

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

- and -

**ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY
GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN,
CANADIAN COUNCIL FOR REFUGEES, ADVOCACY CENTRE FOR TENANTS ONTARIO,
ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA SECURITIES COMMISSION
AND ALBERTA SECURITIES COMMISSION, ECOJUSTICE CANADA SOCIETY,
WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO), WORKERS'
COMPENSATION APPEALS TRIBUNAL (NORTHWEST TERRITORIES AND NUNAVUT)
AND WORKERS' COMPENSATION APPEALS TRIBUNAL (NOVA SCOTIA), APPEALS
COMMISSION FOR ALBERTA WORKERS' COMPENSATION AND WORKERS'
COMPENSATION APPEALS TRIBUNAL (NEW BRUNSWICK), BRITISH COLUMBIA
INTERNATIONAL COMMERCIAL ARBITRATION CENTRE FOUNDATION, COUNCIL OF
CANADIAN ADMINISTRATIVE TRIBUNALS, NATIONAL ACADEMY OF ARBITRATORS,
ONTARIO LABOUR-MANAGEMENT ARBITRATORS' ASSOCIATION AND CONFÉRENCE
DES ARBITRES DU QUÉBEC, CANADIAN LABOUR CONGRESS, NATIONAL
ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, QUEEN'S PRISON LAW
CLINIC, ADVOCATES FOR THE RULE OF LAW, PARKDALE COMMUNITY LEGAL
SERVICES, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM,
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST
CLINIC, CANADIAN BAR ASSOCIATION, CANADIAN ASSOCIATION OF REFUGEE
LAWYERS, COMMUNITY & LEGAL AID SERVICES PROGRAMME, ASSOCIATION
QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION and
FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA**

Interveners

- and -

DANIEL JUTRAS AND AUDREY BOCTOR

Amici curiae

**FACTUM OF THE INTERVENER,
ADVOCATES FOR THE RULE OF LAW**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

McCARTHY TÉTRAULT LLP
745 Thurlow Street, Suite 2400
Vancouver, BC V6E 0C5

Adam Goldenberg (agoldenberg@mccarthy.ca)
Robyn Gifford (rgifford@mccarthy.ca)
Asher Honickman
(ahonickman@matthewsabogado.com)

Tel.: (604) 643-7100
Fax: (604) 643-7900

**Counsel for the Intervener, Advocates for the
Rule of Law**

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

Darius Bossé (dbosse@juristespower.ca)

Tel.: (613) 702-5560
Fax: (613) 702-5560

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

[Style of cause continued on next page.]

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, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, TELUS COMMUNICATIONS INC., ADVOCACY CENTRE FOR TENANTS ONTARIO, ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA SECURITIES COMMISSION AND ALBERTA SECURITIES COMMISSION, ECOJUSTICE CANADA SOCIETY, WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO), WORKERS' COMPENSATION APPEALS TRIBUNAL (NORTHWEST TERRITORIES AND NUNAVUT) AND WORKERS' COMPENSATION APPEALS TRIBUNAL (NOVA SCOTIA), APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION AND WORKERS' COMPENSATION APPEALS TRIBUNAL (NEW BRUNSWICK), BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE FOUNDATION, COUNCIL OF CANADIAN ADMINISTRATIVE TRIBUNALS, NATIONAL ACADEMY OF ARBITRATORS, ONTARIO LABOUR-MANAGEMENT ARBITRATORS' ASSOCIATION AND CONFÉRENCE DES ARBITRES DU QUÉBEC, CANADIAN LABOUR CONGRESS, NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, QUEEN'S PRISON LAW CLINIC, ADVOCATES FOR THE RULE OF LAW, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM, ASSOCIATION OF CANADIAN ADVERTISERS AND THE ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS, BLUE ANT MEDIA INC., CANADIAN BROADCASTING CORPORATION, DHX MEDIA LTD., GROUPE V MÉDIA INC., INDEPENDENT BROADCAST GROUP, ABORIGINAL PEOPLES TELEVISION NETWORK, ALLARCO ENTERTAINMENT INC., BBC KIDS, CHANNEL ZERO, ETHNIC CHANNELS GROUP LTD., HOLLYWOOD SUITE, OUTTV NETWORK INC., STINGRAY DIGITAL GROUP INC., TV5 QUÉBEC CANADA, ZOOMERMEDIA LTD. AND PELMOREX WEATHER NETWORKS (TELEVISION) INC., SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BAR ASSOCIATION and FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA

Interveners

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici curiae

[Style of cause continued.]

S.C.C. File No. 37897

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))

- and -

**ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY
GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN,
TELUS COMMUNICATIONS INC., ADVOCACY CENTRE FOR TENANTS ONTARIO,
ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA SECURITIES COMMISSION
AND ALBERTA SECURITIES COMMISSION, ECOJUSTICE CANADA SOCIETY,
WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO), WORKERS'
COMPENSATION APPEALS TRIBUNAL (NORTHWEST TERRITORIES AND NUNAVUT)
AND WORKERS' COMPENSATION APPEALS TRIBUNAL (NOVA SCOTIA), APPEALS
COMMISSION FOR ALBERTA WORKERS' COMPENSATION AND WORKERS'
COMPENSATION APPEALS TRIBUNAL (NEW BRUNSWICK), BRITISH COLUMBIA
INTERNATIONAL COMMERCIAL ARBITRATION CENTRE FOUNDATION, COUNCIL OF
CANADIAN ADMINISTRATIVE TRIBUNALS, NATIONAL ACADEMY OF ARBITRATORS,
ONTARIO LABOUR-MANAGEMENT ARBITRATORS' ASSOCIATION AND CONFÉRENCE
DES ARBITRES DU QUÉBEC, CANADIAN LABOUR CONGRESS, NATIONAL
ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, QUEEN'S PRISON LAW
CLINIC, ADVOCATES FOR THE RULE OF LAW, CAMBRIDGE COMPARATIVE
ADMINISTRATIVE LAW FORUM, ASSOCIATION OF CANADIAN ADVERTISERS AND
THE ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS,
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST
CLINIC, CANADIAN BAR ASSOCIATION and FIRST NATIONS CHILD AND FAMILY
CARING SOCIETY OF CANADA**

