Administrative Law – Cases, Text and Materials

Supplement 2015-2019

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Table of Cases

Chapter 3 – Fairness: Sources and Threshold, Sources, The *Dunsmuir* Exception, p. 97

Add after the discussion of *Canadian Arab Federation*:

In *Canadian Arab Federation v Canada (Citizenship and Immigration)*, 2015 FCA 168, the Federal Court of Appeal upheld the motions judge's decision. However, it did not do so on the ground that the relationship between the Federation and the government was strictly commercial and, for that reason, not subject to a duty of procedural fairness:

> Dawson J.A. –
>
> (…)
>
> [5] The threshold issue of whether the Minister owed the Federation a duty of procedural fairness when he decided that his department would not enter into a new contribution agreement with it is a question of law, reviewable on the standard of correctness.
>
> [6] The primary basis for the Federal Court's conclusion that no duty of fairness arose was that the nature of the relationship between the Federation and CIC was strictly commercial. Neither a statutory nor a contractual provision imposed any procedural fairness obligations on the Minister; accordingly, no duty of fairness arose (reasons at paragraph 38). In the alternative, the Federal Court found that the Federation did not have a right, privilege or interest that was affected by the decision sufficient to impose a duty of fairness on the Minister (reasons at paragraph 54).
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> [7] During oral argument, counsel for the Minister candidly acknowledged that the Federal Court's primary ground for finding no duty of fairness to exist is problematic. This is because the Court's analysis placed the relationship between the Federation and CIC completely in the realm of private law when, as a matter of law, the relationship contained a mix of public and private law elements.
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> [8] As further acknowledged by counsel for the Minister, the required analysis in this case is that articulated in cases such as *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643 and *Martineau v. Matsqui Institution*, 1979 CanLII 184 (SCC), [1980] 1 S.C.R. 602. In *Cardinal*, at page 653 of the reasons, the Supreme Court affirmed, as a general common law principle, that a duty of procedural fairness lies on every public authority making an administrative decision when the decision affects the rights, privileges or interests of an individual.
>
> [9] The Federal Court relied upon the following factors to find that the Federation did not possess sufficient rights, privileges or interests to engage an obligation of fairness:
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> i) The Federation had no right to receive LINC funding (reasons paragraph 56);
>
> ii) Any added legitimacy the Federation received as a result of its contractual relationship with CIC was not a sufficient interest to attract procedural fairness obligations. Otherwise, any party that contracts with the government would by virtue thereof acquire procedural rights (reasons paragraph 57); and
>
> iii) The sharing of infrastructure costs with the Federation's other operations was insufficient to trigger a duty of fairness. Funding for the LINC program was provided on a

> cost-recovery basis for recoverable costs related to the LINC program (reasons paragraph 58).
>
> [10] On this appeal, the Federation does not seriously challenge these findings. Indeed, it concedes that the contribution agreement conferred no commercial benefit upon it. Rather, the Federation argues that the decision amounted to a condemnation of it – the Federation was effectively labelled a supporter of terrorism and anti-Semitic. Reputational harm is of particular significance for a non-profit community organization; therefore, the Federation asserts that this is a sufficient interest to attract the duty of procedural fairness.
>
> [11] I disagree for the following reasons.
>
> [12] First, the Federation is unable to point to any authority that has found a reputational interest to be sufficient to trigger duties of procedural fairness. While counsel referred to the obligation of a public inquiry to give notice and an opportunity to be heard before making a report against an individual, the source of this obligation is statutory: section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11. As this duty does not flow from the common law, this example does not assist the Federation.
>
> [13] Second, when courts have found a common law duty of procedural fairness to apply, the rights, privileges or interests that were implicated were qualitatively more substantial than the reputational interest here asserted (for examples, see Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Carswell, 2014) at 7-53 to 7-55).
>
> [14] Finally, I agree with the Federal Court that if the Federation were afforded procedural rights in this context, every failed applicant for a contribution agreement would be entitled at least to notification that their proposal was not going to be accepted and an opportunity to address the Minister's concerns. This would significantly constrain the Minister's ability to make broad, policy-based decisions on an expeditious basis. As the Federal Court wrote at paragraph 58 of its reasons "[a]ny incidental interest [the Federation] may have had was heavily outweighed by the public's interest in a Minister with the discretion to make decisions swiftly, instead of one who is paralyzed by procedure".

Do you agree that reputational interests such as those involved in *Canadian Arab Federation* are insufficient to trigger a duty of procedural fairness? How do such interests compare to those involved in *Hutfield v Board of Fort Saskatchewan General Hospital District No 98* (at p. 130 of this chapter) where a duty of fairness was recognized?

Chapter 3 – Fairness: Sources and Thresholds, Constitutional and Quasi-Constitutional Sources of Procedures (p. 101)

Add to p. 101, following the text on s. 23 of the Quebec Charter.

The Quebec Court of Appeal, in *Imperial Tobacco Canada Ltd. v Québec (Procureure générale)*, 2015 QCCA 1554 at para. 50, reiterated that the protection supplied by s. 23 is "purely procedural" and that the provision "codifies the principles of natural justice usually recognized in procedural and administrative law".

Chapter 3, Procedures, The Common Law Threshold, Decisions of a Legislative and a General Nature (p. 107)

Delete the paragraph:

The Federal Court has recently held that where legislative amendments to the *Navigation Protection Act*, RSC 1985, CN-22 and to the *Fisheries Act*, RSC 1985, C F-14 introduced in Parliament in Omnibus budget legislation carried with them the potential risk of harm to the treaty rights of Aboriginal peoples, including the right to fish on their traditional lands, the Crown was subject to a duty to consult under s 35 of the *Constitution Act, 1982* and required to give notice to the affected First Nations and to afford them a reasonable opportunity to make submissions: *Courtoreille v Canada (Aboriginal Affairs and Northern Development*), 2014 FC 1244. This decision is considered further in Chapter 8.

Replace with:

The development of legislation has also been held to be exempt from the constitutional duty to consult and accommodate Aboriginal peoples: *Mikisew Cree First Nation v Canada (Governor General in Council*), 2018 SCC 40, [2018] 2 SCR 765. In this case, a majority of the Supreme Court upheld a distinction between Cabinet's executive and legislative roles. This decision is considered further in Chapter 8.

Chapter 5 – Bias: The General Test, Association Between Party and Decision-Maker, p. 446

Add to p. 446, following reference to *Terceira*.

The Ontario Court of Appeal reversed the Divisional Court's decision in *Terceira v Labourers International Union of North America*, 2014 ONCA 839. It noted that in quashing the Vice-Chair's decision, the Divisional Court had incorrectly applied the test for disqualification due to a conflict of interest on the part of a lawyer (*MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235) rather than for reasonable apprehension of bias by an adjudicator. Rather than presuming that the Vice-Chair was impartial, the Divisional Court had presumed that his past representation of one of the parties raised a conflict of interest. Applying the proper test, the Court of Appeal found no reasonable apprehension of bias on the facts of the case.

(i) Reasonable Apprehension of Bias

[26] Before this court, it was accepted by all parties that the test set forth in *Wewaykum* was applicable and not that in *MacDonald Estate*. This court and others, as well as the OLRB, have consistently applied a reasonable apprehension of bias test to address adjudicators' prior professional relationships [citations omitted]…

[27] The distinction between a claim of conflict of interest by a lawyer and reasonable apprehension of bias by an adjudicator is significant for a number of reasons. In *MacDonald Estate*, which addresses a lawyer's potential conflict of interest, the Supreme Court found, at p. 1260, that the imparting of confidential information is presumed to occur. In contrast, in *Wewaykum*, which addresses a claim of reasonable apprehension of bias of an adjudicator, the Supreme Court established, at para. 59, that impartiality of the adjudicator is presumed. Indeed, there is a strong presumption of judicial (or in this case adjudicative) impartiality and integrity: *Ontario Provincial Police v. MacDonald*, 2009 ONCA 805 (CanLII), 255 O.A.C. 376, at para 44.

[28] The rules governing a lawyer's conflict of interest stem, in part, from the existence of a fiduciary relationship and a duty of loyalty owed to the client: *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (CanLII), [2013] 2 S.C.R. 649, at paras. 19, 48; *R. v. Neil*, 2002 SCC 70 (CanLII), [2002] 3 S.C.R. 631, at pp. 640-644 and *MacDonald Estate*, at pp. 1243-1246. In contrast, the adjudicator's duty is anchored in principles of procedural fairness including impartiality: *Wewaykum*, at paras. 57-59.

[29] The distinction has important implications for the OLRB administrative function. In selecting its adjudicators, the OLRB draws upon the expertise of practitioners from within the labour and employment bar. A presumption of disqualification would operate to disregard this practical reality. As stated by Morden J. in *Re Marques and Dylex Ltd*., at p. 70*:* "Most, if not all of those appointed [to the OLRB], are bound to have some prior association with parties coming before the Board." Having said that, there will of course be instances of adjudicative bias as, for instance, where a decision-maker has a material pecuniary interest in a proceeding.

[30] By applying the incorrect test, the Divisional Court failed to apply the presumption of impartiality. The Divisional Court also failed to conduct a contextual analysis, which requires consideration of a number of factors that are relevant to the reasonable apprehension of bias test: *Wewaykum*, at paras. 74-93. The inquiry into an allegation of apprehension of bias by an adjudicator is "highly fact-specific" and is evaluated on an objective standard: *Wewaykum*, at paras.

73, 77. The person considering the alleged bias must be reasonable and the apprehension of bias must be reasonable: *Wewaykum*, at para 73. To succeed in this case, the Employees would have to establish that reasonable, right-minded and properly informed persons would think that the Vice-Chair was consciously or unconsciously influenced by his participation, about seven years earlier, in a matter resolved at the pleadings stage and of which the Vice-Chair said he had no knowledge of any parts material to the proceeding before him.

[31] Given the foregoing, I must consider anew the issue of reasonable apprehension of bias. For the following reasons, I would reinstate the Vice-Chair's decision.

[32] Fundamentally, the Employees failed to rebut the presumption of impartiality that attached to the Vice-Chair.

[33] The proceeding before the Vice-Chair was a hearing dealing with preliminary motions submitted by LIUNA and Local 183 and, as such, was limited in scope. Mr. O'Brien's length of service with an entity related to Local 183, if relevant at all, was only germane to the remedial stage of the Application. This was not before the Vice-Chair.

[34] No materials or record of any kind were filed in support of a claim of reasonable apprehension of bias. This is particularly noteworthy given that the client was making the bias allegation rather than an opposing party who might not possess any such materials. The Employees submit that they were unaware that the Vice-Chair was to preside until they entered the hearing room. That said, they did not seek an adjournment.

[35] Mr. O'Brien's retainer ended about seven years prior and settled at the pleadings stage. It did not include unfair labour practice complaints against LIUNA or Local 183. Examined objectively, there was an inadequate nexus between the factual matrix before the Vice-Chair and the prior retainer by Mr. O'Brien. Furthermore, the Vice-Chair noted, at para. 7 of his reasons dated March 30, 2012:

> There was no suggestion by counsel for the applicants that I am in possession of confidential information from Mr. O'Brien that would negatively affect his interests or the interests of the other applicants in this proceeding.

As stated in *Rando Drugs Ltd.*, at para. 29, an adjudicator's statement that "he or she knew nothing about the case and had no involvement in it will ordinarily be accepted at face value unless there is good reason to doubt it."

[36] On the issue of being a potential witness, there was no evidence of material facts on which the Vice-Chair might be called to testify nor was there any representation that Mr. O'Brien would waive any solicitor/client privilege that might govern the Vice-Chair's anticipated testimony.

[37] I therefore conclude that the Vice-Chair's decision on the issue of reasonable apprehension of bias should be reinstated. As such, there is no need to address the appellants' submission that the Employees waived their right to object given their failure to object during the four week hearing of the consolidated proceedings.

Chapter 5 – Bias and Independence, Variations Depending on Context, p. 476

Add to p. 476, following reference to *Seanic Canada Inc*.

The Newfoundland Court of Appeal reversed Chief Justice Orsborn's decision in *St. John's (City) v Seanic Canada Inc.*, 2016 NLCA 42. It held that he had correctly selected the closed-mind standard because the Council's decision on whether to accept a rezoning application was discretionary, having regard to relevant planning considerations, and not adjudicative. However, he had erred in law in his application of the test.

> [53] Based on the foregoing [arguments of counsel], I would state the following:
>
> (a) The "closed mind" test needs to be applied in a way that accords with the realities facing elected officials. It does not require an elected official to remain in a state of uncertainty until the instant before a vote is taken. Rather, a "closed mind" exists when someone refuses to consider what they are supposed to consider, in this case "relevant planning considerations".
>
> (b) I cannot agree with Seanic's submission that Councillor Collins was biased against the project and that he prejudged the decision because he opposed it based on the views of his constituents. Councillor Collins did what we expect politicians to do; he listened to his constituents on matters relevant to the issues under consideration. Where the decision to be taken is discretionary (as it was here), elected officials are entitled to do so. That is part of the normal process of politics in a democracy. It is not "bias". (An example of bias would be if Councillor Collins opposed the project for some invalid purpose, e.g. if he opposed it because he wished to cause harm to a proponent who had supported a rival candidate.)
>
> (c) It would be an error to say that bias exists because a councillor takes into account the views of his constituents when considering relevant concerns, e.g. traffic. It would be no less an error to say a councillor has a "closed mind" because he tells his constituents that he shares their views regarding relevant concerns.
>
> (d) As to prejudging the issue, it is too artificial, too much at odds with the role of a politician to require him or her to proclaim until the moment before a vote is taken that he or she continues to have an "open mind" on the issue when almost certainly he or she does not. That is not reality. That is not practicality. And the law should be neither unrealistic nor impractical.
>
> (e) Councillor Collins addressed relevant planning issues, including traffic concerns and the accessibility of services for seniors in his consideration of Seanic's application for rezoning. The fact that he approached such issues bearing in mind the views of his constituents did not undermine the legitimacy of his participation in the debate and the vote by Council.
>
> [54] Accordingly, I find that the Trial Division judge erred in law in his application of the closed mind test. Councillor Collins' participation in the Council debate and his vote on the rezoning application offended no law; they were proper in the circumstances.

Chapter 8 – The Duty to Consult and Accommodate Aboriginal Peoples, The Threshold

Add after Note no. 2, at p. 607:

3. The forward-looking nature of the duty to consult was confirmed again in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, where the Supreme Court stated (at para 41): "The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances." However, the Court then cited *West Moberly First Nations*, discussed below, to make the point that "it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context. Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult. This is not 'to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from' the project." (at para 42, citations omitted). It is, of course, not always easy to draw the line between a historical impact that does not trigger the duty and a cumulative impact that triggers the duty and forms part of the context and description of the adverse impacts of a project.

Chapter 8 – The Duty to Consult and Accommodate Aboriginal Peoples, The Threshold, Does the Duty Apply to Legislative Action?

Delete the last paragraph on p. 609 through to the next heading on page 611 ("Identifying the Parties to Consultation"):

Replace these paragraphs with the follow text and excerpts:

While *Tsuu T'ina Nation* applied the duty to Cabinet decisions to pass subordinate legislation, in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765, the majority held that the duty to consult and accommodate does not apply to Cabinet activities related to the development of primary legislation.

The Mikisew Cree First Nation sought judicial review of the Federal Cabinet's introduction of omnibus legislation in 2012 that included changes to several environmental protection regimes, including the repeal of the *Canadian Environmental Assessment Act*, SC 1992, c 37, and the replacement of that legislation with the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s. 52. Significant amendments were also introduced to the protection regime under the *Fisheries Act*, RSC 1985, c F-14, the *Species at Risk Act*, SC 2002, c 29, and the *Navigable Waters Protection Act*, which was renamed the *Navigation Protection Act*, R.S.C. 1985, c. N-22. There was no consultation with the Mikisew Cree First Nation before these legislative changes were introduced and passed by Parliament. The Mikisew Cree argued the Crown had a duty to consult on this legislative package, which reduced federal environmental protections and, in turn, had the potential to adversely affect their harvesting rights under Treaty 8. The Federal Trial Court granted a declaration that a duty to consult applied under the honour of the Crown to Cabinet's role in preparing legislation and had been breached, but the Federal Court of Appeal (2016) and the Supreme Court (2018) unanimously concluded that Cabinet's legislative functions did not fall within the authority for judicial review under ss 18 and 18.1 of the *Federal Courts Act,* RSC 1985 C F-7. At the Supreme Court, the narrow point of agreement was that the *Federal Courts Act* precludes judicial review of federal Ministers conducting parliamentary activities.

Beyond this narrow point, there was little common ground amongst the members of the Supreme Court on the constitutional issues and principles, including how the separation of powers and parliamentary sovereignty applied in the case, and whether the duty to consult applied to the actions of Cabinet in legislative processes, or whether other obligations under the honour of the Crown might apply in such contexts. Their opinions varied significantly across four different sets of reasons. The main positions taken can be summarized as follows:

1. The constitutional principles of the separation of powers (or parliamentary sovereignty) and parliamentary privilege protected all aspects of the legislative process – including the development of legislation by Cabinet: "[T]he entire law-making process – from initial policy development to royal assent – is legislative activity that cannot be supervised by the courts." (Brown J., at para 116) This position was adopted by 4 judges (Brown J, and Rowe J, writing for Moldaver and Côté JJ).

2. The duty to consult did not apply to legislative processes. This conclusion was reached on two different bases:

a. As legislative conduct, the Crown conduct involved in developing primary legislation was excluded from the Crown conduct that triggered the duty to consult. (Brown J, with Rowe J, writing for Moldaver and Côté JJ concurring).

Further, related reasons for not applying the duty to consult to the development of legislation were explained by Rowe J:

> The application of the duty to consult to "high-level managerial or policy decisions" has involved "policy decisions…made by the executive in regards to a *particular development project*." (at para 157, emphasis in original). This executive conduct cannot be extended to "support the proposition that a duty to consult is constitutionally mandated in the law-making process." (at para 157). (paras 150-159)
>
> Applying a duty to consult to legislative conduct is impractical and could lead to further judicial incursions into Parliamentary processes: "[T]he preparation of legislation…is not a simply process. Rather, it is a highly complex process involving multiple actors across government. Imposing a duty to consult at this stage could effectively grind the day-to-day internal operation of government to a halt." (at para 164).

b. The "law-making process – that is, the development, passage, and enactment of legislation – does not trigger the duty to consult. The separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process. Therefore, the duty to consult is ill-suited for legislative action (at para 32, Karakatsanis J, with Wagner CJ and Gascon JJ concurring). Concerns about applying the duty to consult to law-making included the potential for "significant judicial incursions into the workings of the legislature, even if such a duty were only enforced post-enactment" and also for "an inappropriate constraint on the legislatures' ability to control their own processes." (at para 38).

3. Uneven protection of Aboriginal and treaty rights may result from not applying the duty to consult to law-making processes: "When the executive or a statutory decision-maker takes action that may affect asserted or established s. 35 rights, the honour of the Crown imposes a duty to consult. … In contrast, if the state takes the *same action* through legislative means, the Aboriginal communities whose rights are potentially affected may be left without effective recourse….It is of little import to Aboriginal peoples whether it is the executive or Parliament which acts in a way that may adversely affect their rights" (at paras 43-44, Karakatsanis J with Wagner CJ and Gason JJ concurring). As a result, the honour of the Crown may lead to the development of other doctrines "to ensure the consistent protection of s 35 rights and to give full effect to the honour of the Crown through review of enacted legislation." (at para 45). Other forms of recourse may also be available, such as declarations which "may be an appropriate remedy even in situations where other forms of relief would be inconsistent with the separation of powers." (at para 47).

4. The duty to consult applies to the Crown conduct in question and was breached (Abella J, with Martin J concurring). This position was supported by the following reasons:

a. "[T]he issues in this appeal require the Court to reconcile, not choose between, protecting legislative process from judicial interference and protecting Aboriginal rights from the legislative process." (at para 84) Judicial respect for the separation of powers does not

require an interpretation of parliamentary sovereignty that eradicates obligations "under the honour of the Crown that arose at its assertion…. "Sovereign will" alone does not itself indicate legitimacy in the context of a constitutional democracy characterized by competing values, rights and obligations." (at para 91). The constitutional balance can be maintained through the flexibility of the duty to consult and scope of remedies available where a breach of the duty is established in the context of law-making (at para 93). Although not a rule, declarations will generally be the appropriate remedy in these circumstances (at para 97). Further, "Parliament's exclusive control over its own proceedings" can be respected by allowing challenges only to existing legislation (i.e., following enactment) rather than allowing "direct challenges to a legislature's procedure prior to the enactment of legislation." (at para 93).

b. The duty to consult applies to all exercises of governmental authority including law-making: "The question is not whether the duty to consult is *appropriate* in the circumstances, but whether the decision is one to which the duty to consult applies… Because the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples, the duty to consult must apply to all exercises of authority which are subject to scrutiny under s. 35. This includes, in my view, the enactment of legislation. Like the infringement analysis under *Sparrow*, the duty to consult does not discriminate based on the type of government action, but rather is triggered based on the potential for adverse *effects.*" (at para 63, emphasis in original).

As this overview suggests, there is no bottom line to the Supreme Court's judgment in this case beyond the non-applicability of the *Federal Courts Act* to Cabinet's law-making activities. The different opinions rendered in the case demonstrate significantly different approaches to reconciliation with Indigenous peoples and their rights. Two judges understand implementing and vindicating Aboriginal rights and Crown obligations to require shifts in constitutional principles and legislative practices (as per Abella J), while a strong minority (as per Brown J and Rowe J) consider the implementation and vindication of Aboriginal rights and Crown obligations to be adequately or better served by adhering to the constitutional traditions of the separation of powers and parliamentary privilege, and fitting the honour of the Crown within the parameters of these traditions. Yet another set of judges sought a middle ground between these positions, acknowledging the complexity of applying the duty to consult to law-making institutions but also acknowledging that the constitutional nature of the honour of the Crown suggests that attendant obligations are not limited to the executive branch.

Although potential litigants are likely to shy away from a similar challenge in the near future, *Mikisew Cree First Nation v Canada* certainly does not mark the end of the issue. One circumstance that may come forward is where potential litigants have a protocol or other basis from which to argue that the obligation to consult during legislative development exists. For example, as intervenors argued and as Abella J acknowledged, modern treaties "provide for Crown consultation with First Nations in respect of legislative developments and amendments." (at para 83) Karakatsanis J explicitly exempted modern treaty provisions from her decision, implying that the implementation of such provisions through legislation amounted to "manner and form" requirements, and stating that "[m]anner and form requirements (i.e., procedural restraints on enactments) imposed by legislation are binding" (at para 51). How far does this exception go and is the basis for the exception identified by Karakatsanis J appropriate? Commitments to review legislation also occur in reconciliation and other protocols. For example, in section 6.6 and 6.7 of the 2009 Kunst'aa guu- Kunst'aayah Reconciliation Protocol between the Province of British Columbia and Haida Nation, a joint commitment was made by the parties to review one another's implementing

legislation. Thus, the relevance of the commitment was prior to the existence of implementation legislation. Had there been a need, would this commitment have been enforceable? Are there other judicial review doctrines available in these circumstances, such as legitimate expectations, that would allow the Crown activities in question to be re-characterized as "executive" action rather than legislative, or possibly, to carry a double characterization as both executive and legislative activities, such that judicial review would be available? (see Brown J at paras 111-112).

A further question arises regarding government efforts across Canada to implement the United Nations Declaration of the Rights of Indigenous Peoples – which, in Article 19, includes an obligation to obtain the free, prior and informed consent of Indigenous peoples "before adopting or implementing "legislative or administrative measures" that may affect them." Will such efforts be limited by the constitutional principles protecting parliamentary processes or will such provisions of the Declaration be understood as an imperative and an opportunity to acknowledge and protect Indigenous self-determination through involvement in the state's policy and legislative processes? If legislation is passed implementing specific commitments to consult on legislation, would the conduct of such commitments be limited to review for the satisfaction of "matter and form" requirements?

Chapter 8 – The Duty to Consult and Accommodate Aboriginal Peoples, The Threshold, Identifying the Parties to Consultation

Add to the text on p. 614:

Some of the questions raised in this section were revisited in the recent decisions of *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 [*Clyde River*] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 [*Chippewas*].

The Supreme Court considered the role of tribunals, and specifically the National Energy Board (NEB), in regulatory processes where the NEB had final approval authority without involvement of a ministry of the Crown. The Supreme Court largely confirmed the approach to tribunal jurisdiction as set out in *Haida Nation, Taku River Tlingit*, *and Rio Tinto Alcan*, described above. The Court's approach also indicates that there are limits to the parallels between tribunal jurisdiction in relation to the duty to consult and established approaches to tribunal jurisdiction over *Charter* rights and remedies.

In *Rio Tinto Alcan* and in the precedent cases outside of the s. 35 context (and indeed, in the discussion in the preceding section of the Casebook), the issue of tribunal jurisdiction is framed as one of discerning legislative intent to "delegate" authority to an administrative decision-maker: "The legislature may choose to delegate to a tribunal the Crown's duty to consult." (*Rio Tinto Alcan* at para 56). By contrast, in the *Clyde River* and *Chippewas* cases, the Court described the issue as one of "reliance" by the Crown on a tribunal, as demonstrated in the following extracts from these judgments:

> "[W]hile ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60). In the NEB 's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing." (*Clyde River* at para 30)
>
> "As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77)." (*Chippewas* at para 37)
>
> "[I]f the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal." (*Chippewas* at para 32).

> "If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval… Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project [for which the NEB is the final decision maker] remains unfulfilled, the NEB must withhold project approval." (*Clyde River* at para 39)

In this "reliance" approach, the Crown is differentiated from tribunals that operate at arm's length from government ministries, which nevertheless act "on behalf" of the Crown in carrying out their regulatory processes and approvals (*Chippewas* at para 31). It allows for the possibility that the regulatory process may be sufficient to meet the duty to consult while also allowing for the possibility that further consultation efforts may be required beyond the regulatory process as set out in legislation or policy, and leaving it up to the Crown to address such further measures if required. A further implication of this approach is that it preserves the regulatory process itself as constitutional, requiring the decision rather than the process to be brought into line with constitutional standards through Crown (ministerial) efforts over and above regulatory requirements.

The reliance approach is, on the one hand, responsive to Indigenous peoples' arguments to the extent that it preserves their relationship with the Crown and not with arm's length regulatory agencies such as the NEB. On the other hand, this approach treats Aboriginal constitutional rights differently than other constitutional rights. Although the Court was responding to Indigenous and government arguments in adopting the language of "reliance", the Court did not explain this change in language from *Rio Tinto Alcan* or what principled reasons might exist for treating Aboriginal constitutional rights differently from other constitutional rights when it comes to tribunal jurisdictions. Thus, while these cases do not mark a big departure from precedent, they do raise many new questions. For example, how can we reconcile an approach that emphasizes the relationships between branches of the executive, only one of which is delegated responsibilities by legislation (i.e., the tribunal), with the ordinary focus in administrative law on *legislative* intent? Does the constitution and the honour of the Crown principle call upon the courts to interpret delegations of authority over questions of law as only partial delegations of responsibility for addressing constitutional questions? Alternatively, is legislative intention for constitutional responsibilities to be shared by both the Crown and the agency? If the constitutional obligation rests with the Crown and the executive, what is the legislature's role in articulating legislation that might re-organize how the duty to consult is carried out? And how does this approach reconcile with the justification test in *Sparrow* and *Tsilhqot'in Nation*, under which adequate consultation must be carried out in order to potentially justify a legislative infringement of an Aboriginal right?

Further questions arise when we consider what *Clyde River* and *Chippewas of the Thames* offer on how the shared responsibility of the Crown "proper" and tribunals should play out. In these decisions, the Court did not have to consider whether the agency had the authority to delay and "withhold project approval" to ensure the Crown's consultation obligations were met. Moreover, the Court did not have to address the details of how a process might play out in which the regulatory agency deems consultation to be inadequate and requires the Crown to take further efforts to satisfy the agency's view of adequate consultation obligations. What powers are necessary for the agency to be able to compel the Crown to act? Might legislation with strict regulatory timelines restrict the agency's ability to delay its decision, or potentially re-open hearings, to allow for further consultation efforts if necessary? Of course, if the

necessary powers are not present and consultation is inadequate, it is always possible that the regulatory agency might deny the application.

How might reliance on consultation processes above and beyond the regulatory framework (where required) affect the aims of transparency, accountability, accessibility and efficiency in regulatory systems? Such aims are a concern for both proponents trying to navigate regulatory approvals and for Indigenous parties, who are again asked to rely on the goodwill and policy discretion of the Crown (presumably acting on prerogative authority) rather than the law as articulated by legislatures and interpreted by courts. Note that the Court addressed the need for notice to at least Indigenous parties regarding the Crown's intent to rely on regulatory processes to fulfill its consultation obligations:

> Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner. (*Clyde River*, at para 23).

In *Chippewas*, the Crown did not respond to the First Nation's request for consultation and explicitly indicate it was relying on the NEB process until after the NEB's hearing process was complete. Nevertheless, the Chippewas of the Thames First Nation were notified of and participated in the NEB hearing process as an intervenor, and were aware that no ministers of the Crown would be participating and that the NEB was the final decision-maker in this process. In light of these circumstances, the Supreme Court held that notice of the Crown's reliance was sufficient in this case (*Chippewas* at paras 44-46). Was the notice obligation effectively delegated to the NEB in this case? Given the obligation that both Indigenous and Crown parties participate in good faith, did the Chippewas of the Thames First Nation have any choice about participating in the NEB process? Does the reliance approach allow Indigenous parties any ability to insist on action from the Crown? If not, is the reliance approach a meaningful response to First Nations' arguments of a nation-to-nation relationship (and therefore a relationship with the Crown and not regulatory agencies) based on their treaties?

Two other points are worth noting from these cases. First, the Court firmly rejected the lingering contention that an agency could not carry responsibility for the duty to consult while maintaining their independence as a quasi-judicial body. This argument was founded on the pre-*Haida Nation* case, *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159, in which the Supreme Court held that the NEB could not owe a fiduciary responsibility or heightened duty of fairness to Indigenous peoples because such an obligation would compromise the tribunal's independence. In rejecting this argument in *Chippewas*, the Supreme Court drew directly on administrative law principles that define tribunal independence as more flexible than what is demanded under the constitutional principle of judicial independence:

> When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for

> agencies to operate effectively and according to their intended roles (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 41). Furthermore, the Court contemplated this very possibility in *Carrier Sekani*, when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58). (*Clyde River,* at para 34).

Finally, in drawing a distinction between parts of the executive, the Court in *Clyde River* took the occasion to discuss who and what is the Crown, a discussion worth reproducing so that it may assist in formative understandings of the executive branch:

> [28] In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority [citations omitted]. For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359 (H.L.), at p. 397:
>
> > The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."
>
> [29] By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown's ministers — no relationship of control exists between them [citation omitted]. As a statutory body holding responsibility under [legislation], however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*,"[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers …. to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action.

Chapter 8 – The Duty to Consult and Accommodate Aboriginal Peoples, The Content

Add after the first full paragraph at the top of p. 623:

Although the primary significance of *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 [*Clyde River*] relates to the role of tribunals in carrying out and assessing the adequacy of Crown consultation obligations, *Clyde River* offers a more substantive reading of the duty to consult in its finding that consultation was inadequate. In the paragraphs reproduced below, the Supreme Court suggests that consultation must be conversational and that accommodation measures must respond to Indigenous concerns in order to satisfy deep consultation obligations.

The consultation process at issue involved proponents seeking a permit to conduct offshore seismic testing for oil and gas resources. The affected Inuit communities raised concerns about the impact of the proposed seismic activities on marine mammals and on their treaty rights to harvest these animals under the *Nunavut Land Claims Agreement* (1993). The Supreme Court held that the duty to consult was not met by the companies' approach to answering Inuit questions about these impacts:

> [49] ….Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "'[C]onsultation' in its least technical definition is talking together for mutual understanding" (T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61). No mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here.
>
> [50] The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.
>
> [51] These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada"

> (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.
>
> [52] The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

Following *Clyde River,* the Supreme Court's insistence on meaningful dialogue in the context of deep consultation obligations, including dialogue and accommodation that recognize and respond to the nature and impact on the rights at stake, was reinforced in *Tsleil-Waututh Nation v Canada (Attorney General),* 2018 FCA 153: "Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation" (at para 564). The Federal Court of Appeal found several flaws in the Crown's execution of the consultation process, including the limited mandate of officials interacting with Indigenous parties that could not sustain two-way dialogue; responses that were not specific enough to the different concerns of the different Indigenous parties; and a failure to consult beyond and about the findings of the National Energy Board that recommended conditional approval of the project. The Court concluded that the duty to consult was not satisfied and on this and other administrative law grounds, quashed the approval of the Trans Mountain pipeline expansion project.

Chapter 9 – The Standard of Review, Lingering Questions After Dunsmuir (p. 649)

Add to p. 649 following the discussion of the role of the four factors in the standard of review analysis:

An important fault line has reappeared on the Supreme Court with respect to the role of the contextual factors in determining the standard of review for a decision involving a decision-maker's interpretation of its enabling statute (or a statute closely connected to its function). In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 SCR 293, 2016 SCC 47, five judges privileged the application of the presumption of reasonableness and four judges strongly reasserted the importance of an analysis of the statutory mechanism of review and the tribunal's relative expertise in ascertaining the standard of review. Capilano disputed the City of Edmonton's assessment of the property value of its shopping centre by filing a complaint with the Assessment Review Board of the City of Edmonton seeking a reduction in the assessed value. The City discovered what it determined to be an error in its initial assessment and requested that the Board increase the assessed value of the shopping centre. The Board increased the assessment. Capilano appealed the Board's decision to the Alberta Court of Queen's Bench, arguing that it did not have the authority to increase its assessment under s. 467(1) of the *Municipal Government Act*, RSA 2000, c M-26, which provided that after hearing a complaint, an assessment review board may "change" the assessment or "decide that no change is required". Sections 470(1) and (5) of the Act provided that a decision of an assessment review board could be appealed to the Court of Queen's Bench, with permission, on "a question of law or jurisdiction of sufficient importance to merit an appeal". Where the appeal was successful, the Board was required, under s. 470.1(2), to "rehear the matter and deal with it in accordance with the opinion of or any direction given by the Court on the question of law or the question of jurisdiction". Justice Karakatsanis, writing for Justices Abella, Cromwell, Wagner and Gascon, held that a standard of reasonableness was presumed to apply to the Board's interpretation of its home statute. Justices Côté and Brown, writing for Chief Justice McLachlin and Justice Moldaver, decided that this presumption was rebutted by clear signals of legislative intent. Having regard to the wording of the statutory right of appeal, which was limited to questions of law and jurisdiction, and to the Board's lack of expertise at interpreting such questions, the legislature intended such questions to be reviewed on a correctness basis.

> The judgment of Abella, Cromwell, Karakatsanis, Wagner and Gascon JJ. was delivered by Karakatsanis J. —
>
> (…)
>
> A. *Standard of Review*
>
> [20] In this case, Slatter J.A. said: "The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review" (para. 11). That day has not come, but it may be approaching. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 (CanLII), [2016] 1 S.C.R. 720, my colleague Abella J. expressed an interest in revisiting the standard of review framework. The majority appreciated Justice Abella's efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability. In my view, the principles in *Dunsmuir* should provide the foundation for any future direction. However, any recalibration of our jurisprudence should await full submissions. This appeal was argued on the basis of our current jurisprudence and I proceed accordingly.

[21] The *Dunsmuir* framework balances two important competing principles: legislative supremacy, which requires the courts to respect the choice of Parliament or a legislature to assign responsibility for a given decision to an administrative body; and the rule of law, which requires that the courts have the last word on whether an administrative body has acted within the scope of its lawful authority (paras. 27-31).

(1) Presumption of Reasonableness

[22] Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, at para. 46). This 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. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

[23] The *Dunsmuir* framework provides a clear answer in this case. The substantive issue here — whether the Board had the power to increase the assessment — turns on the interpretation of s. 467(1) of the *MGA*, the Board's home statute. The standard of review is presumed to be reasonableness.

(2) Categories That Rebut the Presumption of Reasonableness

[24] The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or *vires*", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (*Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42 (CanLII), [2014] 2 S.C.R. 197, at para. 13; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at para. 22).

(a) *Is the Issue on Appeal a True Question of Jurisdiction?*

[25] The chambers judge found, and the Company submits, that whether the Board had the power to increase the assessment is a true question of jurisdiction reviewable on correctness. The Court of Appeal did not agree that this issue was a true question of jurisdiction.

[26] This category is "narrow" and these questions, assuming they indeed exist, are rare (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 2015 SCC 57 (CanLII), SCC 57, [2015] 3 S.C.R. 615, at para. 39; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*,2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at paras. 33-34). It is clear here that the Board may hear a complaint about a municipal assessment. The issue

is simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints. No true question of jurisdiction arises.

(b) *Is a Statutory Right of Appeal a New Category of Correctness?*

[27] The Court of Appeal concluded that when the decisions of a tribunal are subject to a statutory right of appeal (or a right to apply for leave to appeal), rather than ordinary judicial review, the standard of review on such appeals is correctness. It determined that a statutory appeal should be recognized as "an addition to or a variation of" the list of correctness categories enumerated in *Dunsmuir* (Court of Appeal reasons, at para. 24). Slatter J.A. reasoned that the existence of a statutory right of appeal is a strong indication that the legislature intended the courts to show less deference than they would in an ordinary judicial review.

[28] I disagree. In my view, recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence from this Court.

[29] At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (*McLean*; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 (CanLII), [2009] 2 S.C.R. 764; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 (CanLII), [2015] 3 S.C.R. 147; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45 (CanLII), [2015] 3 S.C.R. 219).

[30] In *Saguenay*, this Court confirmed that whenever a court reviews a decision of an administrative tribunal, the standard of review "must be determined on the basis of administrative law principles . . . regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal" (para. 38, per Gascon J.; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, at paras. 2 and 21).

[31] The Court of Appeal relied on this Court's decision in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 (CanLII), [2015] 1 S.C.R. 161, where the statutory appeal clause was referred to when finding the standard of review was correctness (para. 36). However, the Court in *Tervita* relied upon the unique statutory language of that particular appeal clause: a decision of the tribunal was appealable "as if it were a judgment of the Federal Court" (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1)). Obviously, judgments of the Federal Court do not benefit from deference on appeal (except on questions of fact, for entirely different reasons). *Tervita* does not stand for the proposition that all issues arising on all statutory appeals are reviewable on the correctness standard.

(3) Contextual Analysis

[32] The Court of Appeal also conducted a review of the relevant contextual factors to support the conclusion that the standard of review is correctness. The presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness (*Saguenay*, at para. 46; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283, at para. 16).

[33] The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: ". . . in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 25). Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: ". . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir*, at para. 68). As this Court has often remarked, courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work" (*McLean*, at para. 31, quoting *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324, at p. 1336, per Wilson J.).

[34] As discussed, this Court has often applied a reasonableness standard on a statutory appeal from an administrative tribunal, even when the appeal clause contained a leave requirement and limited appeals to questions of law (see, e.g., *Sattva*), or to questions of law or jurisdiction (see, e.g., *McLean*, *Smith*, *Bell Canada*). In light of this strong line of jurisprudence — combined with the absence of unusual statutory language like that at issue in *Tervita* — there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same as in those cases. The presumption of reasonableness is not rebutted.

[35] I would add this comment. The contextual approach can generate uncertainty and endless litigation concerning the standard of review. Subject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review (see the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58 and 59). Unfortunately, clear legislative guidance on the standard of review is not common.

(…)

The reasons of McLachlin C.J. and Moldaver, Côté and Brown JJ. were delivered by Côté and Brown JJ. (dissenting) —

(…)

II. Standard of Review

[65] The "overall aim" of the standard of review analysis has always been "to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law": *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, at para. 26. As Binnie J. once remarked, the standard of review analysis "is necessarily flexible" as it seeks "the polar star of legislative intent": *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 (CanLII), [2003] 1 S.C.R. 539, at para. 149.

[66] In our view, taken together, the statutory scheme and the Board's lack of relative expertise in interpreting the law lead to the conclusion that the legislature intended that the Board's decisions on questions of law and jurisdiction appealed to the Court of Queen's Bench be reviewed on a correctness standard. As a result, even were the Board's interpretation presumptively owed deference on the basis that the Board is interpreting its home statute, this presumption of deference has been rebutted by clear signals of legislative intent.

A. *Contextual Analysis of the Statutory Scheme and Signals of Legislative Intent*

[67] As we will explain, the nature of the relevant statutory scheme demonstrates that the legislature intended correctness review be applied to decisions on questions of law and jurisdiction for which leave to appeal is granted to the Court of Queen's Bench. Any expertise of the Board does not overcome this clear indication of legislative intent. Indeed, we are of the view that the legislature has indicated that the Board lacks relative expertise to decide those questions.

[68] Before addressing this legislative context, however, we wish to make some preliminary comments on the statutory right of appeal in s. 470 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 ("Act").

(1) A Statutory Right of Appeal Is Not a Category of Correctness Review

[69] In response to the reasons of Slatter J.A. in the Court of Appeal (2015 ABCA 85 (CanLII), 599 A.R. 210), the majority questions whether a statutory right of appeal is a new "category" of correctness review. Relying on recent decisions of this Court, it concludes that no such category of correctness review exists because the reasonableness standard has been applied in other cases where statutory rights of appeal are present.

[70] We agree that a statutory right of appeal is not a new "category" of correctness review. However, the ostensibly contextual standard of review analysis should not be confined to deciding whether new categories have been established. An approach to the standard of review analysis that relies exclusively on categories and eschews any role for context risks introducing the vice of formalism into the law of judicial review, as it seeks to "secure a measure of certainty or predictability at the cost of blindly prejudging what is to

be done in a range of future cases, about whose composition we are ignorant": H. L. A. Hart, *The Concept of Law* (3rd ed. 2012), at pp. 129-30.

[71] In every case, a court must determine what the appropriate standard of review is for *this* question decided by *this* decision maker. This is not to say that a full contextual standard of review analysis must be conducted in every single case. The applicable standard of review is a question of law: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 (CanLII), [2004] 3 S.C.R. 152, at para. 6. Questions of law forming part of the *ratio decidendi* of a decision are binding on lower courts as a matter of *stare decisis*: *Osborne v. Rowlett* (1880), 13 Ch. D. 774, at p. 785. Where a standard of review analysis is performed and the proper standard of review is determined for a particular question decided by a particular decision maker, that standard of review should apply in the future to similar questions decided by that decision maker.

[72] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, this Court made room for the simple operation of the doctrine of precedent in this manner. It recognized that a full contextual standard of review analysis need not be performed in every case, since the appropriate standard of review has often been settled in the jurisprudence. But "[t]his simply means that the analysis required is already deemed to have been performed and need not be repeated" (para. 57). It does not mean that the contextual analysis itself should be curtailed in favour of categories that are themselves "both over- and under-inclusive": P. Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 50 *Osgoode Hall L.J.*317, at p. 342. Despite the "attractive simplicity" of the category-based approach, eschewing context in favour of categories is "seriously overbroad": S. Breyer, "Judicial Review of Questions of Law and Policy" (1986), 38 *Admin. L. Rev.* 363, at p. 373. Disregard for the contextual analysis would represent a significant departure from *Dunsmuir* and from this Court's post-*Dunsmuir* jurisprudence.

(2) The Statutory Scheme

[73] Because context always matters, we do not agree that the existence of a statutory right of appeal cannot, in combination with other factors, lead to a conclusion that the proper standard of review is correctness. A statutory right of appeal, like a privative clause, "is an important indicator of legislative intent" and, depending on its wording, it "may be at ease with [judicial intervention]": *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 55, per Binnie J. In our view, the wording of this statutory appeal clause, in combination with the legislative scheme, points to the conclusion that the legislature intended that a more exacting standard of review be applied to questions appealed to the Court of Queen's Bench.

[74] The majority says, however, that a contextual analysis is unnecessary here in light of this Court's recent decisions of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160; and *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 (CanLII), [2009] 2 S.C.R. 764. With respect, we do not read

those decisions as supportive of our colleagues' position, because none of them states or even implies that a right of appeal is not a relevant factor in the contextual analysis.

[75] Section 470 of the Act grants a statutory right of appeal with leave to the Court of Queen's Bench on a "question of law or jurisdiction" (s. 470(1)) where a judge "is of the opinion that the appeal involves a question of law or jurisdiction of sufficient importance to merit an appeal and has a reasonable chance of success" (s. 470(5)). If a question of law or jurisdiction is appealed to the Court of Queen's Bench and the Court of Queen's Bench decides the question and refers the matter back to the Board, "the board must rehear the matter and deal with it in accordance with the opinion of or any direction given by the Court on the question of law or the question of jurisdiction" (s. 470.1(2)).

[76] It is only questions of law and jurisdiction that are "of sufficient importance to merit an appeal" that may be appealed pursuant to s. 470 of the Act. All other questions may still be the subject of judicial review: *Edmonton (City) v. Edmonton (City) Assessment Review Board*, 2010 ABQB 634(CanLII), 503 A.R. 144, at paras. 10-12; *Associated Developers Ltd. v. Edmonton (City)*, 2011 ABQB 592 (CanLII), 527 A.R. 287, at paras. 17-24; *Edmonton (City) v. Edmonton (Composite Assessment Review Board)*, 2012 ABQB 118 (CanLII), 534 A.R. 110, at para. 78.

[77] In our view, the legislature's decision to enact a limited right of appeal rather than a full right of appeal indicates that the legislature intended these questions to be reviewed by the Court of Queen's Bench for correctness.

[78] The legislature must have known that judicial review is available for any question not covered by a limited right of appeal (*Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180 (CanLII), [2015] 3 F.C.R. 327, at para. 35; see also D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 3-9), given that the legislature is presumed to know the law: *R. v. D.L.W.*, 2016 SCC 22(CanLII), [2016] 1 S.C.R. 402, at para. 21, per Cromwell J.; *Townsend v. Kroppmanns*, 2004 SCC 10 (CanLII), [2004] 1 S.C.R. 315, at para. 9. The legislature only designated some questions to be the subject of this right of appeal, thereby signalling its intention that these important questions of law and jurisdiction be treated differently from all other questions which are subject to ordinary judicial review. These issues, after all, transcend the particular context of a disputed assessment and have broader implications for the municipal assessment regime. Had the legislature merely intended to provide for a different procedure than judicial review to enhance administrative efficiency within the yearly cycle created by the legislature, it would have enacted a full statutory right of appeal with a shorter limitation period than ordinary judicial review. After all, questions of fact and mixed fact and law would also benefit from a shorter limitation period to enhance administrative efficiency within the yearly cycle. We note, in this regard, the similarity between the wording of s. 470(5) and the statutory right of appeal that was considered in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, in respect of which Bastarache J., for this Court, said:

> First, s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" . . . . The general

> importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal — and inferentially, the Federal Court, Trial Division — is permitted to substitute its own opinion for that of the Board in respect of questions of general importance. [Emphasis added; para. 43.]

[79] That correctness review was legislatively intended is supported by other aspects of the statutory scheme. Section 470.1(2) of the Act provides that, where the Court of Queen's Bench "cancels a decision", it must refer the matter back to the Board and the Board must "rehear the matter and deal with it in accordance with the opinion of or any direction given by the Court on the question of law or the question of jurisdiction". This strongly suggests that correctness review is the standard that the legislature intended to be applied to these questions, because giving "direction" on a pure and distilled question of law and jurisdiction would be inconsistent with reasonableness review. The fundamental premise of reasonableness review is that "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result": *Dunsmuir*, at para. 47. However, the fundamental premise of s. 470.1(2) is that pure questions of law and jurisdiction appealed to the Court of Queen's Bench do lend themselves to one specific, particular result because the Court of Queen's Bench is bound to provide *direction* on these pure questions of law and jurisdiction and the Board is prohibited from reaching a different result on those questions when the matter is remitted to it.

