S.C.C. File No. 40123

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

B E T W E E N :

SOCIÉTÉ DES CASINOS DU QUÉBEC INC.
AND ATTORNEY GENERAL OF QUEBEC

APPELLANTS

- and -

ASSOCIATIONS DES CADRES DE LA SOCIÉTÉ DES CASINOS DU QUÉBEC

RESPONDENT

- and -

[*Style of cause continued next page*]

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(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada,* S.O.R./2002-156)

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1. Canadian Association of Counsel to Employers ("**CACE**") intervenes on the question of whether the exclusion of employees who perform management functions or are the representatives of the employer (for this factum CACE refers to those who are excluded as "**managers**") from the definition of "employee" in the Quebec *Labour Code* constitutes an infringement of the freedom of association of such managers.[1]

2. Collective representation and bargaining is inherently adversarial and rests on a fundamental distinction between the union and its members on the one hand, and the employer and its representatives on the other hand. Maintaining that distinction and an arms' length relationship between the two sides is not only essential to the structure of labour relations, but a constitutionally enshrined component to the freedom of association guaranteed by the *Charter*.[2]

3. Consequently, managers have traditionally and correctly been excluded from access to labour relations regimes, to ensure managers are not placed into an untenable position of divided loyalty or a potential conflict of interest, which undermines labour relations for both unions and employers. Further, labour boards across Canada, including Quebec, already carefully and narrowly apply this managerial exclusion based on the specific factual circumstances of the individual's role, which ensures that those excluded are managers in a meaningful sense.[3]

4. CACE therefore makes two submissions. ***First***, the freedom of association right to collectively bargain guaranteed in section 2(d) of the *Charter* does not extend to managers, which is

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[1] *Labour Code*, CQLR c C-27, s. 1(l)(1) ("**Quebec *Code***").

[2] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Charter of Human Rights and Freedoms*, CQLR c C-12 (collectively the "***Charter***", with reference to the Canadian *Charter* to refer to both legislation).

[3] **See for example**, *Syndicat des travailleuses et travailleurs de Cookshire-Eaton (CSN) v Cookshire-Eaton (Ville)*, 2011 QCCRT 585 ("***Cookshire***"); *Syndicat canadien de la fonction publique, section locale 2326 v Terrebonne (Ville)*, 2005 QCCRT 193 ("***Terrebonne***"); *Southeast Kootenay Principals' And Vice-principals' Association v British Columbia (Attorney General)*, 2021 BCLRB 82 ("***Kootenay***"), at para. 143; *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 880 v. Ford Motor Company of Canada Limited*, 1993 CanLII 7810 (ON LRB) ("***Ford Motor***"), at para. 69; *Grande Prairie Roman Catholic Separate School District No. 28 v Communications, Energy and Paperworkers Union of Canada, Local Union No 328*, 2011 CanLII 62471 (AB LRB) ("***Grande Prairie***") at paras. 9-10; *Food and Commercial Workers Union Canada, Local 864 v Fisherman's Market International Incorporated*, 2017 NSLB 34 ("***Fisherman's Market***"), at paras. 76-77.

in fact safeguarded by manager exclusion from labour relations regimes. ***Second***, although the existing frameworks across Canada have already formulated a framework that already adequately balances the interests at stake, if this Court is inclined to expand access to collective bargaining to managers, this Court must limit the inclusion of managers as much as possible so as to mitigate the inherent conflict of interest of providing managers with the right to collectively bargain.

PART II—POSITION RESPECTING THE APPELLANT'S QUESTIONS

5. Section 1(l)(1) of the Quebec *Labour Code* does not contravene the *Charter*.

PART III—STATEMENT OF ARGUMENT

(a) The Freedom of Association right to collectively bargain does not extend to managers.

6. The section 2(d) right to collective bargaining rests on an inherent distinction between employees and employers,[4] aimed at upholding a "balance necessary to ensure the meaningful pursuit of workplace goals" between them.[5]

7. Allowing the inclusion of managers into unions would undermine that balance by presenting them with an irreconcilable conflict of interest between their management duties and their own union activity. All of the provinces in Canada have therefore protected that balance by generally excluding managers from being able to collectively bargain (with some exceptions).[6]

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[4] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 90 *in fine*.