Intervenors

- and -

DANIEL JUTRAS and AUDREY BOCTOR

Amici curiae

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

ATTORNEY GENERAL OF CANADA
Department of Justice
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Michael H. Morris
(michael.morris@justice.gc.ca)
Marianne Zorić (marianne.zoric@justice.gc.ca)
John Provart (john.provart@justice.gc.ca)

Tel.: (647) 256-7539
Fax: (647) 256-1160

**Counsel for the Appellant (37748),
Minister of Citizenship and Immigration**

McCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
66 Wellington Street West
Toronto, ON M5K 1E6

Steven G. Mason (smason@mccarthy.ca)
Brandon Kain (bkain@mccarthy.ca)
Joanna Nairn (jnairn@mccarthy.ca)
Richard Lizius (rlizius@mccarthy.ca)

Tel.: (416) 601-8200
Fax: (416) 868-0673

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

**DEPUTY ATTORNEY GENERAL OF
CANADA**
Department of Justice
National Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Christopher M. Rupar
(christopher.rupar@justice.gc.ca)

Tel.: (613) 670-6290
Fax: (613) 954-1920

**Ottawa Agent for the Appellant (37748),
Minister of Citizenship and Immigration**

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

Jeffrey W. Beedell
(jeff.beedell@gowlingwlg.com)

Tel.: (613) 786-0171
Fax: (613) 788-3587

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

McCARTHY TÉTRAULT LLP

Suite 5300, Toronto Dominion Bank Tower
66 Wellington Street West
Toronto, ON M5K 1E6

Steven G. Mason (smason@mccarthy.ca)

Brandon Kain (bkain@mccarthy.ca)

Joanna Nairn (jnairn@mccarthy.ca)

James S.S. Holtom (jholtom@mccarthy.ca)

Tel.: (416) 601-8200

Fax: (416) 868-0673

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

JACKMAN NAZAMI & ASSOCIATES

536 St. Clair Avenue West, Unit 3
Toronto, ON M6C 1A6

Hadayt Nazami (hadayt@rogers.com)

Tel.: (416) 653-9964

Fax: (416) 653-1036

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

DEPARTMENT OF JUSTICE CANADA

The Exchange Tower
130 King Street West, Suite 3400
Toronto, ON M5X 1K6

Michael H. Morris

(michael.morris@justice.gc.ca)

Ian Demers (ian.demers@justice.gc.ca)

Laura Tausky (laura.tausky@justice.gc.ca)

Tel.: (647) 256-7539

Fax: (416) 973-0809

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

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

(jeff.beedell@gowlingwlg.com)

Tel.: (613) 786-0171

Fax: (613) 788-3587

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

CHAMP AND ASSOCIATES

43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy (broy@champlaw.ca)

Tel.: (613) 237-4740

Fax: (613) 232-2680

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

DEPARTMENT OF JUSTICE CANADA

Civil Litigation Branch, East Tower
234 Wellington Street
Ottawa, ON K1A 0H8

Christopher M. Rupar

(christopher.rupar@justice.gc.ca)

Tel.: (613) 941-2351

Fax: (613) 954-1920

**Ottawa Agent for the Respondent (37896 and
37897), Attorney General of Canada**

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

Daniel Jutras (daniel.jutras@mcgill.ca)

Tel.: (514) 398-6604
Fax: (514) 398-4659

Amicus curiae

IRVING MITCHELL KALICHMAN LLP
Alexis Nihon Plaza, Tower 2
3500 De Maisonneuve Blvd. West
Montreal, QC H3Z 3C1

Audrey Boctor (aboctor@imk.ca)

Tel.: (514) 934-7737
Fax: (514) 935-2999

Amicus curiae

**CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**
Les Terrasses de la Chaudière, Central Building
1 Promenade du Portage
Gatineau, QC J8X 4B1

Crystal Hulley-Craig (crystal.hulley@crtc.gc.ca)

Tel.: (819) 956-2095
Fax: (819) 953-0589

**Counsel for the Intervener, Canadian Radio-
Television and Telecommunications
Commission**

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102
Fax: (613) 695-8580

Ottawa Agent for the *amicus curiae*

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102
Fax: (613) 695-8580

Ottawa Agent for the *amicus curiae*

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

Sara Blake (sara.blake@ontario.ca)
Judie Im (judie.im@ontario.ca)

Tel.: (416) 326-4155
Fax: (416) 326-4181

**Counsel for the Intervener,
Attorney General of Ontario**

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102
Fax: (613) 695-8580

**Ottawa Agent for the Intervener,
Attorney General of Ontario**

MINISTÈRE DE LA JUSTICE DU QUÉBEC
1200, route de l'Église, 3e étage
Québec (Québec) G1V 4M1

Me Stéphane Rochette
(stephane.rochette@justice.gouv.qc.ca)

Tél.: (418) 643-6552
Fax: (418) 643-9749

**Counsel for the Intervener,
Attorney General of Quebec**

NOËL & ASSOCIÉS, s.e.n.c.r.l.
111, rue Champlain
Gatineau (Québec) J8X 3R1

Me Sylvie Labbé (s.labbé@noelassocies.com)

Tél.: (819) 771-7393, poste 431
Fax: (819) 771-5397

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

**ATTORNEY GENERAL OF BRITISH
COLUMBIA**
1001 Douglas Street
Victoria, BC V8W 9J7

Micah Rankin (micah.rankin@gov.bc.ca)
Leah Greathead (leah.greathead@gov.bc.ca)

Tel.: (250) 387-3129
Fax: (250) 356-9154

**Counsel for the Intervener,
Attorney General of British Columbia**

MICHAEL SOBKIN
Barrister and Solicitor
331 Somerset Street W.
Ottawa, ON K2P 0J7

Michael Sobkin (msobkin@sympatico.ca)

Tel.: (613) 282-1712
Fax: (613) 288-2896

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

**ATTORNEY GENERAL FOR
SASKATCHEWAN**
900 – 1874 Scarth Street
Regina, SK S4P 4B3

Laura Mazenc (laura.mazenc@gov.sk.ca)

Tel.: (306) 787-6272
Fax: (306) 787-0581

**Counsel for the Intervener,
Attorney General for Saskatchewan**

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

D. Lynne Watt (lynne.watt@gowlingwlg.com)

Tel.: (613) 786-8695
Fax: (613) 788-3509

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

NELLIGAN O'BRIEN PAYNE LLP
300 – 50 O'Connor Street
Ottawa, ON K1P 6L2

Christopher Rootham
(christopher.rootham@nelligan.ca)

