

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

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION
Intervener (Rule 22(2)(c)(iii))

- and -

ATTORNEY GENERAL OF ONTARIO et al.

Interveners

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici Curiae

[Complete Style of Cause shown on next page]

JOINT FACTUM OF THE APPELLANTS
BELL CANADA ET AL and NATIONAL FOOTBALL LEAGUE ET AL
IN REPLY TO THE *AMICI CURIAE*

(Pursuant to the Order of Karakatsanis J. dated September 24, 2018)

MCCARTHY TÉTRAULT LLP

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

Steven G. Mason (smason@mccarthy.ca)
Brandon Kain (bkain@mccarthy.ca)
Joanna Nairn (jnairn@mccarthy.ca)
Richard Lizius (rlizius@mccarthy.ca)
James S.S. Holtom (jholtom@mccarthy.ca)

Tel: (416) 601-8200
FAX: (416) 868-0673

Counsel for the Appellants, Bell Canada, Bell
Media Inc., National Football League, NFL
International LLC and NFL Productions LLC

GOWLING WLG (CANADA) LLP

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

Jeff Beedell (jeff.beedell@gowlingwlg.com)

Tel: (613) 786-0171
FAX: (613) 563-9869

Ottawa Agent for Counsel to the Appellants

[Complete Style of Cause]

SCC File No. 37896

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Appellants

- and -

ATTORNEY GENERAL OF CANADA

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CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

- and -

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

Interveners

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici Curiae

AND BETWEEN:

**NATIONAL FOOTBALL LEAGUE and NFL INTERNATIONAL LLC AND NFL
PRODUCTIONS LLC**

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

- and -

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

Interveners

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici Curiae

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

AND TO:

ATTORNEY GENERAL OF CANADA
Department of Justice
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice
National Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Per: Michael H. Morris
(michael.morris@justice.gc.ca)
Marianne Zorić
(marianne.zoric@justice.gc.ca)
John Provart (john.provart@justice.gc.ca)

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

Tel.: (647) 256-7539 / (647) 256-7318 /
(647) (256)-0784
Fax: (647) 256-1160

**Ottawa Agent for the Appellant, Minister of
Citizenship and Immigration**

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

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

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

Hadayt Nazami (hadayt@rogers.com)

Bijon Roy (broy@champlaw.ca)

Tel.: (416) 653-9964 Ext. 226
Fax: (416) 653-1036

Tel.: (613) 237-4740
Fax: (613) 232-2680

**Counsel for the Respondent (37748),
Alexander Vavilov**

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

DEPARTMENT OF JUSTICE CANADA
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Michael H. Morris

(michael.morris@justice.gc.ca)

Ian Demers (ian.demers@justice.gc.ca)

Laura Tausky (laura.tausky@justice.gc.ca)

Tel.: (647) 256-7539

Fax: (416) 973-0809

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

DEPARTMENT OF JUSTICE CANADA
Civil Litigation Branch, East Tower
234 Wellington Street
Ottawa, ON K1A 0H8

Christopher M. Rupar

(christopher.rupar@justice.gc.ca)

Tel.: (613) 941-2351

Fax: (613) 954-1920

**Ottawa Agent for the Respondent, Attorney
General of Canada**

McGILL UNIVERSITY

3644 Peel Street

Old Chancellor Day Hall

Faculty of Law, Room 20

Montreal, QC H3A 1W9

Daniel Jutras, Ad.E. (daniel.jutras@mcgill.ca)

Edward B chard Torres

(edward.becharde@torres@gmail.com)

Tel.: (514) 398-1453

Fax: (514) 398-4659

Amicus Curiae

SUPREME ADVOCACY LLP

340 Gilmour Street

Suite 100

Ottawa, ON K2P 0R3

Marie-France Major

(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 Ext. 102

Fax: (613) 695-8580

Ottawa Agent for the *Amici Curiae*

IRVING MITCHELL KALICHMAN LLP

Alexis Nihon Plaza, Tower 2

3500 De Maisonneuve Blvd. West

Suite 3500

Montreal, QC H3Z 3C1

Audrey Boctor (aboctor@imk.ca)

Olga Redko (oredko@imk.ca)

Tel.: (514) 934-7737

Fax: (514) 935-2999

Amicus Curiae

**CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**

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

Crystal Hulley-Craig (crystal.hulley@crtc.gc.ca)

Tel.: (819) 956-2095

Fax: (819) 953-0589

**Counsel for the Intervener, Canadian Radio-
Television and Telecommunications
Commission**

McCARTHY TÉTRAULT LLP

745 Thurlow Street
Suite 2400
Vancouver, BC V6E 0C5

Adam Goldenberg (agoldenberg@mccarthy.ca)

Robyn Gifford (rgifford@mccarthy.ca)

Asher Honickman

(ahonickman@matthewsabogado.com)

Tel.: (604) 643-7100

Fax: (604) 643-7900

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

JURISTES POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé (dbosse@juristespowerlaw.ca)

Tel.: (613) 702-5560

Fax: (613) 702-5560

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

ATTORNEY GENERAL FOR ONTARIO

Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Sara Blake (sara.blake@ontario.ca)

Judie Im (judie.im@ontario.ca)

Tel.: (416) 326-4155 / (416) 326-3287

Fax: (416) 326-4015

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

SUPREME ADVOCACY LLP

340 Gilmour Street
Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102

Fax: (613) 695-8580

**Ottawa Agent for the Intervener, Attorney
General for Ontario**

MINISTÈRE DE LA JUSTICE DU QUÉBEC
1200, Route de l'Église, 3e étage
Québec, Québec G1V 4M1

