S.C.C. File No. 37748

IN THE 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

- and -

ALEXANDER VAVILOV

Respondent

- and -

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Interveners

- and -

DANIEL JUTRAS AND AUDREY BOCTOR

Amici curiae

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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S.C.C. File No. 37896

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

- and -

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Interveners

- and -

DANIEL JUTRAS and AUDREY BOCTOR

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S.C.C. File No. 37897

B E T W E E N :

NATIONAL FOOTBALL LEAGUE and NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

Appellants

- and -

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Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

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PART I—OVERVIEW

1. In these appeals, some parties and interveners, notably the Attorneys General, urge this Court further to entrench deference to executive decision makers. Others, including those advocating for vulnerable participants in the legal system, argue for greater oversight.

2. Advocates for the Rule of Law ("**ARL**") takes no position on whether more or less deference is desirable as a matter of policy. It intervenes, instead, to propose a normative framework for judicial review that reflects Canada's constitutional structure and the principles that underpin it. ARL's position is rooted in rule of law considerations that can and should inform the standard of review analysis in all three of these appeals, as well as in future cases.

3. Specifically, ARL makes two interrelated submissions.

4. ***First,*** legislative supremacy and the rule of law are not in tension. Nor are they necessarily distinct; rather, the former is an aspect of the latter. In all but exceptional circumstances, the rule of law requires courts to determine whether and to what extent the legislature intended the court to defer to the administrative decision maker. Courts too often avoid these questions. They adopt, instead, a nearly irrefutable presumption of deference, one that undermines the very principle of legislative supremacy that ostensibly justifies it. The result, ***administrative supremacy***, is inconsistent with judicial review's constitutional footing.

5. ***Second***, the rule of law requires reviewing courts to interpret legislation. Judges cannot assess the legality of administrative decisions without first understanding the scope of the authority that the legislature intended to delegate. This obliges courts to engage in at least limited interpretation of the decision maker's "home" statute. ARL therefore proposes a framework that is grounded in the search for legislative intent.

6. ARL's submissions are distinctive. They will be of assistance to the Court as it considers the "nature and scope of judicial review of administrative action"[1]. Accordingly, ARL requests that it be granted leave to make combined oral submissions, not to exceed five minutes in length.

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

PART II—POSITION RESPECTING THE APPELLANTS' QUESTIONS

7. ARL submits that, to respect the rule of law and legislative supremacy, a court should determine whether deference is due to an administrative decision maker by deploying the established tools of statutory interpretation. Reviewing courts should defer where the question is one that the legislature intended the decision maker, rather than the court, to answer.

PART III—STATEMENT OF ARGUMENT

1. The Rule of Law Requires Respect for Legislative Supremacy

8. In *Dunsmuir*, the Court stated that "[j]udicial review seeks to address ***an underlying tension between the rule of law and the foundational democratic principle***".[2] It has recently made similar pronouncements about the relationship between legislative supremacy ("the foundational democratic principle") and the rule of law. It has suggested that the two are opposing forces,[3] or merely framed them as distinct.[4] This dichotomy, however presented, has come to justify a strong presumption of deference to an administrative decision maker's interpretation of its "home" statute. As the majority put it in *Edmonton East*, the "presumption of deference on judicial review respects ***the principle of legislative supremacy*** and ***the choice made to delegate decision making to a tribunal***, rather than the courts".[5] The rule of law has been left to do little work, other than to justify the existence of judicial review itself.[6]

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[2] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶27, *emphasis added*.

[3] See, *e.g.*, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, ¶72, per Côté and Rowe JJ.; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶22; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶30, per Abella J.; see also P. Daly, "Struggling towards Coherence in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. at 527, 533-34, Book of Authorities of the Intervener ARL ("**ARL BOA**") Tab 3.

[4] See, *e.g.*, *Groia v. Law Society of Upper Canada*, 2018 SCC 27, ¶178, per Karakatsanis, Gascon and Rowe JJ.; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶124, per Brown J.; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, ¶140, per Rowe J.

[5] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶22; see also *Groia v. Law Society of Upper Canada*, 2018 SCC 27, ¶178, per Karakatsanis, Gascon and Rowe JJ.

[6] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶21; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶¶28-29, per Abella J.

9. These developments, however, do not reflect the true relationship between legislative supremacy and the rule of law. Unless the legislature has sought to ***insulate*** a decision maker from curial oversight — either altogether, as with a privative clause,[7] or with respect to a legal question on which the rule of law requires uniformity, as with one of the "correctness categories" identified in *Dunsmuir*[8] — the rule of law requires respect for the legislature's exclusive lawmaking authority in the exercise of judicial review.[9] To uphold the rule of law, courts must ensure that statutory delegates remain subordinate to the law and within their mandates, as the legislature has defined them.[10] Thus, as the Court recognized in *Dunsmuir*, "the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter".[11]

10. There is thus an inescapable nexus between legislative supremacy ("what did the legislature intend?") and the rule of law ("is the administrative decision at issue consistent with the legislature's intent?") in undertaking judicial review. This is equally so in determining whether and how much deference is due; both legislative supremacy and the rule of law require the court to inquire as to "whether the legislature intended the delegated decision-maker or the reviewing court to answer a particular question".[12] Yet, the jurisprudence has come instead to ***presume*** an inconsistency between legislative supremacy

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[7] See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at 236-37; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶74, per Rothstein J.

