

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

B E T W E E N:

BELL CANADA and BELL MEDIA INC.

Appellants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and -

CANADIAN RADIO-TELEVISION AND  
TELECOMMUNICATIONS COMMISSION

Intervener (pursuant to Rule 22(3)(c)(iv))\*

---

**FACTUM OF THE JOINT INTERVENERS,  
THE ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS AND  
THE ASSOCIATION OF CANADIAN ADVERTISERS**  
(Pursuant to Rule 42 of the *Rules of The Supreme Court of Canada*, S.O.R./2002-156)

---

**LENCZNER SLAGHT ROYCE  
SMITH GRIFFIN LLP**  
Barristers  
130 Adelaide Street West, Suite 2600  
Toronto ON M5H 3P5

**J. Thomas Curry** ([tcurry@litigate.com](mailto:tcurry@litigate.com))  
**Sam Johansen** ([sjohansen@litigate.com](mailto:sjohansen@litigate.com))  
Telephone: 416-865-9500  
Fax: 416-865-9010

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

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

**Maxine Vincelette** ([mvincelette@powerlaw.ca](mailto:mvincelette@powerlaw.ca))  
Tel: 613-702-5573  
Fax: 613-702-5573

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

*[Style of cause continued on next page.]*

\*Continued from page 1

– and –

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

Interveners

- and -

DANIEL JUTRAS AND AUDREY BOCTOR

*Amici curiae*

---

**SCC Court File No.: 37897**

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

B E T W E E N:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC  
and NFL PRODUCTIONS LLC

Appellants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and -

CANADIAN RADIO-TELEVISION AND  
TELECOMMUNICATIONS COMMISSION

Intervener (pursuant to Rule 22(3)(c)(iv))

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC,  
ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF  
SASKATCHEWAN, TELUS COMMUNICATIONS INC., ADVOCACY CENTRE FOR  
TENANTS ONTARIO, ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA  
SECURITIES COMMISSION and ALBERTA SECURITIES COMMISSION,  
ECOJUSTICE CANADA SOCIETY, WORKPLACE SAFETY AND INSURANCE APPEALS  
TRIBUNAL (ONTARIO), WORKERS' COMPENSATION APPEALS TRIBUNAL  
(NORTHWEST TERRITORIES AND NUNAVUT) and WORKERS' COMPENSATION  
APPEALS TRIBUNAL (NOVA SCOTIA), APPEALS COMMISSION FOR ALBERTA  
WORKERS' COMPENSATION and WORKERS' COMPENSATION APPEALS TRIBUNAL  
(NEW BRUNSWICK), BRITISH COLUMBIA INTERNATIONAL COMMERCIAL  
ARBITRATION CENTRE FOUNDATION, COUNCIL OF CANADIAN ADMINISTRATIVE  
TRIBUNALS, NATIONAL ACADEMY OF ARBITRATORS, ONTARIO LABOUR-  
MANAGEMENT ARBITRATORS' ASSOCIATION and CONFÉRENCE DES ARBITRES DU  
QUÉBEC CANADIAN LABOUR CONGRESS, NATIONAL ASSOCIATION OF PHARMACY  
REGULATORY AUTHORITIES, QUEEN'S PRISON LAW CLINIC, ADVOCATES FOR  
RULE OF LAW, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM,  
ASSOCIATION OF CANADIAN ADVERTISERS and THE ALLIANCE OF CANADIAN  
CINEMA, TELEVISION AND RADIO ARTISTS, SAMUELSON-GLUSHKO CANADIAN  
INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BAR ASSOCIATION,  
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Interveners

- and -

DANIEL JUTRAS AND AUDREY BOCTOR

*Amici curiae*

**ORIGINAL TO: SUPREME COURT OF CANADA**  
**The Registrar**  
301 Wellington Street  
Ottawa, ON K1A 0J1

**ATTORNEY GENERAL OF CANADA**

Department of Justice  
Ontario Regional Office  
The Exchange Tower  
3400 – 130 King Street West  
Toronto, ON M5X 1K6  
Fax No.: 416-973-0809

**Per: Michael H. Morris**  
**Roger Flaim**  
**Laura Tausky**

Tel Nos. 416-973-9704  
416-952-6889  
416-952-5864

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

**MCCARTHY TÉTRAULT LLP**

Suite 5300, TD Bank Tower  
Toronto, ON M5K 1E6

**Steven G. Mason** ([smason@mccarthy.ca](mailto:smason@mccarthy.ca))  
**Brandon Kain** ([bkain@mccarthy.ca](mailto:bkain@mccarthy.ca))  
**Joanna Nairn** ([jnairn@mccarthy.ca](mailto:jnairn@mccarthy.ca))  
**Richard Lizius** ([rlizius@mccarthy.ca](mailto:rlizius@mccarthy.ca))  
Tel: 416-601-8200  
Fax: 416-868-0673

**Counsel for the Appellants (37896),  
Bell Canada and Bell Media Inc.**

**Steven G. Mason** ([smason@mccarthy.ca](mailto:smason@mccarthy.ca))  
**Brandon Kain** ([bkain@mccarthy.ca](mailto:bkain@mccarthy.ca))  
**Joanna Nairn** ([jnairn@mccarthy.ca](mailto:jnairn@mccarthy.ca))  
**James S.S. Holtom** ([jholtom@mccarthy.ca](mailto:jholtom@mccarthy.ca))  
Tel: 416-601-8200  
Fax: 416-868-0673

