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THE YEAR IN REVIEW:
RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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I. INTRODUCTION[1]

Although there haven't been any seismic shifts in administrative law this past year, there have been quite a few decisions which are worthy of note. Many of these decisions continue to work out how to determine—and apply—the applicable standard of review. Others involve procedural fairness, standing, multiple forums and a host of other miscellaneous issues. In many of these decisions, there is a growing recognition of the courts' role in ensuring the legality of administrative decisions.

II. STANDARDS OF REVIEW

Despite the Supreme Court of Canada's valiant attempt to simplify standards of review in *Dunsmuir*, this continues to remain a live and vexing problem. Reading the cases, it is apparent that the courts are openly frustrated and critical of the standards of review analysis and the inconsistencies in the jurisprudence.[2] In the words of one judge:

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1. I gratefully acknowledge the very capable assistance of Dawn M. Knowles, LL.B. from our office in the preparation of this paper. I also appreciate those colleagues from across the country who draw my attention to interesting developments in administrative law in their jurisdictions.

2. See, for example, *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 at paras. 133 - 135; *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*, 2015 ABCA 85 at paras 11*ff*, application for leave to appeal to SCC granted on September 3, 2015 [2015] SCCA No. 161; *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at para. 71; and the dissenting decisions of Abella J. in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 and *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.

> The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day.[3]

Many of the recent cases consider whether to apply the correctness standard of review, notwithstanding the presumption that reasonableness should generally be the applicable standard of review. Does the existence of a statutory right of appeal make a difference? Is it relevant that the statutory delegate has some specialized function or expertise? Is there an extricable question of law respecting the scope of a legal concept? What is the role of either legislative intent, or the four *Pushpanathan* factors? Should different standards of review be applied to different issues, or should reasonableness be applied in some global way when reviewing the decision of a statutory delegate? What standard of review should an administrative appellate body apply when reviewing the decision of the initial decision-maker? How is the reasonableness standard of review to be applied—that is, what makes a decision "reasonable"? The wide variety of approaches suggests that there is no bright-line test for determining the applicable standard of review, or how that applicable standard should be applied.

A. Administrative law principles apply to determine the standard of review where there is a statutory appeal: *Saguenay*

There has been some disagreement in the courts about whether *administrative law* principles or *appellate* principles are to be applied to determine the applicable standard of review where there is a statutory appeal from a specialized administrative tribunal.

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3. Slatter J.A. in *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*, 2015 ABCA 85 at para. 11, application for leave to appeal to SCC granted on September 3, 2015 [2015] SCCA No. 161.

If *appellate law* principles were to apply, the court would use the correctness standard of review for all questions of law.[4] On the other hand, if *administrative law* principles apply, a court hearing an appeal in an administrative law case may sometimes apply the reasonableness standard of review and defer to the decision by a specialized statutory delegate on at least some questions of law: *Pezim*,[5] *Southam*[6] and *Dr Q*.[7]

(Of course, applying *administrative law* principles may also result in the court concluding either that (a) correctness is the applicable standard of review, or (b) even though reasonableness is the applicable standard of review, the impugned decision was unreasonable.)

1. *Saguenay*

In *Saguenay*,[8] all of the judges in the Supreme Court of Canada reiterated that *administrative law* principles are to be applied when determining the applicable standard of review in statutory appeals as well as applications for judicial review from decisions of specialized administrative bodies. It was an error for the Court of Appeal to have applied the *appellate* test of "palpable and overriding error", even though it was hearing a statutory appeal.

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4. The standards of review used by appellate courts in non-administrative law matters are set out in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. For a helpful and thorough examination of the standards of review in these circumstances, see the decision by Justice Slatter of the Northwest Territories Court of Appeal in *Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2.

5. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

6. *Southam Inc. v. Canada (Director of Investigation & Research, Combines Investigation Branch)*, [1997] 1 S.C.R. 748.

7. *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226.

8. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.

Background

The case involved a complaint to the Quebec Human Rights Commission by an atheist, Simoneau, about a municipal council's practice of saying a prayer before its meetings. The Human Rights Tribunal held that the prayer and exhibition of religious symbols in the council's meeting room violated the complainant's freedom of conscience and religion, and amounted to discrimination contrary to the Quebec *Charter of human rights and freedoms*; and awarded the complainant $30,000 in compensatory and punitive damages. The City appealed to the Court of Appeal, which allowed the appeal. The Court of Appeal applied the correctness standard of review, holding that the question of the religious neutrality of the state was a matter of importance to the legal system over which the Tribunal did not have exclusive jurisdiction. With respect to the qualification of the appellant's expert witness and the assessment of the expert's testimony, the Court of Appeal intervened on the basis of the appellate standard of "palpable and overriding error". The Court of Appeal concluded that the prayer expressed universal values and could not be affiliated with any particular religious denomination and that the religious symbols were works of art that did not affect the state's religious neutrality. Any interference with Simoneau's freedom of conscience and religion was trivial or insubstantial.

The Supreme Court of Canada overturned the Court of Appeal's decision. It held that the Court of Appeal had erred in two ways with respect to standard of review: (1) by applying both administrative law principles related to judicial review (the correctness standard) and tests applicable to appeals (the palpable and overriding error test); and (2) by only applying the correctness standard of review when the reasonableness standard of review should have been applied to some issues.

The decision by the Supreme Court of Canada

Justice Gascon, speaking for the majority,[9] held that when a court is hearing an appeal from a decision of a specialized tribunal, the standard of review must be determined according to administrative law principles and that the existence of a right to appeal does not mean that the tribunal's specialized administrative nature can be ignored:

> 38 ...Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal (*Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195, at paras. 13 and 18-21; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at para. 27).
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> 39 It is true that the Tribunal is similar to a court both in the questions it must decide and in the adversarial nature of the proceedings before it. However, these similarities do not change its nature. It is a specialized administrative tribunal. As in the reasons of Dalphond J.A. in *Gallardo* and Gagnon J.A. in the instant case, the Court of Appeal has characterized the Tribunal as such in several other cases (*Conférence des juges de paix magistrats du Québec v. Québec (Procureur général)*, 2014 QCCA 1654, at para. 60; *For-Net Montréal inc. v. Chergui*, 2014 QCCA 1508, at para. 69; *Association des juges administratifs de la Commission des lésions professionnelles v. Québec (Procureur général)*, 2013 QCCA 1690, [2013] R.J.Q. 1593, at para. 25, note 17; *Imperial Tobacco Canada Ltd. v. Létourneau*, 2013 QCCA 1139, at para. 23, note 4; *Commission de la santé et de la sécurité du travail v. Fontaine*, 2005 QCCA 775, [2005] R.J.Q. 2203, at para. 35; *Québec (Procureure générale) v. Tribunal des droits de la personne*, [2002] R.J.Q. 628 (Que. C.A.), at para. 67). There are a number of factors that support this characterization.
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> 40 First of all, the Tribunal is not a court to which the *Courts of Justice Act*, CQLR, c. T-16, applies. It is a body created under the *Quebec Charter* whose expertise relates mainly to cases involving discrimination (ss. 71, 111 and 111.1 of the *Quebec Charter*). Its jurisdiction in this regard is based on the mechanism for receiving and processing complaints that is provided for in the *Quebec Charter* and implemented by the Commission. For such complaints, the Tribunal is intended to be an extension, as an adjudicative body, of the

9. Chief Justice McLachlin, and Justices LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner concurred. Justice Abella dissented, but not with respect to this point.

> Commission's preliminary investigation mechanism (*Gallardo*, at para. 39). Some of its members are appointed from among the judges of the Court of Québec having experience, expertise and an interest in human rights (s. 101). The others are assessors, who have experience, expertise and an interest in the same area and who assist those judges (ss. 62, 101 and 104). The members are appointed for five-year terms, which are renewable (s. 101).
>
> 41 The Tribunal's procedure also reflects its nature. The rules governing the Tribunal are set out in ss. 110, 113 and 114 to 124 of the *Quebec Charter*. They provide *inter alia*, that the Tribunal is not strictly bound by the usual rules of the *Code of Civil Procedure*, CQLR, c. C-25 ("*C.C.P.*"). The powers conferred on the Tribunal give it the flexibility it needs to carry out its mandate. The process is meant to be quick and efficient in order to improve access to justice (*Gallardo*, at paras. 42-43; *For-Net*, at paras. 36-37).
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> 42 Finally, the *Quebec Charter* protects the Tribunal's jurisdiction by means not only of a privative clause (s. 109 para. 1), but also of a supporting clause (s. 109 para. 2).
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> 43 Contrary to what the first of the Court of Appeal's approaches suggests, the existence of a right to appeal with leave does not mean that the Tribunal's specialized administrative nature can be disregarded. Nor is the fact that the Tribunal does not have exclusive jurisdiction in discrimination cases and that a complainant can also turn to the ordinary courts determinative. Although the scope of a right to appeal and the absence of exclusive jurisdiction may sometimes affect the deference to be shown to decisions of a specialized administrative tribunal, this does not justify replacing the standards of review applicable to judicial review with the appellate standards (*Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at paras. 35-39; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paras. 23-24; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 14-15; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 23).
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> 44 There is nothing novel about applying judicial review standards to a specialized administrative tribunal like the Tribunal. As this Court stated in *Mowat* (at para. 19), this is true with respect to many bodies that are required to rule on human rights complaints.
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> [Emphasis added.]

The decision is also important for other aspects of standard of review (discussed below).

B. Applying administrative law principles, the existence of a statutory right of appeal may nevertheless be a factor in determining that correctness is the applicable standard of review

Even applying *administrative law* principles, various factors may indicate that correctness is the applicable standard of review. The existence of a statutory right of appeal may be one of those factors.

1. *Tervita*

In *Tervita Corp. v. Canada (Commissioner of Competition)*,[10] all but one[11] of the judges of the Supreme Court of Canada held that the correctness standard of review should be applied because the statute (a) gave the statutory delegate's decision the same status "as if it were a judgment of the Federal Court", and (b) provided for an appeal to the Federal Court of Appeal. This case is an example of successfully rebutting the presumption that reasonableness is the standard of review when a tribunal is interpreting its home statute.

Background

Tervita dealt with an appeal from a judgment of the Federal Court of Appeal which affirmed a decision of the Competition Tribunal ("the Tribunal") prohibiting a proposed merger between Tervita and two other companies.

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10. 2015 SCC 3.

11. The one judge who dissented on this point was Justice Abella.

The Tribunal was called upon to interpret two key provisions in its enabling legislation, the *Competition Act*:[12] section 92, which deals with the prevention or lessening of competition, and section 96, which raises the efficiencies defence. The issue arose about what standard of review should be applied on the appeal of the Tribunal's decision.

Despite the fact that the Tribunal was interpreting its home statute, the Federal Court of Appeal applied the correctness standard when reviewing the Tribunal's determinations of questions of law.[13] It went on to hold that the Tribunal's decision was correct. Tervita appealed to the Supreme Court of Canada.

The Supreme Court of Canada also applied the correctness standard of review, but held that the Tribunal's decision was incorrect, allowed the appeal and set the Tribunal's decision aside.

Reasons of Justice Rothstein for the majority

The reasons of the majority were delivered by Justice Rothstein.[14] On the issue of standard of review, Rothstein J. agreed with the Federal Court of Appeal that correctness was the appropriate standard of review even though the Tribunal was interpreting its home statute.[15]

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12. R.S.C. 1985, c. C-34.

13. 2013 FCA 28.

14. Chief Justice McLachlin and Justices Cromwell, Moldaver and Wagner concurred. Justice Karakatsanis agreed with Justice Rothstein's approach but dissented on the outcome, would have upheld the Court of Appeal's ruling, and therefore would have maintained the divestiture order.

15. Madam Justice Abella dissented on this point, applied the reasonableness standard of review, but held that the Tribunal's decision was unreasonable, and therefore agreed with the majority's outcome that the appeal should be allowed.

He held that this was a proper case to find the presumption of reasonableness had been rebutted. In so doing, Rothstein J. noted that the enabling statute specifically provided that an appeal from the Tribunal's decision would be the same as an appeal from a judgment of the Federal Court and that appeals on questions of law from judgments of the Federal Court are determined on a correctness standard:

> 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, [2008] 1 S.C.R. 190, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30). However, the presumption of reasonableness is rebutted in this case.
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> 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, [2001] 3 F.C. 185 ("*Superior Propane II*"), at paras. 59-91; *see also Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598, at para. 43; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3, at para. 34; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 64 C.P.R. (4th) 181, at para. 5).
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> 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] 2 S.C.R. 557, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [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).
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> 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*, 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.
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> [Emphasis added.]

Reasons of Justice Abella

Justice Abella dissented on the issue of standard of review. She was of the view that the applicable standard of review was reasonableness (and agreed that the appeal should be allowed because the Tribunal's decision was unreasonable) because there was a specialized tribunal interpreting its home statute and the wording of the enabling legislation was immaterial:

> 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] 2 S.C.R. 135, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616; *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678.
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> [Emphasis added.]

Justice Abella expressed concerning about chipping away at an existing principle that had finally, and in her opinion, rightly, been established by the court:

170 ...Through cases like *McLean*, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [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—at this 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] 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.... 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 context" (*Dunsmuir*, at para. 54). [Emphasis added by Justice Abella.]
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> . . .

> 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:
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> > 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, [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 experience, ... '[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, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).
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> 177 Notably, a statutory right of appeal is not one of them.
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> 178 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, elevated the factor of statutory language to a preeminent 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] 2 S.C.R. 633.
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> [Emphasis added; footnotes omitted.]

Notice Justice Abella's view that the presence of a right of appeal or a privative clause—that is, legislative wording—should not be relevant to displace the presumption that reasonableness is the applicable standard of review where a specialized tribunal is interpreting its home statute. Somewhere, somehow, the judicially developed presumption of deference trumps legislative intention, and statutory rights of appeal can be completely ignored.

On the other hand, notice that Justice Rothstein did not hold that the presence of just any statutory right of appeal would be sufficient to engage the correctness standard of review. He accepted that *Pezim*, *Southam*, *Smith* and *McLean* are authoritative, and that reasonableness can be (may be presumed to be) the applicable standard of review even where there is a garden-variety type of statutory appeal. His judgment is based on the very specific statutory provisions in the *Competition Act*—namely, that the Tribunal's decision is to be considered as though it were a decision of the Federal Court and could be appealed to the Federal Court of Appeal as of right.[16]

2. *Capilano Shopping Centres*

In *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*,[17] the Court of Appeal of Alberta held that the existence of a statutory right of appeal might indeed indicate a legislative intent that the court should apply the correctness standard of review. Justice Slatter, speaking for the court, noted as follows:

> 17 The "external" model of judicial review is no longer universal. Legislatures are increasingly recognizing the role of the superior courts in balancing the need to maintain the integrity of the administrative law system with: 1) the need to maintain the rule of law, and 2) the legitimate expectations of parties in having their rights protected by proportional but effective error correcting mechanisms. Sometimes statutes specifically state the standard of review. On other occasions, rights of appeal to the superior courts (sometimes only with leave, and sometimes directly to the Court of Appeal) are built right into the administrative structure. This represents a recognition that while the administrative tribunal has "expertise", so do the superior courts. A right of appeal is a signal that the Legislature wishes to take advantage of (and make available to affected citizens) all the expertise

16. Question: would the same analysis apply where there is a statutory provision that the decisions of an administrative tribunal can be registered as orders or judgments of the superior court?

17. 2015 ABCA 85. The Supreme Court of Canada has granted leave to appeal: 3 September 2015, File No. 36403.

