

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

**B E T W E E N :**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

Appellant (Respondent)

- and -

**ALEXANDER VAVILOV**

Respondent (Appellant)

- and -

**DANIEL JUTRAS and AUDREY BOCTOR**

Amici Curiae

(Continued on next page)

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**FACTUM OF THE INTERVENER, THE CANADIAN LABOUR CONGRESS**  
*(Rule 42 of the Rules of the Supreme Court of Canada)*

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AND BETWEEN :

**BELL CANADA and BELL MEDIA INC.**

Appellants (Appellants)

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent (Respondent)

- and -

**CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION**

Intervener

- and -

**DANIEL JUTRAS and AUDREY BOCTOR**

Amici Curiae

AND BETWEEN :

**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

- and -

**DANIEL JUTRAS and AUDREY BOCTOR**

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- and -

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## **PART I – OVERVIEW**

1. The standard of review lies at the heart of the relationship between specialist tribunals and generalist courts. The Canadian Labour Congress (CLC) submits that the core features of the *Dunsmuir* framework as it applies to independent adjudicative tribunals – a summary process for standard selection characterized by a strong presumption of deference with only narrow exceptions – should be retained (see paragraphs 4 to 11).

2. While the *Dunsmuir* approach provides considerable certainty, is sound in policy and accommodates legislative supremacy and the rule of law, the CLC also submits that the *Dunsmuir* framework requires three important refinements:

- a) not all administrative decision makers are alike; while deference is appropriate for traditional adjudicative tribunals characterized by expertise, independence and procedural fairness, its automatic application to other decision-makers lacking these safeguards may be problematic (see paragraphs 12 to 18);
- b) while certain narrow exceptions to deferential reasonableness review may be appropriate, this Court should eliminate correctness review based on the notion that certain issues are jurisdictional in nature (see paragraphs 19 to 27);
- c) privative clauses are not merely one contextual factor to be weighed against others, but rather should conclusively impose a deferential reasonableness standard (paragraph 28).

## **PART II – QUESTIONS AT ISSUE**

3. The CLC does not take a position on the specific questions at issue in these appeals.

## **PART III – STATEMENT OF ARGUMENT**

### **A. THE CRITICAL IMPORTANCE OF DEFERENCE TO EXPERT ADJUDICATIVE TRIBUNALS**

4. Legislatures establish independent adjudicative tribunals in order to pursue at least three important goals: expert decision-making, access to justice, and efficiency.<sup>1</sup> Applying a high

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<sup>1</sup>See the discussion in McLachlin, “Administrative Tribunals and the Courts: An Evolutionary Relationship”, online: <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx> [“*Administrative Tribunals and the Courts*”].

degree of deference to their decisions is a critical element in achieving these goals. Indeed, the history of judicial review of expert labour relations tribunals provides a compelling example of the rationale for judicial deference to expert tribunals.<sup>2</sup>

5. Legislatures assign responsibility to independent adjudicative tribunals precisely because they wish to create a decision-making forum **other than the courts** for adjudicating disputes through application of special expertise and experience to their decisions, including the interpretation of their enabling statute.<sup>3</sup> While there are varying sources of this expertise, adjudicators working every day within complex regimes inevitably develop considerable expertise in the complexities and nuances of their field.<sup>4</sup> Moreover, as demonstrated by labour relations and arbitration boards, expertise, knowledge and sensitivity to labour relations realities is not only important for sound decision making, but also promotes the confidence of the parties appearing before these tribunals necessary to preserve industrial peace.<sup>5</sup>

6. Administrative tribunals also have an important function in supporting access to justice. Financial constraints represent a significant barrier to accessing adjudicative bodies, a reality that frequently puts even the most meritorious claims at risk. In an attempt to address this reality,

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<sup>2</sup> For scholarly reviews and critiques of the history of repeated non-deferential judicial intervention in labour decisions in the post-war period until this Court's seminal 1979 decision in *CUPE v. New Brunswick Liquor Corp.* [1979] 2 S.C.R. 227, see Bora Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 Can. Bar Rev. 986 ["Laskin"]; H.W. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967) 45 Can. Bar Rev. 786; Paul Weiler, "The 'Slippery Slope' of Judicial Intervention: The Supreme Court and Canadian Labour Relations (1950-1970)" (1971) 9 OHLJ 1; H.W. Arthurs, "Re-Thinking Administrative Law: A Slightly Dicey Business" (1979) 17 OHLJ 1 ["Re-Thinking Administrative Law"]; H.W. Arthurs, "Protection against Judicial Review" (1983) 43 R. du B. 277; Brian Langille, "Judicial Review, Judicial Revisionism and Judicial Responsibility" (1986) 17 R.G.D. 169; D.J. Mullan, "Labour Law and Administrative Law: Still the Tail that Wags the Dog?" (2005) 12 CLELJ 213

<sup>3</sup> See, for example, the discussion in *Re-Thinking Administrative Law*, supra note 2 at 37-40.

