SCC File No. 37896

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

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

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 RESPONSES OF THE INTERVENERS

(*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

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, 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

SCC File No. 37897

A N D B E T W E E N :

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

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

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

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

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

Per: **Christopher M. Rupar**
(christopher.rupar@justice.gc.ca)

Tel.: (613) 670-6290
Fax: (613) 954-1920

Ottawa Agent for the Appellant, Minister of Citizenship and Immigration

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

Hadayt Nazami (hadayt@rogers.com)

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

Counsel for the Respondent (37748), Alexander Vavilov

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

Bijon Roy (broy@champlaw.ca)

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

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 Béchard Torres
(edward.bechardtorres@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 Promendade 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: (6014) 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@noelassocies.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

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

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

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

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

Susan L. Stewart (sstewart@idirect.ca)

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

Counsel for the Intervener, National Academy of Arbitrators

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

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 Interveners, 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 Interveners, 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

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON KIP 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 Gelinas-Faucher
(bruno.gelinas.faucher@gmail.com)
Paul Warchuk

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

Counsel 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 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 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.

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.

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)

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: (647) 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

TABLE OF CONTENTS

STATEMENT OF ARGUMENT IN REPLY 1

1. True Questions of Jurisdiction Must be Correctly Decided 1
2. Appeal Rights Indicate a Standard of Review of Correctness 4
3. Reasonableness Review Must Be Substantive 6
4. Judicial Review Can Account for Context 7
5. The CRTC Decision was Incorrect and Unreasonable 8

TABLE OF AUTHORITIES 12

STATUTORY PROVISIONS 13

STATEMENT OF ARGUMENT IN REPLY

1. This Court has received submissions from 27 interveners, totalling almost 300 pages, in the Bell and NFL appeals alone. Bell and the NFL (the "**Appellants**"), therefore do not respond to each submission individually, but instead address the following conceptual points raised by various interveners in the Bell and NFL appeals.

1. True Questions of Jurisdiction Must be Correctly Decided

2. As argued in full in Bell's appeal factum, correctness review must continue to exist for true questions of jurisdiction, such as whether the CRTC has the power to dictate the content of individual programs under s. 9(1)(h) of the *Broadcasting Act*.[1] Certain interveners oppose this proposition on the following three grounds:

(a) True questions of jurisdiction are difficult to define, were once used to subvert legislative intent, and should therefore be abolished;[2]

(b) Correctness review of true questions of jurisdiction is incompatible with home statute deference;[3] and

(c) Correctness review of true questions of jurisdiction is inefficient given the expertise of administrative tribunals.[4]

3. Those submissions should be rejected for several reasons, including the following four:

4. ***First***, the interveners' opposition to correctness review of true questions of jurisdiction is essentially grounded in **policy** analysis, which cannot overcome the **constitutional imperative** for correctness review under such circumstances.

---

[1] *Broadcasting Act*, (S.C. 1991, c. 11), s 9(1)(h).
[2] See for example Factum of Attorney General of British Columbia, para 23 ("**AG British Columbia Factum**"); Factum of Attorney General of Saskatchewan ("**AG Saskatchewan Factum**"), para 8.
[3] See for example Factum of Canadian Labour Congress, para 26 ("**CLC Factum**"); Factum of National Association of Pharmacy Regulatory Authorities ("**NAPRA Factum**").
[4] See for example CLC Factum, paras 5-8; Workplace Safety and Insurance Appeals Tribunal *et al.* ("**Workplace Tribunal Factum**"), paras 29-31.

