SCC Court File Nos.: 37748 / 37896 / 37897

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

B E T W E E N:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT
(Respondent in the Court below)

- and –

ALEXANDER VAVILOV

Respondent
(Appellant in the Court below)*

FACTUM OF THE INTERVENER,
CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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Continued from page 1

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Interveners

SCC Court File No.: 37896

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

B E T W E E N:

BELL CANADA and BELL MEDIA INC.

Appellants (Appellants)

- and –

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and -

CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION

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

– and –

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Interveners

SCC Court File No.: 37897

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

B E T W E E N:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC
and NFL PRODUCTIONS LLC

Appellants (Appellants)

- and –

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- and -

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PART I and II – OVERVIEW AND ISSUES

1. The default rule in our system of government is that courts interpret the law. A statute that grants decision-making power to an administrator should not be enough, on its own, to displace this default rule. Throughout the rest of the common law world, legislatures must clearly signal their desire to displace the role of the judiciary through more than merely empowering an administrator. We submit that this should be the case in Canada too.

2. We thus set out to achieve three things with our submissions. First, to demonstrate the existence of a presumption that courts are to answer questions of law. Second, to show why this presumption is not implicitly displaced by statutory delegation. And third, to suggest what is enough to displace the presumption.

3. We take no position on the facts of these appeals.

PART III – ARGUMENT

i. "The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces"[1]

4. The separation of powers is "an essential feature of our constitution."[2] Within Canada's constitutional framework, each branch has a different prescribed role. [3] The role of the judiciary is to interpret and apply the law. This is not one of many roles. This is *the* role of the judiciary:

> There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. In broad terms, **the role of the judiciary is, of course, to interpret and apply the law**; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy.[4]

5. The reasons for the judiciary's role are clear. First, people will frequently arrive at different interpretations of the same law and there must be a body with the power to finally and authoritatively resolve those disputes. In order for parties to accept the resulting decisions as legitimate, that body

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[1] *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 745.
[2] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 [*Wells*] at para. 52
[3] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. 27.
[4] *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455 at p. 469-470 [emphasis added]. See also *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 50.

must also be impartial and independent. Where those disputes arise between the state and individuals, it is thus critical that the final interpreter of law be independent from the state.[5]

6. Second, the role of the judiciary as the final interpreter of law is especially important in Westminster parliamentary systems because, as this Court has recognized, "the same individuals control both the executive and the legislative branches of government."[6] This means that the process of interpreting law provides a critical check—sometimes the only check—against their power. As leading public law scholar Peter Cane puts it:

> [I]n systems of concentrated (legislative-executive-bureaucratic) power, such as England and Australia, in which the role of courts is to provide a robust external check to government, it makes sense that interpretation is understood as a distinctively legal task that courts jealously reserve for themselves in order to provide a counterweight to the political might of the government.[7]

7. The judiciary's role as final interpreter of questions of law is thus integrally linked with the rule of law, as this Court has acknowledged:

> The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The **judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication** of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy.[8]

8. The above passage also highlights a third reason why the judiciary has been tasked with legal interpretation: subject matter expertise. Courts are experts in statutory interpretation; they apply the tools of statutory interpretation across all fields. This role enables courts to develop a unified approach to statutory interpretation,[9] which in turn furthers consistency and provides a solid basis

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[5] *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at para. 30.
[6] *Wells* at para. 53.
[7] Peter Cane, *Controlling Administrative Power* (Cambridge: CUP, 2016) at p. 230.
[8] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at 28-29 [emphasis added].
[9] See e.g. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

against which Parliament can legislate. Legislative drafters can only convey the will of Parliament through text when they know the methodology that will be used to interpret that text.

ii. The assignment of power is not enough to displace this presumption

9. As Chief Justice Lamer recognized, because Canada's separation of powers is not strict, "judicial functions, including the interpretation of law, may be vested in non-judicial bodies such as tribunals".[10] However, "[i]t is not up to the courts to presume such an intention."[11] Indeed, such a presumption is inconsistent with the persuasive reasons underpinning the judiciary's role as final interpreter of law and the "wise principle that the courts and Parliament strive to respect each other's role."[12] In our submission, such a shift in the basic rules governing the branches of government should only be done by clear legislation.

