

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

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

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

- and -

ATTORNEY GENERAL OF ONTARIO et al.

Interveners

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici Curiae

[Complete Style of Cause shown on next page]

JOINT FACTUM OF THE APPELLANTS
BELL CANADA ET AL and NATIONAL FOOTBALL LEAGUE ET AL
IN REPLY TO THE RESPONSES OF THE INTERVENERS
(Pursuant to the Order of Karakatsanis J. dated September 24, 2018)

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[Complete Style of Cause]

SCC File No. 37896

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B E T W E E N :

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Appellants

- and -

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

- and -

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Interveners

- and -

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AND BETWEEN:

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

Appellants

- and -

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Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

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

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STATEMENT OF ARGUMENT IN REPLY

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

1. True Questions of Jurisdiction Must be Correctly Decided

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

- (a) True questions of jurisdiction are difficult to define, were once used to subvert legislative intent, and should therefore be abolished;²
- (b) Correctness review of true questions of jurisdiction is incompatible with home statute deference;³ and
- (c) Correctness review of true questions of jurisdiction is inefficient given the expertise of administrative tribunals.⁴

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

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

¹ *Broadcasting Act*, (S.C. 1991, c. 11), s 9(1)(h).

² See for example Factum of Attorney General of British Columbia, para 23 (“**AG British Columbia Factum**”); Factum of Attorney General of Saskatchewan (“**AG Saskatchewan Factum**”), para 8.

³ See for example Factum of Canadian Labour Congress, para 26 (“**CLC Factum**”); Factum of National Association of Pharmacy Regulatory Authorities (“**NAPRA Factum**”).

⁴ See for example CLC Factum, paras 5-8; Workplace Safety and Insurance Appeals Tribunal *et al.* (“**Workplace Tribunal Factum**”), paras 29-31.

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

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

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

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

8. The consequences of inconsistent (or incorrect) determinations of a tribunal’s own jurisdiction would create great uncertainty and inequality before the law for litigants. The perverse consequences of inconsistent administrative decision making are highlighted by a number of interveners, including the Canadian Council for Refugees¹⁰ and Parkdale Community Legal Services.¹¹

⁵ *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), paras 30, 36, 50 and 59 [*Dunsmuir*].

⁶ *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016 SCC 47](#), para 21.

⁷ *Reference re Pan -Canadian Securities Regulation*, [2018 SCC 48](#), para 55.

⁸ Factum of Attorney General of Ontario (“**AG Ontario Factum**”), para 7.

⁹ Factum of Advocates For The Rule of Law Factum (“**ARL Factum**”), para 4.

¹⁰ Factum of Canadian Council for Refugees (“**CCR Factum**”), paras 9-14.

¹¹ Factum of Parkdale Community Legal Services, paras 30-32.

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

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

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

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

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

¹² *Dunsmuir*, [2008 SCC 9](#), para 59.

¹³ Factum of Bell Canada *et al.* (“**Appeal Factum**”), para 56.

¹⁴ Factum of Samuelson-Glushko Canadian Internet Policy *et al.* (“**CIPPIC Factum**”), para 37.

¹⁵ Factum of Queen’s Prison Law Clinic, para 18.

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

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

2. **Appeal Rights Indicate a Standard of Review of Correctness**

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

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

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

¹⁶ *Administrative Tribunals Act*, [SBC 2004, c 45](#), s. 59 as cited in Factum of First Nations Child and Family Caring Society of Canada (“**FNCFCS Factum**”), para 27.

¹⁷ *Federal Courts Act*, [RSC 1985, c F-7](#), s. 18.1(4)(c) as cited in ARL Factum, para 19.

¹⁸ *Judicial Review Procedure Act*, [RSO 1990, c J.1](#), s. 2(2) cited in ARL Factum, para 18.

¹⁹ See for example AG Saskatchewan Factum, para 28(c).

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

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

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

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

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

²⁰ Queen’s Prison Law Clinic Factum, paras 13-15.

²¹ *Housen v. Nikolaisen*, [2002 SCC 33](#).

²² *Broadcasting Act*, [SC 1991, c 11](#), s. 31(2) and *Federal Courts Act*, [R.S.C., 1985, c. F-7](#), s. 23(1).

²³ AG British Columbia Factum, para 33.