[80] Further, as Slatter J.A. noted at the Court of Appeal, the municipal assessment regime set out in the Act is applied by local and composite assessment review boards in municipalities across the province. Each assessment review board is a unique entity established by the local municipal council (s. 454). Because each assessment review board is a distinct entity, there is no overarching institutional body capable of promoting consistency in the interpretation and application of the Act between them. We echo the concern of Slatter J.A. that "it is undesirable for the *Municipal Government Act* to mean different things in different parts of the province" (para. 30). Consistency in the understanding and application of these legal questions is necessary, and only courts can provide such consistency. And, to reiterate, the legislature of Alberta has done so here by providing assessed persons a right to appeal certain questions to the courts, which are, in turn, tasked with providing *binding rulings* on those questions: s. 470.1(2) of the Act.

B. *Expertise*

[81] In our view the question at issue is not one which falls within the Board's expertise. Indeed, the Board's lack of expertise in statutory interpretation suggests that the legislature would have wanted courts to review Board answers on questions of law on a more exacting standard.

[82] We acknowledge that the notion of "expertise" has become a catch-all trigger for deferential review in this Court's jurisprudence, since an administrative decision maker is simply presumed to be an expert in matters regarding the application of its home statute. We wish, therefore, to be clear: our point of departure from the majority is whether the presumption has been rebutted. And we add this: in strengthening the presumption by ignoring or explaining away any factors that might rebut it, the majority risks making this presumption irrebuttable.

[83] Despite its prevalence, this presumption of expertise has rarely been given much explanation or content in our jurisprudence: L. Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003), 27 *Adv. Q.* 478, at pp. 490-91; B. Bilson, "The Expertise of Labour Arbitrators" (2005), 12 *C.L.E.L.J.* 33, at p. 41. As McLachlin C.J. explained in *Dr. Q*, expertise "can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone" (para. 29). Some administrative decision makers are required to possess expert qualifications or experience in a particular area as a condition of appointment: *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at paras. 50-53. Other administrative decision makers may accumulate "a measure of relative institutional expertise" by habitually making findings of fact in a particular specialized legislative context: *Dr. Q*, at para. 29; *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324, at p. 1336, per Wilson J. This specific or institutional expertise may command deference, though the question of expertise is "closely interrelated" to the nature of the question that forms the basis of the application for judicial review: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 (CanLII), [2001] 2 S.C.R. 100, at para. 32. In other words, an administrative decision maker is not entitled to blanket deference in all matters simply because it is an expert in some matters. An administrative decision maker is entitled to deference on the basis of expertise only if the question before it falls within the scope of its expertise, whether specific or institutional.

[84] A constant in this Court's jurisprudence both pre- and post-*Dunsmuir* is that expertise is a relative concept. It is not absolute: *Pushpanathan*,at para. 33; *Dr. Q*, at para. 28; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 (CanLII), [2002] 1 S.C.R. 249, at para. 50; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283, at para. 15, per Rothstein J. As Sopinka J. explained in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, "a lack of relative expertise on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference" (p. 335). An administrative decision maker often possesses greater relative expertise in interpreting and applying its constituting statute in the context of administering a specialized regime: *Pushpanathan*, at para. 36; *Dunsmuir*, at para. 54; *Smith*, at para. 80, per Deschamps J., dissenting on this point. But this is not an absolute rule, as a legislature may always indicate that the expertise of an administrative decision maker in interpreting and administering its home statute is not greater relative to the courts: see, e.g., *Rogers Communications*, at para. 16.

[85] The legislature therefore has a role to play in designating and delimiting the presumed expertise of an administrative decision maker. The majority's view that "expertise is something that inheres in a tribunal itself as an institution" (para. 33) risks transforming the presumption of deference into an irrebuttable rule. Courts must not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law. After all, "some administrative decision makers have considerable legal expertise . . . . Others have little or none": *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at para. 84, per Binnie J., concurring. Respect for legislative supremacy must leave open to the legislature the possibility of creating a non-expert administrative decision maker, or creating an administrative decision maker with expertise in some areas but not others. Rothstein J. gave effect to this possibility in *Rogers Communications*, holding that the concurrent jurisdiction shared by the courts and the Copyright Board under the *Copyright Act*, R.S.C. 1985, c. C-42, led to the inference "that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions" (para. 15). We must therefore examine the legislative scheme to determine whether the legislative intent was to recognize the superior expertise of the Board or the courts on matters forming the subject of an appeal pursuant to s. 470.

[86] The Act is a broad statute that covers a vast array of municipal government issues. The Board at issue here is a composite assessment review board, created pursuant to s. 454 of the Act with jurisdiction to only hear complaints about certain assessments by taxpayers and assessed persons, and to deal only with the issues listed in s. 460(5) of the Act. The Alberta legislature delegated to other boards and administrative decision makers the simultaneous task of interpreting and applying provisions of the Act, such as the Municipal Government Board (s. 486); growth management boards (s. 708.02); the Minister of Municipal Affairs (in the context of the assessment provisions of the Act, see ss. 317 to 325, 370, 381, 390, 409.3, 425.1, 436.23, 452, 453 to 457, 476.1, 484.1, 514 to 517, 5 27.1 and 570 to 580); the chief administrative officer of each municipal council (ss. 205, 207 and 208); the Land Compensation Board (ss. 15, 23, 26 and 534); and the Alberta Utilities Commission (ss. 30, 31, 43 to 45, 47 and 47.1), among others. It is therefore incorrect to characterize a specific composite assessment review board as an expert tribunal tasked with administering the Act. We cannot presume greater relative expertise without first examining the statutory scheme that creates the administrative decision maker.

[87] The question, then, is whether the Alberta legislature intended to recognize superior expertise in assessment review boards or in the courts with respect to the specific questions appealed pursuant to s. 470 of the Act. As the majority acknowledges, this case is, in part, about the interpretation of s. 467 of the Act. Statutory interpretation does not fall within the specialized expertise of the Board, since its day-to-day work focuses on complex matters of valuation of property. We note that the majority relies on this Court's jurisprudence for the proposition that a court may not be as qualified as a board to interpret the board's home statute given "the broad policy context within which" the board must work (para. 33). That may be true in the application of one's governing statute. However, it is not so in these circumstances, where the matter is one of legal interpretation

going to jurisdiction, not practical application. While the Board may have familiarity with the application of the assessment provisions of the Act, the legislature has recognized that the Board's specialized expertise does not necessarily extend to general questions of law and jurisdiction. The Board's decisions may, instead, be appealed on these questions of law and jurisdiction.

[88] In light of this lack of relative expertise on questions of law and jurisdiction, it cannot be maintained that a presumption applies that the legislature intended that the review board's determinations on questions of law and jurisdiction be owed deference. The legislature created a tribunal with expertise in matters of valuation and assessment. But the legislature placed that tribunal within a statutory scheme that would allow municipalities and assessed persons to appeal questions of law and jurisdiction, while still implicitly permitting judicial review on all other questions. This, in our view, is a clear signal by the legislature that the tribunal it created is not entitled to deference from the courts on questions of law and jurisdiction appealed pursuant to s. 470, while it must be afforded deference on other matters. Such clearly expressed legislative intent should be respected, by applying correctness review in this case.

[89] We note the concern that a contextual analysis can generate uncertainty and prolonged litigation concerning the applicable standard of review. But the lode star of legislative supremacy and the rule of law remains. The contextual standard of review analysis ensures that legislative intent is respected and the rule of law is protected when courts review decisions of administrative actors. And context does not cease to be relevant once the standard of review is selected. Even if the applicable standard of review were reasonableness, it is a contextual analysis — guided by the principles of legislative supremacy and the rule of law — that defines the range of reasonable outcomes in any given case: P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (forthcoming, *McGill L.J.*), at p. 21. In short, "context simply cannot be eliminated from judicial review" (*ibid.*, at p. 16).

[90] We note the chambers judge's conclusion that the issue in this case is a true question of jurisdiction: 2013 ABQB 526 (CanLII), 570 A.R. 208. As the majority explained in *Dunsmuir*, a true question of jurisdiction asks "whether or not the tribunal had the authority to make the inquiry", and added that "[a]dministrative bodies must . . . be correct in [these] determinations": at para. 59; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 S.C.R. 471, at para. 18. In light of our conclusion above, however, it is not necessary to also consider whether the question at issue falls within that category.

These divisions persist in the Supreme Court's recent decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 where a majority of the court stated that the contextual analysis should play only a "subordinate role" in the standard of review framework. In *CHRC*, several individuals were denied registration as "Indians" under the *Indian Act* because they did not satisfy the eligibility criteria set out in s. 6 of the *Act* and which had been put in place to remedy the effect of discriminatory provisions that had in the past stripped individuals of Indian status. They filed complaints against Indian and Northern Affairs Canada (INAC) under the *Canadian Human Rights Act*, alleging that it had engaged in a discriminatory practice in the provision of services contrary to s. 5 of the *CHRA* when it denied them a form of registration that would allow them to pass on their entitlements under the *Act* to their children. Following the Federal Court of Appeal's binding jurisprudence, two panels of the Canadian Human Rights Tribunal determined that while the act of processing applications and registering individuals could be characterized as a service, the underlying entitlement provisions were a benefit offered by an Act of Parliament, not a service under s. 5 of the *CHRA*. It found that absent proof of a discriminatory practice under the *CHRA*, it could not entertain and remedy a direct challenge to legislative provisions. Writing for the majority, Gascon J. provided the summarized the standard of review framework as follows:

> The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. was delivered by Gascon J. —
>
> (…)
>
> [27] This Court has for years attempted to simplify the standard of review analysis in order to "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case"… To this end, there is a well-established presumption that, where an administrative body interprets its home statute, the reasonableness standard applies… [Case citations omitted].
>
> [28] The presumption may be rebutted and the correctness standard applied where one of the following categories can be established: (1) issues relating to the constitutional division of powers; (2) true questions of vires; (3) issues of competing jurisdiction between tribunals; and (4) questions that are of central importance to the legal system and outside the expertise of the decision maker (*Capilano*, at para. 24; *Dunsmuir*, at paras. 58-61). Exceptionally, the presumption may also be rebutted where a contextual inquiry shows a clear legislative intent that the correctness standard be applied… [Case citations omitted].
>
> [29] In applying the standard of review analysis, there is no principled difference between a human rights tribunal and any other decision maker interpreting its home statute… [Case citations omitted.] Human rights tribunals are equally entitled to deference where they apply their home statute.

Noting, at para. 30, that the CHRT's interpretation of "service" in s. 5 of the CHRA, its home statute, fell squarely within the presumption of deference, Gascon J. then determined that this question did not fall within the correctness categories of true questions of *vires* and questions of central importance outside the decision maker's expertise (excerpts of the judgment relating to this issue are set out in the supplement to Chapter 13). Finally, Gascon J. found that the presumption of reasonableness review was not rebutted by a contextual analysis. In doing so, he reinforced the position of the majority in *Edmonton East* that reviewing courts should undertake a contextual analysis only in exceptional cases:

> (3) Contextual Approach

[44] The Commission also urged that a contextual analysis rebuts the presumption of reasonableness review. It argued that this shows clear legislative intent that the correctness standard applies, largely on the ground that the Tribunal changed the "foundational legal test" for what constitutes a service under the *CHRA*. On the basis of their contextual analysis, my colleagues Côté and Rowe JJ. would also apply a correctness standard of review. Respectfully, I disagree with both positions.

[45] The presumption of reasonableness was intended to prevent litigants from undertaking a full standard of review analysis in every case. Where the presumption applies, such simplicity requires that the contextual approach play a subordinate role in the standard of review analysis. Certainly, this Court has indicated that, occasionally, such a contextual inquiry can rebut the presumption of deference (*Saguenay*, at para. 46; *Capilano*, at para. 32; *Tervita*, at para. 35; *McLean*, at para. 22; *Barreau du Québec*, at para. 23). However, the Court has also noted that this will occur in the "exceptional other case" (*Rogers*, at para. 16 (emphasis in original)).

[46] This contextual approach should be applied sparingly. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" (para. 44). After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano*, at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano*, at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51).

[47] In this regard, I cannot agree with my colleagues Côté and Rowe JJ.'s characterization of the current standard of review framework as requiring correctness review wherever the "contextual factors listed in *Dunsmuir* point towards correctness as the appropriate standard" (para. 73). Where the presumption of reasonableness review applies, as it does here, this suggestion is contrary to the contextual approach's ancillary role in our current jurisprudence and would undermine the certainty this Court has sought to establish in the past decade. While this Court may eventually find it necessary to revisit the standard of review framework, dissatisfaction with the current state of the law is no reason to ignore our precedents following *Dunsmuir*. To do so only adds confusion to an already challenging area of law.

[48] Turning to the specifics of this case with this guidance in mind, there are no factors present in this appeal that would necessitate a long and detailed contextual analysis to rebut the presumption. The Commission's submission that changes to "foundational legal tests" require the application of a correctness standard must be rejected. It has no basis in the jurisprudence, is not a clear indicator of legislative intent, and would risk adding only more uncertainty to the standard of review analysis. Moreover, I would be cautious not to expand the appropriate factors beyond those enumerated in *Dunsmuir* without a

principled basis for doing so, as this would invite unprincipled interference with the legislature's delegates.

[49] I also consider it necessary to address my colleagues Côté and Rowe JJ.'s own application of the contextual analysis in this case. None of the factors they raise, in my opinion, warrants the application of the contextual approach or, by extension, correctness review. With respect, I am of the view that their treatment of the contextual analysis is unsupported by, and at points contrary to, this Court's jurisprudence.

[50] With regard to the absence of a privative clause, this Court has long since established that such an omission does not rebut the presumption of deference *(Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Mowat*, at para. 17). To the contrary, the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review (*Khosa*, at para. 25).

[51] This Court's jurisprudence also does not support correctness review on the basis that other administrative tribunals may consider the CHRA. Certainly, this Court has recognized that correctness review may be applied where a tribunal is not part of a "discrete and special administrative regime" because it shares jurisdiction with the courts or because there is clear language indicating that it is to be treated as if it were a court (*Rogers*, at para. 15 (emphasis deleted), citing *Dunsmuir*, at para. 55; see also *Tervita*, at para. 38). This is distinguishable, however, from the situation where a tribunal applies its home statute, the courts have no concurrent jurisdiction and there is no explicit appeal clause. Indeed, in my view, the approach taken by Côté and Rowe JJ. would create a new category of correctness review for alleged questions of central importance regardless of the tribunal's expertise.

[52] The potential for conflicting lines of authority does not warrant correctness review either. This Court has recognized that conflicting lines of authority do not, on their own, justify judicial review and it has applied a deferential standard where they have been raised (*Wilson*, at para. 17; *Barreau du Québec*, at para. 19; Smith, at para. 38; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 800-801). I also doubt that there is a conflicting line of authority in this case. The approach to s. 5 of the *CHRA* taken in *Druken* in 1998 was set aside in *Murphy* in 2012, and this guidance has since been followed. Tellingly, the most recent conflicting authority Côté and Rowe JJ. have identified dates back 17 years.

[53] Lastly, I take issue with the treatment Côté and Rowe JJ. give to the nature of the question at issue and the purpose of the Tribunal. Interpreting the scope of the term "services" does not have a constitutional dimension. No interpretation of s. 5 of the *CHRA* could prevent superior courts from hearing challenges under s. 15 of the *Charter* or give the Tribunal the power to hear *Charter* applications. Indeed, framing these factors as a question of whether certain questions are better suited for courts effectively applies the jurisdiction/preliminary question doctrine. As discussed, this doctrine was long ago put to rest (*CUPE*, at p. 233; *Dunsmuir*, at para. 59; *Halifax*, at para. 34).

The majority determined, at para 56, that the adjudicators' decisions that the setting of legislative standards was not a service under the s. 5 prohibition on discriminatory practices and that, absent a discriminatory practice, the CHRT could not exercise its authority under the *CHRA* to declare conflicting legislation inoperable were reasonable:

> In coming to this conclusion, the adjudicators considered the complainants' evidence and submissions, the governing jurisprudence, the purpose, nature and scheme of the *CHRA*, and relevant policy considerations. The decisions meet the *Dunsmuir* standard of intelligibility, transparency and justifiability, and fall within the range of reasonable outcomes (para. 47).

While concurring in the result, Côté and Rowe JJ. disagreed with important aspects of the majority's discussion of the applicable standard of review, including the place of context in the standard of review analysis. In reading their concurring judgment, ask yourself whether it is truer to the approach described in *Dunsmuir* than the majority judgment.

> A. What Is the Applicable Standard of Review?
>
> [71] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 62, this Court established a two-stage framework for determining the degree of deference owed to an administrative body's decision on judicial review. First, the reviewing court is to survey the jurisprudence to ascertain whether the applicable standard of review has already been settled. If so, the inquiry ends there and the court applies that standard in reviewing the merits of the impugned decision. If the appropriate standard has not been settled in the jurisprudence, however, the second stage of the analysis directs the court to undertake a more rigorous analysis to determine whether the statutory body's decision ought to be reviewed for reasonableness or for correctness.
>
> [72] The standard of review analysis set out in Dunsmuir requires the court to consider several contextual factors, which include the nature of the question at issue, the presence or absence of a privative clause, the tribunal's statutory purpose, and the expertise of the tribunal (para. 64). These factors help to determine the standard that strikes the appropriate balance between respect for the rule of law on one hand, and legislative supremacy on the other.
>
> [73] In the jurisprudence that followed *Dunsmuir*, this Court has placed significant emphasis on the nature of the question at issue when determining the applicable standard of review. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39, this Court affirmed that reasonableness will be the presumptive standard for the review of questions that involve the tribunal's interpretation and application of its home statute or of a statute closely related to its function. There are, however, two situations where the presumption will not apply. First, the jurisprudence recognizes four "categories" of questions that will necessarily attract review on a standard of correctness: constitutional questions, questions of law that are both of central importance to the legal system and that are outside of the tribunal's specialized area of expertise, questions that involve the drawing of jurisdictional lines between two or more competing specialized tribunals, and true questions of jurisdiction.

Second, the presumption of reasonableness will be rebutted if the contextual factors listed in Dunsmuir point towards correctness as the appropriate standard.

[74] Turning to the present case, we agree with the Canadian Human Rights Commission ("Commission") that the jurisprudence is unclear as to which standard applies to the review of the particular question before us. This was the conclusion reached by the unanimous Federal Court of Appeal panel; after undertaking a careful review of the relevant case law, Gleason J.A. observed the difficulty in "draw[ing] a bright line as to when the reasonableness or the correctness standard will apply to decisions of human rights tribunals interpreting the scope of the protections afforded in their constituent legislation" (para. 69). And while this Court in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), applied a reasonableness standard when reviewing a decision of the Tribunal finding that it had the statutory authority to order costs in favour of a successful complainant, it nevertheless recognized that the *Dunsmuir* framework may direct that certain decisions of the Tribunal be reviewed for correctness (para. 23).

[75] The parties frame the issue in the present case around the Tribunal's interpretation of s. 5 of the CHRA, and neither disputes that this is a question to which the presumption of reasonableness applies. The respondent, the Attorney General of Canada, submits that this presumption is not rebutted on either a categorical or a contextual basis. By contrast, the appellant, Commission, submits that a contextual analysis leads to the conclusion that the standard of correctness ought to apply in these circumstances.

[76] Since the interpretation of s. 5 of the CHRA is at issue in this case, we agree that reasonableness presumptively applies. Gascon J. is of the view that the issue before us does not fall within any of the recognized categories that attract correctness review — but has much more to say in this regard. Without it having been raised as an issue before this Court, he goes to great lengths to point out the perceived difficulties associated with the category of jurisdictional questions, and expresses significant doubt as to whether this category even remains an analytically useful component of the standard of review analysis (paras. 31-41).

(Rowe and Côté JJ's discussion of the category of true questions of jurisdiction, omitted, is set out below in the supplement to Chapter 13.)

[78] We also disagree with the proposition that the contextual approach plays merely a subordinate role in the standard of review analysis (reasons of Gascon J., at para. 45). On our reading of the applicable case law, resort to the contextual approach is not exceptional at all; the framework set out by this Court in *Dunsmuir* is manifestly contextual in nature. The "correctness categories", as they have become known, are simply instances where the jurisprudence has already settled the appropriate standard, such that a more extensive analysis of the relevant contextual factors needs not be performed (*Dunsmuir*, at paras. 57-61; Hon. M. Bastarache, *Dunsmuir* 10 Years Later (March 9, 2018) (online)). In this regard, we can only repeat what this Court said regarding the determination of the appropriate standard of review 10 years ago in *Dunsmuir*:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the

> degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
>
> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case. [Emphasis added; paras. 62-64.]

[79] With this in mind, we simply cannot agree with the suggestion that the contextual analysis "should be applied sparingly", or that "[t]he presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard" (reasons of Gascon J., at para. 46). *Dunsmuir* provides that such an analysis must be undertaken where the categories identified in the jurisprudence do not apply. And we observe that a number of post-Dunsmuir decisions from this Court have done just that… [numerous case citations omitted]. The importance of context within the *Dunsmuir* framework cannot be downplayed.

[80] For this reason, we dispute Gascon J.'s qualification of our standard of review analysis as being "unsupported by, and at points contrary to, this Court's jurisprudence" (para. 49).

[81] Returning to the present case, and without deciding whether or not this question falls within any category of questions calling for correctness review, the relevant contextual factors listed in *Dunsmuir* lead us to conclude that the presumption has been rebutted in this case, and that the appropriate standard of review is therefore correctness. In this respect, we would also note that correctness review for questions that involve the scope of human rights protections under the *CHRA* — on the basis of either categories or context — is not at all unprecedented (see, for example, *Mowat*, at para. 23; *Canada (Attorney General) v. Watkin*, 2008 FCA 170, 378 N.R. 268, at para. 23; *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, [2015] 2 F.C.R. 595, at paras. 44-52; *Canadian National Railway v. Seeley*, 2014 FCA 111, 458 N.R. 349, at paras. 35-36).

(1) Absence of a Privative Clause

[82] First is the absence of a privative clause. This Court in *Dunsmuir* noted that the existence of "a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized" (para. 52). Put differently, while these statutory provisions

do not oust the superior courts' inherent and constitutional authority to judicially review administrative action, they nevertheless provide a strong indication that deference is to be shown to that particular decision maker.

[83] Although the *CHRA* confers onto the Tribunal the power to "decide all questions of law or fact necessary to determining the matter" before it (s. 50(2)), Parliament opted not to shield these decisions from exacting review behind a privative clause. We appreciate that the absence of a privative clause does not, on its own, rebut the presumption of deference, though we would nevertheless note that it does not support reasonableness review either.

(2) Expertise of the Tribunal: Section 5 of the *CHRA* Is Not Interpreted Exclusively Within a Discrete and Special Administrative Regime

[84] The second factor militating in favour of correctness review is the desirability of a uniform interpretation of the term "services" as it appears in s. 5 of the CHRA across federal statutory bodies. On several occasions, this Court has affirmed that human rights protections must be interpreted consistently across jurisdictions, unless the legislative intent clearly indicates otherwise (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 373; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 47; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604, at para. 68, per McLachlin C.J., concurring in part). In our view, it is even more imperative that provisions within a given human rights statute be interpreted consistently among courts and tribunals tasked with its application. The rule of law is undermined where the same anti-discrimination protection is interpreted and applied a certain way by one administrative decision maker, and altogether differently by another.

[85] The Tribunal is not the only administrative decision maker at the federal level that is tasked with enforcing the anti-discrimination protections of the CHRA. This Court has found that administrative decision makers other than human rights tribunals may also have the authority to interpret and apply human rights legislation in connection with matters properly before them (*Tranchemontagne v. Ontario (Director, Disability Support Program*), 2006 SCC 14, [2006] 1 S.C.R. 513; see, for example, *Canada Employment Insurance Commission v. M. W.*, 2014 SSTAD 371, at paras. 51-69 (CanLII)). We are therefore of the view that the particular question at issue — whether legislation can be challenged as discrimination in the provision of a service — does not arise within a particularly discrete administrative regime over which the Tribunal has exclusive jurisdiction (Dunsmuir, at para. 55; Rogers Communications, at para. 18; Johnstone, at paras. 47-48). Various other decision makers — including the Commission, the Social Security Tribunal, and labour arbitrators — have been and will continue to be asked that very same question. To borrow the words of Slatter J.A. in *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at para. 95:

> . . . it cannot be the legislative intent that public statutes mean different things in different parts of the [country]. In a related but analogous context, the Supreme Court accepted in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 9-10, [2002] 2 S.C.R. 235 (S.C.C.) that appellate courts perform legitimate law-settling and law-making roles. It is part of the legitimate role of appellate courts to ensure that the

> same legal rules are applied in similar situations. For that same reason, the standard of review of correctness should be applied when many tribunals have to interpret the same statute.

[86] The principal concern regarding this concurrent jurisdiction is therefore that these decision makers will arrive at competing conclusions as to the scope of the very same human rights protection — or, to put it more generally, that the answer to a given legal question will depend on the decision maker considering it. This concern is fundamentally tied to the rule of law. And in our view, it matters not that jurisdiction is shared between a statutory body and a court, or instead among several statutory bodies; the fact that an administrative decision may have ramifications beyond a single, discrete tribunal underscores this rule of law concern, and supports review of that decision on a standard of correctness.

[87] This rule of law concern is more than just theoretical. As was highlighted in both *Andrews* and in *Matson*, there exists diverging lines of authority as to whether the human rights protection in s. 5 of the *CHRA* permits challenges aimed at legislation and nothing else. In *Druken*, both the Tribunal and the Federal Court of Appeal accepted that unemployment insurance, which was available pursuant to the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, and its regulations, was a "service" for the purpose of s. 5 of the CHRA (*Druken v. Canada (Employment and Immigration Commission)*, 1987 CanLII 99; *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24). This reasoning was followed by the Federal Court in *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] 3 F.C. 646 (T.D.), and by the Tribunal in *McAllister-Windsor v. Canada (Human Resources Development)*, 2001 CanLII 20691. By contrast, other decision makers interpreting that very same provision of the *CHRA* reached the opposite conclusion. For example, the Federal Court of Appeal in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7, 428 N.R. 240 ("*Murphy*"), held that "the *CHRA* does not provide for the filing of a complaint directed against an act of Parliament" (para. 6). This echoed the holding of the Tribunal in *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5, and of the Federal Court in *Canada (Human Rights Commission) v. M.N.R.*, 2003 FC 1280, [2004] 1 F.C.R. 679, at para. 30, as well as the comments made by Robertson J.A. of the Federal Court of Appeal in *Canada (Attorney General) v. McKenna*, [1999] 1 F.C. 401, at paras. 78-80.

[88] Can both of these ostensibly reasonable interpretations of the same human rights protection co-exist side-by-side? Should the scope of s. 5 of the *CHRA* be contingent on the view of the Tribunal member or judge before whom the litigants find themselves? We would say no. Given the foregoing, and bearing in mind the quasi-constitutional status of human rights legislation, the question arising in the present case is precisely one that calls for uniform and consistent answers across Canadian courts and statutory bodies. This cannot be achieved, however, if superior courts require only that these decisions fall within a range of reasonable outcomes. Rather, applying a non-deferential correctness standard allows the courts to provide meaningful guidance as to the scope of these fundamentally important human rights protections, and ensure respect for the rule of law in such cases.

(3) The Purpose of the Tribunal and the Nature of the Question at Issue

> [89] Finally, the issue before this Court touches on the very purpose for which the Tribunal exists. In deciding whether or not challenges to legislation are caught within the meaning of a "discriminatory practice" under the *CHRA*, the Tribunal's decision responds to a question of law with a constitutional dimension: Who gets to decide what types of challenges can be brought against legislative action? The Commission argued that a determination that legislative challenges are not caught within the scope of s. 5 undermines the primacy of human rights law by barring claimants from bringing certain types of challenges before the Tribunal. While this appeal is not constitutional in the narrow sense — in that it does not directly engage rights protected under the *Canadian Charter of Rights and Freedoms*, for example — it necessarily implicates the rule of law and the duty of superior courts under s. 96 of the *Constitution Act, 1867* to uphold this fundamental constitutional principle (Dunsmuir, at paras. 29 and 31). No deference is owed to the decision of an administrative decision maker in these circumstances.
>
> (4) Conclusion
>
> [90] We accept that the analysis in the present case begins with the presumption of reasonableness, but it cannot be disputed that this presumption is rebuttable through a contextual analysis. We also agree with our colleague Gascon J. that the omission of a privative clause "does not rebut the presumption of deference" (para. 50). Indeed, this Court has recognized that "their presence or absence is no longer determinative about whether deference is owed to the tribunal or not" (*Mowat*, at para. 17). Furthermore, there is no dispute that the potential for conflicting lines of authority does not, on its own, warrant a less deferential standard of review (reasons of Gascon J., at para. 52). In our view, however, they are each indicia that point toward correctness. While neither factor may independently call for correctness, we repeat that "[t]he analysis must be contextual" (*Dunsmuir*, at para. 64). And when this Court stated that "[i]n many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case" (*Dunsmuir*, at para. 64), it did so, recognizing that, in other cases, the whole context would be determinative. This is such a case. For this reason, a contextual analysis leads us to the conclusion that the presumption is rebutted in this case, and that the impugned decision ought to be reviewed for correctness.

Brown J. held that the CHRT's decisions were unassailable on either standard of review. However, he wrote separate reasons to highlight his concerns with the majority's treatment of true questions of jurisdiction and the role of a contextual analysis in the Court's standard of review framework. While his views on jurisdictional questions are excerpted below in the supplement to Chapter 13, his views on the contextual analysis are outlined here.

> [113] This brings me to my second concern, which is the extremely narrow scope for contextual analysis that my colleague Gascon J. states, and which would significantly impede that necessary flexibility. Contextual analysis is, he says, "exceptional", should be undertaken "sparingly", and plays a "subordinate role" in deciding the standard of review (paras. 45-46).
>
> [114] Descriptors like "exceptional" and "sparingly" are, of course, the same sort of cautions which this Court has from time to time stated in respect of true questions of

> jurisdiction, which suggests that contextual analysis may be next in line for "euthanizing". That aside, and with respect, and accepting that my colleague can draw from past statements of this Court for support, such statements give little if any meaningful guidance to lower courts. Indeed, statements suggesting that contextual review should be applied "sparingly" or that it plays a "subordinate role" are not easily reconciled with my colleague's acknowledgment (at para. 46) that reviewing courts ought to examine "factors that sho[w] a clear legislative intent justifying the rebuttal of the presumption". If one is considering factors which show legislative intent, one is undertaking a contextual analysis.

Notes and Question:

1. After reading the judgments in *CHRC*, do you think that the majority is still applying *Dunsmuir* in its standard of review analysis? Consider the following comments by the Honourable Michel Bastarache, one of the co-authors of the majority judgment in *Dunsmuir*, on the role of the contextual factors in the *Dunsmuir* framework and on the post-*Dunsmuir* rise of "presumptions":

> We did not think that we could eliminate the pragmatic and functional factors entirely, however, simply because we realized the sheer breadth and diversity of the administrative state, and the ability of governments to come up with new and inventive ways of enforcing laws, delivering services, and carrying out social policies. Thus, if the standard of review had not been clearly identified in the past in relation to the particular body and type of decision, the court would still be able to consult the newly renamed standard of review factors.
>
> It is true that the factors were not new, and did not lead to a clear or undisputable result in every case, but we saw no reason to abandon them. We believed, like many of our colleagues before us, that the standard of review factors – the presence of a privative clause, the purpose of the tribunal or other decision maker, the nature of the question at issue and the expertise of the tribunal – were the type of considerations that properly informed the question of how our courts should determine the appropriate degree of deference. Given the nature of the case itself, our analysis was prepared with adjudicative tribunals in mind; more attention would be paid to other actors in the administrative state in another context. But our hope at the time was that new decisions could fill that void, and that the retention of the standard of review factors gave the courts the tools to do so.
>
> …
>
> In the *Saguenay* case, the court found that the presumption of deference had been rebutted; but I do not think there is or should be a legal presumption. The presumption of deference came from *Alberta Teachers*. As I understand *Dunsmuir* — a necessary qualification, because I know my co-author signed on to the reasons in *Alberta Teachers*! — we insisted on a contextual approach with general guideposts, which is inconsistent with a presumption of deference across the board. We simply said that, generally, reasonableness would apply in some circumstances (at para 54). We certainly did not say that correctness would no longer apply except in the case of four categories of decisions; the so-called correctness categories were examples of cases where correctness was obviously required. Beyond those categories, context would determine when correctness would be applied, and expertise would play a key role in those determinations. I might add that we did not say

> that expertise would be presumed, as some subsequent cases have held; in my opinion, deference had to be earned and justified in the context (at para 49). Deference is imperative for "processes and determinations that draw on particular expertise and experiences", but not for all questions of law, merely because the question is raised by a decision-maker's home statute. As Justice Slatter of the Alberta Court of Appeal put it, "these signposts were never intended to be hard and fast categories, and the standard of review analysis remains sensitive to the statutory and factual context." *Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)* 2015 ABCA 85 at para 23.
>
> From Hon. Michel Bastarache, "The context, aims, and aftermath of Dunsmuir" (2018), Administrative Law Matters Blog, online: www.administrativelawmatters.com

2. We can expect that the lingering questions about the role of the contextual analysis and the presumptive application of the reasonableness standard of review will be revisited by the Supreme Court soon, at least in the context of questions of statutory interpretation. In an unusual move, the Supreme Court signaled its intent to consider the standard of review analysis in accepting leave in three appeals that raise questions about the tribunal's interpretation of their home statutes: *Bell Canada v Canada (AG)*, 2018 CanLII 40808 (SCC), *National Football League v Canada (AG)*, 2018 CanLII 40806 (SCC) and *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2018 CanLII 40807 (SCC). These cases were heard in December 2018 and are under reserve.

Chapter 10 – Privative Clauses and Statutory Rights of Appeal, Rights of Appeal in the Standard of Review Analysis, p. 660

Add to p. 660 at the end of the discussion on rights of appeal:

In *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161, a majority of the Supreme Court found that the specific wording of a right of appeal to the Federal Court of Appeal from decisions of the Competition Tribunal set out in s. 13(1) of the *Competition Act* rebutted the presumption that the standard of review of Tribunal interpretations of its home statute were to be reviewed on a reasonableness standard. Writing for the majority, Justice Rothstein stated:

> [34] The parties agree that the Federal Court of Appeal properly applied a correctness standard of review to the Tribunal's determinations of questions of law. I agree that correctness is the applicable standard in this case.
>
> [35] The questions at issue are questions of law arising under the Tribunal's home statute and therefore a standard of reasonableness presumptively applies (*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160, at para. 28, per Fish J.; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at para. 30). However, the presumption of reasonableness is rebutted in this case.
>
> [36] A decision or order of the Tribunal on a question of law is appealable as of right as if "it were a judgment of the Federal Court" with the proviso that leave is required for appeals on questions of fact (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1)). The Federal Court of Appeal has consistently held that questions of law arising from decisions of the Tribunal should be reviewed on a correctness standard (see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104 (CanLII), [2001] 3 F.C. 185 ("*Superior Propane II*"), at paras. 59-91; see also *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121 (CanLII), [2002] 4 F.C. 598, at para. 43; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (CanLII), [2007] 2 F.C.R. 3, at para. 34; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22(CanLII), 64 C.P.R. (4th) 181, at para. 5).
>
> [37] In finding that the presumption of reasonableness is not rebutted, Justice Abella acknowledges that the statutory language in the appeal provisions in *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895; and *Smith* differs from the language at issue here, but is of the opinion that "it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute" (para. 179).
>
> [38] With respect, the difference in statutory language between the *Competition Tribunal Act* and the legislation relied upon by Justice Abella is significant. The appeal provision at issue in *Pezim* and *McLean* provided that individuals affected by decisions of the B.C. Securities Commission "may appeal to the Court of Appeal with leave of a justice of that court" (*Securities Act*, S.B.C. 1985, c. 83, s. 149(1), which later became *Securities Act*,R.S.B.C. 1996, c. 418, s. 167(1)). The appeal provision in *Smith* provided that, under the *National*

> *Energy Board Act*, R.S.C. 1985, c. N-7, "[a] decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court" (s. 101). By contrast, the *Competition Tribunal Act* provides that "an appeal lies to the Federal Court of Appeal from any decision or order . . . of the Tribunal as if it were a judgment of the Federal Court" (s. 13(1)).
>
> [39] The statutes at issue in *Pezim*, *McLean*, and *Smith* did not contain statutory language directing that appeals of tribunal decisions were to be considered as though originating from a court and not an administrative source. The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.
>
> [40] I also agree with the Federal Court of Appeal that the standard of review for mixed questions of fact and law and questions of fact is reasonableness. Reasonableness is normally the "governing standard" for questions of fact or mixed fact and law (*Smith*, at para. 26). In this case, there is nothing to indicate that this presumption should be rebutted.

Justice Abella, in a spirited dissent, claimed that the appropriate standard was reasonableness:

> [169] Abella J. — In *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557, which predates *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, the Court deferred to the British Columbia Securities Commission's specialized expertise in the interpretation of provisions of the *Securities Act*, S.B.C. 1985, c. 83, and applied a reasonableness standard despite the presence of a right of appeal and the absence of a privative clause. In other words, the specialized nature of the tribunal was seen to be more determinative of the legislature's true intent to make the tribunal master of its mandate. More recently, notwithstanding the same right of appeal in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, this Court once again applied a reasonableness standard based on the British Columbia Securities Commission's specialized expertise: see *Securities Act*, R.S.B.C. 1996, c. 418, s. 167.
>
> [170] The cornerstone laid in *Pezim* introduced a new edifice for the review of specialized tribunals. Through cases like *McLean*, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, judges and lawyers engaging in judicial review proceedings came to believe, rightly and reasonably, that the jurisprudence of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause — that is notwithstanding legislative wording — when a tribunal is interpreting its home statute, reasonableness applies. I am at a loss to see why we would chip away — again[1] — at this

[1] See *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283.

precedential certainty. It seems to me that what we should be doing instead is confirming, not undermining, the reasonableness presumption and our jurisprudence that statutory language alone is not determinative of the applicable standard of review.

[171] That is why, with respect, although I otherwise agree with the reasons of the majority, I think the applicable standard is reasonableness, not correctness. I am aware that it is increasingly difficult to discern the demarcations between a reasonableness and correctness analysis, but until those lines are completely erased, I think it is worth protecting the existing principles as much as possible. To apply correctness in this case represents a reversion to the pre-*Pezim* era. Creating yet another exception by relying on the statutory language in this case which sets out a right of appeal, undermines the expertise the statute recognizes. This new exception is also, in my respectful view, an inexplicable variation from our jurisprudence that is certain to engender the very "standard of review" confusion that inspired this Court to try to weave the strands together in the first place.

[172] The building blocks in our jurisprudence were carefully constructed. Binnie J. explained in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 25, that

Dunsmuir recognized that *with or without a privative clause*, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54). [Emphasis added.]

[173] This was further explained in *Alberta Teachers' Association* in its first paragraph: "Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals."

[174] In *Smith*, this Court applied a reasonableness standard of review to an arbitration committee's interpretation of its home statute, even though that statute provided that decisions of the arbitration committee on questions of law or jurisdiction *could be appealed to the Federal Court* (para. 40; see *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 101). And, as previously noted, in *McLean* the Court held that a reasonableness standard applied to the British Columbia Securities Commission's interpretation of its home statute

despite the fact that the statute contained a statutory right of appeal with leave to the British Columbia Court of Appeal: paras. 23-24; *Securities Act*, s. 167.

[175] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 S.C.R. 471, the Court recognized that the fact that little deference had traditionally been extended to human rights tribunals in respect of their decisions on legal questions, was in tension with the deferential approach to judicial review espoused in *Dunsmuir*. The Court ultimately held that because the question of costs was located within the Canadian Human Rights Tribunal's core function and expertise relating to its interpretation and application of its enabling statute, a reasonableness standard of review applied. As LeBel and Cromwell JJ. noted, "[i]n the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise": para. 30.

[176] The presumption of reasonableness to an administrative decision maker's interpretation of its home statute or closely related legislation, even on questions of law, is therefore well established in this Court's jurisprudence: see also *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 (CanLII), [2014] 2 S.C.R. 135; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), [2011] 3 S.C.R. 616; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (CanLII), [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), [2009] 2 S.C.R. 678.

[177] It is true that this Court has recognized that certain categories of questions warrant a correctness review. Rothstein J. set them out in *Alberta Teachers' Association*, at para. 30:

There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

[178] Notably, a statutory right of appeal is not one of them.

[179] While the statutory language granting the right of appeal in this case may be different from the language in *Pezim*, *McLean* and *Smith*, it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute. Using such language to trump the deference owed to tribunal expertise, elevates the factor of statutory language to a pre-eminent and determinative

status we have long denied it. I see nothing, in other words, that warrants departing from what the legal profession has come to see as our governing template for reviewing the decisions of specialized expert tribunals on a reasonableness standard, most recently on muscular display in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633.

Chapter 12 – The Nature of the Question, Questions of Law, p. 722

Add to p. 713 following the second sentence of the second paragraph under "Questions of Law" on whether constitutional questions can easily be isolated from factual or contextual aspects of an administrative decision:

Discussed at greater length in the supplement to Chapter 14, a minor but interesting aspect of the Supreme Court's decision in *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] S.C.J. No. 4 focused on whether the interpretation of Article 13 of the *British Columbia Terms of Union, 1871*, RSC 1985, Appendix II, No 10, regarding the succession of obligations in relation to Indigenous peoples from the Colony to the new Dominion when BC joined confederation, was a constitutional question that attracted the correctness standard. The Tribunal's consideration of the Terms of Union was brief, even if some members of the Supreme Court would have preferred a more involved analysis on the significance of this constitutional document to the Tribunal's ultimate finding of federal crown liability for breaches of fiduciary obligations by the predecessor colonial crown under s. 14(2) of the *Specific Claims Tribunal Act*, SC 2008, c 22 (See the reasons of McLachlin CJ and Brown CJ, at para 197, reproduced in the supplement to Chapter 14). In the end, all of the judgments from the Supreme Court in this case applied the reasonableness standard. Writing for the majority, Wagner J clarified:

> [27] I agree that the standard of review is reasonableness. None of the points of statutory interpretation or common law on which the Tribunal's decision rests falls into the categories that this Court identified in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at paras. 58-61, as attracting a correctness standard…..
>
> [28] In particular, I am of the view that the Tribunal's decision to validate the band's claim did not depend on its resolution of a constitutional issue as contemplated in *Dunsmuir* or in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (CanLII), [2003] 2 S.C.R. 504, at para. 31. Article 13 of the *Terms of Union* forms part of the historical circumstances of the fiduciary relationship between the Crown and Indigenous peoples in the Province of British Columbia. However, the fiduciary obligation alleged was not imposed or created by any particular enactment; it was a common law obligation arising from that relationship. Specific questions pertaining to whether the circumstances of the implementation of Article 13 gave rise to fiduciary obligations and what those obligations entailed do not necessarily take on the character of constitutional issues so as to be reviewable on a correctness standard. I do not consider questions about the nature of the band's Aboriginal interest in the Village Lands, and whether that interest stood to be adversely affected by exercises of discretionary power by Crown officials, to be constitutional issues.

Add to p. 722 following the question on the role of the certification provision of the *Immigration Act* in determining the standard of review:

Justice Bastarache stated that the certification requirement for appeals to the Federal Court of Appeal provided in s. 83(1) would be incoherent if the standard of review were anything but correctness. The issue of the appropriate standard of review to be applied by the Federal Court of Appeal in deciding a certified question bearing on matters of statutory interpretation arose once again in *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 32, which involved the review of an immigration officer's decision to deny a foreign national's application under s. 25 of the *Immigration and Refugee Protection Act* for an exemption from the ordinary requirements of the *Act* on humanitarian and compassionate grounds. The Federal Court of Appeal explained that it had "consistently taken the view that where a certified question asks a question of statutory interpretation, this Court must provide the definitive interpretation without deferring to the administrative decision-maker." It acknowledged, at para 36, that this was the "functional equivalent of engaging in correctness review". While the Court of Appeal noted that the Supreme Court, in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, had reviewed a visa officer's decision regarding the interpretation of the *Immigration and Refugee Protection Act* on a reasonableness standard, it decided to continue to follow its practice until clarification from the Supreme Court was received. In *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 at para 44, the Supreme Court confirmed that the presence of a certified question was not determinative of the appropriate standard of review:

> … [T]he case law from this Court confirms that certified questions are not decisive of the standard of review: *Baker*, at para. 58; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84, at para. 23. As the Court said in *Baker*, at para. 12, the certification of a question of general importance may be the "trigger" by which an appeal is permitted. The subject of the appeal is still the judgment itself, not merely the certified question. The fact that the reviewing judge in this case considered the question to be of general importance is relevant, but not determinative. Despite the presence of a certified question, the appropriate standard of review is reasonableness: *Baker*, at para. 62.

Are you convinced by the Court's analysis? Following the reasoning of Justice Bastarache in *Pushpanathan*, could it not be argued as in *Tervita* that the certification provision "evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness"? Can *Kanthasamy* be reconciled with paragraph 78 of the dissenting judgment of Justices Côté and Brown (joined by McLachlin C.J. and Moldaver J.) in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.* (see Chapter 9, above)?

Chapter 12 – The Nature of the Question, Questions of Law, p. 725

Add to page 725, following the description of the *Nor-Man* decision:

In *Commission scolaire de Laval v Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8, the Supreme Court divided on the scope of the category of general questions of law of central importance to the legal system and outside of the adjudicator's area of expertise. A grievance arbitrator had decided to allow the union an opportunity to examine members of the school board's "executive committee" on the *in camera* deliberations that preceded the committee's decision to terminate the grievor in order to ascertain whether the collective agreement, which specified that a termination could be made only after "thorough" deliberations, had been respected. The school board had argued that the individual committee members were shielded from such examination by the principle of deliberative secrecy. It also claimed that the Supreme Court's decision in *Consortium Developments (Clearwater) Ltd. v Sarnia*, [1998] 3 S.C.R. 3 stood for the principle that the motives of the individual members of a collective decision-making body were irrelevant to the question of whether a decision made by that body is valid. According to Justice Gascon, writing for Chief Justice McLachlin and Justices Abella and Karakatsanis, the question of whether the union could examine the committee members related to evidence and procedure in the arbitration process, over which the grievance arbitrator had full authority and exclusive jurisdiction under s. 100.2 of the *Labour Code*. Moreover, the arbitrator's decision that the members' testimony would be relevant to the "thoroughness" of pre-termination deliberations bore directly on to the interpretation of the collective agreement over which, under the *Labour Code*, he had exclusive jurisdiction. The appropriate standard of review was reasonableness:

> [32] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the Court stated that when an administrative tribunal interprets or applies its home statute, there is a presumption that the standard of review applicable to its decision is reasonableness: paras. 39 and 41; see also *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 et 28; *Dunsmuir*, at para. 54. That presumption applies in the case at bar. The arbitrator's decision to allow the Union to examine the executive committee's members was based on his conclusion that their testimony would be helpful to him in determining whether the collective agreement and the legislation had been complied with. This conclusion flowed from his interpretation of the local agreement between the parties and of the *EA*. His home statute, the *Labour Code*, provides that an arbitrator may "interpret and apply any Act or regulation to the extent necessary to settle a grievance" (s. 100.12(*a*)). The Court has held that a reviewing court owes the greatest possible deference to an interpretation of provisions of the *EA* by a grievance arbitrator in an educational setting: *Syndicat de l'enseignement du Grand-Portage v. Morency*, 2000 SCC 62, [2000] 2 S.C.R. 913, at para. 1.
>
> [33] The presumption is reinforced by the fact that the Court has held that the usual standard for judicial review of decisions of grievance arbitrators is reasonableness: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 7; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 8; *Dunsmuir*, at para. 68. The Court added in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3

> S.C.R. 616, that this standard is equally appropriate where the arbitrator applies or adapts, for example, common law and equitable doctrines that emanate from the courts (paras. 5-6, 31 and 44-45). This is because the grievance arbitrator is part of a discrete and special administrative scheme under which the decision maker has specialized expertise. In Quebec, moreover, the grievance arbitrator is protected by general full privative clauses: ss. 139, 139.1 and 140 *L.C.*; *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323, at para. 89.

