S.C.C. File No. 37748

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

B E T W E E N :

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

Appellant

- and -

**ALEXANDER VAVILOV**

Respondent

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## MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER, ADVOCATES FOR THE RULE OF LAW

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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*[Style of cause continued inside cover.]*

*[Style of cause continued.]*

S.C.C. File No. 37896

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))

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S.C.C. File No. 37897

B E T W E E N :

**NATIONAL FOOTBALL LEAGUE, 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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## PART I—OVERVIEW

1. This is a motion by Advocates for the Rule of Law (**"ARL"**) for leave to intervene on the question of standard of review and "the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*… and subsequent cases".[1] Specifically, ARL proposes to make submissions on ***the role of statutory interpretation*** in navigating what this Court described in *Dunsmuir* as the "underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers".[2]

2. ARL is a non-profit, non-partisan, Canadian think tank.[3] Its members seek to foster dialogue and promote education on a broad range of rule of law issues, including the standard of review in administrative law, by encouraging scholarship and informed commentary and by intervening constructively in appellate proceedings.[4] The Court's potential reconsideration of the *Dunsmuir* framework in these appeals will engage the rule of law — and thus ARL's mandate and the interests of its members — directly, and potentially with profound consequences.

3. Accordingly, if granted leave to intervene, ARL will make two interrelated submissions:

(a) ***Legislative supremacy and the rule of law are not in tension.*** The standard of review framework has come to be applied in a manner that assumes a tension, or at least a clear distinction, between legislative supremacy and the rule of law. ARL will argue that this reflects a false dichotomy; in all but exceptional circumstances, the rule of law and legislative supremacy are mutually reinforcing. Indeed, the rule of law requires courts to determine ***whether and to what extent the legislature intended courts to defer*** to administrative decision makers on questions of law. By adopting a nearly irrefutable presumption of deference for home statute interpretation in the name of legislative supremacy, courts have too often neglected ***both*** legislative supremacy and the rule of law.

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[1] *Minister of Citizenship and Immigration v. Alexander Vavilov*, 2018 CanLII 40807 (S.C.C.); *Bell Canada, et al. v. Attorney General of Canada*, 2018 CanLII 40808 (S.C.C.); *National Football League, et al. v. Attorney General of Canada*, 2018 CanLII 40806 (S.C.C.).
[2] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶27.
[3] Affidavit of Justin W. Anisman, sworn August 28, 2018 [the "**Anisman Affidavit**"], ¶2, Motion Record ("**MR**"), Tab 2, p. 11.
[4] See Anisman Affidavit, ¶4, 6, MR, Tab 2, pp. 12 and 13.

(b) ***The rule of law requires reviewing courts to interpret legislation.*** Judges cannot assess the legality of administrative decisions without first understanding the scope of the authority that the legislature intended to delegate. This obliges courts to engage in at least limited interpretation of the decision maker's "home" statute. ARL will propose a principled approach to integrating statutory interpretation into the curial oversight of administrative action — one that not only clarifies the limits of deference, but that also aligns legislative supremacy with the rule of law by ensuring that public authorities do not overreach their lawful powers.

4. These submissions are different from those advanced by the parties. In the *Vavilov* appeal, the appellant argues for a streamlined and simplified approach to the standard of review, the principal justifications for which are practical; by adopting a virtually unlimited rule in favour of deference, eliminating contextual analysis, and rejecting margins of appreciation, the *Vavilov* appellant suggests that the Court can streamline the analysis and thus advance the goals of access to justice and judicial economy. In the *Bell Canada* and *National Football League* appeals, by contrast, the appellants' submissions chiefly build on the *Dunsmuir* framework, particularly with respect to identifying true questions of jurisdiction, rebutting the presumption of deference for home statutes, and applying the reasonableness standard to questions of law.

5. ARL's submissions will focus instead on the broader, principled, rule of law considerations that ARL says must inform the ***entire*** standard of review analysis — and thus the implications that these appeals will have on judicial review for all types of decision makers in Canada. In this way, ARL's contribution will be useful to the Court in developing a common normative vocabulary that can be applied to all three appeals.

6. ARL therefore requests that it be granted leave to intervene in all three appeals, with permission to present a total of five minutes of oral argument and to file a single 10 page factum.

## PART II—STATEMENT OF QUESTION IN ISSUE

7. The issue is whether ARL satisfies the test for an intervention order pursuant to Rule 59 of the *Supreme Court Rules*.[5] ARL must establish that it: (i) has an interest in the appeals; and (ii) will make submissions that are useful and different from those of the other parties.[6]

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[5] *Rules of the Supreme Court of Canada*, SOR/2002-156 ["***Rules***"], R. 59.

