File number: 37748

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant (Respondent)

-and-

ALEXANDER VAVILOV

Respondent (Appellant)

- and –

DANIEL JUTRAS AND AUDREY BOCTOR

Amici Curiae

AND B E T W E E N:

File number: 37896

BELL CANADA and BELL MEDIA INC.

Appellants (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and –

DANIEL JUTRAS AND AUDREY BOCTOR

Amici Curiae

AND B E T W E E N:

File number: 37897

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC

Appellants (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and –

DANIEL JUTRAS AND AUDREY BOCTOR

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FACTUM OF THE INTERVENER,
THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA
(Rule 42 of the *Rules of the Supreme Court of Canada*)

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, ATTORNEY GENERAL OF ONTARIO, TELUS COMMUNICATIONS INC., ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, CANADIAN COUNCIL FOR REFUGEES, ADVOCACY CENTRE FOR TENANTS ONTARIO, ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA SECURITIES COMMISSION, ALBERTA SECURITIES COMMISSION, ECOJUSTICE CANADA SOCIETY, WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO), WORKERS' COMPENSATION APPEALS TRIBUNAL (NORTHWEST TERRITORIES AND NUNAVUT), WORKERS' COMPENSATINO APPEALS TRIBUNAL (NOVA SCOTIA), APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION AND WORKERS' COMPENSATION APPEALS TRIBUNAL (NEW BRUNSWICK), BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE FOUNDATION, COUNCIL OF CANADIAN ADMINISTRATIVE TRIBUNALS, NATIONAL ACADEMY OF ARBITRATORS, ONTARIO LABOUR-MANAGEMENT ARBITRATORS' ASSOCATION, CONFÉRENCE DES ARBITRES DU QUÉBEC, CANADIAN LABOUR CONGRESS, NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, QUEEN'S PRISON LAW CLINIC, ADVOCATES FOR THE RULE OF LAW, PARKDALE COMMUNITY LEGAL SERVICES, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM, ASSOCIATION OF CANADIAN ADVERTISERS AND THE ALLIANCE OF CANADIAN CINEMAN, TELEVISION AND RADIO ARTISTS, BLUE ANT MEDIA INC., CANADIAN BROADCASTING CORPORATION, DHX MEDIA LTD., GROUP V MÉDIA INC., INDEPENDNET BROADCAST GROUP, ABORIGINAL PEOPLES TELEVISION NETWORK, ALLARCO ENTERTAINMENT INC. BBC KIDS, CHANNEL ZERO, ETHNIC CHANNELS GROUP LTD., HOLLYWOOD SUITE, OUTTV NETWORK INC., STINGRAY DIGITAL GROUP INC., TV5 QUÉBEC, ZOOMERMEDIA LTD., PELMOREX WEATHER NETWORKS (TELEVISION) INC., SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BAR ASSOCIATION, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, COMMUNITY & LEGAL AID SERVICES PROGRAMME, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION, and FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

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I. OVERVIEW

1. These appeals provide this Court with an opportunity to adopt a new judicial review framework that promotes four fundamental principles: justice, access to justice, legislative supremacy, and the rule of law. It also provides this Court with a chance to consider the broad range of administrative decisions and the impact that current judicial review approaches have on vulnerable litigants, such as First Nations peoples and First Nations children.

2. The current framework has two vital aspects that result in negative outcomes for First Nations children and their families: a reasonableness standard that does not guarantee the best interests of the child; and a "presumption of deference" approach that hinders true access to justice. The First Nations Child and Family Caring Society of Canada (the "**Caring Society**") therefore intervenes in these appeals to make the following two submissions.

3. First, regardless of the applicable standard of review or the approach taken to determine it, consideration of the best interests of the child ought to be recognized as an inherent and essential element of any lawful decision affecting a child, including a First Nations child. This fundamental concept is a necessary component of any legally defensible decision affecting children. In other words, there can be no correct or reasonable outcome unless an affected child's best interests are considered.