Me Stéphane Rochette
(stephane.rochette@justice.gouv.qc.ca)

Tél.: (418) 643-6552 poste 20734
Fax: (418) 643-9749

Counsel for the Intervener, Attorney General of Quebec

NOËL & ASSOCIÉS, s.e.n.c.r.l.
111, rue Champlain
Gatineau, Québec J8X 3R1

Me Sylvie Labbé (s.labbé@noelassociés.com)

Tél.: (819) 771-7393, poste 431
Fax: (819) 771-5397

Ottawa Agent for the Intervener, Attorney General of Quebec

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street
Victoria, BC V8W 9J7

Micah Rankin (micah.rankin@gov.bc.ca)

Tel.: (250) 387-3129
Fax: (250) 356-9154

Counsel for the Intervener, Attorney General of British Columbia

MICHAEL SOBKIN
Barrister and Solicitor
331 Somerset Street W.
Ottawa, ON K2P 0J7

Michael Sobkin (msobkin@sympatico.ca)

Tel.: (613) 282-1712
Fax: (613) 288-2896

Ottawa Agent for the Intervener, Attorney General of British Columbia

ATTORNEY GENERAL OF SASKATCHEWAN
The Deputy Minister of Justice & Deputy Attorney General
900 – 1874 Scarth Street
Regina, SK S4P 4B3

Laura Mazenc (laura.mazenc@gov.sk.ca)
Kyle McCreary

Tel.: (306) 787-6272
Fax: (306) 787-0581

Counsel for the Intervener, Attorney General of Saskatchewan

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

D. Lynne Watt (lynne.watt@gowlingwlg.com)

Tel.: (613) 786-8695
Fax: (613) 788-3509

Ottawa Agent for the Intervener, Attorney General of Saskatchewan

NELLIGAN O'BRIEN PAYNE LLP

50 O'Connor Street
Suite 1500
Ottawa, ON K1P 6L2

Christopher Rootham

(christopher.rootham@nelligan.ca)

Michael Ryan

Tel.: (613) 231-8080

Fax: (613) 238-2098

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

THE LAW OFFICE OF JAMIE LIEW

39 Fern Avenue
Ottawa, ON K1Y 3S2

Jamie Liew (jamie.liew@uottawa.ca)

Gerald Heckman

(gerald.heckman@umanitoba.ca)

Jean Lash (lashj@lao.on.ca)

Tel.: (613) 808-5592

Fax: (888) 843-3413

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

**COMMUNITY LEGAL SERVICES OF
OTTAWA**

1355 Bank Street, Suite 406
Ottawa, ON

Jaime Lefebvre (lefebvi@lao.on.ca)

Tel. : (613) 733-0140

Fax : (613) 733-0401

**Ottawa Agent for the Intervener, Canadian
Council for Refugees**

**ADVOCACY CENTRE FOR TENANTS
ONTARIO**

55 University Avenue
Suite 1500
Toronto, ON M5J 2H7

Karen Andrews (andrews@lao.on.ca)

Tel.: (416) 597-5855

Fax: (416) 597-5821

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

SUPREME ADVOCACY LLP

340 Gilmour Street
Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 Ext. 102

Fax: (613) 695-8580

**Ottawa Agent for the Intervener, Advocacy
Centre for Tenants Ontario**

ONTARIO SECURITIES COMMISSION

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

Matthew H. Britton (mbritton@osc.gov.on.ca)

Jennifer M. Lynch (jlynch@osc.gov.on.ca)

Paloma Ellard (pellard@osc.gov.on.ca)

Tel.: (416) 593-8294 / (416) 593-8152 / (416) 595-8906

Fax: (416) 593-8231

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

-and-

BRITISH COLUMBIA SECURITIES COMMISSION

701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, BC V7Y 1L2

David Hainey (dhainey@bcsc.bc.ca)

Tel.: (604) 899-6505

Fax: (604) 899-6506

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

-and-

ALBERTA SECURITIES COMMISSION

Suite 600
250 – 5th Street SW
Calgary, AB T2P 0R4

Don Young (don.young@asc.ca)

Tel.: (403) 297-2642

Fax: (403) 297-6156

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

CONWAY BAXTER WILSON LLP

411 Roosevelt Avenue
Suite 400
Ottawa, ON K2A 3X9

Benjamin Grant (bgrant@conway.pro)

Tel.: (613) 780-2008

Fax: (613) 688-0271

Ottawa Agent for the Joint Interveners, Ontario Securities Commission, British Columbia Securities Commission and Alberta Securities Commission

ECOJUSTICE CANADA SOCIETY

777 Bay Street, Suite 1910
PO Box 106
Toronto, ON M5G 2C8

Laura Bowman (lbowman@ecojustice.ca)
Bronwyn Roe (broe@ecojustice.ca)

Tel: (416) 368-7533
Fax: (416) 363-2746

Counsel for the Intervener, Ecojustice Canada Society

SUPREME LAW GROUP

275 Slater Street
Suite 900
Ottawa, ON K1P 5H9

Moira Dillon (mdillon@supremelawgroup.ca)

Tel.: (613) 691-1224
Fax: (613) 691-1338

Ottawa Agent for the Intervener, Ecojustice Canada Society

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO)

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

Michelle Alton (michelle.alton@wst.gov.on.ca)
David Corbett (david.corbett@wst.gov.on.ca)
Kayla Seyler (kayla.seyler@wst.gov.on.ca)
Ana Rodriguez (ana.rodriguez@wst.gov.on.ca)

Tel.: (416) 314-8800
Fax: (416) 326-5164

Counsel for the Interveners, 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)

