S.C.C. Court File No. 37748/37896/37897

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

B E T W E E N:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant
(Respondent)

- and -

ALEXANDER VAVILOV

Respondent
(Appellant)

A N D B E T W E E N:

BELL CANADA and BELL MEDIA INC.

Appellants
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

-and-

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener
(Intervener)

A N D B E T W E E N:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC,
and NFL PRODUCTIONS LLC

Appellants
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

-and-

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

INTERVENER
(Intervener)

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

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Court File Number: 37748

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

B E T W E E N:

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APPELLANT
(Respondent on Appeal)

- and –

ALEXANDER VAVILOV

RESPONDENT
(Appellant on Appeal)

- and –

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INTERVENERS

- and –

DANIEL JUTRAS and AUDREY BOCTOR

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SCC 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
(Appellants)

and

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

and

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

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INTERVENERS

and

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

B E T W E E N:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

APPELLANTS
(Appellants)

and

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

and

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INTERVENER

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TABLE OF CONTENTS

PART I – OVERVIEW and FACTS

1. Ontario intervenes to address the standard of review with a view to improving the quality of statutory interpretation. On questions of statutory interpretation, *Dunsmuir* fails to uphold the rule of law in that it does not ensure that a tribunal interpretation of statute is the result of the application of established principles of statutory interpretation. On matters that the Legislature gave discretion to a tribunal, *Dunsmuir* establishes a threshold for review that permits Superior Court Judges to interfere too readily.

2. The standards of reasonableness and deference do not give adequate guidance to judges as to the type or magnitude of error to look for in a tribunal decision. The correctness standard invites a Superior Court to conduct its own analysis of the statute without regard for the analysis done by the tribunal.

3. A court should review a tribunal's statutory interpretation to ensure it is a logical result of the application of established principles of statutory interpretation but the court should not review an exercise of discretion unless it is inconsistent with statutory purposes (or is a result of procedures that prejudiced a party's right to be heard).

4. A practical benefit of Ontario's approach is to focus on the merits of the tribunal's statutory analysis without diversion to any separate standard of review analysis.

5. The Court has endeavoured to craft a single standard of review that is flexible enough to be applied to the widely varied types of statutory decision makers and varied issues that they have authority to decide. The flexibility takes into account the contextual factors identified in the jurisprudence.

6. A contextual factor that has not been adequately explored is the extent to which the decision maker is accountable to the Legislature for its decisions on the merits. This accountability has been reduced by judicial support of greater independence. This Court has equated a lack of independence with bias.[1] In a democracy there must be public accountability

[1] Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 SCR 3 at ¶ 75-84; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919

for decisions that affect persons' legal rights. So long as a decision maker is accountable to a minister, it is accountable through the minister to the Legislature.[2] This accountability is reduced by the increased independence from ministerial control.

7. Greater independence allows scope for problems that can arise from freedom to act without supervision. Tribunal members are genuinely committed to serving their public interest mandates but it would be a rare member who regards their statute as perfect. Most members have views as to how the regulatory regime could be improved. They may disagree with some of the enacted provisions. They may hold a view as to how competing interests should be balanced which is different from the Legislative choice. They may believe that, in order to effectively regulate, they need more powers or their authority should be extended to address problems on the margins of the regulatory field. These personal views can give rise to an inclination, which may be unconscious, to interpret the statute so as to change the law to be more consistent with their views. However, that interpretation might not be what the Legislature intended. Ontario submits that the court should ensure that the tribunal interprets the statute in accordance with the established principles of statutory interpretation rather than their personal views of what the law ought to be.

PART II – ATTORNEY GENERAL'S POSITION ON THE ISSUES

8. Ontario submits that the Court should review an interpretation of statute by a statutory decision maker to ensure it is based on an application of established principles of statutory interpretation but the Court should not review an exercise of discretion unless its exercise is inconsistent with statutory purposes.

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[2] Ontario tried to address the problem of accountability in the context of independence by enacting the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c. 33, Sch. 5, ss. 1-14, 20-21. However, nothing in this Act authorizes a minister to exert control over an adjudicative tribunal's interpretation of statute in individual cases. Court supervision is required.

PART III – STATEMENT OF ARGUMENT

9. Ontario advocates for a more robust review of questions of statutory interpretation, including a different way for it to be informed by tribunal expertise. Ontario then addresses the scope of tribunal discretion and recommends a more statute-focussed approach to judicial review.

Questions of statutory interpretation

10. A legislative intention common to all statutes is that they be interpreted in accordance with established principles of statutory interpretation.

