S.C.C. Court File No. 37896

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

BELL CANADA , et al.

APPELLANTS (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT(Respondents)

-and-

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, et al.

INTERVENERS

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

S.C.C. Court File No. 37748

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT (Respondent)

-and-

ALEXANDER VAVILOV

RESPONDENT (Appellant)

ATTORNEY GENERAL OF ONTARIO, et al.

INTERVENERS

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

S.C.C. Court File No. 37897

AND BETWEEN:

NATIONAL FOOTBALL LEAGUE, et al.

APPELLANTS (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT (Respondents)

-and-

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, et al.

INTERVENERS

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

FACTUM OF THE INTERVENER, COUNCIL OF CANADIAN ADMINISTRATIVE TRIBUNALS.

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

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

Counsel for the Intervener, Council of Canadian Administrative Tribunals.

SUPREME ADVOCACY LLP
340 Gilmour St.
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

S.C.C. Court File No. 37896

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.

APPELLANT (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT(Respondents)

-and-

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

INTERVENER

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, 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), 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, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM, 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 THE RULE OF LAW, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BAR ASSOCIATION, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, BLUE ANT MEDIA INC., CANADIAN BROADCASTING CORPORATION, DHX MEDIA LTD., GROUPE V MEDIA 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., TELUS COMMUNICATIONS INC., ASSOCIATION OF CANADIAN ADVERTISERS AND ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS

INTERVENERS

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

S.C.C. Court File No. 37748

AND BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT (Respondent)

-and-

ALEXANDER VAVILOV

RESPONDENT (Appellant)

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, CANADIAN COUNCIL FOR REFUGEES, 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 THE RULE OF LAW, PARKDALE COMMUNITY LEGAL SERVICES, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BAR ASSOCIATION, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, COMMUNITY & LEGAL AID SERVICES PROGRAMME, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

INTERVENERS

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

S.C.C. Court File No. 37897

AND BETWEEN:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC

APPELLANT (Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT (Respondents)

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, 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), 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, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM, 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 THE RULE OF LAW, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BAR ASSOCIATION, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, TELUS COMMUNICATIONS INC., ASSOCIATION OF CANADIAN ADVERTISERS AND ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS

INTERVENERS

-and-

DANIEL JUTRAS AND AUDREY BOCTOR

AMICUS CURIAE

ATTORNEY GENERAL OF CANADA
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6

John Provart
Marianne Zoric
Tel: (416) 973-1346
Fax: (416) 954-8982
E-mail: john.provart@justice.gc.ca

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

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 0'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)

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

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

Steven G. Mason
Brandon Kain
Steven Tanner
James S.S Holtom
Richard Lizius
Tel: (416) 601-8200
Fax: (416) 868-0673
E-mail: smason@mccarthy.ca

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

MCCARTHY TÉTRAULT LLP
66 Wellington Street West
Suite 5300, Toronto Dominion Bank Tower
Toronto, Ontario M5K 1E6

Steven G. Mason
Brandon Kain
Richard Lizius
Tel: (416) 601-8200
Fax: (416) 868-0673
E-mail: smason@mccarthy.ca

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, Ontario M5H 1T1

Michael H. Morris
Roger Flaim
Laura Tausky
Tel: (647) 256-7539
FAX: (416) 952-4518
E-mail: 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, Ontario
M6C 1A6

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: 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, Ontario K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: 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
Department of Justice Canada
50 0'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 Respondent, Attorney General of Canada (SCC 37896, 37897)

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, Ontario
K2P 0W6

Hadayt Nazami
Tel: (416) 653-9964
Fax: (416) 653-1036
E-mail: hadayt@rogers.com

Counsel for the Respondent, Alexander Vavilov

Bijon Roy
Tel: (613) 237-4740
Fax: (613) 232-2680
E-mail: broy@champlaw.ca

Agent for, Counsel for the Respondent, Alexander Vavilov

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION
Les Terrasse de la Chaudière, Central Building
1 Promenade du Portage
Gatineau, Quebec J8X 4B1

Crystal Hulley-Craig
Tel: (819) 956-2095
Fax: (819) 953-0589
E-mail: crystal.hulley@crtc.gc.ca

