

**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**

Intervener

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**

Intervener

AND BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

-and-

ALEXANDER VAVILOV

Respondent

**FACTUM OF THE JOINT INTERVENER, THE ONTARIO SECURITIES
COMMISSION, THE BRITISH COLUMBIA SECURITIES COMMISSION AND THE
ALBERTA SECURITIES COMMISSION**

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

**Co-Counsel for the Joint Interveners,
Ontario Securities Commission, British
Columbia Securities Commission and
Alberta Securities Commission**

**Ottawa Agent for Co-Counsel for the Joint
Interveners, Ontario Securities Commission,
British Columbia Securities Commission
and Alberta Securities Commission**

ONTARIO SECURITIES COMMISSION
20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

CONWAY BAXTER WILSON LLP
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Matthew H. Britton
Tel.: (416) 593-8294
Fax: (416) 593-8321
Email: mbritton@osc.gov.on.ca

Benjamin Grant
Tel.: (613) 780-2008
Email: bgrant@conway.pro

Jennifer M. Lynch
Tel.: (416) 593-8152
Email: jlynch@osc.gov.on.ca

Paloma Ellard
Tel.: (416) 595-8906
Email: pellard@osc.gov.on.ca

**BRITISH COLUMBIA SECURITIES
COMMISSION**
701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, BC V7Y 1L2

David Hainey
Tel.: (604) 899-6505
Email: DHainey@besc.bc.ca

ALBERTA SECURITIES COMMISSION
Suite 600, 250-5th Street, SW
Calgary, AB T2P 0R4

Don Young
Tel.: (403) 297-2642
Email: don.young@asc.ca

ATTORNEY GENERAL OF CANADA

130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6

John Provart

Marianne Zoric

Tel: (416) 973-1346

Fax: (416) 954-8982

Email: john.provart@justice.gc.ca

**Counsel for the Appellant, Minister of
Citizenship and Immigration (SCC 37748)**

MCCARTHY TÉTRAULT LLP

66 Wellington Street West
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Steve G. Mason

Brandon Kain

Steven Tanner

James S.S. Holtom

Richard Lizius

Tel. (416) 601-8200

Fax (416) 868-0673

Email: smason@mccarthy.ca

**Counsel for Appellant, Bell Canada and
Bell Media Inc. (SCC 37896)**

MCCARTHY TÉTRAULT LLP

66 Wellington Street West
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Steven G. Mason

Brandon Kain

Richard Lizius

Tel: (416) 601-8200

Fax: (416) 868-0673

Email: smason@mccarthy.ca

**Counsel for the Appellant, National
Football League, NFL International LLC
and NFL Productions LLC (SCC 37897)**

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
50 O'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2

Christopher M. Rupar

Tel.: (613) 941-2351

Fax: (613) 954-1920

Email: Christopher.rupar@justice.gc.ca

**Agent for Counsel for the Appellant,
Minister of Citizenship and Immigration
(SCC 37748)**

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: (613) 786-0171

Fax: (613) 788-3587

Email: jeff.beedell@gowlingwlg.com

**Agent for Counsel for the Appellant, Bell
Canada and Bell Media Inc. (SCC 37896)**

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: (613) 786-0171

Fax: (613) 788-3587

Email: jeff.beedell@gowlingwlg.com

**Agent for Counsel for the Appellant,
National Football League, NFL
International LLC and NFL Productions
LLC (SCC 37897)**

ATTORNEY GENERAL OF CANADA

Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Michael H. Morris

Roger Flaim

Laura Tausky

Tel: (647) 256-7539

FAX: (416) 952-4518

Email: michael.morris@justice.gc.ca

**Counsel for the Respondent, Attorney
General of Canada (SCC 37896, 37897)**

JACKMAN NAZAMI & ASSOCIATES

596 St. Clair Avenue West, Unit 3
Toronto, ON M6C 1A6

Hadayt Nazami

Bijon Roy

Tel: (416) 653-9964

Fax: (416) 653-1036

Email: hadayt@rogers.com

**Counsel for the Respondent, Alexander
Vavilov**

**CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS
COMMISSION**

Les Terrasse de la Chaudière, Central
Building 1 Promenade du Portage
Gatineau, QC J8X 4B1

Crystal Hulley-Craig

Tel: (819) 956-2095

Fax: (819) 953-0589

Email: crystal.hulley@crtc.gc.ca

**Counsel for the Intervener, Canadian
Radio- Television and
Telecommunications Commission
(SCC 37896, 37897)**

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
50 O'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2

Christopher M. Rugar

Tel.: (613) 941-2351

Fax: (613) 954-1920

Email: Christopher.rugar@justice.gc.ca

**Agent for Counsel for the Respondent,
Attorney General of Canada (SCC 37896,
37897)**

CHAMP AND ASSOCIATES

43 Florence Street
Ottawa, ON K2P 0W6

Tel: (613) 237-4740

Fax: (613) 232-2680

Email: pchamp@champlaw.ca

**Agent for, Counsel for the Respondent,
Alexander Vavilov**

MCGILL UNIVERSITY
3644 Peel Room 20
Old Chancellor Day Hall, Faculty of Law
Montreal, QC H3A 1W9

Daniel Jutras
Tel: (514) 398-1453
Fax: (514) 398-4659
Email: daniel.jutras@mcgill.ca