In Justice Gascon's view, the arbitrator's decision did not involve a general question of law of central importance to the legal system and outside his expertise:

> [34] The presumption from *Alberta Teachers* has not been rebutted in the instant case. The issues in this case are not included in the narrow class of issues identified in *Dunsmuir* for which the applicable standard is correctness. As the Court explained in *Dunsmuir*, that standard can apply to questions of law that are of central importance to the legal system as a whole and are outside the decision maker's area of expertise (paras. 55 and 60). Such questions must sometimes be dealt with uniformly by courts and administrative tribunals "[b]ecause of their impact on the administration of justice as a whole" (para. 60). However, questions of this nature are rare and tend to be limited to situations that are detrimental to "consistency in the fundamental legal order of our country": *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paras. 26-27; see also *Dunsmuir*, at para. 55.
>
> [35] Bich J.A. maintained that the questions related to the principle that motives are "unknowable" and deliberative secrecy are of central importance to the legal system because they concern [translation] "all decisions made by public (or even private) bodies that act through collective decision-making authorities" (para. 49). In her opinion, they are questions that could be raised not only before arbitrators or administrative tribunals, but also in any court of law. She stressed that these questions do not form part of "the arbitrator's specialized area of adjudicative expertise" (para. 51). With respect, this characterization seems to disregard what the appellants are actually asking for and what the arbitrator ultimately decided.
>
> [36] The arbitrator was asked, in the context of his interpretation of the *Labour Code*, the *EA* and the collective agreement between the parties, to decide on the application of well-known and uncontroversial rules and principles. On the one hand, while it is true that this Court has never applied *Clearwater* to facts like the ones in the case at bar, the scope of that case was clearly defined by Binnie J., who stated that the "rule" in question related to whether the testimony of members of a legislative body would be relevant (para. 45). In their respective reasons, both Delorme J. (at para. 29) and Bich J.A. (at para. 46) referred to "relevance" to characterize what must be considered as a result of *Clearwater*. Because the arbitrator has full authority over evidence and procedure in an inquiry into a grievance, it is up to the arbitrator to apply the rule of relevance to the facts of the case in such a way as he or she deems helpful for the purpose of ruling on the grievance. This is exactly what the arbitrator did in the instant case in concluding that what took place in the executive committee's in camera deliberations was relevant. A reviewing court owes deference to the

> arbitrator's decision. Moreover, the appellants themselves recognize in this Court that their arguments against allowing the commissioners to be called to testify about those deliberations are based on the question whether that testimony would be relevant. With this in mind, applying the standard of correctness cannot be justified.
>
> [37] On the other hand, as regards deliberative secrecy, its scope is well known. The appellants are not asking that this scope be expanded. Bich J.A. agreed on this point when she wrote that the appellants [translation] "are employing a concept here that does not apply in the circumstances" (para. 123). As a result, all the arbitrator had to do in this regard was to apply a known rule in order to decide whether deliberative secrecy shielded the executive committee's deliberations in the context of B's dismissal. In light of the arbitrator's broad jurisdiction over evidence and procedure, this does not amount to a question of law of central importance that is outside his area of expertise.
>
> [38] Although my colleague Côté J. does not call the reasonableness of the arbitrator's decision into question, she finds that the standard of correctness should apply to it instead. On this point, her concurring reasons stray, in my humble opinion, from the Court's decisions in *Nor-Man*, *Alberta Teachers* and *Dunsmuir*, among others. The questions of evidence and procedure that arise here with respect to the principle that motives are "unknowable" and to deliberative secrecy in the context of an employer's collective decision-making authority are not outside the arbitrator's area of expertise. Nor does the application of that principle and of deliberative secrecy to a fact situation characteristic of a dismissal amount to a question that is detrimental to consistency in the country's fundamental legal order. Once this is established, maintaining that the concepts at issue do not fall solely within the arbitrator's expertise in the area or jurisdiction over the matter (paras. 82 and 84 of my colleague's reasons), or that one of them is a general principle of law that applies to other legal fields (para. 82 of her reasons), is not in my opinion enough to justify dispensing with the deferential standard that is required in such a case: *Nor-Man*, at para. 55, citing the majority in *Smith*, at para. 26, and *Dunsmuir*, at para. 60; *Mowat*, at para. 23.

Justice Côté agreed that the appeal should be dismissed and the arbitrator's decision upheld. In her view, however, the appropriate standard of review was correctness:

> [77] My colleague Gascon J. writes that "[w]hether the examination of the members of the Board's executive committee should be allowed is ultimately an evidentiary issue" and that "a desire, like that of the appellants, to attribute an excessive scope to this Court's decisions in [*Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3,] and [*Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952,] does not transform this determination into a question of law that is of central importance to the legal system and is outside the arbitrator's area of expertise, such that the standard of correctness should apply" (para. 30). It is true that the arbitrator has jurisdiction over evidentiary issues and that deference is usually owed in this regard. There are times, however, when a question concerning an area over which the arbitrator generally has full authority is of such a nature as to affect the administration of justice as a whole and relates to principles in respect of which the arbitrator has no particular expertise in that they are not specific to the arbitrator's specialized role. According to the principles stated by the

Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and 60, and as the Court of Appeal noted at para. 33 of its reasons in the case at bar, [translation] "the standard of correctness will apply to decisions of arbitrators (as to those of any administrative tribunal) in which they rule on general questions of law that are, first, of central importance to the legal system and, second, outside their specialized area of expertise in the sense of not being specific to their specialized role" (2014 QCCA 591, 69 Admin. L.R. (5th) 95 (emphasis added)).

[78] Although such questions are rare — as the majority of the Court of Appeal acknowledged — I consider it necessary to refrain from giving too narrow an interpretation to the category of general questions of law that was established in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, and reiterated in *Dunsmuir*. Where the question relates not simply to the rules of evidence in general, but to the scope of such basic rules as those relating to the immunities from disclosure and deliberative secrecy, a court reviewing an arbitrator's decision in this regard must be able to go further than merely inquiring into the reasonableness of the decision. Where necessary, it must also be able, absent clear instructions to the contrary, to substitute its own view for that of the arbitrator if the arbitrator's decision is incorrect. But my colleague's reasoning leads to the conclusion that judicial review on a question related to the scope of professional secrecy, for example, would also be subject to the reasonableness standard. Given the importance of such questions and the fact that an arbitrator has no particular expertise or expertise unique to his or her specialized role with respect to such matters, I am of the opinion that, despite the privative clause in the instant case, the legislature could not have intended such an outcome.

[79] Even more importantly, I find that the applicable standard of review cannot depend on how a court will ultimately answer the question, as that could make it even more difficult to predict what the result of the analysis will be. Instead, what is important is the nature of the question being raised. In the case at bar, the appellants submit that the effect of *Clearwater* is that any collective decision-making body that makes a decision in writing is shielded by a form of immunity from disclosure. They also argue that deliberative secrecy, as recognized in *Tremblay*, applies to every administrative body with adjudicative functions. Although the cases on which the appellants rely do not have the scope the appellants would give them — I agree with my colleague in this regard — the questions of law raised in their submissions are nonetheless general in nature and must be applied uniformly and consistently. Gascon J. seems in fact to acknowledge this, at least in part, in writing that "extending the conclusions reached by this Court in *Clearwater* to every decision made by a public or private collective decision-making body, as the appellants propose, would have unfortunate consequences in spheres that are unrelated to the context of the instant case" (para. 55 (emphasis added)). What the appellants want the Court to accept in the case at bar is, first and foremost, a principle that motives are "unknowable" that applies to every collective decision-making body that makes a decision in writing.

[80] This being said, it must be acknowledged that the application of the principles stated by this Court, at least those from *Clearwater*, does not lead to a clear result in the instant case, as can be seen from the conclusions reached by the Superior Court judge and the dissenting judge of the Court of Appeal on the merits of the case. In short, although I agree

that the appellants are trying to attribute an excessive scope to *Clearwater* and *Tremblay*, their arguments are not entirely unfounded. As I mentioned above, when all is said and done, what is important is the nature of the question being raised, not how a court will answer it.

[81] The foregoing is what led all the judges of the Court of Appeal and the Superior Court judge to find that the applicable standard of review is correctness. In this regard, Bich J.A. wrote that [translation] "the questions submitted to the arbitrator, as drafted, are limited neither to the context of the grievance before him nor to that of the collective agreement on which the grievance is based, and they engage principles that apply generally to the administration of justice as a whole and are not entirely dependent on the particular facts of the case" (para. 44 (emphasis added)). It would be hard to put it better.

[82] Furthermore, if the Court were to decide in the instant case to accept the appellants' argument regarding the principle that motives are unknowable and to hold that the commissioners cannot be examined, that decision would be based not on circumstances specific to this case, but on a general principle of law that applies in every legal field and to proceedings in every court and administrative tribunal. Thus, even if the examination of the commissioners were not authorized on the basis that it would be irrelevant, the conclusion that it would be irrelevant would not flow from the assessment intrinsically linked to the facts of the case that is traditionally made by an arbitrator, but would instead be based on a principle that is not specific to the arbitration context and that has not yet been clearly defined by the courts.

[83] This case can therefore be distinguished from *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, to which my colleague refers (at paras. 33 and 38). First of all, what was at issue in that case was the *application to the facts* of a principle — estoppel — whose scope was well known and clearly defined. Moreover, Fish J. stated that arbitrators are well equipped to adapt and fashion that principle as they see fit (para. 45). The same cannot be said with respect to the immunities from disclosure and deliberative secrecy. These principles, which relate to the administration of justice as a whole, must be applied uniformly and consistently. In addition, the principle at issue in *Nor-Man* was closely linked to the arbitrator's discretion to order the remedy he or she considers just and appropriate in the circumstances of the case before him or her. Finally, and most importantly, the application of the principle of estoppel was not of central importance to the legal system in such circumstances.

[84] It is true that the existence of a privative clause indicates that the legislature intended to limit the review of an arbitrator's decision to a minimum. Deference to the legislature's intention is important in employment law matters. Nevertheless, the existence of a privative clause is not in itself determinative (*Dunsmuir*, at para. 52), nor can it preclude intervention by a court on every question over which an arbitrator has jurisdiction or that relates to the arbitrator's general jurisdiction as a decision maker (as opposed to his or her particular expertise). Section 139 of the *Labour Code*, CQLR, c. C-27, cannot preclude a court from intervening in respect of [translation] "issues of a general nature that might be raised in the same terms before any arbitrator and any administrative tribunal, but also in

> any court of law, and that cannot be resolved differently from one forum to the next" (per Bich J.A., at para. 39 (emphasis added)).
>
> [85] In short, despite the existence of a privative clause and even though the appeal arises in the context of the hearing of the evidence, over which the arbitrator has full authority, the specific questions that are raised in this case are general questions of law that, by their nature, are of central importance to the administration of justice as a whole and in respect of which the arbitrator has no particular expertise or expertise that is unique to his or her specialized role. As Bastarache and LeBel JJ. wrote, for the majority, in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60).

Divisions on the Court persisted in *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555. A majority of the Supreme Court held that the Information and Privacy Commissioner's interpretation of a provision of the *Freedom of Information and Protection of Privacy Act* (FOIPPA) that engaged the protection of solicitor-client privilege should be reviewed on a correctness standard because it fell within the scope of the category of general questions of law of central importance to the legal system and outside of the adjudicator's area of expertise. In wrongful dismissal litigation with the University of Calgary, an employee sought disclosure of records over which the University claimed solicitor-client privilege. The University provided a "list of documents" as required by Alberta's Rules of Civil Procedure, but the Information & Privacy Commissioner ordered production of the documents for review under s. 56(3) of the FOIPPA which provided that "despite… any privilege of the law of evidence, a public body must produce to the Commissioner… any record or a copy of any record…" The Commissioner claimed that "solicitor-client privilege was a 'privilege of the law of evidence'." For the majority, Justice Côté wrote as follows:

> A. *Standard of Review*
>
> [19] The application judge and the Court of Appeal concluded that the applicable standard of review was correctness. I agree.
>
> [20] Whether *FOIPP* allows solicitor-client privilege to be set aside is a question of central importance to the legal system as a whole and outside the Commissioner's specialized area of expertise. As this Court said in *Blood Tribe*, solicitor-client privilege is "fundamental to the proper functioning of our legal system" (para. 9). It is also a privilege that has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy (*R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445, at para. 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209, at para. 46; see also *Canada (National Revenue) v. Thompson*, 2016 SCC 21 (CanLII), [2016] 1 S.C.R. 381, at para. 17). Further, as the Court of Appeal observed, the question of what statutory language is sufficient to authorize administrative tribunals to infringe solicitor-client privilege is a question that has potentially wide implications on other statutes.
>
> [21] In *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 (CanLII), [2014] 2 S.C.R. 135, Rothstein J., writing for the Court, discussed how a question of statutory interpretation that does *not* have wide implications on other statutes

would *not* be of central importance to the legal system as a whole and would thus attract a reasonableness standard. Paragraph 60 of *National Railway* reads as follows:

> This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the [*Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*")]. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the *CTA* and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under s. 120.1(1). This question does not have precedential value outside of issues arising under this statutory scheme.

Conversely, it follows that where — as in this case — the question *does* have wide implications on other statues, the appropriate standard of review is correctness.

[22] In addition, there is nothing to suggest that the Commissioner has particular expertise with respect to solicitor-client privilege, an issue which has traditionally been adjudicated by courts (see *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278(CanLII), 226 D.L.R. (4th) 20, at para. 25). Therefore, the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 60), for both (i) the decision that the Commissioner has the authority to require the production of records over which solicitor-client privilege is asserted, and (ii) the decision to issue the Notice to Produce Records.

[23] My colleague Justice Abella thinks otherwise. Drawing from six judgments of this Court involving disclosure decisions by Information and Privacy Commissioners, she suggests that there is a "clear lineage" of cases dictating that the standard of review in this appeal should be reasonableness. With respect, I cannot agree.

[24] Of the six decisions identified by Abella J., only two mention solicitor-client privilege. One of them is *Blood Tribe*, in which Binnie J. in effect reviewed the impugned decision on the standard of correctness, although he did not expressly state so. The other is *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, which addressed, as a secondary issue, whether the Assistant Commissioner properly exercised his discretion under a provision explicitly permitting him to exempt from disclosure documents subject to solicitor-client privilege. That was it. Resolution of that question had few ramifications on the principle of solicitor-client privilege and its application beyond the particular exercise of discretion in that case.

[25] The question here is different. It does not just ask whether the Commissioner exercised her discretion appropriately in the instant case. It asks whether the phrase "privilege of the law of evidence" suffices to identify, for the purpose of abrogation, the substantive features of solicitor-client privilege. This necessitates an inquiry into both the substantive and evidentiary qualities of the privilege.

[26] The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole. In *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, Chief Justice Lamer described its rationale as follows:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication . . . . [Emphasis added; p. 289.]

As noted in the majority judgment, Justice Abella was of the view that reasonableness review was appropriate:

> [130] Most legal decisions made by tribunals touch on important legal questions, such as limitation periods in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, or estoppel in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), [2011] 3 S.C.R. 616. They have been found nonetheless to fall within the reasonableness test created in *Dunsmuir* for adjudicators applying their expertise in interpreting their own specialized mandates. We have not, before this case, excavated the legal concept from its statutory context in order to give it the singular stature *Dunsmuir* says attracts correctness.
>
> [131] This Court has decided six cases in recent years involving disclosure decisions by Information and Privacy Commissioners. In two of them — *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 (CanLII), [2013] 3 S.C.R. 733, and *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574 — there was no reference to the standard of review. In the four remaining — *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,2014 SCC 31 (CanLII), [2014] 1 S.C.R. 674; *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), [2014] 2 S.C.R. 3; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815 — the standard of review was held to be reasonableness. In the 2010 case of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, a Commissioner's decision was reviewed on the reasonableness standard, even though the issue involved the disclosure of documents covered by solicitor-client privilege.
>
> [132] In each case, a Commissioner was interpreting his or her home statute. Under *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, and its progeny, that means the standard of review is reasonableness unless the question raised falls into one of the categories to which the correctness standard applies, such as questions of central importance to the legal system as a whole which are outside the tribunal's expertise.
>
> [133] Despite this clear lineage, we now find ourselves being asked to depart from what has been the accepted path for Information and Privacy Commissioners applying their specialized expertise in interpreting their own statutes, including when solicitor-client privilege is at issue, and asked to follow a new route for no discernible reason.
>
> [134] Solicitor-client privilege is neither more nor less important now than it was when we decided all of the previous cases under a reasonableness standard. That standard applied

> because, as here, the issue, while important, was well within the statutory mandate the Commissioner works with on a daily basis. It falls, in other words, within her expertise.
>
> [135] The Commissioner's mandate is to monitor the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, and ensure that its purposes are achieved. The *Act* gives individuals access to certain types of information held by public bodies, subject to specific exceptions. One of those exceptions is solicitor-client privilege, as set out in s. 27(1)(a) of the *Act* which states:
>
> > **27(1)** The head of a public body may refuse to disclose to an applicant
> >
> > (a) information that is subject to any type of legal privilege, *including solicitor-client privilege* or parliamentary privilege,
>
> It seems to me to be logically questionable to conclude that even though the legislature has given the Commissioner the express mandate to consider the application of solicitor-client privilege, it is nonetheless deemed to be outside her expertise. Such an approach inexplicably eliminates the conjunctive "and" from the *Dunsmuir* test that requires that the issue be both of central importance to the legal system *and* outside the expertise of the adjudicator. It also has the disruptive potential for rendering meaningless the presumption of deference to home statute expertise.
>
> [136] Moreover, she is not being asked to explain the content of solicitor-client privilege for the whole legal system, she is being asked to apply it in the context of one provision — s. 56(3) — of the *Freedom of Information and Protection of Privacy Act*, her enabling legislation. This is classic "reasonableness review" territory.

Following *Alberta (Information and Privacy Commissioner) v University of Calgary*, the Court had another opportunity to consider the standard of review applying to statutory interpretation that implicates the special role of lawyers in the justice system in *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488. The Minister opposed the granting of social assistance to two individuals by the social division of the Administrative Tribunal of Quebec (ATQ). The Minister then sought review of the decisions granting entitlement at the ATQ, which the individuals challenged on the basis that the requests for review were filed by a person who was not enrolled with the Barreau du Québec as an advocate. The issue on judicial review centred on the ATQ's interpretation of the *Act respecting the Barreau du Québec,* with the Barreau du Québec arguing that the *Alberta* decision indicated a correctness standard should apply.

The majority judgment, written by Brown J, distinguished the *Alberta* case and applied the reasonableness standard*,* indicating that in this case the question of statutory interpretation at stake was not one of "central importance":

> 18 It is true that the Barreau's role in regulating the representation of others before a court or tribunal is of obvious importance…, but this does not mean that every question touching on this subject is automatically one of central importance to the legal system as a whole. In the instant case, what the ATQ had to do was not to determine the overall scope of the monopoly of advocates on the provision of legal services. Rather, it had to determine the scope of a narrow exception that had been established by the Quebec legislature in order to allow the Minister to be represented by a person who is not an advocate in certain

proceedings before the ATQ's social affairs division. The impact of this case is limited, and in the final analysis, the issue quite simply does not come close to being a question of central importance to the legal system as a whole. (…)

Chapter 12 – The Nature of the Question, Questions of Law, p. 727

Add to page 727, after discussion of *Rogers Communications Inc*:

This "shared jurisdiction" exception to the presumption of reasonableness review of tribunals' interpretation of their enabling statute was also invoked by a majority of the Supreme Court in *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 to justify correctness review of the Québec Human Rights Tribunal's interpretation of s. 3 of Québec's *Charter of human rights and freedoms* which guarantees freedom of conscience and religion. The case involved a complaint that the recital of a prayer before council meetings of the City of Saguenay and the presence of religious symbols in the council chambers violated the state's duty of religious neutrality that flowed from freedom of conscience and religion. Writing for the majority, Justice Gascon determined that on the question of the scope of the state's duty of religious neutrality under s. 3 of the Québec *Charter*, the appropriate standard of review was correctness because this was a general question of law of central importance to the legal system falling outside the Tribunal's expertise and because first instance jurisdiction over complaints brought under the Québec *Charter* was shared by the Tribunal and the Superior Court.

> Gascon J. —
>
> (…)
>
> (2) Standards of Review Applicable in the Instant Case
>
> [45] This being said, the choice of the applicable standard depends primarily on the nature of the questions that have been raised, which is why it is important to identify those questions correctly (*Mowat*, at para. 16; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 4). For the purposes of this appeal, it will suffice to mention the following in this regard.
>
> [46] Deference is in order where the Tribunal acts within its specialized area of expertise, interprets the *Quebec Charter* and applies that charter's provisions to the facts to determine whether a complainant has been discriminated against (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 (CanLII), [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42 (CanLII), [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7(CanLII), [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54). In such situations, deference should normally be shown, although this presumption can sometimes be rebutted. One case in which it can be rebutted is where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters; the existence of concurrent and non-exclusive jurisdiction on a given point of law is an important factor in this regard (*Tervita*, at paras. 35-36 and 38-39; *McLean*, at para. 22; *Rogers*, at para. 15).

[47] Another such case is where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise (*Dunsmuir*, at paras. 55 and 60). Moldaver J. noted the following on this point in *McLean* (at para. 27):

> The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).

[48] As LeBel and Cromwell JJ. pointed out in *Mowat* (at para. 23), however, it is important to resist the temptation to apply the correctness standard to all questions of law of general interest that are brought before the Tribunal:

> There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise.

[49] In the instant case, an important question concerns the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the *Quebec Charter*. The Tribunal and the Court of Appeal each dealt with this question of law, but they disagreed on how it should be answered. Whereas the Tribunal found that the state has an [translation] "obligation to maintain neutrality" (paras. 209-11), the Court of Appeal preferred the more nuanced concept of [translation] "benevolent neutrality" (paras. 76-79). Although I agree with the Tribunal on this point, I am of the opinion that, in this case, the Court of Appeal properly applied the correctness standard on this question.

[50] However, it was not open to the Court of Appeal to apply that standard to the entire appeal and to disregard those of the Tribunal's determinations that require deference and are therefore subject to the reasonableness standard. For example, the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the determination of whether it was discriminatory fall squarely within the Tribunal's area of expertise. The same is true of the qualification of the experts and the assessment of the probative value of their testimony, which concerned the assessment of the evidence that had been submitted (*NGC*, at para. 30; *Mission Institution v. Khela*, 2014 SCC 24 (CanLII), [2014] 1 S.C.R. 502, at para. 74; *Khosa*, at paras. 59 and 65-67). The Tribunal is entitled to deference on such matters. The only requirement is that its reasoning be transparent and intelligible. Its decision must be considered reasonable if its conclusions fall within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47).

> [51] In her concurring reasons, Abella J. disagrees with this approach to the applicable standards of review in the instant case. In my opinion, in the context of this appeal, this Court's decisions, more specifically *Dunsmuir*, *Mowat* and *Rogers*, to which I have referred, support a separate application of the standard of correctness to the question of law concerning the scope of the state's duty of neutrality that flows from freedom of conscience and religion. I find that the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable. Moreover, the jurisdiction the legislature conferred on the Tribunal in this regard in the *Quebec Charter* was intended to be non-exclusive; the Tribunal's jurisdiction is exercised concurrently with that of the ordinary courts. I am therefore of the view that the presumption of deference has been rebutted for this question. This Court confirmed in a recent case (*Tervita*, at paras. 24 and 34-40) that the applicable standards on judicial review of the conclusions of a specialized administrative tribunal can sometimes vary depending on whether the questions being analyzed are of law, of fact, or of mixed fact and law.

The majority's treatment of the question of standard of review prompted Justice Abella to issue reasons strongly dissenting on this point.

> [165] Abella J. — I agree with the majority that the appeal should be allowed, but I have concerns about how the Tribunal's decision was reviewed. In particular, using different standards of review for each different aspect of a decision is a departure from our jurisprudence that risks undermining the framework for how decisions of specialized tribunals are generally reviewed. In *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650, at para. 100, this Court expressly rejected the proposition that a decision of a tribunal can be broken into its many component parts and reviewed under multiple standards of review. And in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708, we confirmed that the reasons of a specialized tribunal must be read as a whole to determine whether the result is reasonable: see also *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 S.C.R. 613, at para. 79.
>
> [166] Extricating the question of the "state's duty of religious neutrality that flows from . . . freedom of conscience and religion" and other aspects of the Tribunal's decision from the rest of its discrimination analysis is in direct conflict with this jurisprudence and creates yet another confusing caveat to this Court's attempt in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, to set out a coherent and simplified template for determining which standard of review to apply. It also contradicts *Dunsmuir*'s directive that, based on the specialized expertise of tribunals, reasonableness applies when tribunals are interpreting their home statute: para. 54.
>
> [167] It is true that we also concluded in *Dunsmuir* that if the issue is one of general law that is *both* of central importance to the legal system as a whole *and* outside the adjudicator's specialized area of expertise, correctness applies. But it is important to stress that this is a binary exception to the presumptive application of reasonableness for decisions of specialized tribunals. Evaluating a *component* of an enumerated right more rigorously than the right itself, has the effect of negating the admonition in *Dunsmuir*, at

para. 60, that questions of general importance to the legal system attract the correctness standard *only if* they are outside the tribunal's expertise.

[168] In this case, we are dealing with a human rights tribunal. Its mandate is to determine whether discrimination has occurred based on a number of enumerated rights. One of those rights is freedom of religion and conscience. This is undoubtedly a question of "central importance to the legal system as a whole", but far from being "outside the adjudicator's specialized area of expertise", it is the Tribunal's daily fare. Since state neutrality is about what the role of the state is in protecting freedom of religion, part of the inquiry into freedom of religion necessarily engages the question of state religious neutrality. It is not a transcendent legal question meriting its own stricter standard, it is an inextricable part of deciding whether discrimination based on freedom of religion has taken place. As the majority reasons themselves state, the duty of state religious neutrality "*flows from* freedom of conscience and religion". Like freedom of conscience and religion, its application depends on the context. It is not an immutable criterion which yields consistent measurements, it is, like the right from which it flows, an important concept that both forms and takes its shape from the circumstances. To extricate it from the discrimination analysis as being of singular significance "to the legal system as a whole", elevates it from its contextual status into a defining one.

[169] Ironically, this has the effect of subjecting one aspect of freedom of religion to more rigorous scrutiny than the main issue of whether the right itself has been violated and there has been discrimination, a question we have traditionally subjected to a reasonableness standard. Surely the various elements of an enumerated right, such as state religious neutrality in the case of freedom of religion, deserve no more heightened scrutiny than the right itself.

[170] We have never dissected the right in order to subject its components to different levels of scrutiny. What we have considered instead is whether the decision as a whole should be upheld as reasonable. In *Moore v. British Columbia (Education)*, 2012 SCC 61 (CanLII), [2012] 3 S.C.R. 360, for example, this Court reviewed the British Columbia Human Rights Tribunal's decision that the failure to provide educational support to a child with dyslexia constituted discrimination on the basis of disability. We did not subject the questions of how the tribunal interpreted disability, or the role of education, or how public funds are dispersed, to separate standards of review. Each of these components is undoubtedly of central importance to the legal system, but each is also inextricably tied to the ultimate issue, namely whether discrimination took place, an issue at the core of a human rights tribunal's specialized mandate.

[171] And in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 S.C.R. 467, where this Court reviewed the Saskatchewan Human Rights Tribunal's decision that certain flyers constituted discrimination based on sexual orientation, a reasonableness standard was applied. Again, we did not excavate the decision to find and separately scrutinize aspects of the tribunal's discrimination analysis that might be of central importance to the legal system.

[172] *All* issues of discrimination are of central importance to the legal system, but they are also, because of that very importance, issues legislatures across the country have assigned

to specialized tribunals with expertise in human rights, not to the generalist courts. Atomizing what is meant to be a holistic approach to determining whether discrimination has occurred, undermines an analysis that requires careful scrutiny of *all* of the interconnected relevant factual and legal parts.

[173] My final concern is a practical one. What do we tell reviewing courts to do when they segment a tribunal decision and subject each segment to different standards of review only to find that those reviews yield incompatible conclusions? How many components found to be reasonable or correct will it take to trump those found to be unreasonable or incorrect? Can an overall finding of reasonableness or correctness ever be justified if one of the components has been found to be unreasonable or incorrect? If we keep pulling on the various strands, we may eventually find that a principled and sustainable foundation for reviewing tribunal decisions has disappeared. And then we will have thrown out *Dunsmuir*'s baby with the bathwater.

Chapter 12 – The Nature of the Question, The Disaggregation Dilemma: Lévis and VIA Rail, p. 739

Add to page 739, after the discussion of *Via Rail*:

Fault lines once again surfaced at the Supreme Court on the appropriateness of disaggregation in substantive review in *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615. The Copyright Board had decided to impose royalty fees on the CBC for the creation of "broadcast-incidental copies" of television programs using copyright-protected music. The making of such copies was required by modern broadcasting technology. In arriving at its decision to impose royalty fees, the Board went through several steps. It found that the CBC's creation of these copies engaged the reproduction right protected by the *Copyright Act*, that a licence for such copies could not be implied from "synchronization licences" that covered the production process and that a separate reproduction license was required under the *Act*. It then decided on a valuation for this license and issued a reproduction license authorizing the CBC, for a fee, to reproduce musical works in conjunction with its production and broadcasting of programs. Justice Rothstein, writing for the majority, segmented the Board's decision into its components and assigned to each a standard of review. In particular, he characterized the question of whether the creation of broadcast-incidental copies engaged the reproduction right under the *Copyright Act* as a question of law reviewable, as per the Court's decision in *Rogers Communications Inc.*, on a correctness basis. This approach and the sharp criticism it drew from Justices Abella and Karakatsanis are set out in the extracts below.

> The judgment of McLachlin C.J. and Cromwell, Moldaver, Wagner, Gascon and Côté JJ. was delivered by Rothstein J. –
>
> (…)
>
> A. *Standard of Review*
>
> [35] Whether broadcast-incidental copies engage the reproduction right, and thus whether the *Copyright Act* allows SODRAC to seek a licence for CBC's broadcast-incidental copying, is a question of law. This Court has established that there is a presumption that the decisions of administrative bodies should receive deference when interpreting or applying their home statute. However, because of the "unusual statutory scheme under which the Board and the court may each have to consider the same legal question [under the *Copyright Act*] at first instance", the presumption is rebutted here: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283, at para. 15. Thus, a standard of correctness applies to this issue.
>
> [36] Whether a licence for CBC's broadcast-incidental copying is implied in the associated synchronization licences involves both the scope of the reproduction right and the interpretation of SODRAC's synchronization licences. As this Court has recently observed, "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 633, at para. 50. The licences here fall under that principle. Accordingly, a standard of reasonableness applies when reviewing the Board's determination regarding what may be implied from the relevant synchronization licences.

[37] The Board's decision establishing the monetary value of a broadcast-incidental copying licence involves the examination of how the user intends to make use of the licensed works in light of the legal principles relevant to the reproduction right, and thus involves questions of mixed fact and law. Accordingly, a standard of reasonableness applies: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 (CanLII), [2015] 1 S.C.R. 161, at para. 40; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160, at para. 26.

[38] CBC challenges the Board's interim order on two points. First, CBC argues that the 2008-2012 licence was not an appropriate status quo baseline for the interim licence. The selection of the baseline involves the exercise of the Board's discretion to issue an interim licence under s. 66.51 of the *Copyright Act*. This exercise of discretion is not shared with the courts, and thus will be reviewed on a reasonableness standard.

[39] The second basis on which CBC challenges the interim order concerns whether the Board may impose a blanket synchronization licence on a user against that user's wishes. CBC characterizes this as a question of the Board's jurisdiction to issue certain types of licences, and argues that it should be reviewed for correctness. While it is possible to frame any interpretation of a tribunal's home statute as a question of whether the tribunal has the jurisdiction to take a particular action, this Court has rejected this definition of jurisdiction in the context of standard of review and emphasized that the category of "true questions of jurisdiction", if it exists at all, is narrow: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at para. 34. As in *Alberta Teachers' Association*, the parties have not presented argument on the question of whether the category of true questions of jurisdiction should continue to be recognized. Assuming such questions exist, this issue is not one of the "exceptional" instances of a true question of jurisdiction.

[40] The question of whether the Board is generally able to impose blanket synchronization licences under the *Copyright Act* against the wishes of a licensee is nonetheless a question of law, but it is not an interpretive question the Board shares with the courts at first instance: the courts can be seized of the question of whether the Board acted properly in structuring a licence only once there is a Board-imposed licence to review. Accordingly, this issue attracts a standard of reasonableness.

[41] Justice Abella objects to the segmentation of issues for the purpose of standard of review analysis and to the confusion she says this causes. This is the same objection she raised in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, a decision issued by this Court in April 2015. *Saguenay* is the controlling authority and, on the issue of standard of review, these reasons apply *Saguenay*.

[42] Justice Karakatsanis disagrees that a specific standard of review should be ascribed to each issue arising in the appeal. However, she herself extricates the question of whether broadcast-incidental copies engage the reproduction right. Then she says that a reasonableness standard applies to the balance of the decisions under review. She does not explain how she could come to that conclusion without considering the issues in the balance of the decisions under review. With respect, every standard of review analysis requires identification of the issues under review: *Dunsmuir v. New Brunswick*, 2008 SCC

9 (CanLII), [2008] 1 S.C.R. 190, at paras. 51-64. She has simply done implicitly what these reasons do explicitly.

The following are the reasons delivered by Abella J. (dissenting)

(…)

[184] In conclusion, applying the standard of reasonableness and looking at the Board's reasons as a whole, in my view its decision to impose royalty fees for broadcast-incidental copies was unreasonable. It is, as a result, unnecessary to consider the valuation issue.

[185] Why apply reasonableness? Here we come yet again to this Court's prodigal child, the standard of review. Too much obfuscation has already cluttered the journey, but while I hesitate to add words to an already overcrowded space, I have concerns that the majority has created yet another confusing fork in the road.

[186] The central issue in this appeal is whether the Copyright Board ought to have imposed royalty fees on the CBC for the creation of incidental copies that arise as a technical part of the digital broadcasting process. This question is at the heart of the Copyright Board's specialized mandate and therefore reviewable on a reasonableness standard.

[187] In this case, rather than review the Copyright Board's decision as a whole, Rothstein J. identifies no less than five separate issues, each of which he says attracts its own discrete standard of review analysis. One of these issues, "whether the *Copyright Act* allows SODRAC to seek a licence for CBC's broadcast-incidental copying", is said to warrant correctness review, while the other four are to be reviewed on the reasonableness standard. Applying these competing standards to the different components of the Copyright Board's decision, he ultimately concludes that the Copyright Board was correct in proceeding on the basis that broadcast-incidental copies engage the reproduction right under the *Copyright Act*, but that some of its conclusions with respect to the other issues were reasonable while others were not. With respect, this takes judicial review Through the Looking Glass.

[188] It is true that, in *Rogers v. SOCAN*, the majority held that the appropriate standard of review is correctness for questions of law for which the Copyright Board and courts share concurrent jurisdiction: para. 15. But in that case, the "sole issue" was "the meaning of the phrase 'to the public' in s. 3(1)(*f*) of the [*Copyright Act*]": para. 2. After deciding the legal issue, the majority applied that conclusion to the facts: paras. 53-56. No further standard of review was discussed, considered or applied. In this case, the Board's decision was to impose royalty fees for the creation of broadcast-incidental copies. Rothstein J. not only extricates as a discrete legal question whether the *Copyright Act* allows SODRAC to seek a licence for the CBC's broadcast-incidental copying, he subdivides the rest of the decision into separate compartments entitled to their own standard of review. This is both new and regressive. It is also an approach that was proscribed by this Court in *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650, at para. 100.

[189] Extricating the various components of the decision and subjecting each to its own standard of review analysis represents, with respect, a significant and inexplicable change

in this Court's standard of review jurisprudence, further erodes the careful framework this Court endorsed in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, and risks creating an unworkable template for the judicial review of administrative decision-making.

[190] This latest movement in Rothstein J.'s shifting tectonic reviewing plates — extricating the various aspects of a tribunal's decision for their own individual standard of review analysis — creates even more confusion in an area of jurisprudence already unduly burdened by too many exceptions in the brief years since this Court decided *Dunsmuir*. There are always many parts of a tribunal's decision. Requiring courts to separately assess the standard of review for each of these parts and then to decide how many of those parts must be found to be unreasonable or incorrect in order to outweigh those parts which are found to be reasonable or correct may lead, with respect, to absurd results. Reviewing courts will be left to wonder just how many unreasonable or incorrect components of a decision it takes to warrant judicial intervention.

[191] Breaking down a decision into each of its component parts also increases the risk that a reviewing court will find an error to justify interfering in the tribunal's decision, and may well be seen as a thinly veiled attempt to allow reviewing courts wider discretion to intervene in administrative decisions. This, at its core, is the re-introduction of the long since abandoned "preliminary question doctrine", whereby courts adopted such a broad and probing understanding of "jurisdictional error" that they could effectively substitute their own opinion for that of a tribunal on virtually any aspect of a tribunal's decision. The preliminary question doctrine was a judicial tactic to permit courts to intervene and substitute their own views. It was a tactic *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, sought to end and *Dunsmuir* sought to bury. Its spiritual heirs should be given the same treatment.

(…)

The following are the reasons delivered by Karakatsanis J. (dissenting)

[193] I agree with my colleague Justice Abella on the merits and in the result. I write, however, because I cannot accept her position on the standard of review. This expert tribunal is presumptively reviewable on the basis of reasonableness. However, I agree with Justice Rothstein that the legal issue of whether broadcast-incidental copies engage the reproduction right must be reviewed on the basis of correctness, in accordance with our decision in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283, at paras. 10-20. As the presumption has not otherwise been displaced, the standard of review of reasonableness applies to the balance of the statutory licence decision and the interim licence decision: Copyright Board file Nos. 70.2-2008-01, 70.2-2008-02, November 2, 2012 (online), and file No. 70.2-2012-01, January 16, 2013 (online), respectively.

[194] However, I do not endorse the general approach my colleague Justice Rothstein has taken to his analysis of the standard of review. I am concerned with a methodology that examines and ascribes a specific standard of review to each individual issue challenged within a tribunal decision. Our jurisprudence permits the isolation of a particular question

of law on an exceptional basis; it does not *require* a separate standard of review analysis for each issue. I worry that an issue-by-issue approach, within each decision, will add to the submissions and analysis required to establish the standard of review in each case. It unnecessarily complicates an already overwrought area of the law.

Chapter 13 – Jurisdictional Questions and the Origins of the Standard of Review Analysis, Introduction, p. 749

Add following the Note on the *Alberta Teachers' Association* case:

In *Quebec (Attorney General) v Guérin*, 2017 SCC 42, three of seven judges on the Supreme Court supported Justice Cromwell's position that where a plausible argument was advanced that a particular statutory provision must be interpreted correctly, a thorough examination of legislative intent could displace the presumption of reasonableness review. Québec's *Health Insurance Act* provided that a dispute resulting from the interpretation or application of a framework agreement (the "Framework Agreement") between the Fédération des médecins spécialistes du Québec and the Québec government (the negotiating parties) governing the remuneration and working conditions of health care professionals "is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction". The negotiating parties had created a digitization fee to encourage radiologists to modernize their equipment. The fee was reserved to laboratories that the negotiating parties jointly recognized and designated, following a procedure and applying criteria set out in an agreed-upon protocol (the "Protocol"). In October 2009, Guérin, a radiologist, applied to the negotiating parties for a declaration that certain radiology laboratories were eligible for the digitization fee. While the laboratories were eventually recognized effective June 21, 2011, Guérin submitted a dispute to the council of arbitration arguing that this recognition should have been retroactive to an earlier date. An arbitrator appointed to perform the functions of the council of arbitration determined that he lacked jurisdiction to grant the relief sought by Guérin because under the Framework Agreement only the negotiating parties could negotiate the recognition of laboratories and because individual physicians could not "ask a council of arbitration . . . to modify in respect of him the rules that the parties to the Framework Agreement, and they alone, negotiated". Guérin sought judicial review of the arbitrator's decision. Both negotiating parties argued that it should be upheld. Justices Wagner and Gascon, joined by McLachlin C.J. and Karakatsanis J., concluded that the applicable standard of review was reasonableness, since the council of arbitration was interpreting and applying its enabling statute, the Framework Agreement and the Protocol, which were at the core of its mandate, in order to determine whether Guérin's complaint was arbitrable and whether Guérin had standing to submit a matter for arbitration. They determined that the council of arbitration's decision on both issues was reasonable. For their part, Justices Brown and Rowe characterized the question of arbitrability as a true question of jurisdiction reviewable on a correctness standard and held that the council of arbitration had incorrectly found that it lacked jurisdiction to decide the complaint. However, they agreed with the majority that the council had reasonably concluded that Guérin lacked standing to bring the complaint to arbitration. Justice Côté would have found that the questions of arbitrability and standing were jurisdictional and would have quashed the council's decision on both issues. Their opinions on the issue of the appropriate standard of review are reproduced below:

> English version of the judgment of McLachlin C.J. and Karakatsanis, Wagner and Gascon JJ. delivered by Wagner and Gascon JJ. —
>
> A. Applicable Standard of Review is Reasonableness
>
> [30] The courts below were unanimous in concluding that the applicable standard of review was reasonableness (motion judge's reasons, at para. 26; C.A. reasons, at paras. 21, 45-46 and 71). Indeed, the parties agreed on this point in the Court of Appeal. In this Court, although Dr. Guérin acknowledged that the current law supports the application of that

standard, he asserted that the standard of correctness should nonetheless apply (R.F., at paras. 15-17; transcript, at pp. 58-59 and 80-81).

[31] The courts below were right to apply the reasonableness standard. Reasonableness necessarily applies, because the council of arbitration was called upon to interpret and apply its enabling statute, the Framework Agreement and the Protocol, which are at the core of its mandate and expertise (notice of dispute (reproduced at para. 2 of the arbitration award), in the recitals and at paras. 1-3; *Dunsmuir*, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 11; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 32).

[32] The two arguments on which Dr. Guérin relies in asserting that the correctness standard should apply are without merit. First, as both the motion judge (at para. 26) and all the judges of the Court of Appeal (at paras. 21 and 85) recognized, it is wrong to argue that this appeal raises a true question of jurisdiction in relation to the council of arbitration (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 35). As this Court has noted in the past, courts should "not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (*Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233, quoted in *Dunsmuir*, at para. 35). In a similar vein, this Court has frequently stressed that, if they exist, "[t]rue questions of jurisdiction are narrow and will be exceptional" (*Alberta Teachers*, at para. 39; see also at para. 34; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 26; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 39; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219, at para. 27). Such questions must be understood "in the narrow sense of whether or not the tribunal had the authority to make the inquiry" (*Dunsmuir*, at para. 59; see also *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 34; *Canon Canada Inc. v. Sylvestre*, 2012 QCCS 1422, at para. 29 (CanLII)).

[33] It is clear, on the one hand, that the council of arbitration had jurisdiction to interpret and apply agreements entered into under the Act, such as the Framework Agreement and its schedules, including the Protocol. It therefore had the authority to make the inquiry and to determine whether Dr. Guérin's proceeding raised an arbitrable dispute under the Act and the Framework Agreement. Indeed, it is well established that the reasonableness standard applies where an arbitrator must determine, by interpreting and applying his or her enabling legislation and related documents, whether a matter is arbitrable (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 16). The fact that an arbitrator can dismiss a proceeding on the basis that it does not constitute an arbitrable dispute does not necessarily lead on its own to the conclusion that the proceeding raises a true question of jurisdiction (see, e.g., *Ontario Refrigeration and Air Conditioning Contractors Assn. v. United Association of Journeymen*

and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 787, 2016 ONCA 460, 131 O.R. (3d) 665, at para. 55, leave to appeal refused, No. 37179, March 10, 2017, [2017] Bull. S.C.C. 431).

[34] When an arbitrator interprets his or her enabling legislation to determine whether a dispute is arbitrable, applying the reasonableness standard undermines neither the rule of law nor the other constitutional bases of judicial review. In contrast, the effect of applying the correctness standard by erroneously characterizing such a question as a true question of jurisdiction would be to undermine the presumption in favour of the reasonableness standard that has been consistently recognized and endorsed by this Court in numerous cases since *Alberta Teachers* (para. 39; see, e.g., *Rogers*, at para. 11; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 21; *SODRAC 2003*, at para. 35; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35; *ATCO Gas and Pipelines*, at para. 28; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 17; *Saguenay*, at para. 46; *Commission scolaire de Laval*, at para. 32; *Capilano*, at para. 22).

[35] On the other hand, the other issue, concerning Dr. Guérin's standing in this case, is not really a true question of jurisdiction either. It is true that this Court applied the correctness standard in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, in which it found that "[t]he issue [was] jurisdictional" in that it went to whether the Canadian International Trade Tribunal could hear a complaint initiated by a non-Canadian supplier under the *Agreement on Internal Trade*, (1995) 129 Can. Gaz. I, 1323 (para. 10). Nonetheless, as the Court subsequently explained in *Alberta Teachers*, its holding in *Northrop* that the question was subject to "review on a correctness standard . . . was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction" (para. 33 (emphasis added)). This interpretation, which was endorsed by a majority of this Court, is also authoritative.

[36] Moreover, Brown and Evans observe that a number of courts have held that standing was not a true question of jurisdiction, even where the relevant enabling legislation addressed it (D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), heading 14:4331, footnote 369, citing *Canadian Merchant Service Guild v. Teamsters, Local Union 847*, 2012 FCA 210, 433 N.R. 200, at para. 19). In the instant case, too, the question of Dr. Guérin's standing relates to the council of arbitration's interpretation of its enabling legislation and of the Framework Agreement. This question does not cast doubt on "the [council of arbitration's] authority to make the inquiry" submitted to it (*Dunsmuir*, at para. 59; see also *Nolan*, at para. 34) but is, rather, intended to determine who — Dr. Guérin or the Fédération — can submit it. That is far from the narrow and limited scope this Court has attributed to true questions of jurisdiction.

[37] Finally, contrary to what Dr. Guérin is now arguing in this Court, this is not a case in which the rule of law requires the application of the correctness standard. The fact that a question of law might give rise to conflicting interpretations does not on its own support a conclusion that the correctness standard applies (*Wilson v. Atomic Energy of Canada Ltd.*,

2016 SCC 29, [2016] 1 S.C.R. 770, at para. 17). Also, Dr. Guérin cites no award in which an arbitrator adopted an interpretation contrary to that of the arbitrator in the instant case. Thus, even if conflicting lines of authority could lead to the application of the correctness standard, which is itself not always the case (*Atomic Energy*, at para. 17; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 38-39; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 784-801), that is, in any event, not the situation in the case at bar.

The following are the reasons delivered by Brown and Rowe JJ. —

[65] We have read the reasons of our colleagues, Justices Wagner and Gascon. While we agree in the result, we see the matters of the council of arbitration's jurisdiction and of Dr. Guérin's standing before the council differently.

[66] In brief, we are of the view that the issue of the capacity of the arbitrator to hear Dr. Guérin's matter raised a question of jurisdiction, not of arbitrability. Applying the standard of correctness, we find that the arbitrator erred in concluding that he did not have jurisdiction to hear the matter. As to the matter of Dr. Guérin's standing, we agree with our colleagues Wagner and Gascon JJ. that the arbitrator's decision on this point is reviewable for reasonableness and that it was reasonable, but we approach the identification of the appropriate standard of review from a different starting point. In our view, standing questions become jurisdictional where the tribunal is confined by the terms of its statutory grant of authority to hear only from a certain class of complainants. Because this was not the case here, reasonableness review is appropriate.

[67] We also agree with our colleagues that, as this Court said in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59, questions of jurisdiction or *vires* refer to "the narrow sense of whether or not the tribunal had the authority to make the inquiry". Identifying questions of jurisdiction is therefore, on this Court's jurisprudence, a straightforward matter: they arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (*Dunsmuir*, at para. 59).