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

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

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

Amicus Curiae (SCC 37748, 37896, 37897)

IMK LLP
Alexis Nihon Plaza, Tower 2
3500 De Maisonneuve Blvd. West
Montreal, Quebec H3Z 3C1
Audrey Boctor
Tel: (514) 934-7737
Fax: (514) 935-2999
E-mail: aboctor@imk.ca

Amicus Curiae SCC 37748, 37896, 37897)

SUPREME ADVOCACY LLP
340 Gilmour St.
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)

ATTORNEY GENERAL OF ONTARIO
8th fl. – 720 Bay Street
Toronto, Ontario M5G 2K1

Sara Blake
Judie Im
Tel: (416) 326-4155
Fax: (416) 326-4181
E-mail: sara.blake@jus.gov.on.ca

Counsel for the Intervener, Attorney General of Ontario.

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

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

Agent for Counsel for the Intervener, Attorney General of Ontario

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

Counsel for the Intervener, Telus Communications Inc.

THE LAW OFFICE OF JAMIE LIEW
39 Fern Avenue
Ottawa, Ontario K1Y 3S2

Jamie Liew
Gerald Heckman
Jean Lash
Tel: (613) 808-5592
Fax: (888) 843-3413
E-mail: jamie.liew@uottawa.ca

Counsel for the Intervener, Canadian Council for Refugees.

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

Jaime Lefebvre
Tel: (613) 733-0140 Ext: 6027
E-mail: lefebvj@lao.on.ca

Agent for Counsel for the Intervener, Canadian Council for Refugees

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

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

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

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

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

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

Counsel for the Interveners, Ontario Securities Commission, BC Securities Commission and Alberta Securities Commission.

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

Agent for Counsel for the Interveners, Ontario Securities Commission, BC 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

Counsel for the Intervener, Ecojustice Canada Society

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

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

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

Counsel for the Intervener, National Association of Pharmacy Regulatory Authorities

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

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

Counsel for the Intervener, AG of Saskatchewan

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
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, British Columbia V6C 0A3

Gavin R. Cameron
Tom Posyniak
Telephone: (604) 631-4756
FAX: (604) 631-3232
E-mail: gcameron@fasken.com

Counsel for the Intervener, BC International Commercial Arbitration Centre Foundation

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

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
7th Fl. – 505 University Avenue
Toronto, ON M5G 2P2

Michelle Alton
David Corbett
Kayla Seyler
Ana Rodriguez
Tel: (416) 314-8800
Fax: (416) 326-5164
E-mail: 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)

SUPREME ADVOCACY LLP
340 Gilmour St., 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)

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

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

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

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, Ontario M6S 4S6

Tel: (416) 531-3736
Fax: (416) 604-2897
E-mail: sstewart@idirect.ca

Counsel for the Intervener, 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

Counsel for the Intervener, Canadian Labour Congress

PROCUREURE GÉNÉRALE DU QUÉBEC
1200, Route de l'Église
3e étage
Québec, Quebec G1V 4M1

Stéphane Rochette
Tel: (418) 643-6552
Fax: (418) 643-9749
E-mail: 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, Ontario M5K 1H1

Brendan Van Niejenhuis
Andrea Gonslaves
Tel: (416) 593-7200
Fax: (416) 593-9345
E-mail: brendanvn@stockwoods.ca

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

Agent for Counsel for the Intervener, National Academy of Arbitrators

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

Agent for counsel for the Intervener, Canadian Labour Congress

NOËL & ASSOCIÉS
111 rue Champlain
Gatineau, Quebec J8X 3R1

Sylvie Labbé
Tel: (819) 771-7393
Fax: (819) 771-5397
E-mail: s.labbe@noelassocies.com

Agent for Counsel for the Intervener, AG Quebec

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

Maxine Vincelette
Tel : (613) 702-5561
Fax : (613) 702-5561
E-mail : mvincelette@powerlaw.ca

Agent for Counsel for the Intervener,

Counsel for the Intervener, Queen's Prison Law Clinic

Queen's Prison Law Clinic

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

Counsel for the Intervener, AG British Columbia

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, Ontario
K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Agent for Counsel for the Intervener, AG British Columbia

