SCC Court File Nos. 37748, 37896, 37897

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)

FACTUM OF THE INTERVENER, THE CANADIAN LABOUR CONGRESS

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

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Steven M. Barrett
Ethan Poskanzer
Daniel Sheppard
Tel: 416-977-6422
Fax: 416-591-7333
sbarrett@goldblattpartners.com

Counsel for the Intervener, the Canadian Labour Congress

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
cbauman@goldblattpartners.com

Ottawa Agent for the Intervener, the Canadian Labour Congress

A N D 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

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici Curiae

A N D 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

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici Curiae

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN COUNCIL FOR REFUGEES, ADVOCACY CENTRE FOR TENANTS ONTARIO, ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA SECURITIES COMMISSION, ALBERTA SECURITIES COMMISSION,

ECOJUSTICE CANADA SOCIETY, WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO), WORKERS' COMPENSATION APPEALS TRIBUNAL (NORTTHWEST TERRITORIES AND NUNAVUT), WORKERS' COMPENSATION APPEALS TRIBUNAL (NOVA SCOTIA), APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION, 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, CONFERENCE DES ARBITRES DU QUEBEC, CANADIAN LABOUR CONGRESS, NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, QUEEN'S PRISON LAW CLINIC, ADVOCATES FOR THE RULE OF LAW, PARKDATE 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 QUEBECOISE DES AVOCATES EN DROIT DE L'IMMIGRATION, FIRST NATIONS FAMILY CARING SOCIETY OF CANADA, TELUS COMMUNICATIONS INC., ASSOCIATION OF CANADIAN ADVERTISERS, ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS, 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., HOLLOWOOD SUITE, OUTTV NETWORK INC., STINGRAY DIGITAL GROUP INC., TV5 QUEBEC CANADA, ZOOMERMEDIA LTD., and PELMOREX WEATHER NETWORKS (TELEVISION) INC.

Interveners

TO: THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

ATTORNEY GENERAL OF CANADA
120 Adelaide Street West, Suite 400
Toronto ON M5H 1T1

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

Counsel for the Appellant (in 37748)

ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500, Room 557
Ottawa, Ontario K1A 0H8

Christopher M. Rupar
Tel: 613-670-6290
Fax: 613-954-1920
christopher.rupar@justice.gc.ca

Ottawa Agent for the Appellant (in 37748)

JACKMAN NAZAMI & ASSOCIATES
596 St. Clair Avenue West, Unit 3
Toronto, ON M6C 1A6

Hadayt Nazami
Tel: 416-653-9964
Fax: 416-653-1036
hadayt@rogers.com

Counsel for the Respondent (in 37748)

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

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

Ottawa Agent for the Respondent (in 37748)

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

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

Counsel for the Appellants
(in 37896 & 37897)

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

Jeffrey W. Beedell
Tel: 613-786-0171
Fax: 613-788-3587
Jeff.beedell@gowlingwlg.com

Ottawa Agent for the Appellants
(in 37896 & 37897)

ATTORNEY GENERAL OF CANADA
120 Adelaide Street West, Suite 400
Toronto ON M5H 1T1

Michael H. Morris
Roger Flaim
Laura Tausky
Tel: 647-256-7539
Fax: 416-952-4518
michael.morris@justice.gc.ca

Counsel for the Respondent
(in 37896 & 37897)

ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500, Room 557
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: 613-670-6290
Fax: 613-954-1920
christopher.rupar@justice.gc.ca

Ottawa Agent for the Appellant
(in 37896 & 37897)

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

Daniel Jutras
Tel: 514-398-1453
Fax: 514-398-4659
daniel.jutras@mcgill.cca

Amicus Curiae

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

Marie-France Major
Tel: 613-695-8855 Ext: 102
Fax: 613-695-8580
mfmajor@supremeadvocacy.ca

Ottawa Agent for Amicus Curiae

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

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

Amicus Curiae

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

Marie-France Major
Tel: 613-695-8855 Ext: 102
Fax: 613-695-8580
mfmajor@supremeadvocacy.ca

Ottawa Agent for Amicus Curiae

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

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

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

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 8th Floor
Toronto, Ontario M5G 2K1