[68] We acknowledge that the Court has also observed, in *obiter dicta*, that "[s]ince *Dunsmuir*, [it] has not identified a single true question of jurisdiction" or "seen such a situation" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 33 and 34). The reason for this may be that an administrative tribunal's jurisdiction (decisions on which are reviewable for *correctness*) is established and confined by its enabling ("home") statute (the interpretation of which is presumptively reviewable for *reasonableness*). While, as we make clear below, we do not in these reasons presume to cut this Gordian knot, we maintain that the mere fact that this Court has not discerned a question of jurisdiction since *Dunsmuir* does not mean that such questions have ceased to exist, nor that we should be blind to one when it clearly manifests itself. Indeed, the consequences of failing to identify a jurisdictional question as such are serious: "as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is 'correct'" (*Alberta Teachers' Association*, at para. 94, per Cromwell J.,

concurring). This "core principl[e]" of judicial review was laid down by the Court in *Dunsmuir*:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. 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 . . . . [para. 29]

[69] Here, the arbitrator saw his capacity to hear Dr. Guérin's matter as raising precisely that — a question of jurisdiction (arbitration award, at paras. 31 and 34, reproduced in A.R., at p. 25) — as did Grenier J. at the Superior Court (2013 QCCS 6950, at paras. 17-19 (CanLII)), the majority at the Court of Appeal (2015 QCCA 1726, at paras. 27 and 42 (CanLII)) and the dissenting judge at the Court of Appeal (para. 85). It is difficult to see the question otherwise, as it involved, in the language of *Dunsmuir*, "the tribunal . . . explicitly determin[ing] whether its statutory grant of power g[ave] it the authority to decide a particular matter" (para. 59).

[70] Our colleagues Wagner and Gascon JJ., however, say that jurisdiction was not at issue here; rather, they view the matter as one of arbitrability. It is true that an issue is not arbitrable before a tribunal that has no jurisdiction to hear it. That said, arbitrability is distinct from jurisdiction and standing. Jurisdiction is about who has competence to decide what issues. Standing is about who can participate in the proceedings. Arbitrability, however, is akin to justiciability, in that it goes to whether the issue is capable of being considered legally and determined by the application of legal principles and techniques (by, in this case, the arbitrator). In our respectful view, the majority risks undermining the coherence of the analytical structure in administrative law by mischaracterizing questions of jurisdiction and standing as questions of arbitrability. The question of whether the arbitrator had the authority to decide on Dr. Guérin's matter was, as we say and as this Court's own jurisprudence demonstrates, clearly jurisdictional.

[71] It follows that the arbitrator had to answer this question correctly (*Dunsmuir*, at para. 59; D.J.M. Brown and J.M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topics 14:4331 and 14:4521). And, in our view, in declining to hear Dr. Guérin's matter, he did not. By s. 54 of the *Health Insurance Act*, CQLR, c. A-29, the Quebec National Assembly gave the council of arbitration exclusive jurisdiction to hear "dispute[s] resulting from the interpretation or application of an agreement". The matter raised by Dr. Guérin — specifically, a dispute concerning how the agreement between the Fédération des médecins spécialistes du Québec ("Fédération") and the Minister of Health and Social Services operated with respect to his facility — was clearly a "dispute resulting from the interpretation or application of an agreement".

[72] But who can bring such a dispute to arbitration? Were this dispute between the Minister and the Fédération, either would have standing to do so. Does, however, Dr. Guérin have standing to bring a "dispute resulting from the interpretation or application of an agreement" to arbitration? Our colleagues Wagner and Gascon JJ. say that the arbitrator's decision that Dr. Guérin did not have standing is reviewable for reasonableness, and that it was reasonable. We agree. Their reasons, however, in our respectful view, elide two important points: first, questions of standing *can* be jurisdictional (in which case decisions thereon are reviewable for correctness); and second, this being so, further explanation of why the arbitrator's decision on standing was reviewable for reasonableness is called for.

[73] The first point is straightforward. Standing is often described as raising a question of jurisdiction:

> Administrative adjudicators must comply with the terms of their statutory grants of authority. On occasion, it may be necessary for a tribunal to determine *explicitly* whether or not the grant authorizes it to decide a particular matter. When this situation arises, as where there are two intersecting administrative schemes, or there is a question of an applicant's standing to institute proceedings, whether or not a claim is statute-barred, the resulting decision will usually be subject to review by the courts on the "correctness" standard of review. [Footnotes omitted; underlining added.] (Brown and Evans, at topic 14:4331.)

[74] Similarly, in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10, this Court described a question of standing as "jurisdictional". Our colleagues Wagner and Gascon JJ., citing *Alberta Teachers' Association*, at para. 33, say that the Court's conclusion in *Northrop Grumman* was the product of "pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction" (para. 35). With great respect, this explanation is simply not grounded in a tenable reading of *Northrop Grumman*. While the Court did indeed look in that case to pre-*Dunsmuir* jurisprudence, its conclusion that the matter raised a question of jurisdiction was expressed with exclusive reference to the nature of the question posed: "The issue on this appeal is jurisdictional in that it goes to whether the [Canadian International Trade Tribunal] can hear a complaint initiated by a non-Canadian supplier under the [*Agreement on Internal Trade*]. Accordingly, the standard of review is correctness" (para. 10 (Emphasis added)).

[75] We also acknowledge that, as our colleagues observe, by referring to a decision of the Federal Court of Appeal, the case law cited by the authors Brown and Evans in support of their statement that questions of standing are jurisdictional is inconsistent. This is unsurprising, as the jurisprudence is indeed inconsistent, having injected confusion even into the definition of a question of jurisdiction itself. (Contrast *Dunsmuir*, at para. 59 ("true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter") with *Alberta Teachers' Association*, at para. 42 ("I am unable to provide a definition of what might constitute a true question of jurisdiction").)

[76] But again, none of this means that questions of jurisdiction have ceased to exist. While our colleagues do not suggest otherwise, their reasons do not explain precisely *why* the question of Dr. Guérin's standing is *not* jurisdictional — or, more precisely, why the presumption, stated by the majority in *Alberta Teachers' Association*, that this is not a question of jurisdiction but rather a question of statutory interpretation, was not rebutted. Nor do they explain what would have been required to rebut it. Of course, this is precisely the difficulty which Cromwell J. identified in his concurring reasons in *Alberta Teachers' Association*:

> My colleague suggests that true questions of jurisdiction or *vires* arise so rarely when a tribunal is interpreting its home statute that it may be asked whether "the category of true questions of jurisdiction exists" and further that "the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review" (para. 34). There is no indication of how, if at all, this *presumption* could be rebutted. I have two difficulties with this position.
>
> The first difficulty concerns elevating to a virtually irrefutable presumption the general guideline that a tribunal's interpretation of its "home" statute will not often raise a jurisdictional question. This goes well beyond saying that "[d]eference will usually result" with respect to such questions (as in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54) or that "courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority" (as in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 34). . . . Creating a presumption without providing guidance on how one could tell whether it has been rebutted does not, in my respectful view, provide any assistance to reviewing courts. The second difficulty concerns the suggestion that jurisdictional questions may not in fact exist at all. Respectfully, these propositions undermine the foundation of judicial review of administrative action. [Underlining added; paras. 91 and 92.]

[77] To be clear, we do not doubt the authority of *Alberta Teachers' Association* as a decision of this Court. Rather, we point out that its application is logically and practically impeded by the unresolved problem — indeed, the analytical incoherence — which Cromwell J. identified therein, and of which this case presents an obvious instance. As we say, we do not presume to cut this Gordian knot here; and nor do our colleagues. We maintain, however, that it follows from the foregoing, particularly the statements of this Court in *Dunsmuir* and *Northrop Grumman*, and from the commentary on the subject, that more needs to be said than our colleagues say about why Dr. Guérin's standing does not raise a jurisdictional question. It is not, again with respect, solely a matter of home statutes, presumed expertise and deference. Otherwise, reasonableness review of the arbitrator's decision on Dr. Guérin's standing would operate in marked tension with this Court's statement in *Northrop Grumman*. The two must be reconciled.

[78] As this Court stressed in *Dunsmuir*, "determining the applicable standard of review is accomplished by establishing legislative intent" (para. 30). A court determining the standard of review to be applied to an administrative tribunal's decision on a question of standing must therefore examine the text of the statutory grant of power. In *Northrop Grumman*, for instance, the standing issue was whether a non-Canadian supplier could bring a complaint regarding military procurement under the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.). The Court resolved this issue by first looking to s. 30.11(1) of that Act, which provides that "a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint". It then noted that s. 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 further provides that a "designated contract" is one described in certain trade agreements, including the *Agreement on Internal Trade*, (1995) 129 Can. Gaz. I, 1323, which requires that the supplier under a "designated contract" be a "Canadian supplier".

[79] The significance of the foregoing is this: the statutory grant in *Northrop Grumman*, taken together with its regulations and the *Agreement on Internal Trade* which those regulations referentially incorporated, explicitly restricted the class of suppliers which could bring a complaint. This is what made standing a jurisdictional question in that case: the tribunal was confined *by the terms of its grant* to hear only from a certain class of complainants. For the tribunal to have heard from anyone else would have exceeded the scope of its grant, thereby amounting to jurisdictional error.

[80] This brings us to the reason why the matter of Dr. Guérin's standing to appear before the council of arbitration in this case does not present a question of jurisdiction. Recall that the arbitrator's statutory grant of power is contained in s. 54 of the *Health Insurance Act* which reads, in relevant part:

> A dispute resulting from the interpretation or application of an agreement is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction.

[81] The passive text in s. 54 of "is submitted" ("*est soumis*"), unaccompanied by any qualification upon who *does* the actual "submitting", stands in contrast to the language of the statutory grant in *Northrop Grumman* ("Canadian supplier"). The arbitrator's decision on Dr. Guérin's standing was, as our colleagues Wagner and Gascon JJ. say, reviewable for reasonableness, but principally because the jurisdiction of councils of arbitration is not statutorily confined under s. 54 to hearing matters brought from certain classes of persons.

[82] One final point. While we agree with our colleagues that the arbitrator's decision regarding Dr. Guérin's standing was reasonable, we do not share their "floodgates" concern (paras. 58-59) arising from the potential proliferation of matters coming before councils of arbitration should Dr. Guérin be granted standing. While they see this as militating against granting standing, we respectfully see this concern as tending to cut the other way. The more persons who are placed in the difficult position in which Dr. Guérin finds himself, the more compelling the basis for allowing him and others to have their disputes heard by an impartial decision-maker.

English version of the reasons delivered by Côté J. —

[83] I cannot improve on what my colleagues Brown and Rowe JJ. say on the standard of review to be applied with respect to the arbitrator's jurisdiction. I therefore concur with them on that issue. In other words, I am of the opinion that the determination of whether it was open to the arbitrator to hear the case of the respondent, Dr. Ronald Guérin, raises a true question of jurisdiction, and that the appropriate standard in this regard is correctness. I agree with Brown and Rowe JJ. that the arbitrator erred in concluding that he did not have jurisdiction to hear the case before him.

[84] I have also read what my colleagues Brown and Rowe JJ. say on the standard of review to be applied on the issue of the respondent's standing, but in my view, their reasoning should have led them to conclude that, in this case, the appropriate standard in this regard is correctness. There are circumstances in which the issue of standing is a question of jurisdiction, and in such a case, the appropriate standard of review is correctness (*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10). In the case at bar, I am of the opinion that whether the respondent had standing is a question of jurisdiction, because the arbitrator's interpretation of the *Health Insurance Act*, CQLR, c. A-29 ("HIA"), and the *Accord-cadre entre le ministre de la Santé et des Services sociaux et la Fédération des médecins spécialistes du Québec aux fins de l'application de la Loi sur l'assurance maladie* ("Framework Agreement") leads to the conclusion that he cannot hear any dispute submitted by a medical specialist, except one with respect to fees.

[85] However, even if the reasonableness standard is applied on this issue, I am of the opinion that the arbitrator erred in concluding that the respondent did not have standing in this case. The only point of contention between myself and Brown and Rowe JJ. that merits further discussion thus relates to the review of the arbitrator's decision on whether the respondent had standing.

[A discussion of the reasonableness of the council's decision on standing is omitted.]

Following, *Guerin*, the Supreme Court has twice considered the category of a "true" jurisdictional question. *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 involved the judicial review of the Workers' Compensation Board's exercise of its authority under s. 225 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 to "make regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment." At issue was s. 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97:

> **26.2** (1) The owner of a forestry operation must ensure that all activities of the forestry operation are both planned and conducted in a manner consistent with this Regulation and with safe work practices acceptable to the Board.

Noting that it had adopted a flexible standard of reasonableness where an enabling statute grants a large discretion to a subordinate body to craft regulations, the majority reviewed the decision as a question of statutory interpretation:

> [10] The question before us is whether s. 26.2(1) of the Regulation represents a reasonable exercise of the Board's delegated regulatory authority. Is s. 26.2(1) of the Regulation within the ambit of s. 225 of the Act? Section 225 of the Act is very broad. Subsection (1) empowers the Board to make "regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment". This makes it clear that the Legislature wanted the Board to decide what was necessary or advisable to achieve the goal of healthy and safe worksites and pass regulations to accomplish just that. The opening words of subsection (2) — "Without limiting subsection (1)" — confirm that this plenary power is not limited by anything that follows. In short, the Legislature indicated it wanted the Board to enact whatever regulations it deemed necessary to accomplish its goals of workplace health and safety. The delegation of power to the Board could not be broader.
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> [11] From this broad and unrestricted delegation of power we may conclude that any regulation that may reasonably be construed to be related to workplace health and safety is authorized by s. 225 of the Act. The Legislature, through s. 225 of the Act, is asking the Board to use its good judgment about what regulations are necessary or advisable to accomplish the goals of workplace health and safety. A regulation that represents a reasonable exercise of that judgment is valid: *Catalyst*, at para. 24; *Green*, at para. 20.
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> [12] Determining whether the regulation at issue represents a reasonable exercise of the delegated power is, at its core, an exercise in statutory interpretation, considering not only the text of the laws, but also their purpose and the context. The reviewing court must determine if the regulation is "inconsistent with the objective of the enabling statute or the scope of the statutory mandate" to the point, for example, of being "'irrelevant', 'extraneous' or 'completely unrelated'": *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 24 and 28. To do this, the Court should turn its mind to the typical purposive approach to statutory interpretation and seek an "interpretative approach that reconciles the regulation with its enabling statute": *Katz*, at para. 25.
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> [13] First, applying the usual principles of statutory interpretation to s. 225 of the Act, it is clear that it authorizes s. 26.2(1). I have already discussed the broad wording of s. 225 of the Act. The Board is expected to craft such regulations as it deems necessary or appropriate in

order to promote workplace health and safety. Section 26.2(1) is clearly linked to workplace safety and meets this requirement.

[14] Second, the Regulation fits with other provisions of the statute. Section 26.2(1) is consistent with s. 230(2)(a) of the Act, which allows the Board to make regulations that apply to any "persons working in or contributing to the production of an industry". This would include forest license owners like the appellant. Section 26.2(1) is also consistent with s. 111 of the Act, which provides that the Board's mandate includes making regulations in support of the purpose of Part 3 of the Act. The purpose of Part 3 is captured in s. 107: it aims to promote occupational health and safety in the workplace in broad terms. Section 26.2(1) shares that purpose.

(…)

[19] Finally, two additional external contextual factors are relevant for this inquiry: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; *Catalyst*, at paras. 18 and 24. These considerations are both within the expertise and capacity of the Board.

[20] First, the Board adopted s. 26.2(1) of the Regulation in its present form in 2008 in response to a concern in the province about the growing rate of workplace fatalities in the forestry sector. This concern is plainly one of "occupational health and safety and occupational environment", the focus of s. 225. The Board's adoption of s. 26.2(1) of the Regulation in response to this significant workplace safety concern provides a clear illustration of why a legislature chooses to delegate regulation-making authority to expert bodies — so that gaps can be addressed efficiently.

[21] Second, s. 26.2(1) is a natural extension of an owner's duty under s. 119(a) to maintain the worksite. Forestry worksites are constantly changing due to weather and other natural occurrences. To maintain the worksite in the face of the dynamic interaction of natural forces and work practices, the owner must ensure that the work in question is planned and conducted safely. Therefore, to fulfill the duty of maintaining a safe worksite under s. 119 of the Act, the owner must ensure that the work is planned and conducted safely. The two go hand in hand.

[22] I conclude that s. 26.2(1) represents a reasonable exercise of the delegated power conferred on the Board by s. 225 of the Act to "make regulations [it] considers necessary or advisable in relation to occupational health and safety and occupational environment".

[23] It is true that this Court, in *Dunsmuir*, referred to prior jurisprudence to indicate that true questions of jurisdiction, which some suggest the present matter raises, are subject to review on a standard of correctness — noting, however, the importance of taking a robust view of jurisdiction. Post-*Dunsmuir*, it has been suggested that such cases will be rare: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 33. We need not delve into this debate in the present appeal. Where the statute confers a broad power on a board to determine what regulations are necessary or advisable to accomplish the statute's goals, the question the court must answer is not one of *vires* in the traditional sense, but whether the regulation at issue represents a reasonable exercise of the delegated power, having regard to those goals, as we explained

> in *Catalyst* and *Green*, two recent post-*Dunsmuir* decisions of this Court where the Court unanimously identified the applicable standard of review in this regard to be reasonableness. In any event, s. 26.2(1) of the Regulation plainly falls within the broad authority granted by s. 225 of the Act as an exercise of statutory interpretation. This is so even if no deference is accorded to the Board and if we disregard all of the external policy considerations offered in support of its position.

Côté, Rowe and Brown JJ, each writing a dissenting judgment, would have applied a correctness standard to the question of whether the Board had the authority to enact s. 26.2(1). Justice Côté's judgment is illustrative:

> A. *Standard of Review*
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> [56] Correctness is the appropriate standard of review for determining whether a regulator exceeded the scope of its statutory authority to promulgate regulations. The first question in this appeal is jurisdictional in nature: whether the Board has the authority to adopt a regulation of this nature *at all*. This is not a challenge to the merits or the substance of a regulation. This inquiry lends itself to only one answer: either the Board acted within its powers, or it did not. There is no "reasonable" range of outcomes when a court is asked to determine whether the Board — which possesses only the authority that is delegated to it by statute — exercised its legislative powers in accordance with its mandate. In this context, correctness simply means that a reviewing court must engage in a *de novo* analysis of the regulator's statutory authority to promulgate regulations, applying the usual approach to statutory interpretation, and determine whether the impugned regulation falls within that grant of authority.
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> [57] This appeal highlights an important distinction between actions taken by a regulator in an adjudicative capacity and actions taken by a regulator in a legislative capacity — a distinction that is central to the policy concerns that animate judicial review and the traditional standard of review analysis.
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> [58] A regulator (in this case, the Board) acts in an adjudicative capacity when it resolves case-specific disputes that are brought before it in accordance with its statutory mandate and applicable law. It is in this context that a tribunal may bring technical expertise to bear or exercise discretion in accordance with policy preferences. It is also in this context that there may exist a range of reasonable conclusions, as it may not be possible to say that there is one "single 'correct' outcome" for any given dispute (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2009] 1 S.C.R. 190, at para. 146, per Binnie J.).
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> [59] On the other hand, a regulator acts in a legislative capacity when it enacts subordinate legislation pursuant to a statutory grant of power. The scope of the body's regulation-making authority is a question of pure statutory interpretation: Did the legislature permit that body to enact the regulation at issue, or did the body exceed the scope of its powers? A regulator does not possess greater expertise than the courts in answering this question. Moreover, a challenge to a regulator's exercise of legislative powers involves no case-specific facts and no direct considerations of policy, as the merits of the impugned regulation are not at issue. In this context, respect for legislative intent — a cornerstone of judicial review — requires that courts accurately police the boundaries of delegated power.

[60] Here, the Board was unquestionably engaged in an exercise of legislative rather than adjudicative power when it enacted s. 26.2(1) of the Regulation, as the Board itself concedes. To determine the standard of review, the question the Court must answer is whether this Board is entitled to any deference as to its own conclusion that it had the authority to enact the impugned regulation.

[61] The standard of review framework established in *Dunsmuir* was developed in the context of a challenge to a tribunal's exercise of adjudicative power. The issue there was the validity of an adjudicator's conclusions regarding an employee's dismissal and the standard of review that should apply. *Dunsmuir*'s categories of reasonableness review and correctness review must be understood in that context. In contrast, this case does not raise the issue of whether a case-specific dispute was resolved appropriately. Rather, the issue it raises is whether a regulator exceeded its authority when it enacted an impugned regulation, which is an exercise of legislative power.

[62] However, *Dunsmuir* is instructive. It recognized that "[a]dministrative bodies must . . . be correct in their determinations of true questions of jurisdiction or *vires*" (para. 59 (emphasis added)). It also cited approvingly to *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, in which this Court considered whether a Calgary bylaw that froze the issuance of taxi plate licences was within the city's statutory powers under the *Municipal Government Act*, S.A. 1994, c. M-26. Writing for a unanimous court, Bastarache J. stated, at para. 5:

> The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy-making function is being exercised. [Emphasis added.]

[63] *United Taxi* squarely governs this case. It recognized the distinction between legislative and adjudicative power (see also *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 51) and the imperative of applying correctness review where there is a direct challenge to the *vires* of a regulation. This is why *Dunsmuir* held that true questions of jurisdiction *must* be reviewed on the standard of correctness. Unlike exercises of adjudicative power, which may be reviewed for reasonableness under *Dunsmuir* and its progeny, depending on the particular context, questions of *vires* can attract only one answer. As a result, lower courts have generally understood the enactment of subordinate legislation to be subject to correctness review. [citations omitted]… Indeed, in this case, it is instructive that the trial court (2015 BCSC 1098, 2 Admin. L.R. (6th) 148), the Court of Appeal (2016 BCCA 473, 405 D.L.R. (4th) 621), West Fraser, and the Board all agreed that correctness was the appropriate standard of review for the *vires* question.

[64] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, and *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360, are not to the contrary. Neither case addressed the question at issue here: whether a regulator had the *authority* to adopt a particular regulation. Rather, both involved challenges to the *substance* or *merits* of an impugned regulation. In *Catalyst*, the issue was whether a municipality had exercised its taxation powers in a reasonable manner by imposing a particular tax rate for a certain class of property (para. 7). There was no question as to the municipality's authority to impose the tax rate, since the relevant enabling legislation gave municipalities "a broad and virtually unfettered legislative discretion to establish property tax rates" (para. 26). In *Green*, the issue was whether the Law Society of Manitoba had acted reasonably in imposing particular rules of conduct. As in *Catalyst*, there was no question that the enabling legislation provided "clear authority for the Law Society to create a [continuing professional development] program" (para. 44).

[65] Moreover, there were policy considerations in both cases that militated against correctness review. In *Catalyst*, where the parties agreed that reasonableness was the appropriate standard of review, the Court relied on the fact that municipalities are democratic institutions. Applying reasonableness review in this context ensures that courts "respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19). This was especially compelling given that a "deferential approach to judicial review of municipal bylaws has been in place for over a century" (para. 21) — a historical tradition that does not exist here. *Green* invoked the same democratic accountability rationale in the context of an impugned Law Society rule because benchers "are elected by and accountable to members of the legal profession", the only persons to whom the rules apply (para. 23).

[66] Here, the democratic accountability rationale counsels in favour of the correctness standard. The Board is an unelected institution that may exercise only the powers the legislature chose to delegate to it. The correctness standard ensures that the Board acts within the boundaries of that delegation and does not aggrandize its regulation-making power against the wishes of the province's elected representatives.

[67] I take no issue with the notion that courts should interpret statutory authorization to promulgate regulations in a broad and purposive manner, in accordance with modern principles of interpretation. This is precisely how the Court approached the issue in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810. But that proposition is quite different from the idea that courts should defer to a regulator's incorrect conclusion as to its authority to enact a particular regulation. It is still possible to interpret statutory mandates broadly and purposively while recognizing that there can be only one answer to the question of whether a regulator exceeded its mandate in promulgating an impugned regulation.

[68] In fact, *Katz* supports the case for correctness review. First, nowhere in *Katz* did the Court purport to depart from the traditional reasonableness/correctness framework. One would expect such a significant doctrinal development, if it occurred, to be announced rather than implied. To the extent that *Katz* did not openly state the standard of review, it should

not be read as *sub silentio* overturning this Court's express holding in *United Taxi*, reaffirmed in *Dunsmuir*, that the *vires* of a regulation is subject to correctness review.

[69] Second, several of the hallmarks of reasonableness review — paying "respectful attention" to the tribunal's reasons (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 49) and determining whether the decision was "defensible in respect of the . . . law" (*Dunsmuir*, at para. 47) — were conspicuously missing in *Katz*. Perhaps this is because a regulator may not produce a recorded set of reasons when it acts in a legislative capacity, as it does when it engages in adjudicative functions — a distinction that further illustrates the awkwardness of applying anything but correctness review to determine the *vires* of a regulation. If a court does not know the reasons justifying a decision or an exercise of jurisdiction, how can it afford any deference? But, in any case, the Court in *Katz* effectively engaged in a *de novo* analysis of the statutory authority for the regulations at issue, looking to the text of the legislative grants of authority and the purpose behind the enabling statutes. This is, by any definition, correctness review. Thus, *Katz* is relevant to this appeal only to the extent that it illustrates the applicable principles of statutory interpretation.

[70] For these reasons, I am of the view that correctness is the appropriate standard of review. The majority evidently disagrees; but its rationale largely escapes me. In an effort to sidestep many of the arguments I have raised about the standard of review, the majority posits that "[w]e need not delve into this debate in the present appeal" (para. 23). As a result, important points go unaddressed, and the basis for applying the reasonableness standard remains largely unexplained.

[71] First, the majority simply asserts-with no analysis or explanation-that *Catalyst* and *Green* prescribe reasonableness review where an enabling statute grants a subordinate body discretion to enact regulations. It does not tell us *why* this is the case. As I have already described, that is not a proper reading of these cases. The majority offers no rebuttal.

[72] Second, the majority reasons do not address *United Taxi*. And so one can only speculate whether the majority has chosen to disregard authorities that are contrary to its position, or whether *United Taxi* is now impliedly overturned. Prospective litigants would be well served by having a clear answer to that question.

[73] Third, the majority does not address the distinction between an exercise of legislative power and an exercise of adjudicative power. This distinction, in my view, provides a principled basis for recognizing the jurisdictional nature of the question at issue in this case. The majority offers no basis for its disagreement.

[74] In sum, the majority has offered almost no analysis on a question that will prove to be important in subsequent cases where the *vires* of a regulation is at issue. In light of the fact that the parties in this case devoted significant attention to this question, a more thorough account of this issue than the majority's reasons provide would have been helpful.

Justice Brown agreed that a correctness standard applied to the question of *whether* the Board had the authority to adopt the regulation but faulted the majority for its overly intrusive review of *how* the Board had exercised its authority:

> [117] Thirdly, I respectfully disagree with the Chief Justice's framing of the issue before the Court as being whether the Board's adoption of s. 26.2(1) represents a reasonable exercise of its delegated power under the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492. While the judicial role properly and necessarily includes seeing that statutory delegates operate within the bounds of their grant of authority, the overall "reasonableness" of *how* a statutory delegate has chosen to exercise its lawful authority is *not* the proper subject of judicial attention. In short, while the Board's *authority* to regulate is (and must be) reviewable, the Board's chosen *means* of regulation are — subject to what I say below about *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 — a matter for the Board, and not for this or any other court.
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> [118] The Chief Justice's reasons on this point go well beyond this Court's judgment in *Catalyst* by effectively recognizing a new generalized basis for judicial review of *the regulatory means chosen* by statutory delegates acting within the bounds of their grant of legal authority. By way of explanation, unreasonableness, as a ground recognized in *Catalyst* for invalidating an action by a statutory delegate, operates narrowly (and only once *vires* has been established). As this Court explained in *Catalyst*, at paras. 21 and 24, the sorts of measures which, in the context of municipal bylaws, would be illegitimate for municipal councillors to take are those which are unreasonable in the sense described by Lord Russell C.J. in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.):
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> > But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." [pp. 99-100]
>
> Unreasonableness, in the sense affirmed in *Catalyst*, therefore concerns factors or considerations which have long been understood as illegitimate in the context of municipal governance (e.g. *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299), and not factors which might lead a reviewing court to think a measure "unreasonable" in the sense of being merely unnecessary or inadvisable in light of the goals of a particular enabling statute.
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> [119] The point merits restating: the issue before us is not directed to whether the regulation "represents a reasonable exercise of the delegated power": Chief Justice McLachlin's reasons, at para. 23. Rather, the issue is whether the Board *is authorized to adopt* the Regulation at issue. I note that the parties in the present appeal and the courts below all viewed the s. 26.2(1) issue as a matter of jurisdiction or *vires*.
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> [120] It follows that I also reject the Chief Justice's sidestepping of the jurisdictional inquiry in favour of a review of various contextual factors which are said to support reasonableness review: Chief Justice McLachlin's reasons, at paras. 19-21. If the Board's adoption of s. 26.2(1)

> presents a jurisdictional question — which the Chief Justice does not deny — such contextual factors are irrelevant.

In Justice Rowe's view, the review of the validity of the Board's regulation should proceed in two steps:

> [127] … The first relates to jurisdiction "in the narrow sense of whether or not the [board] had the authority to make the inquiry" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59). The second is a substantive inquiry into the exercise of the grant of authority: ". . . the substance of [the regulations] must conform to the rationale of the statutory regime set up by the legislature" (*Catalyst*, at para. 25). Both steps involve interpretation of the authorizing statute, the first focusing more on the grant of regulation-making authority, the second having regard more generally to the scheme and objects of the statute.
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> [128] Without referring to the two steps I have noted above, in effect the Chief Justice addresses the first in paras. 10-11 and the second in paras. 12-22. With the foregoing comment, I concur with her analysis that s. 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, is *intra vires*.
>
> [129] I would add a further comment. In para. 9, the Chief Justice quotes D. J. Mullan to the effect that reasonableness review recognizes "the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" ("Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; *Dunsmuir*, at para. 49). This is an over-generalization that obscures rather than enlightens. I would agree that "working day to day" with an administrative scheme can build "expertise" and "field sensitivity" to policy issues and to the weighing of factors to be taken into account in making discretionary decisions. But how does "working day to day" give greater insight into statutory interpretation, including the scope of jurisdiction, which is a matter of legal analysis? The answer is that it does not. This is one of the myths of expertise that now exist in administrative law (*Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at para. 94).

In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 (summarized above in the supplement to Chapter 9), Gascon J., for a majority of the Supreme Court, returned to the question of whether the category of true questions of jurisdiction should be eliminated. While the parties had not argued that the CHRT's interpretation of "service" in s. 5 of the *Canadian Human Rights Act*, which prohibits the discriminatory denial of "goods, services, facilities or accommodation customarily available to the general public" was a true question of *vires*, the majority examined this correctness category as well as the category of questions of general law of central importance outside the decision maker's expertise.

> (1) True Questions of Jurisdiction
>
> [31] True questions of vires have been described as a narrow and exceptional category of correctness review (*Alberta Teachers*, at para. 39), confined to instances where the decision maker must determine whether it has the authority to enter into the inquiry

before it (*Dunsmuir*, at para. 59; *Guérin*, at para. 32). In this sense, "true" questions of jurisdiction involve a far narrower meaning of "jurisdiction" than the one ordinarily employed. This narrow sense of jurisdiction was emphasized by Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("CUPE"), where he warned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). This Court reaffirmed the narrow approach to jurisdiction in Dunsmuir when it explicitly rejected a return to the jurisdiction/preliminary question doctrine that had "plagued the jurisprudence" (para. 59; see also *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at para. 34). A departure from this constrained understanding of jurisdiction would only risk resurrecting long-buried debates.

[32] Neither the Commission nor any lower court has suggested that this case involves the enigmatic category of true questions of *vires*. But the issue on appeal has, at times, been characterized by the parties and the courts below as being whether the Tribunal has the "jurisdiction" to consider direct attacks to legislation or whether the courts are the better forum to ascertain the validity of legislation. However, distilled to its essentials, the question before the Tribunal was whether legislative entitlements under the Indian Act fell within the definition of a service under the CHRA. As such, the Tribunal was determining whether the complaints concerned a discriminatory practice as defined by the CHRA.

[33] There is no question that the Tribunal had the authority to hear a complaint about a discriminatory practice. To that end, the question of what falls within the meaning of "services" is no more exceptional than those found in other cases where a majority of this Court has repeatedly declined to recognize a true question of jurisdiction… [case citations omitted]. To find that the Tribunal was faced with a true question of vires would only risk disinterring the jurisdiction/preliminary question doctrine that was clearly put to rest in *Dunsmuir*. Plainly, the definition of a service under the CHRA is not a true question of vires.

[34] That being said, the persistent uncertainty over this category's scope requires further comments. Since its inclusion as a category of correctness review in *Dunsmuir*, the concept of true questions of *vires* has been as elusive as it has been controversial. In *Alberta Teachers*, a majority of this Court considered eliminating *vires* review, remarking that it served little purpose but "has caused confusion to counsel and judges alike" (para. 38; see also paras. 34-42). The majority stressed that it was "unable to provide a definition of . . . a true question of jurisdiction" (para. 42).

[35] I pause here to note that it is indeed a challenge to identify a true question of jurisdiction in a coherent manner without returning to the jurisdiction/preliminary question doctrine that this Court clearly rejected in both *CUPE* (p. 233) and *Dunsmuir* (para. 35). In the view of some, most questions that might be identified as "jurisdictional" involve nothing more than an interpretation of a decision maker's home statute or a closely related statute (P. Daly, The hopeless search for "true" questions of jurisdiction (August 15, 2013) (online)). In *McLean*, Moldaver J. observed that the U.S. Supreme Court has rejected the distinction between jurisdictional and non-jurisdictional interpretations of a home statute

as a "mirage" (note 3, citing *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013), at p. 1868).

[36] Nonetheless, in *Alberta Teachers*, the majority stayed its hand and instead emphasized that, if they exist, "[t]rue questions of jurisdiction are narrow and will be exceptional" (para. 39). It was left to future litigants to overcome the heavy burden of establishing that they have indeed discovered a true question of *vires* (para. 42). Yet, to date, no litigant has met this challenge before us.

[37] Since *Alberta Teachers*, the search for true questions of *vires* has, in fact, been fruitless. When the existence of such a question has been argued by litigants, this Court has reasserted the narrow and exceptional nature of this category… [case citations omitted]. In 2013, an academic commentator characterized the search for a true question of jurisdiction as "hopeless", noting that this Court had yet to identify one five years after *Dunsmuir* (Daly). It is now 10 years from *Dunsmuir* and the search remains just as hopeless. In applying *Dunsmuir*, our Court has been unable to identify a single instance where this category was found to be applicable.

[38] No more would need to be said on this matter if true questions of vires had simply faded into obscurity. However, that has not happened. The difficulty with true questions of vires is that jurisdiction is a slippery concept. Where decision makers interpret and apply their home statutes, they inevitably determine the scope of their statutory power (*Alberta Teachers*, at para. 34). There are no clear markers to distinguish between simple questions of jurisdiction (i.e., questions that determine the scope of one's authority) and true questions of vires (i.e., questions that determine whether one has authority to enter into the inquiry). Such imprecision tempts litigants and judges alike to return to a broad understanding of jurisdiction as justification for correctness review contrary to this Court's jurisprudence. As a result, the elusive search for true questions of vires may both threaten certainty for litigants and undermine legislative supremacy.

[39] For some, the continued existence of the category of true questions of vires may seem to provide conceptual value, at most. In his concurrence in *Alberta Teachers*, Cromwell J. wrote a spirited defence of the conceptual necessity of correctness review for jurisdiction given the courts' supervisory power over the bounds of jurisdiction, but even he conceded that the category of true questions of vires has little analytical value in the standard of review analysis (para. 94). It remains an open question whether conceptual necessity can justify the resources that courts and parties devote to the attempt to define an inherently nebulous concept.

[40] Our jurisprudence has held that the constitutional guarantee of judicial review is premised on the courts' duty to ensure that public authorities do not overreach their lawful powers (*Dunsmuir*, at para. 29; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 234-38). However, the jurisprudence has also affirmed that judicial review is based on respect for the choices of the legislature's delegated decision makers and recognizes the legitimacy of multiple reasonable interpretations of a statute (*Dunsmuir*, at para. 35; *McLean*, at para. 33). In matters of statutory interpretation where there is only one reasonable answer, this Court has shown that the reasonableness standard still allows the reviewing court to properly deal with the principles of the rule of law and legislative

supremacy that remain at the core of the judicial review analysis (*McLean*, at para. 38; Mowat, at para. 34; *Dunsmuir*, at para. 75). In this regard, reasonableness review is often more than sufficient to fulfil the courts' supervisory role with regard to the jurisdiction of the executive.

[41] The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of vires, and the existence of this category has long been doubted. Absent full submissions by the parties on this issue and on the potential impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88).

(2) Questions of Central Importance

[42] The Commission argues that the Tribunal's decisions raise a question of central importance in which it lacks expertise because other federal tribunals with the power to determine general questions of law have concurrent jurisdiction to interpret the scope of s. 5 of the CHRA. *Dunsmuir* recognized that the correctness standard of review can apply to questions of law that are both of central importance to the legal system as a whole and outside the decision maker's specialized area of expertise (paras. 55 and 60). Since *Dunsmuir*, this category of correctness review has been applied only twice by this Court — first in *Saguenay*, at paras. 49-51, and then in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 21-22 and 26. Indeed, this Court has repeatedly rejected a liberal application of this category (see, e.g., *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 38; *Whatcott*, at para. 168; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at para. 44; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 34; *Alberta Teachers*, at para. 32; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2. S.C.R. 488, at para. 18; *Canadian National Railway*, at paras. 60 and 62; *McLean*, at para. 28).

[43] Here, the Tribunal has extensive expertise in determining what is meant by a discriminatory practice. The ability of other federal tribunals to apply the CHRA does not rob the Tribunal of its expertise in its home statute. Regardless of whether the questions before the Tribunal rose to the requisite level of importance, they were clearly within the Tribunal's expertise. This category does not apply.

Rowe and Côté JJ. disagreed with the majority's analysis on whether the correctness category of true questions of vires should be eliminated:

[77] We would strongly distance ourselves from these obiter comments. Recognizing that the concept of jurisdiction has and continues to play a crucial role in administrative law, this Court has made clear on several occasions that administrative decision makers must be correct in their determinations as to the scope of their delegated authority (*Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *United Taxi Drivers'*

> *Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5; *Dunsmuir*, at para. 29). This is because jurisdictional questions are fundamentally tied to both the maintenance of legislative supremacy, which requires that a given statutory body operate within the sphere in which the legislature intended that it operate, as well as the rule of law, which requires that all exercises of delegated authority find their source in law (*Dunsmuir*, at para. 28). Nothing in our reasons should be read as undermining these longstanding principles of judicial review. We agree with our colleague Gascon J., however, that any uncertainty surrounding the jurisdictional question category ought to be resolved another day, when this issue is squarely raised by the parties.

Brown J. also had important reservations about the majority's treatment of true questions of jurisdiction:

> [110] Justice Gascon's discussion regarding true questions of jurisdiction omits a central point that, while not determinative, is in my respectful view an important consideration which militates against his suggestion that this category of correctness review might be "euthanized". I refer to the Court's expression, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, of the continued recognition of this category as being fundamental to judicial review. My colleague observes that "dissatisfaction with the current state of the law is no reason to ignore our precedents following *Dunsmuir*" (para. 47). But this observation applies with equal force to *Dunsmuir* itself. And, in *Dunsmuir*, this Court, citing the Honourable Thomas Cromwell, wrote that "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority" (para. 30, citing T. Cromwell, "Appellate Review: Policy and Pragmatism", in 2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice, V-1, at p. V-12). This presupposes not only that the treatment of such questions is a matter of first importance, but that such questions continue to exist. While, therefore, one might "euthanize" the category of true jurisdictional questions, it would not follow that such questions themselves will disappear.
>
> [111] Deciding whether and how any "euthanizing" of true questions of jurisdiction is to proceed will, therefore, require a measure of circumspection. The exercise of public power, including delegated public power, must always be authorized by law. Judicial review guarantees fidelity to that principle. As I indicated in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, at para. 124, I accept that it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute. But there will remain questions that tend more to the former, including matters which are still widely regarded as jurisdictional by lower courts (for example, a decision to enact subordinate legislation: *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, at para. 80 (CanLII)), and which raise squarely the same concerns for the rule of law identified by this Court in Dunsmuir as demanding a more exacting standard of review. To consign such questions to the same, one-size-fits-all "reasonableness" standard of review that all other questions receive would render that standard far less useful, since it would furnish a reviewing court with no basis for distinguishing matters warranting deference from those which do not.

[112] It follows that abolition of the category of true questions of jurisdiction will necessitate a concomitant shift towards more flexible, rather than a strictly binary (or strictly reasonableness) standard of review framework.

Chapter 14 – Applying the Standard of Review, Reasonableness Review, p. 816

Add following the discussion of the *CEP* decision:

In *CEP*, the majority faults the dissenting judges for engaging in a "line-by-line treasure hunt for error" in their review of the board's decision. Where a decision could be understood in more than one way, does the deferential approach inherent in reasonableness review require the reviewing court to adopt a plausible reading of the decision that would allow the court to uphold it?

Consider in this respect the Supreme Court's decision in *Groia v Law Society of Upper Canada*, 2018 SCC 27. Groia acted on behalf of the defendant in insider trader proceedings brought by the Ontario Securities Commission. In the course of the trial Groia engaged in personal attacks, sarcastic outbursts and allegations of professional impropriety against the OSC prosecutors. These stemmed from their disagreement over the scope of the OSC's disclosure obligations and over the admissibility of documents, based largely on Groia's honest but mistaken understanding of the law of evidence and the role of the prosecutor. When the Law Society Appeal Panel concluded that he was guilty of professional misconduct based on his uncivil behaviour, Groia sought judicial review. Though unsuccessful before the Ontario Divisional Court and Court of Appeal, Groia convinced a majority of the Supreme Court to quash the decision. Eight of nine judges adopted a reasonableness standard because the Panel's approach to determining whether incivility amounts to professional misconduct involved its interpretation of the *Rules of Professional Conduct* enacted under its home statute and its discretionary application of general principles to the facts before it. However, the majority and dissent differed in their reading of the Panel's decision on the crucial point of whether, to avoid a finding of professional misconduct on account of allegations of prosecutorial misconduct that impugned the integrity of opposing counsel, Groia had to demonstrate that these allegations were made in good faith and had a reasonable basis. Justice Moldaver read the Panel's decision requiring both a subjective (good faith) and objective (reasonable) basis for allegations of professional misconduct as follows:

> [88] … [T]he reasonable basis requirement is not an exacting standard. I understand the Appeal Panel to have meant that allegations made without a reasonable basis are those that are speculative or entirely lacking a factual foundation. Crucially, as the Appeal Panel noted, allegations do not lack a reasonable basis simply because they are based on legal error: at para. 280. In other words, it is not professional misconduct to challenge opposing counsel's integrity based on a sincerely held but incorrect legal position so long as the challenge has a sufficient factual foundation, such that if the legal position were correct, the challenge would be warranted.

He then determined that the Panel' decision was unreasonable because it had "repeatedly used Mr. Groia's sincerely held but mistaken legal beliefs to ground its conclusion that Mr. Groia's allegations lacked a reasonable foundation" (paras 131-132). In his view, based on the approach to assessing professional misconduct due to incivility outlined by the Panel and on the facts of Groia's case, there was "only one reasonable outcome in this matter: a finding that Mr. Groia did not engage in professional misconduct on account of incivility" (para 125). Dissenting, Karakatsanis, Gascon and Rowe JJ focused their criticism on what they believed was the majority's failure to appropriately apply the reasonableness standard to the Panel's decision:

> *A. The Reasonableness Standard*

[175] We have read the reasons of our colleague Justice Moldaver and agree with him on a number of key issues. We agree that reasonableness is the applicable standard of review: Moldaver J.'s reasons (M.R.), at paras. 43–57. We also agree that the simple fact that a lawyer's behavior occurs in the courtroom does not deprive the Law Society of Upper Canada of its legitimate role in regulating the profession nor does it justify heightened judicial scrutiny: M.R., at paras. 53–56. Lastly, we agree that, in articulating a standard of professional misconduct, the Law Society Appeal Panel reasonably set out a contextual approach which will vary according to the particular factual matrix in which it is applied: M.R., at paras. 77–80.

[176] However, we disagree with Justice Moldaver's disposition in this appeal. In our view, the Appeal Panel's decision was reasonable. The Panel set out an approach for assessing whether Mr. Groia had committed professional misconduct and faithfully applied it. Its analysis was cogent, logical, transparent, and grounded in the evidence. Its decision achieved a reasonable balance of its statutory objectives and an advocate's freedom of expression. There is no basis to interfere.

[177] We also have a number of concerns about Justice Moldaver's application of the reasonableness standard. Respectfully, we are of the view that he fundamentally misstates the Appeal Panel's approach to professional misconduct, and reweighs the evidence to reach a different result. This is inconsistent with reasonableness review as it substitutes this Court's judgment for that of the legislature's chosen decision maker. Further, we have serious concerns about the impacts that will follow from our colleague's analysis and disposition in this appeal.

…

[179] Where, as here, the standard of review analysis leads to the application of reasonableness, deference is not optional. [Extracts from the *Dunsmuir* definition of reasonableness omitted]. (…)

[180] In applying the reasonableness standard, deference bars a reviewing court from conducting an exacting criticism of a decision in order to reach the result that the decision was unreasonable: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 56. It follows that a reviewing court also cannot supplement the decision maker's reasoning for the purpose of undermining it. Neither may a reviewing court reweigh evidence or contextual factors considered by the decision maker: [case citations omitted].

[181] Fundamentally, reviewing courts cannot simply "pay lip service to the concept of reasonableness review while in fact imposing their own view": *Dunsmuir*, at para. 48. At all times, the starting point of reasonableness review is the reasons for the decision under review.

B. *The Appeal Panel's Decision Was Reasonable*

[182] For the reasons that follow, we would find that the Appeal Panel's decision was reasonable.

(1) <u>The Appeal Panel's Approach to Civility and Professional Misconduct</u>

[183] The Appeal Panel started its analysis by examining lawyers' professional conduct obligations and the concept of civility. It reviewed the rules and the codes of conduct, as they appeared at the time of the *Felderhof* trial as well as related commentary, and noted the need to balance a lawyer's expressive rights with his or her professional obligations… The Appeal Panel also highlighted the impact of uncivil behaviour on the administration of justice… The Panel noted that incivility is about more than "hurt feelings"; attacks on the integrity of one's opponent risk disrupting a trial and risk rendering opposing counsel ineffective… [page references to Panel's decision omitted.]

[184] Following its detailed analysis of the importance of civility in the legal profession, the Appeal Panel articulated its approach to determining when uncivil courtroom behaviour crosses the line. This approach is "fundamentally contextual and fact-specific" so as to take into account the trial context and avoid a chilling effect on zealous advocacy… All of the surrounding circumstances must be considered. The Appeal Panel noted that the trial judge's reaction, while relevant to an assessment of misconduct, is not determinative…

[185] The Appeal Panel then narrowed its focus to the issue arising in Mr. Groia's case, "the extent to which zealous defence counsel may impugn the integrity of opposing counsel and make allegations of prosecutorial misconduct"… The Panel stated:

> In our view, it is professional misconduct to make allegations of prosecutorial misconduct or that impugn the integrity of opposing counsel unless they are both made in good faith and have a reasonable basis. A *bona fide* belief is insufficient; it gives too much licence to irresponsible counsel with sincere but nevertheless unsupportable suspicions of opposing counsel . . . .
>
> In addition, even when a lawyer honestly and reasonably believes that opposing counsel is engaging in prosecutorial misconduct or professional misconduct more generally, she must avoid use of invective to raise the issue. That is, it is unprofessional to make submissions about opposing counsel's improper conduct, to paraphrase Justice Campbell, in a 'repetitive stream of invective' that attacks that counsel's professional integrity. [paras. 235-36]

[186] Notably, the Appeal Panel determined that any allegations of professional misconduct or that impugn the integrity of opposing counsel must be made in good faith and with a reasonable basis. Even where these two requirements are met, lawyers must be respectful and avoid the use of invective. The Appeal Panel was clear that any such allegations must be considered in context; the requirement to consider good faith and reasonableness are necessarily informed by the way the trial unfolded.

