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)*

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# FACTUM OF THE INTERVENER, QUEEN'S PRISON LAW CLINIC

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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**STOCKWOODS LLP**
TD North Tower
77 King Street West, Suite 4130
Toronto-Dominion Centre
Toronto, ON M5K 1H1

**Brendan van Niejenhuis**
Tel: 416-593-2487
Fax: 416-593-9345
Email: BrendanVN@stockwoods.ca

**Andrea Gonsalves**
Tel: 416-593-3497
Fax: 416-593-9345
Email: AndreaG@stockwoods.ca
**Counsel for the Intervener, Queen's Prison Law Clinic**

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

**Maxine Vincelette**
Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

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

*Continued from page 1*

– and –

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

Interveners

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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 –

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, TELUS COMMUNICATIONS INC., ADVOCACY CENTRE FOR TENANTS ONTARIO, ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA SECURITIES COMMISSION and ALBERTA SECURITIES COMMISSION, ECOJUSICE 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 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, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Interveners

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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 –

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and -

CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION

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

– and –

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

Interveners

**ORIGINAL TO:** **SUPREME COURT OF CANADA**
**The Registrar**
301 Wellington Street
Ottawa, ON K1A 0J1


**ATTORNEY GENERAL OF CANADA**
Department of Justice
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1
Fax No.: 647-256-1160

**Per:** **Michael H. Morris**
**Marianne Zoric**
**John Provart**

Tel Nos. 647-256-7539
647-256-7318
647-256-0784

E-mails: Michael.Morris@justice.gc.ca
Marianne.Zoric@justice.gc.ca
John.Provart@justice.gc.ca


**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
Fax No.: 613-954-1920

**Per:** **Christopher Rupar**
Tel. No.: 613-670-6920
E-mail: Christopher.Rupar@justice.gc.ca


**Ottawa agent for the Appellant (37748), Minister of Citizenship and Immigration and for the Respondent (37896 and 37897), Attorney General of Canada**


**ATTORNEY GENERAL OF CANADA**
Department of Justice
Ontario Regional Office
The Exchange Tower
3400 – 130 King Street West
Toronto, ON M5X 1K6
Fax No.: 416-973-0809

**Per:** **Michael H. Morris**
**Roger Flaim**
**Laura Tausky**

Tel Nos. 416-973-9704
416-952-6889
416-952-5864


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

**MCCARTHY TÉTRAULT LLP**
Suite 5300, TD Bank Tower
Toronto, ON  M5K 1E6

**Steven G. Mason** (smason@mcarthy.ca)
**Brandon Kain** (bkain@mccarthy.ca)
**Joanna Nairn** (jnairn@mccarthy.ca)
**Richard Lizius** (rlizius@mccarthy.ca)
Tel: 416-601-8200
Fax: 416-868-0673

**Counsel for the Appellants (37896), Bell Canada and Bell Media Inc.**

**Steven G. Mason** (smason@mcarthy.ca)
**Brandon Kain** (bkain@mccarthy.ca)
**Joanna Nairn** (jnairn@mccarthy.ca)
**James S.S. Holtom** (jholtom@mccarthy.ca)
Tel: 416-601-8200
Fax: 416-868-0673

**Counsel for the Appellants (37897), National Football League, NFL International LLC and NFL Productions LLC**

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

**Jeffrey Beedell**
(jeff.beedell@gowlingwlg.com)
Tel: 613-786-0171
Fax: 613-788-3587

**Ottawa agent for the Appellants (37896 & 37897), Bell Canada and Bell Media Inc., National Football League, NFL International LLC and NFL Productions LLC**

**JACKMAN NAZAMI AND ASSOCIATES**
Barristers and Solicitors
3-596 St. Clair Avenue West
Toronto, ON  M6C 1A6
Fax No.: 416-653-1036

**Per:** **Hadayt Nazami**
Tel No.: 416-653-9964
E-mail: hadayt@rogers.com

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

**CHAMP & ASSOCIATES**
43 Florence Street
Ottawa, ON  K2P 0W6
Fax: 613-232-2680

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

**Ottawa agents for the Respondent (37748), Alexander Vavilov**

**DANIEL JUTRAS**
University of McGill
3644 Peel, Old Chancellor Day Hall,
Faculty of Law, Room 15
Montreal, Quebec H3A 1W9

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

Tel: 514-398-6604
Fax: 514-398-4659
E-mail: Daniel.jutras@mcgill.ca

**AUDREY BOCTOR**
Irving Mitchell Kalichman LLP
Alexis Nihon Plaza, Tower 2
3500 De Maisonneuve Blvd. West
Montreal, Quebec H3Z 3C1

Tel: 514-934-7737
Fax: 514-935-2999
E-mail: aboctor@imk.ca

***Amicus curiae* (37748 / 37896 / 37897)**

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

**Ottawa agents for the *Amicus curiae*, Daniel Jutras and Audrey Boctor**

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

**Sara Blake / Julie Im**
Tel: 416-326-4155
Fax: 416-326-4181
E-mail: sara.blake@jus.gov.on.ca

**Counsel for the Intervener (37748 / 37896 / 37897), Attorney General of Ontario**

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

**Karen Andrews**
Tel: 416-597-5855
Fax: 416-597-5821
E-mail: andrews@lao.on.ca

**Counsel for the Intervener (37748 / 37896 / 37897), Advocacy Centre for Tenants Ontario**

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

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

**Ottawa agents for the Interveners, Attorney General of Ontario; Advocacy Centre for Tenants Ontario; 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), National Association of Pharmacy Regulatory Authorities, Community & Legal Aid Services Programme**

**WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO)**

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

**Michelle Alton / David Corbett**
**Kayla Seyler / Ana Rodriguez**
Tel: 416-573-1704
Fax: 416-326-5164
E-mail: michelle.alton@wst.gov.on.ca