Amicus Curiae (SCC 37748, 37896, 37897)

IMK LLP
Alexis Nihon Plaza, Tower 2
3500 De Maisonneuve Blvd. West
Montreal, QC H3Z 3C1

Audrey Boctor
Tel: (514) 934-7737
Fax: (514) 935-2999
Email: aboctor@imk.ca

Amicus Curiae (SCC 37748, 37896, 37897)

ATTORNEY GENERAL OF ONTARIO
8TH Floor – 720 Bay Street
Toronto, ON M5G 2K1

Sara Blake
Judie Im
Tel: (416) 326-4155
Fax: (416) 326-4181

Email: sara.blake@jus.gov.on.ca

**Counsel for the Intervener, Attorney
General of Ontario**

NELLIGAN O'BRIEN PAYNE LLP
300 - 50 O'Connor Street
Ottawa, ON K1P 6L2

Christopher Rootham
Michael Ryan
Tel: (613) 231-8311
Fax: (613) 788-3667
Email: christopher.rootham@nelligan.ca

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Agent for the Amicus Curiae, Daniel Jutras,
and Audrey Boctor SCC 37748, 37896,
37897)**

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel. (613) 695-8855
Fax (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

**Counsel for the Intervener, Telus
Communications Inc.**

THE LAW OFFICE OF JAMIE LIEW

39 Fern Avenue
Ottawa, ON K1Y 3S2

Tel: (613) 808-5592
Fax: (888) 843-3413
Email: jamie.liew@uottawa.ca

**Counsel for the Intervener, Canadian
Council for Refugees**

**WORKPLACE SAFETY AND
INSURANCE APPEALS TRIBUNAL**

7th Floor – 505 University Avenue
Toronto, ON M5G 2P2

**Michelle Alton
David Corbett
Kayla Seyler
Ana Rodriguez**

Tel: (416) 314-8800
Fax: (416) 326-5164
Email: Michelle.Alton@wst.gov.on.ca

**Counsel for the Interveners, Workplace
Safety and Insurance Appeals Tribunal
(Ontario), Counsel for the Interveners,
Workers' Compensation Appeals
Tribunal (Northwest Territories and
Nunavut), Workers' Compensation
Appeals Tribunal (Nova Scotia), Appeals
Commission for Alberta Workers'
Compensation and Workers'
Compensation Appeals Tribunal (New
Brunswick)**

**ADVOCACY CENTRE FOR TENANTS
ONTARIO**

1500 - 55 University Avenue
Toronto, ON M5J 2H7

Karen Andrews

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Interveners,
Workplace Safety and Insurance Appeals
Tribunal (Ontario), Counsel for the
Interveners, Workers' Compensation
Appeals Tribunal (Northwest Territories
and Nunavut), Workers' Compensation
Appeals Tribunal (Nova Scotia), Appeals
Commission for Alberta Workers'
Compensation and Workers' Compensation
Appeals Tribunal (New Brunswick)**

SUPREME ADVOCACY LLP

340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580

Tel: (416) 597-5855
Fax: (416) 597-5821
Email: andrews@lao.on.ca

**Counsel for the Intervener, Advocacy
Centre for Tenants (Ontario)**

ECOJUSTICE CANADA SOCIETY
1910 - 777 Bay Street, PO BOX 106
Toronto, ON M5G 2C8

Laura Bowman
Bronwyn Roe
Tel: (416) 368-7533
Fax: (416) 363-2746
Email: lbowman@ecojustice.ca

**Counsel for the Intervener, Ecojustice
Canada Society**

SHORES JARDINE LLP
10104 - 103 Avenue
Suite 2250
Edmonton, AB T5J 0H8

William W. Shores, Q.C.
Kirk N. Lambrecht, Q.C.
Tel: (780) 448-9275
Fax: (780) 423-0163
Email: bill@shoresjardine.com

**Counsel for the Intervener, National
Association of Pharmacy Regulatory
Authorities**

**ATTORNEY GENERAL FOR
SASKATCHEWAN**
900 - 1874 Scarth Street
Regina, SK S4P 4B3

Laura Mazenc
Tel: (306) 787-6272
Fax: (306) 787-0581
Email: laura.mazenc@gov.sk.ca

**Counsel for the Intervener, AG of
Saskatchewan**

Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Advocacy Centre for Tenants (Ontario)**

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel.: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

**Agent for Counsel for the Intervener,
Ecojustice Canada Society**

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
National Association of Pharmacy
Regulatory Authorities**

GOWLING WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

**Agent for Counsel for the AG of
Saskatchewan**

**FASKEN MARTINEAU DUMOULIN
LLP**

2900 - 550 Burrard Street
Vancouver, BC V6C 0A3

Gavin R. Cameron

Tom Posyniak

Tel.: (604) 631-4756

Fax: (604) 631-3232

Email: gcameron@fasken.com

**Counsel for the Intervener, BC
International Commercial Arbitration
Centre Foundation**

**LAX O'SULLIVAN LISUS GOTTLIEB
LLP**

2750 - 145 King Street West
Toronto, ON M5H 1J8

Terrence J. O'Sullivan

Paul Mitchell

James Renihan

Tel: (416) 644-5359

Fax: (416) 598-3730

Email: tosullivan@counsel-toronto.com

**Counsel for the Intervener, Council of
Canadian Administrative Tribunals**

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

155 Wellington Street, 35th floor
Toronto, ON M5V 3H1

Linda R. Rothstein

Michael Fenrick

Angela E. Rae

Anne Marie Heenan

Tel: (416) 646-4300

Fax: (416) 646-4301

Email: linda.rothstein@paliareroland.com

**Counsel for the Interveners, Ontario
Labour- Management Arbitrators'
Association and Conférence des arbitres
du Québec**