SUPREME ADVOCACY LLP

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

Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 Ext. 102
Fax: (613) 695-8580

Ottawa Agent for the Interveners, 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)

FASKEN MARTINEAU DUMOULIN LLP
2900 – 550 Burrard Street
Vancouver, BC V6C 0A3

Gavin R. Cameron (gcameron@fasken.com)
Tom Posyniak (tposyniak@fasken.com)

Tel.: (604) 631-3131
Fax: (604) 631-3232

**Counsel for the Intervener, British Columbia
International Commercial Arbitration Centre
Foundation**

LAX O’SULLIVAN LISUS GOTTLIEB LLP
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

Terrence J. O’Sullivan
(tosullivan@counsel-toronto.com)
Paul Michell (pmichell@counsel-toronto.com)
James Renihan (jrenihan@counsel-toronto.com)

Tel.: (416) 644-5359
Fax: (416) 598-3730

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

SUSAN L. STEWART
7 L’Estrange Place
Toronto, ON M6S 4S6

Susan L. Stewart (ssewart@idirect.ca)

Tel.: (416) 531-3736
Fax: (416) 604-2897

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

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

Sophie Arseneault (sarseneault@fasken.com)

Tel.: (613) 236-3882
Fax: (613) 230-6423

**Ottawa Agent for the Intervener, British
Columbia International Commercial
Arbitration Centre Foundation**

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

Eugene Meehan, Q.C.
(emeehan@supremeadvocacy.ca)
Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855
Fax: (613) 695-8580

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

CAZA SAIKALEY LLP
222 Laurier Avenue West, Suite 350
Ottawa, ON K1P 5Z9

Alyssa Tomkins (atomkins@plaideurs.ca)

Tel.: (613) 564-8269
Fax: (613) 565-2087

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

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

Linda R. Rothstein
(linda.rothstein@paliareroland.com)
Michael Fenrick
(michael.fenrick@paliareroland.com)

Tel.: (416) 646-4327
Fax: (416) 646-4301

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

-and-

RAE CHRISTEN JEFFRIES LLP
70 University Avenue, Suite 320
Toronto, ON M5J 2M4

Angela E. Rae (angela@rcjlaw.ca)
Anne Marie Heenan (annemarie@rcjlaw.ca)

Tel.: (416) 743-7153
Fax: 416.595-7321

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

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

Steven M. Barrett
(sbarrett@goldblattpartners.com)
Ethan Poskanzer
Daniel Sheppard

Tel.: (416) 977-6422
Fax: (416) 591-7333

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

CAZA SAIKALEY LLP
222 Laurier Avenue West
Suite 350
Ottawa, ON K1P 5Z9

Alyssa Tomkins (atomkins@plaideurs.ca)

Tel.: (613) 565-2202
Fax: (613) 565-2087

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

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

Colleen Bauman
(cbauman@goldblattpartners.com)

Tel.: (613) 482-2463
Fax: (613) 235-3041

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

SHORES JARDINE LLP

Suite 2250, 10104 – 103 Avenue
Edmonton, AB T5J 0H8

William W. Shores, Q.C.

(bill@shoresjardine.com)

Kirk N. Lambrecht, Q.C.

(kirk@shoresjardine.com)

Tel.: (780) 448-9275

Fax: (780) 423-0163

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

SUPREME ADVOCACY LLP

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

Marie-France Major

(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 Ext. 102

Fax: (613) 695-8580

**Ottawa Agent for the Intervener, National
Association Of Pharmacy Regulatory
Authorities**

STOCKWOODS LLP

TD North Tower, Suite 4130
77 King Street West
Toronto, ON M5K 1H1

Brendan van Niejenhuis

(BrendanVN@stockwoods.ca)

Andrea Gonsalves (AndreaG@stockwoods.ca)

Tel.: (416) 593-2487 / (416) 593-3497

Fax: (416) 593-9345

**Counsel for the Intervener, Queen's Prison Law
Project**

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette (mvincelette@powerlaw.ca)

Tel.: (613) 702-5573

Fax: (613) 702-5573

**Ottawa Agent for the Intervener, Queen's
Prison Law Project**

**PARKDALE COMMUNITY LEGAL
SERVICES**

1266 Queen Street West
Toronto, ON M6K 1L3

Toni Schweitzer (schweit@lao.on.ca)

Tel.: (416) 531-2411

Fax: (416) 531-0885

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

**COMMUNITY LEGAL SERVICES OF
OTTAWA-SOUTH OFFICE**

406 – 1355 Bank Street
Ottawa, ON K1H 8K7

Elaine Simon (simone@lao.on.ca)

Tel.: (613) 733-0140

Fax: (613) 733-0401

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

-and-

POULTON LAW OFFICE PROFESSIONAL CORPORATION

596 St. Clair Avenue West, Suite 6
Toronto, ON M6C 1A6

Ronald Poulton (ronald@poultonlaw.com)

Tel.: (416) 653-9900
Fax: (416) 653-1036

**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 Gelinias-Faucher
(bruno.gelinias.faucher@gmail.com)
Paul Warchuk

Tel.: (737) 838-3023 Ext. 44
Fax: (514) 565-9877

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

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

J. Thomas Curry (tcurry@litigate.com)
Sam Johansen (sjohansen@litigate.com)

Tel.: (416) 865-9500
Fax: (416) 865-9010

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

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

Maxine Vincelette (mvincelette@powerlaw.ca)

Tel.: (613) 702-5573
Fax: (613) 702-5573

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

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

Maxine Vincelette (mvincelette@powerlaw.ca)