Tel.: (613) 231-8311
Fax: (613) 788-3667

**Counsel for the Intervener,
Telus Communications Inc.**

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

Jamie Liew (jamie.liew@uottawa.ca)
Gerald Heckman
(gerald.heckman@umanitoba.ca)
Jean Lash (lashj@lao.on.ca)

Tel.: (613) 808-5592
Fax: (888) 843-3413

**Counsel for the Intervener,
Canadian Council for Refugees**

**ADVOCACY CENTRE FOR TENANTS
ONTARIO**

55 University Avenue, Suite 1500
Toronto, ON M5J 2H7

Karen Andrews (andrews@lao.on.ca)

Tel.: (416) 597-5855
Fax: (416) 597-5821

**Counsel for the Intervener,
Advocacy Centre for Tenants Ontario**

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102
Fax: (613) 695-8580

**Ottawa Agent for the Intervener,
Advocacy Centre for Tenants Ontario**

ONTARIO SECURITIES COMMISSION

20 Queen Street West, 22nd Floor
Toronto, ON M5H 3S8

Matthew H. Britton (mbritton@osc.gov.on.ca)
Jennifer M. Lynch (pellard@osc.gov.on.ca)
Paloma Ellard (jlynch@osc.gov.on.ca)

Tel.: (416) 593-8294
Fax: (416) 593-8231

**Co-Counsel for the Interveners,
Ontario Securities Commission, British
Columbia Securities Commission and Alberta
Securities Commission**

CONWAY BAXTER WILSON LLP

411 Roosevelt Avenue, Suite 400
Ottawa, ON K2A 3X9

Benjamin Grant (bgrant@conway.pro)

Tel.: (613) 780-2008
Fax: (613) 688-0271

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

-and-

**BRITISH COLUMBIA SECURITIES
COMMISSION**

701 West Georgia Street
P.O. Box 10142, Pacific Centre
Vancouver, BC V7Y 1L2

David Hainey (dhainey@bcsc.bc.ca)

Tel.: (604) 899-6505
Fax: (604) 899-6506

**Co-Counsel for the Interveners,
Ontario Securities Commission, British
Columbia Securities Commission and Alberta
Securities Commission**

-and-

ALBERTA SECURITIES COMMISSION

Suite 600, 250 – 5th St. SW
Calgary, AB T2P 0R4

Don Young (don.young@asc.ca)

Tel.: (403) 297-2642

Fax: (403) 297-6156

**Co-Counsel for the Interveners,
Ontario Securities Commission, British
Columbia Securities Commission and Alberta
Securities Commission**

ECOJUSTICE CANADA SOCIETY

777 Bay Street, Suite 1910
PO Box 106
Toronto, ON M5G 2C8

Laura Bowman (lbowman@ecojustice.ca)

Bronwyn Roe (broe@ecojustice.ca)

Tel: (416) 368-7533

Fax: (416) 363-2746

**Counsel for the Intervener,
Ecojustice Canada Society**

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

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

Michelle Alton (michelle.alton@wst.gov.on.ca)

David Corbett (david.corbett@wst.gov.on.ca)

Kayla Seyler (kayla.seyler@wst.gov.on.ca)

Ana Rodriguez (ana.rodriguez@wst.gov.on.ca)

Tel.: (416) 573-1704

Fax: (416) 326-5164

**Counsel for the Interveners, Workplace Safety
and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal
(Northwest Territories and Nunavut),
Workers' Compensation Appeals Tribunal
(Nova Scotia), Appeals Commission for Alberta**

SUPREME LAW GROUP

275 Slater Street, Suite 900
Ottawa, ON K1P 5H9

Moira Dillon (mdillon@supremelawgroup.ca)

Tel.: (613) 691-1224

Fax: (613) 691-1338

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

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102

Fax: (613) 695-8580

**Ottawa Agent for the Interveners, Workplace
Safety and Insurance Appeals Tribunal
(Ontario), Workers' Compensation Appeals
Tribunal (Northwest Territories and Nunavut),
Workers' Compensation Appeals Tribunal
(Nova Scotia), Appeals Commission for Alberta**

**Workers' Compensation and Workers'
Compensation Appeals Tribunal (New
Brunswick)**

FASKEN MARTINEAU DUMOULIN LLP
2900 – 550 Burrard Street
Vancouver, BC V6C 0A3

Gavin R. Cameron (gcameron@fasken.com)
Tom Posyniak (tposyniak@fasken.com)

Tel.: (604) 631-4756
Fax: (604) 631-3232

**Counsel for the Intervener, British Columbia
International Commercial Arbitration Centre
Foundation**

LAX O'SULLIVAN LISUS GOTTLIEB LLP
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

Terrence J. O'Sullivan
(tosullivan@counsel-toronto.com)
Paul Michell (pmichell@counsel-toronto.com)
James Renihan (jrenihan@counsel-toronto.com)

Tel.: (416) 598-3556
Fax: (416) 598-3730

**Counsel for the Intervener,
Council of Canadian Administrative Tribunals**

SUSAN L. STEWART
7 L'Estrange Place
Toronto, ON M6S 4S6

Susan L. Stewart (sstewart@idirect.ca)

Tel.: (416) 531-3736
Fax: (416) 604-2897

**Counsel for the Intervener,
National Academy of Arbitrators**

**Workers' Compensation and Workers'
Compensation Appeals Tribunal (New
Brunswick)**

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

Sophie Arseneault (sarseneault@fasken.com)

Tel.: (613) 236-3882
Fax: (613) 230-6423

**Ottawa Agent for the Intervener, British
Columbia International Commercial
Arbitration Centre Foundation**

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
(emeehan@supremeadvocacy.ca)

Tel.: (613) 695-8855
Fax: (613) 695-8580

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

CAZA SAIKALEY LLP
222 Laurier Avenue West, Suite 350
Ottawa, ON K1P 5Z9

Alyssa Tomkins (atomkins@plaideurs.ca)

Tel.: (613) 564-8269
Fax: (613) 565-2087

**Ottawa Agent for the Intervener,
National Academy of Arbitrators**

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

Linda R. Rothstein
(linda.rothstein@paliareroland.com)
Michael Fenrick
(michael.fenrick@paliareroland.com)