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

**DEPUTY ATTORNEY GENERAL OF  
CANADA**

Department of Justice  
National Litigation Sector  
50 O'Connor Street, Suite 500  
Ottawa, ON K1A 0H8  
Fax No.: 613-954-1920

**Per: Christopher Rupar**  
Tel. No.: 613-670-6920  
E-mail: [Christopher.Rupar@justice.gc.ca](mailto:Christopher.Rupar@justice.gc.ca)

**Ottawa agent for the Respondent (37896 and  
37897), Attorney General of Canada**

**GOWLING WLG (CANADA) LLP**

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

**Jeffrey Beedell**  
([jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com))  
Tel: 613-786-0171  
Fax: 613-788-3587

**Ottawa agent for the Appellants (37896 &  
37897), Bell Canada and Bell Media Inc.,  
National Football League, NFL International  
LLC and NFL Productions LLC**

**DANIEL JUTRAS**

University of McGill  
3644 Peel, Old Chancellor Day Hall,  
Faculty of Law, Room 15  
Montreal, Quebec H3A 1W9

Tel: 514-398-6604

Fax: 514-398-4659

E-mail: [Daniel.jutras@mcgill.ca](mailto:Daniel.jutras@mcgill.ca)

**AUDREY BOCTOR**

Irving Mitchell Kalichman LLP  
Alexis Nihon Plaza, Tower 2  
3500 De Maisonneuve Blvd. West  
Montreal, Quebec H3Z 3C1

Tel: 514-934-7737

Fax: 514-935-2999

E-mail: [aboctor@imk.ca](mailto:aboctor@imk.ca)

*Amicus curiae* (37896 / 37897)

**ATTORNEY GENERAL OF ONTARIO**

720 Bay Street, 8<sup>th</sup> Floor  
Toronto, Ontario M5G 2K1

**Sara Blake / Julie Im**

Tel: 416-326-4155

Fax: 416-326-4181

E-mail: [sara.blake@jus.gov.on.ca](mailto:sara.blake@jus.gov.on.ca)

**Counsel for the Intervener (37896 / 37897),  
Attorney General of Ontario**

**ADVOCACY CENTRE FOR TENANTS  
ONTARIO**

1500 – 55 University Avenue  
Toronto, Ontario M5J 2H7

**Karen Andrews**

Tel: 416-597-5855

Fax: 416-597-5821

E-mail: [andrews@lao.on.ca](mailto:andrews@lao.on.ca)

**Counsel for the Intervener (37896 / 37897),  
Advocacy Centre for Tenants Ontario**

**SUPREME ADVOCACY LLP**

100 – 340 Gilmour Street  
Ottawa, Ontario  
K2P 0R3

**Marie-France Major**

Tel: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa agents for the *Amicus curiae*, Daniel  
Jutras and Audrey Boctor**

**SUPREME ADVOCACY LLP**

100 – 340 Gilmour Street  
Ottawa, Ontario K2P 0R3

**Marie-France Major**

Tel: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Ottawa agents for the Interveners, Attorney  
General of Ontario; Advocacy Centre for  
Tenants Ontario; Workplace Safety and  
Insurance Appeals Tribunal (Ontario),  
Workers' Compensation Appeals Tribunal  
(Northwest Territories and Nunavut) and  
Workers' Compensation Appeals Tribunal  
(Nova Scotia), Appeals Commission for  
Alberta Workers' Compensation and  
Workers' Compensation Appeals Tribunal  
(New Brunswick), National Association of  
Pharmacy Regulatory Authorities**

**WORKPLACE SAFETY AND INSURANCE  
APPEALS TRIBUNAL (ONTARIO)**

505 University Avenue, 7th Floor  
Toronto, Ontario M5G 2P2

**Michelle Alton / David Corbett**

**Kayla Seyler / Ana Rodriguez**

Tel: 416-573-1704

Fax: 416-326-5164

E-mail: [michelle.alton@wst.gov.on.ca](mailto:michelle.alton@wst.gov.on.ca)

**Counsel for the Intervener (37896 / 37897),  
Workplace Safety and Insurance Appeals  
Tribunal (Ontario), Workers' Compensation  
Appeals Tribunal (Northwest Territories and  
Nunavut) and Workers' Compensation  
Appeals Tribunal (Nova Scotia), Appeals  
Commission for Alberta Workers'  
Compensation and Workers' Compensation  
Appeals Tribunal (New Brunswick)**

**SHORES JARDINE LLP**

10104 - 103 Avenue  
Suite 2250  
Edmonton, Alberta T5J 0H8

**William W. Shores, Q.C.**

**Kirk N. Lambrecht, Q.C.**

Tele: (780) 448-9275

Fax: (780) 423-0163

E-mail: [bill@shoresjardine.com](mailto:bill@shoresjardine.com)