10. The Attorney General of Canada argues that by giving an administrator the power to make a decision, a legislature implicitly gives them the authority to do everything necessary to make that decision, including answer questions of law.[13] This idea conflates the necessity of interpreting law with conclusive interpretation. Every good faith exercise of statutory power requires the recipient to interpret their empowering law. For example, when a border services officer decides whether to search a traveller, they must interpret their search powers granted under the *Customs Act*. This interpretation is a necessary step in the exercise of their power. Yet, it does not demonstrate that Parliament wanted to grant officers not only the power to search, but the power to be the conclusive interpreters of when they may search.[14] Nor do courts defer to police officers' interpretations while exercising powers under the *Criminal Code*.

11. The *Citizenship Act*,[15] relevant to one of the appeals now before the Court, demonstrates a further problem with the Attorney General's argument, as Parliament never empowered the administrator at all. The Registrar, who made the decision, is not mentioned anywhere in the Act. In fact, the Registrar is purely an executive creation whose authorities have been delegated from the Minister. The Attorney General thus asks that this Court presume that Parliament intended to

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[10] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 10.
[11] *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 at para. 192.
[12] *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 20. While the court then said Parliament does so by refraining from commenting on matters before courts, we believe it equally applies here.
[13] *Bell Canada, et al. v. Attorney General of Canada* (SCC Court File No 37896), Factum of the Respondent Attorney General of Canada at para. 32.
[14] See *R. v. Monney*, [1999] 1 S.C.R. 652 at paras 25-48.
[15] *Citizenship Act*, R.S.C., 1985, c. C-29.

implicitly empower the Registrar to conclusively interpret the statute, even though it did not grant the Registrar any powers at all, or even know of its existence.

a) In no other common law country does the delegation of power directly displace the rule that courts interpret the law

12. Judicial review in the UK begins from the same constitutional principles found in Canada. Under the separation of powers, the judiciary's role is to interpret the law. As Lord Bingham wrote, "under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions."[16] This role, i.e. the courts' "constitutional role as interpreters of the written law and expounders of the common law and rules of equity",[17] leads to a presumption that questions of law are for the courts, and Parliament will not be taken to alter this position, absent clear intent. In the words of Lord Diplock:

> Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities powers to decide questions of law as well as questions of fact or of administrative policy, but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.[18]

13. As a result, courts are generally the final arbiters of all questions of law and no deference is given to legal interpretations by administrators.[19] Even policies created by administrators are interpreted by the courts as "a matter of law which the court must therefore decide for itself."[20] And where courts have needed to reduce judicial review for practical reasons, they have done so through a leave to review process, rather than through deference on questions of law.[21]

14. In Australia, where the constitution lays out a more explicit separation of powers, courts also determine all questions of law finally and de novo. Declaring the meaning of a statute is "exclusively

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[16] *A. v. Secretary of State for the Home Department*, [2004] UKHL 56 at para. 29.
[17] *Re Racal Communications Ltd,* [1980] UKHL 5, [1981] AC 374 [*Racal*] at p. 383.
[18] *Ibid.*
[19] *R (ProLife Alliance) v. British Broadcasting Corporation*, [2003] UKHL 23, [2004] 1 AC 185 at para. 75; *R v Lord President of the Privy Council, ex parte Page*, [1992] UKHL 12, [1993] AC 682; *Boddington v. British Transport Police*, [1998] UKHL 13, [1999] 2 AC 143 at 154.
[20] *Mandalia v Secretary of State for the Home Department*, [2015] UKSC 59 at para. 31.
[21] *R (Cart) v. The Upper Tribunal*, [2011] UKSC 28.