**Counsel for the Intervener (37748 / 37896 / 37897), 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)**

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

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

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

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

**Subodh Bharati**
Tel: 416-736-5029

Fax: 416-736-5564
E-mail: sbharati@osgoode.yorku.ca

**Counsel for the Intervener (37748), Community & Legal Aid Services Programme**

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

**Stéphane Rochette**
Tel: (418) 643-6552
Fax: (418) 643-9749
E-mail: stephane.rochette@justice.gouv.qc.ca

**Counsel for the Intervener (37748 / 37896 / 37897), Attorney General of Quebec**

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

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

**Ottawa agent for the Intervener, Attorney General of Quebec**

**ATTORNEY GENERAL OF BRITISH COLUMBIA**
PO Box 9280 Stn Prov Govt
Victoria, British Columbia V8W 9J7

**Leah Greathead**
**Micah Rankin**
Tel: 250-356-8892
Fax: 250-356-9154
E-mail: leah.greathead@gov.bc.ca

**Counsel for the Intervener (37748 / 37896 / 37897), Attorney General of British Columbia**

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

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

**Ottawa agent for the Intervener, Attorney General of British Columbia**

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

**Laura Mazenc**
Tel: 306-787-6272
Fax: 306-787-0581
E-mail: laura.mazenc@gov.sk.ca

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

**D. Lynne Watt**
Tel: 613-786-8695
Fax: 613-788-3509
E-mail: lynne.watt@gowlingwlg.com

**Counsel for the Intervener (37748 / 37896 / 37897), Attorney General for Saskatchewan**

**Ottawa agent for the Intervener, Attorney General for Saskatchewan**

**ONTARIO SECURITIES COMMISSION**
2200 – 20 Queen Street West
Toronto, Ontario M5H 3S8

**Matthew H. Britton / Jennifer M. Lynch**
**Paloma Ellard / David Hainey**
**Don Young**
Tel: 416-593-8294
Fax: 416-593-2319
E-mail: mbritton@osc.gov.on.ca

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

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

**Benjamin Grant**
Tel: 613-780-2008
Fax: 613-688-0271
E-mail: bgrant@conway.pro

**Ottawa agent for the Interveners, Ontario Securities Commission, British Columbia Securities Commission and Alberta Securities Commission**

**ECOJUSTICE CANADA SOCIETY**
1910 - 777 Bay Street
PO BOX 106
Toronto, Ontario M5G 2C8

**Laura Bowman / Bronwyn Roe**
Tel: 416-368-7533
Fax: 416-363-2746
E-mail: LBOWMAN@ECOJUSTICE.CA

**Counsel for the Intervener (37748 / 37896 / 37897), Ecojustice Canada Society**

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

**Moira Dillon**
Tel: 613-691-1224
Fax: 613-691-1338
E-mail: mdillon@supremelawgroup.ca

**Ottawa agent for the Intervener, Ecojustice Canada Society**

**FASKEN MARTINEAU DUMOULIN LLP**
2900 - 550 Burrard Street
Vancouver, British Columbia V6C 0A3

**Gavin R. Cameron / Tom Posyniak**
Tel: 604-631-4756
Fax: 604-631-3232
E-mail: gcameron@fasken.com

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

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

**Ottawa agent for the Interveners, British Columbia International Commercial**

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

**Arbitration Centre Foundation, Blue Ant Media Inc., Canadian Broadcasting Corporation, DHX Media Ltd., and Group 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 Quebec Canada, Zoomermedia Ltd., and Pelmorex Weather Networks (Television) Inc.**

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

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

**Counsel for the Interveners (37896), Blue Ant Media Inc., Canadian Broadcasting Corporation, DHX Media Ltd., Group 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 Quebec Canada, Zoomermedia Ltd., and Pelmorex Weather Networks (Television) Inc.**

**LAX O'SULLIVAN LISUS GOTTLIEB LLP**
2750 - 145 King St. West
Toronto, Ontario M5H 1J8

**Terrence J. O'Sullivan / Paul Mitchell**
**James Renihan**
Tel: 416-644-5359
Fax: 416-598-3730
E-mail: tosullivan@counsel-toronto.com

**Counsel for the Intervener (37748 / 37896 / 37897), Council of Canadian Administrative Tribunals**

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

**Eugene Meehan, Q.C.**
Tel: 613-695-8855 Ext: 101
Fax: 613-695-8580
E-mail: emeehan@supremeadvocacy.ca

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

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

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

**Linda R. Rothstein / Michael Fenrick**
**Angela E. Rae / Anne Marie Heenan**
Tel: (416) 646-4300
Fax: (416) 646-4301
E-mail: linda.rothstein@paliareroland.com

**Counsel for the Intervener (37748 / 37896 / 37897), Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec**

**Alyssa Tomkins**
Tel: 613-565-2292
Fax: 613-565-2087
E-mail: atomkins@plaideurs.ca

**Ottawa agent for the Interveners, Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec, National Academy of Arbitrators**

**SUSAN L. STEWART**
7 L'Estrange Place
Toronto, Ontario M6S 4S6
Tele: 416-531-3736
Fax: 416-604-2897
E-mail: sstewart@idirect.ca

**Counsel for the Intervener (37748 / 37896 / 37897), National Academy of Arbitrators**

**GOLDBLATT PARTNERS LLP**
20 Dundas Street West, Suite 1100
Toronto, Ontario M5G 2G8

**Steven Barrett**
Tel: (416) 979-6422
Fax: (416) 591-7333
E-mail: sbarrett@goldblattpartners.com

**Counsel for the Intervener (37748 / 37896 / 37897), Canadian Labour Congress**

**GOLDBLATT PARTNERS LLP**
500-30 Metcalfe St.
Ottawa, Ontario K1P 5L4

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

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

**MCCARTHY TÉTRAULT LLP**
745 Thurlow Street, Suite 2400
Vancouver, British Columbia V6E 0C5

**Adam Goldenberg / Robyn Gifford**
**Asher Honickman**
Tel: 604-643-7100
Fax: 604-643-7900
E-mail: agoldenberg@mccarthy.ca