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

Counsel for the Intervener, Advocates for the Rule of Law

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

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

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

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

Counsel for the Intervener, Parkdale Community Legal Services

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

Elaine Simon
Tel: (613) 733-0140
Fax: (613) 733-0401
E-mail: 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
E-mail: 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, Ontario M5H 3P5

J. Thomas Curry
Sam Johansen
Tel: (416) 865-3096
Fax: (416) 865-9010
E-mail: 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, Ontario
K1P 5Z9

Alyssa Tomkins
James Plotkin
Michel Bastarache
Tel: (613) 565-2292
Fax: (613) 565-2087
E-mail: atomkins@plaideurs.ca

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

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

Maxine Vincelette
Tel: (613) 702-5561
Fax: (613) 702-5561
E-mail: mvincelette@powerlaw.ca

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

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

Maxine Vincelette
Tel: (613) 702-5561
Fax: (613) 702-5561
E-mail: 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 St.
Ottawa, Ontario
K1N 6N5

David Fewer
Tel: (613) 562-5800 Ext: 2558
Fax: (613) 562-5417
E-mail: 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, Quebec H4Z 1E9

Christian Leblanc
Michael Shortt
Tel: (514) 397-7545
Fax: (514) 397-7600
E-mail: cleblanc@fasken.com

Counsel for the Interveners, Blue Ant Media Inc., Canadian Boradcasting Corporation, DHX Media Lts., Groupe V Media Inc., Independent Brodcast Group, Aboriginal Peoples Television Netork, 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.

FASKEN MARTINEAU DUMOULIN LLP
1300 – 55 rue Metcalfe
Ottawa, Ontario K1P 6L5

Sophie Arseneault
Tel: (613) 236-3882
Fax: (613) 230-6423
E-mail: sarseneault@fasken.com

Agent for Counsel for the Interveners, Blue Ant Media Inc., Canadian Boradcasting Corporation, DHX Media Lts., Groupe V Media Inc., Independent Brodcast Group, Aboriginal Peoples Television Netork, 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, Prince Edward Island
C1A 8B9

Jonathan M. Coady
Justin L. Milne
Tel: (902) 629-4520
Fax: (902) 566-5283
E-mail: jcoady@stewartmckelvey.com

Counsel for the Intervener, Canadian Bar Association

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

Agent for Counsel for the Intervener, Canadian Bar Association

LEGAL AID ONTARIO
Refugee Law Office
20 Dundas Street West
Toronto, Ontario M5G 2H1

Anthony Navaneelan
Audrey Macklin
Tel: (416) 977-8111 Ext: 7181
Fax: (416) 977-5567

COMMUNITY LEGAL SERVICES OTTAWA
1301 Richmond Road
Ottawa, Ontario K2B 7Y4

Nicholas Hersh
Tel: (613) 596-1641
Fax: (613) 596-3364
E-mail: hershni@lao.on.ca

E-mail: navanea@lao.on.ca

Counsel for the Intervener, Canadian Association of Refugee Lawyers

Agent for 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, Ontario M3J 1P3

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

Counsel for the Intervener, Community and Legal Aid Service Programme

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, Community and Legal Aid Service Programme

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

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

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

HAMEED LAW
43 Florence Street
Ottawa, ON K2P 0W6

Yavar Hameed
Tel: 613-232-2688
Fax: 613-232-2680
Email: yhameed@hameedlaw.ca.

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

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

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

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

1. Administrative tribunals play a central role in Canadian society. The Canadian administrative justice sector includes a diverse array of tribunals dealing with a variety of specialized matters assigned to them by legislatures. These tribunals have varying procedures, resources and policies to carry out their statutory mandates. But they are unified by a common thread: the application of specialized expertise to their respective subject matters. That specialized expertise is held by both individual tribunal members and by institutions as a whole.

2. Expertise, and the intention of legislators in assigning this work to tribunals rather than courts, warrants respect in the form of deference when judicial review is sought of tribunal decisions. In support of this broad principle, the Council of Canadian Administrative Tribunals ("CCAT") makes the following submissions.