**Counsel for the Intervener (37896 / 37897),  
National Association of Pharmacy Regulatory  
Authorities**

**PROCUREURE GÉNÉRALE DU QUÉBEC**

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

**Stéphane Rochette**

Tel: (418) 643-6552

**NOËL & ASSOCIÉS**

111 rue Champlain  
Gatineau, Quebec J8X 3R1

**Sylvie Labbé**

Tel: (819) 771-7393

Fax: (418) 643-9749  
E-mail: [stephane.rochette@justice.gouv.qc.ca](mailto:stephane.rochette@justice.gouv.qc.ca)

**Counsel for the Intervener (37896 / 37897),  
Attorney General of Quebec**

**ATTORNEY GENERAL OF BRITISH  
COLUMBIA**

PO Box 9280 Stn Prov Govt  
Victoria, British Columbia V8W 9J7

**Leah Greathead**

**Micah Rankin**

Tel: 250-356-8892

Fax: 250-356-9154

E-mail: [leah.greathead@gov.bc.ca](mailto:leah.greathead@gov.bc.ca)

**Counsel for the Intervener (37896 / 37897),  
Attorney General of British Columbia**

**ATTORNEY GENERAL FOR  
SASKATCHEWAN**

900 - 1874 Scarth Street  
Regina, Saskatchewan S4P 4B3

**Laura Mazenc**

Tel: 306-787-6272

Fax: 306-787-0581

E-mail: [laura.mazenc@gov.sk.ca](mailto:laura.mazenc@gov.sk.ca)

**Counsel for the Intervener (37896 / 37897),  
Attorney General for Saskatchewan**

**ONTARIO SECURITIES COMMISSION**

2200 – 20 Queen Street West  
Toronto, Ontario M5H 3S8

**Matthew H. Britton / Jennifer M. Lynch**

**Paloma Ellard / David Hainey**

**Don Young**

Tel: 416-593-8294

Fax: 416-593-2319

E-mail: [mbritton@osc.gov.on.ca](mailto:mbritton@osc.gov.on.ca)

Fax: (819) 771-5397

E-mail: [s.labbe@noelassociés.com](mailto:s.labbe@noelassociés.com)

**Ottawa agent for the Intervener, Attorney  
General of Quebec**

**MICHAEL J. SOBKIN**

331 Somerset Street West  
Ottawa, Ontario K2P 0J8

Tel: 613-282-1712

Fax: 613-288-2896

E-mail: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)

**Ottawa agent for the Intervener, Attorney  
General of British Columbia**

**GOWLING WLG (CANADA) LLP**

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

**D. Lynne Watt**

Tel: 613-786-8695

Fax: 613-788-3509

E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**Ottawa agent for the Intervener, Attorney  
General for Saskatchewan**

**CONWAY BAXTER WILSON LLP**

400-411 Roosevelt Avenue  
Ottawa, Ontario K2A 3X9

**Benjamin Grant**

Tel: 613-780-2008

Fax: 613-688-0271

E-mail: [bgrant@conway.pro](mailto:bgrant@conway.pro)

**Ottawa agent for the Interveners, Ontario  
Securities Commission, British Columbia**

**Counsel for the Interveners (37896 / 37897),  
Ontario Securities Commission, British  
Columbia Securities Commission and Alberta  
Securities Commission**

**ECOJUSTICE CANADA SOCIETY**

1910 - 777 Bay Street  
PO BOX 106  
Toronto, Ontario M5G 2C8

**Laura Bowman / Bronwyn Roe**

Tel: 416-368-7533

Fax: 416-363-2746

E-mail: [lbowman@ecojustice.ca](mailto:lbowman@ecojustice.ca)

**Counsel for the Intervener (37896 / 37897),  
Ecojustice Canada Society**

**FASKEN MARTINEAU DUMOULIN LLP**

2900 - 550 Burrard Street  
Vancouver, British Columbia V6C 0A3

**Gavin R. Cameron / Tom Posyniak**

Tel: 604-631-4756

Fax: 604-631-3232

E-mail: [gcameron@fasken.com](mailto:gcameron@fasken.com)

**Counsel for the Intervener (37896 / 37897),  
British Columbia International Commercial  
Arbitration Centre Foundation**

**FASKEN MARTINEAU DUMOULIN LLP**

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

**Christian Leblanc / Michael Shortt**

Tel: (514) 397-7545

Fax: (514) 397-7600

E-mail: [cleblanc@fasken.com](mailto:cleblanc@fasken.com)

**Counsel for the Interveners (37896), Blue Ant  
Media Inc., Canadian Broadcasting  
Corporation, DHX Media Ltd., Group V**

**Securities Commission and Alberta  
Securities Commission**

**SUPREME LAW GROUP**

900 - 275 Slater Street  
Ottawa, Ontario K1P 5H9

**Moira Dillon**

Tel: 613-691-1224

Fax: 613-691-1338

E-mail: [mdillon@supremelawgroup.ca](mailto:mdillon@supremelawgroup.ca)

**Ottawa agent for the Intervener, Ecojustice  
Canada Society**

**FASKEN MARTINEAU DUMOULIN LLP**

55 rue Metcalfe, Bureau 1300  
Ottawa, Ontario K1P 6L5

**Sophie Arseneault**

Tel: 613-236-3882

Fax: 613-230-6423

E-mail: [sarseneault@fasken.com](mailto:sarseneault@fasken.com)