[5] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("***MPAO***"), at para. 72.

[6] All jurisdictions exclude those with managerial functions from the definition of employee, except Manitoba and Saskatchewan, which exclude those with primarily management functions. The Federal jurisdiction and British Columbia, New Brunswick (public sector employees), and Saskatchewan, allow those with supervisory duties to unionize. **See** *Canada Labour Code*, RSC 1985, c L-2 ("**Canada *Code***"), s. 3(1) and s. 27(3); *Labour Relations Act*, 1995, SO 1995, c 1, Sch A ("**Ontario *LRA***"), s. 1(3); *Labour Relations Code*, RSBC 1996, c 244 ("**BC *Code***"), s. 1(1) and s. 29; Quebec *Code*, *supra* note 1, s. 1(l)(1); *Labour Relations Code*, RSA 2000, c L-1 ("**Alberta *Code***"), s. 1(l)(i); *Trade Union Act*, RSNS 1989, c 475, s. 2(2); *Public Service Labour Relations Act*, RSNB 1973, c P-25, s. 1(g) and s. 25(5)(c); *Industrial Relations Act*, RSNB 1973, c l-4, s. 1(1)(a); *Saskatchewan Employment Act*, SS 2013, c S-15.1, s. 6-1(1)(h)(i) and 6-11(1); *Labour Relations Act*,

8. This conflict of interest is real and consequential. It is not merely a "theoretical abstraction" or "academic concern".[7] It means managers must somehow loyally represent and promote the employer's interests just as they are beholden to or aligned in adverse interest with a union. Not only does putting managers in such a conflict of interest violate this constitutionally recognized and necessary balance, but it also contravenes the legal duty of loyalty that managers have towards their employers, for example expressly under Article 2088 of the *Civil Code of Québec.* A correspondingly higher duty is owed to the employer where the individual assumes management responsibilities.[8]

9. This conflict of interest would not be resolved by merely placing managers into a separate bargaining unit or having them represented by a separate union because, as the British Columbia Labour Relations Board stated in *Cowichan*

> A supervisor who is simply placed in a separate bargaining unit does not resolve the issue of conflict of interest for the employer. That is because the potential conflict of interest[…] is not the one which is internal to the bargaining unit[…] but rather, is directed at maintaining an arm's length relationship between supervisors and *any* unionized bargaining unit.[9]

10. Likewise, the inclusion of managers compromises and impairs the duty of loyalty in every imaginable scenario, regardless of whether there is only "potential" for or the appearance of conflict and not actual proven conflicts of interest.[10] This impairment affects both the employer and the union and its members, such that the managers' exclusion is to the benefit of both.

RSNL 1990, c L-1, s. 2(1)(m); *Labour Act*, RSPEI 1988, c L-1, s. 7(2); *The Labour Relations Act*, CCSM c L10, s.1.

[7] *Ford Motor, supra* note 3, at paras. 12 and 16.

[8] *Civil Code of Québec*, CQLR c CCQ-1991. **See** *Premier aviation centre de révision inc. v. Barbeau*, 2008 CanLII 50524 (CA LA), at para. 51.

[9] **See** *Cowichan Home Support Society v. UFCW, Local 1518*, 1997 CarswellBC 3185 (BCLRB) ("***Cowichan***") at paras. 115-117, Book of Authorities of the Intervener ("**CACE BOA**") Tab 2; *Kootenay*, *supra* note 3, at para. 171; *The Society of Energy Professionals, IFPTE Local 160 v Hydro Ottawa Limited*, 2021 CanLII 92484 (ON LRB) ("***Hydro Ottawa***"), at para. 241; and *Ford Motor*, *supra* note 3, at para. 14.