11. Ontario submits that the Court should review all challenged tribunal interpretations of statute. Ontario does not suggest a correctness standard by which the court determines the correct interpretation without regard for the tribunal's interpretation. Rather, Ontario advocates that the court review a tribunal's interpretation to ensure that it is based on the application of established principles of statutory interpretation. Only if it is not, and with the benefit of the tribunal's analysis in its reasons, which the tribunal may supplement in its submissions to the court on the question of statutory interpretation, may the court determine the correct interpretation.

12. By this standard the court reviews whether the tribunal interpretation is a logical result of an application of well-established principles of statutory interpretation. These include statutory directions which require that an Act be interpreted as being remedial and be given such fair, large and liberal interpretation as best ensures the attainment of its objects[3] and prescribe the English and French versions as equally authoritative.[4] The established judicial principles require that words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament – all of which is to be found by a careful reading of the statute without resort to external aides to interpretation such as Charter values and dictionary definitions.

13. This Court has ruled that resort may be made to aides to interpretation only if a genuine ambiguity arises – that is, the application of established principles of interpretation support

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[3] *Legislation Act, 2006*, SO 2006, c. 21, sch. F, s. 64(1)
[4] *Ibid*, s. 65

different interpretations that are equally valid. Then the question may be settled by resort to legislative history or Charter values.[5]

14. It is rare to find unintentional ambiguity in a statute. Words and phrases that admit more than one interpretation may be enacted to give the tribunal latitude to interpret them in a variety of circumstances. General statutory language may be characterized as a grant of discretion to allow the tribunal flexibility in statutory interpretation to address varied circumstances.[6]

15. The question whether a factual situation fits within the statutory language has been characterized as a question of mixed fact and law. It is really a question of mixed law and discretion. Legislators cannot anticipate all factual situations that may arise.[7] Authority is granted to decision makers so that they may make findings of fact and decide whether the statute applies. If the tribunal's statutory interpretation is a logical result of the application of established principles of statutory interpretation and there is nothing in the statute or its history to suggest that the statute was not intended to apply in the particular context, the standard of review of the discretion to apply the law to a particular factual situation should be the same as for any other exercise of discretion.

16. The discarded "preliminary questions" doctrine allowed the court to decide at first instance whether the statute applied to the factual circumstances. Ontario advocates that the question be left to the discretion of the tribunal at first instance. If the court continues to dismiss as premature every challenge to a preliminary ruling of statutory interpretation, there is little risk of revival of this discarded doctrine.

17. The concept of a question of law that is of central importance to the legal system and outside the specialized area of expertise of the decision maker was initially applied to questions of common law.[8] Ontario submits that the Court erred in applying it to questions of statutory

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[5] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at ¶ 26-30
[6] *Pong Marketing and Promotions Inc. v. Ontario Media Development Corp.*, 2018 ONCA 555 at ¶ 20, 22, 44-48; Graham, Randal N., *Statutory Interpretation* (2001 Emond Montgomery), at pp. 127, 139 [Book of Authorities, Tab 1].
[7] *R v. Wonderland Gifts*, [1996] NJ No 146 at ¶ 47 (NLCA); *Pong Marketing and Promotions Inc. v. Ontario Media Development Corp.*, 2018 ONCA 555 at ¶ 20, 22, 44-48
[8] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at ¶ 60

interpretation.[9] A purpose of enacting a law by statute, rather than deciding issues on a case by case basis, is to establish the law that applies equally to everyone active in the regulated field. A statutory interpretation sets a precedent.

18. Conflicting interpretations of statute ought not to be upheld. Everyone subject to a law has the right to know what the law is and to equality under the law. The law ought not to be different depending on which adjudicator presides. If interpretations by members of the same tribunal conflict, the court may direct reconsideration so as to allow the tribunal to resolve the conflict. If the adjudicators are not part of an institutional tribunal, the court may resolve it after considering the reasons of the adjudicators.[10]

19. The majority of the Court in *Vavilov* ruled that, if the individual rights at issue are high, a more exacting standard of review should be applied to a question of statutory interpretation. Ontario disagrees and the Ontario Court of Appeal has rejected it.[11] This Court has ruled there is only one approach to statutory interpretation. Ontario submits that the nature of the individual rights at issue is not relevant to a question of statutory interpretation unless a notice of constitutional question is delivered and the Court concludes that the statute violates the individual's Charter rights. Otherwise, the rule of law requires that statutes be interpreted consistently so that they apply equally to all.