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

**Darius Bossé**
Tel: 613-702-5566
Fax: 613-702-5566
E-mail: DBosse@juristespower.ca

**Counsel for the Intervener (37748 / 37896 / 37897), Advocates for the Rule of Law**

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

**CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM**
Cambridge University - The Faculty of Law
The David Williams Building - 10 West Road
Cambridge, United Kingdom CB3 9DZ

**Bruno Gélinas-Faucher**
Tel: 737-838-3023 Ext: 44
Fax: 514-565-9877
E-mail: bruno.gelinas.faucher@gmail.com

**Counsel for the Intervener (37748 / 37896 / 37897), Cambridge Comparative Administrative Law Forum**

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

**Maxine Vincelette**
Tel: 613-702-5573
Fax: 613-702-5573
E-mail: mvincelette@powerlaw.ca

**Ottawa Agent for the Interveners, Cambridge Comparative Administrative Law Forum, Association of Canadian Advertisers and the Alliance of Canadian Cinema, Television and Radio Artists**

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

**J. Thomas Curry / Sam Johansen**
Tel: 416-865-3096
Fax: 416-865-9010
E-mail: tcurry@litigate.com

**Counsel for the Intervener (37896 / 37897), Association of Canadian Advertisers and the Alliance of Canadian Cinema, Television and Radio Artists**

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

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

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

**David Fewer**
Tel: 613-562-5800 Ext: 2558
Fax: 613-562-5417
E-mail: david.fewer@uottawa.ca

**Counsel for the Intervener (37748 / 37896 / 37897), Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**

**STEWART MCKELVEY**
65 Grafton Street
P.O. Box 2140, Station Central
Charlottetown, Prince Edward Island C1A 8B9

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

**Counsel for the Intervener (37748 / 37896 / 37897), Canadian Bar Association**

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

**David P. Taylor / Sarah Clarke**
Tel: 613-691-0368
Fax: 613-688-0271
E-mail: dtaylor@conway.pro

**Counsel for the Intervener (37748 / 37896 / 37897), First Nations and Family Caring Socity of Canada**

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

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

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

**Ottawa agent for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**

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

**Guy Régimbald**
Tel: 613-786-0197
Fax: 613-563-9869
E-mail: guy.regimbald@gowlingwlg.com

**Ottawa agent for the Intervener, Canadian Bar Association**

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

**Nicholas Peter McHaffie**
Tel: 613-566-0546
Fax: 613-230-8877
E-mail: nmchaffie@stikeman.com

**Ottawa agent for the Intervener, First Nations and Family Caring Socity of Canada**

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

**Elaine Simon**
Tel: 613-733-0140
Fax : 613-733-0401
E-mail: simone@lao.on.ca

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

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

**Anthony Navaneelan / Audrey Macklin**
Tel: 416-977-8111 Ext: 7181
Fax: 416-977-5567
E-mail: navanea@lao.on.ca

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

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

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

**Ottawa agent for the Intervener, Canadian Association of Refugee Lawyers**

**CANADIAN RADIO-TELEVISION AND TELECOMMUNICATION COMMISSION**
Les Terrasses de la Chaudiére
Central Building
1 Promenade du Portage
Gatineau, Quebec J8X 4B1

**Crystal Hully-Craig**
Tel : 819-956-2095
Fax : 819-953-0589
E-mail: crystal.hully@crtc.gc.ca

**Counsel for the Intervener (37896 / 37897), Canadian Radio-Television and Telecommunication Commission**

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

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

**Counsel for the Intervener (37748), Canadian Council for Refugees**

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

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

**Agent for the Intervener (37748), Canadian Council for Refugees**

**HADEKEL SHAMS s.e.n.c.r.l.**
305, rue Bellechasse est, bureau 400A
Montréal, Quebec H2S 1W9

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

**Counsel for the Intervner (37748), Association québécoise des avocats et avocates en droit de l'immigration**

**HAMEED LAW**
43 Florence Street
Ottawa, Ontario K2P 0W6

**Yavar Hameed**
Tel: 613-232-2688
Fax: 613-232-2680
E-mail: yhameed@hameedlaw.ca

**Agent for the Intervner (37748), Association québécoise des avocats et avocates en droit de l'immigration**

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

**Christopher Rootham / Michael Ryan**
Tel: 613-231-8311
Fax: 613-788-3667
E-mail: christopher.rootham@nelligan.ca

**Counsel for the Intervener (37896 / 37897), Telus Communications Inc.**

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## PART I - STATEMENT OF FACTS

1. The Queen's Prison Law Clinic ("QPLC") takes no position on the facts or the outcome of these appeals, only on the framework for substantive judicial review of administrative action.

## PART II - OVERVIEW AND POSITIONS ON QUESTIONS IN ISSUE

2. Prisoners live in a world governed almost entirely by administrative law. Access to their most basic needs and their limited residual freedoms – food, safety, sleep, movement, hygiene, human interaction, fresh air, exercise, access to reading and writing materials, access to legal counsel, use of a telephone and mail, even the timing of their eventual release – is governed by the decisions of corrections officials. As such, judicial review is their principal avenue to ensure their treatment is lawful. Their perspective sharpens what is at stake in our system of judicial oversight of executive authority granted by statute. The current system, with its "one-size-fits-all" approach to judicial supervision and reluctance to call administrators' decisions into serious question, is a major obstruction to their constitutional right to be treated in accordance with law.