> available in the system. Where there is a right to appeal, the superior courts are a part of the system of administrative justice, not external to it.
>
> 18 As the standard of review analysis has evolved since the 1980s, so too has the legislative response. The legislatures have not simply been idle while the Supreme Court of Canada has searched for the proper balance between deference and review, through trying, and then rejecting or modifying various approaches. Increasingly, legislative drafters have started to place orderly methods of review of administrative action by the superior courts directly into the legislation. The 2010 changes to the *Municipal Government Act*, incorporating direct appeals to the Court of Queen's Bench, but only with leave, are an excellent example.
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> 19 Modern administrative statutes therefore tend to be much more sophisticated in blending the roles of administrative tribunals and courts. That does not eliminate the concept of "deference", nor does it eliminate the need to do a standard of review analysis. The Supreme Court of Canada has indicated that the method of analysis was the same whether there was a statutory appeal or not: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at pp. 591-92 and 598-99; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226 at para. 21. That is undoubtedly so, but just because the method of analysis is the same, does not mean that the outcome will be the same. As has subsequently been recognized in the cases, since legislative intent is the "polar star" of the analysis, the presence of a right of appeal is an important factor.
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> [Emphasis added.]

Justice Slatter's reference to "external judicial review" is to the inherent nature of judicial review. There is no requirement for a statute to make any reference to judicial review in order for it to be available to review the actions of statutory delegates. (Some statutes today do refer to judicial review, often to shorten the time limit for making such applications, or to stay the impugned decision pending the outcome of the application for judicial review.)[18] On the other hand, appeals by their very nature must be created by statute. The fact that the legislature has created an appeal should be relevant to determining its intention about the standard of review to be used by the appellate body (though the mere existence of a statutory

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18. For example, see s. 74(2) of the *Freedom of Information and Protection of Personal Privacy Act*, R.S.A. 2000, c. F-25 which provides for a statutory application for judicial review, shortens the usual six-month time limit for making such applications to 45 days, and stays the Commissioner's decision pending the outcome of the application.

appeal is not conclusive to determine that correctness is always the applicable standard of review: *Pezim*, *Southam*, *Smith* and *McLean*).

Conversely, the legislature often inserted privative clauses into statutes to suppress (or at least limit) "external judicial review". The presence of a privative clause should be relevant in determining the legislature's intention that correctness may not be the applicable standard of review even for questions of law. Traditionally, privative clauses and statutory rights of appeal did not exist side-by-side in the same legislation. It is not clear whether the presence of a privative clause has any relevance after *Dunsmuir*, although it was certainly one of the four *Pushpanathan* factors in determining the applicable standard of review.[19]

The Supreme Court of Canada has granted leave to appeal. It will be interesting to see whether the court takes the opportunity to comment on the role of legislative intent in determining the applicable standard of review, and also whether the *Pushapanathan* factors[20] have any continuing (even if residual) role after *Dunsmuir*. Both of these questions are intimately related to the legal source of the courts' power to grant "external judicial review".

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19. The presence of a privative clause, of course, would indicate a legislative intention of deference, so would be a factor favouring the selection of reasonableness as the standard of review. Question: does a privative clause completely oust judicial review, or just prevent judicial review of decisions which are not unreasonable? Question: What is the juridical basis for a court intervening in the face of a privative clause where the decision is unreasonable? Because a statutory delegate has no jurisdiction to make an unreasonable decision, so there is nothing for the privative clause to protect? For an interesting discussion of this issue, see *Green v. Alberta Teachers' Association*, 2015 ABQB 379 (Clackson J.).

20. One of which is the existence of a statutory right of appeal (or a privative clause).

3. *Fecteau*

In *Fecteau v. College of Psychologists of New Brunswick*,[21] the New Brunswick Court of Appeal also determined that the presence of a statutory appeal is a factor in determining that the standard of review should be correctness for an error of law with respect to a common law concept (*functus officio*).

> [19] Given the broad statutory right of appeal, the lack of a privative clause, and the nature of the issue, being the application of an important common law principle for which the Discipline Committee lacks expertise, I conclude the standard of review is correctness (*The New Brunswick Real Estate Association v. Moore*, at para. 7).

C. Applying different standards of review to different issues

There is also a difference of opinion in the Supreme Court of Canada about whether different standards of review should in appropriate cases be applied to different issues, or whether one global standard of review (virtually always reasonableness) is to be applied to the decision as a whole.[22]

1. *Saguenay*

This difference of approach is highlighted by the second error which the majority found in *Saguenay*.

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21. 2014 NBCA 74, at paras. 15 and 19. See also *The New Brunswick Real Estate Association v. Moore*, 2007 NBCA 64, 319 N.B.R. (2d) 147, at para. 7, leave to appeal refused [2007] S.C.C.A. No. 510 (QL).

22. For an earlier discussion of this issue, see *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, [2007] 1 S.C.R. 650, 59 Admin. L.R. (4th) 1.

Justice Gascon held that separate standards of review applied to different issues on the appeal. While the standard of correctness applied to the question of law concerning the state's duty of religious neutrality because of the importance of this question to the legal system, other issues attracted a reasonableness standard:

> 45 ... 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, [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, [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, [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, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [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, [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).

[Emphasis added.]

Reasons of Abella J.

While Justice Abella concurred in part with the reasons of Gascon J., she was of the view that using different standards of review for different aspects of an impugned decision is a

risky departure from the Court's previous jurisprudence that undermines the framework for how decisions of specialized tribunals are generally reviewed.[23] She focussed on the fact that the case involved a human rights complaint and the specialized expertise of the Tribunal, so she would have applied one standard of review (reasonableness) to the decision as a whole.

> 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.
>
> [Emphasis added.]

Response by Justice Gascon

In response, Gascon J. acknowledged Abella's concerns but disagreed with her:

> 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.

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23. At para. 165.

Note that if only one global standard of review were always to be applied to the decision as a whole, that standard would almost always be reasonableness. Conceivably, this would result in deference to a wider range of decisions because a decision as a whole might be reasonable even though important parts of it were incorrect. This would be particularly true if "reasonableness" were considered without regard to the statutory, common law and factual context.[24] Abstract reasonableness is not sufficient to provide legal authority for an administrative decision.[25]

2. *Lum*

A similar issue arose in *Lum v. Council of the Alberta Dental Assn. and College Review Panel*,[26] which dealt with a judicial review application with respect to a decision of a Review Panel which upheld the Registrar's refusal to register Lum as a dentist in Alberta.

Issues regarding standards of review arose on two levels: the first level concerned the correct standard of review to be applied on the internal review conducted by the Review Panel;[27] and

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24. Taking the statutory context into account, Justice Abella would have held that the Competition Tribunal's decision in *Tervita* was unreasonable.

25. In other words, "jurisdiction". For an interesting discussion about the meaning of "jurisdiction" and its evolution over time, see the decision of the Nova Scotia Supreme Court in *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 at paras. 145 - 154. Justice Rothstein again referred to rarity of "true questions of jurisdiction" in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45 at para. 27.

26. 2015 ABQB 12. See also *Stewart v. Elk Valley Coal Corp.*, 2015 ABCA 225 (discussed below), for another example of a case which recognizes that different standards of review must be applied to different issues.

27. This aspect of the case will be discussed below.

the second level concerned the applicable standard of review to be applied by the court reviewing the decision of the Review Panel.

With respect to the second level, Justice Graesser applied different standards of review to different issues:

> 90 ... the issue of good character and reputation is not an extricable question of law; it is a question of mixed fact and law. That issue attracts the reasonableness review standard and does not fall within any of the exceptions to *Alberta Teachers' Association* ....
>
> 91 I take a different approach with respect to the [*Trade, Investment and Labour Mobility Agreement*] argument. I considered similar issues in a recent decision: *Challenger Geomatics Ltd. v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2014 ABQB 712.
>
> 92 In that case, I held that the issue raised (there, alleged conflicts between Workers' Compensation Board policy and provincial and federal statutes, the *Alberta Human Rights Act* and the *Competition Act*), fell within the exceptions described in *Alberta Teachers' Association*.
>
> 93 Here, the issue as to whether (and the extent to which) the Review Panel must interpret and apply the [*Health Professions Act*] and the *AB Regulation* in the context of *TILMA* is an extricable question of law. It is one which is not within the experience or expertise of the Review Panel as it involves the potential application of legislation other than the Review Panel's home statute and a determination as to how these potentially conflicting obligations are to be reconciled (or ignored).
>
> 94 I am supported in this by Lee J's analysis of this issue:
>
> > [24] Additionally the City argues, the correctness standard is applicable because this ground of appeal raises an error of law not within the specialized expertise of the CARB. This is consistent with the reasoning of the Supreme Court of Canada in *Dunsmuir* at paragraphs 51 to 64, and the Alberta Court of Appeal in both *Boardwalk* at paragraphs 19 to 31, and *Maduke v. Leduc (County) No 25*, 2010 ABCA 331 (CanLII) at paragraph 6, where the Court stated:
> >
> > > Questions of law that engage the specialized expertise of the SDAB warrant some degree of deference. Questions of law that are of general application for which the SDAB has no special expertise are reviewed for correctness:

> *Canada Lands Co. v. Edmonton (City)*, 2005 ABCA 218 (CanLII), 2005 ABCA 218 (Alta.C.A.) at paras 7-10.
>
> *Edmonton (City) v Governors of the University of Alberta*, 2013 ABQB 440 at para 24

D. Standard of review and the Rule of Law

While, as numerous Supreme Court of Canada judgments have observed, deference might be the appropriate standard of review even for some (perhaps many) pure questions of law, there is a discernible thread of cases which are troubled by what that does to the Rule of Law.

1. *Saguenay*

Justice Gascon referred to this at paragraph 46 of his judgment in *Saguenay*:

> 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).
> >
> > [Emphasis added.]

2. *Stewart*

The Court of Appeal of Alberta emphasized the importance of the Rule of Law in selecting the standard of review in *Stewart v. Elk Valley Coal Corp.*[28]

The case dealt with a complaint of workplace discrimination. Stewart was terminated from his job as a loader truck operator after he was in a workplace accident and tested positive for cocaine use. The employer had a policy that provided that employees with a dependency or addiction could, before the occurrence of a work-related accident, seek rehabilitation without fear of discipline or termination. The policy also provided that discipline or termination could not be avoided for treatment of dependency or addiction sought only *after* an accident. The union filed a complaint with the Human Rights Commission ("the Commission") alleging that Stewart was disabled by his cocaine addiction and that he had been fired due to his disability. The Commission held that there was no *prima facie* discrimination because Stewart was not fired because of his addiction but rather he was fired because of his failure to stop his drug use, his failure to stop being impaired in the workplace and his failure to disclose his drug use to his employer. The Court of Queen's Bench upheld the Tribunal's decision.[29] Stewart appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal. Writing for the majority,[30] Watson and Picard JJ. held that Stewart was not fired because of his disability; he was fired because he had violated

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28. 2015 ABCA 225.

29. 2013 ABQB 756.

30. O'Ferrall J.A. agreed with Watson and Picard JJ.A. on the issue of standard of review but wrote separate dissenting reasons on the issue of whether a *prima facie* case of discrimination had been made out.

the employer's policy. On the issue of standard of review, they adopted the approach taken by the majority in *Saguenay* and applied a correctness standard to questions of law of fundamental importance to the legal system and a standard of reasonableness to questions of fact and mixed law and fact. In doing so, the court emphasized the rule of law that it is the obligation of independent judicial courts to make law, not tribunals or state agents:[31]

> 47 In our respectful view, the standard of review as to the extricable questions of law respecting the scope in law of the definition of discrimination set out in *Moore* and the definition of *bona fide* occupational requirement/accommodation set out in *Meiorin* must be correctness. These definitions are questions of law of fundamental significance to the Canadian legal system. They are concepts for which first instance assessment and application directly occurs in various tribunals and in proceedings before judges of superior courts.
>
> 48 Oliver Wendell Holmes referred to the "interstitial" nature of judicial law making in *Southern Pacific Co. v. Jensen*, 244 US 205 at p 221 in 1926 saying:
>
> > I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.
>
> His point was that courts must be careful and act incrementally—not an unfamiliar refrain in Canada: see *e.g. Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210, 153 DLR (4th) 385, *per* McLachlin J as she then was at p 1262.
>
> 49 But making law remains the rule of law obligation of independent judicial courts. It is not the role of tribunals or state agents or officials who, in essence, are emanates of the executive branch of government doing the *practical* will of the executive and legislative branches. Judicial review exists to make sure the decisions and process of such tribunals or state agents conform with the rule of law in so doing. As pointed out in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para 41, [2008] 1 SCR 761, 2008 SCC 23, referring to the broad, even political discretion of the Minister of Justice on surrender of extradition subjects:

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31. See also *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*, 2015 ABCA 85, application for leave to appeal to SCC granted on September 3, 2015 [2015] SCCA No. 161, in which the Court of Appeal of Alberta also emphasized the rule of law and the need to maintain the integrity of the system of administrative justice; and see *Northwest Territories (A.G.) v. Association des parents ayants droit de Yellowknife*, 2015 NWTCA 2.

> ... To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. ...

50 There is no legal space for a multitude of inconsistent legal meanings to the constituent elements of the *Meiorin* or *Moore* definitions in our Constitutional order, notably as they are common law elaborations of statute. Multiple answers to those legal definitions could not be equally defensible or acceptable. The presumption of reasonableness to a tribunal's interpretation of terms of a 'home statute' is therefore rebutted in this specific respect.

51 The Commission has intervened to advance a strong argument that it should get deference on *all* legal issues under its authorizing statute—deference being appropriate on many procedural or evidential points.

52 The tests in *Meiorin* and *Moore* may be changed by the Supreme Court of Canada over time, but as they are central pillars of the law of the people, their meaning cannot be variable depending on the composition or purpose of the tribunal. The policy rationale for this was elegantly expressed in quite a different context by Lord Shaw of Dunfermline when he said "[t]o remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand" (*Scott v. Scott* [1913] AC 417, p 477).

53 On the other hand, it is conspicuously plain that the roles of tribunals, like those of courts, involve examination and assessment of evidence. The role of the tribunal will also involve the production of a decision which explains or at least demonstrates how the tribunal views that evidence (depending on how much the law might require as to reasons). Absent a specific statutory direction requiring otherwise, it is hard to envision why a presumption of reasonableness would not apply to such factual determinations. This is particularly so when many, if not most, enactments creating tribunals provide for great flexibility for the tribunals as to admissibility of evidence and procedure, meaning limits on process itself tend to be based primarily on considerations of fairness and what used to be called natural justice.

54 To defer to tribunal fact findings and tribunal exercises of discretion, coupled with applying correctness to foundational law principles is not to replicate in these statutory appeals the scope of review of appeals in the ordinary courts. While adopting an analogous approach as between court appeals and administrative law judicial review might ultimately become a good idea for administrative law generally—now that judicial review is firmly entrenched in our Constitution—it is plain that, for now, the Supreme Court has established the view that the law of judicial review differs, and it operates with the presumption of reasonableness for what might be loosely characterized as the 'law of the tribunal': see *Mouvement laïque québécois v. Ville de Saguenay*, 2015 SCC 16, 382 DLR (4th) 385.

. . .

> 56 The intervener Human Rights Commission asserts expertise on this issue and, as a result, presses for a reasonableness standard to be applied to its tribunals respecting findings of *prima facie* discrimination citing, in particular, *Saskatchewan (Human Rights Tribunal) v. Whatcott*, 2013 SCC 11 at paras 166 to 168, [2013] 1 SCR 467. But the matter is now settled by *Saguenay*. As mentioned above, the application of judicial review principles to statutory appeals was clearly affirmed by the Supreme Court. But the implications of doing so did not jettison the 'rule of law' role of courts under judicial review...
>
> 57 In the result, correctness applies to the *legal* interpretation of the *Meiorin* and *Moore* standards by the Tribunal and for that matter to the decisions of the chambers judge and this Court on the same questions.
>
> 58 Correctness would not apply to the underlying fact findings such as respecting what is; (a) the specific work environment; (b) the taxonomy of relevant and reasonable occupational requirements in that environment; (c) the reality of employer-employee relations in that environment; (d) the content of collective agreements or other arrangements involving the employer and employees, would deserve deference. Equally, matters such as the credibility of witnesses or the value of expert evidence and so on are matters of fact or are contributors to conclusions of mixed law and fact. For those things, a review standard of reasonableness is appropriate with the deference associated therewith being owed: *Saguenay*.
>
> [Underlining emphasis added; italics in the original.]