**Ottawa agent for the Interveners, British  
Columbia International Commercial  
Arbitration Centre Foundation, Blue Ant  
Media Inc., Canadian Broadcasting  
Corporation, DHX Media Ltd., and Group V  
Média Inc., Independent Broadcast Group,  
Aboriginal Peoples Television Network,  
Allarco Entertainment Inc., BBC Kids,  
Channel Zero, Ethnic Channels Group Ltd.,  
Hollywood Suite, OUTtv Network Inc.,  
Stingray Digital Group Inc., TV5 Quebec  
Canada, Zoomermedia Ltd., and Pelmorex  
Weather Networks (Television) Inc.**



**Média Inc., Independent Broadcast Group,  
Aboriginal Peoples Television Network,  
Allarco Entertainment Inc., BBC Kids,  
Channel Zero, Ethnic Channels Group Ltd.,  
Hollywood Suite, OUTtv Network Inc.,  
Stingray Digital Group Inc., TV5 Quebec  
Canada, Zoomermedia Ltd., and Pelmorex  
Weather Networks (Television) Inc.**

**LAX O’SULLIVAN LISUS GOTTLIEB LLP**  
2750 - 145 King St. West  
Toronto, Ontario M5H 1J8

**Terrence J. O’Sullivan / Paul Mitchell  
James Renihan**  
Tel: 416-644-5359  
Fax: 416-598-3730  
E-mail: [tosullivan@counsel-toronto.com](mailto:tosullivan@counsel-toronto.com)

**Counsel for the Intervener (37896 / 37897),  
Council of Canadian Administrative  
Tribunals**

**PALIARE ROLAND ROSENBERG  
ROTHSTEIN LLP**  
155 Wellington Street, 35th Floor  
Toronto, Ontario M5V 3H1

**Linda R. Rothstein / Michael Fenrick  
Angela E. Rae / Anne Marie Heenan**  
Tel: (416) 646-4300  
Fax: (416) 646-4301  
E-mail: [linda.rothstein@paliareroland.com](mailto:linda.rothstein@paliareroland.com)

**Counsel for the Intervener (37896 / 37897),  
Ontario Labour-Management Arbitrators’  
Association and Conférence des arbitres du  
Québec**

**SUSAN L. STEWART**  
7 L’Estrange Place  
Toronto, Ontario M6S 4S6  
Tele: 416-531-3736  
Fax: 416-604-2897  
E-mail: [sstewart@idirect.ca](mailto:sstewart@idirect.ca)

**SUPREME ADVOCACY LLP**  
100 – 340 Gilmour Street  
Ottawa, Ontario K2P 0R3

**Eugene Meehan, Q.C.**  
Tel: 613-695-8855 Ext: 101  
Fax: 613-695-8580  
E-mail: [emeehan@supremeadvocacy.ca](mailto:emeehan@supremeadvocacy.ca)

**Ottawa agent for the Intervener, Council of  
Canadian Administrative Tribunals**

**CAZASAIKALEY LLP**  
220 avenue Laurier Ouest  
Ottawa, Ontario  
K1P 5Z9

**Alyssa Tomkins**  
Tel: 613-565-2292  
Fax: 613-565-2087  
E-mail: [atomkins@plaideurs.ca](mailto:atomkins@plaideurs.ca)

**Ottawa agent for the Interveners, Ontario  
Labour-Management Arbitrators’  
Association and Conférence des arbitres du  
Québec, National Academy of Arbitrators**

**Counsel for the Intervener (37896 / 37897),  
National Academy of Arbitrators**

**GOLDBLATT PARTNERS LLP**  
20 Dundas Street West, Suite 1100  
Toronto, Ontario M5G 2G8

**Steven Barrett**  
Tel: (416) 979-6422  
Fax: (416) 591-7333  
E-mail: [sbarrett@goldblattpartners.com](mailto:sbarrett@goldblattpartners.com)

**Counsel for the Intervener (37896 / 37897),  
Canadian Labour Congress**

**MCCARTHY TÉTRAULT LLP**  
745 Thurlow Street, Suite 2400  
Vancouver, British Columbia V6E 0C5

**Adam Goldenberg / Robyn Gifford  
Asher Honickman**  
Tel: 604-643-7100  
Fax: 604-643-7900  
E-mail: [agoldenberg@mccarthy.ca](mailto:agoldenberg@mccarthy.ca)

**Counsel for the Intervener (37896 / 37897),  
Advocates for the Rule of Law**

**STOCKWOODS LLP**  
TD North Tower  
77 King Street West, Suite 4130  
Toronto-Dominion Centre  
Toronto, ON M5K 1H1  
Fax: 416-593-9345

**Brendan van Niejenhuis**  
Tel: 416-593-2487  
Email: [BrendanVN@stockwoods.ca](mailto:BrendanVN@stockwoods.ca)  
**Andrea Gonsalves**  
Tel: 416-593-3497  
Email: [AndreaG@stockwoods.ca](mailto:AndreaG@stockwoods.ca)