3. If this Court recognizes the need to revisit *Dunsmuir*, it should correct the widely-acknowledged problems in this area of law at their root. Courts must discharge their constitutional *duty* to decide what the law is, while respecting express legislative intention. The universal application of a time-consuming and unwieldy "standard of review analysis" should be discarded. It is unjustified and contrary to legislative intention wherever a statute creates a right of appeal or gives other direction that the court *take a hand* in correcting administrators' actions or decisions. And it is unnecessary and contrary to constitutional principle where the legislation is silent; simpler common law principles of judicial oversight should then apply to ensure the individual does not suffer a burden from an *unlawful* administrative action.

4. One area sure to remain complex and difficult is where a privative clause purports to forbid judicial review, yet a question is raised about the legal authority (or "jurisdiction") of the administrator to have taken an impugned action. The law has not improved upon the conclusion of Dickson J in 1979 that such questions are "often very difficult to determine" and that in consequence, a court should hesitate to find errors of jurisdiction in doubtful cases. The tools and aids articulated as the "pragmatic and functional approach" (or for the last decade, the "standard of review analysis") in cases such as *Bibeault* should be retained and deployed – but *only* in this

limited context, where they are useful in resolving a conflict between the rule of law (and the court's constitutional duty to finally interpret the law) and legislative supremacy.

5. In other words, the Court should, with respect, abandon the doomed search for a "grand unified theory" of substantive review and focus on core judicial functions in these fundamentally different contexts. By doing so, the widely-bemoaned and opaque[1] "standard of review analysis" may be cleaved away from huge volumes of *practical* judicial review work and reserved for those cases where its balance, nuance and posture are both *suited* and *necessary* – those in which the court must resolve a challenge to jurisdiction in the face of a privative clause.

6. Reflexive, near-universal "deference" cannot solve the law's problems. The reduction of administrative law to "reasonableness" is hostile to the principle of legality, and may rightly be viewed as judicial *refusal* to implement appeal-creating provisions.[2] Deference is built on faith-based presumptions of expertise,[3] instead of proper and respectful attention to demonstrations of expertise. The predictable result is administrators becoming attuned to the curial deference they inevitably will be shown, exploiting it to mask failings in their decisions (or motives), and becoming literally a law unto themselves.[4] That risk is all too real for the QPLC's clients.

7. In every aspect of their daily lives, prisoners are subject to the coercive control of the administrative state and to the full gamut of discretionary power – from the Commissioner promulgating policy directives, to the officer patrolling the cells. Prisoners are in a uniquely vulnerable position,[5] and have a particular interest in ensuring that administrative powers are exercised scrupulously and within the constraints of the law.[6] Regrettably, as noted by numerous

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[1] See, for example, the Hon Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency," (2016) 42 Queen's LJ 27; the Hon Justice David Stratas, "A Decade of Dunsmuir: Please No More" (8 March 2018), online: *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2018/03/08/a-decade-of-dunsmuir-please-no-more-hon-david-w-stratas/>; the cconcurring reasons of Nadon JA in *Bell Canada v 7265921 Canada Ltd*, 2018 FCA 174; Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58 McGill LJ 483.

[2] A similar theme runs through the dissenting reasons of Côté and Brown JJ in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293, especially at paras 73-80. And see criticisms of the majority reasons in that case in David Philips Jones, QC, "Administrative Law in 2016: Update on Caselaw, Recent Trends and Related Developments, Part II—An Additional Case" (14 November 2016) at 10-12, online: <http://sagecounsel.com/wp-content/uploads/2016/11/2016-Recent-Developments-DPJ-PART-II-AN-ADDITIONAL-CASE-v2.pdf>.

[3] Peter A Gall, QC, "Problems with a Faith Based Approach to Judicial Review" (2014) 66 SCLR (2d) 183.

[4] In his report, the Hon James McRuer wrote of the "strong disciplinary effect" of appeal rights on tribunals: Ontario, *Royal Commission Inquiry into Civil Rights*, Hon JC McRuer (Toronto: Queen's Printer, 1968) ("McRuer Commission Report") at 233.

[5] *Drennan v. Canada (Attorney General)*, 2008 FC 10 at para 41.

[6] Mark MacGuigan, The Sub-Committee on the Penitentiary System in Canada, (Ottawa: Minister of Supply and Services Canada 1976-1977) at para. 418: "Abuse of power and denial of justice are always possible under any system, no matter how well conceived or organized it may be. These things are felt no less keenly in prison than elsewhere, and their consequences in a penitentiary setting are often far more severe" ("MacGuigan Report").

reports and commissions of inquiry over the past 80 years, Canadian penal culture has persistently failed to internalize and adhere to the principle of legality.[7] It is only through ***effective*** judicial oversight that the legal rights of prisoners are safeguarded and the rule of law runs within penitentiary walls.[8] Prisoners know most intimately how substantive justice is impaired when courts step away from their constitutional duty to guarantee the rule of law, and adopt reflexive deference to administrators even on questions of law and matters of liberty.

## PART III - LAW AND ARGUMENT

### A. The constitutional duty of the court

8. What we call "administrative law" is in some ways merely a specialized form of statutory interpretation.[9] Legislatures are supreme within their constitutional limits, but they can exert that supremacy only *through statutes*. Yet statutes by their very nature must be applied and interpreted, and someone must decide whether they apply to a particular circumstance. As the Hon James McRuer observed in his seminal report,[10] "the imperfections of language as a means of communication often result in obscurity or ambiguity in the application of [the statute] to particular facts. In such instances a court applying a statute is required to give a precise meaning to the language for the purposes of applying it to those facts". By acting through a statute, a legislature necessarily subjects its intention to the interpretation its words are found to bear.