20. The practical application of Ontario's approach would require the court to review the tribunal's statutory analysis to ensure the tribunal considered the words of the provision, the statutory context of the provision, including every part of the statute that is relevant to the interpretation of the provision as well as the statutory purposes and, if relevant, the statutory history, a comparison of both the English and French versions and the practical implications of the interpretation. The court would review whether the tribunal interpretation is the logical result of that analysis. If there were errors in the analysis or the tribunal interpretation is not a logical result, the court may substitute its view. If the tribunal interpretation is a logical result of proper analysis, the court may not substitute its view even if there is another logical interpretation.

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[9] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at ¶ 70
[10] *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374 at ¶ 80-81
[11] *Pong Marketing and Promotions Inc. v. Ontario Media Development Corp.*, 2018 ONCA 555 at ¶ 41-52

21. Advantages of Ontario's recommended approach include the precedential value of a court ruling that upholds or rules on an interpretation of a statutory provision. This approach best upholds the rule of law. In addition, there will no longer be any need to consider whether a statutory provision raises a true question of jurisdiction.

22. If the question of statutory interpretation was not raised before the tribunal and if a factual record is necessary to determine the question, the court may exercise its discretion in at least two ways. If the party knew or ought to have known about the statutory interpretation issue but did not raise it before the tribunal, the court may dismiss the application or appeal. If the parties were not aware of the issue until they received the tribunal decision, it may be appropriate for the court to refer the case back to the tribunal to give the party an opportunity to be heard by the tribunal on this issue.

Tribunal expertise in statutory interpretation

23. Adoption of Ontario's recommendation should be complemented by providing an opportunity for the tribunal's statutory analysis to be presented to the court. A question of statutory interpretation may be raised on judicial review or appeal in circumstances where it had not been necessary for the tribunal to explain its statutory analysis in its decision. The tribunal may have applied an interpretation established in its prior cases or the issue may have been raised but not vigorously argued, or it was not raised or argued at all. Regardless, a tribunal should be allowed[12] to deliver a factum and make submissions to the court on the question of statutory interpretation. The tribunal factum may show how its interpretation is based on an application of established principles of statutory interpretation rather than its view of what the law ought to be and inform the court about the practical regulatory impacts of each interpretation.[13]

24. This is a preferable way for a tribunal to demonstrate its expertise in interpreting a statute with which it is familiar. It avoids a presumption that ignores the varied levels of expertise among tribunal members. If the decision was made by a new appointee or a non-lawyer, the

[12] A tribunal may choose not to participate: It may be confident that a party will adequately explain the statutory analysis or it may choose to let the court decide.

[13] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at ¶ 53

statutory analysis in the reasons may not be as robust as it could have been. A tribunal that is allowed to explain its statutory analysis to the court may draw on the collective expertise of its members as well as institutional resources and legal advice. The court will benefit from the tribunal's best analysis of the statute and need not purport to review reasons that could have been given but were not.

25. This opportunity does not offend the principle against bootstrapping as it should not give rise to a reasonable apprehension of bias in the exercise of discretion.[14]

26. The onus is on the challenging party to persuade the court that there is an error in the tribunal's statutory analysis and that the interpretation should be different. A cogent explanation by the tribunal establishes a high burden for the party to overcome.

Discretion in the determination of persons' legal rights

27. Ontario's submissions in this part focus on decisions that directly affect the legal rights and interests of parties. Otherwise policy choices are not reviewable.[15]

28. A statute may confer authority to exercise discretion in individual cases so as to further the public interest purposes of the statute or to make polycentric choices that balance competing interests, weigh a variety of factors and take into account a variety of scientific, economic, social and political considerations. Discretion may be granted to a decision maker who has expertise gained from the day-to-day regulation of the subject field. Also, regulators need flexibility to address loopholes in regulatory regimes.

29. This Court in *Dunsmuir* said, "Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures. … In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy."[16]

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[14] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at ¶ 63-72
[15] *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 SCR 602 at p. 628
[16] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at ¶ 27, 30

30. Ontario submits that the standard of reasonableness does not adequately respect legislative supremacy, especially when reviewing decisions of ministry officials who are accountable through a Minister to the Legislature for their exercise of statutory power. Even when reviewing independent tribunal decisions, the standard does not adequately reflect the legislative choice to confer discretion on them.