3. First, any standard of review analysis must prioritize deference as its guiding principle and extend it to all issues of fact, law or procedure. Regardless of what approach the Court adopts, administrative decisions ought to be entitled to broad deference as a general rule.

4. Second, to ensure that this deference is properly applied in practice, CCAT urges the Court to provide further guidance as to what it means for a tribunal decision to be "reasonable". This will assist reviewing courts in applying the reasonableness standard. It will also provide guidance to administrative tribunals to ensure that their decision-making processes meet the reasonableness standard. This Court has noted the problem of disguised correctness review, where deference is given lip service, but in reality a correctness standard is applied. CCAT submits that disguised correctness review must be resisted. In determining whether a decision is reasonable, reviewing courts ought to ask whether the result or a particular holding cannot be justified given the tribunal's reasoning, the evidence and the applicable law.

5. Third, CCAT argues that reviewing courts should exercise caution when asked to supplement or rely on reasons that the administrative tribunal itself did not put forth as a basis on which to uphold tribunal decisions. Doing so may undermine tribunal autonomy and runs afoul of the legislature's allocation of decision-making authority to the tribunal.

PART II - QUESTIONS IN ISSUE

6. Given its composition, background and expertise, CCAT focuses on three key issues arising out of these appeals:

(a) what is the role and scope of deference in judicial review?;

(b) how are reviewing courts to apply deference in practice?; and

(c) should courts be permitted to uphold decisions of administrative tribunals for reasons other than those that the tribunal itself relied on?

7. CCAT addresses these questions below. Several commentators have observed that a key flaw of the *Dunsmuir* framework was that it emerged spontaneously without input from administrative tribunals, or indeed discussion of their role in Canada's system of administrative justice and standard of review issues.[1] CCAT, as an organization with a broad national membership of regulators, rights adjudicators, and tribunals dealing with benefits and compensation regimes, a long history, and extensive involvement in training and networking in the administrative sector, is uniquely placed to provide that input to this Court.

8. CCAT takes no position on the merits of these appeals.

PART III - STATEMENT OF ARGUMENT

A. Deference Ought to be the Key Feature of Judicial Review

1. Administrative tribunals' expertise warrants deference as a general rule

9. Administrative tribunals deal with a wide range of legal and policy matters under specific statutory mandates. "Vast swaths of the rule of law are dealt with by commissions and tribunals."[2] They offer efficient, inexpensive and specialized forums to determine people's rights and resolve their disputes. Tribunals are critical to the operation of public administration and the legal system.

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[1] *e.g.*, Lorne Sossin, "*Dunsmuir* – Plus ça change redux" (March 7, 2018).

[2] Beverley McLachlin, P.C., "Administrative Tribunals and the Courts: An Evolutionary Relationship", Remarks, 6th Annual Conference of the Council of Canadian Administrative Tribunals, May 27, 2013.

10. The hallmark of administrative tribunals is their expertise. Unlike superior courts, which deal with different types of disputes arising out of varying legal frameworks, administrative tribunals specialize in certain subject matters. They are structured to be experts in particular fields, alive to relevant law, public policy and the particular dynamics of making adjudicative decisions in those fields. They are attuned to the needs of the parties who appear before them.

11. This specialized expertise entitles the decisions of administrative tribunals to deference on judicial review as a general rule.[3] Deference recognizes that administrative tribunals have and develop expertise that the courts do not possess, and that the legislature has allocated certain issues to administrative tribunals for resolution. Deference provides tribunals with the autonomy to develop jurisprudence and procedures without intrusive review from courts exercising a general jurisdiction.

12. The principle of broad deference to tribunals has sometimes been attacked on the basis that some tribunals' members are said not to possess sufficient expertise to warrant deference. These attacks are misguided. As a majority of this Court held in *Edmonton East*, expertise "inheres in a tribunal itself as an institution."[4] The expertise of the members is presumed or assumed.[5] This expertise stems not just from specialization. It also arises from the fact that tribunals train members through comprehensive programs, encourage a collegial sharing of expertise among members, and develop policies and practices that respond to the needs of those who use the tribunals and that reflect the mandates provided to them by statute. This expertise is then reflected in the jurisprudence created by the tribunals.