9. The court's constitutional duty is to give the *final* interpretation of what a law *means* and how it *applies*. Chief Justice Laskin (for the Court) found that essential power to be guaranteed by s 96 of the *Constitution Act 1867*, in *Crevier*.[11] That case dealt with a privative clause

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[7] See, e.g.: *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: King's Printer, 1938) at 61-62: the failure to deal justly with prisoners was found to be "a major contributing cause of breaches of discipline, conspiracies, assaults, and riots in the penitentiaries. … [I]nstead of instilling faith in human justice into the heart of the prisoner, which is an essential part of reformation, it will create in his mind a disbelief in justice and an unbreakable creed of scepticism and contempt … [T]his feeling of injustice is quite prevalent in our penitentiaries."; MacGuigan Report, *supra*, at para. 411: "There is a great deal of irony in the fact that imprisonment - the ultimate product of our system of criminal justice – itself epitomizes injustice."; Solicitor General of Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) ("Arbour Report") at para. 3.1.2: "The breakdown of the Rule of Law in corrections has been denounced in the past, often in the most forceful terms. ... The absence of the Rule of Law is most noticeable at the management level, both within the prison and at the Regional and National levels. The Rule of Law has to be imported and integrated, at those levels, from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously". See also: *British Columbia Civil Liberties Assn v Canada (Attorney General)*, 2018 BCSC 62, [2018] BCJ no 53 at paras 28-48; *Currie v Alberta (Edmonton Remand Centre)*, 2006 ABQB 858 at paras 2-13.

[8] *May v Ferndale Institution*, [2005] 3 SCR 809 at para 72; Arbour Report, *supra*, at para 3.2.1: "[T]here is little hope that the Rule of Law will implant itself within the correctional culture without assistance and control from Parliament and the courts."

[9] *UES Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1087.

[10] McRuer Commission Report, *supra*, at 23.

[11] *Crevier v Quebec (Attorney-General)*, [1981] 2 SCR 220.

forbidding all judicial review – including the interpretation or application of the statute. Laskin CJC held that such a clause *cannot* be obeyed, because taken literally it is nonsense. To *obey* the provision is to apply it, and thus to *disobey* its command. To that extent, the law is clear – a privative clause may bear meaning, but its literal meaning must be ignored as unconstitutional.

10. An elegant expression of this essential characteristic of our courts is found in the famous American case *Marbury v Madison*: "It is emphatically the **province and duty of the judicial department to say what the law is.** Those who apply the rule to particular cases must of necessity expound and interpret the rule."[12] In Canada, this core constitutional principle is drawn from the terse language of s 96 and the dense factual/procedural context of *Crevier*; still, our law is clear that our constitution gives *courts* the "last word" on what the law is.[13]

11. The QPLC submits that having "the last word" on what the law is *is not optional*. It is not a mere *power* that the courts can use if they want to or decline if they do not. It is a *job* – a public duty owed to those made subject to the laws. It is both their province *and duty*, as *Marbury* puts it. The question is how best to discharge that duty in the context of administrative actions. That question must be answered differently depending on whether the court is hearing an appeal or other proceeding expressly authorized by statute; hearing an application in the face of a privative clause; or faced with an application where the statute is silent as to the court's role.

## B. Statutory appeals or other legislated authorization of judicial review

12. The "standard of review analysis" (formerly the "pragmatic and functional approach") was developed to deal with the paradox of the privative clause, and the difficulty of distinguishing a "true" jurisdictional excess, or unauthorized action or decision, from a mere error of law *within* the authority of the administrator.[14] That situation – discussed below – exposes a conflict between the duty to *apply* the legislature's statute (*i.e.*, legislative supremacy), and the duty to *interpret* the law to determine its true meaning and scope (*i.e.*, the rule of law).

13. Where the legislature creates an appeal right, there is no such tension and thus no need for special tools to resolve it. Usually the provision will say something about the scope of an appeal

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[12] 5 US (1 Cranch) 137 (1803).
[13] This duty is expressly acknowledged in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 27-31, confirming "the courts' **constitutional duty** to ensure that public authorities do not overreach their lawful powers", and the nature of judicial review as to "**ensure** the legality" of government action (*per* Bastarache and LeBel JJ). See also para 128 (*per* Binnie J).
[14] *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1338-46 *per* Wilson J.

right – whether it is limited to questions of law, or includes questions of fact, or a power to substitute the Court's opinion for that of the administrator. These provisions should be interpreted and applied according to their terms, and informed by general appellate law principles.[15] Surely legislators know what an "appeal" means when they use that word in an administrative statute, as they do when they use it in the *Criminal Code* or *Courts of Justice Act*.

14. But the current jurisprudence demands a ceremonial[16] standard of review analysis, however clear the appeal language may be.[17] The normal result – deference, or a "reasonableness" standard – is frequently *at odds with* the legislative intention expressed. As Laskin CJC said in *Bhadauria v Seneca College* in considering the availability of "full curial enforcement by wide rights of appeal" in the *Human Rights Code*, appeal provisions clearly state a legislative intent to create a "regime which does not exclude the courts but rather ***makes them part of the enforcement machinery*** under the [statute]".[18]

15. Since *Bhadauria*, however, the case law has come to reject the court's assigned role as "part of the enforcement machinery" of an administrative regime. This Court made that shift in the 1994 *Pezim* case,[19] and has entrenched the approach in many cases since then. It has done so based on the fiction that legislatures – even where they create a clear, explicit appeal right – intend courts to defer to administrators anytime they are said (by courts) to have "expertise".