5. In *Dunsmuir*, this Court concluded that "without question", the standard of review of correctness must be maintained in respect of jurisdictional questions.[5] Judicial independence requires that courts have the "last word" on jurisdictional questions.[6]

6. Were it otherwise, the power of the executive would be substantially contrary to the Constitution. As this Court recently recognized in the 2018 *Securities Reference*:

> …Parliamentary sovereignty therefore means that the **legislative branch of government has supremacy over the executive and the judiciary**: both must act in accordance with statutory enactments, and **neither can usurp or interfere with the legislature's law-making function**.[7]

7. The executive is able to appoint administrative decision makers, and if such decision makers are given deference on the scope of their own jurisdiction (in short, the right to make an **incorrect** determination of their own jurisdiction, different from that intended by the legislature), then it can illegally expand its own powers beyond those the legislature intended to grant. Similarly, as the AG Ontario recognizes, many administrative decision makers have views on how their regulatory powers should be extended to address problems on the "margins" of the regulatory field.[8] Thus, deference on jurisdictional matters would effectively transfer legislative power to administrative decision makers, what the Advocates for the Rule of Law term "administrative supremacy".[9]

8. The consequences of inconsistent (or incorrect) determinations of a tribunal's own jurisdiction would create great uncertainty and inequality before the law for litigants. The perverse consequences of inconsistent administrative decision making are highlighted by a number of interveners, including the Canadian Council for Refugees[10] and Parkdale Community Legal Services.[11]

---

[5] *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras 30, 36, 50 and 59 [*Dunsmuir*].
[6] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, para 21.
[7] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para 55.
[8] Factum of Attorney General of Ontario ("**AG Ontario Factum**"), para 7.
[9] Factum of Advocates For The Rule of Law Factum ("**ARL Factum**"), para 4.
[10] Factum of Canadian Council for Refugees ("**CCR Factum**"), paras 9-14.
[11] Factum of Parkdale Community Legal Services, paras 30-32.

9. ***Second***, while at one time courts may have expanded the concept of "jurisdictional" questions as a means to interfere in administrative decision making, that does not mean that true questions of jurisdiction elude definition.

10. The Appellants have identified clear and workable definitions of "jurisdictional" questions from this Court (and applied those definitions to the facts of this case). In *Dunsmuir* this Court identified Jurisdiction as "the narrow sense of whether or not the tribunal had the authority to make the inquiry… whether its statutory grant of power gives it the authority to decide a particular matter".[12] The Appellants have identified the following hallmarks of a jurisdictional question from the jurisprudence: (1) the issue alleges a fundamental flaw that goes to the root of the tribunals' authority; (2) the issue raises serious concerns about the rule of law; and (3) treating the issue as a jurisdictional one implements Parliament's intent.[13]

11. Similarly, the CIPPIC has also examined precedent to offer a clear definition of "jurisdictional" questions as those pertaining to: (1) what matters the decision-maker may decide (subject matter jurisdiction); (2) with respect to whom the decision may be made (personal jurisdiction); and (3) whether the decision-maker may grant a certain right, impose a certain obligation or issue a certain sanction (remedial jurisdiction).[14]

12. While decades ago courts may have taken advantage of ambiguity in the definition of "jurisdiction" to improperly intervene in tribunal decisions, the Queen's Prison Law Clinic rightly warns against restricting the scope of judicial review out of fear of the "outdated bogeyman of judicial interventionism".[15] The definitions of jurisdictional questions identified above, when applied in good faith, will not lead courts to "brand as jurisdictional that which is doubtfully so" but will preserve the constitutional role of courts and the legislature.

13. ***Third***, a common law presumption of home statute deference cannot overcome the constitutional issues set out above. As numerous interveners have submitted, the presumption of home statute deference is often inconsistent with actual legislative intent. For example, the

---

[12] *Dunsmuir*, 2008 SCC 9, para 59.
[13] Factum of Bell Canada *et al.* ("**Appeal Factum**"), para 56.
[14] Factum of Samuelson-Glushko Canadian Internet Policy *et al*. ("**CIPPIC Factum**), para 37.
[15] Factum of Queen's Prison Law Clinic, para 18.

British Columbia *Administrative Tribunals Act* provides for a standard of review of **correctness** on legal issues,[16] the *Federal Courts Act* provides for relief where a tribunal "erred in law"[17] and the Ontario *Judicial Review Procedure Act*, provides for review of an "error of law on the face of the record".[18] Thus, the presumption of "home statute deference" is often more a judicial fiction than a legislative fact, and cannot be used to displace the rule of law or legislative supremacy.