## PART III—STATEMENT OF ARGUMENT

### 1. ARL Has an Interest in the Appeals

8. This Court has a wide jurisdiction in deciding whether to allow a person to intervene.[7] As it has emphasized, ***any*** interest is sufficient, subject to the Court's discretion.[8] ARL clearly has an interest, as an organization devoted to promoting the rule of law and in particular the separation of powers, in the limits that this Court may place on judicial oversight of the executive when the latter purports to act with authority delegated to it by the legislature. ARL is thus a public interest organization with a "direct stake" in the appeal through both its members and its mandate.[9]

9. ARL's mandate to promote the rule of law is premised on a number of core principles. These include but are not limited to the supremacy of the Constitution, the separation of powers, and Parliamentary sovereignty. ARL consequently seeks to ensure that administrative decision makers are subordinate to the law, that the general public is governed by fixed rules known in advance, and that the courts apply the law equally, impartially, and predictably.[10] In advancing these objects in other contexts, ARL has previously participated as an intervener before this Court.[11] The question of whether — and the degree to which — courts should defer to administrative decision makers on questions of law is precisely the sort of issue that ARL exists to address.

10. The standard of review engages a number of issues fundamental to the legal order, including the proper allocation of authority between branches of government and the judicial role in ensuring that state power is exercised in accordance with the law. ARL and its members have contributed, and continue to contribute, to scholarly and judicial conversations about these and other rule of law issues that arise in administrative law.[12] In particular, ARL and its members have articulated principled objections to jurisprudential moves towards presumptive deference and away from statutory interpretation as a means of discerning and effectuating legislative

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[6] *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 339; *R. v. Finta*, [1993] 1 S.C.R. 1138 (Chambers), at 1142; *Rules*, R. 57.
[7] *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665, at 667; *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 339.
[8] *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 339.
[9] *R. v. Finta*, [1993] 1 S.C.R. 1138 (Chambers), at 1142.
[10] See Anisman Affidavit, ¶2, MR, Tab 2, pp. 11-12.
[11] Anisman Affidavit, ¶6, MR, Tab 2, p. 13.
[12] See Anisman Affidavit, ¶4, MR, Tab 2, pp. 12-13.

intent.[13] As set out below, ARL proposes to advance its interests by participating in these appeals and seeking a return to "the polar star of legislative intent" in the standard of review analysis.[14]

11. Finally, ARL's interest in these appeals is that of a public interest organization, rather than of a private litigant. As this Court has emphasized, ***"[p]ublic interest organizations are, as they should be, frequently granted intervener status.*** The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts".[15]

### 2. ARL Will Make Useful Submissions from a Different Perspective

12. A potential intervener must make useful submissions from a different perspective. As Sopinka J. explained:

> ***This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter***. As stated by Brian Crane: …"an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue".[16]

13. ARL meets this standard. It will "present the court with submissions which are useful and different from the perspective of a non−party who has a special interest or particular expertise in the subject matter of the appeal".[17] It will draw on its experience as an exponent of rule of law principles to propose a normative framework, grounded in the search for legislative intent that will advance ***both*** legislative supremacy and the rule of law in judicial review of administrative action. These are important submissions that will provide the Court with a distinct contribution on the appeal.[18]

#### A. The Rule of Law Requires Respect for Legislative Supremacy

14. *Dunsmuir* teaches:

> Judicial review seeks to address ***an underlying tension between the rule of law and the foundational democratic principle***, which finds an expression in the

[13] See Anisman Affidavit, ¶4, 12, MR, Tab 2, pp. 12-13 and 14.
[14] *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, ¶149, per Binnie J.
[15] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at 256, *emphasis added.*
[16] *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 340, *emphasis added.*
[17] *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (Chambers), at 463.
[18] *R. v. Finta*, [1993] 1 SCR 1138 (Chambers) at 1143–44.

initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.[19]

15. In recent years, the Court has made similar pronouncements about the relationship between legislative supremacy ("the foundational democratic principle") and the rule of law. In some cases, it has suggested that the two are opposing forces, which the standard of review analysis seeks to reconcile.[20] In other cases, it has merely framed them as distinct.[21] This dichotomy, however presented, has come to justify a strong presumption in favour of deference to an administrative decision maker's interpretation of its "home" statute; as the majority put it in *Edmonton East*, the "presumption of deference on judicial review respects ***the principle of legislative supremacy*** and ***the choice made to delegate decision making to a tribunal***, rather than the courts".[22] The rule of law has been left to do little work, other than to justify the existence of judicial review itself.[23]

16. ARL will argue that these developments do not reflect the true relationship between legislative supremacy and the rule of law. Unless the legislature has sought to ***insulate*** a decision maker from curial oversight — either altogether, as with a privative clause,[24] or with respect to a legal question on which the rule of law requires uniformity, as with one of the "correctness categories" identified in *Dunsmuir*[25] — the rule of law ***requires*** respect for legislative supremacy

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[19] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶27, *emphasis added*.