the function of the judicial power."[22] In analysing but ultimately rejecting the possibility of American-style deference, the High Court of Australia concluded that:

> The fundamental consideration in this field of discourse…[is] that an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers.[23]

This continues to be the position of courts in Australia today.[24]

15. Similarly, courts in New Zealand have long held that the standard of review applicable to an administrator's interpretation of a statute is correctness (or "substitution of judgment"). That is, courts on review will substitute what they consider to be the correct interpretation for that of the administrator, with no deference to the administrator's view. The landmark decision *Bulk Gas* established that there is a presumption against conclusive interpretive authority being conferred on an administrative decision-maker, and that this presumption can only be rebutted "expressly or by necessary implication".[25] This strong presumption finds its rationale in the rule of law, as it is the function of the courts to interpret conclusively questions of law "in fulfillment of their constitutional role as interpreter of the written law".[26] More recently, the Court of Appeal confirmed the settled nature of the New Zealand Position in *Wool Board Disestablishment Company*.[27] In his concurring reasons, Hammond J emphasised the "fundamental and constitutionally important position" under Anglo-New Zealand administrative law:

> [W]hat the statute means is *always* a question of law for the courts. Unless that approach is adopted the rule of law itself is subverted.[28]

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[22] Stephen Gageler, "The underpinnings of judicial review of administrative action: Common law or Constitution?" (2000) 28 *Federal Law Review* 303 at p. 309; see also *Attorney General v Quin*, [1990] HCA 21, (1990) 170 CLR 1 (HCA) at 35-36;
[23] *Corporation of the City of Enfield v. Development Assessment Corporation*, [2000] HCA 5 at para. 43, (1999) CLR 135.
[24] *Chief of Defence Force v. Gaynor*, [2017] FCAFC 41 at para. 102.
[25] *Bulk Gas Users Group v. Attorney-General*, [1983] NZLR 129 (CA) at 136.
[26] *Ibid*, following *Racal*.
[27] *Wool Board Disestablishment Company Ltd v. Saxmere Company Ltd*, [2010] NZCA 513; See also *Tannadyce Investments Ltd v Commissionner of Inland Revenue*, [2011] NZSC 158 at para. 3, following *Bulk Gas*.
[28] *Ibid* at para. 116 [emphasis in original]. Citing, among others, Lord Bingham, *The Rule of Law* (London: Allen Lane, 2010) at p. 48.

16. Even in the United States, where courts accept deference to some agency interpretations, they do not assume that decision-making power implicitly includes the power to conclusively interpret the law. In order to receive deference, Congress must have delegated authority to an agency to make rules carrying the force of law and the agency must act within that delegated authority to interpret an ambiguous statutory provision of their organic (home) statute. The idea being that statutory "gaps" were intended to be filled by agencies who have the power to make legal pronouncements. If this is the case, then deference will be shown to that interpretation. However, whether Congress has delegated such authority to an agency and whether statutory provisions are ambiguous are questions for the courts to determine using the ordinary tools of statutory interpretation.[29]

17. More recently, a growing portion of the Supreme Court of the United States has expressed doubts about the legitimacy of deference to agencies on questions of statutory interpretation. Four sitting justices and one retired justice have all expressed their concerns.[30] In June 2018, these doubts culminated in Justice Kennedy calling for the Court to reconsider deference to agency determinations of law (*Chevron* deference):

> Given the concerns raised by some Members of this Court, [citations omitted] it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.[31]

18. Also in 2018, the state supreme courts for Wisconsin and Mississippi abandoned the principle of deference to agency interpretations of law altogether, declaring them to violate the separation of powers.[32] In doing so, the Supreme Court of Mississippi expressly adopted the reasoning of Justice Gorsuch in his *Gutierrez-Brizuela v. Lynch* concurrence, where he argued that

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[29] *United States v. Mead Corp.,* 533 U.S. 218 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984); *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967 (2005).