**Counsel for the Intervener (37896/  
37897), Queen's Prison Law Clinic**

**GOLDBLATT PARTNERS LLP**  
500-30 Metcalfe St.  
Ottawa, Ontario K1P 5L4

**Colleen Bauman**  
Tel: 613-482-2463  
Fax: 613-235-3041  
E-mail: [cbauman@goldblattpartners.com](mailto:cbauman@goldblattpartners.com)

**Ottawa agent for the Intervener, Canadian  
Labour Congress**

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

**Darius Bossé**  
Tel: 613-702-5566  
Fax: 613-702-5566  
E-mail: [DBosse@juristespower.ca](mailto:DBosse@juristespower.ca)

**Ottawa agent for the Intervener, Advocates  
for the Rule of Law**

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

**Maxine Vincelette**  
Tel: 613-702-5573  
Fax: 613-702-5573  
Email: [mvincelette@powerlaw.ca](mailto:mvincelette@powerlaw.ca)

**Ottawa Agent for the Interveners,  
Queen's Prison Law Clinic and Cambridge  
Comparative Administrative Law Forum**

**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  
Paul Warchuk**

Tel: 737-838-3023 Ext: 44

Fax: 514-565-9877

E-mail: [bruno.gelinas.faucher@gmail.com](mailto:bruno.gelinas.faucher@gmail.com)

**Counsel for the Intervener (37896 / 37897),  
Cambridge Comparative Administrative Law  
Forum**

**CAZASAIKALEY LLP**  
220 avenue Laurier Ouest  
Ottawa, Ontario K1P 5Z9

**Alyssa Tomkins / James Plotkin  
Michel Bastarache**

Tel: 613-565-2292

Fax: 613-565-2087

E-mail: [atomkins@plaideurs.ca](mailto:atomkins@plaideurs.ca)

**Counsel for the Intervener (37896 / 37897),  
Samuelson-Glushko Canadian Internet  
Policy and Public Interest Clinic**

**STEWART MCKELVEY**  
65 Grafton Street  
P.O. Box 2140, Station Central  
Charlottetown, Prince Edward Island C1A 8B9

**Jonathan M. Coady / Justin L. Milne**

Tel: 902-629-4520

Fax: 902-566-5283

E-mail: [jcoady@stewartmckelvey.com](mailto:jcoady@stewartmckelvey.com)

**Counsel for the Intervener (37896 / 37897),  
Canadian Bar Association**

**UNIVERSITÉ D'OTTAWA**  
Common Law Section  
57 Louis Pasteur St.  
Ottawa, Ontario K1N 6N5

**David Fewer**

Tel: 613-562-5800 Ext: 2558

Fax: 613-562-5417

E-mail: [david.fewer@uottawa.ca](mailto:david.fewer@uottawa.ca)

**Ottawa agent for the Intervener, Samuelson-  
Glushko Canadian Internet Policy and  
Public Interest Clinic**

**GOWLING WLG (CANADA) LLP**  
160 Elgin Street  
Suite 2600  
Ottawa, Ontario K1P 1C3

**Guy Régimbald**

Tel: 613-786-0197

Fax: 613-563-9869

E-mail: [guy.regimbald@gowlingwlg.com](mailto:guy.regimbald@gowlingwlg.com)

**Ottawa agent for the Intervener, Canadian  
Bar Association**

**CONWAY BAXTER WILSON LLP**

400 - 411 Roosevelt Avenue  
Ottawa, Ontario K2A 3X9

**David P. Taylor / Sarah Clarke**

Tel: 613-691-0368

Fax: 613-688-0271

E-mail: [dtaylor@conway.pro](mailto:dtaylor@conway.pro)

**Counsel for the Intervener (37896 / 37897),  
First Nations and Family Caring Society of  
Canada**

**STIKEMAN ELLIOTT LLP**

1600 - 50 O'Connor Street  
Ottawa, Ontario K1P 6L2

**Nicholas Peter McHaffie**

Tel: 613-566-0546

Fax: 613-230-8877

E-mail: [nmchaffie@stikeman.com](mailto:nmchaffie@stikeman.com)

**Ottawa agent for the Intervener, First  
Nations and Family Caring Society of  
Canada**

**CANADIAN RADIO-TELEVISION AND  
TELECOMMUNICATION COMMISSION**

Les Terrasses de la Chaudière  
Central Building  
1 Promenade du Portage  
Gatineau, Quebec J8X 4B1

**Crystal Hully-Craig**

Tel : 819-956-2095

Fax : 819-953-0589

E-mail: [crystal.hully@crtc.gc.ca](mailto:crystal.hully@crtc.gc.ca)

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

**NELLIGAN O'BRIEN PAYNE LLP**

300 - 50 O'Connor Street  
Ottawa, Ontario K1P 6L2

**Christopher Rootham / Michael Ryan**

Tel: 613-231-8311

Fax: 613-788-3667

E-mail: [christopher.rootham@nelligan.ca](mailto:christopher.rootham@nelligan.ca)