Tel.: (613) 702-5573
Fax: (613) 702-5573

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

FASKEN MARTINEAU DuMOULIN LLP
800 Victoria Square
Suite 3700
Montréal, QC H4Z 1E9

Christian Leblanc (cleblanc@fasken.com)
Michael Shortt (mshortt@fasken.com)

Tel.: (514) 397-7400
Fax: (514) 397-7600

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

CAZA SAIKALEY LLP
220 Laurier Avenue West
Suite 350
Ottawa, ON K1P 5Z9

Alyssa Tomkins (ATomkins@plaideurs.ca)
James Plotkin (JPlotkin@plaideurs.ca)

Tel.: (613) 565-2292
Fax: (613) 565-2087

Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)

FASKEN MARTINEAU DuMOULIN LLP
55 Metcalfe Street
Suite 1300
Ottawa, ON K1P 6L5

Sophie Arseneault (sarseneault@fasken.com)

Tel.: (613) 696-6904
Fax: (613) 230-6423

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

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)
University of Ottawa
Faculty of Law, CML Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

David Fewer (dfewer@uottawa.ca)

Tel.: (613) 562-5800 Ext. 2558
Fax: (613) 562-5417

Ottawa Agent for the Intervener, CIPPIC

STEWART McKELVEY
65 Grafton Street
P.O. Box 2140, Station Central
Charlottetown, PE C1A 1K8

Jonathan M. Coady
(jcoady@stewartmckelvey.com)
Justin L. Milne (jmilne@stewartmckelvey.com)

Tel.: (902) 629-4520
Fax: (902) 566-5283

Counsel for the Intervener, Canadian Bar Association

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

Guy Régimbald
(guy.regimbald@gowlingwlg.com)

Tel.: (613) 786-0197
Fax: (613) 788-3559

Ottawa Agent for the Intervener, Canadian Bar Association

**CENTRE FOR CRIMINOLOGY &
SOCIOLEGAL STUDIES**
University Of Toronto
78 Queen's Park
Toronto, ON M5S 2C5

Audrey Macklin (audrey.macklin@utoronto.ca)

Tel.: (416) 978-7124 Ext. 246
Fax: (416) 978-4195

Counsel for the Intervener, Canadian Association of Refugee Lawyers

-and-

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

Anthony Navaneelan (navanea@lao.on.ca)
Audrey Macklin (audrey.macklin@utoronto.ca)

Tel.: (416) 977-8111 ext. 7181
Fax: (416) 977-5567

Counsel for the Intervener, Canadian Association of Refugee Lawyers

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

Nicholas Hersh (hershni@lao.on.ca)

Tel.: (613) 596-1641
Fax: (613) 596-3364

Ottawa Agent for the Intervener, Canadian Association of Refugee Lawyers

COMMUNITY & LEGAL AID SERVICES PROGRAMME

York University, Osgoode Hall Law School
Ignat Kaneff Building, 4700 Keele Street
Toronto, ON M3J 1P3

David Cote (david@ssblaw.ca)
Subodh Bharati (sbharati@osgoode.yorku.ca)

Tel.: (416) 645-8855 / (416) 736-5029
Fax: (416) 645-8856 / (416) 736-5564

Counsel for the Intervener, Community & Legal Aid Services Programme

SUPREME ADVOCACY LLP

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

Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 Ext. 102
Fax: (613) 695-8580

Ottawa Agent for the Intervener, Community & Legal Aid Services Programme

HADEKEL SHAMS s.e.n.c.r.l.

305 rue Bellechasse est, bureau 400A
Montréal, QC H2S 1W9

Peter Shams (peter@hadekelshams.ca)
Guillaume Cliche-Rivard
(g.cliche.rivard@dmavocats.com)
Claudia Andrea Molina
(molina@cabinetmolina.com)
David Berger (david.berger@cilaw.ca)

Tel.: (514) 439-0800
Fax: (514) 439-0798

Counsel for the Intervener, Association québécoise des avocats et avocates en droit de l'immigration

HAMEED LAW

43 Florence Street
Ottawa, ON K2P 0W6

Yavar Hameed (yhameed@hameedlaw.ca)

Tel.: (613) 232-2688
Fax: (613) 232-2680

Ottawa Agent for the Intervener, Association québécoise des avocats et avocates en droit de l'immigration

CLARKE CHILD & FAMILY LAW

36 Toronto Street, Suite 950
Toronto, ON M5C 2C5

Sarah Clarke (sarah@childandfamilylaw.ca)

Tel.: (416) 260-3030
Fax: (416) 689-3286

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

STIKEMAN ELLIOTT LLP

50 O'Connor Street, Suite 1600
Ottawa, ON K1P 6L2

Nicholas McHaffie (nmchaffie@stikeman.com)

Tel.: (613) 566-0546
Fax: (613) 230-8877

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

-and-

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

Nicholas McHaffie (nmchaffie@stikeman.com)

Tel. : (613) 566-0546
Fax: (613) 230-8877

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

-and-

CONWAY BAXTER WILSON LLP
411 Roosevelt Ave, Suite 400
Ottawa, ON K2A 3X9

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

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

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STATEMENT OF ARGUMENT IN REPLY TO THE *AMICI CURIAE*

1. These submissions respond to the *amici curiae*. In brief, the appellants make four submissions: **First**, even accepting the *amici*'s proposed framework, correctness review applies to these appeals. **Second**, the *amici*'s institutional design cannot supersede Canada's constitutional design. **Third**, contrary to the *amici*'s submissions, true questions of jurisdiction exist and are a necessary feature of administrative law – the category of true questions of jurisdiction cannot be abolished. **Fourth**, even if deference is warranted, according to the *amici*'s proposed framework, the CRTC Instruments are unreasonable and must be set aside.