3. *Altus Group*—inconsistent decisions may be unreasonable

Even if the applicable standard of review is reasonableness, it may be unreasonable for a statutory delegate to ignore previous decisions by a court or the statutory delegate itself.

Altus Group Ltd. v. Calgary (City)[32] raised a number of interesting and novel questions: What standard of review applies when there are numerous reasonable interpretations of a tribunal's enabling legislation? When an appellate court has found one interpretation to be reasonable, are future tribunals bound by that interpretation? What if there are existing conflicting statutory interpretations by the same administrative body?

32. 2015 ABCA 86.

The case dealt with an appeal by the City from a reviewing judge's decision to quash a decision of the Local Assessment Review Board imposing a business tax on landlords for leasing parking spots to their tenants. The reviewing judge held the Board had erred by failing to distinguish a Court of Appeal decision in which it had interpreted the relevant City by-law to mean that such landlords were not operating parking businesses and would not be charged business tax.[33]

The Court of Appeal of Alberta upheld the reviewing judge's decision. Applying a standard of reasonableness,[34] the court concluded that, although the Board was not bound by the Court of Appeal's decision, its interpretation of the by-law was unreasonable given the Court of Appeal's decision in *BTC Properties*:

> 16 Strictly speaking, an administrative tribunal is not bound by its previous decisions or the decisions of its predecessor: *Irving Pulp & Paper Ltd. v. LEP, Local 30*, 2013 SCC 34, [2013] 2 SCR 458 at para 6; *Halifax Employers Assn. v. International Longshoremen's Assn., Local 269*, 2004 NSCA 101, 243 DLR (4th) 101 at para 82, leave to appeal to SCC refused, [2004] 334 NR 197. Where numerous reasonable interpretations exist, the administrative tribunal may change its consensus or policy with respect to which one it will adopt. There is no rule of law that an administrative tribunal can never change its policies, nor change its interpretation of a particular policy, nor change the way that the policy will be applied to particular fact situations: *Thompson Brothers (Construction) Ltd. v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2012 ABCA 78, [2012] AWLD 2212 at para 39.

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33. 2013 ABQB 617. The Court of Appeal decision noted was *Calgary (City) v. Alberta (Municipal Government Board)*, 2012 ABCA 13 (the "*BTC Properties*" decision).

34. The court applied a reasonableness standard notwithstanding the fact that a different panel of the Court of Appeal had applied the correctness standard in the similar case of *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*, 2015 ABCA 85, application for leave to appeal to SCC granted on September 3, 2015, [2015] SCCA No. 161. The court noted that the parties had made submissions based on the reasonableness standard and the lower court decision had been decided on that basis. The court also noted that using the reasonableness standard was the most favourable to the appellant and that using it would not affect the result.

17 Similarly, even where an appellate court has found one interpretation to be reasonable, that decision will not necessarily bind a future administrative tribunal considering the legislation afresh....

18 Nevertheless, prior decisions provide important context to the analysis. In *Irving Pulp & Paper*, the Supreme Court dealt with arbitral decisions of the Labour Board and the interpretation of a collective agreement. The majority referred to existing precedents as a "valuable benchmark against which to assess the arbitration board's decision" (at para 6). Rothstein and Moldaver JJ., (in dissent, with McLachlin C.J.C. concurring), went on to explain this point in agreement with the majority's comment (at paras 75, 78).

> The context of this case is informed in no small part by the wealth of arbitral jurisprudence concerning the unilateral exercise of management rights arising under a collective agreement in the interests of workplace safety. We will say more about the "balancing of interests" test that has emerged from that jurisprudence in a moment, but for now the salient point is that arbitral precedents *in previous cases* shape the contours of what qualifies as a reasonable decision *in this case*. In that regard, we agree with our colleague, Abella J., who describes this "remarkably consistent arbitral jurisprudence" as "a valuable benchmark against which to assess the arbitration board's decision in this case" (paras. 16 and 6).
>
> ...
>
> Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption—for the parties, labour arbitrators, and the courts—that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As Professor Weiler, a leading authority in this area, observed in *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 21 L.A.C. 332:
>
> > This board is not bound by any strict rule of *stare decisis* to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable. [Emphasis added; p. 344.]
>
> See, also D.J.M. Brown and D.M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), at topic 1:3200 (including discussion of the "Presumption Resulting From Arbitral Consensus"); R.M. Snyder, *Collective Agreement Arbitration in Canada* (4th ed. 2009), at p. 51 (identifying Professor Weiler's view as "typical").

> ... Reasonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency.

Thus, while the existence of the Court of Appeal's decision in *BTC Properties* did not—by itself—constitute a ground for appeal or make the decision unreasonable, it narrowed the field of what would be a reasonable interpretation of the by-law.

The court went on to discuss the situation of conflicting statutory interpretations by the same administrative body and the desirability of consistency:

> 19 Little direct authority exists for reviewing conflicting statutory interpretations by the same administrative body (See: L.J. Wihak, "Wither the Correctness Standard of Review? *Dunsmuir*, Six Years Later" (2014), 27 Can J Admin L & Prac 173 at 174).
>
> 20 This issue was first addressed by the Supreme Court of Canada in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, a pre-*Dunsmuir* decision. In *Domtar*, the question was whether divergent interpretations of the same legislation, albeit by two different administrative tribunals, could be raised as an independent basis for judicial review. The Supreme Court held that it could not. L'Heureux-Dubé J., writing for the Court, noted the importance of consistency in administrative decision making (at para 59):
>
> > While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:
> >
> > > Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration".

> (H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.J. 435, at p. 446.)

21 *Domtar* was considered by the Supreme Court in *Ellis Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 [2001] 1 SCR 221 at para 28, in the context of institutional consultation by an administrative body. Noting the importance of proper consultation to ensure consistency in decision making, the majority held (at para 28):

> Inconsistencies or conflicts between different decisions of the same tribunal would not be reason to intervene, provided the decisions themselves remained within the core jurisdiction of the administrative tribunals and within the bounds of rationality. It lay on the shoulders of the administrative bodies themselves to develop the procedures needed to ensure a modicum of consistency between its adjudicators or divisions (*Domtar*, *supra*, at p. 798).

22 The same approach was endorsed in *Thompson Brothers*, where this court considered the authority of the Workers' Compensation Appeals Commission to change its interpretation of existing policies: "The existence of allegedly conflicting decisions by a tribunal on a particular subject does not itself warrant judicial intervention, unless the particular decision under review is unreasonable" (at para 39, citing *Ellis Don* at para 28). Also see: *I.A.F.F., Local 255 v. Calgary (City)*, 2003 ABCA 136, 7 WWR 226 at para 27, leave to appeal to SCC refused, [2003] 328 NR 194, [2003] S.C.C.A. No. 304; *Hydro Ottawa Ltd. v. International Brotherhood of Electrical Workers, Local 636*, 2007 ONCA 292 at para 59, 281 DLR (4th) 443, leave to appeal to SCC refused, [2007] 385 NR 379, [2007] S.C.C.A. No. 305; *National Steel Car Ltd. v. United Steelworkers of America, Local 7135* (2006), 278 DLR (4th) 345, 159 LAC (4th) 281 (Ont CA) at para 31, leave to appeal to SCC refused, [2007] 374 NR 389, [2007] S.C.C.A. No. 62.

23 Canadian courts and commentators have noted the difficulty in accepting two conflicting interpretations by the same administrative tribunal as reasonable. In the context of a public statute, the rule of law and the boundaries of administrative discretion arguably cannot be served in the face of arbitrary, opposite interpretations of the law.

24 For example, in *Novaquest Finishing Inc. v. Abdoulrab*, 2009 ONCA 491, 95 Admin LR (4th) 121 at para 48, while the decision did not turn on this issue, Juriansz J.A. observed:

> From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that they both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.

25 Similar concerns were raised by the Ontario Court of Appeal in *Investment Dealers Association of Canada v. Taub*, 2009 ONCA 628, 311 DLR (4th) 389 at para 67:

> I agree with Juriansz J.A. that it accords with the rule of law that a public statute that applies equally to all affected citizens should have a universally accepted interpretation. It follows that where a statutory tribunal has interpreted its home statute as a matter of law, the fact that on appeal or judicial review the standard of review is reasonableness does not change the precedential effect of the decision for the tribunal. Whether a court has had the opportunity to declare the decision to be correct according to judicially applicable principles should not affect its precedential status. As in *Abdoulrab*, it is not necessary to decide the issue in this case.

26 These comments were endorsed by the Federal Court of Appeal in *Canada (Attorney General) v. Mowat*, 2009 FCA 309, 4 FCR 579 at paras 45-47, aff'd *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471. In that case, the court noted the diversity of opinions between the Federal Court and Human Rights Commissions regarding the authority to award legal costs to a successful complainant in determining the proper standard of review. The issue did not receive direct comment by the Supreme Court of Canada on appeal.

27 While some statutory provisions may be amenable to different, yet reasonable interpretations, it is difficult to conceive of meaningful legislation that would allow diametrically opposed interpretations, both of which are reasonable, not to mention correct.

28 Opposite interpretations of a legislative provision are also difficult to accept under the presumption of legislative coherence. An interpretation that is so broad that it fosters inconsistency or repugnancy should be avoided: *Alberta Power Limited v. Alberta Public Utilities Board*, 66 DLR (4th) 286, 19 ACWS (3d) 763 at para 31, leave to appeal to SCC refused, [1990] 120 NR 80, [1990] S.C.C.A. No. 165. In the context of the statutory interpretation of taxation powers, consistency is also particularly important. Tax legislation should be interpreted to achieve "consistency, predictability and fairness" to achieve equity and finality in taxation and allow taxpayers to manage their affairs (*Husky Energy Inc. v. Alberta*, 2011 ABQB 268, 11 WWR 282, at para 12 leave to appeal to SCC refused, [2012] 447 NR 400, [2012] S.C.C.A. No. 411 ; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 SCR 601 at para 12; *Toronto (City) v. Municipal Property Assessment Corporation*, 2013 ONSC 6137, 234 ACWS (3d) 267 at para 30).

29 Sara Blake also notes that, in many cases, only one interpretation of a statutory provision will be reasonable at page 211:

> When the reasonableness standard of review is applied, conflicting interpretations of a question of law may be upheld by the courts if both are reasonable, though an interpretation may be held to be unreasonable if it is inconsistent with the prevailing interpretation. However, when the test of correctness is applied, it is not likely that different interpretations of the law will be upheld, because there can be only one correct interpretation,

> while there can be several reasonable interpretations. Given that most statutes are not ambiguous and do not permit more than one reasonable interpretation, there will not often be different interpretations that may both be upheld as reasonable.

30 In a comprehensive review of the case law, one commentator has called on appellate courts to review administrative decisions in a way that ensures consistency in the interpretation of public statutes (L.J. Wihak at pages 198-199):

> Public statutes apply equally to all citizens and they should have universal, consistent application. Citizens are entitled to advanced knowledge, certainty, and clarity regarding their respective entitlements or obligations under these public statutes...
>
> Not only do judges have greater expertise in the law relative to administrative decision-makers, they also have a constitutional responsibility to ensure that each person in Canada is subject to the same law and legal principles, and that tribunals are acting legally. As such, "appellate courts require a broad scope of review with respect to matters of law" [citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 9].

4. *Wilson*—inconsistent decisions may be incorrect

In *Wilson v. Atomic Energy of Canada Limited*,[35] the issue was whether an employer governed by the *Canada Labour Code* has the right to terminate an employee's employment without cause but with notice, or can only terminate employment for cause (without which there would be an unjust dismissal, regardless of the amount of notice, and the employee would be entitled to file a grievance which could be advanced to arbitration). The arbitral cases are split on this issue. In this case, the arbitrator held cause was required. On judicial review, the Federal Court[36] held that the arbitrator's decision was unreasonable, and quashed it. The Federal Court of Appeal unanimously dismissed the appeal. Justice Stratas, writing the decision, held that correctness was the applicable standard of review, for the following reasons:

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35. 2015 FCA 17 (Stratas, Webb and Near JJ.A.), leave to appeal to SCC granted on July 9, 2015.

    Justice Stratas has also observed the Federal Court of Appeal's practice and assumption that correctness is the appropriate standard of review when that court is dealing with a question of statutory interpretation which has been certified to it by the Federal Court pursuant to s. 74(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113, leave to appeal to SCC granted on December 4, 2014, appeal heard and reserved April 16, 2015. The Federal Court of Appeal's practice may have been overlooked by the Supreme Court of Canada in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. In addition, see the decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85, where Justice Noël applied the correctness standard to review a Minister's interpretation of a statute, after (1) considering whether the reasonableness presumption from *Alberta Teachers' Association* applies to all statutory delegates interpreting their home statutes, or just to adjudicative ones; and (2) the circumstances in which the presumption can be rebutted, including the absence of a privative clause; the nature of the issue, being a pure question of statutory interpretation; the absence of any discretionary element in the decision; the absence of anything in the structure of the legislation suggestive of the notion that deference should be accorded to the delegate on the question to be decided. See also *Kinsel v. Canada (M.C.I.)*, 2014 FCA 126 (Dawson J.A.).

    Wilson also contains important *dicta* about whether an application for judicial review is premature.

36. 2013 FC 733 (O'Reilly J).

[46] Normally, a labour adjudicator's interpretation of a provision in a labour statute would be subject to reasonableness review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654. This, however, is an unusual case. For a long time, adjudicators acting under the Code have disagreed on whether Part III of the *Canada Labour Code* permits dismissals on a without cause basis.

47] Some agree with the adjudicator and the appellant in the case at bar and have concluded that the Code does not permit dismissals on a without cause basis: see, *e.g.*, *Re Roberts and the Bank of Nova Scotia* (1979), 1 L.A.C. (3d) 259; *Champagne v. Atomic Energy of Canada Ltd.*, [2012] C.L.A.D. No. 57; *Iron v. Kanaweyimik Child and Family Services Inc.*, [2002] C.L.A.D. No. 517; *Lockwood v. B&D Walter Trucking Ltd.*, [2010] C.L.A.D. No. 172; *Stack Valley Freight Ltd. v. Moore*, [2007] C.L.A.D. No. 191; *Morriston v. Gitanmaax Band*, [2011] C.L.A. No. 23; Innis Christie, *et al.*, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) at page 669; David Harris, *Wrongful Dismissal*, loose-leaf (Toronto: Carswell, 1990) at pages 6.7-6.9.

[48] Others disagree and have concluded that the Code does permit dismissals on a without cause basis: see, *e.g.*, *Knopp v. Western Bulk Transport Ltd.*, [1994] C.L.A.D. No. 172; *Chalifoux v. Driftpile First Nation–Driftpile River Band No. 450*, [2000] C.L.A.D. No. 368 aff'd on other grounds, 2001 FCT 785, aff'd 2002 FCA 521 (CanLII); *Jalbert v. Westcan Bulk Transport Ltd.*, [1996] C.L.A.D. No. 631; *Prosper v. PADC Management Co.*, [2010] C.L.A.D. No. 430; *Halkowich v. Fairford First Nation*, [1998] C.L.A.D. No. 486; *Daniels v. Whitecap Dakota First Nation*, [2008] C.L.A.D. No. 135; *Klein v. Royal Canadian Mint*, [2012] C.L.A.D. No. 358; *Paul v. National Centre For First Nations Governance*, [2012] C.L.A.D. No. 99; Gordon Simmons, "Unjust Dismissal of the Unorganized Workers in Canada," 20 Stan J. Int'l Law 473 (1984) at pages 496-97.

[49] In circumstances such as these, what is the standard of review?

[50] *Dunsmuir*, *supra* provides the answer in two ways: one by way of concept, another by way of presumptive rule.

[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.