[10] *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2013 BCCA 497 ("***BC Ferry***"), application for leave to appeal to SCC denied, 2014 CanLII 16027 (SCC), at para. 11; *Ford Motor*, supra note 3, at para. 11; *Legal Services Society v. B.C. Government and Service Employees' Union*, 2006 CanLII 8842 (BC LRB), at para. 59; *Cowichan*, *supra* note 9, at para. 9, CACE BOA Tab 2.

i. Impairments to the Employer

11. This potential conflict harms employers by impairing the duty of loyalty of the manager to the employer, and providing a means for unions to assert undue influence over the manager (and by proxy, the employer). This in turn undermines fairness and the necessary balance in labour relations required by section 2(d). In particular, it creates an incentive and opportunity for unfair labour practices, blurs the necessary delineation between employer and employee, and distorts the ability of the employer to adequately manage labour relations.

12. The very real consequences for employers of permitting managers to unionize could include:

(a) Impairments to day-to-day management: the effect of the potential conflict of interest would undermine, in a significant way, the essential managing functions entrusted upon managers by employers, as managers "provide the day-to-day monitoring, oversight and supervision"[11] that employers rely on, and are therefore "the eyes and ears of the employer on the floor".[12] Having a divided loyalty would affect how or whether they decide to enforce workplace policies and practices, discipline or report performance issues or misconduct of other workers, or otherwise influence the decisions and directions of the employer.[13] If the manager is in the same union as the non-manager employees, this would become even more problematic, as he or she "may often find it necessary to take actions that are distasteful to some employees and contrary to the union's constitution or bylaws. The ability of the union to discipline supervisors for such actions may inhibit management's operation of the business."[14]

(b) Impairments to operations during a labour conflict: The ability of employers to continue operations during labour conflicts could be compromised in several ways:

(i) First, managers are representatives of the employer in the context of labour conflicts, and employers, should they choose to do so, can rely heavily on managers to continue their

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[11] *Labourers' International Union of North America, Ontario Provincial District Council v Perlane Construction Inc.*, 2020 CanLII 9548 (ON LRB) at para. 53, citing *Carpenters Union (United Brotherhood of Carpenters and Joiners of America) v. J.D. Strachan Construction Limited*, 2011 CanLII 43828 (ON LRB)

[12] *Ford Motor, supra* note 3, at para. 9.

[13] **See e.g.** *Vézina composite Inc. c. Syndicat canadien des communications, de l'énergie et du papier (SCEP) F.T.Q.*, 2002 CanLII 34423 (QC TT), at paras. 19-22.

[14] Phillip E. Garber, "The Role of Supervisors in Employee Unions" (1972) 40 U Chicago L 1, Article 8 at 189, online <https://chicagounbound.uchicago.edu/uclrev/vol40/iss1/8>.

operations during a strike or lock-out.[15] When these labour conflicts arise, despite their duty to the employer, unionized managers would be presented with an opportunity and incentive to refuse to cross a picket line, perform a striking employee's work, carry out legitimate directives from their employer in connection with the employer's legal right to operate during a strike or lockout or protect employer property and ensure the health and safety of its employees during the industrial dispute. Managers would be pulled opposite to the interests of their employer by their union's directives and by their solidarity with striking employees (even if those employees are represented by another bargaining unit or union).

(ii) Second, managers are the vehicle through which the employer directs the non-managerial workforce. If managers decided to strike, this would affect the employer's ability to direct the workforce or continue operations (whether or not the non-manager employees are in a separate bargaining unit to the managers). In such cases, a manager led strike would mean that non-striking employees could also be prevented from working. In other words, it would allow manager unions to effectively 'lockout' non-manager employees, to influence the employer to unfairly concede to the manager union's demands, whether or not those demands would be beneficial to the non-manager employees and without their choice.

(iii) Third, employers rely heavily on managers in regulating the employers' responses to employee conflicts and work stoppages. This impairment is clearest in scenarios where managers would be expected to discipline unlawful strikes or organizing activities, but would also arise in cases in which employers merely rely on the managers to monitor, report, or otherwise prevent or respond to such unlawful activity. The latter examples would apply to all managers, even if they do not have the authority to discipline, since they are the "eyes and ears" of the employer on the floor.