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

Counsel for the Intervener, Attorney General of Ontario
(in 37748, 37896 & 37897)

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

Marie-France Major
Tel: 613-695-8855 Ext: 102
Fax: 613-695-8580
mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener, Attorney General of Ontario
(in 37748, 37896 & 37897)

ATTORNEY GENERAL OF QUEBEC
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
stephane.rochette@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Quebec
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener, Attorney General of Quebec
(in 37748, 37896 & 37897)

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
leah.greathead@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia (in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener, Attorney General of British Columbia (in 37748, 37896 & 37897)

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

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

Counsel for the Intervener, Attorney General of Saskatchewan (in 37748, 37896 & 37897)

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

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Saskatchewan (in 37748, 37896 & 37897)

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
jamie.liew@uottawa.ca

Counsel for the Intervener, The Canadian Council for Refugees (in 37748)

COMMUNITY LEGAL SERVICES
406 – 1355 Bank Street
Ottawa, ON K1S 0X2

Jaime Lefebvre
Tel: (613) 733-0140
Fax: (613) 733-0401
lefebvj@lao.on.ca

Ottawa Agent for the Intervener, The Canadian Council for Refugees (in 37748)

ADVOCACY CENTRE FOR TENANTS ONTARIO
1500 - 55 University Avenue
Toronto, Ontario M5J 2H7

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

Counsel for the Intervener, Advocacy Centre For Tenants (in 37748, 37896 & 37897)

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

Marie-France Major
Tel: 613-695-8855 Ext: 102
Fax: 613-695-8580
mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener, Advocacy Centre for Tenants (in 37748, 37896 & 37897)

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
mbritton@osc.gov.on.ca

Counsel for the Interveners, Ontario Securities Commission, British Columbia Securities Commission and Alberta Securities Commission (in 37748, 37896 & 37897)

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

Benjamin Grant
Tel: (613) 780-2008
Fax: (613) 688-0271
bgrant@conway.pro

Ottawa Agent for the Intervener, Securities Commission, British Columbia Securities Commission and Alberta Securities Commission (in 37748, 37896 & 37897)

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
lbowman@ecojustice.ca

Counsel for the Intervener,
Ecojustice Canada Society
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener,
Ecojustice Canada Society
(in 37748, 37896 & 37897)

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
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
Michelle.Alton@wst.gov.on.ca

Counsel for the Intervener,
Workplace Safety and Insurance Appeals Tribunal (Ontario)
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener,
Workplace Safety and Insurance Appeals Tribunal (Ontario)
(in 37748, 37896 & 37897)

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

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

Counsel for the Intervener,
Telus Communications Inc.
(in 37896 & 37897)

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
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
Michelle.Alton@wst.gov.on.ca

Counsel for the Interveners,
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut) and Workers' Compensation Appeals Tribunal (Nova Scotia)
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Interveners,
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut) and Workers' Compensation Appeals Tribunal (Nova Scotia)
(in 37748, 37896 & 37897)

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL
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
Michelle.Alton@wst.gov.on.ca

Counsel for the Interveners,
Appeals Commission for Alberta Workers' Compensation and Workers' Compensation Appeals Tribunal (New Brunswick)
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Interveners,
Appeals Commission for Alberta Workers' Compensation and Workers' Compensation Appeals Tribunal (New Brunswick)
(in 37748, 37896 & 37897)

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
gcameron@fasken.com

Counsel for the Intervener,
British Columbia International Commercial Arbitration Centre Foundation
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener,
British Columbia International Commercial Arbitration Centre Foundation
(in 37748, 37896 & 37897)

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
tosullivan@counsel-toronto.com

Counsel for the Intervener, Council of Canadian Administrative Tribunals
(in 37748, 37896 & 37897)

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

Eugene Meehan, Q.C.
Telephone: (613) 695-8855 Ext: 101
FAX: (613) 695-8580
emeehan@supremeadvocacy.ca

Ottawa Agent for the Intervener, Council of Canadian Administrative Tribunals
(in 37748, 37896 & 37897)