**Counsel for the Intervener (37896 / 37897),  
Telus Communications Inc.**

**TABLE OF CONTENTS**

<b>PART I– OVERVIEW AND FACTS</b> .....	1
<b>PART II – ISSUES</b> .....	3
<b>PART III – ARGUMENT</b> .....	3
A. Review for Reasonableness .....	3
B. Very Narrow Range of Reasonable Outcomes .....	4
C. The Policy of the Broadcasting Act .....	5
D. Inadequate Explanation of the CRTC’s Policy Reasoning .....	7
E. Impact of the CRTC’s Decision.....	8
<b>PART IV – COSTS</b> .....	10
<b>PART V – ORDER SOUGHT</b> .....	10
<b>PART VI – TABLE OF AUTHORITIES</b> .....	11



## **PART I - OVERVIEW AND FACTS**

1. The Interveners, the Alliance of Canadian Cinema, Television and Radio Artists (“ACTRA”) and the Association of Canadian Advertisers (the “ACA”) deliver this factum in support of the appeals initiated by the appellants Bell Canada and Bell Media Inc. (collectively “Bell”) and the National Football League, NFL International LLC and NFL Productions LLC (collectively the “NFL”) of the decision of the Federal Court of Appeal dated December 18, 2017 (the “Appeal Decision”).

2. These submissions address the issue of whether paragraph 9(1)(h) of the *Broadcasting Act* authorizes the Canadian Radio-Television and Telecommunications Commission (the “CRTC”) to require a licensee to carry a single program, in this case the American broadcast of the Super Bowl. Relying on its determination that paragraph 9(1)(h) gave it this power, the CRTC decided on August 19, 2016 to cease authorizing simultaneous substitution of the feed of a Canadian licensee for that of the American broadcaster of the same program (the “CRTC Decision”).

3. ACTRA and the ACA say that Simultaneous Substitution (“SimSub”) is an important component of the social contract among participants in the television broadcasting industry in Canada. It ensures that the broadcast of non-Canadian programming does not deprive Canadian advertisers of revenue, some of which supports the generation of original Canadian content. The CRTC Decision relies upon a flawed interpretation of a single paragraph of the *Broadcasting Act* to undermine SimSub in a manner that deprives Canadian advertisers (and indirectly, content providers) of significant advertising revenue from one of the most watched broadcasting events of the year.

4. The CRTC Decision is unreasonable because it is founded upon a flawed premise. Instead of giving appropriate weight to the policy objectives underlying SimSub, the CRTC began with the premise that broadcasting distribution undertakings (“BDUs”) generally cannot alter or delete signals, and then elevated that principle to one of superordinate importance. The CRTC treated the SimSub regime as an exception that required special justification, and then, without a reasonable basis, found this justification lacking with respect to a single program.

5. The creation of this hierarchy of policy objectives produced an arbitrary result that is indefensible with regard to the policy objectives of the *Broadcasting Act* as a whole. These objectives, codified in section 3 of the *Broadcasting Act*, affirm that the Canadian broadcasting system should safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada, and should encourage the development of Canadian expression. In spite of these objectives, the CRTC Decision has stressed the superordinate importance of making available to Canadians foreign-produced advertisements.

6. To be intelligible and defensible with regard to the scheme of the Act as a whole, the CRTC decision needed to explain why exactly the need to see American advertisements is so compelling a policy objective that it should prevail. Yet such a justification is lacking. The decision is explained only on the basis that “other policy objectives and concerns” prevail over the policy considerations that are expressly referenced in section 3 of the *Broadcasting Act*.

7. The CRTC Decision is so far outside the range of acceptable outcomes that it cannot survive review for reasonableness. That it should have survived review in the Federal Court of Appeal invites reflection about the standards applicable to substantive judicial review of the decisions of administrative tribunals. The CRTC Decision illustrates that Courts still have a role



to play in ensuring that the decisions of administrative tribunals stay within the boundaries set for them by Parliament.

8. In this case, applying either a traditional *Dunsmuir* analysis or any framework that may be substituted for it, the CRTC Decision cannot be rationally justified and must be set aside.

## **PART II - ISSUES**

9. This factum addresses the principal issue in this case, which is:

- (a) Can the result reached in this case by the Court below and the CRTC be supported on any applicable test?

## **PART III - ARGUMENT**

### **A. Review for Reasonableness**

10. The decision under appeal found the CRTC Decision to be a reasonable exercise of the CRTC's powers under paragraph 9(1)(h) of the *Broadcasting Act*.

11. The jurisprudence of this Court has established that review for reasonableness involves the following principles:

- (a) Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit “justification, transparency and intelligibility within the decision-making process”<sup>1</sup>

---

<sup>1</sup> *Dunsmuir v. New Brunswick*, [2008 SCC 9](#) at para. 47; *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016 SCC 38](#) at para 56.

