyzenhaus, "Justification"].

[17] *Dunsmuir, supra* note 1 at para. 145, per Binnie J.

the Court has an opportunity to direct lawyers and judges back to explaining why the substantive outcomes in their cases are justified or not. As stated in *Dunsmuir*, the standard of review analysis must continue to be one where intervention is permitted "where justice requires it, but not otherwise."[18]

B. Our modern understanding of the rule of law.

12. The relationship between administrative decision-making and judicial review is not an adversarial one. Both have a legitimate and independent function in our constitutional order. Administrative decision-makers must act in accordance with the law, and courts engaged in judicial review demand nothing more.[19] The relationship is therefore one of mutual respect and "institutional dialogue."[20]

13. In other words, the rule of law has matured to recognize that legal decision-making is now a pluralist exercise in Canada. Courts no longer "have a monopoly on deciding all questions of law."[21] Instead of being "a brute guardian" of the law, the court is "a partner" in its construction and protection.[22] Our current conception of the rule of law recognizes the legitimacy and necessity of the administrative state in our legal order.[23]

14. Deferential review of administrative action is consistent with this modern understanding of the rule of law. Expressed through both judicial and administrative decision-making, the rule of

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[18] *Ibid.* at para. 43

[19] McLachlin, "Finding a Path," *supra* note 3 at 129.

[20] Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context*, 2nd ed. (Toronto: Emond Montgomery, 2013) 39 at 111 [Liston].

[21] *Dunsmuir*, *supra* note 1 at para. 30.

[22] Rt. Hon. Chief Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 Can. J. Admin. L. & Prac. 171 at 175 [McLachlin, "Rule of Law"].

[23] *Ibid.* at 173.

law is, at its core, concerned with ensuring voluntary compliance with the law.[24] Any legitimate exercise of public authority must therefore be justified in a manner that can be readily understood. This culture of justification rests at the heart of judicial review.[25] When considered through this contemporary lens, there is nothing inconsistent with the rule of law when a reviewing court respects an administrative decision that is justified in fact and law.

15. Submission to the law also does not depend on the type of reasoning (judicial or administrative) or the identity of the decision-maker (court or administrator).[26] Indeed, for most Canadians, justice begins and ends with an administrative decision-maker and not a judge. However, the rule of law does insist that the justification offered – whether administrative or judicial – be sufficient to demand respect for, and submission to, the law.

16. The standard of review analysis ought to reflect our contemporary understanding that the law can "speak in different voices."[27] Administrative decision-makers and courts both play a necessary part in our legal order, and each gains their legitimacy through reasoned justification.[28] While the sources of their respective authorities are different, they are equally legitimate and credible.[29] When the rule of law is viewed as a matter of shared responsibility, reasoned justifications are required from both administrative decision-makers and reviewing courts.[30] In doing so, the rule of law facilitates both deference and dialogue.

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[24] See generally Liston, *supra* note 20 at 82.

[25] McLachlin, "Rule of Law," *supra* note 22 at 174.

[26] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 278 at 303.

[27] McLachlin, "Rule of Law," *supra* note 22 at 175.

[28] See e.g. Jocelyn Stacey & Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74 S.C.L.R. (2d) 211.

[29] *Rasanen v. Rosemount Instruments Ltd*. (1994), 17 O.R. (3d) 267 at 279-280 (C.A.), per Abella J.A.

[30] Dyzenhaus, "Justification," *supra* note 16 at 113-114.

C. The basic soundness of *Dunsmuir* and its development by the Court.

17. In *Dunsmuir*, the Court helpfully identified the two basic principles that anchor the standard of review analysis: legislative supremacy and the rule of law.[31] Both are sound. The Court explained that judicial review is grounded in not only deference for administrative decision-makers, but also supervision by reviewing courts.[32] While it reserved "the last word"[33] on questions of general law, the Court also acknowledged that the legislative choice to create an administrative decision-maker is entitled to respect.[34] That decision-maker has been delegated authority to determine the outcome at first instance – not the court.

18. The principle of deference expressed in *Dunsmuir* is sound. The Court helpfully described deference as a "requirement" to show "respectful attention" to the reasons supporting an administrative decision.[35] By directing reviewing courts to examine both the reasons and the outcome of the impugned decision,[36] the Court identified that the proper starting point for judicial review is the content of the administrative decision itself.

19. The recognition in *Dunsmuir* that judicial review is a contextual exercise is also sound. The spectrum of administrative decision-making is broad. While administrative decision-makers share common features, their powers also vary depending on the context. For these reasons, the Court rightly recognized that the substantive review process must be capable of examining a variety of surrounding legal, factual and institutional circumstances.[37]

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[31] *Dunsmuir, supra* note 1 at paras. 27-31.
[32] *Ibid.* at paras. 28 and 48.
[33] *Ibid.* at para. 30.
[34] *Ibid.* at para. 48.
[35] *Ibid*.
[36] *Ibid.* at para. 47.
[37] *Ibid.* at paras. 74 and 76.