4. Second, this Court ought to adopt a standard of review analysis in which (a) deference is given on findings of fact, questions of mixed fact and law, and exercises of discretion; and (b) deference is only given on legal issues where a privative or finality clause or other express legislated indicator of deference is present. Such a framework would largely eliminate litigation about the standard of review by providing a simple and readily applicable approach. It would support justice and the rule of law both by giving primacy to the legislatures and their expressed intent and by having legal issues decided correctly unless the legislature has expressly called for deference. Most importantly, it would promote true access to justice by placing and keeping the focus on the merits of a litigant's case.

5. The Caring Society has a firsthand perspective on the adverse impacts of an unduly complex and unpredictable administrative law regime, that puts insufficient focus on the interests of children. In 2007, the Caring Society and the Assembly of First Nations filed a *Canadian Human Rights Act* complaint alleging discrimination in Canada's inequitable and flawed provision of services to over 165,000 First Nations children. A CHRA complaint was chosen over other options as it appeared to provide an expedited and binding approach to ending discrimination. For six years, however, judicial reviews that focused on side issues such as the standard of review thwarted a hearing on the merits. Children were being placed in child welfare care while lawyers argued about the standard of review.[1]

6. The unique stages of children's development predisposes them to significant and long-lasting negative effects of adverse governmental decisions, amplifying the need for both expedited access to justice and a focus on the particular needs and interests of children in those decisions. Unlike many administrative decisions, those affecting First Nations children are often made by federal officials in purported implementation of policies and programs that have no legislative framework. These decisions are made against a historical backdrop of government authorities using administrative powers to make decisions, such as those implementing residential schools, that have resulted in multi-generational trauma that affects First Nations children and their families today.

7. This is far different from the context in which the notions of reasonableness and deference were developed, in which a legislature expressly empowers an expert decision-maker to regulate a technical field and statutorily protects those decisions. A universal presumption of deference ignores the non-legislative context of many administrative decisions, including those affecting First Nations children. As this Court stated in *Trang*: "Ensuring access to justice requires paying attention to the plight of all litigants."[2]

8. *Dunsmuir* sought to return reviewing courts to the merits of the case rather than complex and arcane standard of review discussions.[3] The presumption of reasonableness was also intended to return courts to the merits,[4] but jurisprudence, academic commentary,

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[1] The complaint was substantiated in 2016, but litigation continues regarding compliance.

[2] *Royal Bank of Canada v. Trang*, 2016 SCC 50, at para. 30.

[3] *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paras. 133 (*per* Binnie J.), 32-33, 158-160.

[4] *Canada (CHRC) v. Canada (AG)*, 2018 SCC 31 ["*Matson"*], at para. 27; see also para. 45.

and experience show it has not had this effect. Instead, it has driven arguments to issues of exceptions, rebutting the presumption, and the meaning of reasonableness. This results in confusion and increased costs, delay and unpredictable outcomes for litigants, which in turn act as a barrier to access to justice. An approach in which the legislature's express choice as to whether to defer on issues of law is both respected and determinative of the standard of review would meet Justice Binnie's call for "access to an independent judge through a procedure that is quick and relatively inexpensive".

II. THE CARING SOCIETY'S POSITION ON THE ISSUES

9. This Court ought to adopt an approach to judicial review in which (A) considering the best interests of the child is recognized as an inherent and essential element of any lawful decision affecting a child; and (B) deference is given on issues of law where the legislature has expressly called for deference, but not where a legislated indicator of deference is absent; with continued deference given to factual findings and discretionary decisions.

III. SUBMISSIONS

A. Reasonableness must include the best interests of the child

10. These appeals do not directly raise issues regarding the best interests of children (although Mr. Vavilov was a child during many of the relevant administrative steps in his case). However, given the Court's stated intention to revisit the scheme of judicial review, any approach adopted should consider the broader context of administrative decisions, including the impact of decisions on children. This approach should give primacy to the best interests of the child, or must at the very least not preclude its recognition in future cases.

11. Administrative decisions made in relation to First Nations children are often made by federal bureaucrats rather than by expert administrative tribunals and are grounded in federal programs and policies lacking an articulated legislative framework. Such decisions frequently have discretionary aspects, focusing on the applicability of policy criteria and appropriate remedies or outcomes in a particular case.[5] A standard of reasonableness will thus typically apply on any judicial review.