[30] The Chief Justice in *City of Arlington v FCC,* 569 US 290 (2013); Gorsuch J. in *SAS Institute Inc. v. IANCU,* 138 S. Ct. 1348 (2018) and *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016); Thomas J. in *Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015); Kennedy J. in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); and Kavanaugh J. in Brett Kavanaugh, "Fixing Statutory Interpretation" (2016) 129 *Harv L Rev* 2118 at 2150. See also Justice Breyer's most recent discussion in part III-A of his dissent in *SAS Institute Inc. v. IANCU*, 138 S. Ct. 1348 (2018).

[31] *Pereira v. Sessions*, 138 S. Ct. 2105 at 2121 (2018)

[32] *King v. Mississippi Military Dep't*, 245 So. 3d 404 (Miss. 2018); *Tetra Tech EC, Inc. v. Wisc. Dep't of Revenue*, 2018 WI 75, 914 N.W.2d 21.

removing deference would allow courts to "fulfil their duty to exercise their independent judgment about what the law is".[33]

b) Canadian courts long held that delegation of power was not enough to displace the rule that courts interpret the law

19. Until the establishment of the presumption of deference to an administrator's interpretation of their home statute in 2011, Canadian courts had also required more than the mere delegation of power to displace the ordinary position of courts. The entire purpose of standard of review analysis was to determine what the "legislator intended to leave to the exclusive determination of the administrative tribunal."[34] Courts would not assume that the legislature automatically intended to confer exclusive powers of legal interpretation on the administrator.[35] Instead, under the pragmatic and functional approach—started in *Bibeault* and perfected in *Pushpanathan*—courts sought to determine the legislature's intent through analysing a diversity of factors, believed to be indicia of intent. These factors were the presence of appeal/privative clauses, relative expertise of the administrator, purpose or nature of the scheme (dispute settling or polycentric) and the nature of the problem (question of fact, law, or mixed fact and law).[36]

20. Again, in the case of questions of law, the assignment of decision-making authority was in no way equated with delegation of final legal interpretation. In fact, even ambiguous intentions were not enough to displace the courts' role as interpreter of law.[37] This Court frequently held that purely legal questions were "ultimately within the province of the judiciary" and that "courts cannot abdicate this duty to the tribunal."[38]

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[33] *King v. Mississippi Military Dep't* at para. 12.

[34] *Union des employés de service, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 [*Bibeault*] at para. 118. See also, *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 149; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 [*Pushpanathan*] at para. 26; *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 30.

[35] *Pushpanathan* at para. 37.

[36] *Ibid* at paras. 29-38; *Bibeault* at p. 1088-1089.

[37] *Pushpanathan* at para. 37.

[38] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at p. 585; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 28; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 46; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28 at para. 16; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para. 10.

21. How then did we arrive at the present state, where courts presume that legislatures intend each administrator that they empower to be the conclusive interpreter of their home statute? A presumption so strong that is can only be rebutted "exceptionally" by "clear legislative intent that the correctness standard be applied" or four categories of decisions.[39]

22. The pragmatic and functional approach was a multi-factor test, where the factors were often in conflict, and thus one had to dominate. When the approach first began, it focused on privative clauses and appeal provisions,[40] but by the late 1990s the focus had shifted to the expertise of the tribunal, relative to the court. The tribunal's relative expertise was "the most important of the factors that a court must consider in settling on a standard of review."[41] Indeed, when legislative intent was ambiguous, the relative expertise of courts was often used to justify their role as final interpreters of law.[42]

23. The dominance of the expertise rationale was still in place when this Court decided in *Dunsmuir* to attempt to simplify standard for review analysis by moving to a more categorial approach. This expertise rationale led the court to state that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity".[43] Though, *Dunsmuir* said "many legal issues attract a standard of correctness,"[44] in *Alberta Teachers,* this stance was elevated to the strong presumption that it now is, without any further explanation.[45] This presumption, developed without strong rationale, is ultimately a poor proxy for legislative intent.