20. In the years since *Dunsmuir*, the Court has also refined the standard of review analysis in ways that have further buttressed these foundational principles:

(a) First, the Court has held that, even when undertaking deferential review, there will be occasions when a question of law has only one outcome that is justifiable in the circumstances.[38] Abella J. has also observed that nothing in *Dunsmuir* "precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference and the possibility of a single answer where the rule of law demands it."[39] In other words, the standard of review analysis must always remain capable of providing a final answer to legal questions.[40]

(b) Second, the Court has held that deference does not allow courts to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale."[41] In other words, justification matters. Judicial review begins with a search for an "intelligible and transparent justification" from the administrative decision-maker – not with an answer from the reviewing court.[42]

21. Taken together, these principles provide a solid foundation for simplifying judicial review. By focusing on them, instead of the categorization of the underlying questions, the Court can further refine *Dunsmuir* in a manner that is "theoretically sound and effective in practice."[43]

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[38] See e.g. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 38 [*McLean*].

[39] *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 31.

[40] There are a number of cases where the Court, despite being divided on the applicable standard of review, has reached the same final outcome. See e.g. *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; and *Tervita*, *supra* note 11.

[41] *Alberta Teachers, supra* note 5 at para. 54.

[42] *Ibid.*

[43] *Dunsmuir*, *supra* note 1 at para. 32.

D. Incremental changes would further simplify the standard of review analysis.

22. Many challenges in the standard of review analysis may be resolved by the Court making incremental changes and reinforcing the principles that animate substantive review:

(a) Legal decision-making is a joint enterprise.[44] Both administrative decision-makers and reviewing courts have a legitimate role in interpreting and applying the law in our modern constitutional order. The relationship between administrative decision-making and judicial review is not adversarial in nature. Rather, any tension is grounded in, and may be resolved by, mutual respect and dialogue.[45]

(b) Deference and context are distinct concepts.[46] Deference as respect arises from expressions of legislative choice and the separation of powers in our constitutional order. Context is the field within which an administrative decision-maker operates and includes the factual, legal, and institutional circumstances surrounding the substantive outcome under review.

(c) The rule of law insists that both administrative decision-makers and reviewing courts provide reasoned justifications for their respective decisions. This commitment to justification serves to reinforce deference for legislative choices. It also contributes to the rule of law by forcing courts to explain any departure from the justification already offered by the underlying decision-maker.[47] The combined effect is respectful communication between equally legitimate institutions.

(d) Deferential review does not prevent reviewing courts from finally determining

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[44] McLachlin, "Rule of Law," *supra* note 22 at 185.
[45] Liston, *supra* note 20 at 100.
[46] *Dunsmuir*, *supra* note 1 at para. 167, per Deschamps J.
[47] Liston, *supra* note 20 at 107.

questions of law.[48] Both administrative decision-makers and reviewing courts are constrained by the rule of law. After an administrative outcome is respected or displaced on judicial review, the decision by the reviewing court inevitably forms part of the subsequent context.[49] Judicial review can therefore be simplified without undermining important rule of law values, including predictability, consistency and finality.

23. The foundation constructed in *Dunsmuir* may be preserved by the Court. Changes ought to instead be aimed at moving lawyers and reviewing courts away from preliminary matters of categorization and directing them back to the "substantive merits of their case."[50] By clearing a path through the thicket, the Court will allow lawyers and judges to immediately review whether the administrative decision is justifiable. That has always been the essence of substantive review.

24. In summary, the rule of law insists that administrative decision-makers act within the limits of the law. Reviewing courts can demand nothing more. Reasoned justifications from both institutions will ensure that the dialogue between the executive and the judiciary gives meaning to legislative choices, encourages deference, and contributes to the values at the core of the rule of law.

PART IV – SUBMISSION ON COSTS

25. The CBA makes no submissions as to costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

26. The CBA seeks permission to present oral argument at the hearing of the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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[48] *McLean, supra* note 38.

[49] See e.g. *Altus Group Limited v. Calgary (City)*, 2015 ABCA 86 at paras. 31-32.

[50] *Dunsmuir, supra* note 7 at para. 145.

Dated at Charlottetown, Province of Prince Edward Island, this 29th day of October, 2018.

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PART VI – TABLE OF AUTHORITIES & LEGISLATION

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David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev. Const. Stud. 87.	10, 16
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