[58] Even if the standard of review were reasonableness, as we shall see, the statutory interpretation point before us involves relatively little specialized labour insight beyond the

> regular means the courts have at hand when interpreting a statutory provision. Accordingly, if we were to conduct reasonableness review in this case, we would afford the adjudicator only a narrow margin of appreciation: see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228 (CanLII), 245 A.C.W.S. (3d) 846, and *Canada (Attorney General) v. Abraham*, 2012 FCA 266 (CanLII), 440 N.R. 201. In the end, whether we conduct reasonableness review or correctness review, the outcome of this appeal would be the same.
>
> [Emphasis added.]

5. *Durocher v. Commissions de relations de travail*

Durocher v. Commissions de relations de travail[37] applied the correctness standard of review to resolve a legal question upon which the labour board and arbitrators had differed.

E. The role of legislative intent

A similar analysis occurs when the court determines that the impugned decision is inconsistent with the intent of the legislature intent (legislative intent being the "polar star" for determining the applicable standard of review).[38]

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37. 2015 QCCA 1384. Compare *Syndicat national des travailleurs et travailleuses des pâtes et papiers d'Alma Inc.*, 2015 QCCA 1040, where the Court applied the reasonableness standard of review to set aside an arbitral decision where there was only one reasonable statutory interpretation; and *CRDI du Saguenay-Lac-St-Jean c. Fortier*, 2014 QCCA 158, where the Court did not intervene where multiple decision-makers had reached different interpretations.

38. Justice Binnie in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 149. On the sanctity of legislative intent, see *Imperial Tobacco Canada Ltd. v. Québec (P.G.)*, 2015 QCCA 1554.

1. *Tervita*

In the *Tervita* decision (discussed above), the majority decision by Justice Rothstein emphasized the statutory language used in the tribunal's home statute when determining whether the presumption of reasonableness had been rebutted:

> 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.
>
> [Emphasis added.]

2. *Saguenay*

See paragraph 46 (set out above).

3. *Edmonton East (Capilano) Shopping Centres Ltd.*

The Court of Appeal of Alberta focussed on legislative intent when determining standard of review in *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*:[39]

> 15 ... The Supreme Court of Canada has stated on numerous occasions that the ultimate objective of the standard of review analysis is to ascertain the intent of the legislature:

39. 2015 ABCA 85, application for leave to appeal to SCC granted on September 3, 2015, [2015] SCCA No. 161.

> The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para. 26)
>
> . . . the "weighing up" of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent. (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 149, [2003] 1 SCR 53)
>
> . . . In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent. (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 30, [2008] 1 SCR 190)
>
> Where the legislature clearly specifies the standard of review, that specification prevails over the common law test. Even where a standard of review is not explicitly stated, in some cases the statutory administrative law regime may well provide compelling signals about the intended standard of review.

The Court recognized that the legislative intent could often be ascertained from whether the enabling statute provides a right of appeal:

> 17 The "external" model of judicial review is no longer universal. Legislatures are increasingly recognizing the role of the superior courts in balancing the need to maintain the integrity of the administrative law system with: 1) the need to maintain the rule of law, and 2) the legitimate expectations of parties in having their rights protected by proportional but effective error correcting mechanisms. Sometimes statutes specifically state the standard of review. On other occasions, rights of appeal to the superior courts (sometimes only with leave, and sometimes directly to the Court of Appeal) are built right into the administrative structure. This represents a recognition that while the administrative tribunal has "expertise", so do the superior courts. A right of appeal is a signal that the Legislature wishes to take advantage of (and make available to affected citizens) all the expertise available in the system. Where there is a right to appeal, the superior courts are a part of the system of administrative justice, not external to it.
>
> 18 As the standard of review analysis has evolved since the 1980s, so too has the legislative response. The legislatures have not simply been idle while the Supreme Court of Canada has searched for the proper balance between deference and review, through trying, and then

> rejecting or modifying various approaches. Increasingly, legislative drafters have started to place orderly methods of review of administrative action by the superior courts directly into the legislation. The 2010 changes to the *Municipal Government Act*, incorporating direct appeals to the Court of Queen's Bench, but only with leave, are an excellent example.
>
> 19 Modern administrative statutes therefore tend to be much more sophisticated in blending the roles of administrative tribunals and courts. That does not eliminate the concept of "deference", nor does it eliminate the need to do a standard of review analysis. The Supreme Court of Canada has indicated that the method of analysis was the same whether there was a statutory appeal or not: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at pp. 591-92 and 598-99; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226 at para. 21. That is undoubtedly so, but just because the method of analysis is the same, does not mean that the outcome will be the same. As has subsequently been recognized in the cases, since legislative intent is the "polar star" of the analysis, the presence of a right of appeal is an important factor.

4. The principles of statutory interpretation may lead to only one interpretation

Last year's paper noted the possibility that the principles of statutory interpretation might lead to only one interpretation of a provision in the statutory delegate's home statute, with the result that a contrary interpretation would either be incorrect or at least unreasonable: *Mowat*,[40] *McLean v. British Columbia (Securities Commissioner)*,[41] *Qin v. Canada (Minister of Citizenship and Immigration)*.[42] As Justice Moldaver put it in *McLean*:

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single

40. *Canada (Canadian Human Rights Commission) v. Canada*, 2011 SCC 53 ("*Mowat*"), 2011 SCC 53, [2011] 3 S.C.R. 471 *per* Cromwell J. See also *New Brunswick Liquor Corp. v. Small*, 2012 NBCA 53 at para. 31 where Justice Robertson stated that the deference only comes into play if the court is satisfied that the statute is ambiguous. The Court of Appeal of Alberta referred to para. 38 from *McLean* in *1694192 Alberta Ltd. v. Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 319 at para. 24. For an early example of this type of analysis, see *IMS Health Canada Limited v. Alberta (Information and Privacy Commissioner)*, 2008 ABQB 213 (Ross J.).

41. 2013 SCC 67, at paras. 38 and 39 (Moldaver J.).

42. 2013 FCA 263, at paras. 31 to 37 (Evans J.A.).

> reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable—no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation—and the administrative decision maker must adopt it.
>
> [39] But, as I say, this is not one of those clear cases....
>
> [Emphasis added.]

For a recent example of this approach, see *Corporation d'Urgences-santé v. Syndicat des employées d'Urgences-Santé*.[43]

F. The concept of "reasonableness"

Assuming that the applicable standard of review is reasonableness, the question then is "how does one determine whether the decision *is* reasonable"? Reasonableness does not exist in the abstract, but must be determined by reference to the statutory, common law, and the factual context in which the impugned decision is made.

1. *Egg Films*

In *Egg Films Inc. v. Nova Scotia (Labour Board)*,[44] the Nova Scotia Court of Appeal was deciding whether the Labour Board had erred by concluding that technicians working on short term productions were employees under the *Trade Union Act*[45] that could take part in

43. 2015 QCCA 315.

44. 2014 NSCA 33, leave to appeal to the SCC refused, [2014] SCCA No. 242.

45. R.S.N.S. 1989, c. 475.

collective bargaining. The court adopted a standard of review of reasonableness noting that the Board was exercising one of its core functions.

In applying the reasonableness standard, the court made some interesting comments on the meaning of reasonableness in this context:

> 26 Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't—What does the judge think is correct or preferable? The question is—Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11-17. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, paras 20, 31-41. *Coates v. Nova Scotia (Labour Board)*, 2013 NSCA 52, para 46.
>
> 27 At the appeal hearing, counsel articulated forceful submissions on the mechanics of reasonableness. Egg Films' factum summarized its position:
>
> > ... while courts tend to show deference to the decisions reached by Labour Boards, it's important to note that the reasonableness standard does not allow for the application of more than one degree of deference. ... The deference owed to the Labour Board is the same as the deference owed to any other adjudicator who attracts the reasonableness standard of review. That being said, courts have found that the nature of the question under review may indicate whether the range of possible outcomes is wide or narrow.
> >
> > ...
> >
> > ... While it's indisputable that a reasonableness review does not contemplate a "line-by-line treasure hunt for error", reviewing courts are not restricted from "zooming in" where necessary, nor should the reasonableness review be reduced to a simple "tracking" exercise meant to ensure that an adjudicator's reasons are internally consistent with their conclusions. Such a tautological approach amounts to reasoning in a

> vacuum, with no attention given to the overarching context in which a decision is made.
>
> ... The Appellant respectfully submits that if the Board's decision, however well-written, reaches a conclusion that is not "legally possible" or "legally permissible", it does not matter that the outcome can be said to "flow logically" from the reasons, or that the Board's reasons can be "tracked". ...

28 I'll comment on three of these points.

1(a) No Spectrum of Standards

29 As to degrees of deference—since *Dunsmuir* there is only one deferential standard. In *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para 59, Justice Binnie for the majority said "[r]easonableness is a single standard that takes its colour from the context". "Colour from the context" in my view means that, when statutory authority is in issue, the application of this single standard involves analysis of each statute's unique text, context, scheme and objectives that may widen or narrow the range of reasonable outcomes.

1(b) Attention to Board's Reasons

30 Next, the judge's "treasure hunting", "zooming in", or "tracking" of the Board's reasons. Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. *Law Society v. Ryan*, *supra*, at paras 50-51. That itinerary requires a "respectful attention" to the tribunal's reasons, as Justice Abella explained in the well-known passages from *Newfoundland and Labrador Nurses' Union*, paras 11-17.

[Emphasis added.]

G. Examples of unreasonable decisions

Even if reasonableness is determined to be the applicable standard of review, there are numerous examples of courts finding that the impugned administrative decision is nevertheless unreasonable. Some examples:

- *Bombardier*:[46] Although the Supreme Court of Canada unanimously held that the standard of review for the particular issue in this case was reasonableness (though there is not much discussion—decided after *Saguenay* came out), it also unanimously held that the Tribunal's decision was unreasonable because there was no evidence that Mr. Latif's nationality or race was a factor (or connection) in the US authority's refusal to grant him a licence. The Supreme Court of Canada held that the standard of proof was the usual standard of proof employed in all civil proceedings—namely, balance of probabilities.

- *Tervita*:[47] Justice Abella dissented on the applicable standard of review (preferring reasonableness to correctness), but nevertheless held that the Tribunal's decision was unreasonable, and therefore concurred with the majority in setting it aside.

- *Tri-Country Regional School Board v. Nova Scotia (Human Rights Board of Inquiry)*:[48] The Nova Scotia Court of Appeal held that the analysis and conclusion of the Board of Inquiry was unreasonable.

Note the converse situation can also arise. A decision may be correct as well as reasonable. For example, Justice Abella in *Saguenay* dissented on the applicable standard of review (preferring a global appraisal of the reasonableness of the statutory delegate's decision as a

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46. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39.

47. 2015 SCC 3.

48. 2015 NSCA 2.

whole, rather than segmenting the tribunal's decision and applying correctness to the legal interpretation issue) but agreed with the majority in upholding the tribunal's decision.

Different judges may also have different perceptions about whether a particular decision by a statutory delegate is reasonable or not reasonable:

- In the *Ontario Energy Board* case,[49] all seven of the judges sitting in the Supreme Court of Canada determined that reasonableness was the applicable standard of review; six held that the Board's decision was reasonable, whereas Justice Abella would have held that the decision was unreasonable.

And a court may in fact review a statutory delegate's decision for correctness, despite having determined that reasonableness was the applicable standard of review:

- *Jono Developments Ltd. v. North End Community Health Association*[50] which involved a judicial review of a school board's decision about what to do with a closed school.

H. Standards of review and internal administrative appellate bodies

One of the current issues in administrative law is whether internal administrative appellate bodies are required to determine the standard of review they should employ in hearing an

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49. *Ontario (Energy board) v. Ontario Power Generation*, 2015 SCC 44. Justice Rothstein wrote the decision for the majority.

50. 2014 NSCA 92, leave to appeal to SCC refused, [2014] S.C.C.A. No. 527.

appeal from the first instance administrative decision. In what circumstances (if any) should they defer to decisions made by the first instance decision-maker?

1. *Lum*

Lum v. Council of the Alberta Dental Association and College, Review Board[51] was discussed above with respect to the standards of review to be used by a *court* when dealing with decisions by a specialized tribunal (either on a statutory appeal or on an application for judicial review).

The case is also noteworthy for its discussion of standards of review analysis when an internal administrative appellate body is reviewing the decision of a tribunal of first instance.

A Review Panel was reviewing a decision of the Registrar refusing Lum's registration as a dentist in Alberta. It applied a standard of reasonableness and upheld the Registrar's decision. Lum argued that the Review Panel should have applied the correctness standard, citing *Newton v. Criminal Trial Lawyer's Association*.[52] *Newton* set out the following factors that should be considered when an internal appeal body is reviewing the decision of an administrative tribunal of first instance:

> [42] The determination of the standard of review to be applied by an appellate administrative tribunal (here the Board) to the decision of an administrative tribunal of first instance (here the presiding officer) requires a consideration of many of the same factors that are discussed in *Housen* and *Dunsmuir*/*Pushpanathan*, adapted to the particular context: *College of Physicians and Surgeons of Ontario v. Payne* (2002), 2002 CanLII 39150 (ON SCDC), 219 DLR (4th) 350, 163 OAC 25 (Div Ct) at para 20.

51. 2015 ABQB 12.

52. 2010 ABCA 399.

> [43] The following factors should generally be examined:
>
> (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
>
> (b) the nature of the question in issue;
>
> (c) the interpretation of the statute as a whole;
>
> (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
>
> (e) the need to limit the number, length and cost of appeals;
>
> (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
>
> (g) other factors that are relevant in the particular context.
>
> *Newton* at paras 42-43

Lum argued that, in applying the *Newton* factors to this case, a standard of review of correctness was warranted. The Court of Queen's Bench of Alberta disagreed. Graesser J. was satisfied that the *Newton* factors pointed to a standard of review of reasonableness and upheld the Review Board's decision. In doing so, the court re-affirmed that *Newton* is still good law in Alberta.[53]

53. Even though the British Columbia Supreme Court has in at least one case refused to apply the *Newton* factors, looking instead at the context of the statutory scheme: see *BC Society for the Prevention of Cruelty to Animals for British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331.

2. *R.P. v. Alberta (Director of Child, Youth and Family Enhancement Act)*

In *R.P. v. Alberta (Director of Child, Youth and Family Enhancement Act)*,[54] the Court of Appeal held that when the appeal panel remitted a matter to the Director for further consideration, the Director could only reach a different decision from the Appeal Panel if the Director found that the latter's decision was unreasonable:

> **5** I have concluded that, upon receiving a referral back for further consideration, the Director may vary the decision of the Appeal Panel only upon finding that decision to have been unreasonable. In so doing, he is obliged to defer to it. He must take into account the fact finding and analysis of the Appeal Panel. At minimum, he must give express written reasons for failing to adopt any of its fact finding or conclusions, in the context of an express analysis of each of the considerations set out in s 2 of the *CYFEA*. He must balance each consideration against the others in relation to the facts of the matter before him. He must give reasons as to why he has concluded that making a decision contrary to that made by the Appeal Panel is in the best interests of the child or children in question. His reasons must address the heart of the issues in dispute before the appeal Panel.

III. STANDING

Issues about standing arise in two different contexts: (a) the standing of decision-makers to make submissions in applications for judicial review or on an appeal, and (b) the standing of decision-makers to appeal from judicial review applications or appellate decisions striking down their decisions.

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54. 2015 ABCA 171, para. 5.