FASKEN MARTINEAU DUMOULIN LLP

55 Metcalfe Street, Suite 1300
Ottawa ON, K1P 6L5

Sophie Arseneault

Tel.: (613) 696-6904

Fax: (613) 230-6423

Email: sarseneault@fasken.com

**Agent for Counsel for the Intervener, BC
International Commercial Arbitration
Centre Foundation**

SUPREME ADVOCACY LLP

340 Gilmour Street
Ottawa, ON K2P 0R3

**Eugene Meehan, Q.C Marie-
France Major**

Tel.: (613) 695-8855

Fax: (613) 695-8580

Email:

emeehan@supremeadvocacy.ca

mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Council of Canadian Administrative
Tribunals**

CAZASAIKALEY LLP

220 avenue Laurier Ouest
Ottawa, ON K1P 5Z9

Alyssa Tomkins

Tel: (613) 565-2292

Fax: (613) 565-2087

Email: atomkins@plaideurs.ca

**Agent for Counsel for the Interveners,
Ontario Labour- Management Arbitrators'
Association and Conférence des arbitres du
Québec**

SUSAN L. STEWART

7 L'Estrange Place
Toronto, ON M6S 4S6

Tel: (416) 531-3736
Fax: (416) 604-2897
Email: ssewart@idirect.ca

**Counsel for the Intervener, National
Academy of Arbitrators**

GOLDBLATT PARTNERS LLP

20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Steven Barrett

Tel: (416) 979-6422
Fax: (416) 591-7333
Email: sbarrett@goldblattpartners.com

**Counsel for the Intervener, Canadian
Labour Congress**

**PROCUREURE GÉNÉRALE DU
QUÉBEC**

1200, Route de l'Église
3e étage
Québec, QC G1V 4M1

Stéphane Rochette

Tel: (418) 643-6552
Fax: (418) 643-9749
Email: stephane.rochette@justice.gouv.qc.ca

**Counsel for the Intervener, AG
Quebec**

STOCKWOODS LLP

77 King Street West, Suite 4130
P.O. Box 140
Toronto, ON M5K 1H1

Brendan Van Niejenhuis

Andrea Gonslaves
Tel: (416) 593-7200
Fax: (416) 593-9345

CAZASAIKALEY LLP

220 avenue Laurier Ouest
Ottawa, ON K1P 5Z9

Alyssa Tomkins

Tel: (613) 565-2292
Fax: (613) 565-2087
Email: atomkins@plaideurs.ca

**Agent for Counsel for the Intervener,
National Academy of Arbitrators**

GOLDBLATT PARTNERS LLP

500-30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman

Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

**Agent for counsel for the Intervener,
Canadian Labour Congress**

NOËL & ASSOCIÉS

111 rue Champlain
Gatineau, QC J8X 3R1

Sylvie Labbé

Tel: (819) 771-7393
Fax: (819) 771-5397
Email: s.labbe@noelassocies.com

**Agent for Counsel for the Intervener, AG
Quebec**

POWER LAW

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel : (613) 702-5561
Fax : (613) 702-5561
Email : mvincelette@powerlaw.ca

Email: brendanvn@stockwoods.ca
**Counsel for the Intervener, Queen's
Prison Law Clinic**

**ATTORNEY GENERAL OF BRITISH
COLUMBIA**
PO Box 9280 Stn Prov Govt
Victoria, BC V8W 9J7

**Leah Greathead
Micah Rankin**
Tel: (250) 356-8892
Fax: (250) 356-9154
Email: leah.greathead@gov.bc.ca

**Counsel for the Intervener, AG British
Columbia**

MCCARTHY TÉTRAULT LLP
745 Thurlow Street, Suite 2400
Vancouver, BC V6E 0C5

**Adam Goldenberg
Robyn Gifford
Asher Honickman**
Tel: (604) 643-7100
Fax: (604) 643-7900
Email: agoldenberg@mccarthy.ca

**Counsel for the Intervener, Advocates for
the Rule of Law**

**PARKDALE COMMUNITY LEGAL
SERVICES**
1266 Queen Street West
Toronto, ON M6K 1L3

**Toni Schweitzer
Ronald Poulton**
Tel: (416) 531-2411
Fax: (416) 531-0885
Email: schweit@lao.on.ca

**Counsel for the Intervener, Parkdale
Community Legal Services**

**Agent for Counsel for the Intervener,
Queen's Prison Law Clinic**

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

**Agent for Counsel for the Intervener, AG
British Columbia**

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé
Tel: (613) 702-5566
Fax: (613) 702-5566
Email: DBosse@juristespower.ca