13. As expertise inheres in the institution, it applies to *all* aspects of a tribunal's decision-making function. Issues of fact, law and procedure should all be entitled to deference on judicial review unless a statute specifically provides that a court may substitute its view for that of the tribunal. The long-standing principle that a tribunal is entitled to deference when interpreting its

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[3] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 1; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 169-172.

[4] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 33.

[5] *Edmonton East*, *supra* at para. 33; *Alberta Teachers*, *supra* at para. 1.

home statute, or statutes closely connected to its function, ought to continue.[6] The mere fact that when a tribunal interprets its home statute, it may also touch on broader legal issues does not change the reality that the tribunal considers and applies those issues to a specialized context. Deference ought still to apply.[7]

14. This principle that expertise inheres in the institution has been the subject of some debate at this Court. In *Edmonton East*, the dissent opined that the principle risked transforming the "presumption of deference into an irrebuttable rule."[8] With respect, this concern is misplaced. There is nothing problematic about extending deference to all situations. Deference does not immunize a decision from review. It has its limits. An unreasonable decision exceeds the boundaries of deference and may properly be set aside. Extending deference to tribunal decisions as a general rule rather than a mere presumption does not change that. Even for questions of law that only have one acceptable answer, the reasonableness standard is sufficient to allow a court to intervene without resorting to a less-deferential "correctness" standard.

15. To follow the path of the dissent in *Edmonton East* and make the application of deference depend on the actual expertise of the membership of a given tribunal would disregard legislative intent and unnecessarily complicate the law of judicial review. It would also enshrine a narrow understanding of expertise that would not recognize the rich ways in which tribunals as institutions ensure quality processes and decision-making.

16. A core component of establishing a tribunal is identifying and appointing its members. The legislature identifies the type of individuals best suited to sit on the tribunal, having regard to its subject matter, statutory mandate and interaction with issues of public policy. The executive selects the members, often with input from the tribunal.[9] These choices should not be

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[6] *Alberta Teachers*, *supra* at paras. 34, 39; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 32.

[7] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 130-134; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at paras. 185-191.

[8] *Edmonton East*, *supra* at para. 85.

[9] In some provinces the process is governed by statute: *e.g.*, *Adjudicative Tribunals Accountability, Governance and Appointments Act,* S.O. 2009, c. 33, s. 14 (requiring a competitive, public merit-based process with established criteria to appoint members, and

indirectly second-guessed by the courts. Applying a different standard of review to tribunals based on a court's assessment of the capabilities of its individual members would do just that.

17. Doing so would also introduce an additional, unnecessary issue into judicial review. If the application of deference depends on the actual expertise of the decision-makers, the parties would need to advance evidence of that expertise. They would need to argue whether the expertise is sufficient to attract deference. The parties would need to focus on the *particular* decision-maker(s) involved, not the body of available decision-makers and the practices of the institution as a whole. This would make consistency in judicial review impossible. Litigants should not have a different standard of review applied depending on how many years their adjudicator has served on the tribunal or her educational or professional background.

2. A deferential standard of review strengthens administrative tribunals

18. Administrative tribunals must have the confidence of the public to be effective. They must be seen to be authoritative and binding. A deferential approach to judicial review fosters this confidence, and promotes the autonomy of administrative tribunals.

19. Even in the context of traditional litigation, this Court has emphasized that decisions of superior courts ought generally to be seen as final, with appellate courts serving only to ensure consistency in the law, not providing a new forum for a continued fight.[10] Deference to the superior courts helps to "promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings".[11]

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recommendation of the chair); *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 3 (providing for merit-based appointment process and consultation with chair); *Energy and Utilities Board Act*, R.S.N.B., c. E-9.18, s. 4 (outlining a comprehensive, merit-based approach for appointments, including that appointments may be made only of candidates nominated by a committee comprised of the incumbent chair, vice-chair, and two deputy ministers).

[10] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 51-52.

[11] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 12.

20. These principles are even more applicable in the administrative context, where the legislature has specifically directed that certain issues be addressed outside the judicial system. If courts can readily substitute their own views for those of administrative tribunals, the tribunals will come to be seen as mere stepping stones to the "real" decision makers. A non-deferential standard of review invites applications for judicial review and calls the legitimacy of the administrative justice system into question. It also frustrates legislative intent.