## C. The appropriate use of expertise

16. The notion that administrators, merely by virtue of appointment and regardless of experience, have "expertise" on the legal issues they confront is a fiction. Certainly it *can* and *does* happen that administrators develop and use their expertise to decide tough issues, including legal questions. But common sense and experience show that it is simply not the case that administrators have superior expertise, in a relevant way, on *whatever* comes before them that is somehow connected to their mandate. Our law cannot be based on this clearly false assumption.

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[15] For instance, an appeal would usually imply that some deference to fact-finding is appropriate based on the relative advantage of most first-instance decisions makers who hear *viva voce* evidence, as described in *e.g. Housen v Nikolaisen*, 2002 SCC 33.
[16] Reaching absurd dimensions in *Pushpanathan v Canada (Minister of Citizenship and Immigration),* [1998] 1 SCR 982 at paras 23-50, and in particular para 43, which acknowledges – *after* conducting a full standard of review analysis – that adopting any standard other than "correctness" would render the appeal provision in issue "incoherent".
[17] A striking example of the counterintuitive results is this Court's treatment of the extraordinarily broad appeal provision in *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at paras 20-42. A more recent example is *Edmonton (City)*, *supra*.
[18] *Bhadauria v Seneca College*, [1981] 2 SCR 181 at 194-95.
[19] *Pezim v BC Superintendent of Brokers*, [1994] 2 SCR 557.

17. A court's opinion that an administrator is an "expert" and the court is not, has no bearing on what the legislation means. A particular administrator might have some "expertise", but if the legislature mandates the court to hear an appeal and substitute its opinion for that of the administrator, it is not consistent with the court's constitutional duty to say to the legislature, in effect: "I see you have told me to decide the law freshly, but I think you should have left this decision to the expert, so I am going to 'defer'".

18. It is ironic that what that has driven this focus on expertise has been a desire to *enable* legislatures' authority to confer administrative power (legislative supremacy), and avoid the (now-outdated)[20] bogeyman of judicial interventionism and obstruction of policy advances. Far from *advancing* legislative intent, the current insistence that deference be shown even on a broadly-cast appeal proceeding is better understood as the court *refusing to comply* with legislative direction. Worse, the court's refusal to participate fully in the regime's "enforcement machinery" deprives the individual of their right to be heard on the terms the legislature directed. Legislatures do not confer appeal rights *on courts*, to be used if, as, and when the judge feels best;[21] appeal rights are conferred on *individuals*, to be exercised when they choose.

19. That is not to say expertise is *irrelevant*. But its use should be confined to circumstances where its value and persuasive influence are manifest. *CUPE v New Brunswick Liquor Corp*[22] is a beacon example of such circumstances. There, the statute "bristle[d] with ambiguity", suggesting at least four plausible interpretations. The interpretation adopted by the Labour Board (and by this Court) emerged from the Board's demonstrated appreciation of the public policy purpose behind the statutory provision, and its relationship to other corresponding provisions. The Board, in other words, was respected (in a sense, "deferred to") because it supplied a basis for Dickson J to *prefer* its interpretation, acknowledging that there is often no one inevitable and determinate meaning to the words of an enactment, and that the Board's evident familiarity with

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[20] The caricature of the judicial instinct to obstruct administrative action through tendentious identification of "preliminary questions" and other means emerges, and fairly so, from the first half of the twentieth century and the revolution in labour legislation in that period. The opposition to administrative power has its roots in the specifically English views of AV Dicey in his 1915 work *Introduction to the Study of the Law of the Constitution* and of Lord Hewart in *The New Despotism* (1929). But as long ago as 1968 – fifty years ago – the McRuer Commission observed that this fear was no longer warranted and that the days of courts taking a "hostile attitude" towards administrative power had passed. See McRuer Commission Report, *supra*, at 277-79.

[21] Of course they *can* do this by saying, *e.g.*, "An appeal lies, **with leave of the Court**, to the [Court, parties, issues]…".

[22] [1979] 2 SCR 227.

the context of the statute was *demonstrated*, and once seen, worthy of "deference as respect".[23]

20. A theoretical presumption of "expertise", in a vacuum, is meaningless as an aid to saying what the law is, and as a basis to refuse to discharge the duties conferred through appeal rights. On the other hand, a demonstration of expertise – usually through written reasons – is a sound basis to prefer an administrator's interpretation over other grammatically plausible options.

**D. Privative clauses**

21. The use of true "privative clauses" has declined from its zenith. Where they arise, however, they present a constitutional problem. A truly "court-proof" administrator could confer ever-larger jurisdiction upon itself, declaring for itself powers the legislature never imagined or conferred. Thus, the court has the inalienable constitutional authority and duty to protect individuals from the unlawful assumption of legal authority by saying what the law is. That duty is why we constitutionally protect judicial authority, independence, and remuneration.

22. Cases of wrongly-assumed legal authority, in the face of a privative clause, are nowadays rare compared to more routine problems like statutory appeals. But the rule of law, *Crevier*, and the constitutional necessity of the judicial branch all require the continued existence of "true jurisdictional questions", even if they are rare and sometimes challenging to identify.[24] Recall that what was said by Beetz J in *Bibeault* was affirmed in *Dunsmuir*:[25]

> The idea of the preliminary or collateral question is based on the principle that the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and that such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator. The theoretical basis of this idea is therefore unimpeachable -- which may explain why it has never been squarely repudiated: any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions. [26]

23. The law on standard of review as stated in *Dunsmuir* adds little to the tools identified in *Bibeault* and dubbed the "pragmatic and functional approach". That approach was never meant as a freestanding approach to *all kinds of judicial work involving administrative law*. The approach offers different lenses through which to view the problem of identifying a jurisdictional excess

[23] To use the memorable phrase of Prof David Dyzenhaus in "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) at 279, cited in *Dunsmuir*, *supra*, at para 48.
[24] Those challenges led this Court to question the continued existence of "true jurisdictional questions" in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654.
[25] *Dunsmuir*, *supra*, at paras 27-33 and especially at para 31.
[26] *Bibeault*, *supra*, at 1086 (emphasis added).

that demands judicial correction. ***And that problem only arises when there is a privative clause***. The law will never be rid of this difficulty so long as there remain privative clauses. There is no magic solution to an insoluble paradox. Judges must decide. Our constitution requires it.