14. ***Fourth***, the actual (or presumed) expertise of an administrative tribunal is irrelevant to the scope of that tribunal's jurisdiction. Whatever expertise an administrative decision maker may be presumed to have (or actually have), that expertise cannot **expand** the scope of its mandate beyond that delegated by the legislature. If the legislature did not grant a decision maker the right to make orders in respect of particular subjects, persons or remedies, no amount of expertise can change that fact.

2. Appeal Rights Indicate a Standard of Review of Correctness

15. A statutory right of appeal is a strong indication that the legislature intended an administrative decision to be reviewed on a correctness standard.

16. The AG Saskatchewan argues that statutory appeal rights should not affect the deference owed to a tribunal because considering such appeal rights complicates the standard of review analysis, and the statutory appeal right may not always indicate a legislative intention that decisions be reviewed on a correctness standard.[19] For example, the AG Saskatchewan suggests appeal rights may be created to limit review to questions of law, or to specify procedural powers of the court on appeal.

17. However, if the legislature's goal were to restrict review of a tribunal's decisions it could do so through a conventional privative clause. It makes little sense to give appellants a statutory right of appeal as a means to **restrict** the scope of judicial review. The more reasonable view is that, as the Queen's Prison Law Clinic states, "legislators know what an

---

[16] *Administrative Tribunals Act*, SBC 2004, c 45, s. 59 as cited in Factum of First Nations Child and Family Caring Society of Canada ("**FNCFCS Factum**"), para 27.
[17] *Federal Courts Act*, RSC 1985, c F-7, s. 18.1(4)(c) as cited in ARL Factum, para 19.
[18] *Judicial Review Procedure Act*, RSO 1990, c J.1, s. 2(2) cited in ARL Factum, para 18.
[19] See for example AG Saskatchewan Factum, para 28(c).

"appeal" means when they use that word in an administrative statute".[20] A settled body of law governs the standard of review on appeals,[21] and it should be presumed that the legislature intended that clear law to apply to statutory appeals.

18. That proposition has particular force when applied to, s. 31(2) of the *Broadcasting Act*, which permits appeals on a question of "law or jurisdiction" and **supplements** s. 23(1) of the *Federal Courts Act* which **already provides for judicial review** of CRTC decisions.[22] Thus, the statutory right of appeal on questions of law and jurisdiction, must be something **other** than a mere right to judicial review and logically, as in any appeal, no deference is owed on questions of law or jurisdiction.

19. Moreover, as the AG British Columbia notes, a statutory right of appeal is a clear indication that a legislature intended to **depart** from the general standard of review analysis in *Dunsmuir*.[23] It is difficult to see how respect for legislative supremacy, or legislative intention, can justify a standard of anything less than correctness on a statutory appeal.

20. Indeed, the practical consequence of applying a deferential standard of review to statutory appeals is highlighted by, for example, inconsistent interpretations of key provisions of the *Residential Tenancies Act*, all of which have been held to be reasonable on appeal, and which make it impossible for landlords and tenants to properly understand their rights.[24]

21. While some interveners argue that the complexity of the standard of review analysis is inefficient,[25] particularly when it comes to statutory appeal rights,[26] that concern is readily satisfied by a general presumption that statutory appeals be conducted on a correctness standard with respect to questions of law, while questions of fact, mixed fact and law and discretion receive deference, consistent with the conventional definition of an "appeal".

---

[20] Queen's Prison Law Clinic Factum, paras 13-15.
[21] *Housen v. Nikolaisen*, 2002 SCC 33.
[22] *Broadcasting Act*, SC 1991, c 11, s. 31(2) and *Federal Courts Act*, R.S.C., 1985, c. F-7, s 23(1) .
[23] AG British Columbia Factum, para 33.
[24] Factum of Advocacy Centre For Tenants Ontario ("**Tenant's Advocacy Centre Factum**"), paras 22-31.
[25] See for example AG British Columbia Factum, para 31.
[26] Factum of Canadian Bar Association ("**CBA Factum**"), para 9.