1. On Any Framework, Correctness Applies

2. According to the *amici*'s proposed framework, derogating from their proposed default rule of deference is required in a number of instances based on the application of constitutional principles and clear markers of legislative intent. Several of these apply to these appeals, including a statutory right of appeal on questions of law or jurisdiction, the need to resolve the jurisdictional boundary between the CRTC and the Governor in Council in relation to programs, and persistent legal discord leading to incoherence in the law.

A. Statutory Rights of Appeal Require Correctness Review

3. The appellants agree with the *amici* that a statutory right of appeal is a clear indicator that the legislator intended non-deferential review.¹ Where the legislator has provided for a right of appeal, the constitutional principles of legislative supremacy and the rule of law, and respect for the constitutional separation of powers, are all aligned and require correctness review.

4. As an archetypal example of a statutory appeal right attracting correctness review, the *amici* point to the appeal provision at issue in *Edmonton East*, which created an appeal on questions of law or jurisdiction with leave of the Alberta Court of Queen's Bench.² Such a

¹ Factum of the *Amici Curiae*, ¶ 8, 105 (“**Amici Factum**”).

² *Municipal Government Act*, [R.S.A. 2000, c. M-26](#), ss. 470(1), (5), as they read at that time.

statutory appeal right singles out substantive types of questions for scrutiny and sends a clear signal that these questions are to be treated differently, specifically by review for correctness.³

5. These appeals were brought under an even stronger appeal provision than the one at issue in *Edmonton East*.⁴ Under s. 31(1) of the *Broadcasting Act*, CRTC decisions are stated to be “final and conclusive”, *except* for certain policy questions which are appealable to the Governor in Council under s. 28(1), and *except* for questions of law or jurisdiction, which are appealable to the Federal Court of Appeal with leave under s. 31(2). The scheme of the *Broadcasting Act* dissuades court review, *except* for matters of law or jurisdiction which are explicitly contemplated. Subsection 31(2) is an “unequivocal signal” that the legislator intended correctness review.

6. This point was forcefully made in *Bell Canada v. 7265921 Canada Ltd.*, where Nadon J.A., speaking for himself, held that s. 31(2) required correctness review on appeal:

In my opinion, *it should be self-evident that such a question should be decided on the standard of correctness*, more so considering that Parliament has clearly said, by way of subsection 31(2) of the *Broadcasting Act*, that appeals on questions of law or jurisdiction are to be taken to this Court upon leave. Thus, Parliament has sent an *unequivocal signal* that questions of law or of jurisdiction, arising from decisions made by the CRTC, are to be determined by this Court, which, in my view, can only mean on a standard of correctness.⁵

7. This Court’s current deferential posture on statutory appeals renders the legislator’s intent nugatory.⁶ Entirely apart from s. 31(2) of the *Broadcasting Act*, s. 28(1)(c) of the *Federal Courts Act* already empowers the Federal Court of Appeal to judicially review CRTC decisions on all issues without leave. By singling out questions of law and jurisdiction in s. 31(2), Parliament manifested its intention to treat these questions differently. To give effect to s. 31(2), the CRTC’s interpretation of s. 9(1)(h) must be reviewed for correctness.⁷

³ *Amici Factum*, ¶ 109.

⁴ *Bell Factum*, ¶ 86-87.

⁵ *Bell Canada v. 7265921 Canada Ltd.*, [2018 FCA 174](#), ¶ 190 (*per* Nadon J.A., dissenting on this point).

⁶ See also *Amici Factum*, ¶ 108.

⁷ See also *Bell Factum*, ¶ 84-87.

B. Resolving Jurisdictional Boundaries Requires Correctness Review

8. The appellants also agree with the *amici* that resolving the jurisdictional boundary between competing administrators requires correctness review. Otherwise, Canadians may not know where to turn for redress, or may face contradictory and incoherent legal rules. Both possibilities are antithetical to the rule of law.⁸

9. In these appeals, two administrators vie for the power to compel the broadcast of individual programs: the CRTC and the Governor in Council. Under s. 26(2) of the *Broadcasting Act*, Parliament assigned that power to the Governor in Council, to be used only in circumstances of urgent importance. The CRTC has attempted to usurp that power by reading it into s. 9(1)(h).

10. This jurisdictional overlap raises the spectres of redress in two *fora* and contradictory and incoherent orders. Resolving the jurisdictional boundary between the CRTC and Governor in Council requires that the CRTC's interpretation of s. 9(1)(h) be reviewed for correctness.⁹

C. Persistent Legal Discord Requires Correctness Review

11. Lastly, the appellants also agree with the *amici* that persistent legal discord offends the rule of law and requires correctness review in these appeals.¹⁰

12. Over the course of three decades, the CRTC promulgated multiple sets of regulations and issued many instruments dealing with the meaning of “programming service”. As the NFL Factum shows, throughout, the CRTC's definition has alternated back-and-forth between “a program” and the “entire output of a television channel”.¹¹

13. In **1997**, the CRTC used its power under s. 10 of the *Broadcasting Act* to promulgate the *BD Regulations*, which was formerly used to regulate simultaneous substitution,¹² and

⁸ *Amici Factum*, ¶ 83-84.

⁹ See also Bell Factum, ¶ 5, 64-68, 82; NFL Factum, ¶ 10, 15, 21, 48-59.

¹⁰ *Amici Factum*, ¶ 85.

¹¹ NFL Factum, ¶ 34, 61-62.