21. An interventionist standard of review also undermines the efficiency goals of administrative tribunals, which promote access to justice. The formal litigation process is expensive and time-consuming. Judicial review applications bring parties into that arena, imposing further cost and delay. As important a safeguard as the courts play in the administrative law context, their intervention should be limited to cases where the tribunal arrived at an unreasonable result.

22. Even where judicial review is sought, a deferential standard reduces the cost and complexity of such applications. On several occasions, this Court has lamented the resources parties expended in arguing about the standard of review.[12] An emphasis on deference largely bypasses this debate, allowing the parties to focus their energies where they should be: on the merits of the challenge.

B. The Reasonableness Standard Must Be Clearly Defined

23. Courts must do more than simply purport to defer to the decisions of administrative tribunals. They must actually apply that deference for the benefits described above to be realized. Deferential review – the reasonableness standard – must be sufficiently defined to prevent "disguised correctness" review.[13] It must also provide guidance to administrative tribunals themselves to ensure that their decision-making processes satisfy the reasonableness standard.

24. In *Dunsmuir*, this Court described the reasonableness standard as requiring reviewing courts to accord "respectful attention" to the decision of the tribunal, permitting the tribunal a

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[12] See, *e.g.*, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, at para. 27; *Edmonton East*, *supra* at para. 20; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 20.

[13] *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688 at para. 99; *Wilson*, *supra* at para. 27.

"margin of appreciation" to render a decision falling within a range of "acceptable and rational" solutions.[14] But this language is pitched at a level of abstraction. It does not sufficiently emphasize the primacy of the tribunal's decision-making role, and fails to provide much concrete guidance to reviewing courts or to tribunals themselves. A reviewing court should not merely pay respectful attention to a tribunal's decision: it ought to *defer* to its decision and the reasoning behind it unless it simply cannot be supported on the record.

25. One potential source of difficulty has been that the term "reasonableness" can be misinterpreted as an invitation to judges to evaluate the merits of the tribunal's decision. While CCAT does not advocate for a standard of review name change, Binnie J.'s caution in *Dunsmuir* about possible misinterpretation of the reasonableness standard bears consideration ten years on:

> The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.[15]

26. A decade after *Dunsmuir*, there is a need to reinforce judicial understanding of and commitment to both an attitude of deference and the proper approach to deferential review. The attitude of deference must be grounded in an appreciation that the need for deference in judicial review goes beyond the traditional justifications for deferential review in the appellate context. Administrative tribunals are in the privileged position of hearing the evidence first-hand and, limiting judicial review conserves scarce judicial resources and promotes the autonomy of administrative proceedings. But administrative tribunals have the added feature of being specialized forums for particular issues assigned to them by the legislature, and this gives them expertise in law, policy and procedure in that area. Reviewing courts must approach their task with the understanding they are entering an area of specialized expertise, and must therefore tread lightly.

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[14] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 46-49.
[15] *Dunsmuir v. New Brunswick, supra* at para. 141.

27. The standard of review ought to be deferential no matter how it is defined. Any definition must be founded on the primacy of the tribunal's decision-making role. If a decision was available on the record before the decision-maker and the tribunal's reasoning cannot be shown to be unreasonable, it should stand. The fact that the reviewing court might have come to a different conclusion on the merits if (contrary to the statutory mandate of the tribunal) it were the decision-maker is of no moment. Judicial review on a reasonableness standard must start with an evaluation of the reasons for decision of the tribunal—not a *de novo* analysis by the reviewing court of the issue that the legislature assigned to the tribunal for decision.[16]

28. A deferential standard of reasonableness must extend to administrative tribunals' decisions on questions of law. This respects the intention of the legislator that tribunals apply their specialized expertise to the policy and legal issues that come before them, not just the factual ones. Deference on legal issues:

(a) limits the number, length and cost of judicial reviews, an even more pressing goal than limiting the number, length and cost of appeals from lower courts;

(b) promotes the autonomy and integrity of administrative proceedings; and

(c) recognizes the specialized expertise of decision-makers the legislature designates to hear specific matters, which often intersect with public policy issues.[17]

29. Adopting a reasonableness standard to all situations except where a legislature specifically provides that a court should substitute its view for that of the tribunal would help bring consistency to the application of deference to administrative tribunals. Applying a deferential approach of reasonableness in practice would also eliminate "disguised correctness" review and ensure that deference is actually extended to administrative tribunals in practice.