3. Reasonableness Review Must Be Substantive

22. The Appellants submit that the CRTC decisions at issue in this appeal should be reviewed on a correctness standard. However, even if a standard of reasonableness applies, that standard must provide for meaningful, substantive, review, particularly if this Court does not maintain the category of true questions of jurisdiction.

23. The Canadian Association of Refugee Lawyers rightly relies on Judge Posner's statement that "deference is earned; it is not a birthright".[27] As that principle is applied to Canadian administrative tribunals, a number of interveners recognize that administrative decision makers: (1) must interpret their statutes in light of established principles of statutory interpretation;[28] (2) must reflect the fact that there is often only a single, reasonable interpretation on a question of law,[29] and (3) judicial review must be based on the reasons actually given by the decision maker, not the reasons it could have given.[30]

24. This Court's *Mowat* decision exemplifies meaningful and substantive review, conducted on a reasonableness standard. *Mowat* concerned the interpretation of a provision of the *Canadian Human Rights Act*. In that case, this Court emphasized the importance of a proper statutory interpretation analysis,[31] before looking not just at the text of the provision but also numerous contextual factors including the structure of the Act, the legislative history, the Commission's own prior decisions, other statutes, the presumption against tautology and the meaning of "costs" in legal parlance.[32] This Court ultimately concluded that, even if the Canadian Human Rights Commission's interpretation of the provision could be reconciled with the text, it was unreasonable, in light of the full context set out above.

---

[27] Factum of Canadian Association of Refugee Lawyers ("**CARL Factum**"), para 19.
[28] AG Ontario Factum, para 11; Factum of Ecojustice Canada Society ("**Ecojustice Factum**"), para 21.
[29] Ecojustice Factum, para 16, consistent with *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 and *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29.
[30] CARL Factum, para 21; CBA Factum, para 20; Factum of Council of Canadian Administrative Tribunals ("**CCAT Factum**"), para 32.
[31] *Canada (Canadian Human Rights Commission) v. Canada (AG)*, 2011 SCC 53, para 33 ("***Mowat***").
[32] *Mowat*, 2011 SCC 53, para 35-64.

25. The AG Saskatchewan argues that the standard of review analysis has become too voluminous and wasteful.[33] However, the reason that parties spill so much ink on the standard of review is that anemic reasonableness review (like that applied by the Federal Court of Appeal in this case) does not provide any meaningful oversight of even unreasonable administrative decisions. However, if reasonableness review leads to meaningful, substantive review – albeit on a deferential standard – modeled on this Court's *Mowat* decision, the merits of the case, rather than the standard of review, would once again take centre stage.

4. Judicial Review Can Account for Context

26. Certain interveners argue that there are unique features to particular administrative regimes that militate in favour of more or less deference, whatever the general standard of review. Those interveners advocate for deference to the decisions of commercial arbitrators,[34] labour arbitrators,[35] self-governing professions[36] and securities commissions[37] and advocate for probing review of refugee treaty,[38] constitutional[39] and environmental[40] issues.

27. The Appellants agree with these interveners that unique, contextual factors apply to certain specialized tribunals. For example, the BC Commercial Arbitration Centre submits that particular deference may be due to commercial arbitrators, because they act pursuant to the consent of the parties,[41] and the NAA submits that particular deference may be due to labour arbitrators because they are resolving private disputes and are not a manifestation of the executive,[42] so that in either case rule of law and legislative supremacy considerations do not apply as they do for most tribunals.

---

[33] AG Saskatchewan Factum, paras 1-27.
[34] Factum of British Columbia International Commercial Arbitration Centre Foundation ("**BC Commercial Arbitration Centre Factum**").
[35] Factum of National Academy of Arbitrators *et al.* ("**NAA Factum**"); CLC Factum.
[36] NARPA Factum.
[37] Factum of Ontario Securities Commission *et al.* ("**Securities Commissions Factum**").
[38] CCR Factum.
[39] Factum of Community & Legal Aid Services Programme ("**CLASP Factum**").
[40] Ecojustice Factum.
[41] BC Commercial Arbitration Factum, para 19.
[42] NAA Factum, paras 4, 13-15

28. The corollary of that proposition is that the unique nature of arbitrators, including labour arbitrators, means that the deference that may be called for in the arbitration context may be inappropriate elsewhere (for example, with respect to the CRTC's interpretation of its own statutory mandate). Thus, this Court should not craft its **general** standard of review analysis in light of the particular deference that may be appropriate **specifically** in the context of labour or commercial arbitrations; while it may be appropriate to defer to labour arbitrators, it is not appropriate to defer to all administrative tribunals.