**Agent for Counsel for the Intervener,
Advocates for the Rule of Law**

**COMMUNITY LEGAL SERVICES OF
OTTAWA-SOUTH OFFICE**
406 - 1355 Bank Street
Ottawa, ON K1H 8K7

Elaine Simon
Tel: (613) 733-0140
Fax: (613) 733-0401
Email: simone@lao.on.ca

**Agent for Counsel for the Intervener,
Parkdale Community Legal Services**

**CAMBRIDGE COMPARATIVE
ADMINISTRATIVE LAW FORUM**
Cambridge University - The Faculty of Law
The David Williams Building
10 West Road Cambridge, United Kingdom
CB3 9DZ

Bruno Gélinas-Faucher

Tel: (737) 838-3023 Ext: 44
Fax: (514) 565-9877
Email: bruno.gelinas.faucher@gmail.com

**Counsel for the Intervener, Cambridge
Comparative Administrative Law Forum**

**LENCZNER SLAGHT ROYCE SMITH
GRIFFIN LLP**

Suite 2600, 130 Adelaide Street West
Toronto, ON M5H 3P5

J. Thomas Curry

Sam Johansen

Tel: (416) 865-3096
Fax: (416) 865-9010
Email: tcurry@litigate.com

**Counsel for the Interveners, Association
of Canadian Advertisers and the Alliance
of Canadian Cinema, Television and
Radio Artists**

CAZASAIKALEY LLP

220 avenue Laurier Ouest
Ottawa, ON K1P 5Z9

Alyssa Tomkins

James Plotkin

Michel Bastarache

Tel: (613) 565-2292
Fax: (613) 565-2087
Email: atomkins@plaideurs.ca

**Counsel for the Interveners, Samuelson-
Glushko Canadian Internet Policy and
Public Interest Clinic**

POWER LAW

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: (613) 702-5561
Fax: (613) 702-5561
Email: mvincelette@powerlaw.ca

**Agent for Counsel for the Intervener,
Cambridge Comparative Administrative
Law Forum**

POWER LAW

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: (613) 702-5561
Fax: (613) 702-5561
Email: mvincelette@powerlaw.ca

**Agent for Counsel for the Interveners,
Association of Canadian Advertisers and the
Alliance of Canadian Cinema, Television
and Radio Artists**

UNIVERSITÉ D'OTTAWA

Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

David Fewer

Tel: (613) 562-5800 Ext: 2558
Fax: (613) 562-5417
Email: david.fewer@uottawa.ca

**Agent for Counsel for the Interveners,
Samuelson-Glushko Canadian Internet
Policy and Public Interest Clinic**

**FASKEN MARTINEAU DUMOULIN
LLP**

Bureau 3700, C.P. 242
800, Place Victoria
Montréal, QC H4Z 1E9

Christian Leblanc

Michael Shortt

Tel: (514) 397-7545

Fax: (514) 397-7600

Email: cleblanc@fasken.com

Counsel for the Interveners, Blue Ant Media Inc., Canadian Broadcasting Corporation, DHX Media Lts., Groupe V Media Inc., Independent Broadcast Group, Aboriginal Peoples Television Network, Allarco Entertainment Inc., BBC Kids, Chanel Zero, Ethnic Channels Group Ltd., Hollywood Suite, OUTtv Network Inc., Stingray Digital Group Inc., TV5 Québec Canada, Zoomermedia Ltd. and Pelmorex Weather Networks (Television) Inc.

STEWART MCKELVEY

65 Grafton Street
P.O. Box 2140, Station Central
Charlottetown, P.E.I. C1A 8B9

Jonathan M. Coady

Justin L. Milne

Tel: (902) 629-4520

Fax: (902) 566-5283

Email: jcoady@stewartmckelvey.com

Counsel for the Intervener, Canadian Bar Association

LEGAL AID ONTARIO

Refugee Law Office
20 Dundas Street West
Toronto, ON M5G 2H1

Anthony Navaneelan

Audrey Macklin

Tel: (416) 977-8111 Ext: 7181

FASKEN MARTINEAU DUMOULIN LLP

1300 – 55 rue Metcalfe
Ottawa, ON K1P 6L5

Sophie Arseneault

Tel: (613) 236-3882

Fax: (613) 230-6423

Email: sarseneault@fasken.com

Agent for Counsel for the Interveners, Blue Ant Media Inc., Canadian Broadcasting Corporation, DHX Media Lts., Groupe V Media Inc., Independent Broadcast Group, Aboriginal Peoples Television Network, Allarco Entertainment Inc., BBC Kids, Chanel Zero, Ethnic Channels Group Ltd., Hollywood Suite, OUTtv Network Inc., Stingray Digital Group Inc., TV5 Québec Canada, Zoomermedia Ltd. and Pelmorex Weather Networks (Television) Inc.