A. Standing to make submissions

1. *Ontario Energy Board*

The decision by the Supreme Court of Canada in the *Ontario Energy Board* case[55] describes a principled basis for exercising discretion to permit decision-makers in certain circumstances to have standing to make submissions in judicial reviews or appeals from their decisions. This rejects the categorical restriction from *Northwestern Utilities* against any tribunal participation in favour of the broader—but discretionary, and still limited—contextual approach set out by the Ontario Court of Appeal in *Children's Lawyer* and the Court of Appeal in Alberta in *Leon's Furniture*. While the relevant statute may specify the extent of a tribunal's participation, in the absence of such a statutory provision the ability of a tribunal to make submissions—and the scope of those submissions—will depend upon the nature of its function (standing is more likely to be permitted where the tribunal's function is more distributive and regulatory rather than adjudicative). While there are many circumstances in which a tribunal's submissions could "add value" to the task faced by the court (such as where there is no other party, or there is a need to describe the statutory background to the tribunal's work or matters which are specialized in nature and not readily apparent from the face of the statute), there still are limitations on the appropriateness of the content of a tribunal's submissions.[56] For example, a tribunal cannot "bootstrap" by adding a ground that it did not rely on in the decision under review, or amend its decision (even

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55. *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44. Justice Rothstein wrote the decision for the six judges in the majority which held that the Board's decision was reasonable; Justice Abella dissented about the application of the reasonableness standard of review, and would have held that the Board's decision was unreasonable. She did not dissent from Justice Rothstein's discussion of tribunal standing.

56. Note that Justice Rothstein appears to be making a distinction between standing to make submissions about a particular issue, and the appropriateness of the content of those submissions.

though it is not necessary to refer to every aspect of its practice or statutory framework in every decision). And the more adjudicative the function, the more careful the tribunal must be to avoid being perceived as having lost impartiality.

The decision was written by Justice Rothstein:

> A. The Appropriate Role of the Board in This Appeal
>
> (1) Tribunal Standing
>
> [41] In *Northwestern Utilities Ltd. v. City of Edmonton*, [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] 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), 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, [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 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 Kaiser and 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] 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, [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, 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 to 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, 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) Bootstrapping

[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, 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] 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.

This decision does not provide a bright-line test to determine the scope or appropriateness of a tribunal's submissions. It also does not address the challenge when there are other respondents who, however, do a terrible job of describing the legislative scheme and defending the tribunal's decision. There still is difficulty in predicting how the courts will react in a particular case to submissions from the tribunal—which is even more challenging if the court's practice requires the tribunal to file its written brief or factum at the same time as other respondents.[57]

2. Two British Columbia Court of Appeal Decisions

Earlier this year, prior to the Supreme Court of Canada's decision in *Ontario Energy Board*, the British Columbia Court of Appeal issued two decisions which considered the standing of tribunals to make submissions in applications for judicial review or statutory appeals involving their decisions, and the appropriateness of the content of such submissions. These two decisions are consistent with *Ontario Energy Board*, and both bear taking note:

- In *18320 Holdings Inc. (c.o.b. Automotive Training Centres) v. StudentAid BC*,[58] the British Columbia Supreme Court had awarded special costs against the decision-maker, StudentAid, on the grounds that it had "cast itself into an

57. In last year's paper, I suggested that it might be possible to obtain the court's permission for the tribunal to file its brief or factum after the other respondents, which would enable the tribunal to determine whether the other respondents had done an adequate job or something more needed to be said by the tribunal. This suggestion came out of my experience in the *ATCO* case in the Court of Appeal—ironically, the Supreme Court of Canada issued its judgment in *ATCO* on the same day as the decision in *Ontario Energy Board*, without any mention of the standing issue: 2015 SCC 45. See also the decision of the Court of Appeal of Alberta in *FortisAlberta Inc. v. Alberta (Utilities Commission)*, 2015 ABCA 295, at paras. 104-105 (*per* Paperny J.A.).

58. 2014 BCCA 494.

adversarial role" by making overly comprehensive and extensive submissions and leading evidence on judicial review that went to the merits of the case.[59] StudentAid appealed the award of special costs, arguing that the award was contrary to the general rule that costs were not awarded against an administrative tribunal. The Court of Appeal allowed the appeal. Both Chief Justice Bauman (paragraphs 51-54) and Justice Saunders (paragraphs 80-92) reviewed the law on the standing of a decision maker, and generally accepted the *Children's Lawyer* approach.

- The Court reached a similar result in *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*.[60] In addition to allowing the tribunal to make submissions on the applicable standard of review, the Court rejected the argument that there is a difference between standing to make submissions on what standard of review is to be used and the content of that standard, stating that "[t]he critical determination is not the name of the standard of review, but what the standard entails so that it may properly be applied to the tribunal's decision".[61]

B. Standing to appeal

The other dimension of standing involves whether a statutory tribunal has standing to appeal from an adverse decision from the court on an application for judicial review or appeal.

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59. 2013 BCSC 539 at para. 10.

60. 2014 BCCA 496, application for leave to appeal to SCC filed on June 1, 2015.

61. At para. 33.

1. *Alberta Teachers' Assn.*

In *Alberta Teachers' Assn. v. Buffalo Trail Public Schools Regional Division No. 28*,[62] the Court of Appeal of Alberta held that the Information and Privacy Commissioner (IPC) lacked standing to appeal a decision of the Alberta Court of Queen's Bench quashing its decision. This is consistent with that court's decision in *Brewer v. Fraser Milner Casgrain LLP*[63] and *UFCW (Local 401) v. Alberta (Information and Privacy Commissioner)*.[64]

2. *Ontario Energy Board*

Notice that the appellant in the *Ontario Energy Board* case, discussed earlier, was the Board. No issue seems to have been raised about whether it had standing to appeal.

If a statute makes the tribunal a party on an application for judicial review or an appeal from its decision, does it not follow that the tribunal has standing to appeal? The issue identified in the Alberta case would appear to arise because the statute did not provide standing to the tribunal.

62. 2014 ABCA 432.

63. 2008 ABCA 160.

64. 2012 ABCA 130.

IV. PROCEDURAL FAIRNESS

A. Standards of review and procedural fairness

Previous papers have discussed the confusion about what standard of review applies in cases in which decisions are challenged on the grounds of procedural fairness.[65] Some courts adopt the correctness standard of review;[66] others apply reasonableness;[67] and others suggest that this type of standards of review analysis is not required because the question to be answered is whether the process used to reach the impugned decision was *fair*.[68]

1. *Bergeron*

In *Bergeron v. Canada (Attorney General)*,[69] the Federal Court of Appeal commented on this "jurisprudential muddle" as follows:

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65. See the helpful comment by Professor Paul Daly, "Procedural Fairness in Canada: Continuing Debate over the Standard of Review", at http://www.administrativelawmatters.com/blog/2015/02/02/.

66. Which only makes sense if by "correctness" one means that the court can substitute its view of whether the procedure in question was fair—the essence of "correctness" is being able to substitute one's opinion.

67. Which might make sense when the statutory delegate has discretion to choose its own procedure, because reasonableness is the standard of review for discretionary decisions; but the ultimate question is whether the procedure actually used was fair.

68. See Bredt and Melcov, "Procedural Fairness in Administrative Decision-Making: A Principled Approach", (2015) 28 CJALP 1; Evans, "Fair's Fair: Judging Administrative Procedures", (2015) 28 CJALP 111.

69. 2015 FCA 160.

67 The law concerning the standard of review for procedural fairness is currently unsettled. The unsettled nature of that law is shown by the Supreme Court's recent decision in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, a procedural fairness case. In that decision, the Supreme Court declared, without elaboration, that the standard of review is correctness but just ten paragraphs later it found that some deference should be owed to the administrative decision-maker on some elements of the procedural decision: at paragraphs 79 and 89.

68 Some cases of this Court have fastened onto the Supreme Court's statement of correctness in *Khela* without noting the later words of deference: see, *e.g.*, *Air Canada v. Greenglass*, 2014 FCA 288, 468 N.R. 184 at paragraph 26. Those cases have not referred to other cases of this Court that suggest that the standard is not purely correctness and that some deference can come to bear.

69 For example, this Court has spoken of proceeding under correctness review but in a manner "respectful of the [decision-maker's] choices" with "a degree of deference": *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42. And this Court has also upheld reasonableness review, but on the basis of a variable margin of appreciation being afforded to the decision-maker (as explained above), sometimes a wide one and sometimes no margin at all: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, 465 N.R. 152; and for a defence of this position see my dissenting reasons in *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167. And in this very context—whether procedural fairness was infringed by an insufficiently thorough investigation under the *Canadian Human Rights Act*—there is authority for the proposition that deference to the fact-based judgment of the Commissioner is warranted: *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, 73 F.T.R. 161 (T.D.) at paragraphs 55-56, aff'd (1996), 205 N.R. 383 (C.A.).

70 One might also query whether a failure to investigate thoroughly under the Act is a procedural defect, triggering whatever standard of review applies to procedural matters. A decision based on a deficient investigation can be characterized as one that is not substantively acceptable or defensible because it is based on incomplete information, thereby triggering the standard of review for substantive defects governed by *Dunsmuir*, above. As was the case in *Forest Ethics*, above, the line between a procedural concern and a substantive concern can be a blurry one. As this Court explained in *Forest Ethics*, there is much to be said for the view that the same standard of review—reasonableness with variable margins of appreciation depending on the circumstances (as described earlier in these reasons)—should govern all administrative decisions.

71 So what we have right now is a jurisprudential muddle. And now is not the time to try to resolve it. For one thing, we have not received submissions on the issue in this case. For another, with so many conflicting decisions, perhaps only a reasoned decision of the Supreme Court can provide clarity.

[Emphasis added.]

2. *Waterman*

In *Waterman v. Waterman*,[70] the Nova Scotia Court of Appeal held that procedural fairness issues do not engage the concept of standards of review. Either there was a breach of the principles of natural justice, or there was not.[71]

B. *Audi Alteram Partem*

1. *Waterman*

In *Waterman v. Waterman*,[72] the Nova Scotia Court of Appeal confirmed that the principles of natural justice and procedural fairness apply to courts as well as to administrative tribunals.

The court heard a husband's appeal from a lower court's dismissal of his application to vary a spousal support order made in Ontario. The husband's application was made and processed in Ontario, but because the wife had moved to Nova Scotia, the Ontario court forwarded it to Nova Scotia pursuant to the *Interjurisdictional Support Orders Act*.[73] The hearing took place in Nova Scotia but the husband was not served notice of the hearing date or a copy of the wife's materials. The trial judge dismissed the husband's application. The husband appealed and argued that he had been denied procedural fairness.

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70. 2014 NSCA 110.

71. At para. 23.

72. 2014 NSCA 110.

73. S.O. 2002, c. 13.

The Nova Scotia Court of Appeal allowed the appeal, holding that the husband had been denied natural justice through the absence of notice and the lack of opportunity to be heard. The court reviewed the statutory regime established under Nova Scotia's *Interjurisdictional Support Orders Act*[74] and concluded that it was silent about if, when, and how notice of the hearing and disclosure of a respondent's materials are to be provided to an applicant. However, the court held that such legislative silence could not be interpreted to mean that the *audi alteram partem* rule, which is one of the basic tenets of our legal system, did not apply. That is, the statutory regime did not permit—either expressly or impliedly—the judge to hold a hearing without notice and without providing the husband with a meaningful opportunity to be heard.

The court rejected the wife's argument that the husband had an alternative route he could have pursued where notice would have been afforded (such as proceeding under the *Divorce Act*). The court also rejected the wife's argument that the issue was not properly before the court because the husband had failed to make a constitutional challenge to Nova Scotia's *Interjurisdictional Support Orders Act*.

2. *Swart*

In *Swart v. College of Physicians and Surgeons of Prince Edward Island*,[75] the P.E.I. Court of Appeal held that the College had breached procedural fairness because (1) it deprived parties of a fair opportunity to correct or contradict any relevant standard of practice prejudicial to their position; (2) it started early and interviewed the complainant in the absence of the doctor and his lawyer; (3) it accepted double-hearsay evidence without the

74. S.N.S. 2002, c.2.

75. 2014 PECA 20.

doctor's knowledge; and (4) the members of the tribunal used their professional expertise to make findings not otherwise supported by the evidence.

3. Duty to give reasons: *Wall*

The Ontario Court of Appeal dealt with the requirement to give reasons in its decision in *Wall v. Ontario (Independent Police Review Office Director)*.[76]

The case involved a complaint of police misconduct by Wall to the Office of the Independent Police Review Director (OIPRD). Wall had been arrested and detained for 28 hours because he was walking in downtown Toronto wearing a bandana around his neck during the G20 Summit of world leaders held in 2010. The Director ordered an investigation into the complaint and ultimately decided that the allegation of misconduct was substantiated. Disciplinary proceedings against the two arresting officers took place.

Several months later, after subsequently receiving and reviewing a copy of the investigation report, Wall filed a follow-up complaint against the Chief of Police and other senior officers on the grounds that they had ordered the lower ranks to arrest anyone dressed in certain ways (including the wearing of bandanas) and charge them with the intent to commit an indictable offence.

The Director refused to proceed with the follow-up complaint because more than six months had passed since the facts on which the complaint had occurred. Wall sought judicial review of that decision. The Ontario Divisional Court quashed the Director's decision and remitted

76. 2014 ONCA 884.

the matter back to the Director for his reconsideration.[77] The Divisional Court quashed the decision on two grounds: (a) the Director had misinterpreted the statutory provision imposing the six-month review period and had failed to take into account discoverability principles; and (b) the Director had failed to provide adequate reasons for his decision.[78] The OIPRD appealed that decision to the Ontario Court of Appeal.

The Ontario Court of Appeal dismissed the appeal. First, it rejected the Director's argument that the lower court had erred by importing the principles of discoverability into its decision concerning the limitation period. Secondly, it agreed with the lower court that the Director's reasons were not adequate. The Court rejected the Director's argument that he was making a screening decision rather than a full administrative hearing decision and that, therefore, a short notification letter to the complainant was sufficient:

> 52 The statutory and common law prerequisite for reasons—*i.e.*, adequate reasons—in this context acts as a balancing safeguard: the legislature has mandated that the Director "ensure that every complaint reviewed" is dealt with (s. 59(2)), but made this requirement subject to the discretion to screen out complaints in accordance with s. 60. The requirement in s. 60(7) to give "reasons" in writing may be viewed as a *quid pro quo* for the exception created by the screening out provision.

While the Court accepted that reasons for a screening decision may not require the same level of details as other decisions, it held that the Director's decision did not adequately explain why the complaint was screened out. The Court of Appeal agreed with the Divisional Court that the Director's failure to provide adequate reasons rendered the decision unreasonable.

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77. 2013 ONSC 3312.

78. Section 60(7) of the *Police Services Act*, R.S.O. 1990, c. P.15 provides that a complainant must be notified of the Director's decision, in writing, with reasons.

C. The Rule against Bias

1. *Yukon Francophone School Board*

The Supreme Court of Canada had occasion to address alleged judicial bias in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*.[79]

The case involved an action against the Yukon government by the Yukon Francophone School Board (the Board) for failing to adequately provide for minority language education. During the course of the trial, counsel for the government raised concerns—and made a recusal motion—with respect to comments and decisions made by the trial judge and the fact that he had been involved in the Francophone community in Alberta both before and during his time as a judge. The trial judge, after dismissing the recusal motion, went on to rule in favour of the Board on most issues. The government appealed.

The Yukon Court of Appeal allowed the appeal and ordered a new trial. It held that there was a reasonable apprehension of bias on the part of the trial judge. While finding that the trial judge's involvement with the Francophone community prior to becoming a judge did not raise a reasonable apprehension of bias, his involvement while he was a judge on this case did amount to bias. The Court of Appeal also held that the trial judge had taunted the government's counsel and failed to treat counsel with respect.[80] It noted that the trial judge had refused to grant the government an adjournment when one of its witnesses suffered a

79. 2015 SCC 25.

80. The trial judge called the government's act of giving its legal counsel access to student files "objectionable and reprehensible", refused to allow further argument on the issue, and accused counsel of "playing games". Later, the trial judge accused counsel for the government of lacking conviction and sincerity and of acting in bad faith.

stroke just before the trial was to begin and subsequently refused to allow the stroke victim to give evidence by affidavit. Finally, the trial judge refused to allow the government to file reply costs submissions and the Court of Appeal found his procedure for awarding costs "grossly unfair". The Board appealed.