(c) Impairments to the ability to respond to organizing activity: Across Canada, employers have a right to express their views on organizing activity, so long as they do so without coercion or threats (which is itself a *Charter* right of the employer under section 2(b)).[16] These lawful views are often conveyed through managers. If a manager is already in a union (whether it is a unit or union

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[15] **See** Quebec *Code*, *supra* note 1, section 109.1.

[16] **See** *Syndicat canadien des communications, de l'énergie et du papier, section locale 194 c. Disque Américinc.*, 1996 CanLII 17642 (QC TT), at pp. 29-35. **See also :** Ontario *LRA*, *supra* note 6, s. 70; BC *Code*, *supra* note 6, s. 8; Alberta *Code*, s. 148(2)(c), *supra* note 6.

separate from non-manager employees), there would be an inherent conflict of interest with the manager communicating a view which the manager would be expected to share and support as part of his or her duties to the employer, that might not be aligned with the interests of his or her union. This same conflict of interest would arise even if the manager is not in a union, as he or she may have an opportunity to join one. In all scenarios, the managers' duty of loyalty to the employer - to represent the employer and convey the employer's message - would be compromised.

(d) Increased liability in responding to organizing activity and unfair labour practices: Managers might be inclined to assist a union and the organizing employees in ways they would not otherwise, but for their divided loyalties, by, for example. disclosing a wide range of confidential employer information about wages, benefits, employee lists and contact data, corporate restructuring plans, and employer engagement strategies. Further, managers who are in bargaining units, or who want to unionize, would still represent the employer in the context of organizing drives by non-managers. In such a case, managers would be presented with an opportunity and incentive to act improperly and commit (or assist in the commission of) unfair labour practices to affect a result opposite to the employer's interest, or in the case of competing union campaigns, to assist the union that aligns with the manager's particular interests or loyalties (at the expense of the non-manager employees' freedom of choice). Employers are also vicariously liable for the actions of their managers, and the consequences of managers acting improperly during organizing drives could be significant (for example, bypassing the pre-requirements to call a certification vote or automatically certifying a union).[17]

13. The conflict of interest in each of these scenarios becomes even more pronounced and irreconcilable when a manager holds, or has aspirations to hold, a position in the union, such as local president, collective bargaining committee member, steward, grievance officer, or health and safety representative, as all these positions have greater duties and expectations of loyalty to the union and its members.

ii. Impairments to the Union and its Members

14. The rationale for excluding managers from unions is not simply a conflict of interest analysis that favours employers. Including managers into a bargaining union with non-managerial employees

[17] **See e.g.** Ontario *LRA*, *supra* note 6, s. 11(2)(c); BC *Code*, *supra* note 6, s. 14(4.1); Alberta *Code*, *supra* note 6, s. 17(1)(c.1)(ii); Canada *Code*, s. 99.1, *supra* note 6.

or having the same union representing the two groups, would present a corresponding impairment to the union and its ability to fairly represent the two groups of employees. This would also undermine the protections afforded by section 2(d). "[A] union is obliged to fairly represent all employees for whom it is the bargaining agent, and might find itself in difficulty if the "grievance" of one of its members arose from the actions of others, acting on behalf of the employer."[18]

15. Excluding managers from collective bargaining also ensures unions are protected from undue influence or domination by the employer (in the form of its management representatives), by maintaining an arm's length relationship between the two sides.[19] As stated in *Ford Motor*:

> What distinguishes "management" from ordinary "employees" is the *power* that managers exercise over the economic security of their fellow workers - a power which, in the Board's experience, "foremen" have sometimes used to interfere with the right of those workers to engage in collective bargaining through a trade union of *their choice.* The rewards and penalties which are the instruments of management control can easily be applied to influence employees to join or reject a particular trade union. The fact is (and the cases demonstrate), that foremen occasionally do promote opposition to unions at the organizing stage, do sponsor the termination of an incumbent union's bargaining rights, and do influence employees in favour of unions or associations more congenial to the employer's interests. That is why section 1(3)(b) is but one of a constellation of statutory provisions designed to segregate "employees" from "management", and ensure that the employees and their unions are entirely independent of managerial influence.[20] [emphasis added]

16. In other words, managers, faced with divided loyalties, would be presented with an opportunity and incentive to undermine the union to seek personal advancement with the employer.