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald

Tel. (613) 786-0197

Fax: (613) 563-9869

Email: guy.regimbald@gowlingwlg.com

**Agent for Counsel for the Intervener,
Canadian Bar Association**

COMMUNITY LEGAL SERVICES

OTTAWA

1301 Richmond Road
Ottawa, ON K2B 7Y4

Nicholas Hersh

Fax: (416) 977-5567
Email: navanea@lao.on.ca

**Counsel for the Intervener, Canadian
Association of Refugee Lawyers**

**COMMUNITY & LEGAL AID
SERVICES PROGRAMME**
York University, Osgoode Hall Law School
Ignat Kaneff Build
4700 Keele Street
Toronto, ON M3J 1P3

Subodh Bharati
Tel: (416) 736-5029
Fax: (416) 736-5564
Email: sbharati@osgoode.yorku.ca

**Counsel for the Intervener, Community
and Legal Aid Service Programme**

HADEKEL SHAMS S.E.N.C.R.L.
305, rue Bellechasse est, bureau 400A
Montréal, QC H2S 1W9

**Peter Shams
Claudia Andrea Molina
Guillaume Cliche-Rivard
David Berger**
Tel: (514) 439-0800
Fax: (514) 439-0798
Email: peter@hadekelshams.ca

**Counsel for the Interveners, Association
Québécoise des avocats et avocates en
droit de l'immigration**

CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

**David P. Taylor
Sarah Clarke**
Tel: (613) 691-0368
Fax: (613) 688-0271
Email: dtaylor@conway.pro

Tel: (613) 596-1641
Fax: (613) 596-3364
Email: hershni@lao.on.ca

**Agent for Counsel for the Intervener,
Canadian Association of Refugee Lawyers**

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855 ext 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Community and Legal Aid Service
Programme**

STIKEMAN ELLIOTT LLP
1600 - 50 O'Connor Street
Ottawa, ON K1P 6L2

Nicholas Peter McHaffie
Tel: (613) 566-0546
Fax: (613) 230-8877
Email: nmchaffie@stikeman.com

Counsel for the Intervener, First Nations Child and Family Caring Society of Canada

Agent for counsel for the Intervener, First Nations Child and Family Caring Society of Canada

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Orderly regulation of capital markets is complex. It requires expertise and the exercise of discretion. Provincial legislatures have assigned decision-making authority in this area to specialized administrative bodies that are staffed with industry-specific and experienced individuals. They are vested with broad powers in the public interest.
2. Consistent with *Dunsmuir*, and its attempt to clarify the approach to standard of review, Canadian courts have shown considerable deference to decisions made by these expert bodies on appeal or by way of judicial review. This standard has served Canada and its capital markets well for many years, and the joint interveners – the Ontario Securities Commission (“OSC”), the British Columbia Securities Commission (“BCSC”), and the Alberta Securities Commission (“ASC”) (collectively, “Commissions”) - submit it should continue.
3. The respective provincial legislatures (“Legislatures”), which are constitutionally competent to create administrative bodies such as the Commissions, entrusted the OSC, BCSC, and ASC with broad powers to regulate the capital markets.
4. Each of the Commissions engages in integrated activity designed to develop, express, and regulate market-related policies and decisions. The Commissions can make or recommend legally-binding rules and policy, make decisions on receipting of prospectuses, register market participants, recognize or designate market infrastructure entities (such as stock exchanges), adjudicate breaches of securities law, and make orders in the public interest. This integrated approach to regulation provides the predictability and consistency that is critical to the effective oversight of complex capital markets.
5. By statute and design, a range of options are available to the Commissions to give effect to their broad policy mandates. From an enforcement perspective, the Commissions may proceed against individuals and companies in different ways. They may initiate or recommend quasi-criminal prosecutions in the courts, where imprisonment and fines are available. They may proceed against them in the civil courts to obtain remedial and other

orders. The Commissions also have the option of proceeding against an individual or company in administrative proceedings before the Commissions' tribunals, where an interest in the public order is available. This concurrent jurisdiction provides the Commissions with the flexibility to determine the most effective remedy to achieve the purposes of securities laws: protection of investors and the fostering of fair and efficient capital markets and confidence in those markets.

6. The standard of review issue in these appeals juxtaposes, on the one hand, respect for the democratic principles underlying the Legislatures' creation of expert tribunals (such as the Commissions) that are flexible and have public interest powers; and on the other hand, the rule of law and supervisory function of the courts. The conflict has been successfully managed for many years through the application of deference by appellate and reviewing courts to Commissions' decisions. Deference has been, and must continue to be, a singular, unified concept, and not a sliding scale based on a spectrum of reasonableness. Otherwise, all that *Dunsmuir* sought to resolve with the establishment of two standards will devolve into many standards with gradations of application.
7. Concurrent jurisdiction - the fact that conduct may properly be the subject of proceedings either administratively or before the courts - should not be a determining factor in the application of the appropriate standard of review.
8. The application of the reasonableness standard of review to decisions of the Commissions' tribunals has fostered a stable and sound foundation for the proper oversight of a critical part of the Canadian economy and should continue to be applied.

B. Relevant Facts

(i) The Role of the Commissions

9. The Commissions are independent provincial government agencies responsible for regulation of the capital markets and the administration and enforcement of securities laws ("Acts")¹ in their respective province. Their public interest objectives include providing

¹ *Securities Act*, RSO 1990, c S 5 [OSA]; *Commodity Futures Act*, RSO 1990, c 20 [CFA]; *Securities Act*, RSA 2000, c S-4 [ASA]; *Securities Act*, RSBC 1996, c 418 [BCSA].

protection to investors from unfair, improper or fraudulent practices, and fostering fair and efficient capital markets and confidence in those markets.²