NATIONAL ACADEMY OF ARBITRATORS
7 L'Estrange Place
Toronto, Ontario M6S 4S6

Susan L. Stewart
Tel: (416) 531-3736
Fax: (416) 604-2897
sstewart@idirect.ca

Counsel for the Intervener,
National Academy of Arbitrators
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener,
National Academy of Arbitrators
(in 37748, 37896 & 37897)

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
linda.rothstein@paliareroland.com

Counsel for the Interveners, Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec (in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Interveners, Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec (in 37748, 37896 & 37897)

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
bill@shoresjardine.com

Counsel for the Intervener, National Association of Pharmacy Regulatory Authorities (in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener, National Association of Pharmacy Regulatory Authorities (in 37748, 37896 & 37897)

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

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

Counsel for the Intervener,
Queen's Prison Law Clinic
(in 37748, 37896 & 37897)

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

Maxine Vincelette
Phone: (613) 702-5561
Fax: (613) 702-5661
mvincelette@powerlaw.ca

Ottawa Agent for the Intervener,
Queen's Prison Law Clinic
(in 37748, 37896 & 37897)

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

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

Counsel for the Intervener,
Advocates for the Rule of Law
(in 37748, 37896 & 37897)

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

Darius Bossé
Phone: (613) 702-5566
Fax: (613) 702-5666
dbosse@powerlaw.ca

Ottawa Agent for the Intervener,
Advocates for the Rule of Law
(in 37748, 37896 & 37897)

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

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

Counsel for the Intervener,
Parkdale Community Legal Services
(in 37748)

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

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

Ottawa Agent for the Intervener, Parkdale Community Legal Services
(in 37748)

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
bruno.gelinas.faucher@gmail.com

Counsel for the Intervener,
Cambridge Comparative Administrative Law Forum
(in 37748, 37896 & 37897)

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

Maxine Vincelette
Phone: (613) 702-5561
Fax: (613) 702-5661
mvincelette@powerlaw.ca

Ottawa Agent for the Intervener,
Cambridge Comparative Administrative Law Forum
(in 37748, 37896 & 37897)

CAZA SAIKALEY LLP
220 avenue Laurier Ouest
Ottawa, ON K1P 5Z9

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

Counsel for the Interveners,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Interveners,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
(in 37748, 37896 & 37897)

STEWART MCKELVEY
65 Grafton Street
P.O. Box 2140, Station Central
Charlottetown, PE C1A 8B9

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

Counsel for the Intervener,
Canadian Bar Association
(in 37748, 37896 & 37897)

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

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 563-9869
guy.regimbald@gowlingwlg.com

Ottawa Agent for the Intervener,
Canadian Bar Association
(in 37748, 37896 & 37897)

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

Anthony Navaneelan
Audrey Macklin
Tel: (416) 977-8111 Ext: 7181
Fax: (416) 977-5567
navanea@lao.on.ca

Counsel for the Intervener,
Canadian Association of Refugee Lawyers
(in 37748)

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

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

Ottawa Agent for the Intervener,
Canadian Association of Refugee Lawyers
(in 37748)

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

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

Counsel for the Intervener,
Community and Legal Aid Service Programme
(in 37748)

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

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

Ottawa Agent for the Intervener,
Community and Legal Aid Service Programme
(in 37748)

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

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

Counsel for the Interveners,
Association Québécoise des avocats et avocates en droit de l'immigration
(in 37748)

HAMEED LAW
43 Florence Street
Ottawa, ON K2P 0W6

Yavar Hameed
Tel: (613) 232-2688, ext. 200
Fax: (613) 232-2680
yhameed@hf-law.ca

Ottawa Agent for the Interveners,
Association Québécoise des avocats et avocates en droit de l'immigration
(in 37748)

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

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

Counsel for the Intervener,
First Nations Child and Family Caring Society of Canada
(in 37748, 37896 & 37897)

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

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

Ottawa Agent for the Intervener,
First Nations Child and Family Caring Society of Canada
(in 37748, 37896 & 37897)

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

J. Thomas Curry
Sam Johansen
Tel: (416) 865-3096
Fax: (416) 865-9010
tcurry@litigate.com

Counsel for the Interveners,
Association of Canadian Advertisers and the Alliance of Canadian Cinema, Television and Radio Artists
(in 37896 & 37897)