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[5] E.g., the First Nations Child and Family Services Program, the Non-Insured Health Benefits Program, the High-Cost Special Education Program, and the implementation of Jordan's Principle, each of which are administered by the Government of Canada pursuant to policies but without a legislative framework.

12. Where a discretion is being exercised, a decision-maker must consider all relevant factors, and not irrelevant ones, to render a reasonable decision.[6] Such a decision meets the *Dunsmuir* requirements of "justification, transparency and intelligibility within the decision making process".[7] Where a child's interests are at stake, the best interests of that child is necessarily such a factor, whether expressly called for by statute or not.

13. The best interests of the child is an axiomatic principle of Canadian law: decisions about and impacting children should be based on an assessment of their best interests.[8] Across the country, almost every piece of legislation that governs decisions affecting a child includes some consideration of the best interests of the child.[9] This principle recognizes the inherent vulnerability of children, their differing stages of growth and development, and provides decision-makers with a focus and perspective through which to act on behalf of children.[10] It is also in keeping with our fundamental values in Canadian society, and is consonant with the articulated values and underlying concerns of the *Charter*.[11]

14. In *Baker*, this Court found that even though it was not referenced in the then *Immigration Act*, consideration of the best interests of an affected child as an "important

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[6] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, para. 91; *M.M. v. United States of America*, 2015 SCC 62, para. 147; *British Columbia (Workers' Comp. Board) v. Figliola*, 2011 SCC 52, para. 54 (referring to the *Administrative Tribunals Act*, SBC 2004, c. 45); *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, paras. 93 (*per* Binnie J.) and 29 (*per* Bastarache J., dissenting).

[7] *Dunsmuir*, *supra*, at para. 47

[8] *Syl Apps Secure Treatment Centre v. B.D.,* 2007 SCC 38 at para. 46, citing N. Bala, "*The Best Interests of the Child in the Post-Modernist Era: A Central But Illusive and Limited Concept*", in *Special Lectures of the LSUC 2000: Family Law* (1999), 3.1, at p. 3.1; *Kanthasamy v. Canada (Citizenship and Immigration*), 2015 SCC 61, at para. 36.

[9] See for example *Education Act*, S.Nu. 2008, c. 15, s. 43(13); *Children's Law Act*, R.S.Y. 2002, c. 31, s. 1; *Adoption Act*, S.N.W.T. 1998, c. 9, s. 3; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 15; *Parenting and Support Act,* R.S.N.S. 1989, c. 160, s. 18H; *Family Law Act,* S.B.C. 2011, c. 25, s. 37; *The Emergency Protection for Victims of Child Sexual Abuse and Exploitation Act,* S.S. 2002, c. E-8.2, s. 12; *The Protecting Children (Information Sharing) Act*, S.M. 2016, c. 17, s. 3; *Family Homes on Reserves and Matrimonial Interests or Rights Act,* S.C. 2013, c. 20, s 21.

[10] *Canadian Foundation of Children, Youth and the Law v. Canada (A.G.)*, 2004 SCC 4, at paras. 56, 58; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, at para. 81; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, at para. 17.

[11] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para. 56; *Young v. Young*, [1993] 4 SCR 3, at p. 71.

factor" was "essential for an H&C decision to be made in a reasonable manner."[12] This requirement effectively recognizes that rational, reasonable and intelligible decisions cannot be made about a child absent a consideration of that child's best interests. The approach taken to "humanitarian and compassionate grounds" decisions in *Baker* should prevail for all decisions affecting a child, both by administrative decision-makers (including federal officials, parents, teachers, and child protection workers) and courts.