<sup>4</sup> *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 33; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339 at para. 25; *Edmonton (City) v. Edmonton East (Capilano) Shipping Centres Ltd.*, [2016] 2 SCR 293 at para. 33.

<sup>5</sup> *CUPE v. Ontario (Minister of Labour)*, [2003] 1 SCR 539 at paras. 183-184. In the case of labour arbitrators, the benefits that arise from mutual confidence and respect are reinforced by their consensual appointment by the parties to a dispute.

administrative tribunals often adopt informal procedures that reduce litigation complexity (and therefore cost), making them more accessible to members of the general public. For example, in administrative proceedings related to employment and labour matters, union officials – not lawyers – frequently appear as advocates. The informality of the proceedings, together with the expected finality of the decision, reduces the costs associated with litigation, and in turn broadens access to such bodies for many more people.

7. Finally, administrative tribunals promote greater efficiency and informality in dispute resolution compared to civil litigation, producing expeditious hearings and timely decisions. This efficiency is an important aspect of the access to justice considerations discussed above, but is also a good in itself. For example, in the world of labour relations, this Court has recognized the critical importance of timely decision-making in achieving labour peace.<sup>6</sup>

8. Invasive correctness judicial review of administrative tribunals undermines all three of these objectives. The benefits of an independent administrative tribunal's expertise are lost if reviewing courts are quick to substitute their own views for that of the tribunal. As this Court has repeatedly recognized, deference is owed to specialized adjudicators by generalist courts in order to further the legislature's intent in creating an expert body in the first place.<sup>7</sup> Correctness review also undermines the values of accessibility, efficiency and informality, distracting the focus of expert decision-makers from the regulatory objectives of the schemes they administer, and forcing participants to devote time and resources to potential (or actual) re-litigation in the courts. This can be particularly problematic where, as in labour relations and employment matters, there may be an asymmetry between the parties' resources.

## **B. THE RULE OF LAW DOES NOT DEMAND INVASIVE CURIAL REVIEW**

9. Several participants in these proceedings suggest that there is an inherent tension between reasonableness review and the rule of law. They argue that the rule of law demands that courts be the final arbiter of the meaning of statutory provisions, which are assumed to have only one

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<sup>6</sup> *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 SCR 487 at para. 36

<sup>7</sup> *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 at 1745-1746; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 SCR 316 at 335; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 591-592.

possible meaning. This Diceyan notion of the rule of law conceives the role of the courts as applying “the law”, as only they can determine its single meaning to be, against the unbridled runaway “legislative” powers of administrative tribunals. However, this anachronistic conception of the rule of law neither reflects nor respects the evolving and necessary contemporary role assigned to independent expert tribunals in determining questions of law within their specialized field of regulation. It also usurps the principle of legislative supremacy, ignoring the democratically determined choice to shift primary adjudicative responsibility from the courts to independent administrative tribunals mandated to determine questions of law in their particular field. As a result, a modern understanding of the rule of law must recognize a shift in the role of the courts from “being a brute guardian of an artificial and restrictive Rule of Law to that of a partner, with tribunals and other civic institutions, in its construction and maintenance.”<sup>8</sup>

10. In the CLC’s submission, where independent adjudicative bodies are mandated and equipped to decide question of law, nothing in the rule of law requires courts to ignore the legislative choice to delegate to them the primary responsibility for the interpretation of their home and related statutes.<sup>9</sup> In this context, once it is recognized that “courts do not have a monopoly on deciding all questions of law”<sup>10</sup>, there is no inconsistency between reasonableness review and respect for the rule of law. Indeed, expert tribunals are established precisely because of a legislative judgement that they are better placed to vindicate and promote important rights and interests in a way that the courts cannot. As a result, a deferential standard of review helps to prevent judicial review (ostensibly aimed at ensuring that a tribunal is exercising its power as the legislature intended) from turning into judicial power aimed at directing the tribunal to act as the court prefers (and not as the legislature intended).

