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]

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

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

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[Complete Style of Cause]

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B E T W E E N :

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Appellants

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

- and -

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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))

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## STATEMENT OF ARGUMENT IN REPLY TO THE *AMICI CURIAE*

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

### 1. On Any Framework, Correctness Applies

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

#### A. Statutory Rights of Appeal Require Correctness Review

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

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

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[1] Factum of the *Amici Curiae*, ¶ 8, 105 ("***Amici* Factum**").

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

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

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

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

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

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

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[3] *Amici* Factum, ¶ 109.
[4] Bell Factum, ¶ 86-87.
[5] *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶ 190 (*per* Nadon J.A., dissenting on this point).
[6] See also *Amici* Factum, ¶ 108.
[7] See also Bell Factum, ¶ 84-87.

### B. Resolving Jurisdictional Boundaries Requires Correctness Review

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

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

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

### C. Persistent Legal Discord Requires Correctness Review

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

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

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

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[8] *Amici* Factum, ¶ 83-84.
[9] See also Bell Factum, ¶ 5, 64-68, 82; NFL Factum, ¶ 10, 15, 21, 48-59.
[10] *Amici* Factum, ¶ 85.
[11] NFL Factum, ¶ 34, 61-62.
[12] Specifically ss. 38 and 51, both now repealed.

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

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

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

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

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

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

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

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

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

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

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

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

## 2. Institutional Design Cannot Supersede Canada's Constitutional Design

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

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

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

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

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[17] *Amici* Factum, ¶ 92.
[18] *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶ 89.
[19] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶ 71.
[20] David Stratas, "Looking past *Dunsmuir*: Beginning Afresh", online: <https://doubleaspect.blog/2018/03/08/looking-past-dunsmuir-beginning-afresh/>.
[21] *Amici* Factum, ¶ 44.

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

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

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

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

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

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[22] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, ¶ 28-29. See also *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at 30.
[23] *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at 73 [Emphasis in original].
[24] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶ 29.
[25] *Ibid*, ¶ 30; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, ¶ 53-55.
[26] *Corporation of the City of Enfield v. Development Assessment Commttee*, (2000) HCA 5, ¶

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

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

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

### A. True Questions of Jurisdiction are Constitutionally Necessary

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

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

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

[27] *Amici* Factum, ¶ 46, 50.

[28] *Amici* Factum, ¶ 10, 56-66.

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

[30] *Amici* Factum, ¶ 15.

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

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

### B. True Questions of Jurisdiction Exist and are Identifiable

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

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

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

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[32] Bell Factum, ¶ 36-51.
[33] *CHRC (SCC 2018)*, *supra* note 29, ¶ 77 (*per* Côté and Rowe JJ., concurring).
[34] *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, ¶ 68 ("***Guérin (SCC 2017)***").
[35] *ATA (SCC 2011)*, *supra* note 31, ¶ 34; *CBC v. SODRAC 2003 Inc.*, 2015 SCC 57, ¶ 39; *Guérin (SCC 2017)*, *supra* note 34, ¶ 30; *CHRC (SCC 2018)*, *supra* note 29, ¶ 41.
[36] Bell Factum, ¶ 55.
[37] *Guérin (SCC 2017)*, *supra* note 34, ¶ 66, 68-69 (*per* Brown and Rowe JJ, concurring), 83

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

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

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

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

### D. True Questions of Jurisdiction Apply to All Statutory Courts

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

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(*per* Côté J. dissenting).

[38] *Amici* Factum, ¶ 61-66.

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

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

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

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

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

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

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

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

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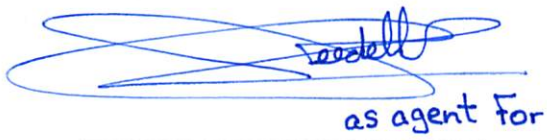
[42] *Amici* Factum, ¶ 116, 118, 122; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, ¶ 23-29.
[43] NFL Factum, ¶ 96-98; Bell Factum, ¶ 110-19; Factum of the Interveners, Alliance of Cdn. Cinema, Television and Radio Artists & Assn. of Canadian Advertisers, ¶ 4-6, 15-18.
[44] CRTC Instruments, ¶ 28, 35, JR Tab 1.
[45] Interventions of the National Football League & BCE Re: Broadcasting Notice of Consultation CRTC 2015-330, JR Tabs 20, 21.
[46] *Amici* Factum, ¶ 123.

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

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