[187] We agree with Cronk J.A., writing for the majority of the Ontario Court of Appeal, that the "highly contextual and fact-specific nature of incivility necessarily requires affording the disciplinary body leeway in fashioning a test that is appropriate in the circumstances of the particular case": 2016 ONCA 471, 131 O.R. (3d) 1, at para. 125. Here, there is no doubt that it was open to the Appeal Panel to adopt the approach it did. The Panel's reasoning was nuanced and flexible, responsive to the particular factual matrix in which it is applied. This approach flowed directly from the Panel's thorough consideration of the rules, related commentary, and the jurisprudence. The adaptability of this approach

ensures that it will not sanction zealous advocacy. It ensures that the context in which the impugned conduct occurred will be adequately accounted for, from the trial judge's reaction to the "dynamics, complexity and particular burdens and stakes of the trial": A.P. reasons, at para. 233. Importantly, the Panel noted that professional misconduct is about more than "mere rudeness" (para. 211); rather, the focus is on allegations of prosecutorial misconduct or that impugn the integrity of an opponent: paras. 210 and 235.

[188] Respectfully, we consider that Justice Moldaver reformulates the Appeal Panel's approach to professional misconduct. While he acknowledges the appropriateness of its chosen contextual approach, he effectively reframes the Appeal Panel's approach as consisting of three factors: (1) what the lawyer said; (2) the manner in which it was said; and (3) the trial judge's reaction (M.R., at para. 36). Tellingly, while not found in the Appeal Panel's reasons, this formulation closely resembles the tests urged by Mr. Groia and the dissenting judge of the Ontario Court of Appeal, both of whom advocated a correctness standard of review. As noted above, the Panel did not opt for such a restrictive framework and instead adopted a fact-specific and contextual approach for ascertaining professional misconduct: A.P. reasons, at paras. 7 and 232.

2. The Appeal Panel's Assessment of the Case

[189] We turn now to the Appeal Panel's application of its approach to the facts of this case. In our view, the Appeal Panel's analysis of the *Felderhof* trial was a faithful and reasonable application of the approach it outlined.

(a) *Whether Mr. Groia Had a Reasonable Basis for His Allegations*

[190] Because the Appeal Panel did not have the benefit of hearing Mr. Groia's testimony, it assumed that Mr. Groia "held an honest belief in his allegations of prosecutorial misconduct": para. 238. On this basis the Appeal Panel assumed Mr. Groia was acting in good faith. The Appeal Panel clearly stated, however, that "it is professional misconduct to make [such allegations] . . . unless they are both made in good faith and have a reasonable basis": para. 235 (emphasis added). The Appeal Panel thus suggested that the Law Society can still consider the reasonableness of a lawyer's allegations even where they are made in good faith, in that they arise from a mistaken but sincerely held belief. As such, the Panel's reasons focussed primarily on whether Mr. Groia had a "reasonable basis" for his allegations of prosecutorial misconduct and his comments that impugned the integrity of his opponents. Mr. Groia argued that he had such a basis: A.P. reasons, at paras. 239-40. The Appeal Panel disagreed. In our view, it was open to the Appeal Panel to do so.

[191] The Appeal Panel's reasons demonstrate that it considered both the factual and legal underpinnings of Mr. Groia's claims to determine whether they had a reasonable basis:

> Our concern about the submissions quoted above is not merely that Mr. Groia was making incorrect legal submissions; that, of course, is not a basis for a finding of professional misconduct. Our concern is that Mr. Groia appears to have been using those submissions as a platform to attack the prosecutors, and in particular to impugn their integrity, without a reasonable basis to do so.

. . .

> [Mr. Groia's] submissions, in our view, directly attack the integrity of the prosecutors, by alleging that they cannot be relied upon to keep their 'word' and are lazy and incompetent.
>
> . . . Further, they have no factual foundation. As a matter of the law of evidence that Mr. Groia ought to have known, Mr. Naster was perfectly entitled to object to Mr. Groia putting documents to a witness notwithstanding that the witness could not identify them and suggesting that they be marked as exhibits. . . .
>
> . . .
>
> In our review of the record, we could find no evidentiary foundation for the allegations of deliberate prosecutorial misconduct at this point in the trial. . . . His submissions regarding the 'conviction filter' not only were wrong in law but did not have a reasonable basis. And again, these submissions amplified and repeated comments made earlier in the trial, to the effect that the prosecutors were acting deliberately to make it impossible for Mr. Felderhof to get a fair trial. [Emphasis added; paras. 280, 285 and 295.]

[192] As the Panel noted, being wrong on the law is itself not a basis for professional misconduct in most situations: para. 280. However, it is clear from the passages cited above that the Appeal Panel was concerned with more than just whether Mr. Groia's legal submissions were *correct* or not. Errors of law may be so egregious that submissions based on those errors have no "reasonable basis". Put another way, allegations — made in good faith — may constitute professional misconduct if they have no reasonable *legal basis*.

[193] In our view, it was open to the Panel to consider both the factual and legal bases for the allegations at issue. The Appeal Panel's mandate permits it to determine "any question of fact or law that arises in a proceeding before it": *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.35(1). Indeed, the Law Society rules govern civility *and* competence: *Rules of Professional Conduct* (2000), Rule 2.01 (now Rule 3.1). One rule that Mr. Groia was accused of having breached prohibits "ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners": *Rules of Professional Conduct* (2000), Rule 6.03(1) commentary; see A.P. reasons, at paras. 203 and 208. This standard can only be applied with some reference to the basic legal information a responsible lawyer is expected to possess or seek out before criticizing another lawyer's professional conduct. The Appeal Panel's choice to require a *reasonable* basis for the submissions indicates its intention to weed out egregious mistakes of law.

[194] As such, the Panel was entitled to consider whether there is a reasonable basis for the allegations where a lawyer alleges prosecutorial misconduct or impugns the integrity of opposing counsel. "Reasonableness", as opposed to "good faith", implies consideration of whether the allegations, objectively, had a legal or factual basis. This approach simply permits the Appeal Panel to consider, as a whole, the reasonableness of allegations that raise prosecutorial misconduct or impugn the integrity of opposing counsel, within the context of the proceedings. This is justified by the serious consequences that irresponsible

attacks can have on opposing counsel's reputation as well as the public perception of the justice system.

[195] Following the Appeal Panel's review of the evidence, the Panel concluded that there was no reasonable basis (in fact or in law) for Mr. Groia's allegations against the Ontario Securities Commission (OSC) prosecutors. It held that there was "no foundation" for Mr. Groia's allegations, and that there was nothing "to suggest that either the OSC or the prosecutors were dishonest or intentionally attempting to subvert the defence" or that the prosecutors were "too busy or lazy to comply with their obligations": paras. 266, 269, 304 and 306. While the prosecutor's actions "may well have formed the basis for an aggressive attack on the Crown's case", "they did not provide a reasonable basis for repeated allegations of deliberate prosecutorial misconduct": A.P. reasons, at para. 323.

[196] These conclusions were open to the Appeal Panel. They flowed directly from the Appeal Panel's thorough consideration of the evidence. The Panel "reviewed Mr. Groia's remarks in their context, often by relying on Mr. Groia's own explanations in the course of the hearing panel proceeding" and gave Mr. Groia the benefit of the doubt whenever possible: para. 241. It considered the conduct of the prosecutors to determine whether Mr. Groia's allegations had a basis in the record… However, despite this balanced review of the evidence, the Panel found that "[n]othing the prosecutors did justified [Mr. Groia's] onslaught": para. 322. In our view, it was open to the Appeal Panel to conclude there was no reasonable basis in fact or in law for Mr. Groia's allegations of prosecutorial misconduct and his comments that impugned the integrity of his opponents.

[197] Justice Moldaver takes a different view of the Appeal Panel's reasoning respecting the "reasonable basis" requirement. He suggests that the Appeal Panel determined that a lawyer's *bona fide* legal mistakes can *never* ground a finding of professional misconduct: paras. 126-27. He therefore concludes that Mr. Groia's good-faith (though mistaken) belief that the OSC prosecutors' actions were contrary to law in part "*provided* the reasonable basis for his allegations": para. 138 (emphasis in original). Respectfully, we are of the view that a reviewing court should give effect to the Appeal Panel's decision to adopt an approach with both subjective and objective considerations (i.e. to require "good faith" and a "reasonable basis"). We would not collapse the distinction between these criteria by restricting the Appeal Panel's ability to assess the reasonableness of legal submissions to determining whether the lawyer was acting in good faith.

[198] The majority's approach effectively creates a novel mistake of law defence: a lawyer will have a "reasonable basis" for allegations of misconduct anytime his beliefs as to the law — if they were correct — would create such a basis. This makes the "reasonable basis" requirement dependent on the *subjective* legal beliefs of the lawyer. As such, any accusations grounded in an honestly held legal belief will be immune from Law Society sanction, irrespective of how baseless that legal belief is.

[199] However, the Appeal Panel explicitly *rejected* the idea that whenever a lawyer's accusations are based on an honestly held belief in the law, they necessarily have a "reasonable basis". As discussed above, the Panel was of the view that allegations must have a *reasonable legal basis* to be justifiable, and this inquiry should not focus solely on the subjective beliefs of the lawyer. It is not a respectful reading of the Appeal Panel's

reasons to articulate a novel test for professional misconduct, then fault the Panel for failing to apply it. It was open to the Appeal Panel to hold that a lawyer who erroneously alleges prosecutorial misconduct or impugns the integrity of opposing counsel should not be shielded from professional sanction because of his or her own incompetence.

[200] Justice Moldaver also takes issue with the Appeal Panel's finding that Mr. Groia had no reasonable *factual* basis for his accusations. The Appeal Panel's decision respecting Mr. Groia was based in part on its conclusion that it is professional misconduct to make allegations that "impugn the integrity of opposing counsel" without a reasonable basis to do so: paras. 235, 320 and 324. The Panel found that Mr. Groia "repeatedly cast aspersions" on Mr. Naster, accusing him of reneging on promises when Mr. Naster contested the admissibility of certain documents: paras. 297, 299 and 319-20. The Panel determined, however, that these allegations had no factual basis:

> . . . Mr. Groia had no reasonable basis on which to attack either the integrity of the prosecutors or their motives. The prosecutors had not promised that they would introduce all relevant documents, regardless of the rules of evidence. They were under no obligation to call evidence favourable to the defence. They had not resiled from their promises. Their positions on evidentiary issues were not improper and were often correct. [Emphasis added; para. 324.]

[201] Justice Moldaver states that it was "not reasonably open" to the Appeal Panel to find that Mr. Groia's allegations lacked a reasonable factual basis: M.R., at para. 134. This, according to his analysis, is because the Panel should have appreciated how Mr. Groia's legal mistakes "coloured his understanding of the facts": M.R., at para. 135. With respect, the Appeal Panel was entitled to make the findings of fact it made. Reasonableness review of a decision requires deferential consideration of the rationales of the decision maker.

(b) *The Appeal Panel's Weighing of the Evidence*

[202] In determining whether Mr. Groia's allegations crossed the line into professional misconduct, the Appeal Panel applied its expertise and decided how to assess the evidence as a whole.

[203] The Appeal Panel focussed, for example, on the disrespectful manner in which Mr. Groia made his allegations: paras. 290, 299 and 328. The Panel noted Mr. Groia's sarcastic use of the word "Government" to describe the OSC's lawyers. The Panel found that it was wrong to use the term "as a way of casting aspersions on opposing counsel without a reasonable basis": para. 286. The Panel also highlighted numerous instances in which Mr. Groia directly attacked the integrity of his opponents in a harsh and cutting way. On the issue of the admission of documents, Mr. Groia repeatedly commented that he could not enter a document "because the Government isn't prepared to stand by its representations to this Court" and because the prosecutors "don't live up to their promises": A.P. reasons, at para. 299. Mr. Groia also remarked: "My friend doesn't like the fact that he is being held to statements he made in open court. I am sorry. He made those submissions" and asked the judge: "Is my friend ever going to explain to this Court, or God forbid, ever apologize to this Court for the Government's conduct in this case?"(*ibid.*) When arguing about the admissibility of a *National Post* article, Mr. Groia said: "I am heartened to

see that Your Honour is no more able to get a straight answer out of the prosecutor than the defence has been" (*ibid*., at para. 311).

[204] The Appeal Panel also placed significant weight on the cumulative impact of Mr. Groia's comments: para. 318. Mr. Groia's comments built on one another throughout the course of the *Felderhof* trial, and the Panel therefore found it necessary to measure their cumulative effects rather than considering each in isolation: paras. 285 and 319.

[205] Following its consideration of the evidence as a whole, the Appeal Panel concluded that Mr. Groia had engaged in professional misconduct. While the Appeal Panel noted that certain of Mr. Groia's comments did not cross the line into professional misconduct, it concluded that his conduct, when considered cumulatively, can "best be described as a relentless personal attack on the integrity and the *bona fides* of the prosecutors": paras. 252, 270, 280, 317 and 318. The Panel also determined that Mr. Groia's behaviour had a negative impact on the trial and on the administration of justice: paras. 313 and 332. In light of all of the facts at play, the Panel concluded that Mr. Groia's allegations crossed the line and warranted sanction.

[206] In our view, it was open to the Panel to weigh the evidence in the way it did. Its findings regarding the disrespectful way that Mr. Groia made his allegations were amply supported by the record, as were its conclusions on the cumulative effects of his conduct. Ultimately, the reasons support the Appeal Panel's conclusion that Mr. Groia was engaged in professional misconduct: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56; *Ryan*, at para. 47. Both the evidentiary foundation and the logic of the reasons were sound: *ibid*. The decision is justifiable, intelligible, and transparent and falls within the range of reasonable outcomes: *Dunsmuir*, at para. 47.

[207] Justice Moldaver takes issue with the way that the Appeal Panel weighed the evidence before it. He would reduce the weight assigned to the manner and effects of Mr. Groia's comments because the state of the law regarding abuse of process was uncertain at the time of the *Felderhof* trial: M.R., at para. 143.

[208] We cannot agree that the Appeal Panel was unreasonable in failing to take such an approach. Most notably, Mr. Groia never raised the unsettled state of the law regarding abuse of process before the Appeal Panel: see A.P. reasons, at para. 239. To criticize the Appeal Panel's reasons for failing to consider an argument never raised before it has no basis in reasonableness review. Adding another matter that the Appeal Panel ought to have considered is a means of reweighing of evidence, which is inappropriate on deferential review: *Suresh*, at para. 29.

[209] Furthermore, whatever uncertainty there was regarding the timing of when abuse of process allegations should be made, there was no uncertainty about the underlying rules of professional ethics and law of evidence upon which Mr. Groia had launched his volleys of ill-considered attacks.

[210] Justice Moldaver also places significant weight on the trial judge's reticence to intervene when Mr. Groia made his allegations: M.R., at paras. 136, 148–54 and 157. However, the Appeal Panel paid close attention to the interventions that the trial judge made in the course of the proceedings but noted that a trial judge's interventions are not a

determinative consideration: paras. 53-56, 76-77, 86-88, 90-91, 103, 263, 269, 272 and 281. The Panel was entitled to determine that other factors warranted more weight in the circumstances of this case.

[211] In the same vein, Justice Moldaver would also discount the manner in which Mr. Groia made his allegations on the basis that the trial judge had not intervened: M.R., at para. 157. In our view, the Appeal Panel was entitled to place substantial weight on Mr. Groia's use of unnecessary invective: A.P. reasons, at paras. 236 and 328.

[212] Justice Moldaver uses the trial judge's lack of intervention in respect of Mr. Groia's legal errors as an indication that the Panel was unreasonable in concluding that Mr. Groia's allegations lacked a factual foundation: M.R., at paras. 136 and 153. With respect, we consider that it is within the Panel's statutory responsibility to assess the reasonableness of lawyers' submissions. The fact that the trial judge did not tell Mr. Groia that he was wrong in law did not require the Panel to find that his submissions were reasonable.

[213] Thus we cannot agree with Justice Moldaver's application of the reasonableness standard. In our view, he misstates the Appeal Panel's approach and reweighs the evidence in order to reach a different result. Our colleague may have preferred choices other than those made by the Appeal Panel. However, that is no basis to intervene on judicial review and rebalance the scales. In reasonableness review, courts must resist the temptation to come to a conclusion different than the tribunal's, particularly where there is a logical and evidentiary underpinning for the tribunal's conclusions: *Southam*, at paras. 79-80.

(3) Conclusion on the Reasonableness of the Appeal Panel's Decision

[214] For over 200 years, the Legislature has delegated to the Law Society the authority to determine both the rules of professional conduct for the profession and their interpretation: *Law Society Act*, ss. 34(1) and 62(0.1)10. Recognizing this expertise, this Court has consistently held that law societies should be afforded deference: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at para. 45; *Ryan*, at para. 42. The Law Society is a specialized body; here, it was applying its own rules to a specific case that fell well within the core of its expertise.

[215] Because of the Law Society's broad mandate, this is not one of the "rare occasions where only one 'defensible' outcome exists": *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 35, per Abella J. The existence of reasonableness review is, rather, premised on the fact that "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result": *Dunsmuir*, at para. 47.

[216] For the reasons set out above, we are of the view that there is no basis on this record to interfere with the Appeal Panel's decision. The Panel articulated an approach for professional misconduct that flowed directly from its consideration of the rules, commentary and jurisprudence. It faithfully followed its approach, based on the evidence respecting Phase One of the *Felderhof* trial, and concluded that Mr. Groia had no reasonable basis for the allegations he made against the OSC prosecutors. It then weighed the whole of the evidence and determined that when considered in light of all of the

relevant factors, Mr. Groia's comments constituted professional misconduct. The Panel's logic, rationales and conclusion were reasonable.

Add following the discussion of the *CEP* decision:

In its decision (2011 NBCA 58, (2011), 375 NBR (2d) 92) the New Brunswick Court of Appeal had adopted a correctness standard of review to the board's analytical framework for determining the validity of the employer's random alcohol testing policy, in part because it was of the view that labour arbitrators had been unable to reach a consensus on how to strike the proper balance between the right of an employer to adopt policies that promote safety in the workplace, and an employee's right to privacy or to freedom from discrimination. As Robertson J.A. stated, at para 23:

> … I am struck by the fact there comes a point where administrative decision makers are unable to reach a consensus on a particular point of law, but the parties seek a solution which promotes certainty in the law, freed from the tenets of the deference doctrine. In the present case, it is evident that the arbitral jurisprudence is not consistent when it comes to providing an answer to the central question raised on this appeal. Hence, it falls on this Court to provide a definitive answer so far as New Brunswick is concerned. This is why I am prepared to apply the review standard of correctness.

Though this point was not addressed by the Supreme Court in *CEP*, it was raised once again by the Federal Court of Appeal in *Wilson v Atomic Energy of Canada Limited*, [2015] 4 FCR 467, 2015 FCA 17. The issue in Wilson was whether Part III of the *Canada Labour Code* allowed employers to dismiss their employees without cause so long as minimum notice or compensation is given or, in other words, whether such actions constituted an unjust dismissal under the *Code*. Noting that there was some disagreement on this question between adjudicators appointed under the *Code*, Justice Stratas set out the Court's reasons for selecting a correctness standard as follows:

> [51] At the conceptual level, the Supreme Court in *Dunsmuir* identified two principles that underlie our law of judicial review, principles that are in tension with each other (at paragraphs 27-31). First, there is the constitutional principle of Parliamentary supremacy. Absent constitutional objection, courts are bound by the laws of Parliament, including those that vest exclusive power in an administrative decision-maker over a certain type of decision. Second, there is the constitutional principle of the rule of law. In some circumstances, courts must intervene even in the face of Parliamentary language forbidding intervention: *Crevier v. A.G. (Québec) et al.*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.
>
> [52] In this case, it is true that Parliament has vested jurisdiction in adjudicators under the Code to decide questions of statutory interpretation, such as the question before us. However, on the statutory interpretation issue before us, the current state of adjudicators' jurisprudence is one of persistent discord. Adjudicators on one side do not consider themselves bound by the holdings on the other side. As a result, for some time now, the answer to the question whether the Code permits dismissals on a without cause basis has depended on the identity of the adjudicator. Draw one adjudicator and one interpretation will be applied; draw another and the opposite interpretation will be applied. Under the rule of law, the meaning of a law should not differ according to the identity of the decision-maker: *Taub v. Investment Dealers Association of Canada*, 2009 ONCA 628 (CanLII), 98 O.R. (3d) 169 at paragraph 67.

> [53] In the case of some tribunals that sit in panels, one panel may legitimately disagree with another on an issue of statutory interpretation. Over time, it may be expected that differing panels will sort out the disagreement through the development of tribunal jurisprudence or through the type of institutional discussions approved in *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524. It may be that at least in the initial stages of discord, without other considerations bearing upon the matter, the rule of law concerns do not predominate and so reviewing courts should lay off and give the tribunal the opportunity to work out its jurisprudence, as Parliament has authorized it to do.
>
> [54] However, here, we are not dealing with initial discord on a point of statutory interpretation at the administrative level. Instead, we are dealing with persistent discord that has existed for many years. Further, because no one adjudicator binds another and because adjudicators operate independently and not within an institutional umbrella such as a tribunal, there is no prospect that the discord will be eliminated. There is every expectation that adjudicators, acting individually, will continue to disagree on this point, perhaps forever.
>
> [55] As a result, at a conceptual level, the rule of law concern predominates in this case and warrants this Court intervening to end the discord and determine the legal point once and for all. We have to act as a tie-breaker.
>
> [56] *Dunsmuir* envisaged just such a situation and formulated a presumptive rule to be applied in circumstances such as these. Where a question of law is of "central importance to the legal system…and outside the…specialized area of expertise" of the administrative decision-maker, correctness is presumed to be the standard of review (at paragraph 55). Questions of central importance to the legal system are those whose "impact on the administration of justice as a whole" is such that they "require uniform and consistent answers" (at paragraph 60). In other words, for certain questions and for some questions in unusual circumstances, rule of law concerns predominate. In these, the court must decide the matter by giving its view of the correct answer.
>
> [57] In this case, the specialized expertise of adjudicators has not led to one accepted answer on the statutory interpretation issue before us. Further, the persistent discord – quite irresolvable among adjudicators – means that here, the rule of law concerns predominate. Therefore, in my view, the standard of review on this statutory interpretation point is correctness.

For a majority of the Supreme Court (*Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770), Justice Abella found, at para 17, that the appropriate standard for labour adjudicators or arbitrators interpreting statutes or agreements within their expertise was reasonableness; that "a handful of adjudicators" had taken a different approach to the interpretation of the *Code* did not justify deviating from this standard. Indeed, she noted that at most 18 cases out of over 1700 had adopted the view that dismissals without cause could be just dismissals under the *Code*. Applying the reasonableness standard, she concluded, at para 39, that the adjudicator's decision finding that a dismissal without cause was unjust under the *Code* was reasonable because:

> The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*.

Justices Côté and Brown, joined by Justice Moldaver, dissented. Like the Federal Court of Appeal, they claimed that rule of law concerns demanded a correctness standard of review:

> *Rule of Law Concerns Justify Correctness Review in This Case*
>
> [79] In our view, this case exposes a serious concern for the rule of law posed by presumptively deferential review of a decision-maker's interpretation of its home statute. In the specific context of this case, correctness review is justified. To conclude otherwise would abandon rule of law values in favour of indiscriminate deference to the administrative state.
>
> [80] This Court has recognized that, where deference is owed, a decision-maker's interpretation of the law will be reasonable if it falls within a range of intelligible, defensible outcomes: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 47. As a general proposition, we agree.
>
> [81] However, deferring in this way on matters of statutory interpretation opens up the possibility that different decision-makers may each reach opposing interpretations of the same provision, thereby creating "needless uncertainty in the law [in the sense that] individuals' rights [are] dependent on the identity of the decision-maker, not the law": J. M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.*101, at p. 105. This concern was raised forcefully by Stratas J.A. at the Federal Court of Appeal in the present case, and has been expressed elsewhere: see, e.g., *Altus Group Ltd. v. Calgary (City)*, 2015 ABCA 86 (CanLII), 599 A.R. 223, at paras. 31-33; *Abdoulrab v. Ontario Labour Relations Board*, 2009 ONCA 491 (CanLII), 95 O.R. (3d) 641, at para. 48; *Taub v. Investment Dealers Assn. of Canada*, 2009 ONCA 628 (CanLII), 98 O.R. (3d) 169, at paras. 65-67.
>
> [82] In theory, these disagreements can last forever. Administrative decision-makers are not bound by the principle of *stare decisis*, and many decision-makers — like the labour adjudicators in the present case — lack an institutional umbrella under which issues can be debated openly and a consensus position can emerge.
>
> [83] This is precisely what has occurred in the present case. For decades, labour adjudicators across the country have come to conflicting interpretations of the unjust dismissal provisions of Part III of the *Code*. These conflicting interpretations go to the heart of the federal employment law regime: Is an employer ever permitted to dismiss a non-unionized employee without cause? Some adjudicators say yes. Some say no. Lower courts have found both interpretations to be reasonable: see, e.g., Federal Court reasons and *Pierre v. Roseau River Tribal Council*, 1993 CanLII 2974 (FC), [1993] 3 F.C. 756 (T.D.).
>
> [84] The rule of law and the promise of orderly governance suffer as a result. When reasonableness review insulates conflicting interpretations from judicial resolution, the

identity of the decision-maker determines the outcome of individual complaints, not the law itself. And when this is the case, we allow the caprice of the administrative state to take precedence over the "general principle of normative order": *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 (CanLII), [2007] 1 S.C.R. 873, at para. 20; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 71; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at pp. 747-52.

[85] More troubling still, such a situation calls into question our legal system's foundational premise that there is "one law for all" (*Reference re Secession of Quebec*, at para. 71), since, realistically, what the law means depends on whether one's case is decided by one decision-maker or another. It goes without saying that the rule of law, upon which our Constitution is expressly founded, requires something closer to universal application.

[86] The cardinal values of certainty and predictability — which are themselves core principles of the rule of law (T. Bingham, *The Rule of Law* (2010), at p. 37) — are also compromised. In the context of the present case, leaving unresolved a divided body of arbitral decisions clouds an essential feature of the federal regime governing employment relationships. Federally regulated employers cannot predictably determine when and how they can dismiss their employees, while employees are left in a state of uncertainty about the extent of their job security.

[87] The conflicting adjudicative jurisprudence has done more than just create general uncertainty. It creates the risk that the *very same* federally regulated employer might be subjected to conflicting legal interpretations, such that it may be told in one case that it *can* dismiss an employee without cause, while being told in another case that it *cannot*. As Rothstein J. stated in his concurring opinion in *Canada (Citizenship and Immigration) v. Khosa*,2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 90, "[d]ivergent applications of legal rules undermine the integrity of the rule of law." This is not mere conjecture; it has already happened to Atomic Energy of Canada Limited, the respondent in the matter before us: see Federal Court reasons and *Champagne v. Atomic Energy of Canada Ltd.*, 2012 CanLII 97650 (CA LA), 2012 CanLII 97650. We would echo the statement of McLachlin J. (as she then was) in her concurring opinion in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, 1995 CanLII 101 (SCC), [1995] 2 S.C.R. 739, that judicial intervention may be required to resolve conflicting administrative decisions:

> We must not forget that the parties involved in problems of this sort are often providing services of considerable importance to the public. It is the task of the legal system to provide them with clear guidance as to their legal obligations so that they can provide the services that they are required to provide in an efficacious and legal manner. When two different boards have given conflicting definitions of a body's legal obligations, it is important that the body be afforded means of determining which obligation prevails and which it must obey. The boards themselves cannot determine this. The only body which can do it is the court. [para. 79]

[88] Finally, the existence of lingering disagreements amongst decision-makers undermines the very basis for deference. It makes little sense to defer to the interpretation of one decision-maker when it is clear that other similarly situated decision-makers — whose

decisions are equally entitled to deference — have reached a different result. To accord deference in these circumstances privileges the expertise of the decision-maker whose decision is currently subject to judicial review over the expertise of other similarly situated decision-makers without any compelling reason for doing so.

[89] We believe, therefore, that where there is lingering disagreement on a matter of statutory interpretation between administrative decision-makers, and where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is appropriate. This lingering disagreement presupposes that both interpretations are reasonable, since, of course, a contradictory but unreasonable decision will be quashed on judicial review and no lingering disagreement can result. But we wish to make one point clear: it does not matter whether one or one hundred decisions have been rendered that conflict with the "consensus" interpretation identified by the majority. As long as there is one conflicting but reasonable decision, its very existence undermines the rule of law: L. J. Wihak, "Wither the correctness standard of review? *Dunsmuir*, six years later" (2014), 27 *C.J.A.L.P.* 173, at p. 197.

[90] Such a lingering disagreement exists in this case. While the majority says that "almost all" of the adjudicators have adopted the interpretation of the legislative scheme that was accepted by the adjudicator in this case (para. 46), there is a significant line of cases adopting the opposite interpretation: see, e.g., *Sharma v. Maple Star Transport Ltd.*, 2015 CanLII 43356 (CA LA), 2015 CanLII 43356; *G & R Contracting Ltd. and Sandhu, Re*, 2015 CarswellNat 7465 (WL Can.); *Pare v. Corus Entertainment Inc.*, [2015] C.L.A.D. No. 103 (QL); *Madill v. Spruce Hollow Heavy Haul Ltd.*, [2015] C.L.A.D. No. 114 (QL); *Swanson and Qualicum First Nation, Re* (2015), 26 C.C.E.L. (4th) 139; *O'Brien v. Mushuau Innu First Nation*, 2015 CanLII 20942 (NL LA), 2015 CanLII 20942; *Newman v. Northern Thunderbird Air Inc.*, [2014] C.L.A.D. No. 248 (QL); *Taypotat v. Muscowpetung First Nation*, [2014] C.L.A.D. No. 53 (QL); *Payne and Bank of Montreal, Re* (2014), 16 C.C.E.L. (4th) 114; *Sharma and Beacon Transit Lines Inc., Re*, 2013 CarswellNat 4148 (WL Can.); *Klein v. Royal Canadian Mint*, 2013 CLLC ¶210-013; *Paul v. National Centre for First Nations Governance*, 2012 CanLII 85154 (CA LA), 2012 CanLII 85154; *Palmer v. Dempsey Laird Trucking Ltd.*, 2012 CarswellNat 1620 (WL Can.); *Gouchey v. Sturgeon Lake Cree Nation*,2011 CarswellNat 3430 (WL Can.); *Stark v. Tl'azt'en Nation*, 2011 CarswellNat 3074 (WL Can.); *Dominic v. Tl'azt'en Nation*, 2011 CarswellNat 3085 (WL Can.); *McCloud v. Samson Cree Nation*, [2011] C.L.A.D. No. 119 (QL); *Prosper v. PPADC Management Co.*, [2010] C.L.A.D. No. 430 (QL); *Perley v. Maliseet First Nation at Tobique*, 2010 CarswellNat 4618 (WL Can.); *Daniels v. Whitecap Dakota First Nation*, [2008] C.L.A.D. No. 135 (QL);*Armsworthy v. L.H. & Co.*, [2005] C.L.A.D. No. 161 (QL); *Indian Resource Council of Canada and Whitecap (Re)*, 2003 CarswellNat 7342 (WL Can.); *Cooper v. Exalta Transport Services Ltd.*, [2002] C.L.A.D. No. 612 (QL); *Chalifoux v. Driftpile First Nation*, [2000] C.L.A.D. No. 368 (QL); *Halkowich v. Fairford First Nation*, [1998] C.L.A.D. No. 486 (QL); *D. McCool Transport Ltd. v. Bosma*, [1998] C.L.A.D. No. 315 (QL), at paras. 12 et seq.; *Jalbert v. Westcan Bulk Transport Ltd.*, [1996] C.L.A.D. No. 631 (QL); *Knopp v. Westcan Bulk Transport Ltd.*, [1994] C.L.A.D. No. 172 (QL).

[91] This is not an exhaustive list, but serves merely to illustrate that discord exists in the adjudicative jurisprudence on the issue of whether the *Code* permits an employer to dismiss an employee without cause. It is the existence of this discord that undermines the

> rule of law and justifies correctness review in this case. Further, this is a matter of general importance, defining the basis of the employment relationship for thousands of Canadians. We would also add that questions regarding the dismissal of federal employees do not fall exclusively within the jurisdiction of labour adjudicators. As we will explain below, civil courts also possess jurisdiction over some of these matters. The narrow and distilled question of law raised by this case goes to the very heart of the federal employment relationship. Consistency in defining the nature of this relationship is therefore required.

The argument that the possibility of inconsistent interpretations of an important provision of the Canadian Human Rights Act justified correctness review of the Canadian Human Rights Tribunal's interpretation of the provision was again recently dismissed in *Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2018 SCC 31*, extracted in the supplement to Chapter 9. *Wilson* is also notable for Justice Abella's proposal, in *obiter dicta*, to reform the standard of review framework by collapsing correctness review into a broader conception of reasonableness review. With the exception of Justice Cromwell, who expressly disagreed with the proposal, Justice Abella's colleagues declined to endorse any proposal to redraw the standard of review framework. Justice Abella's comments are reproduced below and should be read in conjunction with our discussion in the section below titled "Correctness Review in the Guise of Reasonableness?".

> [19] But while it is true that the standard of review in this case falls easily into our jurisprudence, it seems to me that some general comments about standard of review are worth airing, albeit in *obiter*. There are undoubtedly many models that would help simplify the standard of review labyrinth we currently find ourselves in. I offer the following proposal as an option only, for purposes of starting the conversation about the way forward. Because it is only the beginning of the conversation, which will benefit over time from submissions from counsel, this proposal is not intended in any way to be comprehensive, definitive, or binding.
>
> [20] A substantial portion of the parties' factums and the decisions of the lower courts in this case were occupied with what the applicable standard of review should be. This, in my respectful view, is insupportable, and directs us institutionally to think about whether this obstacle course is necessary or whether there is a principled way to simplify the path to reviewing the merits.
>
> [21] For a start, it would be useful to go back to the basic principles set out in *Dunsmuir*, under which two approaches were enunciated for reviewing administrative decisions. The first is deferential, and applies when there is a range of reasonable outcomes defensible on the facts and law. This is by far the largest group of cases. Deference is succinctly explained in *Dunsmuir* as follows:
>
> It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. [para. 48]
>
> [22] The reason for the wide range is, as Justice John M. Evans explained, because "[d]eference . . . assumes that there is no uniquely correct answer to the question":

"Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101, at p. 108. The range will necessarily vary. As Chief Justice McLachlin noted, reasonableness "must be assessed in the context of the particular type of decision making involved and all relevant factors" and "takes its colour from the context": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, at paras. 18, citing with approval *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 59.

[23] The other approach, called correctness, was applied when only a single defensible answer is available. As set out in *Dunsmuir*, this applied to constitutional questions regarding the division of powers (para. 58), "true questions of jurisdiction or *vires*" (para. 59), questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (para. 60), and "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (para. 61).

[24] Most of the confusion in our jurisprudence has been over what to call the category of review in a particular case. Perhaps it is worth thinking about whether it is really necessary to engage in rhetorical debates about what to call our conclusions at the end of the review. Are we not saying essentially the same thing when we conclude that there is only a single "reasonable" answer available and when we say it is "correct"? And this leads to whether we need two different names for our approaches to judicial review, or whether both approaches can live comfortably under a more broadly conceived understanding of reasonableness.

[25] It may be helpful to review briefly how we got here. In *Dunsmuir*, this Court sought to provide "a principled framework that is more coherent and workable" for the judicial review of administrative decisions (para. 32). As a result, the three existing standards of review were replaced by two. The aim was to simplify judicial review. But collapsing three into two has not proven to be the runway to simplicity the Court had hoped it would be. In fact, the terminological battles over which of the three standards of review should apply have been replaced by those over the application of the remaining two. And so we still find the merits waiting in the wings for their chance to be seen and reviewed.

[26] However, where once the confusion was over the difference between patent unreasonableness and reasonableness *simpliciter*, we now find ourselves struggling over the difference between reasonableness and correctness. In my respectful view, this complicated entry into judicial review is hard to justify. Ironically, the explanation in *Dunsmuir* for changing the framework then remains a valid explanation for why it should be changed now, as the following excerpts show:

> The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.
>
> . . .

> Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.
>
> . . . it has become apparent that the present system must be simplified. [paras. 1 and 32-33]

[27] *Dunsmuir* had pointed out that courts were struggling with the "conceptual distinction" between two of the standards — patent unreasonableness and reasonableness *simpliciter* — and were finding that "any actual difference between them in terms of their operation appears to be illusory" (paras. 39-41). An argument can be made, as Prof. David Mullan has, that this Court too has blurred the conceptual distinctions in a number of cases, this time between correctness and reasonableness standards of review, and has sometimes engaged in "disguised correctness" review while ostensibly conducting a reasonableness review.[8] Others too have expressed concerns about inconsistency and confusion in how the standards have been applied.[9]The question then is whether there is a way to move forward that respects the underlying principles of judicial review which were so elegantly and definitively explained in *Dunsmuir*, while redesigning their implementation in a way that makes them easier to apply.

[28] The most obvious and frequently proposed reform of the current system is a single reviewing standard of reasonableness. Before accepting it, it is important to remember the rule of law imperatives of judicial review. *Dunsmuir* discussed the relationship between judicial review and the rule of law in the opening paragraphs of its analysis:

> As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an 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. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
>
> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal

> authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes. [paras. 27-28]

[29] What this means is that "[t]he legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. . . . In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits" (*Dunsmuir*, at para. 31).

[30] Notably, judicial review also "performs an important constitutional function in maintaining legislative supremacy", which results in "the court-centric conception of the rule of law [being] reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law": *Dunsmuir*, at para. 30, citing Justice Thomas Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures*, at p. V-12.

[31] Nothing *Dunsmuir* says about the rule of law suggests that constitutional compliance dictates how many standards of review are required. The only requirement, in fact, is that there *be* judicial review in order to ensure, in particular, that decision-makers do not exercise authority they do not have. I see nothing in its elaboration of rule of law principles that precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, as in the four categories singled out for correctness review in *Dunsmuir.*

[32] A single standard of reasonableness still invites the approach outlined in *Dunsmuir*, namely:

> . . . reasonableness is concerned . . . with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

[33] Approaching the analysis from the perspective of whether the outcome falls within a range of defensible outcomes has the advantage of being able to embrace comfortably the animating principles of both former categories of judicial review. Courts can apply a wider range for those kinds of issues and decision-makers traditionally given a measure of deference, and a narrow one of only one "defensible" outcome for those which formerly attracted a correctness review. Most decisions will continue to attract deference, as they did in *Dunsmuir*, which means, as Justice Evans noted

> [that] a court may be more likely to conclude that a range of reasonable interpretative choices exists, and that deference is meaningful, when the tribunal's authority is conferred in broad terms. If, for example, a tribunal is authorized to make a decision on the basis of the public interest, a reviewing court may well decide that the tribunal has a range of choices in selecting the factors it will consider in making its decision. At this point, questions of law shade imperceptibly into questions of discretion. Reasonableness review permits the court to determine whether the factors considered by the tribunal are rationally related to the generally multiple statutory objectives. It is not the

> court's role to identify the factors to be considered by the tribunal, let alone to reweigh them. [Footnote omitted; p. 110.]

[34] Even in statutory interpretation, the interpretive exercise will usually attract a wide range of reasonable outcomes. This Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559, for example, found that the Minister had considerable latitude in interpreting a statutory provision that required decisions be made in the "national interest".

[35] But there may be rare occasions where only one "defensible" outcome exists. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CANLII), [2011] 3 S.C.R. 471, for example, this Court found that the ordinary tools of statutory interpretation made it clear that the administrative body under review did not have the authority to award costs in a specific context. In the particular circumstances of that case, no other result fell within the range of reasonable outcomes. Similarly, this Court has set aside decisions when they fundamentally contradicted the purpose or policy underlying the statutory scheme: *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 (CanLII), [2012] 2 S.C.R. 108.

[36] The four categories, however, which were identified as attracting correctness under *Dunsmuir* based on rule of law principles, always yield only one reasonable outcome.

[37] I acknowledge that no attempt to simplify the review process will necessarily guarantee consistent outcomes. Even under the current *Dunsmuir* model, there have been cases in this Court where judges applied the same standard, yet came to different conclusions about the decisional effect of applying the standard.[10] But the goal is not to address all possible variables, it is to build on the theories developed in *Dunsmuir* and to apply them in a way that eliminates the need to sort cases into artificial categories.

[38] Even if, however, there proves to be little appetite for collapsing the two remaining standards of review, it would, I think, still be beneficial if the template so compellingly developed in *Dunsmuir*, were adhered to, including by applying the residual "correctness" standard only in those four circumstances *Dunsmuir* articulated.

[39] But as previously noted, in this case we need not do more than apply our usual approach to reasonableness. The issue here is whether the Adjudicator's interpretation of ss. 240 to 246 of the *Code* was reasonable. The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*. The alternative approach of severance pay in lieu falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" because it completely undermines this purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them. The rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator.

Chapter 14 – Applying the Standard of Review, Reasonableness Review, Reasonableness Review and Statutory Interpretation, p. 821

Add after discussion of *McLean* at p. 821:

The Supreme Court has also upheld as reasonable an adjudicator's interpretation of a statutory provision when it found, after examining the provision's meaning in light of its text, context and legislative objective, that the provision admitted of only one reasonable interpretation – the one arrived at by the adjudicator: *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300.

Chapter 14 – Applying the Standard of Review, Reasonableness and the Giving of Reasons, p. 824

Add to p. 829 after the extract from *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*:

The extent to which reviewing courts should supplement the reasons of administrative decision makers based on the *Dunsmuir* majority's endorsement of Professor David Dyzenhaus' concept of "deference as respect" requiring of courts "a respectful attention to the reasons offered or which could be offered in support of a decision" has been a troublesome issue. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, extracted above, the reviewing courts conducting reasonableness review had the benefit of a labour arbitrator's twelve-page award (albeit with a somewhat skeletal analysis of the collective agreement provisions). In *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*, 2011 SCC 61, [2011] 3 SCR 654, where there were no reasons from the Commissioner or his delegated adjudicator on the statutory interpretation issue raised on judicial review because the parties had not raised it, a reasonable basis for the decision was apparent in these decision makers' consistent prior decisions on that issue. In two subsequent decisions, the Court appeared to take a more relaxed approach to supplementing the administrative decision maker's reasons. In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 (extracted at p. 818), in the absence of reasons from the British Columbia Securities Commission regarding the interpretation of a statutory limitation period, the Court based its review on competing interpretations described in the parties' submissions. In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, 2016 SCC 47 (extracted in Chapter 9 of this supplement), in the absence of reasons from a municipal assessment board on a question of statutory interpretation, the Court based its review on the reasoning of a predecessor board on the meaning of the same provision and on its own analysis of that provision.

Summarizing the effect of this increasingly relaxed approach in *Canadian Union of Public Employees v Canada (Minister of Transport)*, 2017 FCA 164, [2017] F.C.J. No. 792, the Federal Court of Appeal stated, at para. 32, that "for a decision to be upheld as being reasonable, it may not even be necessary for the decision-maker to have provided any reasons at all if the record allows the reviewing court to discern how and why the decision was reached and the decision-maker's conclusion is defensible in light of the facts and applicable law."

In *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, [2018] S.C.J. No. 2, a majority of the Supreme Court provided welcome guidance on the circumstances in which it would not be appropriate for the reviewing courts to supplement reasons. Gabor Lukács, a passenger rights advocate, filed a complaint against Delta with the Canadian Transportation Agency, alleging that its policy on the carriage of obese passengers was discriminatory. In support of his complaint, he provided a copy of an email sent by Delta responding to a passenger's complaint about sitting next to a passenger who required additional space. Delta had apologized and set out its policy, which involved asking obese passengers to book an additional seat or buy a ticket on a later flight. The CTA denied Lukács standing and dismissed his complaint. Under the *Canada Transportation Act*, S.C. 1996, c. 10 the CTA has a broad discretion to hear and determine complaints:

> **37** The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

However, the CTA decided to interpret its discretion restrictively by applying the judge-made rules of private interest and public interest standing. It found that Lukács could not be granted private interest standing because he was not a large person and was not subject to Delta's policy. He was not aggrieved or affected and did not have any other sufficient interest. The CTA also denied Lukács public interest standing. It determined that a party seeking public interest standing had to show that: 1) there is a serious issue to be tried; 2) he or she has a genuine interest in the matter; and 3) the proceeding is a reasonable and effective means to bring the issue before the tribunal. Interpreting this test restrictively, the CTA found that public interest standing could be granted only for complaints raising the constitutionality of legislation or administrative action. Because Lukács' complaint did not involve constitutional questions, it denied him standing.

For the majority, Chief Justice McLachlin, as she then was, found, at para. 13, that the CTA's decision was unreasonable:

> The question in this case is whether the Agency reasonably exercised its discretion to dismiss Dr. Lukács' complaint. On a respectful reading of the Agency's reasons, I conclude that it did not. The decision does not satisfy the requirements of justification, transparency, and intelligibility for two reasons. First, the Agency presumed public interest standing is available and then applied a test that can never be met. This approach to standing unreasonably fettered the Agency's discretion. Second, the total denial of public interest standing is inconsistent with a reasonable interpretation of the Agency's legislative scheme.

First, noting at para. 17 that people complaining about airline policies could never get public interest standing under the CTA's test because such complaints never raised constitutional questions, she concluded that "the imposition of a test that can never be met could not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints." By allowing no complainants to have public interest standing, the CTA unreasonably fettered its discretion under the test to balance the preservation of judicial resources with access to justice and allow more complainants through the door. Second, the CTA's narrow interpretation of its power to hear complaints meant that complaints from public interest groups could never be heard, an impact that could not be supported by a reasonable interpretation of the legislative scheme. In particular, the Act allowed the CTA to investigate based on a complaint or of its own motion and to correct discriminatory terms and conditions before passengers were injured. As Chief Justice McLachlin observed, at para 20, "refus[ing] a complaint based solely on the identity of the group bringing it prevents the Agency from hearing potentially highly relevant complaints, and hinders its ability to fulfill the statutory scheme's objective." Quashing the decision, she sent the matter back to the CTA for it to reinterpret the scope of its discretionary power to hear complaints and apply it to the complaint.

Justice Abella, joined by Justices Moldaver and Karakatsanis, dissented. In her view, even though the CTA's reasons for denying Lukács standing were deficient, that outcome was reasonable. In her view, Lukács' complaint was purely theoretical and unsupported by evidence. He had not shown why passengers directly affected by Delta's policy could not submit their own complaint. Chief Justice McLachlin rejected Justice Abella's effort to supplement the CTA's reasons:

> 22 Delta acknowledges that the Agency's reasons are deficient. It argues, however, that the reviewing court is required to examine not only the reasons given, but the reasons that could be given to support the Agency's decision: see *Alberta Teachers*, at para. 53; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury*

Board), 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12. Specifically, it urges this Court to look to the justifications for denying standing enumerated in *Lukács v. Porter Airlines Inc.*, Canadian Transportation Agency, Decision No. 121-C-A-2016, April 22, 2016.

23 Supplementing reasons may be appropriate in cases where the reasons are either non-existent or insufficient. In *Alberta Teachers*, no reasons were provided because the issue had not been raised before the decision maker (para. 51). In *Newfoundland Nurses*, the reasons were alleged to be insufficient (para. 8). These authorities are distinguishable from this case, where the Agency provided detailed reasons that enumerated and then strictly applied a test unsupported by the statutory scheme.

24 The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in Alberta Teachers when he cautioned:

The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" [para. 54, quoting *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56].

In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.