11. Deference does not disregard the role courts play in maintaining the rule of law in Canada. Quite the opposite. By requiring that administrative tribunals do not abuse their

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<sup>8</sup> McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law (1999) 12 CJALP 171 at 174; *Administrative Tribunals and the Courts*, *supra* note 1. See also Wilson J.’s discussion of evolving conceptions of the rule of law and the rationale for deferential judicial review in *National Corn Growers Assn. v. Canada (Import tribunal)*, [1990] 2 SCR 1324.

<sup>9</sup> *McLean v. British Columbia (Securities Commission)*, [2013] 3 SCR 895 at para. 33.

<sup>10</sup> *Dunsmuir*, *supra* note 4 at para. 30.

delegated adjudicative authority by exercising their powers unreasonably, the courts preserve the rule of law while at the same time respecting the legislative determination to confide decision making authority to the expertise of independent administrative tribunals.<sup>11</sup>

**C. NOT ALL ADMINISTRATIVE DECISION MAKERS ATTRACT DEFERENCE**

12. To this point, the CLC’s submissions have been directed at supporting reasonableness review for those expert adjudicative bodies that operate independently and at arm’s length from government ministries and agencies, and which are equipped to decide questions of law. But not all administrative decision makers fall into this category.

13. The *Dunsmuir* majority held that the standard of review analysis applied to all decision makers, though all but one of the cases that it cited concerned “traditional” tribunals. To some extent, this uniform approach failed to recognize that statutory decision makers come in many forms, and that “different administrative decisions command different degrees of deference, depending on who is deciding what.”<sup>12</sup>

14. When it comes to independent, expert adjudicative tribunals, deference is both necessary and appropriate, for the various legal and policy reasons canvassed above. However, the presumption of deferential review need not apply universally and uniformly to all exercises of statutory authority affecting individual rights. While deference is necessary and appropriate if expert and independent tribunals are to fulfill their assigned roles, a one size fits all approach is not appropriate for the myriad administrative decision-makers in the Canadian legal and regulatory landscape. For this reason, it should not be assumed that all delegations of statutory

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<sup>11</sup> See McLachlin, ““Administrative Law is Not for Sissies”: Finding a Path Through the Thicket” (2016) 29 CJALP 127 at 133 (“*This presumption of reasonableness reflects the deference that is due to the person or body which the legislature has appointed as the decision-maker. The deference flows from the right of the legislature to say who will act on its behalf and on the expertise of the tribunal; it is not a gift conferred by the court.*”); Lebel, “Some Properly Deferential Thoughts on Deference” (2008) 21 CJALP 1 at 4-5, 18-20; Coady, “The Time Has Come: Standard of Review in Canadian Administrative Law” (2017) 68 UNBLJ 87 at 94-95; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 SCR 678 at para. 140 (*per* Lebel J., dissenting in part); *Smith v. Alliance Pipeline Ltd.*, [2011] 1 SCR 160 at para. 38; *Quebec (Attorney General) v. Guérin*, [2017] 2 SCR 3 at para. 37; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 40.

<sup>12</sup> *Dunsmuir*, *supra* note 4 at para. 135 (*per* Binnie J.).

power to adjudicate or determine individual rights impliedly include the power to determine the meaning of the enabling statute, subject only to reasonableness review.

15. First, deference to a decision maker's legal interpretations and decisions is predicated on its possession of a power to decide questions of law, but not all administrative actors have such a power. As this Court has recognized in *Martin*<sup>13</sup> and *Conway*,<sup>14</sup> not even all tribunals – let alone other decision makers – have this power. Before deciding whether tribunals had the jurisdiction to apply the *Charter* – the question in those cases – it was first necessary to ascertain whether the particular tribunal had the jurisdiction to decide legal questions.<sup>15</sup> Similarly, a court should only apply the presumptive standard of reasonableness only if the decision maker has a delegated power to decide questions of law. Drawing on the considerations identified in *Martin*, whether a decision maker has an implied power to decide questions of law should be determined on the basis of the statutory scheme as a whole (including the adjudicatory function of the decision-maker), whether deciding questions of law (as distinct from simply applying statutory rules to particular matters before it) is necessary for the decision-maker to fulfil its statutory mandate, and whether the particular decision-maker at issue has the practical capacity to decide legal questions.

16. Second, the presumptive standard of reasonableness should not apply where the procedural framework generally applicable to the administrative actor's decision-making process is not structured in such a way as to afford those whose rights are affected by a decision with a fair and sufficient opportunity for participation in the decision-making process.