Tel.: (416) 646-4327
Fax: (416) 646-4301

**Co-Counsel for the Interveners, Ontario
Labour-Management Arbitrators' Association
and Conférence des arbitres du Québec**

-and-

RAE CHRISTEN JEFFRIES LLP
70 University Avenue, Suite 320
Toronto, ON M5J 2M4

Angela E. Rae (angela@rcjlaw.ca)
Anne Marie Heenan (annemarie@rcjlaw.ca)

Tel.: (416) 743-7153
Fax: 416.595-7321

**Co-Counsel for the Interveners, Ontario
Labour-Management Arbitrators' Association
and Conférence des arbitres du Québec**

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Steven M. Barrett
(sbarrett@goldblattpartners.com)

Tel.: (416) 977-6070
Fax: (416) 591-7333

**Counsel for the Intervener,
Canadian Labour Congress**

CAZA SAIKALEY LLP
222 Laurier Avenue West, Suite 350
Ottawa, ON K1P 5Z9

Alyssa Tomkins (atomkins@plaideurs.ca)

Tel.: (613) 564-8269
Fax: (613) 565-2087

**Ottawa Agent for the Interveners, Ontario
Labour-Management Arbitrators' Association
and Conférence des arbitres du Québec**

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
(cbauman@goldblattpartners.com)

Tel.: (613) 482-2463
Fax: (613) 235-3041

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

SHORES JARDINE LLP
Suite 2250, 10104 – 103 Avenue
Edmonton, AB T5J 0H8

William W. Shores, Q.C.
(bill@shoresjardine.com)
Kirk N. Lambrecht, Q.C.
(kirk@shoresjardine.com)

Tel.: (780) 448-9275
Fax: (780) 423-0163

**Counsel for the Intervener, National
Association Of Pharmacy Regulatory
Authorities**

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

Brendan van Niejenhuis
(BrendanVN@stockwoods.ca)
Andrea Gonsalves (AndreaG@stockwoods.ca)

Tel.: (416) 593-248
Fax: (416) 593-9345

**Counsel for the Intervener,
Queen's Prison Law Project**

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

Toni Schweitzer (schweit@lao.on.ca)
Ronald Poulton (ronald@poultonlaw.com)

Tel.: (416) 531-2411
Fax: (416) 531-0885

**Counsel for the Intervener,
Parkdale Community Legal Services**

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102
Fax: (613) 695-8580

**Ottawa Agent for the Intervener,
National Association Of Pharmacy Regulatory
Authorities**

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

Maxine Vincelette (mvincelette@powerlaw.ca)

Tel.: (613) 702-5573
Fax: (613) 702-5573

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

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

Elaine Simon (simone@lao.on.ca)

Tel.: (613) 733-0140
Fax: (613) 733-0401

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

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

Bruno Gelinas-Faucher
(bruno.gelinas.faucher@gmail.com)

Tel.: +44 737 838 3023
Fax: (514) 565-9877

**Counsel for the Intervener, Cambridge
Comparative Administrative Law Forum**

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

J. Thomas Curry (tcurry@litigate.com)
Sam Johansen (sjohansen@litigate.com)

Tel.: (416) 865-3096
Fax: (416) 865-9010

**Counsel for the Interveners, Association of
Canadian Advertisers and the Alliance of
Canadian Cinema, Television and Radio
Artists**

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

Christian Leblanc (cleblanc@fasken.com)
Michael Shortt (mshortt@fasken.com)

Tel.: (514) 397-7545
Fax: (514) 397-7600

**Counsel for the Interveners, Blue Ant Media
Inc., Canadian Broadcasting Corporation,
DHX Media Ltd., Groupe V Média inc.,
Independent Broadcast Group, Aboriginal
Peoples Television Network, Allarco
Entertainment Inc., BBC Kids, Channel Zero,
Ethnic Channels Group Ltd., Hollywood Suite,**

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

Maxine Vincelette (mvincelette@powerlaw.ca)

Tel.: (613) 702-5573
Fax: (613) 702-5573

**Ottawa Agent for the Intervener, Cambridge
Comparative Administrative Law Forum**

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

Maxine Vincelette (mvincelette@powerlaw.ca)

Tel.: (613) 702-5573
Fax: (613) 702-5573

**Ottawa Agent for the Interveners, Association
of Canadian Advertisers and the Alliance of
Canadian Cinema, Television and Radio
Artists**

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

Sophie Arseneault (sarseneault@fasken.com)

Tel.: (613) 236-3882
Fax: (613) 230-6423

**Ottawa Agent for the Interveners, Blue Ant
Media Inc., Canadian Broadcasting
Corporation, DHX Media Ltd., Groupe V
Média inc., Independent Broadcast Group,
Aboriginal Peoples Television Network, Allarco
Entertainment Inc., BBC Kids, Channel Zero,
Ethnic Channels Group Ltd., Hollywood Suite,**

OUTtv Network Inc., Stingray Digital Group Inc., TV5 Québec Canada, Zoomermedia Ltd. and Pelmorex Weather Networks (Television) Inc.

OUTtv Network Inc., Stingray Digital Group Inc., TV5 Québec Canada, Zoomermedia Ltd. and Pelmorex Weather Networks (Television) Inc.

CAZA SAIKALEY LLP
220 Laurier Avenue West, Suite 350
Ottawa, ON K1P 5Z9

UNIVERSITÉ D'OTTAWA
Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Alyssa Tomkins (ATomkins@plaideurs.ca)
James Plotkin (JPlotkin@plaideurs.ca)
Michel Bastarache (MBastarache@plaideurs.ca)

David Fewer (dfewer@uottawa.ca)

Tel.: (613) 565-2292
Fax: (613) 565-2087

Tel.: (613) 562-5800 ext. 2558
Fax: (613) 562-5417

Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

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

STEWART MCKELVEY
65 Grafton Street
Charlottetown, PE C1A 1K8

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

Jonathan M. Coady
(jcoady@stewartmckelvey.com)
Justin L. Milne (jmilne@stewartmckelvey.com)

Guy Régimbald
(guy.regimbald@gowlingwlg.com)

Tel.: (902) 629-4520
Fax: (902) 566-5283

Tel.: (613) 786-0197
Fax: (613) 563-9869

**Counsel for the Intervener,
Canadian Bar Association**

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

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

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

Anthony Navaneelan (navanea@lao.on.ca)
Audrey Macklin (audrey.macklin@utoronto.ca)