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

Maxine Vincelette
Phone: (613) 702-5561
Fax: (613) 702-5661
mvincelette@powerlaw.ca

Ottawa Agent for the Interveners,
Association of Canadian Advertisers and the Alliance of Canadian Cinema, Television and Radio Artists
(in 37896 & 37897)

FASKEN MARTINEAU DUMOULIN LLP
Bureau 3700, C.P. 242
800, Place Victoria
Montréal, QC H4Z 1E9

Christian Leblanc
Michael Shortt
Tel: (514) 397-7545
Fax: (514) 397-7600
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.
(in 37896)

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

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

Ottawa Agent 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.
(in 37896)

INDEX

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.[1] Applying a high

---

[1]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.[2]

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.[3] 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.[4] 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.[5]

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,

---

[2] 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

[3] See, for example, the discussion in *Re-Thinking Administrative Law*, supra note 2 at 37-40.

[4] *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.

[5] *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.[6]

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.[7] 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

---

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

[7] *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."[8]

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.[9] In this context, once it is recognized that "courts do not have a monopoly on deciding all questions of law"[10], 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 it power as the legislature intended) from turning into judicial power aimed at directing the tribunal to acts 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

---

[8] 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.

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

[10] *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.[11]

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."[12]

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

---

[11] 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.

[12] *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*[13] and *Conway*,[14] 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.[15] 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

---

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

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

[15] 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.[16]

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.[17] 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),[18] making discretionary orders,[19] fact finding,[20] or applying general legal principles within their adjudicative context.[21]

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.[22]

---

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

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

[18] *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.

[19] *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 8.

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

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

[22] *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"[23] appeal language at issue in *Tervita*,[24] and the equally "unusual" system of concurrent jurisdiction at issue in *Rogers*.[25]

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,[26] 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.[27]

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

---

[23] *Edmonton (City), supra* note 4 at para. 34.

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

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

[26] *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.

[27] 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*."[28] 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.[29] 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.[30] *Dunsmuir*'s treatment of jurisdictional questions[31] 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.[32] 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.

---

[28] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 41.

[29] 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*".)

[30] *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.

[31] *Dunsmuir*, *supra* note 4 at para. 59.

[32] *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*[33] 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.[34] 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.[35]

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

---

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

[34] *Pezim, supra* note 7; *Khosa, supra* note 4; *Canadian Human Rights Commission, supra* note 28 at para. 50.

[35] 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

CASE LAW	PARAGRAPH REFERENCE
Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, [2011] 3 SCR 654	19, 22
Association of Justice Counsel v. Canada (Attorney General), [2017] 2 SCR 456	19
Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 SCR 1722	8
Bell Canada v. Canadian Telephone Employees Association, [2003] 1 SCR 884	17
British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority, [2016] 1 SCR 587	19
Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31	11, 24, 28
Canada (Citizenship and Immigration) v. Khosa, [2009] 1 SCR 339	5, 28
Crevier v. Attorney General of Quebec, [1981] 2 SCR 220	27
CUPE v NB Liquor Corporation, [1979] 2 SCR 227	4, 24, 26
CUPE v. Ontario (Minister of Labour), [2003] 1 SCR 539	5
Delta Air Lines Inc. v. Lukács, 2018 SCC 2	19
Dunsmuir v. New Brunswick, [2008] 1 SCR 190	1, 2, 5, 10, 13, 19, 23, 25
Edmonton (City) v. Edmonton East (Capilano) Shipping Centres Ltd., [2016] 2 SCR 293	5, 21, 22
Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City), 2015 ABCA 85	22
Lake v. Canada (Minister of Justice), [2008] 1 SCR 761	18
McLean v. British Columbia (Securities Commission), [2013] 3 SCR 895	10, 20
National Corn Growers Assn. v. Canada (Import tribunal), [1990] 2 SCR 1324	9
Nolan v. Kerry (Canada) Inc., [2009] 2 SCR 678	11
Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals, [2011] 3 SCR 616	19, 23
Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] 2 SCR 504	15

McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law (1999) 12 CJALP 171	9
Paul Weiler, "The 'Slippery Slope' of Judicial Intervention: The Supreme Court and Canadian Labour Relations (1950-1970)" (1971) 9 OHLJ 1	4