10. Each of the Commissions have members that serve as a board of directors with oversight responsibilities over their organization. They also perform a regulatory function, which includes making or recommending rules and policies, and adjudicating administrative proceedings as an expert tribunal.³
11. Members are appointed to the Commissions based on their extensive skills, knowledge, experience, and background in the capital markets and securities law. They have diverse backgrounds in areas directly relevant to the functioning of the capital markets: business, accounting, corporate governance, derivatives, finance, economics, commerce, and law. This blend of legal, accounting, business, corporate and industry experience demonstrates the significant expertise that the members bring to their role of overseeing and regulating the capital markets.
12. The Commissions' functions include:
 - (a) regulating firms and individuals that are in the business of advising or trading in securities or commodity futures, and firms that manage investment funds;
 - (b) regulating reporting issuers and overseeing securities offerings in the public and exempt markets, including reviewing and receipting prospectuses filed by corporations, trusts, limited partnerships, and investment funds;
 - (c) overseeing transactions and proxy voting matters involving public companies and developing rules and policy in mergers and acquisitions and shareholder rights;

² *OSA*, *supra* note 1, s 1.1; *CFA*, *supra* note 1, s 1.1. Note the *OSA* and *CFA* set out a third mandate of “contributing to the stability of the financial system and the reduction of systemic risk”; See *Re Workum and Henning*, 2008 ABASC 719 at para 42, *aff’d Alberta (Securities Commission) v Workum*, 2010 ABCA 405; *Re Pierce*, 2016 BSSECCOM 188 at para 26; *Brosseau v Alberta Securities Commission*, [1989] 1 SCR 301 at 313–314; *Del Bianco v Alberta Securities Commission*, 2004 ABCA 344 at para 5..

³ *OSA*, *supra* note 1, ss 3.1–3.2, 143, 143.8; *ASA*, *supra* note 1, ss 11-12, 223-224; *BCSA*, *supra* note 1, ss 4, 183-184.

- (d) developing a regulatory framework for over-the-counter derivatives trading and compliance oversight of derivatives market participants;
- (e) regulating market infrastructure entities (exchanges, alternative trading systems, self-regulatory organizations, and clearing agencies), and developing policy relating to market structure; and
- (f) investigating, litigating, and adjudicating breaches of securities law and making orders in the public interest.

(ii) Integrated Regulation: Rule, Policy and Adjudicative Functions of the Commissions

13. Unlike some other administrative bodies, the Commissions have been granted a policy-making function and quasi-legislative authority to recommend or make binding rules under their constituting legislation.⁴ By delegating this authority to the Commissions, the Legislatures empowered the Commissions to use their experience and expertise to create the detailed rules necessary to regulate the capital markets. Rules made under securities laws are binding, and a person or company that contravenes a rule may be subject to enforcement action. The Commissions may also adopt policies of a non-binding nature which set out interpretations of their rules or Acts.⁵
14. In addition to the rule and policy-making functions, each of the Commissions has a long-established, integrated, and specialized administrative tribunal that carries out the regulatory function of adjudicating cases and making orders in the public interest.⁶ Public interest jurisdiction is a cornerstone of the effective regulation of the capital markets.
15. Staff of the Commissions may institute administrative proceedings for conduct contrary to the public interest and for breaches of securities laws that include: fraud, misrepresentation,

⁴ *OSA*, *supra* note 1, ss 143 and 143.8; *ASA*, *supra* note 1, s 224; *BCSA*, *supra* note 1, ss 183-184. Note that the *ASA* does not contain a provision specific to policy-making.

⁵ *OSA*, *supra* note 1, s 143.8; *BCSA*, *supra* note 1, s 188.

⁶ *OSA*, *supra* note 1, s 127; *ASA*, *supra* note 1, s 198; *BCSA*, *supra* note 1, s 161.

market manipulation, false or misleading disclosure, and illegal insider trading.⁷ Where liability is established, Commissions' panels have the power to make protective orders in the public interest that impose sanctions on the person found to have violated securities law (e.g., director and officer bans, cease trade orders, disgorgement and administrative penalties).⁸

16. Commissions' panels also conduct hearings on other regulatory matters, including compliance with the regime governing the conduct of take-over bids and issuer bids, reviews of decisions made by staff of the Commissions, as well as reviews of decisions of self-regulatory organizations, exchanges and clearing agencies.⁹
17. As is evident from these varied functions, the Commissions are authorized to make a wide array of decisions under securities law. This is reflected in the definition of "decision" found in each of the Acts: "decision means, in respect of a decision of the Commission or a Director, a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act or the regulations."¹⁰ In making decisions, the Commissions interpret and apply their respective home statutes, as well as regulations, rules, and policies they created and developed. The operation is integrated and cohesive.

(iii) Appeals from Decisions of the Commissions

18. In Ontario, there is a statutory right of appeal from final decisions of the OSC to the Superior Court of Justice (Divisional Court).¹¹ Appeals from the decisions of the Divisional Court are to the Court of Appeal for Ontario, with leave. Appeals from the decisions of the ASC and BCSC are to their respective courts of appeal, although leave is required in British Columbia.¹²

⁷ *OSA*, *supra* note 1, ss 76, 122(1), 126.1, 126.2, 127; *ASA*, *supra* note 1, ss 147(3), 194, 221.1; *BCSA*, *supra* note 1, ss 57.2, 155, 161, 168.1.

⁸ *OSA*, *supra* note 1, s 127(1); *ASA*, *supra* note 1, ss 198, 199; *BCSA*, *supra* note 1, s 161.