The Supreme Court of Canada dismissed the appeal on the question of whether the trial judge had displayed a reasonable apprehension of bias. Speaking for a unanimous court, Abella J. discussed the link between the issue of bias and the need for impartiality:

> 22 The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In *Valente*, Le Dain J. connected the dots from an absence of bias to impartiality, concluding "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" and "connotes absence of bias, actual or perceived": p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required—and expected—to approach every case with impartiality and an open mind: see *S. (R.D.)*, at para. 49, *per* L'Heureux-Dubé and McLachlin JJ.
>
> 23 In *Wewaykum*, this Court confirmed the requirement of impartial adjudication for maintaining public confidence in the ability of a judge to be genuinely open:
>
> > ... public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.
> >
> > The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. [Emphasis added; paras. 57-58.]
>
> 24 Or, as Jeremy Webber observed, "impartiality is a cardinal virtue in a judge. For adjudication to be accepted, litigants must have confidence that the judge is not influenced by irrelevant considerations to favour one side or the other": "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger" (1984), 29 McGill L.J. 369, at p. 389.

Abella J. then went on to discuss the difficulty—but not the impossibility—of rebutting the presumption of judicial impartiality:

25 Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that a judge's individual comments during a trial not be seen in isolation: see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 2; *S. (R.D.)*, at para. 134, *per* Cory J.

26 The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, *per* Cory J. As Cory J. observed in *S. (R.D.)*:

> ... allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.]

27 That said, this Court has recognized that a trial judge's conduct, and particularly his or her interventions, can rebut the presumption of impartiality. In *Brouillard v. The Queen*, [1985] 1 S.C.R. 39, for example, the trial judge had asked a defence witness almost sixty questions and interrupted her more than ten times during her testimony. He also asked the accused more questions than both counsel, interrupted him dozens of times, and subjected him and another witness to repeated sarcasm. Lamer J. noted that a judge's interventions by themselves are not necessarily reflective of bias. On the contrary,

> it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order. [p. 44]

28 On the other hand, Lamer J. endorsed and applied the following cautionary comments of Lord Denning in *Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.):

> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large ... . [p. 159]

(See also *Take and Save Trading CC v. Standard Bank of SA Ltd.*, 2004 (4) S.A. 1 (S.C.A.), at para. 4.)

29 Although Lamer J. was not convinced that the trial judge was actually biased, there was enough doubt in his mind to conclude that a new trial was warranted in the circumstances of the case.

30 In *Miglin*, another case where the allegation of bias arose because of the trial judge's interventions, this Court agreed with the Court of Appeal for Ontario that while many of the trial judge's interventions were unfortunate and reflected impatience with one of the witnesses, the high threshold necessary to establish a reasonable apprehension of bias had not been met. The Court of Appeal observed:

> The principle [that the grounds for an apprehension of bias must be substantial] was adopted and amplified in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, ... to reflect the overriding principle that the judge's words and conduct must demonstrate to a reasonable and informed person that he or she is open to the evidence and arguments presented. The threshold for bias is a high one because the integrity of the administration of justice presumes fairness, impartiality and integrity in the performance of the judicial role, a presumption that can only be rebutted by evidence of an unfair trial. Where, however, the presumption is so rebutted, the integrity of the justice system demands a new trial.
>
> The assessment of judicial bias is a difficult one. It requires a careful and thorough review of the proceedings, since the cumulative effect of the alleged improprieties is more relevant than any single transgression. [53 O.R. (3d) 641, at paras. 29-30]

31 As for how to assess the impact of a judge's identity, experiences and affiliations on a perception of bias, Cory J.'s comments in *S. (R.D.)* helpfully set the stage:

> Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations. [para. 120]

32 But it is also important to remember the words of L'Heureux-Dubé and McLachlin JJ. in *S. (R.D.)*, where they compellingly explained the intersecting relationship between a judge's background and the judicial role:

> ... judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the

> valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.
>
> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. [paras. 38-39]

33 Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. Bora Laskin noted that the strength of the common law lies in part in the fact that

> the judges who administer it represent in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties. It is salutary that this is so, and eminently desirable that it should continue to be so. ["The Common Law is Alive and Well—And, Well?" (1975), 9 *L. Soc'y Gaz.* 92, at p. 99]

34 The reasonable apprehension of bias test recognizes that while judges "must strive for impartiality", they are not required to abandon who they are or what they know: *S. (R.D.)*, at para. 29, *per* L'Heureux-Dubé and McLachlin JJ.; see also *S. (R.D.)*, at para. 119, *per* Cory J. A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life"—their own and those whose lives reflect different realities. As Martha Minow elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding:

> None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration. ["Stripped Down Like a Runner or Enriched by

> Experience: Bias and Impartiality of Judges and Jurors" (1992), 33 *Wm. & Mary L. Rev.* 1201, at p. 1217]

35 This recognition was reinforced by Cameron A.J. of the Constitutional Court of South Africa in *South African Commercial Catering and Allied Workers Union v. Irvin & Johnson Ltd. (Seafoods Division Fish Processing)*, 2000 (3) S.A. 705:

> ... "absolute neutrality" is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality ... Impartiality is that quality of open-minded readiness to persuasion—without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views—that is the keystone of a civilised system of adjudication. Impartiality requires, in short, "a mind open to persuasion by the evidence and the submissions of counsel"; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. [Citations omitted; para. 13.]

36 Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions. It requires judges "to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies": Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12. As Aharon Barak has observed:

> The judge must be capable of looking at himself from the outside and of analyzing, criticizing, and controlling himself...
>
> The judge is a product of his times, living in and shaped by a given society in a given era. The purpose of objectivity is not to sever the judge from his environment... [or] to rid a judge of his past, his education, his experience, his belief, or his values. Its purpose is to encourage the judge to make use of all of these personal characteristics to reflect the fundamental values of the society as faithfully as possible. A person who is appointed as a judge is neither required nor able to change his skin. The judge must develop sensitivity to the dignity of his office and to the restraints that it imposes. [Footnote omitted; *The Judge in a Democracy* (2006), at pp. 103-4.]

37 But whether dealing with judicial conduct in the course of a proceeding or with "extra-judicial" issues like a judge's identity, experiences or affiliations, the test remains

> whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias... . [T]he assessment is difficult and requires a careful

> and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. [Citations omitted; *Miglin*, at para. 26.]

In this case, the Supreme Court of Canada was satisfied that the trial judge had demonstrated a reasonable apprehension of bias through his comments and actions and the unusual costs award and procedure. However, the Court held that the trial judge's current involvement with a Francophone organization did not contribute to the apprehension of bias:

> 59 ... judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest. Judges, as Benjamin Cardozo said, do not stand on "chill and distant heights": *The Nature of the Judicial Process* (1921), at p. 168. They should not and *cannot* be expected to leave their identities at the courtroom door. What they *can* be expected to do, however, is remain, in fact and in appearance, open in spite of them...
>
> 60 ... The *Ethical Principles for Judges* provide guidance to federally appointed judges. They advise that while judges should clearly exercise common sense about joining organizations, they are not prohibited from continuing to serve their communities outside their judicial role... [Quotation omitted.]
>
> 61 Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.

2. *Klippenstein*

In *Klippenstein v. Manitoba Ombudsman*,[81] Mainella J.A. of the Manitoba Court of Appeal was faced with a recusal motion by a mentally ill, self-represented litigant. The applicant argued that Mainella J.A. should recuse himself because he had dismissed a previous

81. 2015 MBCA 15, leave to appeal to the SCC refused on June 18, 2015 [2015] SCCA No. 135.

contempt motion brought by the applicant on the grounds of being frivolous and devoid of merit and that the contempt decision was currently under appeal. The applicant had also laid a complaint against Mainella J.A. personally as a result of his decision in the contempt motion. The applicant argued that Mainella J.A., therefore, had a personal interest in the proceedings.

Mainella J.A. dismissed the recusal motion. Citing the strong presumption of judicial impartiality, Mainella J.A. saw no cogent evidence or reason to disqualify himself. He noted that the applicant was a prolific litigant who did not possess a rudimentary understanding of the legal process and the respective roles of counsel and judiciary.[82] Mainella J.A. reiterated the rule that "the strong presumption of judicial impartiality is not displaced merely because of a previous, unfavourable decision by a judge involving the same party earlier in the proceeding".[83]

3. Institutional bias—*Wilson*

The Court of Queen's Bench of Alberta addressed an allegation of institutional bias in *Wilson v. University of Calgary*.[84] The issue was whether the appeal structure provided for in the University's Non-Academic Misconduct Policy resulted in institutional bias by allowing the Associate Vice-Provost to act as both accuser and judge. While the court agreed that the Policy envisioned the Associate Vice-Provost having overlapping functions—and that such

82. At para. 27.

83. At para. 28.

84. 2014 ABQB 190.

overlapping functions were *prima facie* problematic[85]—the overlap of functions in this case was expressly authorized by statute. The intent of the Legislature was to give the University wide discretion over student disciplinary issues and the allegation of institutional bias was rejected.

V. MULTIPLE FORUMS AND ALTERNATE REMEDIES

1. *Strickland*

In *Strickland v. Canada (Attorney General)*,[86] the issue was whether an application for a declaration that the *Federal Child Support Guidelines* ("the Guidelines") are unlawful should be brought in the Federal Court or in the provincial superior courts.

The appellants applied to the Federal Court for a declaration that the Guidelines are unlawful because they are not authorized by the *Divorce Act*.[87] They argued that the Federal Court has exclusive jurisdiction to grant declaratory relief against any federal board, commission or tribunal pursuant to section 18 of the *Federal Courts Act* and that this exclusive jurisdiction includes the jurisdiction to declare regulations promulgated by the Governor in Council, such as the Guidelines, to be *ultra vires*. As a result, the appellants submitted that litigation seeking a public law remedy against a federal entity may proceed *only* in the federal courts. The Attorney General brought a motion to dismiss the application.

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85. At para. 67.

86. 2015 SCC 37.

87. R.S.C. 1985, c. 3 (2nd Supp.).

The Federal Court dismissed the application and declined to undertake judicial review on the grounds that some other, more suitable remedy was available.[88] Justice Gleason held that the Federal Court is not the appropriate forum in which to address the validity of the Guidelines. Instead, the provincial superior courts have jurisdiction over claims that the Guidelines are unlawful if the claims are made in proceedings properly before them and in which those courts are asked to apply them. Justice Gleason noted the minor role the Federal Court plays in issues under the *Divorce Act* and the breadth of jurisdiction and expertise of the provincial superior courts in the areas of divorce and child support. The Federal Court of Appeal upheld the lower court's decision.[89]

The Supreme Court of Canada dismissed the appeal and agreed that the provincial superior courts have the jurisdiction to address the validity of the Guidelines.

Reasons of Justice Cromwell

Speaking for the majority,[90] Justice Cromwell concluded that:

> 33 The Court's jurisprudence ... supports the principle that the provincial superior courts, in the context of proceedings properly before them, can address the legality of the conduct of federal boards, commissions and tribunals, where doing so is a necessary step in resolving the claims asserted in those proceedings. This means that in the context of family law proceedings otherwise properly before them, the provincial superior courts can decide that the Guidelines are *ultra vires* and decline to apply them if doing so is a necessary step in resolving the matters before them. It follows that the appellants' position to the contrary on

88. 2013 FC 475.

89. 2014 FCA 33.

90. Justice Cromwell delivered reasons for Chief Justice McLachlin, and Justices Rothstein, Moldaver, Karakatsanis, Gascon and Côté. Justices Abella and Wagner issued concurring reasons which will be discussed below.

> this point must be rejected and that the premise underlying the decisions of the Federal Courts to decline jurisdiction was correct.

Justice Cromwell went on to decide that the Federal Court had not erred in refusing to hear the judicial review application on its merits. He noted the greater expertise of provincial superior courts in family law and the discretionary nature of judicial review and declaratory relief. He went on to identify three flaws with the appellants' argument that the Federal Court had exclusive jurisdiction to hear the matter:

> 47 At its core, the appellants' claim is that they are entitled to a ruling on the legality of the Guidelines. They say that they are seeking a purely public law remedy which they can only obtain in the Federal Court and they do not seek, or want, any other remedy. This claim is founded on three flawed propositions that also undermine the appellants' more specific submissions.
>
> 48 First, the appellants' position that they are entitled to a ruling on the legality of the Guidelines through a judicial review is fundamentally at odds with the discretionary nature of judicial review and with the broad grounds on which that discretion may be exercised. As *Brown and Evans* put it, "the discretionary nature of [judicial review] reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals": topic 3:1100. The appellants thus do not have a right to have the Federal Court rule on the legality of the Guidelines; the Federal Court has a discretion to do so, which it has decided not to exercise.
>
> 49 Second, the appellants' position that the alternative is not adequate because it does not provide identical procedures or relief cannot be accepted. The appellants' arguments focus too narrowly on how challenging the Guidelines in the context of family law litigation in the provincial superior courts will not provide everything that might be available to them on judicial review. Exercising the discretion to decline judicial review jurisdiction requires the court to take a broader view. The court should consider such factors as the appropriateness of judicial review in the particular context and, as Mullan put it, whether judicial review is "appropriately respectful" of the statutory framework and of the "normal processes" for which it provides.
>
> 50 In short, the analysis cannot simply look at the alleged advantages of judicial review from the appellants' perspective so that they can make their point, but also must engage with the more fundamental questions of how judicial review interacts with the operation of the Guidelines in family law litigation in the provincial courts. When this is done, the conclusion is that the appellants' position is misconceived.

> 51 The Guidelines operate and play a central role within a complex area of law, governed by the *Divorce Act*. Parliament has entrusted, for practical purposes, this entire area of law to the provincial superior courts. Having done so, it would be curious, to say the least, if the legality of a central aspect of that regime were to be finally decided by the federal courts, which, as a result of federal legislation, have virtually no jurisdiction with respect to family law matters. The appellants' judicial review proceedings are thus deeply inconsistent with fundamental parliamentary choices about where important family law issues will be determined.
>
> 52 Third, the appellants' position that obtaining a ruling in the Federal Court would be more efficient than a proliferation of rulings in the various provincial superior courts in individual family law proceedings cannot be accepted. The appellants submit that the alternative remedy of litigation in the provincial superior courts is inefficient and would give rise to multiple proceedings, undermining judicial economy. This is simply not the case.
>
> 53 The appellants' position overlooks the fact that a ruling of the Federal Court on this issue would not be binding on any provincial superior court. Thus, regardless of what the Federal Court might decide, before the ruling could have any practical effect, the issue would have to be re-litigated in the superior courts, or, alternatively, litigated up to this Court. Even if there were a binding ruling that the Guidelines were unlawful, a proliferation of litigation would be inevitable. It would be for the provincial courts to decide the impact of the illegality of the Guidelines on particular support orders and that could only be done in the context of a multitude of individual cases. A further complexity arises from the fact that all provinces and territories except Quebec have adopted child support guidelines that are very similar to the Guidelines and use the federal child support tables. Those provincial laws are not subject to the appellants' challenge and yet might well be affected by it. These practical considerations significantly undermine the appellants' positions that a single judicial review proceeding would resolve the main issue more efficiently.

Concurring reasons of Justices Abella and Wagner

Justices Abella and Wagner issued concurring reasons in which they noted that the parties had proceeded on the assumption that the Federal Court has exclusive jurisdiction to declare invalid all federal regulations promulgated by the Governor in Council. This issue, however, was not argued, and Justices Abella and Wagner were clear to state that this case should not be seen as "categorically endorsing this assumption".[91] They went on to identify several reasons for their comments:

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91. At para. 67.

68 First, any derogation from the jurisdiction of the provincial superior courts "requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46; *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, at para. 42. A superior court "has jurisdiction to entertain virtually any claim unless that jurisdiction is specifically, unequivocally and constitutionally removed by Parliament": *Sorbara v. Canada (Attorney General)* (2009), 98 O.R. (3d) 673 (C.A.), at para. 7, leave to appeal refused, [2009] 3 S.C.R. x, [2009] S.C.C.A. No. 299. It would be possible to argue, in our view, that s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, does not clearly and unequivocally strip the provincial superior courts of their jurisdiction to declare federal regulations made by the Governor in Council to be invalid on administrative grounds.