Nicholas Hersh (hershni@lao.on.ca)

Tel.: (416) 977-8111 ext. 7181
Fax: (416) 977-5567

Tel.: (613) 596-1641
Fax: (613) 596-3364

**Counsel for the Intervener,
Canadian Association of Refugee Lawyers**

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

**COMMUNITY & LEGAL AID SERVICES
PROGRAMME**

York University, Osgoode Hall Law School
Ignat Kaneff Building, 4700 Keele Street
Toronto, ON M3J 1P3

Subodh Bharati (sbharati@osgoode.yorku.ca)

Tel.: (416) 736-5029

Fax: (416) 736-5564

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

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

(mfmajor@supremeadvocacy.ca)

Tel.: (613) 695-8855 ext. 102

Fax: (613) 695-8580

**Ottawa Agent for the Intervener,
Community & Legal Aid Services Programme**

HADEKEL SHAMS s.e.n.c.r.l.

305 rue Bellechasse est, bureau 400A
Montréal, QC H2S 1W9

Peter Shams (peter@hadekelshams.ca)

Claudia Andrea Molina

(molina@cabinetmolina.com)

Guillaume Cliche-Rivard

(g.cliche.rivard@dmavocats.com)

David Berger (david.berger@cilaw.ca)

Tel.: (514) 439-0800

Fax: (514) 439-0798

**Counsel for the Intervener,
Association québécoise des avocats et avocates
en droit de l'immigration**

CLARKE CHILD & FAMILY LAW

36 Toronto Street, Suite 950
Toronto, ON M5C 2C5

Sarah Clarke (sarah@childandfamilylaw.ca)

Tel.: (416) 260-3030

Fax: (647) 689-3286

**Counsel for the Intervener, First Nations Child
and Family Caring Society of Canada**

STIKEMAN ELLIOTT LLP

50 O'Connor Street, Suite 1600
Ottawa, ON K1P 6L2

Nicholas McHaffie (nmchaffie@stikeman.com)

Tel. : (613) 566-0546

Fax: (613) 230-8877

**Ottawa Agent for the Intervener, First Nations
Child and Family Caring Society of Canada**

-and-

STIKEMAN ELLIOTT LLP
50 O'Connor Street, Suite 1600
Ottawa, ON K1P 6L2

Nicholas McHaffie (nmchaffie@stikeman.com)

Tel. : (613) 566-0546
Fax: (613) 230-8877

**Co-Counsel for the Intervener, First Nations
Child and Family Caring Society of Canada**

-and-

CONWAY BAXTER WILSON LLP
411 Roosevelt Ave, Suite 400
Ottawa, ON K2A 3X9

David P. Taylor (dtaylor@conway.pro)

Tel.: (613) 691-0368
Fax: (613) 688-0271

**Co-Counsel for the Intervener, First Nations
Child and Family Caring Society of Canada**

Table of Contents

	Page
PART I— OVERVIEW	1
PART II— POSITION RESPECTING THE APPELLANTS’ QUESTIONS	2
PART III— STATEMENT OF ARGUMENT	2
1. The Rule of Law Requires Respect for Legislative Supremacy.....	2
2. The Rule of Law Requires Reviewing Courts To Interpret Legislation	5
PART IV— SUBMISSIONS CONCERNING COSTS.....	10
PART V— ORDER SOUGHT	10
PART VI— TABLE OF AUTHORITIES	11
PART VII— LEGISLATION RELIED UPON.....	14

PART I—OVERVIEW

1. In these appeals, some parties and interveners, notably the Attorneys General, urge this Court further to entrench deference to executive decision makers. Others, including those advocating for vulnerable participants in the legal system, argue for greater oversight.

2. Advocates for the Rule of Law (“**ARL**”) takes no position on whether more or less deference is desirable as a matter of policy. It intervenes, instead, to propose a normative framework for judicial review that reflects Canada’s constitutional structure and the principles that underpin it. ARL’s position is rooted in rule of law considerations that can and should inform the standard of review analysis in all three of these appeals, as well as in future cases.

3. Specifically, ARL makes two interrelated submissions.

4. *First*, legislative supremacy and the rule of law are not in tension. Nor are they necessarily distinct; rather, the former is an aspect of the latter. In all but exceptional circumstances, the rule of law requires courts to determine whether and to what extent the legislature intended the court to defer to the administrative decision maker. Courts too often avoid these questions. They adopt, instead, a nearly irrefutable presumption of deference, one that undermines the very principle of legislative supremacy that ostensibly justifies it. The result, *administrative supremacy*, is inconsistent with judicial review’s constitutional footing.

5. *Second*, 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 therefore proposes a framework that is grounded in the search for legislative intent.

6. ARL’s submissions are distinctive. They will be of assistance to the Court as it considers the “nature and scope of judicial review of administrative action”¹. Accordingly, ARL requests that it be granted leave to make combined oral submissions, not to exceed five minutes in length.

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.).

PART II—POSITION RESPECTING THE APPELLANTS’ QUESTIONS

7. ARL submits that, to respect the rule of law and legislative supremacy, a court should determine whether deference is due to an administrative decision maker by deploying the established tools of statutory interpretation. Reviewing courts should defer where the question is one that the legislature intended the decision maker, rather than the court, to answer.

PART III—STATEMENT OF ARGUMENT

1. The Rule of Law Requires Respect for Legislative Supremacy

8. In *Dunsmuir*, the Court stated that “[j]udicial review seeks to address *an underlying tension between the rule of law and the foundational democratic principle*”.² It has recently made similar pronouncements about the relationship between legislative supremacy (“the foundational democratic principle”) and the rule of law. It has suggested that the two are opposing forces,³ or merely framed them as distinct.⁴ This dichotomy, however presented, has come to justify a strong presumption 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”.⁵ The rule of law has been left to do little work, other than to justify the existence of judicial review itself.⁶

² *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶27, *emphasis added*.

³ 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 Coherence in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness” (2016), 62 McGill L.J. at 527, 533-34, Book of Authorities of the Intervener ARL (“**ARL BOA**”) Tab 3.

⁴ 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.

⁵ *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.

⁶ 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.