¹² Specifically ss. 38 and 51, both now repealed.

defined “programming service” to mean “a program”, a definition that still exists to this day.

14. In **2005**, when called upon to decide whether Star Choice had violated s. 7 of the *BD Regulations* by compiling individual programs into a single channel, the CRTC held that “programming service” meant the “entire output of a television channel”, and not a program, despite the definition in those very regulations.¹³

15. In **2015**, the CRTC promulgated new regulations governing simultaneous substitution, the *Sim Sub Regulations*, which re-invoked by reference the single-program definition in the *BD Regulations*. That same year, the CRTC issued broadcasting instruments related to simultaneous substitution that invoke the “entire output of a television channel” definition.¹⁴

16. In **2016**, the CRTC issued the CRTC Instruments – the objects of these appeals – targeting only the Super Bowl, reverting to the single-program definition.

17. In **2017**, the CRTC issued a number of broadcasting instruments under s. 9(1)(h) that revert back to the “entire output of a television channel” definition.¹⁵

18. Adding to the confusion are *five* appellate decisions from *four* different decades (two predating the *BD Regulations*), that split in their usage of “programming service”, including one decision of this Court that adopts the “entire output of a television channel” definition.¹⁶

19. Citing the dissent in *Wilson*, the *amici* argue that correctness is warranted only when there is lingering disagreement and the legislator could only have intended that it bear a single meaning. They argue that “a single conflicting but reasonable decision does not necessarily

¹³ *Distribution of omnibus high definition channels by Star Choice and Cancom – Broadcasting Decision CRTC 2005-195*, ¶26-28.

¹⁴ *Simultaneous substitution errors*, [Broadcasting Information Bulletin CRTC 2015-329](#), ¶13, 3d bullet, Joint Record of the Appellants (“**JR**”) Tab 19.

¹⁵ See, e.g., *Applications for the renewal of services with mandatory distribution on the basic service pursuant to section 9(1)(h)*, [Broadcasting Notice of Consultation CRTC 2017-365](#).

¹⁶ *Refrere Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012 SCC 68](#); *Cathay International Television Inc. v. C.R.T.C.*, 1987 CarswellNat 919 (F.C.A.), ¶3; JA Tab 2; *Country Music Television v. Canada (C.R.T.C.)*, [1994] F.C.J. No. 1957 (C.A.), ¶3, JA Tab 5; *Vidéotron Ltée v. Netstar Communications*, [2004 FCA 299](#), ¶16.

undermine respect for the rule of law”.¹⁷ However, with respect, the *Wilson* dissent held the opposite: “it does not matter whether one or one hundred decisions have been rendered that conflict...[a]s long as there is one conflicting but reasonable decision, its very existence undermines the rule of law”.¹⁸ But either test for correctness is met. The multi-decade discord about the meaning of “programming service” necessitates correctness review.¹⁹

2. Institutional Design Cannot Supersede Canada’s Constitutional Design

20. The bulk of the *amici*’s submissions propose a new theoretical basis for deference: institutional design. They do so by asserting a default rule of deference flowing from the mere fact that the legislator has vested decision-making authority in an administrator.

21. In response, the appellants make two submissions: *First*, and most fundamentally, the mere act of delegation is not a principled basis for deference. The *amici*’s argument about *institutional* design neglects Canada’s underlying *constitutional* design. As the decades have shown, an administrative law theory unmoored from constitutional principles cannot provide stability.²⁰ *Second*, this Court and others have long held that the mere act of delegation does not displace the presumptive role of courts as the final arbiters of law.

A. Institutional Design Theory is Inconsistent with the Separation of Powers

22. Critically, the *amici*’s institutional design argument depends on the assumption that “it is no longer appropriate to characterize the relationship between courts and administrative actors as one of vertical hierarchy” since “[a]dministrative bodies...operate in parallel with the courts as part of an expanded conception of executive and legislative action.”²¹ But that assumption is fatally flawed. It cannot be reconciled with Canada’s *constitutional* design: the separation of powers.

¹⁷ *Amici* Factum, ¶ 92.

¹⁸ *Wilson v. Atomic Energy of Canada Ltd.*, [2016 SCC 29](#), ¶ 89.

¹⁹ *Reference re Secession of Quebec*, [\[1998\] 2 S.C.R. 217](#), ¶ 71.

²⁰ David Stratas, “Looking past *Dunsmuir*: Beginning Afresh”, online: <https://doubleaspect.blog/2018/03/08/looking-past-dunsmuir-beginning-afresh/>.

²¹ *Amici* Factum, ¶ 44.

23. Under the separation of powers, the legislative branch makes policy choices, incorporates them into written laws, and is accountable for public taxation and spending, the executive implements and administers those policy choices and laws, and the judiciary maintains the rule of law by acting as final and conclusive interpreter and applier of the law.²²

24. In furtherance of their constitutional role as final interpreter of the law and defender of the Constitution, judges are insulated from interference by judicial independence. Judicial independence “requires that [courts] be completely separate in authority and function from all other participants in the justice system.”²³ The institutional legitimacy of the courts as keepers of the rule of law depends on it. Executive administrators have no similar guarantee. When it comes to interpreting the law, the executive and the judiciary are simply not on an equal footing. The rule of law requires judges to retain the last word on what the law is.²⁴

25. Moreover, the *amici*’s assumption also violates legislative supremacy by allowing the executive to invade the exclusive province of the legislature to decide what powers an administrative actor has.²⁵

B. Mere Delegation Does Not Displace the Essential Role of the Courts

26. Until 2011, when *Alberta Teachers* established a presumption of deference, Canadian courts required a manifest intention on the part of the legislator before deferring on matters of law. Many of this Court’s foundational administrative law cases – *Bibeault*, *Pushpanathan*, and *Dunsmuir* itself – recognize that determining the standard of review is a search for the appropriate degree of deference, a question rooted in the separation of powers, not the application of a presumption. Indeed, as discussed below, the weight of international authority (including cases cited by the *amici*) is that delegation does not displace the court’s essential role as final arbiter of law.²⁶ The *amici* make no effort to grapple with these decisions.