69 In fact, this Court has never held that the Federal Court enjoys the exclusive authority to declare all regulations made by the Governor in Council invalid. Only two appellate courts have endorsed that proposition: *Saskatchewan Wheat Pool v. Canada (Attorney-General)* (1993), 107 D.L.R. (4th) 63 (Sask. C.A.), at pp. 66-69; *Messageries publi-maison ltée v. Société canadienne des postes*, [1996] R.J.Q. 547 (C.A.).

70 A contrary view was expressed by several others: *Waddell v. Governor in Council* (1981), 30 B.C.L.R. 127 (S.C.), appeal dismissed as academic (1982), 142 D.L.R. (3d) 177 (B.C.C.A.); *Re Williams and Attorney-General for Canada* (1983), 45 O.R. (2d) 291 (H.C.J.); and *British Columbia Milk Marketing Board v. Aquilini*, [1997] B.C.J. No. 843 (S.C.) (QL), rev'd in part on other grounds (1998), 165 D.L.R. (4th) 626 (B.C.C.A.), notice of discontinuance filed, [1999] 2 S.C.R. v, [1998] S.C.C.A. No. 557.

71 Moreover, over three decades ago, this Court decided that provincial superior courts have jurisdiction to declare the federal laws they apply *ultra vires* on division of powers grounds so that they are not left with "the invidious task of execution of federal and provincial laws ... while being unable to discriminate between valid and invalid federal statutes so as to refuse to 'execute' the invalid statutes": *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 328.

72 Provincial superior courts also have jurisdiction to declare the federal laws they apply to be contrary to the *Canadian Charter of Rights and Freedoms*: *Wakeford v. Canada* (2002), 58 O.R. (3d) 65 (C.A.), at para. 40, leave to appeal refused, [2002] 4 S.C.R. vii, [2002] S.C.C.A. No. 147; *Lavers v. British Columbia (Minister of Finance)* (1989), 64 D.L.R. (4th) 193 (B.C.C.A.); *International Fund for Animal Welfare, Inc. v. Canada (Attorney General)* (1998), 157 D.L.R. (4th) 561 (Ont. Ct. (Gen. Div.)).

73 Federal regulations are federal law. Consequently, an argument can be made that the jurisdiction of the provincial superior courts to declare invalid the federal laws they apply necessarily includes the authority to declare invalid the federal *regulations* they apply: see *e.g. Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] 1 S.C.R. 401; *Dyck v. Highton* (2003), 239 Sask. R. 38 (Q.B.); *Ward v. Canada (Attorney General)* (1997), 155 Nfld. & P.E.I.R. 313 (Nfld. S.C. (T.D.)), rev'd on other grounds (1999), 183 Nfld. & P.E.I.R. 295 (Nfld. C.A.), rev'd [2002] 1 S.C.R. 569; *Souliere v. Leclair* (1998), 52 C.R.R. (2d) 156 (Ont. Ct.(Gen. Div.)); *Premi v. Khodeir* (2009), 198 C.R.R. (2d) 8 (Ont. S.C.J.); *Grenon v. Canada (Attorney General)* (2007), 76 Alta. L.R. (4th) 346 (Q.B.).

> 74 We are not suggesting that Parliament lacks the authority under s. 101 of the *Constitution Act, 1867* to grant the Federal Court jurisdiction to declare federal regulations *ultra vires*. Our concern is simply whether the *Federal Courts Act* has given it the *exclusive* jurisdiction to do so.

They concluded:

> 85 Accordingly, although we agree with the result reached by the majority, we are concerned that the reasons not be seen as representing a definitive view from this Court that the provincial superior courts cannot declare federal regulations invalid on administrative grounds.

Interestingly, Justice Cromwell commented on the concurring reasons of Justices Abella and Wagner as follows:

> 63 Since writing my reasons, I have had the advantage of reviewing the concurring reasons of my colleagues Abella and Wagner JJ. As they point out, this case was argued on the basis that there was no dispute that the Federal Court has exclusive original jurisdiction to grant judicial review remedies directed against regulations promulgated by the Governor in Council. This assumption by the parties is hardly surprising given this Court's recent decision in *McArthur*, at paras. 2 and 17 aff'g 2008 ONCA 892, 94 O.R. (3d) 19, at para. 94, in which we at least implicitly if not explicitly affirmed that s. 18 of the Act gives the Federal Court exclusive original jurisdiction to issue a prerogative remedy or grant declaratory relief against any federal board, commission or other tribunal on administrative law grounds. My colleagues point to a number of "concerns" about this assumption and raise various possible arguments that might be made to the contrary. As none of these points was argued, I of course will keep an open mind about them. But I do not want my silence on these issues to be understood as indicating that, at least as presently advised, I share the concerns raised by my colleagues.
>
> 64 At this point, it seems to me that the language of the Act conferring "exclusive original jurisdiction" can be taken as a clear and explicit expression of parliamentary intent. Similarly, as presently advised I see no reason to doubt that the Governor in Council, when exercising "jurisdiction or powers conferred by or under an Act of Parliament" is a "federal board, commission or other tribunal" within the meaning of s. 2 the Act. Further, the Court in *Paul L'Anglais Inc.* distinguished between Federal Court jurisdiction to rule on constitutionality and jurisdiction to engage in judicial review on administrative law grounds. No one questions that s. 18 does not withdraw the authority of the provincial superior courts to grant the traditional administrative law remedies against federal boards, commissions and tribunals on division of powers grounds: see, *e.g.*, *Paul L'Anglais Inc.* at pp. 152-63. But

> with respect to judicial review on administrative law grounds, the Court expressly confirmed that the Federal Court has exclusive original jurisdiction as described in s. 18 of the Act...

2. *Saint John (City) v. CUPE, Local 18*

In *Saint John (City) v. CUPE, Local 18*,[92] the New Brunswick Court of Appeal held that an arbitrator had failed to apply the test for issue estoppel when issuing a preliminary ruling dismissing a grievance under a collective agreement on the basis that the central issued had been determined by the Human Rights Commission and the EI Board of Referees. The Court referred to the Supreme Court of Canada's decision in *Penner*[93] where Justice Cromwell held that the discretionary doctrine of issue estoppel should not be applied where doing so would work an injustice.

3. *Hebron v. University of Saskatchewan*

In *Hebron v. University of Saskatchewan*,[94] a veterinary medicine student took "a second kick at the can" by making a complaint to the Human Rights Commission after unsuccessfully having appealed to the Dean and the University Council Appeals Board. He did not apply for judicial review of the internal university decisions. The Chief Commissioner of the Human Rights Commission rejected the University's application on the basis that it duplicated the UCAB proceedings. The University successfully applied to the Court of Queen's Bench for an order prohibiting the Human Rights Commission from proceeding with the complaint, and the Court of Appeal upheld that decision.

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92. 2015 NBCA 35.

93. *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19.

94. 2015 SKCA 91.

VI. ADMINISTRATIVE LAW AND THE *CHARTER*

The sheer number of cases dealing with the *Charter* and human rights this past year is staggering. For the purposes of this paper, a brief highlight of some of the cases will suffice.

- *Canada (Attorney General) v. Federation of Law Societies of Canada*[95] dealt with provisions of the federal government's anti-money laundering and anti-terrorist financing legislation. The legislation contained sweeping search powers with respect to law offices. The Supreme Court of Canada held that the search powers violated sections 7 and 8 of the *Charter* and could not be saved under section 1.

- *Loyola High School v. Quebec (Attorney General)*[96] addressed the framework for judicial review of discretionary administrative decisions engaging *Charter* protections. Specifically, it dealt with the issue of whether the Quebec government could require a private English-speaking high school to include a program on ethics and religion that was secular, objective and neutral as part of its curriculum. The high school wanted to offer an alternative program to be taught from a purely Catholic perspective. The Supreme Court of Canada held that the government's decision requiring all aspects of the high school religious program to be taught from a neutral perspective violated the parties' freedom of religion and was not saved by section 1.

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95. 2015 SCC 7.

96. 2015 SCC 12.

- The decision in *Mouvement laïque québécois v. Saguenay (City)*,[97] which is discussed above with respect to standards of review, also dealt with freedom of religion. The Supreme Court of Canada held that a municipal by-law directing the recital of a prayer before public municipal council meetings and the exhibition of religious symbols in council chambers violated the *Québec Charter of human rights and freedoms* and the Canadian *Charter*. While neither statute expressly imposed a duty of religious neutrality on the state, the evolving interpretation of freedom of conscience and religion did so.

- In *R. v. Smith*,[98] the Supreme Court of Canada declared that sections 4 and 5 of the *Controlled Drugs and Substances Act*[99] violated section 7 of the *Charter* by restricting access to medical marijuana to marijuana in dried form. The Court held the restriction was null and void.

- In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*,[100] the Supreme Court of Canada discussed what amounts to *prima facie* discrimination under the *Québec Charter of human rights and freedoms*. The court held that it was not shown on a balance of probabilities that there was a connection between a prohibited ground of discrimination (racial profiling) and Bombardier's decision to deny Latif's request for pilot training.

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97. 2015 SCC 16.

98. 2015 SCC 34.

99. S.C. 1996, c. 19.

100. 2015 SCC 39.

- In *Guindon v. Canada*,[101] the Supreme Court of Canada held that the penalties under section 163.2 of the *Income Tax Act* are administrative in nature (not criminal); do not have true penal consequences; and do not constitute an "offence". Therefore, section 11 of the *Charter* does not apply.

- In *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*,[102] the Supreme Court of Canada held that the Automatic Roadside Prohibition scheme in British Columbia (1) was within the legislative competence of the provincial legislature, (2) did not breach section 11 of the *Charter* because it did not create an "offence" within the meaning of *Guindon*, but (3) did breach section 8 of the *Charter* because the required breath sample was a "seizure" which was unreasonable because there was no meaningful review of the accuracy of the test of the breath sample and no effective ability to results of that test.

- In *Wilson v. British Columbia (Superintendent of Motor Vehicles)*,[103] Justice Moldaver held that the *Charter* could not be used as an interpretive tool where there was no ambiguity about the meaning of the statutory provision in question.

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101. 2015 SCC 41 (Rothstein, Cromwell, Moldaver and Gascon JJ. writing for the majority who exercised discretion to hear the constitutional issue even though proper notice had not been given to the Attorneys General; the minority consisting of Abella, Karakatsanis and Wagner JJ. would not have heard the case).

102. 2015 SCC 46 (Karakatsanis J. writing for the majority, Chief Justice McLachlin dissenting on the s. 11 issue).

103. 2015 SCC 47 (Moldaver J.).

- The Court of Appeal of Alberta decision in *Stewart v. Elk Valley Coal Corp.*[104] dealt with workplace discrimination. The Court of Appeal held that the employer's termination of the employee did not amount to discrimination on the grounds of disability where the alleged disability was an addiction to cocaine. The employer's policy of disciplining or terminating an employee where treatment of dependency or addiction was not sought by the employee until after an accident was reasonable. The policy addressed *bona fides* occupational requirements and constituted relevant reasonable accommodation for persons who had an addiction.

- In *P.S. v. Ontario*,[105] the Ontario Court of Appeal held that certain provisions of the Ontario *Mental Health Act*[106] violated section 7 of the *Charter* by allowing for indeterminate detention without providing a fair process and procedural protections mandated by the principles of fundamental justice with respect to long-term patients. The provisions were declared invalid, although the declaration was suspended for 12 months in order to protect public safety while the Ontario legislature revises the *Mental Health Act*. The court also held that section 15 of the *Charter* had been breached because the appellant, a deaf man, had been denied adequate interpretation services.

- In *Peet v. Law Society of Saskatchewan*,[107] the Saskatchewan Court of Appeal rejected an argument that a significant delay in hearing two complaints against a member of the Law Society constituted a breach of his right under section 11(b)

104. 2015 ABCA 225.

105. 2014 ONCA 900.

106. R.S.O. 1990, c. M.7.

107. 2014 SKCA 109.

of the *Charter* to be tried within a reasonable time and/or an abuse of process that warranted a stay in proceedings. The court held that disciplinary proceedings in this case were concerned with regulating a profession or occupation in the public interest and, therefore, did not engage section 11(b) of the *Charter*.[108] Likewise, the court held that the delay did not result in significant prejudice or stigma and a stay was not warranted on administrative law grounds.

- In *Gichuru v. The Law Society of British Columbia*,[109] the British Columbia Court of Appeal addressed remedies for discrimination under British Columbia's *Human Rights Code*,[110] including a *Charter* challenge to the remedial provisions contained in the *Code*. The court rejected the argument that section 37 of the *Code* violates section 15 of the *Charter* by treating human rights complainants differently than other litigants with respect to common law or equitable approaches to issues such as causation.

- The companion cases of *Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest*[111] and *Northwest Territories (Attorney General) v. Association des parents ayants droit de Yellowknife*[112] addressed minority language education rights under section 23 of the *Charter*. In *Northwest Territories (Attorney General) v. Association des parents ayants droit*

108. See the subsequent significant decision of the Supreme Court of Canada in *Guindon v. Canada*, 2015 SCC 41 that administrative penalties do not attract *Charter* protection.

109. 2014 BCCA 396.

110. R.S.B.C. 1996, c. 210.

111. 2015 NWTCA 1, application for leave to appeal to SCC filed on June 8, 2015.

112. 2015 NWTCA 2.

de Yellowknife, the court partially overturned a lower court decision requiring the government to expand the facilities at the Francophone school (although the direction to construct a gymnasium was upheld). It held that the trial judge had erred in finding that non-rights holders who wanted to attend the Francophone school could be counted for the purpose of determining if the numbers of students justified an expansion of the school. It also held that there was nothing inherently unconstitutional about having the Francophone students share space with other neighbouring schools for some activities. The court reiterated its findings in *Northwest Territories (Attorney General) v. Commission Scolaire Francophone, Territoires du Nord-Ouest* and also held that the trial judge had erred in interpreting section 23 and by inflating the powers of the School Board to the level of government.

- *Attaran v. Canada (Attorney General)*[113] dealt with a complaint to the Canadian Human Rights Commission ("the Commission") concerning the processing times for sponsorship applications for parents. The complainant argued that sponsorship applications for parents take significantly longer than applications for other family members and that this violated section 5 of the *Canadian Human Rights Act* by discriminating on the basis of whether a person is a parent. The Commission dismissed the complaint and the Federal Court dismissed the application for judicial review. The Federal Court of Appeal allowed the appeal and held that the Commission's decision was not reasonable and referred the matter back to the Commission for redetermination.

113. 2015 FCA 37.

- In *Wilson v. University of Calgary*,[114] Madam Justice Horner of the Court of Queen's Bench of Alberta held that a decision of the Chair of the Student Discipline Committee was unreasonable because he had not properly taken into account *Charter* values in the exercise of his discretion. The students argued that their right to freedom of expression was violated when the University issued a Notice requiring them to turn their pro-life display inward so that graphic images were not visible to people passing by. The Court held that the Chair was unreasonable in deciding that the issue of whether the University properly balanced the students' freedom of expression with the statutory objectives of safety and security on campus did not arise.

- In *Trinity Western University v. Nova Scotia Barristers' Society*,[115] the court held that the Society's actions of refusing to accept law degrees from Trinity Western unless the university changed its student policy prohibiting sexual intimacy outside of traditionally defined marriage infringed the freedom of religion of the university and its students and was not justified.

  But see the different conclusion of the Ontario Divisional Court in *Trinity Western University v. The Law Society of Upper Canada*.[116]

  Both decisions are under appeal, and similar litigation is pending in British Columbia.

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114. 2014 ABQB 190.

115. 2015 NSSC 25.

116. 2015 ONSC 4250.