C. Courts Should Not Refashion the Tribunal's Reasons or Supply Their Own Reasons

30. The third issue concerns what courts should do in the face of tribunal reasons they consider to be inadequate. According to *Dunsmuir*,[18] as modified in *Newfoundland Nurses*,[19]

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[16] *Delta Airlines Inc. v. Lukács*, 2018 SCC 2 at para. 24.
[17] *Housen v. Nikolaisen, supra* at paras. 15-18.
[18] *Dunsmuir v. New Brunswick, supra* at para. 48.

courts may uphold a tribunal's decision not only for the reasons that the tribunal actually gave, but also for reasons that the court anticipates that the tribunal *could* have given, based on its review of the record.[20] The Court continues to adhere to this rule, although it recognizes that reviewing courts cannot simply ignore the tribunal's reasons and fashion their own.[21]

31. At first blush, this rule seems to support tribunal autonomy, in that it enables courts on review to uphold tribunal decisions even for reasons that the tribunal itself did not advance. And it is of course desirable and appropriate for reviewing courts to consider a tribunal's reasons in the broader context of the evidence that was before the tribunal and the parties' submissions.[22] But on reflection, a rule that permits reviewing courts to uphold tribunal decisions for reasons that the tribunal itself never relied on and may never have agreed with may actually undermine tribunal autonomy and run afoul of the legislative mandate that the tribunal—not the courts—decide the matters referred to it. Court should exercise great caution here.

32. When courts rely on reasons that are not set out in the tribunal's decision, they risk denigrating the autonomy of administrative tribunals in a different way: by undermining the tribunal's good faith efforts to justify their decisions according to the requirements of reasonableness by allowing a reviewing court to simply substitute its own view of the reasons that justify the outcome reached by the tribunal.[23] That is hardly conducive to the development and maintenance of tribunal autonomy and a respectful relationship between courts and tribunals.

33. Rather than supplementing reasons with its own, courts should, first, seek to situate the reasons in the jurisprudence and policies of the tribunal. Reasons that may appear deficient on their own, may, when read in the full context of how the tribunal makes decisions, give a more persuasive explanation. Second, in evaluating reasons, courts must take into account that tribunals' reasons may appropriately look very different from that of courts, given volumes of

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[19] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 12; *Alberta Teachers, supra* at para. 53.
[20] As the Federal Court of Appeal noted below in *Vavilov,* at para. 49.
[21] *Delta Airlines Inc. v. Lukács, supra* at paras. 12, 24.
[22] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para. 37.
[23] *Delta Airlines Inc. v. Lukács, supra* at paras. 27-28.

work and the audiences to whom the tribunal is speaking.[24] So long as the tribunal's reasoning is clear taking into account the entire context of the decision, a court should neither supplement nor overturn a decision as unreasonable because the reasoning was insufficient.

PART IV - SUBMISSIONS ON COSTS

34. CCAT's intervention is on a no-costs basis, as ordered by this Court.

PART V - ORDER SOUGHT

35. CCAT respectfully requests leave to present oral submissions at the hearing of these appeals. This will enable the Court to ask questions of CCAT, and provide CCAT with the opportunity to focus its submissions in light of the submissions of the other interveners in this important case in order to be useful to the Court and distinct.

Dated at Toronto, Ontario this 26th day of October, 2018.

Terrence J. O'Sullivan / Paul Michell / James Renihan

Counsel for the Intervener,
Council of Canadian Administrative Tribunals

[24] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 40, 44.

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STATUTORY PROVISIONS

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Loi de 2009 sur la responsabilisation et la gouvernance des tribunaux décisionnels et les nominations à ces tribunaux, LO 2009, c 33, ann 5, s. 14

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