[8] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶¶58-61; see *Ready v. Saskatoon Regional Health Authority*, 2017 SKCA 20, ¶¶63, 108-19, 116; *Loewen v. Manitoba Teachers' Society*, 2015 MBCA 13, 380 D.L.R. (4th) 654, ¶¶46, 48, 69; see also P. Daly, "The Scope and Meaning of Reasonableness Review" (2014), 52 Alta. L. Rev. 799, at 809, ARL BOA, Tab 4.

[9] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶65, per Brown J., dissenting.

[10] See *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, ¶39; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, ¶21.

[11] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶¶29-30, *emphasis added*; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶15; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶¶31-33; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, ¶149; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, ¶26; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, ¶18, per Sopinka J.

[12] P. Daly, "Deference on Questions of Law" (2011), 74 Modern L. Rev. 694, at 706, ARL BOA, Tab 2; see also *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶98, per Cromwell J.

and the rule of law — that legislative supremacy pushes for deference, while the rule of law pulls the other way — when in fact this is so only rarely. In most cases, the rule of law demands that courts respect legislative supremacy by identifying and adhering to legislative intent, whether in favour of deference or against it.[13] Privileging a common law presumption over discoverable statutory meaning subverts the hierarchy of laws and denies the legislature its constitutional role in shaping the relationship between the executive and the judiciary.

11. In this way, assuming a dichotomy between legislative supremacy and the rule of law has led the standard of review analysis too often to neglect both. Courts have instead embraced a principle of ***administrative supremacy***, reflected most notably in the "presumption of reasonableness" that applies to a decision maker's interpretation of "its own statute or statutes closely connected to its function, with which it [has] particular familiarity".[14] The act of delegation has come to be seen as such a strong signal in favour of deference that it is now possible to argue, as the Attorney General of Canada does in these appeals, that only an explicit legislative instruction to the contrary can overcome it.[15] Absent such "unusual statutory language",[16] on this view, it is the decision maker and not the court that must have the "last word" on what the law requires.[17] Courts thus abandon any search for actual legislative intent, and elevate an interpretive presumption into an inflexible legal rule.

12. The mere act of exercising delegated authority, without more, cannot warrant deference on all questions of law. Such a presumption undermines legislative supremacy — and thus also the rule of law — in the name of upholding it.[18] Instead, courts must consider

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[13] See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶¶77-79, per Rothstein J.

[14] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶54; *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶34; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶¶32, 34.

[15] Appellant's Factum (*Vavilov*), ¶47; Respondent's Factum (*National Football League*), ¶27; Respondent's Factum (*Bell Canada*), ¶27; see also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶35.

[16] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶34.

[17] *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶94, per Cromwell J.

[18] See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶87, per Rothstein J; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶85, per

the actual expression of the legislature's intentions, both in creating and delineating the scope of a decision maker's authority, to determine the appropriate level of deference.

2. The Rule of Law Requires Reviewing Courts To Interpret Legislation

13. Since the rule of law requires respect for legislative supremacy, it also requires statutory interpretation to be the basis of the standard of review analysis. Reviewing courts should look to the legislation under which a decision has been made to determine whether, and to what extent, the legislature intended the decision maker to be the arbiter of the question in issue. Courts should return to the notion that administrative law is fundamentally statutory in practice.[19] As this Court confirmed in *Edmonton East,* deference is inappropriate "if … the legislature intended the standard of review to be correctness".[20]

14. In *Pushpanathan*, the Court framed the former "pragmatic and functional approach" as a means of statutory interpretation. As Justice Bastarache put it, "[t]he central inquiry in determining the standard of review…is the legislative intent of the statute creating the tribunal whose decision is being reviewed".[21] This echoed Justice Beetz's observation, in *Bibeault*, that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation".[22] Justices Bastarache and LeBel maintained this line in *Dunsmuir*; they affirmed that "legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent".[23]

Côte and Brown JJ.; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶92, per Rennie J.A.

[19] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, ¶24,; see also, M. Mancini, "Two Myths of Administrative Law" (October 4, 2018). Western J. Legal Stud., Forthcoming, *available on SSRN*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260672.

[20] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶32.

[21] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, ¶26; see also *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, ¶21.