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[39] *CHRC v. Canada,* 2018 SCC 31 at para 28.
[40] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at p. 1745
[41] *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc* 2001 SCC 36 at paras. 28 & 33; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 50; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at p. 335.
[42] *Pushpanathan* at para. 37.
[43] *Dunsmuir* at 54.
[44] *Ibid.* at 51.
[45] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*] at paras. 39-41.

iii. How can legislatures demonstrate their intent to exclude courts?

24. As Justice Scalia—an ardent defender of *Chevron* deference, wrote:

> If it is, as we have always believed, the constitutional duty of the *courts* to say what the law is, we must search for something beyond relative competence as a basis for ignoring that principle when agency action is at issue.
>
> …
>
> The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.'[46]

25. In our submission, courts must indeed find specific statutory intent before giving up their role as final interpreters of law. We have seen that for 20 years, from 1988-2008, Canadian courts attempted do this by sifting through numerous pieces of statutory context. This project was ultimately abandoned in *Dunsmuir* due to its complexity.

26. The complexity which defined the first 20 years under the contextual approach, combined with the persuasive reasons underlying the judiciary's role as interpreter of law, lead us to the conclusion that legislation must speak clearly before ousting the court's default position as interpreter of law. This presumption best accords with the fundamental principles underlying our constitution, which Parliament should be taken to legislate against. It also furthers the interests of public accountability—those seeking to usurp the judiciary's traditional role must add specific language to legislation. That way, MPs and the general public are cognizant of the powers being transferred.

27. We suggest two possible situations where legislative intent is clearly demonstrated. First, where the legislature has specific language that it intends an administrator to be the final interpreter of law, including a privative clause. Second, where the legislature specifically chooses to use open ended, discretionary language such that it is reasonable to presume, the legislature wanted to delegate the final determination to the administrator. Such language includes phrases like "in the public interest."[47]

28. A final note. This Court recently stated that "deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts." As we stated above, the general intent to empower an administrator cannot

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[46] Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989) 38:3 *Duke LJ* 511 at 514 and 516.

[47] See for example *R. v. Monopolies and Mergers Commission, ex parte South Yorkshire Transport*, [1993] 1 WLR 23.

be taken as specifically intending to oust the judiciary of their fundamental constitutional role. However, this does not mean that deference is not possible. Courts can still respect the expertise and contributions of administrators through what leading administrative law scholar Dr Paul Daly labels epistemic deference,[48] and U.S. courts label *Skidmore* deference.[49] Under epistemic deference, the judiciary maintains the final decision, but it can still accord significant weight to the reasoning of the administrator.

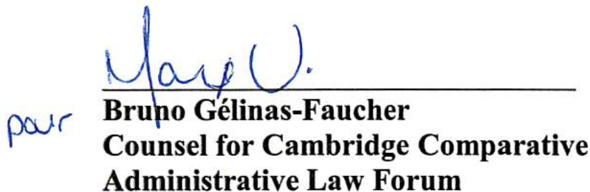
PART IV – COSTS

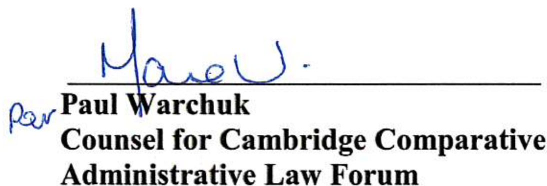
29. The Cambridge Comparative Administrative Law Forum does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

30. The Cambridge Comparative Administrative Law Forum seeks the permission of this Honourable Court to present brief oral argument.

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





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[48] Paul Daly, *A Theory of Deference in Administrative Law: Foundations, Application and Scope* (Cambridge: CUP, 2012) at p. 7.

[49] See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) at p. 140; see also *United States v. Mead Corp.*, 533 U.S. 218 (2001); *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

PART VI – TABLE OF AUTHORITIES

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