24. The best approach to these situations is to heed Dickson J's cautions in *CUPE* and to use the tools developed in *Bibeault* as they were intended – as sign-posts to assist in identifying true jurisdictional errors while being careful not to, in substance, review the "merits" of decisions that lie within the administrator's authority. But the worst thing to do is exactly what has been done – to graft the "standard of review" analysis with all its challenges onto simpler contexts where it is unneeded and unhelpful, *i.e.* statutory appeals and amidst legislative silence as to the court's role in the administrative regime. Standard of review has become a case of the "solution that swallowed the problem"; it should be restricted to the narrow purpose for which it was designed.

**E. Judicial review absent a privative clause or an appeal provision**

25. Most of the decisions affecting the QPLC's clients lie in this third category, as does the *Vavilov* case.[27] It is one well-known to the common law, grown from the old prerogative writs long before the trend of shielding administrators through privative clauses took root.[28] Where the legislature has chosen to be silent, the common law must supply an approach that *at least* lets courts discharge their constitutional duty to say what the law is. In addressing this category, this Court should consider the approaches taken historically, and the broader scope for judicial review recognized at common law before the modern "universal" approach became entrenched. From legislative silence one may infer the intention that these known common law principles apply. The current "standard of review" approach is unsuited to the essence of the judicial function and speaks to issues that just do not arise where the legislature has elected silence.

26. At common law, there were clear grounds on which courts could intervene in administrative decisions and grant remedies in the form of the prerogative writs. Where an official's decision was not sheltered by a privative clause, reviewing courts could grant remedies where there was a defect of jurisdiction, a breach of natural justice, or an error of law "on the face of the record".[29] While there were some procedural anachronisms embedded in these older

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[27] Subject to the important role of s 18.1(4) of the *Federal Courts Act*, mentioned below.
[28] *Attorney General (Que)v Farrah*, [1978] 2 SCR 638 at 651-653.
[29] For an exposition of the grounds see DCM Yardley, "The grounds for certiorari and prohibition," (1959), 37 Can Bar Rev 294.

doctrines that can be discarded, the developed wisdom of the common law has much to offer.

27. Drawing from the common law and from constitutional principle, the QPLC submits that judicial review should be allowed in these cases where the administrator has: (a) made an error of law (including an error of jurisdiction) that affects the outcome for the applicant; (b) made a clearly wrong finding of fact that affects the outcome for the applicant; (c) breached the duty of procedural fairness; or (d) abused its discretion. These bases for review are all consistent with the rule of law; legislative supremacy; reasonable interpretive presumptions about legislative intent; and the constitutional duty of the court to protect the subject from unlawful government action.

28. **Errors of law or jurisdiction.** Where an administrator acts without legal authority, the court *must* intervene to prevent "unlawful attempts at usurpation of power".[30] That is true in the face of a privative clause; *a fortiori* it must be true in the absence thereof. In this context, there is no need to distinguish "jurisdictional" from other questions of law; instead, where an error of law is alleged, the court must discharge its role as final arbiter of the law's meaning. If the administrator has made an error of law, the court should say so. If the administrator has given some basis (*e.g.*, reasons) to take into account its expertise, the court should show "not submission but a respectful attention"[31] to the reasons offered and the expertise relayed, and may legitimately find a basis to prefer (but not blindly "defer to") the administrator's view over other competing possibilities. That meets the court's duty to finally state the law. It is also basically what the law was until the "standard of review" analysis colonized this category in the 1990s. Of course, if the error does *not* meaningfully affect the individual, the court can refuse relief.[32] But where the citizen suffers a disadvantage because an official has misapplied or misinterpreted the law, the courts ought to say so, and grant a remedy to restore the citizen to their lawful position.

29. **Errors of Fact.** Findings of fact properly attract deference where the fact-finder has a better opportunity than the court to consider all of the evidence, hear witnesses, and use its knowledge and expertise to assess the evidence and make factual findings. However, legislatures can be presumed to intend a *fair and reasonable* fact-finding process and outcome. A remedy should be available where the administrator has made an unreasonable finding of fact, such as

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[30] *Jacmain v Attorney General (Can)* (1977), [1978] 2 SCR 15 at 29.
[31] *Dunsmuir*, *supra*, at 48 quoting Dyzenhaus.
[32] The same principles animate the law of mootness, the principle *de minimis non curat lex*, and cases declining judicial review remedies on discretionary grounds, *e.g. Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 and *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6.

one made "absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion".[33]

30. **Breaches of procedural fairness.** The current law has no difficulty fixing administrators with common law procedural obligations. That is based on the reasonable presumption that the legislature does not intend to confer a power to be exercised in an unfair way, and dates back to at least *Cooper v Wandsworth Board of Works*.[34] The QPLC submits that this sensible presumption, and the great edifice of procedural law built upon it, needs no revision.

31. **Abuse of discretion.** *Roncarelli v Duplessis*[35] teaches that discretion may not be abused. Abuse of discretion includes acting in bad faith or for an improper purpose, failing to consider relevant factors, or considering irrelevant factors.[36] If given space, it may evolve. The point is that the legislature is also presumed not to grant to administrators powers that they may abuse.