[22] *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048, ¶120, quoting S. A. de Smith, *Constitutional and Administrative Law* (4th ed. 1981), at 558.

[23] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶30; see also *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, ¶33; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶93, per Rothstein J.

15. The Court has since attempted to simplify the standard of review analysis by limiting the role of statutory interpretation.[24] However, such efforts have been counterproductive. Rather than simplify matters, the Court has provided conflicting guidance; it has rejected lower courts' efforts to use the tools of statutory interpretation to discern and apply legislative intent, while continuing to pay lip service to legislative intent as a feature of the standard of review inquiry.[25] The result has been more tussling over the standard of review, not less.[26]

16. The way forward is for the Court to endorse the established tools of statutory interpretation. These should function as a universal means of determining whether the question at issue on judicial review is one on which the legislature intended curial deference[27] — and, if so, how much deference the legislature intended for courts to accord.[28] The principles of statutory interpretation may be applied as part of a three-step framework for establishing the standard of review, as follows.

17. ***First,*** courts should look to legislation governing the procedures and powers of courts in reviewing administrative action in the applicable jurisdiction. Federally, this will be the *Federal Courts Act*.[29] In Ontario and British Columbia, by contrast, it will be the *Judicial Review Procedure Act*,[30] and the *Administrative Tribunals Act*,[31] respectively. In these enactments, legislatures often expressly or impliedly direct courts to defer — or not.

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[24] See *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7; *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47.

[25] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶¶32, 35; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, ¶46.

[26] See D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 27, at 32-35, ARL BOA, Tab 1.

[27] See *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶99, per Cromwell J.

[28] See *Wilson v. Atomic Energy of Canada* Ltd. 2016 SCC 29, ¶35, per Abella J.; see also M. Mancini, "Statutory Interpretation from the Stratasphere" (2018) Adv. Q., Forthcoming, online: http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/.

[29] *Federal Courts Act*, R.S.C. 1985, c. F-7.

[30] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[31] *Administrative Tribunals Act*, S.B.C. 2004, c. 45; see also *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

18. Several provisions of Ontario's *Judicial Review Procedure Act*, for example, suggest that the legislature intended deference to depend on the question at issue on judicial review. Subsection 2(2) of the Act refers to "the power of the court to set aside a decision for error of law on the face of the record",[32] which suggests that less (or no) deference ought to be accorded to a decision maker's erroneous determination of a question of law. Conversely, s. 2(3) of the Act indicates that heightened deference is appropriate when a court is asked to review "findings of fact of a tribunal made in the exercise of a statutory power of decision".[33]

19. The *Federal Courts Act*, meanwhile, contains even stronger statutory signals as to the standard of review. Where findings of fact are impugned, a reviewing court may grant relief only when the decision was based on an erroneous finding of fact that was made "in a perverse or capricious manner".[34] Section 18.1(4)(c), by contrast, provides for relief where a federal board, commission or tribunal "erred in law…whether or not the error appears on the face of the record".[35] To accord equivalent deference to findings of fact and conclusions of law would fly in the face of this statutory language.

20. ***Second,*** the reviewing court should look to the decision maker's enabling (or "home") statute. Here, the legislature may signal the appropriate level of deference. Statutory appeal rights suggest less deference, while privative clauses and broad grants of discretion, such as mandates to regulate in the "public interest", argue for more deference.[36] Neither deference nor expertise need be "presumed" merely because authority has been delegated.

21. ***Third,*** courts should examine the specific provision pursuant to which the impugned decision was made,[37] reading it in harmony with the legislation as a whole.[38] If the provision

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[32] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(2).

[33] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(3).

[34] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d); see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶72, per Rothstein J.

[35] *Federal Courts Act*, R.S.C., 1985, c. F-7, s.18.1(4)(c).

[36] See, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, ¶¶22, 24; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, ¶50 ; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶74, per Rothstein J; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, ¶¶91-92; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶¶66, 95, per Rennie J.A.

[37] See *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶99, per Cromwell J.; *Wilson v. Atomic Energy of Canada* Ltd. 2016 SCC 29, ¶35,

includes open-textured language that is neither narrowed by nor clarified in the context of the statutory framework (by a statutory right of appeal, for example) then deference will be warranted.[39] If the provision uses narrow statutory language that provides fewer options to the decision maker, by contrast, then deference may not be appropriate.[40] The legislature may have intended more or less administrative latitude in particular circumstances, and so the appropriate degree of deference may vary depending on the provision in issue.

22. This proposed three-step framework — moving from broad, jurisdictional legislation to the specific provisions governing the decision at issue — aims to focus reviewing courts' efforts on the established tools of statutory interpretation, as they determine whether legislative supremacy and the rule of law demand deference. True, this approach may be less simple than applying an ever-stronger presumption of deference. But history has shown that conceptual simplicity invites practical complexity, doctrinal obscurity, and, ultimately, a lack of certainty and predictability. This is the *status quo*.[41] These appeals are an opportunity to improve on it. To do so, the Court should strive for a ***clearer*** methodology, not a simpler one. The foregoing proposed framework reflects that objective.