25 In my view, this is not a case where merely supplementing the reasons can render the decision reasonable. The Agency clearly stated a test for public interest standing and applied that test. The Agency could have adapted the test so that the complainants under its legislative scheme could actually meet it. Of course, it could also have exercised its discretion without any reference to standing at all. But it did neither of these things. The reviewing court must not do them in the Agency's place for three principal reasons.

26 First, to do so would require erasing the public interest standing test and its application, as set out by the Agency, and replacing them with reasons and justifications formulated by this Court. Delta has not pointed to any administrative law authority that would justify this approach.

27 Second, it would undermine, if not negate, the vital role of reasons in administrative law. Dunsmuir still stands for the proposition that reviewing courts must look at both the reasons and the outcome. While this does not require "two discrete analyses" (*Newfoundland Nurses*, at para. 14), it means that reasons still matter. If we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole consideration. With that approach, as long as the reviewing court could come up with some possible justification -- even if it contradicted the reasons given by the administrative body -- the decision would be reasonable. This goes too far. It is important to maintain the requirement that where

administrative bodies provide reasons for their decisions, they do so in an intelligible, justified, and transparent way.

28 Finally, this would amount to the reviewing court assuming the role of the Agency by developing and applying a complaints procedure under the Act. It would be ironic to allow the appeal in the name of deference and then stipulate how the Agency should determine when to hear a complaint: see *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11.

29 With respect, I am of the view that this is the approach taken by Abella J. in this case. Abella J. explains that the outcome is reasonable because Dr. Lukács' complaint is not "an effective and reasonable means of bringing the issue before the Agency" (para. 64) and because he provides no explanation for why an affected passenger could not have submitted his or her own complaint (para. 65). These are not justifications that were provided by the Agency, which set out that the public interest test requires a complaint that raises the constitutionality of legislation or the illegal exercise of administrative authority. The Agency then dismissed Dr. Lukács' complaint on the sole basis that his complaint did neither of these things. I do not see how my colleague's justifications can be used to supplement the Agency's reasons, unless the Agency's own formulation and justification of the legal test is struck from the reasons and these justifications are put in their place. This goes beyond paying respectful attention to the reasons or appropriately supplementing them. It amounts instead to replacing the Agency's reasons with those of this Court and effectively leaving the Agency with a standing test not of its own making.

30 I would agree with Abella J., however, that the Court of Appeal should not have held that standing rules could not be considered by the Agency in its reconsideration of the matter. The better approach is to send this matter back to the Agency for reconsideration in its entirety. In its order, the Court of Appeal stipulated that the Agency must reconsider the matter "otherwise than on the basis of standing" (para. 32). I would not structure the order so strictly so as to foreclose the possibility that the Agency could reasonably adapt the standing tests of civil courts in light of its statutory scheme. As my colleague observes, s. 25 of the Act confers on the Agency "all the powers, rights and privileges that are vested in a superior court" (para. 56) with respect to all matters within its jurisdiction. This language indicates the legislator's intention to give deference to the Agency's determination of its complaints process.

31 Of course, there are numerous other ways that the Agency could exercise its discretion under s. 37 of the Act, including examining whether the complaint is in good faith, timely, vexatious, duplicative, or in line with the Agency's workload and prioritization of cases. The Agency may also wish to consider whether the claim raises a serious issue to be tried or, as Abella J. has done, whether the complaint is based on sufficient evidence. It is not for this Court to tell the Agency which of these methods is preferable. Deference requires that we let the Agency determine for itself how to use its discretion, provided it does so reasonably.

Question

Could the third justification advanced by Chief Justice McLachlin against supplementing the reasons (as opposed to the first two) be extended to cases where the administrative decision maker has simply failed to provide reasons? If so, can the approach to reasons followed by the Supreme Court in *Edmonton East* and *McLean* be reconciled with the Court's prescription in *Lukács*?

Following *Lukács*, significant divisions between members of the Supreme Court have appeared with respect to the sufficiency of reasons on reasonableness review and the role of reviewing courts in supplementing reasons. In *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] S.C.J. No. 4, the Court split 5 to 4 on these issues. *Williams Lake* was the first review of a Specific Claims Tribunal decision at the Supreme Court. In a lengthy decision that found more than one basis for liability, the Specific Claims Tribunal held the Federal Crown liable for a breach of fiduciary duty to the Band arising from commitments to protect its village land that arose prior to confederation (proceedings on compensation were to follow the initial hearing on liability). The determination of liability involved findings that the Colony of British Columbia failed to implement or enforce its proclamation that exempted Indian village lands from pre-emption by settlers. As a result, the Band's desired village lands were encroached by settlers. The Tribunal further held that after BC joined confederation in 1871, the newly minted Federal Crown was responsible for this breach and did not correct it when it failed to recover the original village lands for the Band and eventually set aside different lands for the Band as reserve lands.

A key question before the Tribunal was whether the pre-confederation legal obligation between the Imperial government and the Band "became" a legal obligation of "the Crown" under the *Specific Claims Tribunal Act*, S.C. 2008, c. 22. In other words, could the Federal Crown be responsible for the pre-confederation acts of the colonial government in relation to the village land? The answer to that question depended on the Tribunal's interpretation of s. 14(2) of the *Act*.

> Extended meaning of Crown -- obligations
>
> **14 (2)** For the purpose of applying paragraphs (1)(a) to (c) in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became -- or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become -- the responsibility of the Crown in right of Canada.

The Tribunal's reasons on how the legal obligations of the Colonial Crown became the legal obligations of the new Federal Crown were sparse and conclusory. Writing for the majority, Justice Wagner, as he then was, acknowledged this deficiency but determined that supplementation was appropriate:

> **37** The Tribunal's manner of explaining itself may strike a reviewing court as conclusory. Many of the propositions that make up its analysis, and that come under scrutiny on judicial review, could have been the subject of a lengthy analysis on their own with reference to the basic principles that govern the Crown-Aboriginal fiduciary relationship. However, to fulfil the timeliness aspect of its mandate, the Tribunal must be able to rely on reviewing

> courts to endeavour to make sense of its reasons by looking to the authorities on which it relied, the submissions of the parties to which it responded and the materials before it: *Newfoundland Nurses*, at paras. 17-18. Failure by reviewing courts to do so risks defeating the purpose of delegating the resolution of long standing grievances to a highly specialized group of superior court judges specifically tasked with resolving them efficiently.

Endeavouring to make sense of the Tribunal's reasons over thirty paragraphs of his 131-paragraph judgment, Wagner J. concluded that the Tribunal had decided that in certain cases, fiduciary obligations owed by the colonial government were obligations owed by the "Crown" whether federal or colonial officials were responsible for discharging these obligations at any given point in time. He found that this view of the Crown as a single, continuing and indivisible entity was consistent with Parliament's intent and the legislative history behind the *Specific Claims Tribunal Act* and upheld the Tribunal's decision as reasonable.

Rowe and Côté JJ., in partial dissent, were of the view that this was not an appropriate case for the reviewing court to supplement the reasons. Their detailed reasons on this issue are reproduced here:

> 142 Where they are provided, reasons are an essential focus for reviewing courts as they describe both the result and -- crucially -- the justificatory process used to reach that result. Reasons are the roadmap to understanding both how and why a decision under review was reached. Where they are required by statute or proffered as a matter of practice, they often demonstrate the reasonableness of the decision in question. Conversely, as stated in *Edmonton (City)*, "[w]hen a tribunal does not give reasons, it makes the task of determining the justification and intelligibility of the decision more challenging": para. 36. This is why deficient or insufficient reasons will often cast doubt on the reasonableness of the decision under review. As the goal of reasonableness review is to "understand why the tribunal made its decision" and "determine whether [its] conclusion is within the range of acceptable outcomes", reasons that allow for neither will be hard pressed to meet the requirements of justification, transparency and intelligibility: *Newfoundland Nurses*, at para. 16.
>
> 143 It is not that reasons need attain a uniform standard of perfection. In many cases, reviewing courts will have a certain latitude to uphold administrative decisions that would, under stricter scrutiny, be deficient in their justification. In so doing, reviewing courts pay "respectful attention to the reasons offered or which could be offered in support of a decision": *Dunsmuir*, at para. 48, quoting D. Dyzenhaus [citation omitted] As the Court explained in *Newfoundland Nurses*, many "decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist": para. 13. Because of this, "[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis": *ibid*., at para. 16. With this in mind, rather than engage in "a line-by-line treasure hunt for error", reviewing courts may look beyond the words of the reasons to consider the decision as an "organic whole": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54.

144 Thus, in certain circumstances, reviewing courts will supplement the reasons under review: *Newfoundland Nurses*, at para. 12; *Alberta Teachers*, at paras. 53-54. Courts do so in a number of ways: they may read between the lines for an implied justification consistent with the statutory mandate of the decision-maker (as in *Agraira* v. *Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 57-58); they may look to the record and the parties' submissions (as in *McLean*, at paras. 71-72); or they may consider other decisions rendered by the same decision-maker in which a more detailed justification is provided (as in *Alberta Teachers*, at para. 56).

145 The power of reviewing courts to supplement deficient reasons in this way, however, is not limitless. In *Alberta Teachers*, Justice Rothstein warned against the risk of excessive deference in the face of reasons "which could be offered in support of a decision": para. 54; see also Dunsmuir, at para. 48. Writing for a majority of the Court, he stated:

> I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision" (*Canada (Citizenship and Immigration)* v. *Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, per Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. [Emphasis added; para. 54.]

146 In other words, there must be a sufficient basis in the reasons themselves to which can be added supplementary justification by a reviewing court. The wisdom of this cautionary approach was most recently reaffirmed by the majority in *Delta Air Lines Inc.* v. *Lukács*, 2018 SCC 2, which held that, "while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided": para. 24. Although reviewing courts may sometimes build upon insufficient reasons, they are not entitled to rewrite them in order to uphold the underlying decision. Indeed, to hold otherwise would be to "undermine, if not negate, the vital role of reasons in administrative law": *ibid*., at para. 27. In my respectful view, this approach should have prevailed in the present appeal.

III. Section 14(2) of the *Specific Claims Tribunal Act*

147 The crux of the disagreement in this appeal relates to the Tribunal's interpretation -- or, rather, its lack thereof -- of s. 14(2) of the Act… [The text of s. 14(2) is omitted.]

148 Based on the words of the Act, for the Tribunal to hold the federal Crown liable for any obligation or liability of the "Sovereign of Great Britain and its colonies", the Tribunal must

find that such an obligation or liability "became" (or "would ... have become") the obligation of the federal Crown. The question, then, is whether the Tribunal reasonably concluded that the obligation incurred by the Colony relative to the band "became" the responsibility of the federal Crown for the purposes of s. 14(2) of the Act. As Justice Brown points out, "s. 14(2) is not a self-contained, stand-alone source of liability that may be imposed upon Canada. Liability under s. 14(2) is conditioned upon something else -- that is, something other than s. 14(2) itself -- which made the obligation or liability become Canada's responsibility": para. 182 (emphasis in original). I agree, and would add that the majority does not appear to disagree on this point; indeed, a significant part of its reasons address how, in its view, the Tribunal implicitly found that the Colony came within the extended meaning of "Crown" per s. 14(2). Based on this finding, the majority concludes that the Tribunal reasonably held Canada liable for the band's pre-Confederation claim under s. 14(1)(b).

149 By contrast with the analysis set out by the majority, the Tribunal itself largely limited its discussion of s. 14(2) to the following:

> The legal obligations that "... became or would have become the responsibility of the Crown in right of Canada" are those that became obligations of Canada on confederation, and for which Canada would, if in the place of the colony, have been in breach. [para. 164]

150 In response to arguments made by the federal Crown on the meaning of s. 14(2), the Tribunal then added:

> As I understand the Respondent's position, it is that SCTA, s. 14(2) does not expand the meaning of "legal obligation" in s. 14(1)(b) to apply constitutional obligations of Canada where the claim is grounded in a breach of legal obligation of the colony. Whether or not this is correct, it has no bearing on whether the Claimant, as the Respondent says: "can file historic, pre-confederation claims pursuant to Section 14 of the Act as they could under the Specific Claims Policy" (para 258). [para. 242]

151 Beyond these conclusory statements, the Tribunal was virtually silent on the operation of s. 14(2) of the Act. This is all the more puzzling given that, in all other respects, the reasons were exhaustive. The near-total silence of the Tribunal with respect to s. 14(2) can be seen in two ways: either the Tribunal saw the operation of s. 14(2) as so obvious as not to require interpretation or -- more likely -- as being wholly irrelevant to the validation of pre-Confederation claims. Given the pivotal role played by s. 14(2) in the scheme of the Act, however, this lack of justification -- this absence of reasons -- is untenable. The majority implicitly accepts this by setting out at great length and in considerable detail what the Tribunal might have given as reasons relative to the operation of s. 14(2).

152 In supplementing -- or, one might suggest, substituting -- the Tribunal's sparse reasons on the subject of s. 14(2), the majority sets out an analysis based on the common law of fiduciary obligations: paras. 117-20. Its reasons are offered on the basis that "they are grounded in the Tribunal's reasons and supplement them by reference to the materials and arguments before it and the legal principles underlying the decision as a whole": majority

reasons, at para. 116. While its reasons lead to the same conclusion as the Tribunal, this is the extent of their commonality. Having said nothing about the interplay between s. 14(2) and the common law of fiduciary obligations, the Tribunal did no more than state a bald conclusion about the operation of the Act relative to pre-Confederation claims. The reasons of the majority, thus, are "supplementary" in that they supply the entirety of the analysis.

153 I acknowledge that *Alberta Teachers* allows reviewing courts to supplement reasons that are silent on certain issues that may have been implicitly decided: para. 53. They may only do so, however, if they are persuaded that the issue was not raised by the parties, which accounts for the decision-maker's silence on the issue. In these circumstances, a reviewing court can provide a supplementary justification to elucidate the implied reasoning. In this appeal, it is clear from the record that the interpretation of s. 14(2) was raised by the parties. This bars the reviewing court from implying its preferred interpretation in the bald conclusion of the Tribunal relative to s. 14(2).

154 In my view, the cautious standard set out in Alberta Teachers requires more than a bald conclusion on a crucial point of law before reviewing courts embark upon the task of supplementing reasons. While an administrative "decision-maker is not required to make an explicit finding on each constituent element, however subordinate" (*Newfoundland Nurses*, at para. 16), administrative decision-makers must nonetheless provide a certain basis of analysis on essential questions of law. Given its pivotal role in imposing liability on the federal Crown, s. 14(2) is such an essential element. On this point, the comments of Justice Rennie in *Komolafe* v. *Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, are apposite:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page. [Emphasis added; para. 11.]

155 A clear proposition can be drawn from the interplay of *Alberta Teachers* and *Newfoundland Nurses*. When the implied line of reasoning is obvious -- in light of the record or similar decisions, for example -- supplementing may well be an appropriate means of paying "respectful attention to the reasons offered or which could be offered in support of a decision": *Dunsmuir*, at para 48. However, when faced with an absence of analysis on an essential element such that the implied line of reasoning is inconclusive or, as here, completely obscure, the reviewing court should not impute its own justification as a means of upholding the decision: *Delta Air Lines*, at para. 27. Supplementary reasons must build upon those actually provided by the legislature's chosen decision-maker. They should not spring from the judicial imagination *ex nihilo*.

Rowe and Côté JJ. would have remitted the matter to the Tribunal "for further reasons on whether -- and how -- the obligations and liabilities of the Colony pursuant to s. 14(1)(b) of the Act "became" those of the federal Crown pursuant to s. 14(2)."

Brown J. and McLachlin CJ. also dissented, finding that the Tribunal's conclusions that Canada had breached its fiduciary duties to the Band and that Canada was liable for the Colony's breach under s. 14(2) were unreasonable because, *inter alia*, they were unsupported by the evidence and failed to account for the limits of Canada's responsibilities and powers under the Terms of Union. Their criticism of the majority's decision to supplement the Tribunal's reasons was even more pointed:

> 195 I am mindful of the "respectful attention to the reasons offered or which could be offered in support" of the Tribunal's decision that reasonableness review entails: *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. In my view, however, the Tribunal's treatment in its reasons of s. 14(2) lacks each of the principal hallmarks of a reasonable decision: justification, transparency, and intelligibility (*Dunsmuir*, at para. 47). This was, so far as I am aware, the Tribunal's first opportunity to interpret the extended meaning of "the Crown" in s. 14(2). Its failure to do so is particularly unfortunate in light of the unique role this provision plays in resolving claims arising from pre-Union events. Further, statutory text remains both the starting point of the exercise of statutory interpretation and the focal point of the analysis: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. No clear explanation is offered for the Tribunal's evident reading of s. 14(2) as "defin[ing] the Crown as a single, continuous, and indivisible entity": majority reasons, at para. 127. This is in no sense anchored to the words actually chosen by Parliament. Had such indiscriminate "Crown" liability been Parliament's intended result, the provision could easily have been drafted accordingly.
>
> 196 In sum, the Tribunal's reasons for finding that Canada was liable for breaches by the Colony pursuant to s. 14(2) find no support in, and indeed are entirely untethered from, the applicable statutory scheme which it was bound to apply. Its decision was therefore unreasonable.
>
> 197 It may well be that the *Terms of Union*, correctly understood and interpreted, *do* support the Tribunal's conclusions regarding Canada's liability under s. 14(2). But whether that is so, and why, cannot be ascertained from the Tribunal's reasons. Those reasons should therefore not be the last word on the matter. I would return this matter to the Tribunal for determination of whether, pursuant to s. 14(2), the legal obligation that was breached or the liability relating to its breach became the responsibility of Canada. This would entail accounting for whether, as required by Article 13 of the *Terms of Union*, Canada continued, in respect of lands reserved for Indians, "a policy as liberal as that [prior to Union] pursued by the British Columbia Government".
>
> 198 Further, I note the arguments of the joint interveners the Cowichan Tribes, the Stz'uminus First Nation, the Penelakut Tribe and the Halalt First Nation that Canada may have assumed liability for outstanding breaches of colonial fiduciary obligations under Article 1 of the Terms of Union, inasmuch as those breaches might qualify as "debts and liabilities of British Columbia existing at the time of the Union". On that point, the respondent counters that the language of Article 1 connotes only recorded public debt known at the time of Union: R.F., at para. 127. As I have already noted, the Tribunal chose not to address the effect of Article 1. Remitting this matter back to the Tribunal would

allow it to also consider whether, by operation of Article 1 of the Terms of Union, s. 14(2) can be said to impose responsibility upon Canada on the basis that "liability relating to [the breach of a legal obligation] became ... the responsibility of the Crown in right of Canada".

…

IV. Supplementing the Tribunal's Reasons

199 Although its reasons all but concede that the Tribunal's interpretation of s. 14(2) is wrong, the majority seeks to supplement the Tribunal's deficient reasons regarding s. 14(2).

200 More particularly, the majority seeks to account for "what the Tribunal meant when it said s. 14(2) included obligations 'for which Canada would, if in the place of the colony, have been in breach'": para. 118, quoting T.R., at para. 164. And, we are told, the solution to the puzzle is found in the Tribunal's conclusion that Canada owed a fiduciary duty in relation to the Village Lands when it assumed discretionary control in respect thereof. Both Canada and the Colony had "recognized the band's specific Aboriginal interest" in those lands, the majority says: para. 117. Meaning, at the time of Union, Canada "assumed the office of fiduciary": para. 117. "On this approach", the majority says, "a fiduciary obligation that 'became ... the responsibility' of [Canada] for the purpose of s. 14(2) is one that mirrors a post-Confederation fiduciary obligation of Canada": para. 119.

201 In other words, the sui generis fiduciary duty which the majority has found Canada to have owed and breached after Union is now doing double-duty: it is not only the basis for a finding under s. 14(1)(c) that Canada breached a legal obligation, but also the automatic trigger for finding that Canada is liable for the Colony's breach of a legal obligation under s. 14(1)(b) and s. 14(2). On this understanding of s. 14(2), a finding of a post-Union breach of a legal obligation under s. 14(1)(c) would appear to be determinative of Canada's liability in respect of pre-Union breaches as well. Parliament, ex hypothesi, need not have bothered to legislate s. 14(2) -- or, at least, s. 14(2) is superfluous where a related post-Union breach by Canada is made out.

202 The majority describes this as a "backward-looking 'projection' of Canada's obligations for the purpose of identifying fiduciary obligations falling within s. 14(2)" (para. 129), which it argues is reasonable because it is consistent with Indigenous views as to the continuity of fiduciary relationships with the Crown, and with Canada's growing acceptance of responsibility for remedying historical wrongs. All this may be so. But none of it justifies the Tribunal's reading out of clear statutory text. The Tribunal is no more constitutionally empowered than this Court to aim for a result consistent with its own policy preferences by holding fast to the bits of statutory text that it likes while ignoring the bits that it does not. The proper focus when interpreting legislation is, and must always be, on what the legislator actually said, not on what one might wish or pretend it to have said: Williams v. Canada (Public Safety and Emergency Preparedness), 2017 FCA 252, at paras. 48-50 (CanLII).

203 It is therefore worth reviewing the terms upon which Parliament conditioned the extended definition of "the Crown" in s. 14(2). A legal obligation of the Imperial Crown, or the Imperial Crown's liability for the breach of a legal obligation, may form the subject of a claim against the Crown to the extent that such obligation or liability became the

responsibility of the Crown in right of Canada. While the fact of a legal obligation or of liability relating to its breach is significant in that it raises the issue to be decided by applying s. 14(2), it is not determinative. That legal obligation or liability relating to its breach must still be shown to have otherwise become the responsibility of Canada. It is no answer to the Tribunal's eliding of this key lynchpin to imposing liability upon Canada under s. 14(2) that the considerations which put s. 14(2) into play were present. All they do is raise the question of whether Canada is liable for the Colony's breach. They do not furnish the answer.

204 Like the Tribunal's actual reasons, the majority's "backward-looking projection" theory fails to account for the intention of Parliament as recorded in the relevant statutory language. Far from accounting for the text of s. 14(2), the Tribunal's analysis seems to assume that s. 14(2) is the product of poor drafting or oversight (or, as counsel for the band put it, that it was not drafted with "the utmost felicity": transcript, at p. 34). But this Court should not endorse that assumption. Rather, it should assume that Parliament means what it says -- especially here, where the extended definition of the "Crown" in s. 14(2) is hardly accidental. As the majority itself observes (at para. 125), it was crafted concomitantly with the shift from the use of the term "federal government" to "Crown" in Canada's specific claims policy.

205 Respectfully, then, the majority's theory offers no cogent rationalization of the Tribunal's treatment of s. 14(2). Nor does the majority's theory furnish any comprehensible guidance to the Tribunal as it adjudicates the claims brought before it, whether as to this "projected" obligation's content, its scope, its limits, or the steps that might satisfy it in any given case. Nor does it explain how the Tribunal is to apply ss. 14(1)(b) and 14(2) where the legislative shortcut that the majority invents via its "backward-looking projection" theory is unavailable -- that is, where direct liability has not been fortuitously imposed on Canada for breach of a related legal obligation under s. 14(1)(c).

206 The majority, however, says that its "backward-looking projection" theory is "grounded in the Tribunal's reasons": para. 116. But, and with respect, it is nowhere even remotely suggested in those reasons. The majority also says that this rationale finds support in *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, and *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85. But, and again with respect, the majority cites to passages on resolving textual ambiguity and inconclusive statutory definitions, respectively -- neither of which are present here. There is simply no support for the majority's "backward-looking projection" theory in the law of Canada as stated by this Court, any other court, or Parliament. Indeed, Parliament has legislated to the contrary. In my view, the majority has gone well beyond "supplementing" the reasons of the Tribunal, and has done what this Court cautioned against in *Alberta (Information and Privacy Commissioner)* v. *Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 -- specifically, "to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting P*etro-Canada* v. *Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at para. 56. In other words, the majority does what this Court has just recently warned against in *Delta Air Lines Inc.* v. *Lukács*, 2018 SCC 2, by "replacing the reasons of administrative bodies with [the Court's] own, [such that] the outcome of administrative decisions becomes the sole consideration": para. 27 (emphasis added).

> 207 There is much wisdom in those cautionary notes. Judicial review is not artificial resuscitation. As slow as reviewing courts ought to be to reach such a conclusion, sometimes a statutory delegate's reasons for decision are truly indefensible by any standard. This is one of those times. The Tribunal's reasons for finding that Canada is liable under s. 14(1)(b) for the Colony's breach are just not amenable to judicial supplementing, and this Court should not strain to do so by insisting that, if we just look hard enough, we will be able to see what really isn't there.
>
> 208 I add this. The specific claims process is the product of substantial and complex consultation and carefully crafted legislation. For that reason alone, this Court should not indulge the Tribunal's distortion of the ground rules of this important project. To be sure, the Tribunal's reasons are entitled to "respectful attention". But so is Parliament's carefully expressed direction.
>
> 209 But the stakes here are even higher. It is difficult to overstate the significance of this matter to the ongoing project of reconciliation between the Canadian state and Indigenous peoples, and of remedying historical wrongs. This is particularly so in British Columbia, as the issues under consideration at the Tribunal go to the heart of the constitutional accord represented by the Terms of Union. Rights and, just as importantly, responsibilities -- including, I stress, responsibilities whose discharge is now of potentially central importance to achieving reconciliation in British Columbia -- were assigned thereunder and constitutionally entrenched, by mutual accord, as between British Columbia and Canada. The Tribunal's reasons, and the legally dubious and unsourced theory by which the majority seeks to defibrillate those reasons, elide that constitutional division of responsibilities, and thereby risk upsetting that accord.

Note:

For additional insight on the Court's recent jurisprudence on the role of reasons in reasonableness analysis, see Paul Daly, "Reasons and Reasonableness in Administrative Law: *Delta Air Lines Inc. v Lukács*" (2018) 31 C.J.A.L.P. 209.

Most recently, in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, the Supreme Court examined the issue of supplementation of reasons, this time in the context of discretionary decisions that engage the *Charter* guarantee of freedom of religion. Trinity Western University, a privately funded evangelical Christian university located in British Columbia, sought to open a law school where law could be taught from a Christian perspective in a religious environment. Evangelical members of TWU's community believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct provides an environment where students can grow spiritually. These rules of conduct were reflected in a community covenant agreement (the "Covenant") which students and faculty were required to sign and obey as a condition of attendance or employment. Among other things, the Covenant prohibited "sexual intimacy that violates the sacredness of marriage between a man and a woman". Under the Law Society Rules adopted under British Columbia's *Legal Profession Act* (LPA), students seeking to enroll in the Law Society of British Columbia's (LSBC) bar admission program required proof of academic qualification – a law degree issued by an "approved" common law faculty of law in a Canadian university. An approved law faculty was defined in the Law Society rules as one that had been approved by the Federation of Law Societies unless the LSBC's Benchers adopted a resolution declaring it was not approved. After the Federation approved TWU's law school, the Benchers announced

they would be considering whether to declare that TWU's law school was not an approved faculty of law. At a first meeting, after reviewing submissions and information from TWU, submissions from the profession and the public and various legal opinions, the Benchers decided against the proposed resolution and TWU's law school remained approved. LSBC members reacted by requisitioning a Special General Meeting at which over 3000 of the approximately 4000 participating members voted in favour of a resolution not to approve the law school. At a second meeting, the Benchers met to decide how to respond to the outcome of the Special General Meeting. Rather than immediately implement the members' resolution, the Benchers decided to hold a referendum on the issue of TWU's law school approval and agreed to be bound by the result if a third of the members voted in the referendum and two-thirds of the votes favoured implementation of the members' resolution against approval. When nearly three quarters of the over 8000 members voting in the referendum voted against approval of TWU's law school, the Benchers followed through on their previous commitment and, convening at a third meeting, passed a resolution declaring that TWU's law school was not an approved faculty of law.

TWU and a prospective law student applied for judicial review of the LSBC's decision. Both British Columbia's Supreme Court and Court of Appeal held that by binding themselves to the referendum decision, the Benchers had improperly fettered their discretion and failed to balance the potential infringement of religious freedom with the relevant statutory objectives. The Court of Appeal decided that, in any event, the decision not to approve the law school was not a proportionate balance between the LSBC's statutory objectives and the relevant *Charter* protections. A majority of the Supreme Court found that the LSBC was entitled under its enabling statute to consider TWU's admissions policies and to hold a referendum of its members in deciding whether to approve its proposed law school. It also determined that the LSBC's decision limited the freedom of religion of members of the TWU community. Finally, it decided that the LSBC's decision was reasonable because it reflected a proportionate balance of the *Charter* protection and the statutory objectives. In doing so, it determined that the LSBC's decision-making process showed the transparency, intelligibility and justification required of reasonable decisions, a conclusion that attracted a strong dissent.

In *Doré*, the Supreme Court decided that administrative decision-makers exercising statutory discretion had to balance relevant *Charter* values with the statutory objectives. In doing so, they were to first consider the statutory objectives and then ask how the *Charter* values would best be protected in view of the statutory objectives. This balancing of the severity of the interference of the *Charter* protection with the statutory objectives was at the core of the proportionality exercise. Relying on the process outlined in *Doré*, the British Columbia Court of Appeal had decided that in deferring to the vote of the majority of LSBC members in a referendum rather than engaging in "any exploration of how the *Charter* values in issue… could best be protected in view of the objectives of the *Legal Profession Act*," the Benchers had failed to fulfil their statutory duties and had instead unlawfully fettered their discretion.

The Benchers' decision raised the issue of how courts should conduct a reasonableness review of decisions by bodies that do not usually give reasons for their decisions. In addition to law societies, many elected or appointed bodies, including municipalities enacting by-laws or the executive branch promulgating regulations, make decisions on the basis of votes conducted after debates and, occasionally, input from the public and affected parties. The majority decided that the Benchers' failure to give formal reasons outlining how they had balanced the potential *Charter* limitation against the statutory objectives was not fatal to the reasonableness of their decision. The Court observed, at paras. 52-53, that while a reasonable decision must both fall within a range of possible, acceptable outcomes and exhibit justification, transparency and intelligibility within the decision-making process, the requirements of process varied

with the context and nature of the decision-making process. Relying on *Catalyst Paper Corp.* v. *North Cowichan (District)*, 2012 SCC 2 (a case involving the review of a by-law passed by a municipal council) for the proposition that "there was no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process," Justice Abella, for a majority of the Court, decided that the LSBC Benchers, most of whom served as elected representatives, were not required to justify through formal reasons their decision to refuse to approve TWU's proposed law school by a majority vote:

> 55 Given this context, the LSBC was not required to give reasons formally explaining why the decision to refuse to approve TWU's proposed law school amounted to a proportionate balancing of freedom of religion with the statutory objectives of the LPA. It is clear from the speeches that the LSBC Benchers made during the April 11, 2014 and September 26, 2014 meetings that they were alive to the question of the balance to be struck between freedom of religion and their statutory duties.
>
> 56 As the Benchers were alive to the issues, we must then assess the reasonableness of their decision. Reasonableness review requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (*Dunsmuir*, at para. 48 (emphasis added); see also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). Reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 52, quoting *Newfoundland Nurses*, at para. 15). As we will explain, the Benchers came to a decision that reflects a proportionate balancing.

Dissenting, Brown and Côté JJ. did not accept the majority's view that the LSBC's decision exhibited the justification, transparency and intelligibility within the decision-making process required to pass muster under a reasonableness review. *Doré* itself had highlighted the importance of the reasoning process that must underlie administrative decision-making where a *Charter* right is at issue:

> 294 (…) While the Benchers may not have had a duty to provide formal reasons (Majority Reasons, at para. 55), the rationale for deference under *Doré* -- expertise in applying the *Charter* to a specific set of facts (paras. 47-48) -- requires more engagement and consideration from an administrative decision-maker than simply being "alive to the issues", whatever that may mean (Majority Reasons, at para. 56)…

The debate and deliberation on the *Charter* issues that the Benchers had engaged in at their first two meetings could not be used to justify the final outcome:

> 297 (…) They decided *against* adopting a resolution declaring TWU's proposed law school to *not* be an approved faculty of law at the conclusion of each of those meetings. But that particular deliberation did not lead to the outcome the LSBC now seeks to justify. Instead, despite having (arguably) twice balanced the *Charter* rights implicated with the LSBC's statutory objectives in fulfilment of their statutory duty, the Benchers -- at the conclusion of the September 26, 2014 meeting -- opted for a binding referendum on the issue of TWU's approval, with the results of that referendum being adopted with *no further discussion* and therefore no substantive debate on October 31, 2014.

To the dissenting judges, the majority solution of looking to the record in order to assess the reasonableness of the outcome was untenable. First, in the absence of any reasoning supporting the LSBC's decision, the Court was essentially "replac[ing] the (non-)reasons of the LSBC with its own, and mak[ing] the outcome the sole consideration" (para. 300) contrary to the Courts admonition in *Lukács* that "reviewing Courts look at both the reasons and the outcome". Second, because there was no record of post-referendum deliberation allowing the Court to assess the reasonableness of the outcome, the majority could not "point to any basis whatsoever for suggesting that the Benchers conducted any balancing at all, let alone proportionate balancing" (para. 301).

Question:

Under s. 1 of the *Charter*, the onus is on the government to prove that the limits imposed by laws on *Charter* rights and freedoms are reasonable and demonstrably justified in a free and democratic society. While the question of onus is not yet settled in the context of discretionary decisions by administrative decision-makers that engage the *Charter* (see the extract of *Trinity Western* in the supplement to Chapter 15), four of nine judges on the Supreme Court have stated that it rests with the administrative decision-maker. If that is the case, what kind of reasons might be needed for the LSBC to satisfy the onus of demonstrating that its decision proportionately balanced the TWU community's *Charter* protections with the LSBC's statutory objectives?

Chapter 15 – The Jurisdiction of Tribunals and the Constitution, The Standard of Review, p. 890

Add at the end of the "Notes" on p. 890:

In *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 and *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 the Supreme Court had an opportunity to revisit the *Doré* framework. Trinity Western University, a privately funded evangelical Christian university located in British Columbia, sought to open a law school where law could be taught from a Christian perspective in a religious environment. Evangelical members of TWU's community believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct provides an environment where students can grow spiritually. These rules of conduct were reflected in a community covenant agreement (the "Covenant") which students and faculty were required to sign and obey as a condition of attendance or employment. Among other things, the Covenant prohibited "sexual intimacy that violates the sacredness of marriage between a man and a woman". The Benchers of the Law Societies of British Columbia (LSBC) and Ontario (LSUC) exercised their discretion to refuse to accredit Trinity Western University's proposed law school.

Applying the *Doré* framework, the British Columbia Court of Appeal quashed the LSBC's decision as unreasonable in *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423:

> [190] The TWU community has a right to hold and act on its beliefs, absent evidence of actual harm. To do so is an expression of its right to freedom of religion. The Law Society's decision not to approve TWU's faculty of law denies these evangelical Christians the ability to exercise fundamental religious and associative rights which would otherwise be assured to them under s. 2 of the *Charter.*
>
> [191] In light of the severe impact of non-approval on the religious freedom rights at stake and the minimal impact of approval on the access of LGBTQ persons to law school and the legal profession, and bearing in mind the *Doré* obligation to ensure that *Charter* rights are limited "no more than is necessary" (para. 7), we conclude that a decision to declare TWU not to be an approved law faculty would be unreasonable.
>
> [192] In our view, while the standard of review for decisions involving the *Doré*/*Loyola* analysis is reasonableness and there may in many cases be a range of acceptable outcomes, here (as was the case for the minority in *Loyola*) there can be only one answer to the question: the adoption of a resolution not to approve TWU's faculty of law would limit the engaged rights to freedom of religion in a significantly disproportionate way — significantly more than is reasonably necessary to meet the Law Society's public interest objectives.
>
> [193] A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.

In contrast, in *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518, (2016) 131 OR (3d) 113, the Ontario Court of Appeal also applying the *Doré* framework, upheld the LSUC's decision as a proportionate balancing of the statutory objectives underlying the *Law Society Act* with the limits a denial of accreditation would place on religious freedom:

> [129] …[T]he ultimate question still remains: was the LSUC's decision or the outcome (*Dunsmuir*, at para. 47) reasonable within the parameters set by *Dunsmuir*, *Ryan* and *Doré*? In my view, the answer to this question is 'Yes', indeed 'Clearly yes'. I say this for several reasons.
>
> [130] First, the LSUC is one of two sets of gatekeepers to entry into the legal profession. Law schools are the first set of gatekeepers; law societies are the second.
>
> [131] In a well-known speech in 1986 – "Legal Education", (1986) 64:2 Can. Bar Rev. 374, at p. 377 – Dickson C.J. said this about the first set of gatekeepers:
>
> > I want to say a few words about the gatekeepers to legal education, namely those involved in the admissions process. Those who fulfill that role are, in a real sense, the gatekeepers of the legal profession. Ultimately, the ethos of the profession is determined by the selection process at law schools. In order to ensure that our legal system continues to fulfill its important role in Canadian society, it is necessary that the best candidates be chosen for admission to law schools.
> >
> > Furthermore, it is incumbent upon those involved in the admission process to ensure equality of admissions. … Canada is a country which prides itself on adherence to the ideal of equality of opportunity. If that ideal is to be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession.
>
> [132] In my view, there is also an important role for the second set of gatekeepers, the law societies, in ensuring equality of admission to the legal profession. There is nothing wrong with a law society, acting within its jurisdiction, scrutinizing the admission process of a law school in deciding whether to accredit the law school. In doing so with respect to TWU's application, the LSUC could pay heed to what Iacobucci and Bastarache JJ. said in *TWU 2001*, at para. 25: "a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at considerable personal cost." As well, the LSUC could take account of the fact that all law schools currently accredited by it provide equal access to all applicants in their admissions processes. An accredited TWU would be an exception.
>
> [133] Second, as the Divisional Court noted, at para. 110, "while TWU may not be subject to the *HRC*, the respondent is." Accordingly, in balancing the various rights at issue, the LSUC could attach weight to its obligations under s. 6 of the *HRC*, which provides:
>
> > Every person has a right to <u>equal treatment with respect to membership in any</u> trade union, trade or occupational association or <u>self-governing profession without discrimination because of</u> race, ancestry, place of origin, colour, ethnic

> origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. [Emphasis added.]

[134] Third, there is an important distinction to be made when a religious institution and its members seek to exercise their religious beliefs in a manner that discriminates against others. In her article "TWU Law: A Reply to Proponents of Approval", (2014) 37:2 Dal. L. J. 621, Professor Elaine Craig said, at p. 646:

> The deficiencies with TWU's proposed program do not flow from its Christian worldview or intention to teach from that perspective. … Many worthy and highly esteemed educational institutions such as St. Francis Xavier, Trinity College at the University of Toronto, and Notre Dame in the United States, have a faith-based tradition. The distinction, and it is an important one, is that these institutions do not impose formal policies that discriminate on the basis of sexual orientation. [Emphasis added.]

[135] As I have explained, TWU's Community Covenant discriminates against members of the LGBTQ community, and the LSUC was entitled to consider whether the discriminatory policy precluded accreditation.

[The Court's analysis of American jurisprudence is omitted.]

[138] TWU… is seeking access to a public benefit – the accreditation of its law school. The LSUC, in determining whether to confer that public benefit, must consider whether doing so would meet its statutory mandate to act in the public interest. …[T]he LSUC's decision not to accredit TWU does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others – members of the LGBTQ community.

[The Court also noted that the LSUC's decision was consistent with Article 18(3) of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976.]

[141] Fifth, I agree with Professor Bruce Ryder who wrote, in "State Neutrality and Religious Freedom" (2005), 29 Sup. Ct. L. Rev. (2d) 168 at 173:

> Religious neutrality does not mean that the state must refuse to take positions on policy disputes that have a religious dimension. Many if not most legislative policies will accord with some religious beliefs and violate others.

[142] Thus, the LSUC did not violate its duty of state neutrality by concluding that the public interest in ensuring equal access to the profession justified a degree of interference with the appellants' religious freedoms. It was entitled to take a position. And, for the reasons given above, the position it took was a reasonable one.

[143] Taking account of the extent of the impact on TWU's freedom of religion and the LSUC's mandate to act in the public interest, the decision to not accredit TWU represents a reasonable balance between TWU's 2(a) right under the *Charter* and the LSUC's statutory objectives. While TWU may find it more difficult to operate its law school absent accreditation by the LSUC, the LSUC's decision does not prevent it from doing so. Instead,

> the decision denies a public benefit, which the LSUC has been entrusted with bestowing, based on concerns that are entirely in line with the LSUC's pursuit of its statutory objectives.

A five-judge majority of the Supreme Court applied the *Doré* framework, observing that "*Doré* and *Loyola* are binding precedents of this Court" (para. 59). Instead of applying a different framework without mentioning *Doré*, as in *Loyola*, the concurring and dissenting judges engaged with the *Doré* framework. While McLachlin CJ and Rowe J sought to clarify and improve *Doré*, Brown and Côté JJ condemned it as a betrayal of "the promise of our Constitution that rights limitations must be demonstrably justified" (para. 266).

Applying the *Doré* approach, the Court observed at para 58 that the preliminary question was "whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values." In other words, it first addressed whether, in applying its statutory public interest mandate – including the goals of equal access to and diversity within the legal profession – to the approval of TWU's proposed law school, the LSBC had engaged the TWU community's religious freedom. It determined that:

> 75 By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

Having found that the TWU community's religious freedom was engaged, the majority turned to the second step of *Doré* – the proportionality analysis – and discussed how it incorporated deference to the administrative decision-maker:

> (3) Proportionate Balancing
>
> 79 In *Doré* and *Loyola*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply "a robust proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach" (*Loyola*, at para. 3). Under the *Doré* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola*, at para. 32). *Doré*'s approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake (*Loyola*, at para. 42; *Doré*, at para. 54). Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré*, at para. 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola*, at para. 41). As long as the decision "falls within a range of possible, acceptable outcomes", it will be reasonable (*Doré*, at para. 56). As this Court noted in *Doré*, "there is ... conceptual harmony between a reasonableness review and the *Oakes* framework, since

both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives" (para. 57).

80 The framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality -- rather, it is a robust one. As this Court explained in *Loyola*, at para. 38:

> The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the *Charter* in contexts where Charter rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality". [Emphasis added; text in brackets in original.]

For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision proportionately balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives (*Loyola*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

81 The reviewing court must consider whether there were other reasonable possibilities that would give effect to Charter protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the Charter protection least. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

82 The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds "analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola*, at para. 40). In working "the same justificatory muscles" as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

83 We now turn to whether the limitation on the religious freedom of the members of the TWU community is a proportionate one in light of the LSBC's statutory mandate.

84 The LSBC was faced with only two options -- to approve or reject TWU's proposed law school. Given the LSBC's interpretation of its statutory mandate, approving TWU's proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to Charter protections more fully in light of the statutory objectives.

85 The LSBC's decision also reasonably balanced the severity of the interference with the Charter protection against the benefits to its statutory objectives. To begin, the LSBC's decision did not limit religious freedom to a significant extent. The LSBC did not deny approval to TWU's proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would "consider" amendments to its Covenant, TWU expressed no willingness to compromise on the mandatory nature of the Covenant. The decision therefore only prevents TWU's community members from attending an approved law school at TWU that is governed by a mandatory covenant.

86 The Court of Appeal described the limitation in this case as "severe" because it precludes graduates of TWU's proposed law school from practising law in British Columbia (para. 168). However, the LSBC's decision does not prevent any graduates from being able to practise law in British Columbia. Furthermore, it does not prohibit any evangelical Christians from adhering to the Covenant or associating with those who do. The interference is limited to preventing prospective students from studying law at TWU with a mandatory covenant.

87 First, the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU's proposed law school with a mandatory covenant only prevents prospective students from studying law in their optimal religious learning environment where everyone has to abide by the Covenant.

88 Second, the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth. As McLachlin C.J. explained in *Hutterian Brethren*, at para. 89:

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others. [Emphasis added.]

89 Attending TWU's proposed law school is said to make it "easier" to practise evangelical beliefs. That attending law at TWU, with a mandatory covenant, is a preference is clear from TWU's own affiants who, like Mr. Volkenant, expressed a desire to attend TWU's proposed law school (…)

90 Our point is that, on the record before us, prospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before this Court (see e.g. *Multani*, at para. 3; *Amselem*, at para. 6; and *Hutterian Brethren*, at para. 7; and *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 58). Put otherwise, denying someone an option they would merely appreciate certainly falls short of "forced apostasy" (*Hutterian Brethren*, at para. 89).

91 On the other side of the scale is the extent to which the LSBC's decision furthered its statutory objectives. As the regulator of the legal profession in British Columbia, its decision must represent a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake.

92 It is clear that the decision not to approve TWU's proposed law school significantly advanced the LSBC's statutory objectives -- to promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession (see LPA, ss. 3(a) and 3(b)).

93 First, the decision advances the LSBC's relevant statutory objectives by maintaining equal access to and diversity in the legal profession. While TWU submits that it "is open to all academically qualified people wishing to live and learn in its religious community" (R.F., at para. 10), the reality is that most LGBTQ people will be deterred from applying to its proposed law school because of the Covenant's prohibition on sexual activity outside marriage between a man and a woman. As this Court acknowledged in TWU 2001, "[a]lthough the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost" (para. 25). It follows that the 60 law school seats created by TWU's proposed law school will be effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from gaining entry to the legal profession.

94 TWU submits that even if LGBTQ people are deterred from attending TWU's law school, there are many other options open to LGBTQ people who wish to attend law school (R.F., at para. 175). Even further, TWU asserts that its law school will result in an overall increase in law school seats, which expands choices for all students (para. 138). The British Columbia Court of Appeal accepted this argument, finding that the negative impact on access to law school by LGBTQ students would be "insignificant in real terms" (para. 179).

95 Such arguments fail to recognize that even if the net result of TWU's proposed law school is that more options and opportunities are available to LGBTQ people applying to law school in Canada -- which is certainly not a guarantee -- this does not change the fact that an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity. Those who are able to sign the Covenant will be able to apply to 60 more law school seats per year, whereas those 60 seats remain effectively

closed to most LGBTQ people. In short, LGBTQ individuals would have fewer opportunities relative to others. This undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities -- it prevents "the violation of essential human dignity and freedom" and "eliminate[s] any possibility of a person being treated in substance as 'less worthy' than others" (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 138). The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.

96 Second, the decision furthers the statutory objective -- protecting the public interest in the administration of justice by preserving rights and freedoms -- by preventing the risk of significant harm to LGBTQ people who attend TWU's proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU "they would have to either 'live a lie to obtain a degree' and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion" (para. 172). TWU's Covenant prevents students who are not married to members of the opposite sex from engaging in sexual activity in the privacy of their own bedrooms. It requires non-evangelical LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements even when they are off-campus, in the privacy of their own homes. Attending TWU's law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education (I.F., Egale Canada Human Rights Trust (file No. 37318), at para. 14; Start Proud and OUTlaws (file No. 37209), at para. 6).

97 Despite this, TWU asserts that LGBTQ students will suffer no harm to their dignity or personal identity while enrolled at TWU because the Covenant requires all members of TWU's community to "treat all persons with dignity, respect and equality, regardless of personal differences" (R.F., at para. 92). However, as this Court recognized in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, it is not possible "to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood" (para. 123, quoting L'Heureux-Dubé J. in TWU 2001 in dissent (though not on this point), at para. 69).

98 LGBTQ students enrolled at TWU's law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation (citations omitted)... The public confidence in the administration of justice may be undermined by the LSBC's decision to approve a law school that forces some to deny a crucial component of their identity for three years in order to receive a legal education.

99 The TWU community has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices. Where a religious practice impacts others, however, this can be taken into account at the balancing stage. The Covenant is a commitment to enforcing a religiously based code of conduct, not just in respect of one's

own behaviour, but also in respect of other members of the TWU community (D. Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" (2014), 23:1 Const. Forum Const. 1, at p. 2). The effect of the mandatory Covenant is to restrict the conduct of others.

100 The limitation on religious freedom in this case must be understood in light of the reality that conflict between the pursuit of statutory objectives and individual freedoms may be inevitable. As this Court has held, state interferences with religious freedom "must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs" (*Hutterian Brethren*, at para. 90; see also *Loyola*, at para. 47). Accordingly, minor limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society.