- (b) The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes;<sup>2</sup>
- (c) The reasons must adequately explain the basis for the decision;<sup>3</sup>

12. On the face of it, the CRTC's decision is unreasonable.

### **B. Very Narrow Range of Reasonable Outcomes**

13. In this case, the weight of the relevant contextual factors points to a very narrow range of acceptable and defensible outcomes. These contextual factors include:

- (a) the statutory right of appeal contained in subsection 31(2) of the *Broadcasting Act* (the "Act") is broadly worded - "question[s] of law or question[s] of jurisdiction".<sup>4</sup> This demonstrates Parliament's intention that decisions and orders of the CRTC that involve questions of law or jurisdiction be carefully overseen, and corrected as necessary, by the Federal Court of Appeal;
- (b) that the Act specifies that the CRTC is permitted to make orders under paragraph 9(1)(h) only "in furtherance of its objects" and only in respect of "programming services". The objectives and definitions contained within the Act must therefore serve to narrow the scope of reasonable orders which can be made pursuant to paragraph 9(1)(h), a paragraph that is embedded in the broader context of the Act;

---

<sup>2</sup> *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011 SCC 62](#) at para 14.

<sup>3</sup> *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016 SCC 38](#) at para. 18

<sup>4</sup> *Broadcasting Act*, [SC 1991, c 11](#), s 31(2); *CKLN Radio Inc. v. Canada (Attorney General)*, [2011 FCA 135](#) at paras 5-6.

- (c) that there is a clear statutory purpose underlying paragraph 9(1)(h) of the Act which narrows the reasonableness range of allowable orders;
- (d) the CRTC's own policies, as well as legislation relating to the advertisement of alcohol and drugs in Canada, form part of the context for assessment of the CRTC Order and limit the scope of reasonable outcomes; and
- (e) the reality that the CRTC Order, which weakens the simultaneous substitution regime, undermines and damages the Canadian content industry.

14. Collectively, these contextual factors support the necessity for a probing, exacting review and collectively narrow the range of reasonable outcomes.

**C. The Policy of the *Broadcasting Act***

15. The CRTC Decision, while it does refer to “potential negative impacts” of its decision, does not disclose that the CRTC weighed the important policy objectives of the *Broadcasting Act* and considered the loss of revenues to Canadian advertisers within the context of those objectives.

16. Section 3 of the *Broadcasting Act* stresses the importance of support for Canadian culture and content as an overriding policy objective of the Act, declaring as the broadcasting policy for Canada that:

- (a) “the Canadian broadcasting system shall be effectively owned and controlled by Canadians” (par. 3(1)(a));
- (b) the Canadian broadcasting system is “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty” (par. 3(1)(b));

- (c) the Canadian Broadcasting system should
  - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
  - (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view; and
  - (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society; (par. 3(1)(d))
- (d) “each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming” (par. 3(1)(e));
- (e) “each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other

than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources” (par. 3(1)(f)).

**D. Inadequate Explanation of the CRTC’s Policy Reasoning**

17. The CRTC Decision alludes to “concerns relating to, among other things, revenue losses for local television stations; the ability of Canadian broadcasters to produce and acquire Canadian programming; the loss of advertising opportunities for Canadian companies and the promotion of Canadian programming; and the danger that U.S. commercials being broadcast in Canada are inconsistent with this country’s regulatory regime.”<sup>5</sup> But its reasons do not disclose *how* the Commission weighed these factors in the context of the statutory policy objectives it was bound to apply. It merely states in a conclusory manner that it considered them.<sup>6</sup>

18. In the absence of a coherent explanation as to why unnamed “objectives of the Act” justified privileging unparticularized “frustrations of viewers” over the fundamental policy objectives set out above, the CRTC Decision does not withstand scrutiny. A decision that simply enumerates factors and privileges one over others can be justly characterized as arbitrary. One of the purposes of reasonableness review is to allow courts to control arbitrary administrative decision-making.<sup>7</sup>

---

<sup>5</sup> *Simultaneous substitution for the Super Bowl*, [Broadcasting Regulatory Policy CRTC 2016-334](#) (“CRTC Decision”) at para. 35.

<sup>6</sup> CRTC Decision at paras. 38-39.

<sup>7</sup> *Cooper v. British Columbia (Liquor Control and Licensing Branch)*, [2017 BCCA 451](#) at paras 38-42.

## **E. Impact of the CRTC's Decision**

19. The CRTC's unreasonable interpretation of paragraph 9(1)(h) prioritizes American advertisements over Canadian content and the Canadian production sector, contrary to the cultural purposes of the Act and contrary to the objects of the CRTC.<sup>8</sup> As a consequence, the Canadian production sector, including performers, agencies and advertisers, is deprived of the revenues from simultaneous substitution during the Super Bowl. Canadian advertisers are deprived of the unique opportunity to capture the entire Canadian Super Bowl audience, now split between the American and Canadian broadcasts. The Order substantially weakens the simultaneous substitution regime, a regime that both ACTRA and the ACA's members depend on for their businesses and employment.

20. The reasons acknowledge that the CRTC received submissions that the Super Bowl was essential for businesses to grow and that funding of Canadian content production would be reduced by the decision.<sup>9</sup> The CRTC's reasons state that these submissions "generally reiterate those expressed by interveners in the various phases of the Let's Talk TV proceeding" and that the potential impacts were "taken into consideration", but that "[n]o new evidence was provided" and harks back to another broadcasting policy which affirmed the importance of simultaneous substitution to the Canadian production sector.<sup>10</sup> These reasons are insufficient to justify the severe impact of the decision on the livelihoods and businesses of the interveners' members.