5. The CRTC Decision was Incorrect and Unreasonable

29. Three interveners, ACTRA, TELUS and the Wholesale Code interveners make submissions on the merits of this appeal.

30. The Wholesale Code interveners submit that Bell's position on s. 9(1)(h) of the *Broadcasting Act* in this appeal is inconsistent with the position it took in an appeal of the CRTC's Wholesale Code (in which the CRTC order was struck down as unreasonable).[43]

31. Bell's positions are entirely consistent. In this appeal, Bell submits that orders made against Broadcasting Distribution Undertakings ("**BDUs**") pursuant to s. 9(1)(h) may only be about programming services as a whole, not individual programs. In the Wholesale Code appeal, by contrast, Bell successfully argued that s. 9(1)(h) cannot be used to issue orders against Programming Undertakings ("**PUs**") as opposed to BDUs (and, in particular, could not be used to impose the contractual terms on which PUs must sell their content). This appeal concerns the **subject matter** to which s. 9(1)(h) may be directed (programs or programming services), whereas the Wholesale Code appeal related to the **entities** against whom s. 9(1)(h) orders could be made (BDUs or PUs). The Order at issue in this appeal is directed at BDUs, not PUs, consistent with Bell's prior position. To support this submission, the Wholesale Code interveners improperly rely on the facta filed in the Wholesale Code appeal,[44] which are **not** part of the record on this appeal, contrary to this Court's leave order.

---

[43] Wholesale Code Interveners' Factum (FCA A-51-16), paras 9-13, referencing *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 (the "**Wholesale Code Appeal**")
[44] See Wholesale Code Interveners' Factum, paras 5, 11 and 17

32. The Wholesale Code interveners also argue that the CRTC's power to make orders against BDUs should include the power to make orders that have incidental effects on PUs, and that s. 9(1)(h) should apply outside the context of "mandatory-carriage" orders.[45] Neither is an issue in this appeal, as the Order is clearly directed only against BDUs. This argument is an inappropriate attempt to re-litigate the Wholesale Code appeal before this Court. This Court's leave order specifically provided that the interveners "are not entitled to raise new issues or to adduce further evidence or otherwise supplement the record of the parties".[46] These submissions on a new issue, and their attempt to introduce evidence from the Wholesale Code appeal, are contrary to that order and should be disregarded.

33. TELUS submits that the CRTC Order is justified because the Super Bowl is not an individual "program", but a collection of programs, because each commercial that forms part of the broadcast is itself an independent program.[47] That position, however, is inconsistent with the CRTC's own reasons, which treat the Super Bowl as a "program", not as a collection of programs.[48] Similarly, even if the Super Bowl contains many "programs" it is still not a "programming service" (as required for s. 9(1)(h) to apply) because it does not constitute the "entire output" of a PU.[49] Moreover, it would be incoherent for the CRTC to have the power to control the content of a single program if it is broadcast **with** commercials but not if it is broadcast **without** commercials.