⁹ *OSA*, *supra* note 1, ss 21(5), 21.1(4), 21.2(3), 104; *ASA*, *supra* note 1, ss 63(3), 64(6), 67(6); *BCSA*, *supra* note 1, s 27.

¹⁰ *OSA*, *supra* note 1, s 1(1); *ASA*, *supra* note 1, s 1(n); *BCSA*, *supra* note 1, s 1(1).

¹¹ *OSA*, *supra* note 1, s 9(1).

¹² *ASA*, *supra* note 1, s 38; *BCSA*, *supra* note 1, s 167(1).

19. Since 2001, there have been approximately 76 appeals of decisions of the Commissions. In the vast majority of these appeals, a standard of reasonableness was applied to the review.

(iv) Prosecutions and Applications Before the Courts

20. Securities legislation grants the Commissions the discretion to choose the forum most appropriate for effective enforcement. In addition to the administrative protective orders described above, the OSC and ASC have the authority to investigate and initiate prosecutions in the provincial courts for contraventions of securities laws and to obtain punitive orders such as fines and imprisonment, or both.¹³ In Ontario, a proceeding of this nature can only be commenced with the consent of the OSC.¹⁴ The BCSC also has the authority to investigate contraventions of securities laws, but it must refer matters to provincial Crown counsel for charge approval and prosecution in the provincial courts.¹⁵
21. The Commissions may also bring civil proceedings in the superior courts for remedial orders. Remedies include the rescission of any transaction entered into by a person or company relating to trading in securities, damages, restitution, and disgorgement.¹⁶

PART II – QUESTION IN ISSUE

22. What principles should govern the standard of review that applies to the review of administrative decisions?

PART III – ARGUMENT

A. Reasonableness Standard Applies to a Specialized Administrative Body

23. *Dunsmuir* sought to bring clarity and balance to the world of administrative law and review standards. Properly applied, it ought to have brought closure to the debate about review standards in this area.

¹³ *OSA*, *supra* note 1, ss 122(1); *ASA*, *supra* note 1, s 194.

¹⁴ *OSA*, *supra* note 1, s 122(7).

¹⁵ *BCSA*, *supra* note 1, s 155.

¹⁶ *OSA*, *supra* note 1, s 128; *ASA*, *supra* note 1, s 197; *BCSA*, *supra* note 1, s 157.

24. Reasonableness – the standard of review currently applicable to virtually all Commissions’ decisions - provides a stable and predictable platform for the exercise of administrative and adjudicative authority by these specialized administrative bodies. The Commissions have an integrated market role, carrying out both rule and policy-making function along with adjudicative responsibilities. Application of reasonableness to these functions manages the conflict between legislative choice over regulation and the rule of law. Courts have ultimate oversight responsibility, but deference recognizes the expertise of the Commissions and the integrated nature of their capital market roles and decisions. So long as the Commissions exercise their policy, regulatory and adjudicative functions within the mandate granted them by statute, their decisions will withstand scrutiny.
25. It is axiomatic that securities regulation is complex. The Commissions are highly specialized administrative bodies, granted authority and discretion by the Legislatures to carry out their public interest mandate. This discretion is especially important in the regulation and oversight of today’s sophisticated and rapidly-evolving capital markets. For example, the growth of the fintech financial services sector continues to result in new types of investment instruments (such as, cryptocurrency offerings) as well as new digital platforms connecting investors with companies seeking to raise capital. These innovations require regulatory oversight. Commissions are staffed, and members appointed, based on their education, relevant experience, and recognized expertise. Their experience and skill sets must be current and adaptive to keep pace with the capital markets.
26. Commissions’ decisions have historically and almost invariably received deference on review. With this deference standard, Commissions are able to apply their specialized expertise and consider the broader regulatory implications of their decisions to the capital markets.
27. This Court has specifically recognized the role of the Commissions as a “specialized tribunal with a wide discretion to intervene in the public interest”, the protection of which is “a matter falling within the core of its expertise.”¹⁷ This public interest jurisdiction is a

¹⁷ *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 49.

cornerstone of effective regulation as it permits the Commissions to apply their expertise and experience to the issue at hand and respond flexibly to developments in the capital markets. Wide discretion allows the Commissions to issue a broad range of public interest orders to respond to events such as proxy contests, hostile take-over bids, and the 2008 asset-backed commercial paper crisis. Commissions may respond to misconduct (e.g. insider trading or false disclosure) by issuing preventative orders, such as orders prohibiting individuals from acting as officers and directors of corporations.

28. Predictability and consistency in rule-making and the application of these rules are critical to the orderly regulation of complex systems like capital markets. Indeed, in part, that is what the Legislatures sought to achieve in creating the Commissions and giving them responsibility for regulating this sphere of economic activity in the first place. A change in the deference historically accorded to Commissions could impact the orderly regulation of the capital markets and the predictability that market participants depend on.

B. Concurrent Jurisdiction Does Not Rebut the Presumption of Deference

29. Concurrent jurisdiction is not the determining factor in assessing the appropriate standard of review applicable to administrative decisions.¹⁸
30. Securities misconduct can be prosecuted administratively or quasi-criminally in the courts. The choice of forum gives the Commissions the flexibility to cater the regulatory response to the circumstances of the case. The mere prospect of concurrent jurisdiction does not detract from the specialized expertise of the Commissions' tribunals, or from the integrated approach to adjudication.
31. In *Saguenay*, both the human rights tribunal and the courts had jurisdiction to determine whether the appellant's Quebec Charter rights had been breached. The complainant brought his complaint before the tribunal. This Court concluded that deference should be given to the tribunal, and held generally that reasonableness is the proper standard where a specialized administrative tribunal applies the law to the facts.¹⁹ The Court considered both

¹⁸ *Mouvement laïque Québécois v Saguenay (City)*, 2015 SCC 16 at para 43 [*Saguenay*]; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 23-24 [*McLean*].