17. Manager exclusion from collective bargaining harmonizes with the protections that section 2(d) provides — "to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties".[21] The inclusion of managers is therefore not compatible with one of the essential features of a meaningful process of collective bargaining: independence from management.

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[18] *Ford Motor*, *supra* note 3, at para. 11.
[19] *BC Ferry*, *supra* note 10 at paras. 10-11, citing *Burnaby (District) and CUPE, Local 23, Re,* 1974 CarswellBC 704 (BC LRB) ("***Burnaby***"), at paras. 8-10, CACE BOA Tab 1. **See also** *Ford Motor*, *supra* note 3, at para. 14; *Technical, Office, Professional, Local 1535 v. Northern Telecom,* 1983 CanLII 814 (ON LRB) at para. 2.
[20] *Ford Motor*, *supra* note 3, at para. 16.
[21] *MPAO*, *supra* note 5, at para. 82.

18. The mutually beneficial nature of the manager exclusion is reinforced by the fact that at times unions will seek manager exclusion, because the managers' inclusion presents a conflict of interest such that it would result in the union being compromised and dominated by the employer.[22]

19. For all these reasons, the exclusion of managers from collective bargaining is a feature of, and not contradictory to, the section 2(d) freedom of association. As the Ontario Labour Relations Board in *Hydro Ottawa Limited* stated in rejecting a union's argument that the manager exclusion denied the employees' section 2(d) *Charter* rights, "the Act embodies the same *Charter* value that is urged upon the Board – the protection and facilitation of collective bargaining."[23]

20. The same considerations above also show how the exclusion is demonstrably justified under section 1 of the *Charter*. In particular, the exclusion of managers represents a minimal impairment to freedom of association, "falling within a range of reasonable alternatives", whether or not it is the "least drastic" means of achieving the government's objective.[24] As this Court has stated in *Dunmore*, exclusion of anyone from a labour relations regime "involves a weighing of complex values and policy considerations that are often difficult to balance", and should be interfered only "where a more fundamental value is at stake and where it is apparent that a free and democratic society cannot permit the policy to interfere with the right in the circumstances".[25]

21. In this case, for the reasons cited above, the decision to exclude managers in fact upholds the "fundamental value" at stake, namely freedom of association. Thus, deference is owed to the various legislatures in balancing the complexities at play in protecting this fundamental value.

22. Further, as already noted, the existing frameworks apply this exclusion with care so as to exclude only those who are managers in a meaningful sense, and thereby minimally impairs access to

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[22] **See e.g.** *Fisherman's Market*, *supra* note 3, at paras. 48-49, 52; *Langley City Foods Ltd. v. United Food and Commercial Workers International Union, Local No. 1518*, 2006 CanLII 22075 (BC LRB) at paras. 2, 20; *Samuel, Son & Co. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2009*, 2016 CanLII 59027 (BC LRB) at para. 110.

[23] *The Society of Energy Professionals, IFPTE Local 160 v Hydro Ottawa Limited*, 2021 CanLII 92484 (ON LRB), at para. 229.

[24] *MPAO*, *supra* note 5, at para. 149.

[25] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 ("***Dunmore***") at para. 57.

collective bargaining only to such individuals.[26] In Quebec, as is the case across Canada, adjudicators will assess the work actually performed by the employees in question, to determine whether they are in fact managers such that their inclusion into a union would result in divided loyalty. For this reason, the manager exclusion has been described as being "made within a policy framework that contains a robust weighing of the policy considerations behind the exclusion of managers and which created specific criteria by which the definition of employee can be applied."[27]

23. Lastly, for the reasons stated above, placing the managers into a separate bargaining unit or under a separate union would fail to cure the conflict of interest, and would therefore not be a less intrusive means of achieving the legislative goal behind the manager exclusion.