### F. Section 18.1(4) of the *Federal Courts Act* and *Khosa*

32. Finally, it is necessary to deal with this Court's decision in *Khosa*, which held that the codified "grounds" for review in s. 18.1(4) should be read as requiring the "standard of review analysis".[37] For the reasons already explained, that analysis is not appropriate outside the context of a privative clause. A substantial portion of judicial review applications in Canada come to the federal courts under s 18.1(4) of the *Federal Courts Act*. Correcting the system requires this Court to overturn *Khosa* and, in essence, adopt the dissenting analysis of Rothstein J. Parliament has spoken through this provision just as clearly as it has in the case of a statutory appeal right. The court should apply the provision in just the same way.

## PART IV - COSTS

33. QPLC does not seek costs and asks that none be awarded against it.

## PART V - ORDER REQUESTED

34. QPLC does not request any order.

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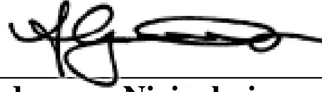
[33] *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 74. For an older recognition of judicial review on the grounds of error of fact, see *Blanchard v Control Data Canada Ltd*, [1984] SCR 476 at 494-95.
[34] [1863] 143 ER 414.
[35] [1959] SCR 121.
[36] See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 53.
[37] *Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 SCR 339.

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



**Brendan van Niejenhuis**
**Andrea Gonsalves**

**STOCKWOODS LLP**
Lawyers for the Intervener,
Queen's Prison Law Clinic

**PART VI - TABLE OF AUTHORITIES**

| **AUTHORITY** | **Paragraph No. Referred to in Factum** |
|---|---|
| *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 | 22 |
| *Attorney General (Que)v Farrah*, [1978] 2 SCR 638 | 25 |
| *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 | 31 |
| *Bell Canada v 7265921 Canada Ltd*, 2018 FCA 174 | 5 |
| *Bhadauria v Seneca College*, [1981] 2 SCR 181 | 14 |
| *Blanchard v Control Data Canada Ltd*, [1984] SCR 476 | 29 |
| *British Columbia Civil Liberties Assn v Canada (Attorney General)*, 2018 BCSC 62, [2018] BCJ no 53 | 7 |
| *Cooper v Wandsworth Board of Works*, [1863] 143 ER 414 | 30 |
| *Crevier v Quebec (Attorney-General)*, [1981] 2 SCR 220 | 9 |
| *CUPE v New Brunswick Liquor Corp*, [1979] 2 SCR 227 | 19 |
| *Currie v Alberta (Edmonton Remand Centre)*, 2006 ABQB 858 http://canlii.ca/t/1q40v | 7 |
| *Drennan v. Canada (Attorney General)*, 2008 FC 10 | 7 |
| *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 | 10, 19, 22, 28 |
| *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293 | 6, 14 |
| *Housen v Nikolaisen*, 2002 SCC 33 | 13 |
| *Jacmain v Attorney General (Can) et al* (1977), [1978] 2 SCR 15 | 28 |
| *Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 | 32 |
| *Law Society of New Brunswick v Ryan*, 2003 SCC 20 | 14 |
| *Marbury v Madison* 5 US (1 Cranch) 137 (1803) | 10 |
| *May v Ferndale Institution*, [2005] 3 SCR 809 | 7 |

| **AUTHORITY** | **Paragraph No. Referred to in Factum** |
|---|---|
| *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 | 28 |
| *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 | 29 |
| *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 | 28 |
| *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 | 12 |
| *Pezim v BC Superintendent of Brokers*, [1994] 2 SCR 557 | 15 |
| *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 | 14 |
| *Roncarelli v Duplessis* [1959] SCR 121 | 31 |
| *UES Local 298 v Bibeault*, [1988] 2 SCR 1048 | 8, 22 |

| **Secondary Sources** | **Paragraph No. Referred to in Factum** |
|---|---|
| *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) <http://publications.gc.ca/collections/collection_2017/bcp-pco/JS42-73-1996-eng.pdf> | 7 |
| Daly, Paul, "*Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review*" (2012) 58 McGill LJ 483, Online: <https://www.erudit.org/fr/revues/mlj/2012-v58-n2-mlj0751/1017521ar.pdf> | 5 |
| Gall, Peter A, QC, "Problems with a Faith Based Approach to Judicial Review" (2014) 66 SCLR (2d) 183 | 6 |
| MacGuigan, Mark, *The Sub-Committee on the Penitentiary System in Canada*, (Ottawa: Minister of Supply and Services Canada 1976-1977) <http://johnhoward.ca/wp-content/uploads/2016/12/1977-HV-9507-C33-1977-MacGuigan.pdf> | 7 |

| **Secondary Sources** | **Paragraph No. Referred to in Factum** |
|---|---|
| The Honourable JC McRuer, *Royal Commission Inquiry into Civil Rights*, (Toronto: Queen's Printer, 1968) <https://archive.org/details/royalcommissioni04onta> | 6, 8, 18 |
| *Report of the Royal Commission to Investigate the Penal System of Canada* (Ottawa: King's Printer, 1938) <http://publications.gc.ca/collections/collection_2014/bcp-pco/CP32-100-1938-1-eng.pdf> | 7 |
| The Honourable Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency," (2016) 42 Queen's LJ 27 | 5 |
| DCM Yardley, "The grounds for certiorari and prohibition," (1959), 37 Can Bar Rev 294 | 26 |

| **Commentary** | **Paragraph No. Referred to in Factum** |
|---|---|
| Jones, David Philips, QC, "Administrative Law in 2016: Update on Caselaw, Recent Trends and Related Developments, Part II—An Additional Case" (14 November 2016) > | 6 |
| The Honourable Justice David Stratas, "A Decade of Dunsmuir: Please No More" (8 March 2018), online: *Administrative Law Matters* | 5 |

| **Legislation** | **Sections** |
|---|---|
| *Federal Courts Act*, R.S.C., 1985, c. F-7 | 18.1(4) |