34. TELUS also submits that any CRTC order is a valid exercise of s. 9(1)(h) provided that it deals with a class of subject set out in the broadcasting policy for Canada (s. 3(1) of the *Broadcasting Act*) and it is consistent with the core purposes of the Act.[50] That submission, however, is irreconcilable with this Court's decision in *Cogeco* which **explicitly rejected** the

---

[45] Wholesale Code Interveners' Factum, paras 17-22 and 23-28.
[46] *Minister of Citizenship and Immigration et al. v. AGC* (24 September, 2018), Ottawa, SCC Nos. 37748, 37896 and 37897 (motions for interventions) ("**Leave Order**").
[47] Factum of TELUS Communications Inc. ("**TELUS Factum**"), para 23.
[48] *CRTC Order*, para 36, Joint Record of the Appellants ("**Joint Record**"), Vol I, Tab 1, p. 9.
[49] *Distribution of omnibus high definition channels by Star Choice and Cancom* – Broadcasting Decision CRTC 2005-195, 12 May 2005, para 27.
[50] TELUS Factum, para 24.

notion that consistency with the CRTC's policy objectives in s. 3(1) was the only constraint on its power under ss. 9 and 10. Such an interpretation would be "akin to unfettered discretion".[51]

35. Finally, even if compliance with the policy objectives of the *Broadcasting Act* were the basis on which to assess an exercise of s. 9(1)(h), ACTRA makes compelling submissions that the CRTC order is unreasonable. In particular, ACTRA explains that the CRTC Order causes Canadian producers, performers, agencies and advertisers to be deprived of significant revenues, while exposing Canadian viewers to irrelevant advertisements (with respect to products not sold in Canada) that are contrary to standards and laws imposed in Canada by *inter alia* the CRTC itself and the *Food and Drugs Act*.[52]

36. Such an outcome can hardly be a reasonable exercise of the CRTC's power in light of s. 3 of the *Broadcasting Act* which emphasizes that the Canadian broadcasting system should be of economic and cultural benefit **to Canadians**.[53] Even the Federal Court of Appeal noted the "irony" that legislation that exists to protect the Canadian broadcasting industry is being used "to the apparent detriment of the Canadian industry and its employees".[54] As ACTRA explains, that result is particularly unreasonable given that the CRTC provided absolutely no explanation for why it decided to override these policy objectives.[55]

37. As noted by the Canadian Association of Refugee Lawyers, "an important indicator of an unreasonable interpretation is that it undermines or is otherwise inimical to attaining the statutory purposes, policy goals and wider legal norms applicable to the regulated field".[56] The CRTC Order does exactly that.

---

[51] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, paras 27-28 ("**Cogeco**").
[52] Factum of Association of Canadian Advertisers *et al.* ("**ACTRA Factum**"), paras 19-25.
[53] See for example, *Broadcasting Act*, SC 1991, c 11, ss. 3(1)(a), 3(1)(b), 3(1)(c)(i), and 3(1)(d).
[54] Appeal Decision, para 24, Joint Record, Vol. I, Tab 8, p. 71.
[55] ACTRA Factum, para 18.
[56] CARL Factum, para 35.

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

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

TABLE OF AUTHORITIES

Case Law	**At Para**
Bell Canada v 7265921 Canada Ltd., 2018 FCA 174	29
Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2011 SCC 53	23
Dunsmuir v New Brunswick, 2008 SCC 9	5, 10
Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47	5
Housen v Nikolaisen, 2002 SCC 33	17
McLean v British Columbia (Securities Commission), 2013 SCC 67	22
Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68	33
Reference re Pan-Canadian Securities Regulation, 2018 SCC 48	6
Wilson v Atomic Energy of Canada Ltd., 2016 SCC 29	22
Secondary Sources	
Distribution of omnibus high definition channels by Star Choice and Cancom – Broadcasting Decision CRTC 2005-195, 12 May 2005	32

STATUTORY PROVISIONS

Statutes / Legislation	**At Para**
Administrative Tribunals Act, SBC 2004, c 45 s. 59	13
Broadcasting Act, S.C. 1991, c. 11 ss. 3(1)(a), 3(1)(b), 3(1)(c)(i), 3(1)(d), 9(1)(h) and 31(2)	2, 18, 35
Tribunals Support Services of Canada Act, S.C. 2014, c. 20 s. 376, ss. 59	13
Federal Courts Act, R.S.C., 1985, c. F-7 ss. 18.1(4)(c), 23(1)	13, 18
Judicial Review Procedure Act, R.S.O. 1990, c. J 1 s. 2(2)	13