²⁴ Factum of Advocacy Centre For Tenants Ontario (“**Tenant’s Advocacy Centre Factum**”), paras 22-31.

²⁵ See for example AG British Columbia Factum, para 31.

²⁶ Factum of Canadian Bar Association (“**CBA Factum**”), para 9.

3. Reasonableness Review Must Be Substantive

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

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

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

²⁷ Factum of Canadian Association of Refugee Lawyers ("**CARL Factum**"), para 19.

²⁸ AG Ontario Factum, para 11; Factum of Ecojustice Canada Society ("**Ecojustice Factum**"), para 21.

²⁹ Ecojustice Factum, para 16, consistent with *McLean v British Columbia (Securities Commission)*, [2013 SCC 67](#) and *Wilson v Atomic Energy of Canada Ltd.*, [2016 SCC 29](#).

³⁰ CARL Factum, para 21; CBA Factum, para 20; Factum of Council of Canadian Administrative Tribunals ("**CCAT Factum**"), para 32.

³¹ *Canada (Canadian Human Rights Commission) v. Canada (AG)*, [2011 SCC 53](#), para 33 ("**Mowat**").

³² *Mowat*, [2011 SCC 53](#), para 35-64.

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

4. Judicial Review Can Account for Context

26. Certain interveners argue that there are unique features to particular administrative regimes that militate in favour of more or less deference, whatever the general standard of review. Those interveners advocate for deference to the decisions of commercial arbitrators,³⁴ labour arbitrators,³⁵ self-governing professions³⁶ and securities commissions³⁷ and advocate for probing review of refugee treaty,³⁸ constitutional³⁹ and environmental⁴⁰ issues.

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

³³ AG Saskatchewan Factum, paras 1-27.

³⁴ Factum of British Columbia International Commercial Arbitration Centre Foundation (“**BC Commercial Arbitration Centre Factum**”).

³⁵ Factum of National Academy of Arbitrators *et al.* (“**NAA Factum**”); CLC Factum.

³⁶ NARPA Factum.

³⁷ Factum of Ontario Securities Commission *et al.* (“**Securities Commissions Factum**”).

³⁸ CCR Factum.

³⁹ Factum of Community & Legal Aid Services Programme (“**CLASP Factum**”).

⁴⁰ Ecojustice Factum.

⁴¹ BC Commercial Arbitration Factum, para 19.

⁴² NAA Factum, paras 4, 13-15

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

5. The CRTC Decision was Incorrect and Unreasonable

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

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

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

⁴³ Wholesale Code Intervenors' Factum (FCA A-51-16), paras 9-13, referencing *Bell Canada v. 7265921 Canada Ltd.*, [2018 FCA 174](#) (the "**Wholesale Code Appeal**")

⁴⁴ See Wholesale Code Intervenors' Factum, paras 5, 11 and 17

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

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

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

⁴⁵ Wholesale Code Interveners' Factum, paras 17-22 and 23-28.

⁴⁶ *Minister of Citizenship and Immigration et al. v. AGC* (24 September, 2018), Ottawa, SCC Nos. 37748, 37896 and 37897 (motions for interventions) ("**Leave Order**").

⁴⁷ Factum of TELUS Communications Inc. ("**TELUS Factum**"), para 23.

⁴⁸ *CRTC Order*, para 36, Joint Record of the Appellants ("**Joint Record**"), Vol I, Tab 1, p. 9.

⁴⁹ *Distribution of omnibus high definition channels by Star Choice and Cancom – Broadcasting Decision CRTC 2005-195*, 12 May 2005, para 27.

⁵⁰ TELUS Factum, para 24.

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

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

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

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

⁵¹ *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012 SCC 68](#), paras 27-28 ("**Cogeco**").

⁵² Factum of Association of Canadian Advertisers *et al.* ("**ACTRA Factum**"), paras 19-25.

⁵³ See for example, *Broadcasting Act*, [SC 1991, c 11](#), ss. 3(1)(a), 3(1)(b), 3(1)(c)(i), and 3(1)(d).

⁵⁴ Appeal Decision, para 24, Joint Record, Vol. I, Tab 8, p. 71.

⁵⁵ ACTRA Factum, para 18.

⁵⁶ CARL Factum, para 35.

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


as agent for

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