[20] See, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, ¶72, per Côté and Rowe JJ.; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶22; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶30, per Abella J.; see also P. Daly, "Struggling towards Coherency in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. at 527, 533-34, MR, Tab 6.

[21] See, e.g., *Groia v. Law Society of Upper Canada*, 2018 SCC 27, ¶178, per Karakatsanis, Gascon and Rowe JJ.; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶124, per Brown J.; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, ¶140, per Rowe J.

[22] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶22; see also *Groia v. Law Society of Upper Canada*, 2018 SCC 27, ¶178, per Karakatsanis, Gascon and Rowe JJ.

[23] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶21; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶28-29, per Abella J.

[24] See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at 236-37; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶74, per Rothstein J.

[25] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶58-61; see *Ready v. Saskatoon Regional Health Authority*, 2017 SKCA 20, at ¶63, 108-19, and 116; *Loewen v. Manitoba Teachers' Society*, 2015

in the context of judicial review of administrative action.[26] To uphold the rule of law, courts must ensure that a statutory delegate has acted within its mandate — as the legislature, in its supremacy, has defined it.[27] As the Court recognized in *Dunsmuir*:

> A decision maker may not exercise authority not specifically assigned to him or her. ***By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.*** Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, ***the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter***. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers….
>
> In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining ***the applicable standard of review is accomplished by establishing legislative intent***.[28]

17. There is thus an inescapable nexus between legislative supremacy ("what did the legislature intend?") and the rule of law ("is the administrative decision at issue consistent with the legislature's intent?") in undertaking judicial review. This is equally so in determining whether and how much deference is due; both legislative supremacy and the rule of law require the court to inquire as to "whether the legislature intended the delegated decision-maker or the reviewing court to answer a particular question".[29] Yet, the jurisprudence has come instead to ***presume*** an inconsistency between legislative supremacy and the rule of law — that legislative supremacy pushes for deference, while the rule of law pulls the other way — when in fact this is

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MBCA 13, 380 D.L.R. (4th) 654, at ¶46, 48 and 69; see also P. Daly, "The Scope and Meaning of Reasonableness Review" (2014), 52 Alta. L. Rev. 799, at 809, MR, Tab 7.

[26] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶65, per Brown J., dissenting.

[27] See *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, ¶39; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, ¶21.

[28] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶29 and 30, *emphasis added*; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶15; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶31-33; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, ¶149; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at ¶26; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at ¶18, per Sopinka J.

[29] P. Daly, "Deference on Questions of Law" (2011), 74 Modern L. Rev 694, at 706, MR, Tab 5; see also *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶98, per Cromwell J.

so only rarely; in most cases, the rule of law demands that courts respect legislative supremacy by identifying and adhering to legislative intent, whether in favour of deference or against it.[30]

18. ARL will argue that, by assuming a dichotomy between legislative supremacy and the rule of law, the standard of review analysis has too often neglected both. Instead, courts have embraced a principle of ***administrative*** supremacy, reflected most notably in the "presumption of reasonableness" that applies to a decision maker's interpretation of "its own statute or statutes closely connected to its function, with which it [has] particular familiarity".[31] The act of delegation has come to be seen as such a strong signal in favour of deference that, as the *Vavilov* appellant proposes, only an explicit legislative instruction to the contrary can overcome it.[32] Otherwise, absent such "unusual statutory language",[33] it is the decision maker and not the court that will have the "last word" on what the law requires.[34] Courts have thus abandoned any search for actual legislative intent and have elevated the presumption into an inflexible legal rule.

19. ARL will argue that the mere act of exercising delegated authority, without more, cannot warrant deference on all questions of law. Such a presumption undermines legislative supremacy — and thus also the rule of law — in the name of upholding it.[35] Instead, courts must consider the actual expression of the legislature's intentions, both in creating and delineating the scope of a decision maker's authority, to determine the appropriate level of deference.