15. While this Court in *Canadian Foundation* found that the best interests of the child is not a principle of fundamental justice protected by s. 7 of the *Charter* (although it is a legal principle), it did so on the basis that a child's best interests can be subordinate to other concerns in appropriate contexts, and not on the basis that they may be wholly irrelevant or ignored in the context of decisions impacting that child.[13]

16. Requiring that a child's best interests form part of any reasonable decision is also in keeping with Canada's international obligations, including those under the *United Nations Convention on the Rights of the Child* (the "CRC"). Article 3.1 of the of the CRC sets out that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" [emphasis added].[14]

17. As this Court recognized in *Kanthasamy*, the "best interests of the child" are contextual, based on multiple factors, and are considered in light of the age, capacity, needs, and maturity of the particular child; there is no precise test and a measure of indeterminacy is inevitable.[15] Decisions affecting a child's best interests will almost always involve some discretion and considerations of fact and of mixed fact and law. Even on the appellate standard, such questions will often be given deference.

18. For a child who is impacted by administrative decisions, particularly First Nations children, any decision can only be "reasonable"—both in reasoning and outcome—if the decision-maker considers the best interests of that child. The alternative can lead to absurd

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[12] *Baker*, *supra*, at paras. 74-75.

[13] *Canadian Foundation*, *supra*, at para. 10.

[14] *Convention on the Rights of the Child*, 44/25 of 20 November 1989 (entered into for 2 September 1990). See also *General Comment No. 14* (2013), United Nations Committee on the Rights of the Children, at para. 30 and *Baker* at para. 71.

[15] *Kanthasamy*, *supra*, at para. 35; *Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 20.

results, such as in *Shiner v. Attorney General*.[16] There, the child applied to the Non-Insured Health Benefits Program (NIHB) for braces to remedy two years of chronic jaw pain. The fact that the child suffered from pain and that the pain could be remedied by braces was never challenged. However, the child's request was denied, as was every subsequent appeal, on the basis that her condition did not meet the strict criteria of the NIHB's internal (non-statutory) orthodontic policy. On judicial review, the Federal Court lamented the pain and suffering experienced by the child, but found that the decision was "reasonable," even though the NIHB had not considered the child's best interests.[17]

19. Given children's particular vulnerability and susceptibility to substantial impacts from delay and the passage of time, administrative decisions affecting them have a heightened importance. Decision-makers must make explicit findings regarding the best interests of the children their decisions will impact. Anything less fails to meet the *Dunsmuir* "justification, transparency, and intelligibility" standard.[18] Decisions impacting children that fail to explicitly consider their best interests cannot by definition have considered all relevant factors, and cannot permit "the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes".[19]

B. The approach to selecting the standard of review

a) *Dunsmuir* and difficulties with the current approach

20. The majority in *Dunsmuir* described an approach that recognizes that "many legal issues attract a standard of correctness", while "[s]ome legal issues" attract the reasonableness standard, based on factors including the existence of a privative clause, and the decision maker's "special expertise". Questions of law "may" be compatible with reasonableness where the privative clause and expertise factors so indicate.[20]

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[16] *Shiner v. Attorney General of Canada*, 2017 FC 515

[17] *Shiner*, *supra*, at paras. 2, 3, 26-32.

[18] *Dunsmuir*, *supra*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, at para. 13.

[19] *Newfoundland Nurses*, *supra*, at para. 16.

[20] *Dunsmuir*, *supra*, at paras. 51-56. The recognition of the importance of privative clauses and expertise led Binnie J. to note in concurring reasons that the majority's approach was essentially the "old pragmatic and functional test" by another name. He also observed that the majority's approach focused on administrative tribunals rather than the system as a whole: *Dunsmuir*, *supra*, at para. 121.

21. In contrast, the "categorical" approach this Court has developed since *Dunsmuir*—starting with *Smith*, and followed by cases like *Alberta Teachers*, *McLean*, and recently *Matson*—focuses almost exclusively on the nature of the question at issue, rather than expertise or statutory direction.[21] By introducing a presumption of deference any time a "home statute" is interpreted (or even the common law[22]), the Court has concluded that all tribunals have expertise in interpretation,[23] and that the legislature must have intended deference simply by virtue of having given the decision-maker decision-making authority.[24]

22. Two primary justifications underlie the current "presumption of reasonableness": (a) it reflects legislative intent; and (b) it provides jurisprudential certainty, allowing for focus on the merits of a case.[25] These justifications require closer examination.