17. Third, when a decision impacting an individual's rights or interests is made by a decision-making body or actor lacking a sufficient degree of independence from the executive branch of government (and hence a relative degree of insulation from political interference or

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<sup>13</sup> *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504 at para. 35.

<sup>14</sup> *R. v. Conway*, [2010] 1 SCR 765 at para. 81.

<sup>15</sup> See also *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3 at para. 102 (Rowe J., concurring).



bias in decision-making), there is a stronger case to be made that the rationale for deferential reasonableness review is less applicable.<sup>16</sup>

18. This is certainly not to say that non-tribunal decision-makers will never be owed deference. There will remain many cases where other considerations militate in favour of deferring to executive branch decisions.<sup>17</sup> But when a decision maker lacks the capacity to decide questions of law, does not provide fair processes for those impacted to be heard, or lacks adequate independence, the case for deference on questions of law is eroded. Some other justification for deference must be identified, and in many cases, no such justification will exist.

#### **D. SELECTING THE STANDARD OF REVIEW FOR ADMINISTRATIVE TRIBUNALS**

19. When it comes to independent and expert adjudicative tribunals, this Court's general approach since *Dunsmuir* is essentially correct: there is a strong presumption that such tribunals are owed deference, whether in interpreting their home or closely related statutes or other constitutive documents (e.g. collective agreements),<sup>18</sup> making discretionary orders,<sup>19</sup> fact finding,<sup>20</sup> or applying general legal principles within their adjudicative context.<sup>21</sup>

20. As this Court has held, even in the case of expert tribunals, the reasonableness standard may be departed from in two ways: when a contextual analysis reveals that the legislature intended a correctness standard; and in certain recognized categories focused on the nature of the questions the tribunal decided.<sup>22</sup>

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<sup>16</sup> On the requirement of independence for adjudicative tribunals, see *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 SCR 884 at paras. 21-24.

<sup>17</sup> *Lake v. Canada (Minister of Justice)*, [2008] 1 SCR 761.

<sup>18</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654 at para. 39; *Association of Justice Counsel v. Canada (Attorney General)*, [2017] 2 SCR 456 at para. 17.

<sup>19</sup> *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 8.

<sup>20</sup> *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, [2016] 1 SCR 587 at para. 30.

<sup>21</sup> *Dunsmuir*, *supra* note 4 at para. 54; *Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616.

<sup>22</sup> *McLean*, *supra* note 9 at para. 22.

21. With respect to departures based on general legislative intent, correctness should apply only in the clearest of cases. Litigants should be required to point to a specific statutory provision that prescribes by clear or necessary implication a different standard. This approach would cover the “unusual”<sup>23</sup> appeal language at issue in *Tervita*,<sup>24</sup> and the equally “unusual” system of concurrent jurisdiction at issue in *Rogers*.<sup>25</sup>

22. Arguments based on broader contextual factors – including the importance of the interest at stake or the presence of ‘ordinary’ appeal rights – should be rejected. Such an approach generates uncertainty, cost, complexity and endless litigation,<sup>26</sup> undermines access to justice, and is inconsistent with the deliberate legislative determination to establish expert and independent tribunals so that legal decisions affecting important individual and collective interests are made by them, and not by the courts.

23. With respect to the individual recognized categories, the CLC submits that, with one important caveat, the *Dunsmuir* framework is essentially sound. Both constitutional questions and questions regarding the jurisdictional lines between competing tribunals should be reviewed on a correctness standard. So too questions of general importance to the legal system as a whole and which are outside of the adjudicator’s area of expertise, though relatively few questions will be of importance to the *entire* legal system, and many still fall within a tribunal’s expertise or require a specialized approach.<sup>27</sup>

24. However, when it comes to so-called questions of jurisdiction, as this Court stated in *Canadian Human Rights Commission*, “true questions of jurisdiction have been on life support

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<sup>23</sup> *Edmonton (City)*, *supra* note 4 at para. 34.

<sup>24</sup> *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 SCR 161.

<sup>25</sup> *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 SCR 283 at para. 15.

<sup>26</sup> *Edmonton (City)*, *supra* note 4 at para. 35 (in which the majority rejects the broader contextual analysis conducted by the Court of Appeal below: *Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)*, 2015 ABCA 85 at paras. 24-31). See also *Alberta Teachers’ Association*, *supra* note 18 at para. 44.