31. An exercise of discretion should not be reviewable by a court except for violation of the constitution or an exercise of discretion for purposes that are inconsistent with the purposes of the Act.[17] This Court in *Roncarelli* said that an exercise of discretion should not be set aside except for a clear departure from statutory objects.[18]

32. Ontario submits that the court should not take a narrow view as to statutory purposes. Some purposes are obvious but others are not. Statutes that state their purposes may also have unstated purposes. And not every provision in a statute furthers the statutory purposes – a provision may reduce the statute's impact on competing public interests or address a side issue. In Ontario's view, courts have erred in setting aside Ministers' exercises of discretion that were based on concerns for the proper management of government fiscal resources,[19] concerns to avoid undermining the purposes of other statutes[20] and concerns for the economic interests of the province.[21] Ontario submits that these are inherent purposes of all statutes.

33. If discretion is conferred on one who is directly or indirectly accountable to the Legislature, such as Cabinet, a Minister or ministry official, the court should assume that they have flexibility to consider a broad range of changing political, scientific, economic and social concerns unless the statute clearly restricts the scope of discretion.

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[17] This Court also reviews for irrelevant considerations and failure to consider appropriate factors: *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 SCR 2; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at ¶ 53; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at ¶ 29, 34-37. But other courts do not: *Transcanada Pipelines Ltd. v. Beardmore (Township)*, [2000] OJ No 1066 at ¶ 95-99 (CA); *Carpenter Fishing Corp. v. Canada*, [1998] 2 FC 548 (CA)

[18] *Roncarelli v. Duplessis*, [1959] SCR 121 at p. 140

[19] *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 OR (2d) 164 at ¶ 45 (Div. Ct.)

[20] *Multi-Malls Inc. v. Ontario (Minister of Transportation and Communications)*, [1976] OJ No. 2288 (CA)

[21] *Fisheries Assn. of Newfoundland and Labrador Ltd. v. Newfoundland (Minister of Fisheries, Food and Agriculture)*, 146 NFLD & PEIR 42.

34. Ontario submits that the Court should be alert to a risk that an independent tribunal may interpret or apply their statute in a way not intended by the Legislature. The risk can be reduced by review to ensure that the exercise of discretion is not just the tribunal's view of what ought to be done but is also within the scope of a discretion that is the logical result of the application of established principles of statutory interpretation and is consistent with statutory purposes.

35. In conclusion, mere doubt as to whether the exercise of discretion is consistent with statutory purposes should not be sufficient to set it aside – *Roncarelli* requires a clear departure from statutory purposes.

Tribunal order conflicts with another statute

36. The Court's established approach is consistent with the legislative intention to avoid regulatory gaps by granting tribunals authority to regulate overlapping subject areas. Court intervention is required only if the order's effect is to impose conflicting obligations on a party, such that compliance with the order violates a statute.[22]

Statutory rights of appeal and privative clauses

37. Statutory rights of appeal and privative clauses may restrict the grounds of review (e.g. review only a question of law)[23] but the standard of review is not prescribed.

38. Two types of provisions have been mischaracterized as privative clauses that influence the standard of review. The purpose of a provision that grants a tribunal "exclusive jurisdiction" is to preclude a court or other tribunal from deciding, at first instance, issues that are within the tribunal's exclusive jurisdiction. The purpose of a provision that makes the tribunal decision "final and binding" or "final and conclusive" is to prevent the parties from re-litigating the decided issues in any forum – tribunal or court. As neither provision concerns the court's supervisory authority over the tribunal's decision, they are not relevant to determining the standard of review.

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[22] *British Columbia Telephone Co. v. Shaw Cable Systems (BC) Ltd.*, [1995] 2 SCR 739

[23] The term "question of law" has been interpreted to include a substantial wrong or miscarriage of justice: *Canadian National Railway Co. v. Emerson Milling Inc.*, 2017 FCA 79 at ¶ 18; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 SCR 471 at ¶ 34, 37, 42-43, 46

39. The rare privative clauses that prohibit judicial review have been read down to permit the court to fulfill its constitutional mandate to review statutory decisions for excess of jurisdiction.[24] Legislatures enact them in exceptional circumstances while understanding that the court may exercise its constitutional mandate.

40. Statutory provisions prescribing a standard of review have been enacted to reduce litigation about the standard of review in the face of the uncertainty resulting from the jurisprudence. If Ontario's recommended approach is adopted by the Court, these statutory provisions may no longer be necessary.

PART V – ORDER REQUESTED

41. Ontario requests leave to present oral argument not exceeding 15 minutes.

October 24th, 2018

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[24] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at ¶ 31, 52, 67, 159

PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE

SECONDARY SOURCES

STATUTES AND REGULATIONS