23. The presumption that legislatures desire deference to all administrative decision-makers through the very act of delegation is inconsistent with the different treatment of different bodies and decisions by increasingly sophisticated legislatures. In Ontario, for example, different decisions of the Environmental Review Tribunal may be protected by a privative clause, may be appealed to the Divisional Court on questions of law, or may be appealable to the Divisional Court on some questions and to the Minister on others.[26] To presume the legislature intended all such decisions to be treated equally, and to apply a blanket presumption of deference in consequence cannot reflect legislative intent,[27] particularly if the presumption is a strong one rebuttable only in "exceptional" cases[28]

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[21] *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, paras. 25-40; *Alberta (Information and Privacy Comm.) v. Alberta Teachers' Assn*, 2011 SCC 61, paras. 30, 33; *McLean v. British Columbia (Securities Comm.)*, 2013 SCC 67, paras. 21-26; *Matson*, *supra*, paras. 27-28.

[22] *Williams Lake Indian Band v. Canada (AANDC)*, 2018 SCC 4, at para. 27.

[23] *McLean*, *supra*, at para. 33.

[24] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, at para. 22; see also *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at paras. 169-170, *per* Abella J., suggesting that the presumption should apply "notwithstanding legislative wording".

[25] See, e.g., *McLean*, *supra*, at para. 33, and *Matson*, *supra*, at paras. 27, 45.

[26] *Environmental Protection Act*, ss. 7, 45(3); *Ontario Water Resources Act*, s. 7; *Pesticides Act*, ss. 15(1) and (4); *Toxics Reduction Act*, s. 39; *Safe Drinking Water Act, 2002*, ss. 134-135.

[27] See the four-member dissent in *Edmonton East*, *supra*, at paras. 63, 77-79.

[28] *Matson*, *supra*, at paras. 28, 45.

24. Decision-making may be delegated for reasons unrelated to expertise and a legislature's desire for deference on legal issues. This includes notably the lower cost and more informal processes of bodies that are often engaged primarily in fact-finding, reasons that promote access to justice.

25. However, this does not mean that the presumption of deference itself can be assumed to foster access to justice.[29] Considering access to justice requires assessment of both "access" and "justice". As to the former, there is no indication that the presumption of deference has or will reduce the number or extent of judicial reviews. To the contrary, judicial reviews continue on the merits, and continue to involve expensive and time-consuming debate over the standard of review. As to the latter, justice is not served if parties are forced to accept an incorrect determination of their rights when not justified under the relevant statutory or non-statutory scheme.

26. Rather than imposing a heavy onus on legislatures to show a "clear" legislative intent to overcome a common law presumption (of recent origin),[30] courts should respect legislative choices as to when justice, and access to justice, are fostered by deference to an administrative body on issues of law. Recognizing privative clauses as an "important indicator of legislative intent"[31] and giving meaning to both their presence and their absence does this, and is a hallmark of legislative supremacy.

27. In B.C., the one province where the legislature has expressly legislated on standards of review, it has indicated that correctness should govern legal issues except where a privative clause shows the legislature's desire for deference.[32] The current presumption of reasonableness assumes that other provinces implicitly desire greater deference—and disregard of indicators such as privative clauses—without any legislative indication that that is the case. The B.C. statute also confirms that it is unsound to assume that delegation to a decision maker necessarily shows a desire to defer to that decision maker on legal issues.

28. Nor does the presumption provide jurisprudential certainty, allowing judicial reviews to focus on the merits. Instead, litigation and commentary have just shifted from assessing

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[29] As the majority did in a brief comment in *Edmonton East*, *supra*, at para. 22.

[30] *Matson*, *supra*, at para. 28.

[31] *Canada (MCI) v. Khosa*, 2009 SCC 12, at para. 45; *Dunsmuir*, *supra*, at para. 31.