23. The principles underlying the proposed three-step framework find support in the jurisprudence. As Rothstein J. explained nearly a decade ago, in *Khosa*:

> Courts must give effect to the legislature's words and cannot superimpose on them a duplicative common law analysis. Where the legislature has expressly

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per Abella J.; see also M. Mancini, "Statutory Interpretation from the Stratasphere" (2018) Adv. Q., Forthcoming, online: http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/.

[38] See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, ¶12; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶¶26-27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ¶21.

[39] See *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, ¶¶126–27; *Canada v. Williams*, [1944] S.C.R. 226, at 239, per Hudson J.

[40] See, e.g., *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶124, per Brown J.; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, ¶36; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, ¶¶90-99; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, ¶¶42-44; *Walchuk v. Canada (Justice)*, 2015 FCA 85, ¶¶33-34, 56; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, ¶53.

[41] See *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶66, per Rennie J.A., and ¶187, per Nadon J.A..

> or impliedly provided for standards of review, courts must follow that legislative intent, subject to any constitutional challenge.[42]

24. Rothstein J. parted company with the majority in *Khosa* over how the common law of judicial review properly interacts with the specific legislative provisions in respect of which judicial oversight occurs.[43] Yet, even the majority (speaking through Binnie J.) acknowledged that "the legislature can by clear and explicit language oust the common law in this as in other matters".[44] Binnie J. referred in this connection to British Columbia's *Administrative Tribunals Act* and other such "judicial review legislation which not only provide[s] guidance to the courts but ha[s] the added benefit of making the law more understandable and accessible to interested members of the public".[45] This describes the focus of the first step of ARL's proposed framework — the broad, jurisdictional statutes that govern curial review.

25. The Federal Court of Appeal recently engaged with the second step of the proposed framework in *Bell Canada v. 7265921 Canada Ltd.* There, Rennie J.A. (dissenting but not on this point) maintained that "the focus of the standard of review analysis should be on discerning legislative intent according to received principles of interpretation" and so a reviewing court must "consider the statute" under which an impugned decision was made in answering the ultimate question of whether "the decision was…authorized by the legislation".[46] Nadon J.A. would have gone further, affording deference on legal questions "only whenever Parliament expressly or impliedly wishes us to" do so.[47] On either view, however, a reviewing court cannot calibrate deference without interpreting the particular statute at issue.[48] Indeed, *Dunsmuir* itself confirms as much.[49]

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[42] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶70, per Rothstein J.

[43] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶¶50-51, per Binnie J., and ¶106, per Rothstein J.; see also *R. v. Owen*, 2003 SCC 33, ¶¶31-32.

[44] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶50, per Binnie J.; see also *Spidel v. Canada (Attorney General)*, 2012 FCA 275, ¶¶8-9.

[45] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶50, per Binnie J.

[46] *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶66, per Rennie J.A.; see also *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, ¶58, per Stratas J.A.

[47] *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶192, per Nadon J.A.

[48] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶¶85-87, per Côté and Brown JJ.; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶15.

26. Finally, this Court has recognized the need to consider the specific provision pursuant to which the administrative decision under review was made in assessing whether deference is appropriate.[50] This, too, reflects the careful attention to which the statutory scheme is entitled in assessing the appropriateness — and appropriate extent — of deference. In Rennie J.A.'s words, "any consideration of the standard of review begins with an inquiry into the role Parliament intended the supervisory court to play in relation to any particular decision".[51]

27. Efforts since *Dunsmuir* to avoid "law office metaphysics"[52] have faltered not despite the Court's good intentions, but because of them. Rather than simplify matters, jurisprudential innovations like the "presumption of reasonableness" have made it more difficult to square practice with first principles. The result has been unpredictability and consternation. By using statutory interpretation to discern legislative intent, and legislative intent to determine deference, the Court now has an opportunity to offer workable guidance that recognizes legislative supremacy and upholds the rule of law. It should do so.

PART IV—SUBMISSIONS CONCERNING COSTS

28. ARL requests that no costs be awarded either for or against it.

PART V—ORDER SOUGHT

29. ARL seeks leave to present five minutes of oral argument.

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

Adam Goldenberg / Robyn Gifford / Asher Honickman

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[49] See *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶¶66-67, 69.

[50] See, e.g., *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶¶6, 10-11, 13; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, ¶¶42, 58; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, ¶¶29-30, 42-43, 48-49; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, ¶¶26-27.

[51] *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶69, per Rennie J.A.

[52] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶122, per Binnie J.

PART VI—TABLE OF AUTHORITIES

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PART VIII—LEGISLATION RELIED UPON

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