<sup>27</sup> For example *Nor-Man Regional Health Authority*, *supra* note 21 at paras. 37-38 (estoppel as applied in the labour context falling within the expertise of labour arbitrator).

since *Alberta Teachers*.<sup>28</sup> In the CLC's submission, now is the time to pull the plug. Despite its beguiling clarity, the distinction between provisions of a statute that define the scope of a grant of authority and those that govern its exercise is illusory.<sup>29</sup> Since adjudicative tribunals are normally empowered to decide any question of law necessary to resolve disputes, the distinction has no basis in either logic, or in relevant constitutional principle.

25. After struggling for years to come up with a workable definition of jurisdictional questions, this Court attempted a fresh start in *Bibeault*, holding that a question was jurisdictional because the legislature intended its interpretation to be reviewable for correctness.<sup>30</sup> *Dunsmuir*'s treatment of jurisdictional questions<sup>31</sup> reverted to the pre-*Bibeault* era, where the interpretation of a provision was reviewable for correctness because the question was jurisdictional, rather than a matter of legislative intent.

26. In the CLC's submission, if the legislature clearly provides that a particular question should be reviewed on a correctness standard, courts must follow this direction. But they should be clear that they are doing so because that is the will of the legislature, not because the question at issue belongs to a mythic category of "jurisdictional" questions. No such category exists. Moreover, the concept of "jurisdictional" questions was traditionally used to subvert the will of the legislature and eviscerate privative clauses.<sup>32</sup> While "true" jurisdictional questions have been notable for their virtual absence since *Dunsmuir*, the spectre of interventionism will haunt the corridors of administrative law, causing uncertainty, so long as the category still exists.

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<sup>28</sup> *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 41.

<sup>29</sup> See *New Brunswick Liquor Corp*, *supra* note 2 at 233 ("One can, I suppose, in most circumstances subdivide the matter before an administrative tribunal into a series of tasks or questions and, without too much difficulty, characterize one of those questions as a "preliminary or collateral matter".)

<sup>30</sup> *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048 at 1086-1089. See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 28.

<sup>31</sup> *Dunsmuir*, *supra* note 4 at para. 59.

<sup>32</sup> *Laskin*, *supra* note 2 at 993; *Re-Thinking Administrative Law*, *supra* note 2 at 44; *New Brunswick Liquor Corp*, *supra* note 2.

27. To the extent that *Crevier*<sup>33</sup> defined the courts' constitutionally entrenched judicial review jurisdiction in terms of jurisdictional questions, *Crevier* should be understood as precluding a privative clause from shielding from judicial review tribunal decisions that are unreasonable or unconstitutional.

28. At the same time as jettisoning the concept of jurisdictional questions, this Court should recognize the special role that privative clauses play in protecting the decisions of independent adjudicative tribunals. This Court has recognized that a privative clause is not necessary to apply a reasonableness standard.<sup>34</sup> However, for all of the reasons set out above, privative clauses should not be treated as merely one contextual factor to be considered in determining the standard of review. Rather, when it comes to decisions of independent adjudicative tribunals, a legislatively enacted privative clause should be treated as establishing an irrebuttable presumption of deference sufficient to attract reasonableness review.<sup>35</sup>

#### **PART IV – COSTS**

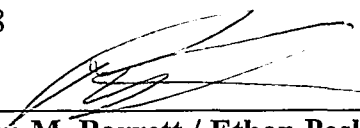
29. The CLC does not seek costs and asks that no costs be ordered against it.

#### **PART V – ORDER SOUGHT**

30. The CLC asks that it be granted leave to make oral argument at the hearing of the appeal.

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**DATED** at the City of Ottawa, this 29th day of October, 2018

  
 \_\_\_\_\_  
**Steven M. Barrett / Ethan Poskanzer /  
 Daniel Sheppard**

<sup>33</sup> *Crevier v. Attorney General of Quebec*, [1981] 2 SCR 220.

<sup>34</sup> *Pezim*, *supra* note 7; *Khosa*, *supra* note 4; *Canadian Human Rights Commission*, *supra* note 28 at para. 50.

<sup>35</sup> The CLC therefore disagrees with the position taken by the Attorney General of Ontario, that “final and biding” clauses are of less force than classic “no *certiorari*” clauses. This Court has correctly rejected the notion that a particular form of words must be used for a privative clause to have real effect: *Bradco Construction*, *supra* note 7 at 331-333; *Pushpanathan*, *supra* note 30 at para. 30.

**PART VI – TABLE OF AUTHORITIES**

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