9. These developments, however, 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,⁷ 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*⁸ — the rule of law requires respect for the legislature’s exclusive lawmaking authority in the exercise of judicial review.⁹ To uphold the rule of law, courts must ensure that statutory delegates remain subordinate to the law and within their mandates, as the legislature has defined them.¹⁰ Thus, as the Court recognized in *Dunsmuir*, “the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter”.¹¹

10. 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”.¹² Yet, the jurisprudence has come instead to *presume* an inconsistency between legislative supremacy

⁷ 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.

⁸ *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶¶58-61; see *Ready v. Saskatoon Regional Health Authority*, 2017 SKCA 20, ¶¶63, 108-19, 116; *Loewen v. Manitoba Teachers’ Society*, 2015 MBCA 13, 380 D.L.R. (4th) 654, ¶¶46, 48, 69; see also P. Daly, “The Scope and Meaning of Reasonableness Review” (2014), 52 Alta. L. Rev. 799, at 809, ARL BOA, Tab 4.

⁹ See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶65, per Brown J., dissenting.

¹⁰ 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.

¹¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶¶29-30, *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, ¶26; *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890, ¶18, per Sopinka J.

¹² P. Daly, “Deference on Questions of Law” (2011), 74 Modern L. Rev. 694, at 706, ARL BOA, Tab 2; see also *Alberta Teachers’ Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶98, per Cromwell J.

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 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.¹³ Privileging a common law presumption over discoverable statutory meaning subverts the hierarchy of laws and denies the legislature its constitutional role in shaping the relationship between the executive and the judiciary.

11. In this way, assuming a dichotomy between legislative supremacy and the rule of law has led the standard of review analysis too often to neglect both. Courts have instead 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”.¹⁴ The act of delegation has come to be seen as such a strong signal in favour of deference that it is now possible to argue, as the Attorney General of Canada does in these appeals, that only an explicit legislative instruction to the contrary can overcome it.¹⁵ Absent such “unusual statutory language”,¹⁶ on this view, it is the decision maker and not the court that must have the “last word” on what the law requires.¹⁷ Courts thus abandon any search for actual legislative intent, and elevate an interpretive presumption into an inflexible legal rule.

12. 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.¹⁸ Instead, courts must consider

¹³ See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶¶77-79, per Rothstein J.

¹⁴ *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, 34.

¹⁵ Appellant’s Factum (*Vavilov*), ¶47; Respondent’s Factum (*National Football League*), ¶27; Respondent’s Factum (*Bell Canada*), ¶27; see also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶35.

¹⁶ *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶34.

¹⁷ *Alberta Teachers’ Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶94, per Cromwell J.

¹⁸ 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

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.

2. The Rule of Law Requires Reviewing Courts To Interpret Legislation

13. Since the rule of law requires respect for legislative supremacy, it also requires statutory interpretation to be the basis of the standard of review analysis. Reviewing courts should look to the legislation under which a decision has been made to determine whether, and to what extent, the legislature intended the decision maker to be the arbiter of the question in issue. Courts should return to the notion that administrative law is fundamentally statutory in practice.¹⁹ As this Court confirmed in *Edmonton East*, deference is inappropriate “if ... the legislature intended the standard of review to be correctness”.²⁰

14. 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”.²¹ This echoed Justice Beetz's observation, in *Bibeault*, that “[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation”.²² Justices Bastarache and LeBel maintained this line in *Dunsmuir*; they affirmed that “legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent”.²³

Côte and Brown JJ.; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶92, per Rennie J.A.

¹⁹ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, ¶24.; see also, M. Mancini, “Two Myths of Administrative Law” (October 4, 2018). *Western J. Legal Stud.*, Forthcoming, available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260672.

²⁰ *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶32.

²¹ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, ¶26; see also *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, ¶21.

²² *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048, ¶120, quoting S. A. de Smith, *Constitutional and Administrative Law* (4th ed. 1981), at 558.

²³ *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶30; 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.

15. The Court has since attempted to simplify the standard of review analysis by limiting the role of statutory interpretation.²⁴ However, such efforts 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.²⁵ The result has been more tussling over the standard of review, not less.²⁶

16. The way forward is for the Court to endorse the established tools of statutory interpretation. These should function as a universal means of determining whether the question at issue on judicial review is one on which the legislature intended curial deference²⁷ — and, if so, how much deference the legislature intended for courts to accord.²⁸ The principles of statutory interpretation may be applied as part of a three-step framework for establishing the standard of review, as follows.

17. **First**, courts should look to legislation governing the procedures and powers of courts in reviewing administrative action in the applicable jurisdiction. Federally, this will be the *Federal Courts Act*.²⁹ In Ontario and British Columbia, by contrast, it will be the *Judicial Review Procedure Act*,³⁰ and the *Administrative Tribunals Act*,³¹ respectively. In these enactments, legislatures often expressly or impliedly direct courts to defer — or not.

²⁴ See *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7; *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47.

²⁵ 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.

²⁶ 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, ARL BOA, Tab 1.

²⁷ See *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶99, per Cromwell J.

²⁸ See *Wilson v. Atomic Energy of Canada Ltd.* 2016 SCC 29, ¶35, per Abella J.; see also M. Mancini, "Statutory Interpretation from the Stratosphere" (2018) Adv. Q., Forthcoming, online: <http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratosphere/>.

²⁹ *Federal Courts Act*, R.S.C. 1985, c. F-7.

³⁰ *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

³¹ *Administrative Tribunals Act*, S.B.C. 2004, c. 45; see also *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

18. Several provisions of Ontario’s *Judicial Review Procedure Act*, for example, suggest that the legislature intended deference to depend on the question at issue on judicial review. Subsection 2(2) of the Act refers to “the power of the court to set aside a decision for error of law on the face of the record”,³² which suggests that less (or no) deference ought to be accorded to a decision maker’s erroneous determination of a question of law. Conversely, s. 2(3) of the Act indicates that heightened deference is appropriate when a court is asked to review “findings of fact of a tribunal made in the exercise of a statutory power of decision”.³³

19. The *Federal Courts Act*, meanwhile, contains even stronger statutory signals as to the standard of review. Where findings of fact are impugned, a reviewing court may grant relief only when the decision was based on an erroneous finding of fact that was made “in a perverse or capricious manner”.³⁴ Section 18.1(4)(c), by contrast, provides for relief where a federal board, commission or tribunal “erred in law...whether or not the error appears on the face of the record”.³⁵ To accord equivalent deference to findings of fact and conclusions of law would fly in the face of this statutory language.