101 In saying this, we do not dispute that "[d]isagreement and discomfort with the views of others is unavoidable in a free and democratic society" (C.A. reasons, at para. 188), and that a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests (para. 131, citing *Loyola*, at para. 43). But more is at stake here than simply "disagreement and discomfort" with views that some will find offensive. This Court has held that religious freedom can be limited where an individual's religious beliefs or practices have the effect of "injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (Big M, at p. 346). Likewise, in *Multani*, the Court held that state interference with religious freedom can be justified "when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others" (para. 26). Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.

102 In the end, it cannot be said that the denial of approval is a serious limitation on the religious rights of members of the TWU community. The LSBC's decision does not suppress TWU's religious difference. Except for the limitation we have identified, no evangelical Christian is denied the right to practise his or her religion as and where they choose.

103 The refusal to approve the proposed law school means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve TWU's proposed law school prevents concrete, not abstract, harms to LGBTQ people and to the public in general. The LSBC's decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school. It also maintains public confidence in the legal profession, which could be undermined by the LSBC's decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.

> 104 Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the Charter rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on Charter protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU's proposed law school represents a proportionate balance. In other circumstances, a more serious limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.
>
> 105 In our view, the decision made by the LSBC "gives effect, as fully as possible to the Charter protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

While she agreed that discretionary administrative decisions engaging the *Charter* were to be reviewed according to the *Doré*/*Loyola* framework, McLachlin C.J. sought to address some of the gaps and omissions in that approach. Her description of the proportionality analysis required by *Doré* more closely tracks *Oakes*' three steps:

> 114 I agree with the majority that on judicial review of a rights-infringing administrative decision, the analysis usually comes down to proportionality, and particularly the final stage of weighing the benefit achieved by the infringing decision against its negative impact on the right (para. 58). Proportionality requires that the state objective capable of overriding a right be rationally connected to the decision; in the administrative context, where the decision falls within the scope of an unchallenged law, usually this is the case. Minimal impairment -- whether the administrative decision infringes a *Charter* right more than necessary or is broader than reasonably required -- arises, but the question is not whether "the law" catches more conduct than it should, as under *Oakes*, but whether an alternative less-infringing decision was possible. Particularly where the decision is a choice between only two options (for example, to accredit or not), this step will also easily be met. This leaves the final stage of the proportionality inquiry -- assessing the actual impact of the decision. It follows that in reviewing administrative decisions, the analysis almost invariably comes down to looking at the effects of the decision and asking whether the negative impact on the right imposed by the decision is proportionate to its objective.
>
> 115 However, I would add four comments. First, to adequately protect the right, the initial focus must be on whether the claimant's constitutional right has been infringed. *Charter* values may play a role in defining the scope of rights; it is the right itself, however, that receives protection under the *Charter*.
>
> 116 Second, the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. A decision based on an erroneous interpretation of a *Charter* right will be unreasonable. Canadians should not have to fear that their rights will be given different levels of protection depending on how the state has chosen to delegate and wield its power.
>
> 117 Third, since this is a matter of justification of a rights infringement under s. 1 of the *Charter*, the onus is on the state actor that made the rights-infringing decision (in this case

> the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society.
>
> 118 Finally, I would note that relying on the language of "deference" and "reasonableness" in this context may be unhelpful. Quite simply, where an administrative decision-maker renders a decision that has an unjustified and disproportionate impact on a *Charter* right, it will always be unreasonable.
>
> 119 To summarize, in judicial review of administrative decisions for compliance with the *Charter*, the focus is on proportionality. The first question is whether the decision infringes a *Charter* right. If so, the state actor that made the infringing decision bears the onus of showing that the infringement is justified under s. 1 of the *Charter.* In most cases, the ultimate question will be whether the decision under review in the particular case balances the negative effects on the right against the benefits derived from the decision in a proportionate way.

While she disputed the majority's conclusion that the LSBC's decision imposed only "minor" limits on the freedom of religion of members of the TWU community, McLachlin CJ agreed that it was proportionate and therefore reasonable.

Like the Chief Justice, Rowe J. offered his own clarifications of the *Doré* framework. He began by addressing the role of *Charter* values in the analysis:

> 171 Confusion arises, however, when *Charter* values are used as a standalone basis for the adjudication of *Charter* claims. This is because the scope of *Charter* values is often undefined in the jurisprudence. In some cases, a *Charter* value aligns with a particular *Charter* right. In other cases, the value does not line up with earlier *Charter* jurisprudence. This lack of clarity heightens the potential for unpredictable reasoning. As Lauwers and Miller JJ.A. recently noted in their concurring reasons in *Gehl* v. *Canada (Attorney General)*, 2017 ONCA 319, 138 O. R. (3d) 52, at para. 79:
>
> > *Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective -- and value laden -- nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.
> >
> > (See also *E.T.* v. *Hamilton-Wentworth District School Board*, 2017 ONCA 893, 397 C.R.R. (2d) 231, at paras. 103-4.)
>
> 172 This lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims. At the outset, it is more difficult to ascertain whether a *Charter* value has been infringed: see A. Macklin, "*Charter* Right or *Charter*-Lite? Administrative Discretion and the *Charter*" (2014), 67 S.C.L.R. (2d) 561, at p. 571. This difficulty extends throughout the analysis. This is because the existence and severity of the infringement is informed by the scope of the value at issue. Without a proper

> understanding of the scope, it is "difficult if not impossible to apply" the proportionality analysis required by *Doré* and *Loyola*: C. D. Bredt and E. Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014), 67 S.C.L.R. (2d) 339, at p. 353.
>
> 173 In this appeal, the majority employs the term *Charter* "protections" -- meaning "both rights and values" -- to refer to the constitutional guarantees of the *Charter*: M.R., at para. 58, citing *Loyola*, at para. 39. With respect, this language does little to clarify the role of *Charter* values in the adjudication of *Charter* claims. By equating "rights and values" under the umbrella term of "*Charter* protections", the majority undermines the view that rights and values are distinct in scope and function.
>
> 174 Where an infringement of *Charter* rights is alleged, there is no reason to depart from an approach based on those *Charter* rights. A claimant bringing a *Charter* challenge is entitled to a determination of whether his or her *Charter* rights have been infringed. If the claimant succeeds, the government then must have the opportunity to argue that this limit on *Charter* rights is justified under s. 1. This follows from the structure of the *Charter* itself.
>
> 175 The point is this. In cases where *Charter* rights are plainly at stake, courts and other decision-makers have a constitutional obligation to address the rights claims as such and to do so explicitly. An analysis based on *Charter* values should not eclipse or supplant the analysis of whether *Charter* rights have been infringed. Where *Charter* rights have been infringed by administrative actors, reviewing courts must determine whether the state meets the burden of justifying the infringement according to s. 1. This is not a matter of doctrinal preference. It is a constitutional obligation imposed by the *Charter*.

Rowe J. agreed with McLachlin J. that the justificatory burden remained on the government once an infringement of *Charter* rights was proven:

> 195 My final concern relates to the burden of proof in *Charter* adjudication and what that burden entails. Under the usual rules of judicial review, it falls to the applicant to demonstrate that the impugned decision should be overturned. By contrast, under the approach set out in *Oakes*, it is government that bears the burden of justification once the claimant has demonstrated an infringement of his or her *Charter* rights. The *Doré*/*Loyola* framework lies at the intersection of administrative and constitutional law but it has remained conspicuously silent on where the burden of proof lies.
>
> 196 It is difficult to conclude that *Doré* changed the burden of proof for the adjudication of *Charter* claims in the administrative context in the absence of an explicit discussion to that effect. Thus, once the claimant has demonstrated that an administrative decision infringes his or her *Charter* rights, it remains incumbent on the state actor to demonstrate that the infringement is justified. In other words, if the claimant can demonstrate that an administrative decision infringes his or her *Charter* rights, the decision is presumptively unreasonable and the state must explain why this infringement is a reasonable limit. The reviewing court must ensure that the state actor has discharged this burden before upholding the impugned decision.
>
> 197 The majority states that "*Charter* rights are no less robustly protected under an administrative law framework": M.R., at para. 57. As discussed, however, the usual rules of administrative law require the applicant to demonstrate that an impugned decision should

be overturned. It is unclear whether this burden persists under an administrative law framework once *Charter* rights are at stake. The majority is silent on this issue. One could infer from this that an impugned decision should be treated as presumptively reasonable unless the claimant demonstrates that the decision is not the result of proportionate balancing. This would provide for less robust protection of *Charter* rights. For the administrative law framework to provide for the same protection of *Charter* rights as the *Oakes* framework, the justificatory burden must remain on the government once an infringement of rights is demonstrated.

198 Such an approach follows from first principles. The administrative state is a statutory creation. As legislation must comply with the *Charter*, it follows that decisions taken pursuant to legislation must also comply with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge*; *Multani*; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 117.

199 The *Constitution Act, 1982* gives normative primacy to the rights and freedoms guaranteed by the *Charter*. By virtue of s. 1, any limit on these guarantees is presumptively unconstitutional. This means that rights infringements can stand only if the limit complies with the requirements of s. 1 (or, in some cases, if the government invokes the override provision in s. 33 of the *Charter*). These are the only options: the government either justifies the infringement, exempts the infringement from constitutional scrutiny, or the infringement is remedied by the court.

200 Where the government opts for justification, it faces successive hurdles. Under the *Oakes* framework, to establish that an infringement is reasonable and demonstrably justified in a free and democratic society, the state must, first, identify an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, the state must show that the infringement passes a "proportionality test": *Oakes*, at p. 139. This entails showing that the measure is rationally connected to the identified objective, that the infringement is minimally impairing and that a balance is struck between the infringing effects of the measure and the importance of the objective. The *Oakes* framework expresses constitutional principles of fundamental importance -- namely, that the rights and freedoms guaranteed by the *Charter* establish a minimum degree of protection that state actors must respect, and that any violation of these guarantees will be subject to close and serious scrutiny.

201 There is no question that these principles continue to guide our assessment of state action in the administrative context. Rather, the debate has centred on how to operationalise these principles. In this appeal, the majority explains that once an infringement has been shown, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": M.R., at para. 58, citing *Doré*, at para. 57, and *Loyola*, at para. 39. I do not see this framework as fundamentally deviating from the principles set out in *Oakes*. Indeed, this Court sought in *Doré* to achieve "conceptual harmony between a reasonableness review and the *Oakes* framework" (para. 57). The key to achieving this harmony is not the

substitution of the principles of *Charter* review for those of administrative law. Rather, as *Loyola* makes clear, the solution is to infuse judicial review with the considerations that make up the *Oakes* analysis.

202 All the elements in the *Oakes* test have a role to play in the judicial review of administrative decisions under *Doré*. In *Doré*, this Court said that a decision will be found reasonable if "the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives" that the decision-maker was bound to carry out (para. 58). This requires an identification of the statutory objective at issue, which corresponds to the first step under *Oakes*. Once a claimant has made out that a decision has infringed a *Charter* right on judicial review, the state must identify a "sufficiently important objective" that could make infringing the *Charter* right reasonable: *Oakes*, at p. 141. The proportionality analysis will then be carried out in relation to that objective. This objective must be sufficiently pressing and substantial to justify the infringement of *Charter* rights: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 20; *Hutterian Brethren*, at para. 42.

203 The state must then show that the decision reflects a "proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. This corresponds to the "proportionality test" under the second step of *Oakes*, which includes the analysis of rational connection, minimal impairment, and the balance between beneficial and deleterious effects.

204 First, if the state cannot demonstrate that the decision-maker has rendered a decision that is rationally connected to the identified statutory objective, then the decision, of necessity, cannot be reasonable. In other words, if the decision is not rationally connected to the statutory objective, then the decision-maker will have acted outside its mandate. Second, as the majority has stated, the decision will be minimally impairing if it affects the right "as little as reasonably possible" in furthering the statutory objectives identified by the state: *M.R.*, at para. 80, citing *Loyola*, at para. 40. Finally, the state must show that the decision strikes "a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake": *M.R.*, at para. 91. If the state can meet this proportionality test, the decision will be reasonable despite having infringed a *Charter* right.

205 I recognize, as does the Chief Justice, that the main hurdle for the state will be the "final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing" (*Loyola*, at para. 40; *C.J.R.*, at para. 113). However, that is not to say that the identification of statutory objectives or the rational connection step cease to be relevant. The fact that most statutes reviewed under the *Oakes* test have failed at the minimal impairment or proportionality stages does not mean that courts have stopped looking to rational connection. Nor does it mean that consideration of the pressing and substantial objective has ceased to be relevant. Similarly, in the administrative context, the fact that most administrative decisions will be rationally connected to an identified statutory objective does not mean that the inquiry need not be carried out. It means only that this component of the analysis will often readily be met.

206 I add this. While the decision in *Doré* was motivated by a desire to streamline the review of administrative decisions for compliance with the *Charter*, its stated preference for

> a "robust conception of administrative law" should not have the (unquestionably unintended) effect of diluting the protection afforded to *Charter* rights (para. 34). Nor should it risk shifting the justificatory burden onto claimants once they have demonstrated an infringement of their rights. The justificatory burden must therefore remain where the *Charter* places it; on the government, whenever a claimant demonstrates that his or her *Charter* rights have been infringed. For the administrative state, this is no more than what s. 1 of the *Charter* requires.
>
> 207 As a final point, I do not dispute that *Doré* and *Loyola* are binding precedents: M.R., at para. 59. The suggestion that the *Doré*/*Loyola* framework requires clarification is in no way inconsistent with this. Whether in response to judicial, academic, or other criticism, this Court has on numerous occasions built on its jurisprudence to provide for greater clarity and consistency in the law: see e.g. *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 29; *Dunsmuir*, at para. 24; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39. Indeed, *Doré* itself was an attempt at clarifying confusion in the jurisprudence (para. 23). These developments reflect how the common law works, through the application and, where warranted, the clarification of jurisprudence. On these matters, I can do no better than to quote Lord Denning from his book The Discipline of Law (1979), at p. 314:
>
> > Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. It is the foundation of our system of case law. This has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its too rigid application -- a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.

Rowe J also outlined his concern that *Charter* rights be delineated properly, in accordance with the Supreme Court's purposive approach to *Charter* interpretation. In his view, properly interpreted, s. 2(a) did not protect "measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith" (para 251). Accordingly, the LSBC's decision did not engage the religious freedoms of members of the TWU community and the *Doré* approach was inapplicable. Applying the reasonableness standard, he found that the LSBC's decision was reasonable.

While McLachlin CJ and Rowe J sought to clarify the *Doré* framework, Brown and Côté JJ's dissenting judgment expresses deep skepticism about the majority's approach to the protection of *Charter* rights in discretionary decision making.

> 302 Our reasons apply the *Doré/Loyola* framework as we are able to understand it from the jurisprudence, but we note our concerns in relation to this framework for judicial review of *Charter*- infringing administrative decisions. The comments and scholars cited by the Chief Justice (para. 111, fn. 1) are overwhelmingly critical and make clear that the

framework's contours are poorly defined. While we welcome the clarification of the framework articulated in the Chief Justice's reasons, we find the lack of rationale for insisting on a distinct framework for administrative decisions troubling, particularly in light of the fact that the application of the stages of the *Oakes* test in our jurisprudence is already context-specific (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; RJR-MacDonald, at para. 132).

303 In our view, the suggestion in *Doré* (at para. 4) that "an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit" does not account for this Court's statement that, where a Charter infringement can be attributed to individualized decisions of state decision-makers, the proportionality test must apply (*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at paras. 16 and 21, per Charron J.). Further, it is belied by the application of the Oakes test by this Court to administrative decisions in many cases prior to *Doré* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dagenais*; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120*; United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Greater Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295). That suggestion is also doubtful in light of the ambivalent application of *Doré* in *Loyola*, and by its non-application in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3. Similarly, this Court avoided applying the deferential *Doré* framework when defining the scope of the *Charter* right in *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456, and *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386.

304 We acknowledge the majority's insistence (at para. 80) that "the framework set out in *Doré* and affirmed in *Loyola* is not a weak or watered-down version of proportionality". Rather, it maintains, it is "robust". But saying so does not make it so. Indeed, the Chief Justice's attempt to clarify that framework, combined with the majority's continued defence of the "robustness" of proportionality as set out in the *Doré/Loyola* framework, simply reinforce our view that the orthodox test -- the *Oakes* test -- must apply to justify state infringements of *Charter* rights, regardless of the context in which they occur. Holding otherwise subverts the promise of our Constitution that the rights and freedoms guaranteed by the *Charter* will be subject only to "such reasonable limits prescribed by law as can be demonstrably justified" (s. 1).

305 This is evident in the majority's own reasons. The state, it says need only show that its decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (para. 80, quoting *Loyola*, at para. 39 (emphasis added)). Or, "[p]ut another way, the *Charter* protection must be 'affected as little as reasonably possible' in light of the applicable statutory objectives" (para. 80, quoting *Loyola*, at para. 40 (emphasis added)). In other words, under *Doré*, *Charter* rights are guaranteed *only so far as they are consistent with the objectives of the enabling statute*. When push comes to

shove, statutory objectives -- including, presumably, unconstitutional statutory objectives -- trump the right. But s. 52 of the *Constitution Act, 1982*, which provides for the primacy of the Constitution, suggests to us that it should be the other way around -- that *rights* trump statutory objectives and decisions taken thereunder. Further, s. 1 of the *Charter* does not guarantee certain rights and freedoms subject only "to the limits imposed by statutory objectives", but to limits that are "demonstrably justified in a free and democratic society". As, therefore, the Court of Appeal for Ontario recently stated, "[a] party bringing a *Charter* challenge is entitled to a judicial determination of whether the *Charter* right has been limited, and the government must have the opportunity to argue that such a limit is justified under s. 1 of the *Charter*: *Symes v. Canada*, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, at para. 105 (*per* Iacobucci J.)" (*Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at para. 78).

306 The majority's continued reliance on "values" protected by the *Charter* as equivalent to "rights" (Majority Reasons, at para. 58), is similarly troubling. These "values" loom large in the majority's reasons, given its description (at para. 41) of the LSBC's interest in protecting "the values of equality and human rights". On this point, the majority also cites to Abella J.'s reference in *Loyola* (at para. 47) to "shared values -- equality, human rights and democracy" as "values the state always has a legitimate interest in promoting and protecting".

307 We are in agreement with the Chief Justice and our colleague Rowe J. that *Charter* values do not receive independent protection under the *Charter*. In our view, and for several reasons, resorting to *Charter* values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice.

308 First, *Charter* "values" -- unlike *Charter* rights, which are the product of constitutional settlement -- are unsourced. They are, therefore, entirely the product of the idiosyncrasies of the judicial mind that pronounces them to be so. And, perhaps one judge's understanding of "equality" might indeed represent a "shared value" with all Canadians, but perhaps another judge's might not. This in and of itself should call into question the legitimacy of judges or other state actors pronouncing certain "values" to be "shared". Canadians are permitted to hold different sets of values. One person's values may be another person's anathema. We see nothing troubling in this, so long as each person agrees to the other's right to hold and act upon those values in a manner consistent with the limits of core minimal civil commitments which are necessary to secure civic order -- none of which are implicated here. What *is* troubling, however, is the imposition of judicially preferred "values" to limit constitutionally protected rights, including the right to hold other values. As W. A. Galston observes in *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (2002), at p. 131, this risks illiberal outcomes:

> When we are trying to decide what to do, we are typically confronted with a multiplicity of worthy principles and genuine goods that are not neatly ordered and that cannot be translated into a common measure of value. This is not ignorance but, rather, the fact of the matter. That is why practical life is so hard. If we could reduce it to some form of quantitative calculation or resolve its quandaries by bowing to clearly dominant values, it would not be so hard.

> But we cannot, at least not without oversimplifying moral experience and running grave risks. In practice, in both our personal and our public lives, the pursuit of a single dominant value, whatever the cost, typically produces side consequences ... that we ought not ignore and that few would willingly accept... .
>
> ...Life would be simpler if there were clear rules to resolve the clashes between politics and its competitors. But there are not. When a parent, or artist, or faith community, or philosopher challenges the political system's right to constrain thought and action, those involved must seek ways of adjudicating the conflict that does not begin by begging the question and does not end in oppression. [Emphasis added.]

309 Secondly, and relatedly, *Charter* "values", as stated by the majority, are amorphous and, just as importantly, undefined. Lacking the doctrinal structure which courts have carefully crafted over the past 35 years to give substantive meaning to *Charter* rights (including the right to equality) and to guide their application, *Charter* values like "equality", "justice", and "dignity" become mere rhetorical devices by which courts can give priority to particular moral judgments, under the guise of undefined "values", over other values and over *Charter* rights themselves.

310 Take, for example, the majority's preferred value of "equality". In our view, without further definition this is too vague a notion on which to ground a claim to equal treatment in any and all concrete situations, such as admission to a law school. Of course, as a legal claim, equality relates to differential application of *a specific rule* to a certain group of people in a certain legal context. But the majority does not (and cannot) point to a specific legal rule or right to ground the application of a value of equality here. Rather, it advances "equality" in a purely abstract sense, such that it could mean almost anything. For example, an acceptable legal incarnation of the abstract notion, "equality" is a principle of the rule of law that all are equal before and under the law, such that all have a claim to equal protection and to equal application of the law (T. Bingham, *The Rule of Law* (2010), at pp. 55-59; F. C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (3rd ed. 2011), at p. 178). But equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited. "Equality" as an abstraction could also mean tolerance of difference, as Justice Sachs said in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, [1998] ZACC 15, 1999 (1) S.A. 6, at para. 132:

> ... equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. [Emphasis added.]

311 None of these (or innumerable other) meanings of "equality" as an abstraction are relied on by the majority or are evident in its reasons. Rather, by relying on a sweeping

> abstraction, the majority avoids actually making explicit its moral judgment, its premises and the legal authority on which it rests. A "value" of "equality" is, therefore, a questionable notion against which to balance the exercise by the TWU community of its *Charter*-protected rights.
>
> 312 Finally, we echo McLachlin C.J.'s comment that "the onus is on the state actor that made the rights-infringing decision (in this case the LSBC) to demonstrate that the limits their decisions impose on the rights of the claimants are reasonable and demonstrably justifiable in a free and democratic society" (para. 117). This Court has, however, been silent on who bears this onus in the administrative context, leaving a conspicuous and serious lacuna in the *Doré/Loyola* framework. Inexplicably, and despite the challenge *on this very question* posed by the reasons of the Chief Justice and of Rowe J., the majority maintains this silence, thereby failing to clarify the matter. With respect, this hardly bolsters the credibility of the *Doré/Loyola* framework.
>
> 313 It follows that we reject the majority's claim that its reasons "explain why and how the *Doré/Loyola* framework applies here" (Majority reasons, at para. 59 (emphasis added)). On the basic question of who bears the onus, the majority explains nothing about *how* that framework applies -- whether here, or anywhere else. In particular, the majority's resort to the passive tense ("the reviewing court *must be satisfied* that the decision reflects a proportionate balance") fails to provide the necessary guidance, since it leaves reviewing courts guessing about precisely who must do the "*satisfying*" -- the rights-holder, or the state actor. Further, and again with respect, the majority's invocation of *stare decisis* ("*Doré* and *Loyola* are binding precedents") is no answer to good faith attempts in concurring and dissenting judgments to clarify precedent. A precedent of this Court should be strong enough to withstand clarification of who carries the burden of proof.
>
> 314 As to how *we* would resolve the question of onus under *Doré/Loyola*, it is this simple: either the majority's statements about the *Doré/Loyola* framework's equivalency to *Oakes* and about the "same justificatory muscles" being flexed (Majority Reasons, at para. 82) are empty and meaningless words, or they are statements to be taken seriously. And if they are statements to be taken seriously, they must in our view mean that the burden to justify a rights limitation rests with the state actor under *Doré/Loyola*, just as it does when *Oakes* flexes its "justificatory muscles".

Brown and Côté JJ would have dismissed the appeal. In their view, the LSBC's statutory objective in approving law schools was limited to ensuring that individual applicants were qualified for licensing. As the fitness of future graduates of TWU's proposed law school was not in dispute, this statutory objective could not justify any limitations on the TWU community's religious freedoms (para. 323). Even if the LSBC's mandate allowed it to consider broader public interest concerns, its decision could not be justified. First, the decision represented a profound interference with religious freedom. Second, approving TWU's proposed law school was not against the public interest because it would have fostered pluralism and guaranteed "an inclusive public square by neither privileging nor silencing any view" (para. 332).

Notes and questions:

A majority of the Supreme Court also upheld the Ontario Court of Appeal's decision as reasonable, with McLachlin C.J., Rowe J., and Brown and Côté JJ. generally adopting the same views on the *Doré* analysis as they had in the British Columbia appeal.

What role can deference, based on the decision-makers' expertise and proximity to the facts, play in the *Doré* proportionality analysis?

Was deference to the LSBC's decision even possible, given the decision-making process that it had adopted? In other words, in light of the majority's approach to reviewing reasons in the context of a process led by elected decision-makers binding themselves to the results of a referendum, discussed in the supplement to Chapter 14, how is the deferential review of a proportionality analysis in this case different from a review for proportionality under a correctness standard?

Do you agree with Brown and Côté JJ that *Charter* values are necessarily "unsourced" and the product of the idiosyncrasies of the judge's mind?

Chapter 17 – Remedies for Unlawful Administrative Action, The Reach of Public Law Remedies, p. 942

Add after the note following Air Canada v Toronto Port Authority

In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall,* 2018 SCC 26, the Supreme Court discussed the availability of *certiorari* in the context of decisions made by voluntary, religious associations. The Jehovah's Witnesses allow for 'disfellowship' of a member of their religious community who engages in conduct that deviates from their accepted standards, a process that involves an appearance before a body of elders called the "Judicial Committee". Mr. Wall was disfellowshipped through this process. He brought an application for judicial review at the Court of Queen's Bench in Alberta, seeking the remedy of *certiorari* based on an alleged breach of procedural fairness in the disfellowship process. Where the lower courts had considered the merits of the application and found in favour of Mr. Wall, a unanimous Supreme Court with Rowe J. writing found that the decision at stake lay beyond the reach of public law remedies: "judicial review is limited to public decision makers, which the Judicial Committee is not" (at para 2):

> [20] … [A] decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.
>
> [21] … The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that "public" decisions of a private body — in the sense that they have some broad import — will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue.

Significantly, Rowe J distinguished *Air Canada v Toronto Port Authority* as a decision about the availability of judicial review under the *Federal Court Act* and what constitutes a federal Board, Tribunal, or Commission, rather than about the availability of judicial review for review of decisions of voluntary associations.

Chapter 17 – Remedies for Unlawful Administrative Action, The Federal Court's Act's Allocation of Jurisdiction as Between the Federal Court and Provincial Court, p. 966

Add at p. 967 following the first full paragraph ending in "consideration of Reza":

The second limited circumstance in which provincial superior courts may decline to exercise *habeas corpus* jurisdiction was set out in a decision called *Peiroo v Canada (Minister of Employment & Immigration)*, (1989) 69 OR (2d) 253 (CA), 60 DLR (4th) 574, 1989 CanLII 184 (ON CA), leave to appeal ref'd, [1989] SCCA No 322, 62 DLR (4th) viii (note). *Peiroo* was understood to preclude *habeas corpus* in matters of immigration law, where Parliament had put in place "a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous". The Ontario Court of Appeal in *Chaudhary v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700 (CanLII), 27 OR (3d) 401 and the Alberta Court of Appeal in *Chhina v Canada (Public Safety and Emergency Preparedness)*, 2017 ABCA 248 (CanLII), (2017) 56 Alta LR (6th) 1 determined that *Peiroo* does not apply to preclude *habeas corpus* where a provincial superior court is asked to review the decision of federal officials to continue a lengthy detention of uncertain duration. Chhina's refugee status was vacated and he was declared inadmissible to Canada due to a misrepresentation on his refugee application and his involvement in criminal activity. A deportation order was issued against him and he was taken into immigration detention. In light of delays in obtaining travel documents from Pakistan, he was released with conditions. In November 2015, after breaching these conditions and disappearing for a year, Chhina was placed in custody at the Calgary Remand Centre, a maximum-security unit which keeps inmates on lockdown 22 and a half hours a day. As required under the *Immigration and Refugee Protection Act*, SC 2001, c 27, his detention was reviewed monthly by the Immigration Division of the Immigration and Refugee Board. Chhina's detention was consistently upheld. In May 2016, Chhina filed an application for *habeas corpus* in the Alberta Court of Queens Bench, arguing that his detention was unlawful because it had become lengthy and indeterminate and because the conditions of his detention were inappropriate. Examining the contextual factors set out by the Supreme Court in *May v Ferndale Institution*, *supra*, the Alberta Court of Appeal determined that the detention review procedures under the *IRPA* did not fall within the *Peiroo* exception. First, it found that the only forum in which Chhina could directly challenge the legality of his on-going detention as contrary to his ss 7 and 9 *Charter* rights and to obtain a *Charter* remedy was in the superior court by way of habeas corpus. The *IRPA* process was of limited utility in this regard: "…[T]he serial nature of the reviews, the role of the reviewing officer, and the deference given to earlier review decisions can lead to ID decisions becoming cumulative, without constituting a fresh review of the legality of the detention. The statutory conditions for detention and the nature of the review also tend to limit its scope" (para 43). Second, Chhina's *habeas corpus* application dealt with the legality of detention, which did not require the immigration expertise of the Federal Court. Third, *habeas corpus* was more accessible than judicial review in the Federal Court, which required leave. Finally, while *IRPA* provided that the onus was on immigration authorities to demonstrate, on a balance of probabilities, that continued detention was warranted, they did not have to justify the length of detention and could satisfy the onus by relying on the findings of prior detention reviews. In contrast, *habeas corpus* applications were considered afresh, with the onus falling squarely on immigration authorities. In *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29, the Supreme Court dismissed Chhina's appeal. Writing for the majority, Justice Karakatsanis determined, at para 40, that "an administrative scheme may be sufficient to safeguard the interests protected by *habeas corpus* with respect to some types of challenges but may also need to be re-examined with respect

to others". Applying the *Peiroo* exception to the facts of Chhina's detention, she held that the Court of Queen's Bench had erred in declining to hear his *habeas corpus* application:

> A. *Determining When the Exception Applies*
>
> [41] How, then, does a court determine whether there is "a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous" such that an applicant will be precluded from bringing an application for *habeas corpus* (*May*, at para. 40)?
>
> [42] First, it is necessary to ask upon what basis the legality of the detention is being challenged. In other words, what are the grounds in the applicant's *habeas corpus* application? Reference to the categories in *Dumas* may be helpful to this inquiry. Is the applicant challenging an initial decision that resulted in detention, such as a removal order? Are they challenging the conditions of their detention? Or are they challenging the length and uncertain duration of their detention? Precisely delineating the grounds for the *habeas corpus* application is necessary in order to determine whether there is an effective statutory remedy to address those grounds.
>
> [43] Second, it is necessary to ask whether there is a complete, comprehensive and expert scheme that is as broad and advantageous as *habeas corpus* in relation to the specific grounds in the *habeas corpus* application. Elements of the *IRPA* detention review scheme may speak to whether the scheme is complete, comprehensive and expert. However, the main issue in this case, and the focus of the parties' submissions, is whether *IRPA* review is as broad and advantageous as *habeas corpus* with respect to the specific basis upon which Mr. Chhina challenged the legality of his detention. In this inquiry, it may be helpful to look at whether a statutory scheme fails entirely to include the grounds set out in the application for *habeas corpus*. If so, the scheme will not be as broad and advantageous as *habeas corpus*. The scheme will also fail to oust *habeas corpus* if it provides for review on the grounds in the application, but the review process is not as broad and advantageous as that available through *habeas corpus*, considering both the nature of the process and any advantages each procedural vehicle may offer.
>
> [44] As I shall explain, applying this framework to the facts of Mr. Chhina's case reveals that while the statutory scheme set out in the *IRPA*, including judicial review, may provide adequate review with respect to some matters, it is unable to effectively address the challenge raised by Mr. Chhina's application in a manner that is as broad and advantageous as *habeas corpus*.
>
> B. *Identifying the Grounds of Mr. Chhina's Challenge*
>
> [45] The first step is to identify the grounds raised in the *habeas corpus* application. Mr. Chhina challenged the legality of his detention on two grounds: that he was being held in inappropriate conditions and that the duration of his detention had become indeterminate and overly lengthy. Mr. Chhina argued that the length and duration of his detention violated his rights under ss. 7 and 9 of the *Charter* because there was no reasonable prospect that the immigration-related purposes justifying his detention would be achieved within a reasonable time. The courts below proceeded on the basis of this second ground: that the lengthy detention of indeterminate duration violated the *Charter*.

[46] Unlike in *Peiroo*, Mr. Chhina's application for *habeas corpus* had nothing to do with whether his inadmissibility or deportation were rightly or wrongly decided.

C. *The IRPA Statutory Review Scheme*

[47] In determining whether the scheme provides for review as broad and advantageous as *habeas corpus*, the court should look at the actual alternatives for detention review realistically available to someone in Mr. Chhina's circumstances. As this Court stated in *May*, a "purposive approach . . . requires that we look at the entire context", which in that case included the relative disadvantages of judicial review in the Federal Court (*May*, at para. 65). This examination may include any administrative adjudicators, tribunals, and internal appeal mechanisms, as well as available judicial review or statutory appeal routes. In this case, I consider both the Immigration Division and the judicial review processes in the Federal Courts.

[48] I begin first with a general overview of how the *IRPA* scheme functions before considering whether it offers review as broad and advantageous as *habeas corpus*. The *IRPA* provides a detailed scheme to deal with the review of detention in the immigration context. Just as in the criminal context, a deprivation of liberty ordered pursuant to the *IRPA* must always be justified. Release is the default except where the Minister establishes that: the detainee is a danger to the public or is unlikely to appear at a hearing; the Minister is inquiring as to inadmissibility due to security risks, human rights violations or criminality; or the Minister has concerns about establishing the person's identity (*IRPA*, s. 58(1)). Each of these grounds of detention is determined in accordance with a list of immigration-specific factors set out in the *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 244-49 (*IRPR*).

[49] Once an initial detention order has been made, the *IRPA* review process provides for periodic internal review of detention by members of the Immigration Division of the Immigration and Refugee Board, who are appointed in accordance with the *Public Service Employment Act*, S.C. 2003, c. 22, (*IRPA*, ss. 151 and 172(2)). A member of the Immigration Division must conduct an initial review within 48 hours of an individual being taken into immigration custody, as well as a review within the 7 following days, and additional reviews every 30 days thereafter (*IRPA*, s. 57).

[50] The *IRPA* also explicitly provides for judicial review of those decisions by the Federal Court (*IRPA*, s. 72). An appeal from this judicial review is available to the Federal Court of Appeal on a certified question of general importance (*IRPA*, s. 74(d)). All the review processes are intimately linked, as judicial review is circumscribed by the statutory mandate of the original decision-maker.

[51] Lastly, it should be noted that immigration officials are experts in applying their statutory mandate. Given its role in judicial review, the Federal Court has also developed significant familiarity with the immigration context and contributes an additional layer of immigration-related expertise.

[52] As this examination reveals, the review process set out in the *IRPA* is detailed and clear. The grounds for ordering or continuing detention are clear. Independent review is assured by judicial review through the Federal Courts. Clear remedies, namely release, exist.

[53] However, as I shall explain, *IRPA* proceedings do not provide for review as broad and advantageous as *habeas corpus* with respect to the specific basis upon which Mr. Chhina has challenged the legality of his detention.

D. *Is Review Under the IRPA as Broad and Advantageous as Habeas Corpus?*

[54] The scope of review under the *IRPA* must, of course, actually include the grounds Mr. Chhina has raised.

[55] Once the Minister has established grounds for detention, immigration officers and members of the Immigration Division must consider factors which may weigh in favour of release, set out at s. 248 of the *IRPR*:

> (a) the reason for detention;
>
> (b) the length of time in detention;
>
> (c) whether . . . that detention is likely to continue and, if so, [how long];
>
> (d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency, or the person concerned; and
>
> (e) the existence of alternatives to detention.

[56] To this list, the Federal Court of Appeal has added that the decision-maker must be mindful of the principles applicable to s. 7 of the *Charter* (*Canada (Minister of Citizenship & Immigration) v. Thanabalasingham*, 2004 FCA 4, [2004] F.C.R. 572, at para. 14).

[57] Mr. Chhina challenged the length, uncertain duration and conditions of his detention. The conditions in which a person is detained are notably absent from the language of s. 248 of the *IRPR*. Counsel for the appellant conceded as much, adding that the conditions of detention are properly within the ambit of the provincial correctional authorities or the Canadian Border Services Agency, not the Immigration Division (*Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710, 25 Admin. L.R. (6th) 191, at para. 138). The Immigration Division has no explicit power to examine harsh or illegal conditions. This is to be contrasted with *habeas corpus*, which provides for review of any unlawful form of detention. The inability of a scheme to respond to the specific ground raised in an application of *habeas corpus* would mean that the scheme does not preclude *habeas corpus*. However, this ground of Mr. Chhina's *habeas corpus* application was not addressed by the Court of Appeal, nor was it argued before this Court.

[58] In contrast to the absence of conditions, the regulations do provide for consideration of the length and likely duration of detention (*IRPR*, s. 248(c) and (d)). The question thus becomes whether review of the length and duration of detention under the *IRPA* is as broad and advantageous as that available through *habeas corpus*. This requires consideration of the nature of the review process and any advantages provided by each procedural vehicle.

[59] I conclude that the *IRPA* does not provide for review as broad and advantageous as *habeas corpus* where the applicant alleges their immigration detention is unlawful on the grounds that it is lengthy and of uncertain duration. Taken as a whole, the scheme falls short in at least three important ways. First, the onus in detention review under the *IRPA* is less

advantageous to detainees than in *habeas corpus* proceedings. Second, the scope of review before the Federal Courts is narrower than that of a provincial superior court's consideration of a *habeas corpus* application. Third, *habeas corpus* provides a more timely remedy than that afforded by judicial review.

[60] Under the *IRPA*, the Minister need only make out a *prima facie* case for continued detention (e.g., indicate that the detainee is a continued flight risk) in order to shift the onus to the detainee to justify release. While the *IRPA* places the onus on the Minister to demonstrate a ground for detention (*IRPA*, s. 58), the regulations simply state that the length and likely duration of detention (among other factors) "shall be considered before a decision is made on detention or release" (*IRPR*, s. 248). The Federal Court has interpreted the regulations as imposing the onus on the detainees to demonstrate that their continued detention would be unlawful in light of the s. 248 factors (*Thanabalasingham*, at para. 16; *Chaudhary*, at para. 86; *Canada (Public Safety and Emergency Preparedness) v. Lunyamila*, 2016 FC 1199, [2017] 3 F.C.R. 428). This understanding of who bears the onus is consistent with the general principle that a *Charter* applicant bears the onus of establishing a *Charter* infringement. In addition, while s. 248 provides that an Immigration Division member must consider certain factors, the regulations provide no guidance as to *how* the length and duration of detention are to be considered and, crucially, when these factors might be outweighed by others — such as the reason for detention. Thus, as Rouleau J.A. has correctly observed, the *IRPA* does not require the Minister to explain or justify the length and uncertain duration of a detention, because the Minister need only establish one of the grounds at s. 58 of the scheme in order to shift the onus to the detainee (*Chaudhary*, at para. 86). This contrasts sharply with *habeas corpus* where, subject to raising a legitimate ground, the onus is on the Minister to justify the legality of the detention in any respect. As noted by this Court in *Mission Institution v. Khela*, the onus in *habeas corpus* is of particular historical significance:

> This particular shift in onus is unique to the writ of *habeas corpus*. Shifting the legal burden on the detaining authorities is compatible with the very foundation of the law of *habeas corpus*, namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified. (para. 40)

[61] Further, on judicial review to the Federal Court, the onus lies squarely upon the applicant to establish that the decision is unreasonable (*Mission Institution v. Khela*, at para. 40).

[62] Moreover, under the *IRPA* the Minister may satisfy its onus by relying on reasons given at a prior detention hearing. This practice has been encouraged by the Federal Courts, which have held that, while previous detention decisions are not binding, "if a member chooses to depart from prior decisions to detain, clear and compelling reasons for doing so must be set out" (*Thanabalasingham*, at para. 10; see also, among others: *Canada (Public Safety and Emergency Preparedness) v. Mehmedovic*, 2018 FC 729, at para. 19 (CanLII); *Canada (Public Safety and Emergency Preparedness) v. Torres*, 2017 FC 918, at para. 20 (CanLII); *Canada (Minister of Public Safety and Emergency Preparedness) v. Karimi-Arshad*, 2010 FC 964, 373 F.T.R. 292, at para. 16). In other words, immigration officials may rely entirely on reasons given by previous officials to order continued detention and remain fully compliant with the

IRPA scheme. In practice, the periodic reviews mandated by the *IRPA* are susceptible to self-referential reasoning, instead of constituting a fresh and independent look at a detainee's circumstances.

[63] Thus, the scheme fails to provide the detainee with the fresh and focussed review provided by *habeas corpus*, where the Minister bears the onus. The fresh evidence filed before this Court emphasizes the above points. An external audit commissioned by the chair of the Immigration and Refugee Board offers a timely, and frankly unfortunate, picture of how the scheme is being administered for those in long-term detention. The 2018 audit highlights how, in practice, detainees do not receive the full benefit of the scheme:

- in principle, the Immigration Division should place the onus on the Minister to continue detention; in practice they often fail to do so (2017/2018, Audit, at p. 18);

- in principle, the Immigration Division should be approaching each detention review afresh; in practice, the Immigration Division is overly reliant on past detention review decisions (2017/2018, Audit, pp. 31-32);

- in principle, the Immigration Division should be impartial and independent from the Canadian Border Services Agency; in practice, the Immigration Division often overly relies on the Canada Border Services Agency's submissions (2017/2018, Audit, pp. 17-18); and

- in principle, the Immigration Division should be reviewing *IRPA* detentions for compliance with ss. 7, 9, and 12 of the *Charter*; in practice, as a result of their failure to consider each detention review afresh, they do not do so (2017/2018, Audit, pp. 31-32).

[64] The second disadvantage of the *IRPA* scheme is the scope of review. As a practical matter, the Immigration Division does not conduct a fresh review of each periodic detention, as discussed above; as such, the scope of review before the Federal Courts is correspondingly narrower than review on *habeas corpus*. The broad review provided by *habeas corpus* grapples with detention as a whole. This case, for example, required a holistic consideration of Mr. Chhina's *Charter* rights and how they may have been violated — not by an individual decision but by the overall context of his detention. This type of inquiry is closely tied to the expertise of the provincial superior courts (*May*, at para. 68; see also *Mission Institution v. Khela*, at para. 45; *Chaudhary*, at para. 102). Relief through judicial review on the other hand, may be sought only with respect to a single decision, which in the *IRPA* context is generally the most recent 30-day review (*Federal Courts Rules*, SOR/98-106, s. 302).

[65] Further, the remedies available on judicial review are more limited and less advantageous to a detainee than on *habeas corpus*. Although the Federal Courts do have limited powers of *mandamus* — the power to require a decision-maker to take positive action, such as requiring the Immigration Division to release a detainee — I am aware of no cases in which release has been ordered. To the extent that they can exercise this power, the remedy is granted only where "certain relatively rarely occurring prerequisites are met" (*Fisher-Tennant v. Canada (Minister of Citizenship and Immigration)*, 2018 FCA 132, at para. 28 (CanLII)). Instead, a successful judicial review will generally result in an order for redetermination, requiring further hearings to obtain release and thereby extending

detention. This is to be contrasted with *habeas corpus*, where release is ordered immediately once the relevant authority has failed to justify the deprivation of liberty.

[66] Lastly, *habeas corpus* provides a more timely remedy than those available through the *IRPA*. Leave is required for judicial review of a detention decision made under the *IRPA*, and perfecting an application for leave on judicial review can take up to 85 days (*IRPA*, s. 72(2)(b); *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, rr. 10(1), 11 and 13). As the Federal Court has acknowledged, even in the best of circumstances, it is thus impracticable for judicial review to occur before the next 30-day detention review has been held, rendering the outcome of the judicial review moot (*Canada (Citizenship and Immigration) v. B386*, 2011 FC 175, [2012] 4 F.C.R. 220, at para. 13; *Chaudhary*, at para. 94). The remedy of a rehearing restarts the review process, leading to further delays. This cycle of mootness at the judicial review stage acts as a barrier to timely and effective relief.

[67] In contrast, the importance of *habeas corpus* as a "swift and imperative remedy" has long been recognized (*Mission Institution v. Khela*, at para. 3; *In Re Storgoff*, [1945] S.C.R. 526, at p. 591). Courts across the country have acknowledged this by enacting rules that prioritize the hearing of *habeas corpus* applications. *Habeas corpus* writs are "returnable immediately" before a superior court judge in Ontario, and the hearing of *habeas corpus* applications have priority over other business of the court in both Quebec and Nova Scotia (*Habeas Corpus Act*, R.S.O. 1990, c. H.1, s. 1(1); *Code of Civil Procedure*, CQLR, c. C-25.01, art. 82 para. 3; *Nova Scotia Civil Procedure Rules*, Royal Gaz. Nov. 19, 2008, r. 7.13(1); see also *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, *Canada Gazette*, Part II, vol. 132, No. 10, May 13, 1998, SI/98-78, ss. 103 to 107). The advantages *habeas corpus* offers with respect to timeliness are especially relevant to an application like Mr. Chhina's, which was primarily concerned with the duration of his detention.

[68] In sum, the *IRPA* fails to provide relief that is as broad and advantageous as *habeas corpus* in response to Mr. Chhina's challenge to the legality of the length and uncertain duration of his detention.

V. Motion to Vary the Record

[69] On appeal before this Court, the respondent brought a motion to vary the record and file new evidence. This new evidence included a troubling audit that found examples of maladministration within the *IRPA* scheme, resulting in some detainees being kept in a cycle of long-term detention.

[70] While the evidence was not necessary to resolve this appeal, it is admissible pursuant to *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. The evidence is new, relevant, credible and confirmatory in that it provides statistical evidence supporting the argument that the *IRPA* scheme is not as broad and advantageous as *habeas corpus* for lengthy detentions, particularly with regards to the onus borne by the applicant at each successive detention review. In this case, even without regard to this evidence, it was clear that the statutory scheme, including judicial review at the Federal Courts, is not as advantageous as *habeas corpus* given the nature of the challenge.

VI. Conclusion

> [71] *Habeas corpus* is a fundamental and historic remedy which allows individuals to seek a determination as to the legality of their detention. A provincial superior court should decline its *habeas corpus* jurisdiction only when faced with a complete, comprehensive and expert scheme which provides review that is at least as broad and advantageous as *habeas corpus* with respect to the grounds raised by the applicant. Although our legal system continues to evolve, *habeas corpus* "remains as fundamental to our modern conception of liberty as it was in the days of King John" and any exceptions to its availability must be carefully limited (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 28). The *IRPA has* been held to be a complete, comprehensive and expert scheme for immigration matters generally, but it is unable to respond to Mr. Chhina's challenge in a manner that is as broad and advantageous as *habeas corpus* and the Alberta Court of Queen's Bench erred in declining to hear Mr. Chhina's *habeas corpus* application. For these reasons, I would allow the motion to adduce new evidence and dismiss the appeal with costs on the basis agreed by the parties.