### B. The Rule of Law Requires Reviewing Courts To Interpret Legislation

20. Since the rule of law requires respect for legislative supremacy, it also requires statutory interpretation to be an integral part of the standard of review analysis. As the Court noted in *Edmonton East*, deference is inappropriate "if the context indicates the legislature intended the

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[30] See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶77-79, per Rothstein J.
[31] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶54; *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶34; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶¶32 and 34.
[32] Appellant's Factum (*Vavilov*), ¶47; see also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶35.
[33] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶34.
[34] *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶94, per Cromwell J.
[35] See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶87, per Rothstein J; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶85, per Côte and Brown JJ.

standard of review to be correctness".[36] To determine the standard of review, then, the reviewing court must look to the decision maker's "home" statute to determine whether, and to what extent, the legislature intended the decision maker to be the arbiter of the question in issue.

21. This is why, in *Pushpanathan*, the Court framed the former "pragmatic and functional approach" as a means of statutory interpretation. As Justice Bastarache put it, "[t]he ***central inquiry*** in determining the standard of review … is ***the legislative intent of the statute creating the tribunal*** whose decision is being reviewed".[37] In *Dunsmuir*, Justices Bastarache and LeBel maintained this line; they affirmed that "legislative supremacy is assured because ***determining the applicable standard of review is accomplished by establishing legislative intent***".[38]

22. Yet, as the Court has since simplified the standard of review analysis, legislative intent has been submerged. When, in *Alliance Pipeline*, the Court embraced a highly categorical approach to selecting the standard of review,[39] Fish J.'s majority opinion made only passing reference to legislative intent, and not in describing the purpose of the standard of review analysis.[40] When the Court embraced the "presumption of reasonableness" in *Alberta Teachers*,[41] Rothstein J.'s reasons for the majority did not refer to legislative intent in the context of determining the standard of review at all.

23. Finally, in *Edmonton East*, the Court not only failed to present the standard of review analysis as a means to discern and give effect to legislative intent, but it also held that a statutory appeal provision — an obvious indicator of legislative intent — was insufficient to justify even a contextual analysis of the legislative scheme.[42] But the *Edmonton East* majority was unable to jettison legislative intent altogether. It acknowledged that "the legislature can specify the standard of review" and confirmed that "clear legislative guidance on the standard of review" must bind a

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[36] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶32.
[37] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, ¶26, *emphasis added*; see also *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, ¶21.
[38] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶30, *emphasis added*; see also *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, ¶33; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶93, per Rothstein J.
[39] *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶25-26.
[40] See *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶31.
[41] *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61.
[42] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶34.

reviewing court.[43] The implication of *Edmonton East*, then, is that courts are only required to give effect to the intent of the legislature in determining whether and how much deference is due when the legislature has expressed its intent in a specific way — i.e., by expressly prescribing a particular standard of review. Such "legislative guidance on the standard of review" will only be sufficiently "clear", for the *Edmonton East* majority's purposes, if it requires almost no statutory interpretation whatsoever.

24. ARL will argue that the Court's efforts to limit the role of statutory interpretation in the standard of review inquiry have been counterproductive. Rather than simplify matters, the Court has provided conflicting guidance; it has rejected lower courts' efforts to use the tools of statutory interpretation to discern and apply legislative intent, while continuing to pay lip service to legislative intent as a feature of the standard of review inquiry.[44] The result has been more tussling over the standard of review, not less.[45]

25. The way forward, ARL will submit, is for the Court to endorse the established tools of statutory interpretation, i.e., the text and context of the decision maker's enabling statute,[46] as a universal means of determining whether the question at issue on judicial review is one on which the legislature intended curial deference,[47] and, if so, how much deference the legislature intended for courts to accord.[48] ARL will canvass legislative signals that may indicate that more or less deference is warranted in respect of a particular statutory provision, and explain how such signals may be discerned and deployed. A wide grant of administrative authority will indicate that more deference is due, while a narrow grant will point to less. A specific requirement that a decision maker possess particular expertise will suggest greater deference, while statutory language that does not lend itself to multiple reasonable interpretations will suggest less, or none

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[43] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶35.
[44] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶32, 35; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, ¶46.
[45] See D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 27, at 32-35, MR, Tab 4.
[46] See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ¶21.
[47] See *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶99, per Cromwell J.
[48] See *Wilson v. Atomic Energy of Canada* Ltd. 2016 SCC 29, ¶35, per Abella J.; see also M. Mancini, "Statutory Interpretation from the Stratasphere" (July 19, 2018), *Advocates for the Rule of Law Blog*, online: <http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/>.

at all. Statutory rights of appeal, meanwhile, will indicate that the legislature intended for a court, not the decision maker, to have the final say on the issue on which the appeal is taken.[49]

26. Finally, ARL will explain how these indicators of legislative intent interact with the "presumption of reasonableness". It is fundamentally a tool of statutory interpretation, after all; it reflects the assumption that, because the legislature created an administrative decision maker, ***the legislature intended*** that the decision maker's decisions be accorded deference by a reviewing court. So construed, the "presumption" can operate comfortably, predictably, and consistently within a standard of review analysis that is rooted in the search for legislative intent.