20. **Second**, the reviewing court should look to the decision maker’s enabling (or “home”) statute. Here, the legislature may signal the appropriate level of deference. Statutory appeal rights suggest less deference, while privative clauses and broad grants of discretion, such as mandates to regulate in the “public interest”, argue for more deference.³⁶ Neither deference nor expertise need be “presumed” merely because authority has been delegated.

21. **Third**, courts should examine the specific provision pursuant to which the impugned decision was made,³⁷ reading it in harmony with the legislation as a whole.³⁸ If the provision

³² *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(2).

³³ *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(3).

³⁴ *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d); see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶72, per Rothstein J.

³⁵ *Federal Courts Act*, R.S.C., 1985, c. F-7, s.18.1(4)(c).

³⁶ See, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, ¶¶22, 24; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, ¶50 ; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶74, per Rothstein J; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, ¶¶91-92; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶¶66, 95, per Rennie J.A.

³⁷ See *Alberta Teachers’ Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶99, per Cromwell J.; *Wilson v. Atomic Energy of Canada Ltd.* 2016 SCC 29, ¶35,

includes open-textured language that is neither narrowed by nor clarified in the context of the statutory framework (by a statutory right of appeal, for example) then deference will be warranted.³⁹ If the provision uses narrow statutory language that provides fewer options to the decision maker, by contrast, then deference may not be appropriate.⁴⁰ The legislature may have intended more or less administrative latitude in particular circumstances, and so the appropriate degree of deference may vary depending on the provision in issue.

22. This proposed three-step framework — moving from broad, jurisdictional legislation to the specific provisions governing the decision at issue — aims to focus reviewing courts' efforts on the established tools of statutory interpretation, as they determine whether legislative supremacy and the rule of law demand deference. True, this approach may be less simple than applying an ever-stronger presumption of deference. But history has shown that conceptual simplicity invites practical complexity, doctrinal obscurity, and, ultimately, a lack of certainty and predictability. This is the *status quo*.⁴¹ These appeals are an opportunity to improve on it. To do so, the Court should strive for a *clearer* methodology, not a simpler one. The foregoing proposed framework reflects that objective.

23. The principles underlying the proposed three-step framework find support in the jurisprudence. As Rothstein J. explained nearly a decade ago, in *Khosa*:

Courts must give effect to the legislature's words and cannot superimpose on them a duplicative common law analysis. Where the legislature has expressly

per Abella J.; see also M. Mancini, "Statutory Interpretation from the Stratasphere" (2018) Adv. Q., Forthcoming, online: <http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/>.

³⁸ See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, ¶12; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶¶26-27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ¶21.

³⁹ See *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, ¶¶126-27; *Canada v. Williams*, [1944] S.C.R. 226, at 239, per Hudson J.

⁴⁰ 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, ¶¶90-99; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, ¶¶42-44; *Walchuk v. Canada (Justice)*, 2015 FCA 85, ¶¶33-34, 56; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, ¶53.

⁴¹ See *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶66, per Rennie J.A., and ¶187, per Nadon J.A..

or impliedly provided for standards of review, courts must follow that legislative intent, subject to any constitutional challenge.⁴²

24. Rothstein J. parted company with the majority in *Khosa* over how the common law of judicial review properly interacts with the specific legislative provisions in respect of which judicial oversight occurs.⁴³ Yet, even the majority (speaking through Binnie J.) acknowledged that “the legislature can by clear and explicit language oust the common law in this as in other matters”.⁴⁴ Binnie J. referred in this connection to British Columbia’s *Administrative Tribunals Act* and other such “judicial review legislation which not only provide[s] guidance to the courts but ha[s] the added benefit of making the law more understandable and accessible to interested members of the public”.⁴⁵ This describes the focus of the first step of ARL’s proposed framework — the broad, jurisdictional statutes that govern curial review.

25. The Federal Court of Appeal recently engaged with the second step of the proposed framework in *Bell Canada v. 7265921 Canada Ltd.* There, Rennie J.A. (dissenting but not on this point) maintained that “the focus of the standard of review analysis should be on discerning legislative intent according to received principles of interpretation” and so a reviewing court must “consider the statute” under which an impugned decision was made in answering the ultimate question of whether “the decision was...authorized by the legislation”.⁴⁶ Nadon J.A. would have gone further, affording deference on legal questions “only whenever Parliament expressly or impliedly wishes us to” do so.⁴⁷ On either view, however, a reviewing court cannot calibrate deference without interpreting the particular statute at issue.⁴⁸ Indeed, *Dunsmuir* itself confirms as much.⁴⁹

⁴² *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶70, per Rothstein J.

⁴³ *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶¶50-51, per Binnie J., and ¶106, per Rothstein J.; see also *R. v. Owen*, 2003 SCC 33, ¶¶31-32.

⁴⁴ *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶50, per Binnie J.; see also *Spidel v. Canada (Attorney General)*, 2012 FCA 275, ¶¶8-9.

⁴⁵ *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶50, per Binnie J.

⁴⁶ *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶66, per Rennie J.A.; see also *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, ¶58, per Stratas J.A.

⁴⁷ *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶192, per Nadon J.A.

⁴⁸ See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶¶85-87, per Côté and Brown JJ.; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶15.

26. Finally, this Court has recognized the need to consider the specific provision pursuant to which the administrative decision under review was made in assessing whether deference is appropriate.⁵⁰ This, too, reflects the careful attention to which the statutory scheme is entitled in assessing the appropriateness — and appropriate extent — of deference. In Rennie J.A.’s words, “any consideration of the standard of review begins with an inquiry into the role Parliament intended the supervisory court to play in relation to any particular decision”.⁵¹

27. Efforts since *Dunsmuir* to avoid “law office metaphysics”⁵² have faltered not despite the Court’s good intentions, but because of them. Rather than simplify matters, jurisprudential innovations like the “presumption of reasonableness” have made it more difficult to square practice with first principles. The result has been unpredictability and consternation. By using statutory interpretation to discern legislative intent, and legislative intent to determine deference, the Court now has an opportunity to offer workable guidance that recognizes legislative supremacy and upholds the rule of law. It should do 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 leave to present five minutes of oral argument.