Dissenting, Justice Abella faulted the majority for interpreting the IRPA too narrowly as excluding the possibility of reviewing all aspects of immigration detention, including its conditions and lawfulness, thus elevating *habeas corpus* into the only meaningful route offering detainees a full review of their detention. She noted, at para 74, that the better approach was "to continue to read the language of IRPA in a manner that is as broad and advantageous as *habeas corpus* and ensures the complete, comprehensive and expert review of immigration detention that it was intended to provide". Key to her dissent was her view that the IRPA had to be interpreted in a manner consistent with ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*:

> [124] When making a decision as to whether to detain or release an individual under *IRPA*, Immigration Division members *must* always exercise their discretion in a way that accords with the *Charter* (see *IRPA*, s. 3(3)(d)). There is a statutory presumption in favour of release before the Immigration Division, which "shall order the release" of a detainee unless it is satisfied that at least one of the grounds set out in s. 58 of *IRPA* is met, taking into account the factors in s. 248 of the *Regulations*.
>
> [125] Significantly, the mandatory s. 248 inquiry on review before the Immigration Division requires the Division to assess the lawfulness of ongoing immigration detention without placing any onus on the detainee. Unlike *habeas corpus* applications, where the detainee must raise a legitimate ground upon which to question the lawfulness of his or her detention, the Minister bears the onus throughout of justifying the detention before the Immigration Division. The detainee bears no onus to produce evidence as to any of the factors enunciated in s. 58 of *IRPA* or s. 248 of the *Regulations*.
>
> [126] To the extent that the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 572, and the Court of Appeal for Ontario in *Chaudhary* reached the contrary conclusion, they were, in my respectful view, wrongly decided. Moreover, the holding in *Chaudhary* that the Minister can satisfy his or her onus before the Immigration Division "simply by relying on the reasons given at prior detention hearings" (para. 87) is inconsistent with the Immigration Division's obligation to conduct a fresh inquiry into the lawfulness of detention at each review. At each Immigration Division hearing, detainees are entitled to the same fresh review of their detention as they would be

on *habeas corpus* review. In cases like Mr. Chhina's, the Immigration Division must always reassess the prior evidence in light of the detainee's *Charter* arguments.

[127] In particular, where a detainee challenges their detention as a violation of the *Charter*, the time between the prior and present review hearing will constitute new evidence that must inform the Immigration Division's application of s. 58 of *IRPA* and s. 248 of the *Regulations*. It is not enough for the Minister to rely on previous Immigration Division decisions to satisfy the Immigration Division on the s. 58 and s. 248 inquiry. The integrity of the *IRPA* process is dependent on a fulsome review of the lawfulness of detention, including its *Charter* compliance, at every review hearing.

[128] The *Charter* both guides the exercise of discretionary administrative decision making under *IRPA* and informs our interpretation of the scheme itself. The *IRPA* scheme must therefore be interpreted harmoniously with the *Charter* values that shape the contours of its application. As Justices Iacobucci and Arbour stated in *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248:

> The modern approach [to statutory interpretation] recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.
>
> Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*... . This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. [paras. 34-35]

[129] Importing *Charter* principles into the exercise of administrative discretion under *IRPA* requires that Immigration Division members apply the scheme in a manner that is at least as rigorous and fair as *habeas corpus* review. It is not enough that a statutory scheme is as broad and advantageous on paper as *habeas corpus* review, the scheme must also be *applied* in a manner that preserves the rights of detainees and the integrity of the process in the most comprehensive way possible.

[130] That means that in carrying out their duties under the *IRPA* scheme, members of the Immigration Division must ensure the fullest possible review of immigration detention. This includes, and has always included, an obligation to weigh the purposes served by immigration detention against the detained individual's ss. 7, 9 and 12 *Charter* rights. The Immigration Division's inquiry into the lawfulness of detention must take into account the detained individual's s. 7 *Charter* right not to be deprived of liberty except in accordance with the principles of fundamental justice, his or her s. 9 right not to be arbitrarily detained or imprisoned, and the s. 12 right not to be subjected to cruel and unusual treatment or punishment. As Rothstein J. observed in *Sahin*, "it is not the words of [*IRPA*] that vest adjudicators with such jurisdiction, but rather, the application of *Charter* principles to the exercise of discretion under [the scheme]" (p. 230).

[131] That, in my respectful view, necessarily includes the Immigration Division's ability to consider the conditions of detention. A comprehensive, *Charter*-infused analysis of immigration detention may reveal that the length *or conditions* of detention are such that

continued detention is not in accordance with the principles of fundamental justice (s. 7), is arbitrary because it is no longer reasonably furthering the state objective (s. 9) and/or amounts to cruel and unusual punishment (s. 12). The application of ss. 7, 9 and 12 of the *Charter* to the *IRPA* scheme brings to light the Immigration Division's obligation to assess the length, future duration and *conditions of detention* when balancing the state's objectives against the detained individual's rights.

[132] The *IRPA* scheme therefore ensures the protection of other *Charter* rights by calling on the Immigration Division to consider whether detentions have become unlawful because of their length, uncertain duration and conditions. There is no principled reason to interpret the review provisions in a way that precludes scrutiny of conditions. Why apply a narrow, constrictive interpretation of a remedial statute when a wider, more protective interpretation is not only available, it is mandated by the purposes underlying the scheme. As these reasons seek to clarify, the s. 248 factors guide the Immigration Division in assessing whether ongoing detention is justified pursuant to the *Charter* based on:

(a)The reason for detention;

(b) Length of time in detention;

(c) Factors that may assist in determining how long detention is likely to continue;

(d) Delays or lack of diligence on the detainee or the government's part; and

(e) Alternatives to detention.

[133] Section 248(a) requires the Immigration Division to weigh the state's immigration objectives against the detained individual's right to be free from arbitrary or indefinite restraints on liberty. As in *habeas corpus* review assessing compliance with the *Charter*, the Immigration Division must assess the strength of the reason for detention. A prior, fact-driven Immigration Division determination that the individual constitutes a flight risk or a danger to the public is entitled to deference on both *IRPA* and *habeas corpus* review (see *Thanabalasingham*, at para. 10 (*IRPA* review) and *Brown v. Canada (Public Safety)* (2018), 420 D.L.R. (4th) 124 (Ont. C.A.), at para. 29 (*habeas corpus* review)). The greater the danger posed to the public, the stronger the justification for ongoing detention (*Sahin*, at p. 231 (*IRPA* review); *Ali v. Canada (Minister of Public Safety and Emergency Preparedness)* (2017), 137 O.R. (3d) 498 (C.A.), at para. 24 (*habeas corpus* review)).

[134] As for s. 248(b), the justification for continued detention decreases as the length of time in detention increases. The Immigration Division must accord "significant weight" to the length of detention (see *Sahin*, at pp. 231-32). The strength of an immigration detainee's argument that his ongoing detention has become a violation of the *Charter* increases with each subsequent review hearing. The detaining authorities bear a correlative onus to justify continued detention in the face of a continually solidifying *Charter* claim. A longer period of detention signifies that immigration authorities have had more time to effect removal, which they are expected to do as soon as reasonably possible. Accordingly, the evidentiary burden on the detaining authority to justify continued immigration detention increases as the length of detention increases. This approach to the length of detention is no different from *habeas corpus* (see *Chaudhary*, *Ali* and *Brown*).

[135] The anticipated future length of detention in s. 248(c) of the *Regulations* requires an estimation of how long detention is likely to continue. A detention that is lawful for the purpose of removal may become arbitrary and in violation of s. 9 of the *Charter* when it becomes unhinged from its immigration-related purpose. Where removal appears unlikely and the future duration of detention cannot be ascertained, this is a factor that weighs in favour of release (*Sahin*, at p. 231; *Charkaoui*, at para. 115).

[136] That is the same inquiry as in *habeas corpus* review. As Rouleau J.A. noted in *Chaudhary*:

> A detention cannot be justified if it is no longer reasonably necessary to further the machinery of immigration control. Where there is no reasonable prospect that the detention's immigration-related purposes will be achieved within a reasonable time (with what is reasonable depending on the circumstances), a continued detention will violate the detainee's ss. 7 and 9 *Charter* rights and no longer be legal. [para. 81]

[137] The Immigration Division is, moreover, better positioned to assess and address the future duration of detention than the superior courts on *habeas corpus* review. As Létourneau J.A. held for the court in *Canada (Minister of Citizenship and Immigration) v. Li*, [2010] 2 F.C.R. 433 (C.A.), the short 30-day period between each Immigration Division review "allows for an estimation based on actual facts and pending proceedings instead of an estimation based on speculation as to potential facts and proceedings" (para. 66). The Immigration Division obtains an accurate picture of the detention every 30 days. It can assess progress over time by reviewing past proceedings and anticipating pending proceedings to guard against a violation of the detainee's *Charter* rights.

[138] Section 248(d) requires a consideration of delays or lack of diligence on the part of the detained individual or the immigration authorities. As Rothstein J. held in *Sahin* and this Court held in *Charkaoui*, unexplained delay or lack of diligence should count against the offending party (*Sahin*, at p. 231; *Charkaoui*, at para. 114). Superior courts reviewing immigration detention for compliance with ss. 7, 9 and 12 of the *Charter* undertake the same inquiry. They look to the complexity of effecting the applicant's removal from Canada, the reasonableness of the steps taken by immigration authorities to effect removal, and the extent to which the applicant has prolonged their detention by failing to cooperate with immigration authorities' removal efforts (see *Brown*, at para. 36; *Canada v. Dadzie*, 2016 ONSC 6045, at para. 46).

(…)

[140] Finally, s. 248(e) of the *Regulations* requires the Immigration Division to consider alternatives to detention. Alternatives to detention include outright release; a bond or guarantee; reporting requirements; confinement to a specific geographic area; and detention in a less restrictive form (*Sahin*, at para. 30). An assessment of the conditions of detention is a vital component of the inquiry into alternatives to detention under s. 248(e). Given the Immigration Division's statutory mandate to assess alternatives to detention; the requirement to make *Charter*-compliant decisions; and its ability to exercise discretion as to the terms of release, the Division's power to release a detainee on conditions must include an ability to modify the conditions of detention. Like the provincial superior courts on *habeas*

corpus review, Immigration Division members must be taken to have the power to release the detainee from a "prison within a prison" pursuant to s. 58(3) (see *R. v. Miller*, [1985] 2 S.C.R. 613, at p. 637, per Le Dain J.; Robert J. Sharpe, *The Law of Habeas Corpus* (1976), at p. 149).

[141] In sum, the process of review before the Immigration Division governed by s. 58 of *IRPA* and s. 248 of the *Regulations* demands that the Division consider the reasons for detention; the length of time in detention; the anticipated future length of detention; delays or lack of diligence; and the availability, effectiveness and appropriateness of alternatives to detention, including changes in the conditions of detention. These are the same considerations that superior courts weigh to assess whether ongoing immigration detention violates ss. 7, 9 or 12 of the *Charter* on *habeas corpus* review.

[142] The Immigration Division has the same constitutional mandate as well as an overarching duty to give effect to "a legislative initiative purporting to provide a whole scheme . . . for the administration and review of proceedings in . . . immigration" (*Peiroo*, at p. 262; see also *Reza v. Canada* (1992), 11 O.R. (3d) 65 (C.A.), at p. 80). Mr. Chhina is attempting to ignore the body explicitly and exclusively tasked with carrying out the purposes of *IRPA* by wrapping his immigration detention with a *Charter* ribbon.

[143] This Court in *Reza* rejected the applicant's similar attempt to bypass the immigration scheme in search of a favourable constitutional disposition. In so doing, we acknowledged that the expertise of the Immigration Division in immigration matters extends to the *constitutional* aspects of immigration matters. As La Forest J. wrote in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical . . .
>
> . . .
>
> It is apparent, then, that an expert tribunal . . . can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. [pp. 18-19]

[144] Despite Mr. Reza's attempt to recast his challenge as a constitutional one, the Court recognized that his *Charter* arguments were fundamentally grounded in immigration policy. The same is true of Mr. Chhina's *Charter* complaints, which arose in relation to the Immigration Division's decisions to continue his detention. These are matters which lie at the heart of immigration policy. The Immigration Division is the most appropriate forum to integrate *Charter* rights within the overall scheme and purposes of *IRPA*.

[145] Properly interpreted, it is clear from the preceding review that the *IRPA* scheme for the review of immigration detention offers a remedy to detainees that is at least as broad, and no less advantageous than review by way of *habeas corpus*. It provides for the fullest possible review of the merits of a challenge to immigration detention. And where an individual is subject to an immigration detention that is said to violate his or her ss. 7, 9 and 12 *Charter* rights, the Immigration Division's review process, guided by s. 58 of *IRPA* and s. 248 of the

Regulations, allows for at least the same substantive assessment as that undertaken by superior courts on *habeas corpus* review.

[146] This Court has repeatedly affirmed that *habeas corpus* will not lie if the statutory alternative provides a remedy that is at least as favourable. In my respectful view, it does. Mr. Chhina's case is therefore captured by the *Peiroo* exception to the availability of *habeas corpus* review. The superior court properly declined to exercise its *habeas corpus* jurisdiction in favour of the complete, comprehensive and expert scheme to which Mr. Chhina was entitled under the *Act*.

[147] I would allow the appeal.

Chapter 18 – Standing, Standing in Judicial Review Proceedings, The Status of the Authority Under Attack, p. 1038

Add before "Intervenors" at p. 1038:

In *Ontario (Energy Board) v Ontario Power Generation Inc*., 2015 SCC 44, [2015] 2 S.C.R. 147, the Supreme Court of Canada was afforded an opportunity to revisit the question of the appropriateness of a statutory authority's participation in the review of its own decision in light of the recent appellate pronouncements in *Goodis* and *Quadrini*. Ontario Power Generation (OPG) had asked the Ontario Energy Board to approve $145 million in labour compensation costs and to incorporate these into its utility rates, enabling it to receive payment amounts to cover these costs. The Board disallowed the costs and Ontario Power Generation appealed. It argued that the Board's decision was unreasonable because the Board was legally required to compensate OPG for all its prudently committed or incurred costs and the Board had not applied the appropriate "prudence methodology". In defence of its decision, the Board argued, *inter alia*, that such a methodology was not compelled by law. OPG also raised concerns regarding the Board's role in acting as a party on appeal from its own decision and claimed that the Board had attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

> The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ. was delivered by Rothstein J. —
>
> A. *The Appropriate Role of the Board in This Appeal*
>
> (1) Tribunal Standing
>
> [41] In *Northwestern Utilities Ltd. v. City of Edmonton*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: ". . . it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).
>
> [42] The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that
>
> > [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]
>
> [43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983, which involved judicial review of a

British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

[44] This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* (1988), 1988 CanLII 2812 (BC CA), 26 B.C.L.R. (2d) 145 (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

> those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.
>
> (*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

[45] Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 (CanLII), [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 2005 CanLII 11786 (ON CA), 75 O.R. (3d) 309 (C.A.)("*Goodis*"), at para. 24.

[46] A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in G. Kaiser and B. Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

[47] In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make.

> Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27 (CanLII), [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.), at para. 32.
>
> (*Goodis*, at para. 34)

[48] The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and to what extent the tribunal should be permitted to make submissions: paras. 36-38.

[49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246 (CanLII), [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

[50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

[51] A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94 (CanLII), 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern Utilities* but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal

participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

[53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 (CanLII), 344 D.L.R. (4th) 292, at para. 42.

[57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[60] Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute with acting to safeguard the public interest — with few alternatives but to participate as a party.

[61] Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[62] The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) <u>Bootstrapping</u>

[63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27 (CanLII), 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

[65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

[66] By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

[67] There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As

discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

[68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[71] I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

. . . if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

[72] In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of

> impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

Justice Rothstein found the Board's decision to be reasonable on the merits. Justice Abella dissented on the merits, finding the Board's decision to be unreasonable.

Chapter 18 – Standing, Standing and Intervention Before Tribunals, p. 1043

Add after *Forest Ethics Advocacy* at p. 1043:

In *Lukács v. Canada (Canadian Transportation Agency)*, 2018 SCC 2, rev'g 2016 FCA 220, the Supreme Court of Canada dealt with the question of whether it is unreasonable for a tribunal to deny a person standing on the grounds that he does not meet the standing requirements developed by the courts of civil jurisdiction when the tribunal's enabling statute sets out a legislated standard for participation. Lukács, an air passenger rights advocate, had filed a complaint against Delta Air Lines with the National Transportation Agency, alleging that Delta's practices relating to the transportation of "large (obese)" persons were discriminatory and contrary to regulations under the *Canada Transportation Act*, S.C. 1996, c. 10, the Agency's enabling statute and to previous Agency decisions. Section 37 of the *Act* granted the Agency the power to inquire into a complaint:

> 37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

Subsection 67.2(1) of the *Act* set out the powers of the Agency if it found terms or conditions in a tariff that were unreasonable or unduly discriminatory:

> 67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

The Agency determined that while Lukács was not required to be a member of the group discriminated against to have standing, he must have a "sufficient interest". Moreover, the use of "any person" in the *Act* did not mean that the Agency should determine issues in the absence of the persons with the most at stake. It found that Lukács himself would not be subject to Delta's policy regarding large persons. It further held that Lukács could not rely on public interest standing to bring his complaint before the Agency, on the basis that this doctrine did not extend beyond cases involving a challenge to the constitutionality of legislation or of administrative action.

Lukács exercised a statutory right of appeal on questions of law to the Federal Court of Appeal. The Court determined that the Agency's decision to grant standing, which engaged the exercise of discretion and required an analysis of specific provisions of its enabling statute, must be reviewed on a standard of reasonableness. It then considered whether the Agency had erred in applying the general law of standing to Lukács' complaint. The Court determined that the Agency's decision denying Lukács standing was unreasonable. It found that the statutory framework distinguished between "those who can bring a complaint to obtain a personal remedy and those who can bring a complaint as a matter of principle and with a view to ensuring that the broad policy objectives of the *Act*, which includes the prevention of harm, are enforced in a timely manner, not just remedied after the fact" (para 25). Noting that the Agency had the power to disallow any tariff or tariff rule found to be unreasonable or unduly discriminatory and substitute it with another one established by the Agency, the Court concluded:

> [27] In that perspective, the fact that a complainant has not been directly affected by the fare, rate, charge, or term or condition complained of and may not even meet the

> requirements of public standing, should not be determinative. If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint. This is not to say, once again, that each and every complaint filed with the Agency has to be dealt with and decided, but that complaints that appear to be serious on their face cannot be dismissed for the sole reason that the person complaining has not been directly and personally affected or does not comply with other requirements of public standing. When read in its contextual and grammatical context, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.

As a result, the Agency's decision was unreasonable:

> [30] I am of the view that the Agency erred in law and rendered an unreasonable decision in dismissing the complaint of Dr. Lukács for lack of standing. The Agency does not necessarily have to investigate and decide every complaint and is certainly empowered to dismiss without any inquiry those that are futile or devoid of any merit on their face; it cannot, however, refuse to look into a complaint on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions. In so doing, the Agency unreasonably fettered its discretion.

Allowing the appeal, the Court directed that "the matter be returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint" (para. 32).

McLachlin CJ, for a majority of the Supreme Court, agreed that the Agency's decision was unreasonable. However, like the dissenting judges, she took issue with the Court of Appeal's decision to prevent the Agency from looking to the rules of standing in reconsidering its decision refusing to hear Lukács' complaint.

> The judgment of McLachlin C.J. and Wagner, Gascon, Côté, Brown and Rowe JJ. was delivered by the Chief Justice B. McLachlin
>
> (…)
>
> **13** The question in this case is whether the Agency reasonably exercised its discretion to dismiss Dr. Lukács' complaint. On a respectful reading of the Agency's reasons, I conclude that it did not. The decision does not satisfy the requirements of justification, transparency, and intelligibility for two reasons. First, the Agency presumed public interest standing is available and then applied a test that can never be met. This approach to standing unreasonably fettered the Agency's discretion. Second, the total denial of public interest standing is inconsistent with a reasonable interpretation of the Agency's legislative scheme. I will address each of these points in turn.
>
> **14** In this case, the Agency had discretion under s. 37 of the Act to determine whether to hear Dr. Lukács' complaint. The Agency did not advert to this discretion, however, and appeared to approach the standing question as if bound by the tests for standing as applied in civil courts. As such, it found that it would hear the complaint only if Dr. Lukács could satisfy the test for either private interest standing or public interest standing.

15 The Agency held that to establish private interest standing, complainants must show that they are "aggrieved", "affected", or have some other "sufficient interest" (para. 64). While the Agency appears to have accepted that a complainant does not need to have suffered discrimination, it held that the complainant does need to be a person to whom the impugned policy applies. Dr. Lukács, who was not a "'large person' for the purpose of Delta's policy", did not therefore have private interest standing *(ibid.)*.

16 Nor, the Agency held, could Dr. Lukács claim public interest standing. The Agency stated the relevant test as follows, at para. 68:

1. Is there a serious issue as to the validity of the legislation?
2. Is the party seeking public interest affected by the legislation or does the party have a genuine interest as a citizen in the validity of the legislation?
3. Is there another reasonable and effective manner in which the issue may be brought to the court?

The Agency recognized this Court's direction in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, at para. 36, that these factors are not technical requirements and must be weighed cumulatively. Nonetheless, the Agency proceeded to deny standing based on a rigid application of the second factor of the test. It concluded that standing must be denied because the complaint was "not related to the constitutionality of legislation or to the non-constitutionality of administrative action" (para. 74).

17 This brings us to the first problem: the Agency applied a test for public interest standing that could arguably never be satisfied. One of the Agency's functions is the regulation of air carriers, which are private, non-governmental actors. Any valid complaint against an air carrier would impugn the terms and conditions established by a private company. A complaint regarding these terms and conditions can never, by its very nature, be a challenge to the constitutionality of legislation or the illegality of administrative action. In sum, the Agency suggests the availability of public interest standing to bring a complaint of this type and then, in the same breath, precludes any possibility of granting it. The imposition of a test that can never be met could not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints.

18 The Agency's application of the test is also inconsistent with the rationale underlying public interest standing. In determining whether to grant public interest standing, courts must take a "flexible, discretionary approach": *Downtown Eastside*, at para. 1. This requires balancing the preservation of judicial resources with access to justice: *ibid.* at para. 23. The whole point is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door. As the Agency rightly put it, the objective is to hear from those plaintiffs or complainants "with the most at stake" (para. 52). The Agency's decision in this case, however, exhibits no balancing; it does not allow those with most at stake to be heard. Rather, it uses public interest standing simply to bar access. *Downtown Eastside* makes clear that at least *some* plaintiffs will be granted public interest standing. The Agency's decision, in contrast, allows *no* complainants to have public interest standing. The Agency

did not maintain a flexible approach to this question and in so doing unreasonably fettered its discretion. While the public interest standing test was designed to protect courts' discretion, the Agency eliminated any of its own discretion under this test.

19 The second problem with the decision is that the impact of the tests for private and public interest standing, applied as they were in this decision, cannot be supported by a reasonable interpretation of how the legislative scheme is intended to operate. Applying these tests in the way the Agency did would preclude any public interest group or representative group from ever having standing before the Agency, regardless of the content of its complaint. A complaint by the Council of Canadians with Disabilities, like the one brought in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, would not be heard. In effect, only a person who is herself targeted by the impugned policy could bring a complaint.

20 This is contrary to the scheme of the Act. Parliament has seen fit to grant the Agency broad remedial authority. Section 5(d) of the Act requires the Agency to promote accessible transportation. And ss. 111 and 113 of the Regulations allow the Agency to act to correct discriminatory terms and conditions before passengers actually experience harm. Indeed, these provisions empower the Agency to investigate based on a complaint or of its own motion. To refuse a complaint based solely on the identity of the group bringing it prevents the Agency from hearing potentially highly relevant complaints, and hinders its ability to fulfill the statutory scheme's objective. This does not mean that every complaint from a public interest group must be heard. It is unreasonable, however, for the Agency to apply a test that would prevent it from hearing the complaint of any such group.

21 For these reasons, I conclude that the Agency's decision fails to meet the indicia of reasonableness enumerated in *Dunsmuir.*

Justice Abella, joined by Justices Moldaver and Karakatsanis, would have upheld the Agency's decision as reasonable, finding that while the Agency was not required to apply judge-made standing rules, nothing in its enabling statute prevented it from doing so:

43 The issue is whether the Agency can develop and apply its own standing rules and, if so, whether they can be similar to those applied by courts. All of the parties agree that reasonableness is the applicable standard of review.

44 The intention of Parliament was for the Agency to have the authority to interpret and apply its wide-ranging governing statute dealing with national transportation issues, address policy, and balance the multiple and competing interests before it (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at para. 107). There is nothing in the Agency's mandate that circumscribes its ability to determine how it will decide what cases to hear.

45 Like the courts, the Agency is entitled to apply a gatekeeping or screening mechanism that is principled and for the same principled reason, namely, to avoid an arbitrary and undisciplined *ad hoc* approach to standing. And, like the courts, a principled gatekeeping function enables the Agency to balance, in a transparent and effective manner, the various competing interests and demands before it, such as access and resources.

46 The Agency's approach to public interest standing is based on this Court's jurisprudence and reflects traditional gatekeeping rationales:

> ... applying standing to public law accomplishes three key objectives. First, it ensures that scarce judicial resources are economized. Second, it ensures that the most urgent cases (those that actually affect people, as opposed to theoretical cases) are heard as quickly and efficiently as possible. Finally, it ensures that the best evidence is before the decision maker: the evidence of someone actually affected.
>
> (*Lukacs v. Porter Airlines Inc.*, Canadian Transportation Agency, Decision No. 121-C-A-2016, April 22, 2016, at para. 19; see also *Amalgamated Transit Union, Local 279 (Re)*, Canadian Transportation Agency, Decision No. 431-AT-MV-2008, August 20, 2008.)

47 Mr. Lukács argued, however, that the courts' law of standing is inappropriate in a tribunal context because, in his view, the assumptions that justify the use of standing in the civil courts context are absent. His argument, at its core, is for universal standing, namely that everyone who brings a claim before the Agency is entitled to have it heard.

48 This claim for universal standing ignores why standing rules exist. As Cromwell J. explained in *Downtown Eastside*, "it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter" (para. 1). Standing rules allow tribunals to preserve and properly allocate scarce judicial resources, screen out "the mere busybody", and ensure that contending points of view are fully canvassed (*Downtown Eastside*, at para. 25).

49 Standing rules also ensure that tribunals have the "benefit of contending points of view of the persons most directly affected by the issue" (*Downtown Eastside*, at para. 29).

50 And, as in courts, standing enables a tribunal to economize and prioritize its resources, and ensure that it benefits from contending points of view that are advanced by those best placed to advance them. And all this to ensure that the most timely and effective use can be made of a tribunal's ability to implement its mandate.

51 Requiring a tribunal to adjudicate even marginal or inadequately substantiated complaints, on the other hand, grinds the operation of a tribunal to a halt and can be "devastating" to private litigants. As Cory J. warned in *Canadian Council of Churches*:

> It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants. [p. 252]

52 The fact that a tribunal's governing legislation has a public interest dimension does not preclude it from adopting similar rules of standing to those used by the courts. All tribunals have a public interest mandate because all legislation does. This does not mean that all

litigants who want to bring a claim can automatically do so. The question is what the tribunal's enabling legislation mandates or precludes (L. Sossin, "Access to Administrative Justice and Other Worries", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 211, at p. 214).

53 Parliament has given the Agency wide discretion to choose, according to its own institutional constraints and demands, how it will promote its overall mandate to regulate and adjudicate national transportation issues. That discretion is found in ss. 17, 25 and 37 of the *Canada Transportation Act*, S.C. 1996, c. 10. Under s. 37 of the *Act*, the Agency has the authority to determine which complaints it will inquire into:

> **37** The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

The Agency's power to process and resolve complaints is framed in discretionary language. The Agency *may* inquire into, hear and determine a complaint. I agree with Mr. Lukács that anyone can *bring* a complaint, but his view that there is no discretion to decide which complaints to hear reads out the word "may" from s. 37.

54 Under s. 17 of the *Act*, the Agency may make its own rules about how it carries on its work, as well as the manner of and procedures for dealing with matters before the Agency. It states:

> **17** The Agency may make rules respecting
>
> **(a)** the sittings of the Agency and the carrying on of its work;
>
> **(b)** the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> **(c)** the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

These rules are codified in the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ("*Rules*").

55 Under s. 5(1) of the *Rules*, the *Rules* are to be interpreted so as to facilitate the optimal use of Agency and party resources, and the promotion of justice. Examining the Agency's mandate through the lens of efficiency, Dawson J.A. noted that "[e]fficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances" (*Lukács v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186, at para. 54). Formulating and applying screening or gatekeeping rules represents one way in which the Agency can legitimately realize these goals.

56 And, under s. 25 of the *Act*, the Agency has "all the powers, rights and privileges that are vested in a superior court" to deal with "all matters necessary or proper for the exercise of its jurisdiction", including compelling the attendance and examination of witnesses, ordering the production and inspection of documents, entering and inspecting property and enforcing its orders. Like s. 17 of the *Act*, s. 25 reflects a choice on the part of Parliament to grant the Agency expansive, discretionary authority to manage its own processes and procedures, including judicial powers.

> **57** The Federal Court of Appeal in this case acknowledged that the Agency has the discretion not to hear every case:
> As recently stated by this Court in *Lukacs v. Canada (Transport Agency)*, 2016 FCA 202 (F.C.A.) at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency "may" inquire into, hear and determine a complaint. There is no question ... that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources. (2016 FCA 220, 408 D.L.R. (4th) 760, at para. 16)

Yet after accepting that the Agency has discretionary gatekeeping authority, the Federal Court of Appeal went on to constrain that discretion by saying that the gatekeeping exercise could not be based on the approach used by courts.

58 The legislature has given the Agency wide discretionary authority over how to exercise its mandate. It is not a fettering of discretion for a tribunal to exercise this discretionary authority differently from how a reviewing court would exercise it. This, with respect, results in the court unduly fettering the Agency's discretion, not the Agency fettering its own.

59 There is no doubt that one can envision other tests for standing, but once we accept that gatekeeping is a legitimate exercise of the Agency's discretion in accordance with its mandate, what is the court's authority for replacing the Agency's test with one it prefers? As McIntyre J. cautioned in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, when he wrote: "... courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility" (para. 7).

60 A tribunal's standing rules will not necessarily survive scrutiny simply because the tribunal is authorized by statute to develop its own procedures. But when a tribunal like the Agency chooses to apply and exercise its broad legislative mandate by borrowing an approach long sanctioned by the courts as an effective and principled way to determine which cases it will hear, reviewing courts should not be overly eager to substitute their own vision of how that tribunal's procedural mandate should be applied. To do so, in effect, undermines not only the legitimacy of the standing rules developed and applied by the courts, it undermines public confidence in the tribunal by suggesting it lacks the indicia of an adjudicative body with sufficient institutional maturity to apply the same rules as a court. Put colloquially, if it's good enough for the courts, it's good enough for tribunals. I

recognize that the application of court-like procedures to the tribunal context may not, in certain circumstances, be appropriate, but where, as here, the adopted procedures flow from the same concerns and rationales, I see no reason for a tribunal to feel immunized from access to a procedure courts have found helpful.

61 This does not mean that tribunals are *required* to follow the same procedures courts use, but when they do, this should not be a stand-alone basis for quashing them. Unless we are prepared to say that the courts' standing rules are inappropriate, I see no reason to conclude that their propriety is diminished when applied by a tribunal. In this case, the Agency developed its standing rules in full accordance with its legislative mandate. There is no basis for interfering with them.

62 There is no doubt that the test for public interest standing is a high threshold and results in some individuals or groups being unable to raise issues they consider significant. Yet courts routinely apply this threshold as a transparent way to determine the most effective use of their time, resources and expertise. No less are tribunals entitled to apply high thresholds in order to preserve their ability to manage resources and expertise in accordance with their mandate. Access to justice demands that courts and tribunals be encouraged to, not restrained from, developing screening methods to ensure that access to justice will be available to those who need it most in a timely way (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87). That is why courts developed standing rules in the first place.

63 The test applied by the Agency effectively foreclosed Mr. Lukács' ability to make out a case for public interest standing in this case. But, in my respectful view, that does not end the matter. The question to be determined is whether the outcome reached by the Agency was reasonable. Mr. Lukács has brought a complaint with no underlying facts, no representative claimants and no argument. He wants to engage the Agency in a fishing expedition that will have the effect of distracting it from its ability to exercise its mandate on behalf of those with a *prima facie* legitimate claim.

64 Even if the Agency had applied the lower public interest standing test proposed by Mr. Lukács, I do not see how he would have been successful in having his complaint inquired into. It is therefore unnecessary to remit the matter back to the Agency. His complaint regarding Delta's practices is purely theoretical, his interest in the issues is academic and the proposed suit does not constitute an effective and reasonable means of bringing the issue before the Agency. He submitted no evidence that any of Delta's passengers, including the passenger whose email he relied on, had actually been affected by the issue he raised before the Agency. In fact, he submitted no evidence at all even though the Agency has an open complaint procedure whereby complainants are invited to make and substantiate their complaints through an accessible online application.

65 Nor has he provided any explanation for why a passenger affected by Delta's practices could not have submitted his or her own application to the Agency, "thereby provid[ing] the Agency with direct and concrete evidence upon which to adjudicate" (*Porter*, at para. 65). Such direct and concrete evidence seems all the more necessary given the Agency's decision dealing with, and Mr. Lukács' acknowledged familiarity with the Agency's best known disability case, setting out the "one-person - one-fare" policy, which states that "the determination of whether a person is disabled by reason of obesity is dependent on the

> facts and circumstances in each individual case and must be assessed on a case-by-case basis" (*Norman Estate v. Air Canada*, Decision No. 6-AT-A-2008, January 10, 2008, at para. 128).
>
> **66** The Agency's decision to deny Mr. Lukács' complaint on the basis that he lacked standing was therefore reasonable in all the circumstances.

As noted in the extract reproduced in the supplement to Chapter 14, the majority disagreed with Justice Abella's decision to "focus on the outcome" in assessing the reasonableness of the Agency's decision. By focusing on the theoretical nature of Lukács' complaint, his failure to support the complaint with evidence, and his failure to explain why a passenger affected by Delta's practices could not have submitted his or her own application, matters that the Agency had not considered in its decision, the dissent was "replacing the Agency's reasons with those of this Court". However, the majority did agree with the dissent that in referring the matter back to the Agency, the Court of Appeal had unduly limited its power to reconsider its decision:

> 30 I would agree with Abella J., however, that the Court of Appeal should not have held that standing rules could not be considered by the Agency in its reconsideration of the matter. The better approach is to send this matter back to the Agency for reconsideration in its entirety. In its order, the Court of Appeal stipulated that the Agency must reconsider the matter "otherwise than on the basis of standing" (para. 32). I would not structure the order so strictly so as to foreclose the possibility that the Agency could reasonably adapt the standing tests of civil courts in light of its statutory scheme. As my colleague observes, s. 25 of the Act confers on the Agency "all the powers, rights and privileges that are vested in a superior court" (para. 56) with respect to all matters within its jurisdiction. This language indicates the legislator's intention to give deference to the Agency's determination of its complaints process.
>
> 31 Of course, there are numerous other ways that the Agency could exercise its discretion under s. 37 of the Act, including examining whether the complaint is in good faith, timely, vexatious, duplicative, or in line with the Agency's workload and prioritization of cases. The Agency may also wish to consider whether the claim raises a serious issue to be tried or, as Abella J. has done, whether the complaint is based on sufficient evidence. It is not for this Court to tell the Agency which of these methods is preferable. Deference requires that we let the Agency determine for itself how to use its discretion, provided it does so reasonably.

Note:

Is a decision resulting from a fettered discretion *per se* unreasonable or will the reasonableness of a discretionary decision-maker's application of an inflexible rule (such as the CTA's standing rule) in the exercise of his or her discretion depend on whether it falls within a range of possible, acceptable outcomes defensible on the facts and the law? In Paul Daly's view, "once it has been established that a discretionary power has been fettered, a court will always be faced with a question of "substantive unacceptability": see Paul Daly, "Reasons and Reasonableness in Administrative Law: *Delta Air Lines Inc.* v. Lukács, (2018) 31 C.J.S.:.P. 209 at 212.

Chapter 19 – The Discretion of the Court, Alternative Remedies, Statutory Appeals to the Courts

Add at the end of this section at p. 1065:

In *Bessette v British Columbia (Attorney General)*, 2019 SCC 31, the Supreme Court of Canada explored whether the BC Supreme Court had erred in dismissing a petition for *certiorari* review of the BC Provincial Court's decision that Bessette had no right to a French-language trial under the *Offence Act*, RSBC 1996, c. 338 on the basis that a statutory appeal of the Provincial Court's final judgement on the merits was an adequate alternative remedy. Charged with "driving while prohibited" under the *Motor Vehicle Act*, RSBC 1996, c. 318, Bessette applied to the Provincial Court to be tried in French based on s. 530 of the *Criminal Code*, RSC 1985, c. C-46. Bessette claimed that the right to a trial in French set out in s. 530 applied because the *Motor Vehicle Act* and the *Offence Act* were silent as to the language of trials and the *Offence Act* provided that gaps in that statute were to be filled with provisions of the *Criminal Code*. The Provincial Court dismissed Bessette's application, agreeing with the Crown's argument that a 1731 English statute directing that court proceedings in British Columbia courts be conducted in English meant that English was the language of provincial offence prosecutions. Bessette brought a petition in the BC Supreme Court for judicial review of the Provincial Court's decision. The BC Supreme Court held that the petition was premature and that Bessette should challenge the language of the trial through an appeal of the trial decision, assuming he was convicted. Deferring to the BC Supreme Court's decision, the Court of Appeal dismissed the appeal. The Supreme Court of Canada held that failing to ensure that the requirements of s. 530 of the *Criminal Code* are met constitutes a jurisdictional error amenable to *certiorari* review in the course of criminal proceedings. It then turned to the question of whether the superior court judge had erred in exercising his discretion not to engage in *certiorari* review:

> The judgment of the Court was delivered by
>
> Côté and Martin JJ.
>
> (…)
>
> (2) Discretion to Undertake *Certiorari* Review
>
> [35] Even where *certiorari* review is available, superior courts retain the discretion to refuse to conduct that review (*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 37). One of the discretionary grounds for refusing to engage in *certiorari* review — the ground invoked by the superior court in this case — is the existence of an adequate alternative remedy (*Strickland*, at para. 40; *R. v. Arcand* (2004), 73 O.R. (3d) 758 (C.A.), at para. 13). Because *certiorari* review is a discretionary remedy, the court's decision not to undertake it is entitled to deference on appeal (*Strickland*, at para. 39). To interfere with the judge's decision, the appellate court must be satisfied that the decision fails to give weight to all relevant considerations (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 43), rests on an error in principle, or is plainly wrong (*Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754, at para. 46; see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at p. 64 (per Sopinka J., dissenting, but not on this point of law)).
>
> [36] In our view, the superior court judge erred in exercising his discretion not to engage in *certiorari* review and consider the substantive issues raised in Mr. Bessette's petition. Specifically, the superior court erred in concluding that (a) whether s. 133 of the *Offence Act*

incorporates s. 530 of the *Criminal Code* is a ruling which does not engage the Provincial Court's "competence" or jurisdiction; (b) there was no "ongoing significant" infringement of Mr. Bessette's rights at stake; and (c) Mr. Bessette's right to a trial in French was a question best left on appeal following his trial. Had the superior court judge recognized the jurisdictional nature of the dispute, the impact of his decision on Mr. Bessette's claimed language rights, and the desirability of deciding the language of trial question before the start of the trial, he should have concluded that an appeal from conviction would not represent an adequate alternative remedy to *certiorari* review.

[37] As explained above, whether Mr. Bessette had a right to a French-language trial for the provincial offence for which he was charged was a jurisdictional question. This factor ought to have weighed heavily against deferring the question until the end of the trial; the prospect of conducting a trial without jurisdiction is a serious matter with important consequences.

[38] Second, this Court has recognized that the right to a trial in the official language of one's choice, where it applies, is "fundamental". The right is substantive, not merely procedural. It is not concerned with trial fairness, but with affirming the accused's linguistic and cultural identity, which is inherently "personal". The violation of the right is a "substantial wrong" (*Beaulac,* at paras. 23, 25, 28, 34, 45, 47 and 53-54).

[39] The Attorney General builds on the reasoning of the Court of Appeal (at para. 30), and cites *Beaulac* (at para. 57), to argue that a new trial can represent a suitable remedy for a language rights violation. The fact that "a new hearing will generally be an appropriate [after-the-fact] remedy for most language rights violations" (*Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, at para. 48) does not mean that a new hearing represents an *adequate* alternative remedy from the outset. What a court may order in response to damage done does not speak to what a court should order when given the opportunity to identify and *prevent* similar damage. In this regard, we note that the relatively short time estimated for Mr. Bessette's trial (an hour) has no import on the analysis; a violation cannot reasonably be quantified by its duration (see *Mazraani*, at para. 51).

[40] As the violation of the accused's trial language right is a harm in itself, an appeal following a conviction by an English-speaking court cannot represent an adequate alternative remedy to deciding, before the trial has taken place, whether the accused is indeed entitled to this fundamental right. Further, Mr. Bessette rightly points out that, had he been acquitted after an English trial, he would have had *no* opportunity to have his language rights vindicated. This is because an accused does not have the right to appeal an acquittal under the *Offence Act* (s. 102).

[41] The superior court judge declined to consider the substantive aspects of Mr. Bessette's petition in part because Mr. Bessette indicated that he might raise another distinct language issue as a defence at his trial (namely, whether he was entitled to receive notice of his driving prohibition in French). The superior court judge considered it "undesirable" to deal with Mr. Bessette's petition on the merits as doing so "could result in two language-rights appeals, one via the current judicial review route (to deal with the language at trial) and the other by way of an ordinary appeal following the trial (to deal with the language issue concerning the notice of prohibition)" (para. 29). While the judge's view may have some practical merit, it ultimately fails to recognize the distinct nature of the trial language claim. An application for

a trial in French asks the court to conduct *future* proceedings in a manner which respects the accused's language rights. The possibility that the accused's rights were violated in the past (by a prohibition notice infringing the accused's language rights) cannot be used to justify additional, preventable infringements.

[42] Finally, we are not persuaded by the Attorney General's argument that the case of *R. v. Prince*, [1986] 2 S.C.R. 480, supports declining *certiorari* review in Mr. Bessette's case. The rationale for declining *certiorari* review in *Prince* is simply not germane to the issues raised in Mr. Bessette's case. In *Prince*, Dickson C.J. stated:

> Although it was not argued in this Court, I wish to add that in my view it is normally appropriate for a superior court to decline to grant a prerogative remedy on an interlocutory application in respect of the rule against multiple convictions. That rule has proved to be a fertile source of appeals. The delay engendered by an erroneous application of the *Kienapple* principle prior to the conclusion of the trial is regrettably illustrated by the present case. Prerogative remedies are discretionary, and notwithstanding the possibility of jurisdictional error in some cases, it would generally be preferable for superior courts to decline to consider the merits of a *Kienapple* argument on an interlocutory application. [Emphasis added; pp. 507-8.]

[43] In our view, Dickson C.J. was not stating that *certiorari* review should be declined when jurisdictional errors are alleged. To the contrary, he was opining that, in light of the particular challenges they pose, and *despite* their jurisdictional nature, alleged *Kienapple* errors should, exceptionally, await adjudication at the end of trial.

[44] In any event, deciding whether a person is entitled to a trial in his or her official language of choice cannot be analogized to applying the *Kienapple* principle against multiple convictions. The latter is inherently fact-specific, record-dependant, and poses the risk (in Dickson C.J.'s view) of becoming a frequent and fertile source of appeals. The same cannot be said of deciding whether the *Offence Act* offers trials in either official language, which is a question of law that does not depend on any evidentiary record. In addition, and as set out above, where the law does indeed provide the accused with a choice to proceed to trial in either official language, that choice is the accused's to make for his or her own reasons. Provided the accused is able to instruct counsel and follow the proceedings in the language selected, no evidentiary record is necessary to justify the accused's stated choice (*Beaulac*, at paras. 34 and 56).

[45] Further, and crucially, the Attorney General acknowledged in oral submissions that a Supreme Court of British Columbia decision on the language of *Offence Act* trials would serve as binding precedent for the statutory courts hearing such trials in the province (transcript, at p. 59). Thus, had the Supreme Court judge decided the merits of Mr. Bessette's petition, his decision would have *discouraged* further interlocutory appeals on the same ground, rather than encouraging them.

[46] As set out above, interlocutory appeals are circumscribed in part because of concerns about judicial economy, delay, and the fragmentation of proceedings. However, in this case, these considerations militate in favour of adjudicating the merits of Mr. Bessette's petition

> before the start of his trial. Modern courts are busy and work to avoid delay. When a *pre-trial* petition alleges a jurisdictional error by the trial court that would render the proceedings a nullity, it is difficult to imagine how it could be preferable for the superior court to refuse to rule on that alleged error and compel a full trial on the merits. To do so would give rise to a potential ground of appeal which might result in the appeal court having to order a new trial. This second trial, which would inevitably take place at some later time further down the road, might have been avoided entirely had the petition been dealt with on the merits when it was first brought. Such successive proceedings cost not only the justice system — crucially, they also cost the accused. Putting the accused through a trial which may well be a nullity risks putting the accused to undue legal expense. This risk should not be taken lightly.
>
> [47] Had Mr. Bessette not appealed the superior court's decision, it would have resulted in a trial in English being conducted without jurisdiction, and a significant infringement of Mr. Bessette's language rights. By failing to recognize this prospect, the superior court made a decision which failed to give weight to all relevant considerations, erred in principle and was, respectfully, "plainly wrong" in the result. In our view, there was no basis for the superior court to exercise its discretion to decline *certiorari* review. The court ought to have decided the merits of Mr. Bessette's petition.

On the merits, the Supreme Court decided that the *Offence Act* incorporated s. 530 of the *Criminal Code*, an incorporation that had implicitly repealed the 1731 statute in respect of *Offence Act*. It allowed the appeal, quashed the order of the Provincial Court, and ordered that Bessette be allowed to stand trial in French.

Chapter 20 – Money Remedies , Tort Liability for Unlawful Administrative Action or Inaction, Constitutional Torts, p. 1175

Add after the discussion on immunities from suit following *Vancouver (City) v Ward* at p. 1185:

In *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3, the Supreme Court considered whether a statutory immunity clause – s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10 [rep. 2012, c. R-17.3, s. 112] – barred the complainant from receiving s. 24(1) damages for a breach of freedom of expression, and if so, whether that clause was itself unconstitutional. The case was brought by Ms. Ernst against the Alberta Energy Regulator (AER) and the related Alberta Government department in relation to hydraulic fracturing ("fracking") carried out by EnCana Corporation. Ms. Ernst complained that the fracking had contaminated her water to the point of making it flammable. She brought a suit for negligent administration by the regulators. The Alberta courts applied the immunity clause to protect the regulators from the suit. Ms. Ernst further claimed that the conduct of the regulator had breached her freedom of expression rights when it had refused to communicate with her, barred her from public complaint processes, and demanded that she stop her public criticism of the regulator, withholding their publicly available government service until that time. She claimed s. 24(2) *Charter* damages from the breaches of her expressive rights engaged by the government body's demands. There were two main issues in the case. Was the immunity clause effective against this damages claim? If it was, did the legislature have the constitutional authority to remove government liabilities from such a suit?

Arising in the context of preliminary applications to strike Ms. Ersnt's claims, the case was decided on the first question, with a bare 5:4 majority deciding in favour of the clause being effective to bar *Charter* damages. On the second question, however, the Court split differently. The four judges who were of the view that the immunity clause was not effective to bar the s. 24(1) damages claim had found it unnecessary to consider the constitutional question. They were joined by Abella J (writing for herself) who preferred to leave the question of the constitutionality of the immunity clause for another day given the inadequate record before the Court due to the constitutional issue being raised at the Supreme Court for the first time.

Underpinning these different positions are stark differences on the Court in applying the *Ward* factors, and particularly the appropriateness and justness of the damages remedy in the circumstances. The majority on the first issue, led by Cromwell J, held that concerns for good governance, such as a potential diversion of the regulator's resources to defend against damages claims and the related potential chill on the regulator's activities were at stake, such that *Charter* damages would never be an appropriate remedy against the regulator. By contrast, the dissent on the first issue, led by McLachlin CJ, Moldaver J and Brown J, pointed out that the impugned actions of the regulator were outside of its core adjudicative functions and were alleged to be punitive and retaliatory. They also did not agree that concerns about limiting liability of public bodies in negligence, underlying the immunity clause and the majority's concern for the diversion of the regulator's resources, were determinative in *Charter* contexts.