²² *Ontario v. Criminal Lawyers’ Association of Ontario*, [2013 SCC 43](#), ¶ 28-29. See also *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005 SCC 49](#) at 30.

²³ *The Queen v. Bearegard*, [\[1986\] 2 S.C.R. 56](#) at 73 [Emphasis in original].

²⁴ *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), ¶ 29.

²⁵ *Ibid.*, ¶ 30; *Reference re Pan-Canadian Securities Regulation*, [2018 SCC 48](#), ¶ 53-55.

²⁶ *Corporation of the City of Enfield v. Development Assessment Committee*, [\(2000\) HCA 5](#), ¶

27. Moreover, as the *amici* point out, the presumption of deference established in *Alberta Teachers* was predicated on assumed expertise on the part of the administrator, an assumption that “does not provide a robust theoretical grounding for *requiring* courts to defer.”²⁷ The *amici* identify no authorities justifying their proposed presumption.

3. True Questions of Jurisdiction are a Necessary Feature of Administrative Law

28. The *amici* also argue that the category of true questions of jurisdiction attracting correctness review should be abolished. In support, they argue that “all questions are jurisdictional in one way or another”, and difficulties identifying such questions mean we should abandon the category altogether.²⁸ This argument should be rejected for four reasons: **First**, this category of questions is constitutionally necessary. **Second**, such questions exist and are identifiable. **Third**, international cases cited by the *amici* are unhelpful. **Fourth**, such questions transcend the administrative state, applying equally to statutory courts.

A. True Questions of Jurisdiction are Constitutionally Necessary

29. The category of true questions of jurisdiction has deep roots, playing a “crucial role” both historically and currently.²⁹ As the *amici* note, the very origin of judicial review is the correction of jurisdictional error.³⁰

30. There are certain issues that require an administrator to be correct in the sense that the courts – not the administrator – have the last word, whether as a matter of either constitutional law or legislative intent.³¹ However, reasonableness review presumes a range of outcomes any

43; *Attorney-General (NSW) v. Quin*, [1990] HCA 21, ¶ 17-18 of Brennan J’s concurrence); *O’Reilly v. Mackman*, [1983] UKHL 1 at 5; *A & Ors v. Secretary of State for the Home Department*, [2004] UKHL 56, ¶ 29; *R (ProLife Alliance) v. BBC*, [2003] UKHL 23, ¶ 75; *Chief of Defence Force v. Gaynor*, [2017] FCAFC 41, ¶ 102; *Wool Board Disestablishment Company Ltd. v. Saxmere Company Ltd.*, [2010] NZCA 513, ¶ 116.

²⁷ *Amici Factum*, ¶ 46, 50.

²⁸ *Amici Factum*, ¶ 10, 56-66.

²⁹ *Canada (C.H.R.C.) v. Canada (A.G.)*, [2018] SCC 31, ¶ 77 (*per* Côté and Rowe JJ., concurring) (“*CHRC (SCC 2018)*”).

³⁰ *Amici Factum*, ¶ 15.

³¹ *Alberta (Information and Privacy Commissioner.) v. Alberta Teachers’ Association.*, [2011] SCC 61, ¶ 94 (*per* Cromwell J., concurring) (“*ATA (SCC 2011)*”).

of which is upheld whether or not the court agrees. If true questions of jurisdiction are eliminated, and deference applies, then administrators – not courts – will have the final say on the scope of their own authority if the authority-granting provision contains a genuine ambiguity. As explained above and in the Bell Factum,³² correctness review cannot be eliminated for this category without critically undermining the rule of law and separation of powers, and radically altering the delicate balance struck in *Dunsmuir*.³³

B. True Questions of Jurisdiction Exist and are Identifiable

31. In *Guérin*, the minority judges explained that “the mere fact that this Court has not discerned a question of jurisdiction since *Dunsmuir* does not mean that such questions have ceased to exist, nor that we should be blind to one when it clearly manifests itself.”³⁴ In that case, three out of seven judges identified a true question of jurisdiction.

32. Not only have true questions of jurisdiction been identified, they are identifiable. While some judges have at times expressed doubt, prior cases acknowledge that this issue was not fully canvassed or was not squarely raised.³⁵ To that end, the appellants have proposed a principled and workable test for true questions of jurisdiction with three core elements: (1) the question goes to the root of the administrator’s authority; (2) it raises serious concerns about the rule of law; and (3) the legislator intended that the question be treated as jurisdictional.³⁶

33. Like the interpretation of s. 9(1)(h), the issue in *Guérin* – whether the arbitrator had jurisdiction to hear a complaint – satisfies the appellants’ proposed test. The issue struck at the heart of the arbitrator’s authority to act, which *Dunsmuir* explains raises serious rule of law concerns, and seven judges in three courts all agreed the question was truly jurisdictional as “a matter of either constitutional law or legislative intent”.³⁷

³² Bell Factum, ¶ 36-51.

³³ [CHRC \(SCC 2018\)](#), *supra* note 29, ¶ 77 (*per* Côté and Rowe JJ., concurring).

³⁴ *Quebec (Attorney General) v. Guérin*, [2017 SCC 42](#), ¶ 68 (“*Guérin (SCC 2017)*”).