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



Adam Goldenberg / Robyn Gifford / Asher Honickman

⁴⁹ See *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶¶66-67, 69.

⁵⁰ See, e.g., *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22, ¶¶6, 10-11, 13; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, ¶¶42, 58; *Katz Group Canada Inc. v. Ontario (Health and Long - Term Care)*, 2013 SCC 64, ¶¶29-30, 42-43, 48-49; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, ¶¶26-27.

⁵¹ *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, ¶69, per Rennie J.A.

⁵² *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶122, per Binnie J.

PART VI—TABLE OF AUTHORITIES

<u>Cases</u>	Paragraph(s) Referenced in Factum
<u><i>Agraira v. Canada (Public Safety and Emergency Preparedness)</i>, 2013 SCC 36</u>	20
<u><i>Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)</i>, 2011 SCC 61</u>	10, 11, 15, 16, 21
<u><i>Bell Canada v. 7265921 Canada Ltd.</i>, 2018 FCA 174</u>	12, 20, 22, 25, 26
<u><i>Bell Canada, et al. v. Attorney General of Canada</i>, 2018 CanLII 40808 (SCC)</u>	6
<u><i>Bell ExpressVu Limited Partnership v. Rex</i>, 2002 SCC 42</u>	21
<u><i>C.U.P.E. v. Ontario (Minister of Labour)</i>, 2003 SCC 29</u>	9
<u><i>Canada v. Williams</i>, [1944] S.C.R. 226</u>	21
<u><i>Canada (Attorney General) v. Almon Equipment Limited</i>, 2010 FCA 193</u>	21
<u><i>Canada (Attorney General) v. Boogaard</i>, 2015 FCA 150</u>	21
<u><i>Canada (Canadian Human Rights Commission) v. Canada (Attorney General)</i>, 2018 SCC 31</u>	8
<u><i>Canada (Citizenship and Immigration) v. Khosa</i>, 2009 SCC 12</u>	9, 10, 12, 14, 19, 20, 23, 24
<u><i>Canada (Transport, Infrastructure and Communities) v. Farwaha</i>, 2014 FCA 56</u>	20, 21
<u><i>Canadian Copyright Licensing Agency (Access Copyright) v. Canada</i>, 2018 FCA 58</u>	25
<u><i>Canadian National Railway Co. v. Canada (Attorney General)</i>, 2014 SCC 40</u>	26
<u><i>Catalyst Paper Corp. v. North Cowichan (District)</i>, 2012 SCC 2</u>	26
<u><i>Crevier v. Attorney General of Quebec</i>, [1981] 2 S.C.R. 220</u>	9
<u><i>Century Services Inc. v. Canada (Attorney General)</i>, 2010 SCC 60</u>	21
<u><i>Dr. Q. v. College of Physicians and Surgeons of British Columbia</i>, 2003 SCC 19</u>	9, 14
<u><i>Dunsmuir v. New Brunswick</i>, 2008 SCC 9</u>	8, 9, 11, 14, 25, 27
<u><i>Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.</i>, 2016 SCC 47</u>	8, 9, 11, 12, 13, 15, 25
<u><i>Green v. Law Society of Manitoba</i>, 2017 SCC 20</u>	20
<u><i>Groia v. Law Society of Upper Canada</i>, 2018 SCC 27</u>	8
<u><i>Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)</i>, 2013 SCC</u>	26

<u>Cases</u>	Paragraph(s) Referenced in Factum
<u>64</u>	
<u>Loewen v. Manitoba Teachers' Society, 2015 MBCA 13, 380 D.L.R. (4th) 654</u>	9
<u>McLean v. British Columbia (Securities Commission), 2013 SCC 67</u>	14, 21
<u>Minister of Citizenship and Immigration v. Alexander Vavilov, 2018 CanLII 40807 (SCC)</u>	6
<u>Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16</u>	15
<u>National Football League, et al. v. Attorney General of Canada, 2018 CanLII 40806 (SCC)</u>	6
<u>Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52</u>	13
<u>Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890</u>	9
<u>Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982</u>	9, 14,
<u>R. v. Owen, 2003 SCC 33</u>	24
<u>Ready v. Saskatoon Regional Health Authority, 2017 SKCA 20</u>	9
<u>Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68</u>	21
<u>Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27</u>	21
<u>Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35</u>	9, 25
<u>Smith v. Alliance Pipeline Ltd., 2011 SCC 7</u>	9, 15
<u>Spidel v. Canada (Attorney General), 2012 FCA 275</u>	24
<u>Tervita Corp. v. Canada (Commissioner of Competition), 2015 SCC 3</u>	9
<u>U.E.S., Local 298 v. Bibeault, [1988] 2 SCR 1048</u>	14
<u>Walchuk v. Canada (Justice), 2015 FCA 85</u>	21
<u>West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 SCC 22</u>	8, 21, 26
<u>Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4</u>	8
<u>Wilson v. Atomic Energy of Canada Ltd., 2016 SCC 29</u>	8, 16, 21
<u>Secondary Sources</u>	
D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal	15

<u>Cases</u>	Paragraph(s) Referenced in Factum
Coherence and Consistency” (2016), 42:1 Queen’s L.J. 27.	
M. Mancini, “Statutory Interpretation from the Stratasphere” (2018) Adv. Q., Forthcoming, online: http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/ .	16, 21
M. Mancini, “Two Myths of Administrative Law” (October 4, 2018). Western J. Legal Stud., Forthcoming, <i>available on SSRN</i> : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260672 .	13
P. Daly, “Deference on Questions of Law” (September 2011). The Modern Law Review, Vol. 74, Issue 5, pp. 694-720.	10
P. Daly, “Struggling towards Coherence in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness” (2016), 62 McGill L.J. 527.	8
P. Daly, “The Scope and Meaning of Reasonableness Review” (2015) 52:4 Alta L Rev 799.	9

PART VIII—LEGISLATION RELIED UPON

<u>Legislation</u>	Paragraph(s) Referenced in Factum
<i>Administrative Tribunals Act, S.B.C. 2004, c. 45</i>	17
<i>Federal Courts Act, R.S.C. 1985, c. F-7</i>	17, 19
<i>Judicial Review Procedure Act, R.S.B.C. 1996, c. 241</i>	17
<i>Judicial Review Procedure Act, R.S.O. 1990, c. J.1</i>	17, 18