---

<sup>8</sup> *Montréal (City) v. Montreal Port Authority*, [2010 SCC 14](#) at paras 42-47; *Delios v. Canada (Attorney General)*, [2015 FCA 117](#) at para 27; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, [2014 FCA 245](#) at para. 69 (eighth bullet); *Canada (Attorney General) v. Almon Equipment Limited*, [2010 FCA 193](#) at para. 21.

<sup>9</sup> CRTC Decision at paras 29, 32.

<sup>10</sup> CRTC Decision at paras. 35-39.

21. The CRTC's unreasonable interpretation of paragraph 9(1)(h) has resulted in one of the largest broadcast audiences of the year being exposed to irrelevant advertisements (because the products advertised are either not sold in Canada or are sold on terms other than advertised), and advertisements contrary to standards and laws imposed in the public interest and implemented by the CRTC itself: the *Food and Drugs Act*, *Food and Drugs Regulations* and the *Code for broadcast advertising of alcoholic beverages*.<sup>11</sup> The CRTC has, in effect, ordered television stations to do that which would amount to violations of its own code.

22. Further, the CRTC Decision is predicated on an unreasonable interpretation and application of paragraph 9(1)(h) of the *Broadcasting Act*, which is inconsistent with the definition of "program" and "programming service" in the Act, the overall context of the Act, persuasive and binding jurisprudence and the CRTC's own policies and decisions, all of which signal a definition of "programming service" that is inapplicable to single programs like the Super Bowl. Worse still, the CRTC's reasons in support of the Order use a definition consistent with these authoritative sources; the Reasons themselves are at odds with the Order.<sup>12</sup>

23. In the face of these considerations, the CRTC's reasons do not provide an intelligible and rational justification for the extraordinary step it has taken of singling out a single program for exemption from the SimSub regime.

24. The CRTC's reasons state that "the Commission has considered the primary goal of enriching Canadian programming through the preservation of the simultaneous substitution regime, but has decided that it needs to recalibrate that regime to ensure that it is better balanced,

---

<sup>11</sup> Affidavit of Ronald S. Lund, sworn August 29, 2018, Book of authorities, Tab 1, paras. 37-40.

<sup>12</sup> *Broadcasting Act*, [SC 1991, c 11](#); CRTC Decision at paras 39, 47 (footnote 8).

and reflects the totality of the policy objectives of the Act.”<sup>13</sup> Even if true, the CRTC’s considerations are not to be found in its reasons. The sole policy objective identified is “ensuring that Canadians have access to local, national and international programming”.<sup>14</sup> The reasons go no further and make no attempt to explain why that objective, to the extent it operates, is entitled to priority over the overall purpose of the Act.

25. On any approach, deferring to the CRTC Decision in the face of the absence of any rational justification for the result reached would require what the majority of this Court in *Dunsmuir* characterized as “blind reverence” to the CRTC’s decision.<sup>15</sup>

#### **PART IV - COSTS**

26. As provided in its application for leave to intervene, ACTRA and the ACA do not ask for costs.

#### **PART V - ORDERS SOUGHT**

27. ACTRA and the ACA ask that the appeals be allowed and that this Court grant an order setting aside the CRTC Decision.

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



---

**J. Thomas Curry/Sam Johansen**

Counsel for the Joint Intervener, the Alliance  
Of Canadian Cinema, Television and Radio  
Artists and the Association of Canadian  
Advertisers

---

<sup>13</sup> CRTC Decision at para. 28.

<sup>14</sup> CRTC Decision at para. 21.

<sup>15</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 48.



**PART VI - TABLE OF AUTHORITIES**

<b>Judicial Decisions</b>	<b>Paragraph(s) Referenced in Factum</b>
<i>Dunsmuir v. New Brunswick</i> , <a href="#">2008 SCC 9</a>	11, 25
<i>Canada (Attorney General) v. Almon Equipment Limited</i> , <a href="#">2010 FCA 193</a>	19
<i>Canada (Attorney General) v. Igloo Vikski Inc.</i> , <a href="#">2016 SCC 38</a>	11
<i>CKLN Radio Inc. v. Canada (Attorney General)</i> , <a href="#">2011 FCA 135</a>	13
<i>Cooper v. British Columbia (Liquor Control and Licensing Branch)</i> , <a href="#">2017 BCCA 45</a>	18
<i>Delios v. Canada (Attorney General)</i> , <a href="#">2015 FCA 117</a>	19
<i>Forest Ethics Advocacy Association v. Canada (National Energy Board)</i> , <a href="#">2014 FCA 245</a>	19
<i>Montréal (City) v. Montreal Port Authority</i> , <a href="#">2010 SCC 14</a>	19
<i>Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)</i> , <a href="#">2011 SCC 62</a>	11
<b>CRTC Decisions</b>	
<i>Simultaneous substitution for the Super Bowl</i> , <a href="#">Broadcasting Regulatory Policy CRTC 2016-334</a> (“CRTC Decision”).	17, 20, 22, 24

**PART VII - LEGISLATION RELIED UPON**

<b>Legislation and Statutes</b>	<b>Paragraph(s) Referenced in Factum</b>
<i>Broadcasting Act</i> , <a href="#">SC 1991, c 11</a>	13, 22