¹⁹ *Saguenay*, *supra* note 18 at para 43.

Dunsmuir and *Rogers* and the issue of concurrent jurisdiction and held that the question of whether or not the administrative body has exclusive jurisdiction is not determinative of the applicable standard of review.²⁰

32. This Court’s finding in *Rogers* has injected unnecessary uncertainty into the determination of the appropriate standard of review for securities administrative cases. *Rogers* was limited to its facts and was not meant to derogate from the approach to the standard of review set out in *Dunsmuir* (and endorsed in *Saguenay*).²¹ The majority stated, “Nothing in these reasons should be taken as departing from *Dunsmuir* and its progeny as to the presumptively deferential approach to the review of questions of law decided by tribunals involving their home statute...”.²²
33. It is noteworthy that the Copyright Board in *Rogers* was not assumed to have more expertise than the courts in applying the *Copyright Act*.²³ In contrast, panels of the Commissions (generally three members) can be filled with the industry-specific expertise relevant to the issues in question. Chartered Accountants have experience and expertise to consider financial disclosure and accounting issues, broker/dealers have experience and expertise to consider trading related issues, and MBAs or corporate lawyers have experience and expertise to deal with securities, corporate and disclosure issues. As this Court stated in *Cartaway*, “[t]he courts also have less expertise than securities commissions in interpreting their constituent statutes given the broad policy context within which securities commissions operate.”²⁴

C. Conclusion

34. The Commissions seek this Court’s confirmation of the importance of preserving the deference afforded to the decisions of administrative bodies interpreting their home statutes. The presumption of deference and application of a reasonableness standard of

²⁰ *Saguenay*, *supra* note 18 at paras. 43 and 46.

²¹ *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 19 [*Rogers*]; *Saguenay*, *supra* note 18 at para 46.

²² *Rogers*, *supra* note 21 at para 19.

²³ *Rogers*, *supra* note 21 at para 15.

²⁴ *Cartaway Resources Corp (Re)*, 2004 SCC 26 at para 46.

review to those decisions have for years fostered a stable and sound foundation for the proper oversight of a critical component of the Canadian economy, and should continue to be applied.

PART IV – COSTS

35. The Commissions do not seek costs and request that no costs order be made against them.

PART V – RELIEF SOUGHT

36. The Commissions request permission to present oral argument to the court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of October 2018.

Matthew Britton/Jennifer M. Lynch/Paloma
Ellard/David Hainey/Don Young

Co-Counsel for the Joint Intervener, the Ontario
Securities Commission, the British Columbia
Securities Commission and the Alberta Securities
Commission

PART VI – TABLE OF AUTHORITIES

Case Law		Pinpoint (paras unless noted)
1.	<i>British Columbia (Securities Commission) v McLean</i>, 2013 SCC 67	23-24
2.	<i>Brosseau v Alberta Securities Commission</i>, [1989] 1 SCR 301	pages 313-314
3.	<i>Cartaway Resources Corp (Re)</i>, 2004 SCC 26	46
4.	<i>Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)</i>, 2001 SCC 37	49
5.	<i>Del Bianco v Alberta Securities Commission</i>, 2004 ABCA 344	5
6.	<i>Mouvement laïque québécois v Saguenay (City)</i>, 2015 SCC 16	43, 45, 46
7.	<i>Re Pierce</i>, 2016 BSSECCOM 188	26
8.	<i>Re Workum and Henning</i>, 2007 ABASC 719	42
9.	<i>Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada</i>, 2012 SCC 35	15, 19
Legislation		Pinpoint
10.	<i>Commodity Futures Act</i> , RSO 1990, c 20	1.1
11.	<i>Loi sur les contrats à terme sur marchandises</i> , LRO 1990, c C.20	1.1
12.	<i>Securities Act</i> , RSA 2000, c S-4	1(n) , 11 , 12 , 38 , 63(3) , 64(6) , 67(6) , 147(3) , 194 , 197 , 198 , 199 , 223 , 224
13.	<i>Securities Act</i> , RSBC 1996, c 418	1(1) , 4 , 27 , 57.2 , 155 , 157 , 161 , 167(1) , 168.1 , 183 , 184 , 188
14.	<i>Securities Act</i> , RSO 1990, c S.5	1(1) , 1.1 , 3.1 , 3.2 , 9(1) , 21(5) , 21.1(4) , 21.2(3) , 76 , 104 , 122(1) ,

		122(7) , 126.1 , 126.2 , 127 , 128 , 143 , 143.8
15.	<i>Loi sur les valeurs mobilières</i> , LRO 1990, c S.5	1(1) , 1.1 , 3.1 , 3.2 , 9(1) , 21(5) , 21.1(4) , 21.2(3) , 76 , 104 , 122(1) , 122(7) , 126.1 , 126.2 , 127 , 128 , 143 , 143.8