[32] *Administrative Tribunals Act (B.C.)*, ss. 58 and 59.

the standard towards arguing exceptions and grounds for rebutting the presumption.[33] To use the language of Binnie J., under the current approach to judicial review, "[p]eople who feel victimized or unjustly dealt with by the apparatus of government" do *not* have "access to an independent judge through a procedure that is quick and relatively inexpensive". Such an approach does not foster access to justice; it is a barrier to it.[34]

29. This Court's post-*Dunsmuir* development of the presumption of reasonableness has also arisen primarily in the context of decision-makers with express statutory powers, usually more formal tribunals. That context is very different from that of many decisions affecting First Nations children, in which decisions are made by government officials referring to non-legislated program manuals, policies or other documents. These decisions may engage or reflect a nation-to-nation relationship rather than a regulator/regulated one. A universal deferential standard premised on legislative intent, presumed expertise and assumptions about access to justice fails to recognize the breadth and source of decision-making powers and the varied contexts in which decisions are made.

b) Proposed new approach

30. The Caring Society submits that this Court ought to adopt an approach in which deference on issues of law is given when, and only when, a legislature expressly indicates a desire for such deference. Such an approach is effectively based on the appellate standards described in *Housen*,[35] modified to recognize the need for deference where there is a privative clause or other express legislated indicator of deference.

31. For most issues, this represents no substantive change. Under both the administrative and appellate approaches, deference is shown on issues of fact, mixed fact and law, and discretion, while correctness is required for issues of constitutionality. The approach would differ from the current approach on issues of law, where justice, access to

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[33] See, e.g., *Tervita*, *supra*; *Edmonton East*, *supra*; *Matson*, *supra*; *McLean*, *supra*; *Alberta Teachers Assn*, *supra*; *Agraira*, *supra*; Daly P., "*The Signal and the Noise in Administrative Law*" (2017) 68 UNBLJ 68, and "*Unreasonable Interpretations of Law*" (2014), 66 SCLR (2d) 233; Stratas D., "*The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency*" (2016) 42 Queen's LJ 27; Mullan D., "*Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action–the Top Fifteen!*" (2013) 42 Advoc.Q. 1.

[34] See, e.g., Reid, T. et al., *A Practitioner's Innovative Response to Abella's Call to Reform Judicial Review* (2018), 69 UNBLJ 364, at pp. 362-365.

[35] *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 8 to 18.

justice, legislative supremacy and the rule of law would all be promoted by requiring correct interpretations of law except where the legislature has expressed a contrary intention.[36]

32. This approach is simple and predictable. *Housen* has governed appellate review for 16 years without significant conceptual or practical difficulties. Appellate courts have little difficulty determining or applying the standard, so few resources are spent on it. Unlike the reasonableness presumption, or even multi-factored approaches like the "pragmatic and functional" one, it does not depend on exceptions or uncertainties. Privative/finality clauses or other legislated indicators (such as a defined standard of review) are readily identifiable.

33. Without such debate over the applicable standard, judicial review proceedings could return to a focus on the merits of the case, and allow litigants, including vulnerable ones, to have the legal aspects of their case heard and decided by a body whose very role is the determination of legal issues. True access to justice lies not only in available and inexpensive administrative decisions, but in available and inexpensive judicial review processes for the determination of a matter by a judicial body on its legal merits.

34. The Caring Society recognizes that this approach represents a reconsideration of this Court's recent jurisprudence and the trend of presuming reasonableness on an increasing number of legal issues. This reconsideration is appropriate as it avoids a further decade of uncertainty and litigation focused on the standard of review instead of the merits, and promotes each of the important principles of justice, access to justice, legislative supremacy, and the rule of law.

IV. COSTS AND ORAL SUBMISSIONS

35. The Caring Society seeks no costs, asks that no costs be awarded against it, and asks for the opportunity to present oral submissions at the hearing of these appeals.

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[36] See, e.g., *Dunsmuir*, *supra*, at paras. 158-166, *per* Deschamps J. concurring; *Khosa*, *supra*, at paras. 70 *ff*, *per* Rothstein J. concurring; *Smith*, *supra*, at paras. 78 *ff*, *per* Deschamps J. concurring.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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