24. Taking into full account all of the above considerations, the exclusion is also proportional, by ensuring the preservation and balance of labour relations and avoidance of conflicts of interest, which protects all unions and employers, at the potential expense of excluding a small subset of the labour force from specific collective bargaining legislation.

(b) In The Alternative, Any Expansion of the Right Must Be as Narrow as Possible

25. In the alternative, if the manager exclusion is found to conflict with section 2(d) of the *Charter*, such that this Court is inclined to expand the right to collective bargaining to certain managers, this Court must be careful to articulate a ruling that extends this inclusion as narrowly as possible so as to properly account for the inherent and incurable conflict of interest that manager inclusion presents.

26. CACE submits that the threshold for inclusion in collective bargaining should, at most, apply only to first level line managers whose managerial responsibilities are exercised within and confined by the employer's clear chain of command of decision-making, such that the effect of their impaired loyalty would be tempered. To extend rights further up the management chain, as the scope of management functions expand to include supervision of managers by managers and broader organizational decision-making impacting fundamental terms and conditions and the employment of all employees (workforce planning, financial matters, corporate structuring), would be to disregard entirely the conflict of interest arguments that support the exclusion of managers, and, importantly

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[26] **See for example**, *Cookshire*, *supra* note 3; *Terrebonne*, *supra* note 3; *Kootenay*, *supra* note 3, at para. 143; *Ford Motor*, *supra* note 3, at para. 69; *Grande Prairie*, *supra* note 3, at paras. 9-10; *Fisherman's Market*, *supra* note 3, at paras. 76-77.

[27] *Kootenay*, *supra* note 3, at para. 141.

from CACE's perspective, impair significantly and unacceptably management's ability to loyally and dispassionately carry out their functions as the employer's representatives in the workplace.[28]

27. In all cases, this Court should maintain the exclusion of managers who are involved in labour relations, labour conflicts or confidential matters, to ensure the collective bargaining interests of the two sides are not adversely affected by the disclosure of this confidential information, and to ensure unions are not infiltrated or subverted by employers.[29]

28. Whatever threshold that might be established should ensure that any constitutional protection is extended only as needed. CACE submits that the prevailing regime of manager exclusion from collective bargaining does not need a dramatic overhaul and to the extent possible the necessary balance between employer and union must be maintained. This Court should also ensure any framework for inclusion must respect each provincial legislature's prerogative to determine its labour relations regime, which has in all cases involved, as this Court recognized in *Dunmore*, "weighing of complex values and policy considerations that are often difficult to balance".[30]

29. In any case, CACE submits that this Court should acknowledge that it is fundamentally inappropriate for managers to be allowed into a bargaining unit of non-manager employees or be represented by a union organization that also represents any of the non-manager employees the managers supervise. Although inadequate to address the broader issue of conflict of interest, such restrictions would at the very least temper the effect of that conflict.[31]

PART IV—SUBMISSIONS CONCERNING COSTS

30. CACE requests that no costs be awarded either for or against it.

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[28] **See e.g.** *Ford Motor*, *supra* note 3, at para 16; *Fisherman's Market*, *supra* note 3, at para. 67; *Terrebonne*, *supra* note 3, at para 13; *Union internationale des travailleurs et travailleuses unis de l'alimentation et de commerce, FAT-COI-CTC-FTQ-TUAC, section locale 1991-P et Contenants IML d'Amérique du Nord inc.*, 2018 QCTAT 2991, at para. 209.
[29] **See e.g.** *Burnaby*, *supra* note 19, at para. 40, CACE BOA Tab 1; *Cowichan*, *supra* note 9 at para. 106, CACE BOA Tab 2.
[30] *Dunmore*, *supra* note 25 at para. 57.
[31] **See e.g.** *Burnaby*, *supra* note 19, at paras. 11-13, CACE BOA Tab 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of March, 2023.

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Tim Lawson / Myriane Le François / Mathieu Bernier Trudeau / Andrew Weizman

PART V—TABLE OF AUTHORITIES

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