27. By returning to these first principles, the Court can ensure that judicial review advances legislative supremacy and the rule of law in tandem. If granted leave to intervene in these appeals, ARL will assist the Court in doing so.

## PART IV—SUBMISSIONS CONCERNING COSTS

28. ARL requests that no costs be awarded either for or against it.

## PART V—ORDER SOUGHT

29. ARL seeks an order granting it leave to intervene in these appeals, on the following terms: (i) ARL be permitted to file a single factum not exceeding 10 pages; (ii) ARL be permitted to make a single set of oral submissions of not more than five minutes at the hearings of the appeals; and (iii) no costs be awarded against ARL on this motion or on the appeals themselves.

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

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Adam Goldenberg / Robyn Gifford / Asher Honickman

[49] See, e.g., *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶124, per Brown J.; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, ¶36; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, ¶90-09; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, ¶42-44; *Walchuk v. Canada (Justice)*, 2015 FCA 85, ¶33, 34 and 56; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, ¶53.

## PART VI—TABLE OF AUTHORITIES



| Authority | Paragraph(s) Referenced in Memorandum of Argument |
|---|---|
| *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 | 17, 18, 22, 25 |
| *Bell Canada, et al. v. Attorney General of Canada*, 2018 CanLII 40808 (S.C.C.) | 1 |
| *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 | 25 |
| *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 | 10, 16 |
| *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 | 25 |
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| *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 | 15 |
| *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 | 16, 17, 19, 21 |
| *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 | 25 |
| *Canadian Council of Churches v. Canada (minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 | 11 |
| *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220 | 16 |
| *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 , [2003] 1 S.C.R. 226. | 16, 21 |
| *Dunsmuir v. New Brunswick*, 2008 SCC 9 | 1, 14, 16, 18, 21 |
| *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 | 15, 16, 18, 19, 20, 23, 24 |
| *Groia v. Law Society of Upper Canada*, 2018 SCC 27 | 15 |
| *Loewen v. Manitoba Teachers' Society*, 2015 MBCA 13, 380 D.L.R. (4th) 654 | 16 |
| *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 | 21, 25 |
| *Minister of Citizenship and Immigration v. Alexander Vavilov*, 2018 CanLII 40807 (S.C.C.) | 1 |
| *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 | 24 |

| **Authority** | **Paragraph(s) Referenced in Memorandum of Argument** |
|---|---|
| *National Football League, et al. v. Attorney General of Canada*, 2018 CanLII 40806 (S.C.C.) | 1 |
| *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665 | 8 |
| *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 | 16 |
| *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 | 16, 21 |
| *R. v. Finta*, [1993] 1 S.C.R. 1138 | 7, 8, 13 |
| *R. v. Morgentaler*, [1993] 1 S.C.R. 462 | 13 |
| *Ready v. Saskatoon Regional Health Authority*, 2017 SKCA 20 | 16 |
| *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 | 7, 8, 12 |
| *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 | 25 |
| *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 | 16 |
| *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 | 16, 22 |
| *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 | 16 |
| *Walchuk v. Canada (Justice)*, 2015 FCA 85 | 25 |
| *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 | 15, 25 |
| *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 | 15 |
| *Wilson v. Atomic Energy of Canada* Ltd. 2016 SCC 29 | 15, 25 |
| ***Secondary Sources*** | |
| D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 27, at 32-35 | 24 |
| M. Mancini, "Statutory Interpretation from the Stratasphere" (July 19, 2018), *Advocates for the Rule of Law Blog*, online: <http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/> | 25 |
| P. Daly, "Deference on Questions of Law" (2011), 74 Modern L. Rev 694, at 706 | 17 |

| Authority | Paragraph(s) Referenced in Memorandum of Argument |
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| P. Daly, "Struggling towards Coherency in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. 527, 533-34 | 15 |
| P. Daly, "The Scope and Meaning of Reasonableness Review" (2014), 52 Alta. L. Rev. 799, at 809 | 16 |

## PART VIII—LEGISLATION RELIED UPON

| **Legislation** | **Paragraph(s) Referenced in Memorandum of Argument** |
|---|---|
| *Rules of the Supreme Court of Canad*a, S.O.R./2002-15, R. 57, 59 | 7 |