³⁵ [ATA \(SCC 2011\)](#), *supra* note 31, ¶ 34; *CBC v. SODRAC 2003 Inc.*, [2015 SCC 57](#), ¶ 39; [Guérin \(SCC 2017\)](#), *supra* note 34, ¶ 30; [CHRC \(SCC 2018\)](#), *supra* note 29, ¶ 41.

³⁶ Bell Factum, ¶ 55.

³⁷ [Guérin \(SCC 2017\)](#), *supra* note 34, ¶ 66, 68-69 (*per* Brown and Rowe JJ, concurring), 83

C. The *Amici*'s International Cases are Unhelpful

34. In support of their argument that true questions of jurisdiction are impossible to identify, the *amici* point to cases from other common law countries – the United Kingdom, Australia, and United States of America.³⁸ However, none of these cases assists the *amici*.

35. In *Anisminic*, the House of Lords made no attempt to separate jurisdictional from non-jurisdictional errors, nor did the Law Lords describe any difficulty doing so. In Australia, “jurisdictional” errors encompass all errors of law, which are, again, reviewed for correctness. The position in both countries reduces to the conclusion that the distinction between truly jurisdictional and not is irrelevant. Correctness applies to *all* legal holdings,³⁹ including questions of true jurisdiction, just as it would to the interpretation of s. 9(1)(h).

36. The U.S. is the outlier. Only there are issues of law given any deference. But, as the intervener, Cambridge Comparative Administrative Law Forum, explains, many now openly doubt *Chevron*, the foundation beneath *Arlington*, and both cases may soon be corrected.⁴⁰

D. True Questions of Jurisdiction Apply to All Statutory Courts

37. Apart from s. 96 courts, every court in Canada is a statutory decision maker. The Federal Courts, provincial appellate courts, and provincial trial and specialty courts all derive their jurisdiction from statutes.⁴¹ Often, these courts must decide whether their “home statutes” vest them with jurisdiction over someone, to hear a matter, or to grant a remedy. No one suggests these issues cannot be separated from the other legal questions these courts are called upon to decide. Consequently, the *amici*'s argument – that identifying true questions of jurisdiction cannot be done for administrators – is problematic. Carried to its logical end point, the *amici*'s argument would also eliminate the concept of jurisdiction for statutory courts.

(*per* Côté J. dissenting).

³⁸ *Amici Factum*, ¶ 61-66.

³⁹ *Re Racal Communications Ltd.*, [1980] UKHL 5, ¶ 14 (*per* Diplock L.); *Hossain v Minister for Immigration and Border Protection*, [2018] HCA 34, ¶ 25.

⁴⁰ *Factum of the Intervener*, Cambridge Comparative Administrative Law Forum, ¶ 17-18.

⁴¹ *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, ¶ 33; *R. v. Mian*, 2014 SCC 54, ¶ 50; *R. v. Raponi*, 2004 SCC 50, ¶ 34.

4. Even if Deference Applies, the CRTC Instruments are Unreasonable

38. In their factum, the *amici* offer submissions on how reasonableness review ought to be conducted. They argue reasonableness review must start with the reasons. The reviewing court must evaluate their justification, transparency and intelligibility for flaws fatal to the legality of the decision, or an outcome that falls outside a reasonable range. Critically, an absence of reasons – either entirely or on critical issues – frustrates deferential review, such that *de novo* review may be the only practical option.⁴²

39. Applying the *amici*'s framework, the CRTC Instruments do not withstand scrutiny. As argued fully in the NFL Factum, the Bell Factum, and by the interveners, the Alliance of Canadian Cinema, Television and Radio Artists and the Association of Canadian Advertisers,⁴³ the CRTC's reasons fail to explain critical issues, including its decision to ban simultaneous substitution for the Super Bowl and its interpretation of s. 9(1)(h).

40. The CRTC was required to consider and weigh the various objectives of the Canadian broadcasting policy embodied in section 3 of the *Broadcasting Act*. Instead, the CRTC's reasons simply state an incomplete list of stakeholder concerns, and that "it needs to recalibrate [the simultaneous substitution] regime to ensure that it is better balanced, and reflects the totality of the policy objectives of the Act"⁴⁴ – assertion without demonstration. Nor does the CRTC engage with the text, context and purpose of s. 9(1)(h), or the *Broadcasting Act* generally, even though all of this was placed before the CRTC at the time.⁴⁵

41. As the *amici* submit, "administrative actors themselves bear some practical responsibility for ensuring that [deferential review] occurs."⁴⁶ In other words, deference must be earned through adequate reasons. Where, as here, the administrator fails to place the Court in a position to defer, the matter can only be reviewed *de novo*.

⁴² *Amici Factum*, ¶ 116, 118, 122; *Delta Air Lines Inc. v. Lukács*, [2018 SCC 2](#), ¶ 23-29.


⁴³ NFL Factum, ¶ 96-98; Bell Factum, ¶ 110-19; Factum of the Intervenors, Alliance of Cdn. Cinema, Television and Radio Artists & Assn. of Canadian Advertisers, ¶ 4-6, 15-18.

⁴⁴ CRTC Instruments, ¶ 28, 35, JR Tab 1.

⁴⁵ Interventions of the National Football League & BCE Re: Broadcasting Notice of Consultation CRTC 2015-330, JR Tabs 20, 21.

⁴⁶ *Amici Factum*, ¶ 123.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of November, 2018.


as agent for

Steven G. Mason
Brandon Kain
Joanna Nairn
James S.S. Holtom
Richard Lizius

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