- In *Peter v. Canada (Minister of Public Safety and Emergency Preparedness)*,[117] the Federal Court rejected the argument that section 112(2)(b.1) of the *Immigration and Refugee Protection Act*[118]—which provides that persons who are under a removal order are not permitted a new risk assessment until 12 months from the date of their previous risk assessment had passed—violates section 7 of the *Charter*. The court also rejected a section 7 argument with respect to the current removals process in its entirety, including the removals test, the substantive content and standard of proof issues with respect to the test, and procedural fairness issues.[119]

- In *Dale v. Nova Scotia (Workers' Compensation Appeals Tribunal*,[120] the Nova Scotia Court of Appeal set out what evidence needs to be on record before a *Charter* challenge can be decided. *Dale* sets out a detailed roadmap on how tribunals and counsel should proceed in *Charter* cases.

- In *Allen v. Alberta*,[121] the Court of Appeal of Alberta upheld the dismissal of a *Charter* challenge to the medicare system in Alberta for lack of a proper evidentiary basis, notwithstanding that the decision of the Supreme Court of

117. 2014 FC 1073.

118. S.C. 2001, c. 27.

119. The court did certify both questions for appeal.

120. 2015 NSCA 71.

121. 2015 ABCA 277.

Canada in *Chaoulli v. Quebec (Attorney General)*[122] would appear to have been dead on point (although with a different evidentiary basis).

VII. A MISCELLANY OF OTHER DEVELOPMENTS

A. Privilege

1. *Federation of Law Societies*

In *Canada (Attorney General) v. Federation of Law Societies of Canada*,[123] the Supreme Court of Canada held that provisions contained in Canada's anti-money laundering and anti-terrorist financing legislation would risk privileged material being disclosed to authorities. There was no requirement for notice to be given to the client and inadequate protection of solicitor-client privilege. The provisions were read down so as to not apply to documents in the possession of legal counsel or in law office premises.

2. *Gichuru v. British Columbia (Information and Privacy Commissioner)*

Gichuru v. British Columbia (Information and Privacy Commissioner)[124] dealt with litigation privilege. The Information and Privacy Commissioner decided that an inquiry into whether documents requested from the Law Society were privileged should not proceed because it was plain and obvious from the table of documents that solicitor-client or litigation privilege

122. 2005 SCC 35, [2005] 1 SCR 791.

123. 2015 SCC 7.

124. 2014 BCCA 259.

applied. The British Columbia Supreme Court upheld the Commissioner's decision. The British Columbia Court of Appeal allowed an appeal in part and held that it was not plain and obvious that several of the documents were, in fact, privileged. The Court of Appeal discussed the scope of litigation privilege and distinguished it from legal advice or solicitor-client privilege. It held that there was insufficient information contained in the table of documents to support a claim of litigation privilege.

3. *University of Calgary v. JR and Information and Privacy Commissioner*

This case was noted in last year's paper.[125] The Supreme Court of Canada has granted leave to appeal from the unanimous decision by the Court of Appeal of Alberta.

4. *Chambre des notaires*

In November, the Supreme Court of Canada is hearing an appeal from the Quebec Court of Appeal reading down certain provisions of the *Income Tax Act* which infringe legal privilege: *Canada (Attorney General) v. Chambre des notaires du Québec*.[126]

B. Burden of Proof

In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*,[127] the Supreme Court of Canada commented

125. 2014 ABCA 263. Leave to appeal granted on 29 October 2015.

126. 2014 QCCA 552.

127. 2015 SCC 39.

on the burden of proof and statutory provisions that relieve against the strict application of the rules of evidence:

> 66 At the hearing, the Commission cited s. 123 of the *Charter* in support of its argument that the degree of proof is different in a discrimination case. In our opinion, s. 123 of the *Charter* applies to an entirely different situation. It reads as follows: The Tribunal, though bound by the general principles of justice, may admit any evidence useful and relevant to the application submitted to it and allow any means of proof. The Tribunal is not bound by the special rules of evidence applicable in civil matters, except to the extent determined in this Part.
>
> 67 In essence, the purpose of this section is to relax the rules governing the admissibility and presentation of evidence, not to lower the usual civil standard of proof. In practice, this means that the Tribunal may accept any means of proof—writings, presumptions, testimony, admissions or the production of real evidence. Since it is not bound by the specific rules of evidence applicable in civil matters, it could, for example, admit hearsay evidence on certain conditions. That being said, the Tribunal must nevertheless, after hearing all the evidence, be satisfied on a balance of probabilities that the plaintiff has been discriminated against before it can decide in the plaintiff's favour.
>
> 68 This relaxation of the rules of evidence is not unique to the Tribunal or to the application of the *Charter*; it can in fact be found in the enabling legislation of other quasi-judicial tribunals. This choice can be explained by a legislative intent to favour the resolution of certain types of disputes in a more expeditious and less costly manner, and in more accessible and less formalistic forums in which plaintiffs are often not represented by counsel:
>
> > see, *inter alia*, P. Garant, *Droit administratif* (6th ed. 2010), at p. 105. Subject to the principles of natural justice and to the specific rules set out in their enabling legislation, administrative tribunals therefore have full authority over their procedure and over the admission of evidence: see, *inter alia*, ss. 9 to 12 of the Act respecting administrative justice, CQLR, c. J-3; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, at p. 485.

The Court also commented on the need for evidence in the record to support a finding:

> 73 For the reasons that follow, we are of the opinion that because the Tribunal's decision was not supported by the evidence in the record, it was unreasonable and must therefore be set aside.
>
> …

> 81 As for the circumstantial evidence, we do not agree with the Court of Appeal that the inference drawn by the Tribunal was based solely on Ms. Bahdi's expert report. The Tribunal based its finding on all the evidence in the record. In our opinion, however, that evidence was not sufficient to support an inference of a connection between Mr. Latif's ethnic or national origin and his exclusion. It follows that the Tribunal's finding of fact was clearly unreasonable.

The approach of the court on the issue leaves open the opportunity for reviewing courts to really dig into the evidence to assess whether it is sufficient, especially in a case where the evidence is circumstantial and inferences are drawn. (A similar result and approach is found in our Court of Appeal's decision in *Walton et al. v. Alberta Securities Commission*, 2014 ABCA 273 at paras 25-29; 134).

C. Jurisdiction—reconsiderations

1. *Fraser Health Authority*

In *Fraser Health Authority v. Workers' Compensation Appeal Tribunal*,[128] a five-member panel of the British Columbia Court of Appeal discussed the scope of the Workers' Compensation Appeal Tribunal's ("WCAT") power to reopen and reconsider its own previous decisions. The Court of Appeal held that a reconsideration decision of WCAT should be set aside because a newly constituted panel of WCAT did not have jurisdiction to review a previous panel's decision to determine whether the decision was patently unreasonable. The majority of the court (consisting of Justices Chiasson, Frankel and

128. 2014 BCCA 499, leave to appeal to SCC granted on June 25, 2015 (without reasons) [2015] SCCA 58.

Goepel)[129] distinguished between cases in which WCAT reopens an appeal to correct a clerical error or cure a jurisdictional defect from cases in which WCAT reopens an appeal to decide whether a previous decision was patently unreasonable. The majority held that WCAT was attempting to equate the common law power to reopen an appeal to cure a jurisdictional defect with the power of a superior court on judicial review. It held that the question of whether a previous WCAT decision was patently unreasonable was one of true jurisdiction and, since WCAT had fulfilled its mandate by making the initial decision, WCAT was *functus officio*.

In a dissenting judgment, Justices Newbury and Bennett held that WCAT had the jurisdiction to hear a reconsideration of a different panel's earlier ruling for the purpose of correcting a jurisdictional error. This jurisdiction included the power to decide if a previous decision was patently unreasonable. They held that "jurisdictional error" in this context could be distinguished from questions of "true jurisdiction" identified in *Dunsmuir* and subsequent cases.

The Supreme Court of Canada has granted leave to appeal this decision.

2. *Pacific Newspaper*

In *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*,[130] which is discussed in detail under the heading "Standing" above, the British Columbia Court of Appeal addressed the scope of discretion exercised by a

129. The majority for the administrative law issues. Justice Goepel dissented on the decision on the merits.

130. 2014 BCCA 496, application for leave to appeal to SCC filed on June 1, 2015.

reconsideration panel in considering an application for a declaratory opinion. The Court of Appeal held that the statutory language contained in section 70 of British Columbia's *Labour Relations Code*[131] permitted the reconsideration panel to exercise its discretion to refuse to give a declaratory opinion on the grounds that a declaration would not be consistent with good labour relations. The fact that a subsequent reconsideration panel gave different, or additional, reasons for declining to make a declaration did not render the decision patently unreasonable, because the reasoning in each decision withstood scrutiny and neither was clearly irrational.

D. Statutory Interpretation

1. *Thibodeau*

In *Thibodeau v. Air Canada*,[132] the Supreme Court of Canada discussed the interface between a treaty and statute. The appellants filed several complaints against Air Canada with the Office of the Commissioner of Official Languages for the airline's failure to provide services to them in French contrary to the *Official Languages Act* ("OLA").[133] Four complaints were upheld by the Commissioner and the appellants commenced an action in Federal Court claiming damages[134] against Air Canada. Air Canada defended the claims by relying on the limitations on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air* ("the Convention"). The Federal Court awarded

131. R.S.B.C. 1996, c. 244.

132. 2014 SCC 67.

133. R.S.C. 1985, c. 31 (4th Supp.).

134. They also sought a structural order requiring Air Canada to take steps to ensure future compliance with the *Official Languages Act*.

damages[135] but the Federal Court of Appeal set aside that ruling in part, holding that the Convention precluded the awarding of damages for events that took place on board Air Canada flights.[136] The appellants appealed to the Supreme Court of Canada.

The Supreme Court of Canada dismissed the appeal. The majority[137] noted the interplay between Canada's domestic commitment to official languages and its international commitment to an exclusive and uniform scheme of damages liability for international air carriers. Upon interpreting the OLA and the Convention, the majority held that there was no conflict between the remedial powers contained in the OLA and the exclusion of damages under the Convention.[138] The OLA provided that the court could grant "appropriate and just remedies". A remedy was not "appropriate and just" if awarding it would contravene Canada's international obligations under the Convention. Thus, damages were not an appropriate remedy in this case.[139]

The dissenting judges[140] held that the Convention did not bar a damage award for breach of language rights on an international flight.

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135. 2011 FC 876.

136. 2012 FCA 246.

137. The majority consisted of Chief Justice McLachlin and Justices LeBel, Rothstein, Cromwell and Karakatsanis.

138. Interestingly, the court did not discuss standards of review.

139. The court also held that the structural order should be set aside because it was too imprecise. In general, structural orders require sufficient clarity to give the parties bound by them fair guidance and to prevent potentially endless litigation and ongoing judicial supervision.

140. Justices Abella and Wagner.

2. *Waterman*

In *Waterman v. Waterman*,[141] which was discussed above under "Procedural Fairness", the Nova Scotia Court of Appeal reviewed the principles of statutory interpretation, particularly in the context of mandatory versus permissive language:

> 29 ... Words are not given meaning in a vacuum. The *Interpretation Act* sets out the general principles that guide courts in the interpretative process. It provides:
>
> > 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
> >
> > (a) the occasion and necessity for the enactment;
> > (b) the circumstances existing at the time it was passed;
> > (c) the mischief to be remedied;
> > (d) the object to be attained;
> > (e) the former law, including other enactments upon the same or similar subjects;
> > (f) the consequences of a particular interpretation; and
> > (g) the history of legislation on the subject.
>
> 30 There is symmetry and harmony between the common law principles of statutory interpretation and statutes such as the *Interpretation Act* (See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *Municipal Enterprises Ltd. v. Nova Scotia (Attorney General)*, 2003 NSCA 10.)
>
> 31 In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 the Supreme Court gave clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the Court, wrote:
>
> > [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

141. 2014 NSCA 110.

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

32 Iacobucci J., again writing for the Court, in *Bell Express-Vu*, elaborated:

> [26] ...Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev*. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

33 These same principles govern the question whether the use of the seemingly imperative "shall" was meant to be mandatory or merely directive. In *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, Iacubocci J., commented on this issue:

> [148] ...the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from

> *Reference re Manitoba Language Rights*, *supra*, the principle is "vague and expedient" (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result.

34 The Supreme Court, in the subsequent case of *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, affirmed the role that the object of the statute and the consequences play in the interpretative exercise. Gonthier J., for the majority, wrote:

> [42] This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175):
>
> > When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only . . . .
>
> Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed. This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.

E. Mootness

In *Alberta Teachers' Association v. Buffalo Trail Public Schools Regional Division No. 28*,[142] the Court of Appeal of Alberta struck an appeal brought by the Information and Privacy Commissioner on the grounds that the appeal was moot. A request for documents had been made in the course of a labour dispute. The parties had settled the labour dispute but the Information and Privacy Commissioner sought to appeal the decision of the chambers judge which allowed an application for judicial review with respect to a non-disclosure decision that had been made while the dispute was a live issue. The court held that the appeal was moot and it should not exercise its discretion to hear the appeal where the only party to the appeal was the Information and Privacy Commissioner.

F. Time limit for applying for judicial review

In *Raczynska v. Alberta (Human Rights Commission)*,[143] the Court of Queen's Bench of Alberta dealt with a procedural application to have a party added as a respondent and the time limit for bringing a judicial review application to be extended with respect to a judicial review application from a decision of the Human Rights Commission. Mr. Justice Graesser denied the application, holding that the authorities are clear that a respondent to a human rights complaint must be added as a party to any judicial review of a decision of the Commission and that the time for serving the respondent is a firm deadline that cannot be extended. He rejected the applicant's argument that the court should apply a lesser standard

142. 2014 ABCA 432.

143. 2015 ABQB 494.

of compliance with the *Rules of Court* because she was a self-represented litigant, stating that "[a]dherence to legislated process matters a great deal."[144]

G. Costs against statutory delegates

In *18320 Holdings Inc. (c.o.b. Automotive Training Centres) v. StudentAid BC*,[145] the British Columbia Court of Appeal discussed the scope of immunity from costs enjoyed by tribunals. The court confirmed that costs of a judicial review may be awarded against a tribunal if it exhibited misconduct or perversity in its proceedings, including breaching procedural fairness, or if it improperly defended the merits of its decision on judicial review. However, the court overturned the chambers judge's award of special costs against the tribunal where the tribunal had only made submissions and led evidence on the merits because no other respondent was available to do so.

On the other hand, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*,[146] the Nova Scotia Supreme Court awarded significant costs[147] against the Human Rights Commission whose full participation in the application for judicial review went beyond defending its jurisdiction.[148] Justice Moir held that the general immunity of decision-makers from costs only applies where the decision-maker limits its participation to

144. At para. 67.

145. 2014 BCCA 494.

146. 2015 NSSC 118 (Gerald R.P. Moir, J.). For some other cases where significant costs were awarded against a statutory tribunal, see: *Dalhousie University v. Aylward*, 2001 NSSC 51; *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 189; *Pink v. Davis*, 2011 NSSC 237; *St. Peters Estates Limited v. P.E.I. Land Use Commission*, [1991] P.E.I.J. No. 40 (McCuaid J).

147. $10,000 plus disbursements of $885.33.

148. Indeed, the grounds advanced by the Commission had nothing to do with jurisdiction: para. 36.

defending its jurisdiction, and not where there is a breach of the principles of procedural fairness, engagement in the merits of the application for judicial review, or some other inappropriate conduct.

H. Availability of judicial review

1. *Mourant v. Sackville (Town)*

In *Mourant*,[149] the town dismissed its chief administrative officer for cause. He commenced an action against the Town, seeking reinstatement with back pay and benefits. The New Brunswick Court of Appeal ruled that a decision cannot be challenged in a court action which seeks a remedy which is only available by judicial review.

2. *Tapics v. Dalhousie University*

In *Tapics*,[150] the Nova Scotia Court of Appeal struck out the majority of a civil action because it should have been brought as an application for judicial review. The case also discusses abuse of process by re-litigation.

149. 2014 NBCA 56 at para. 21.

150. 2015 NSCA 72 at para. 53.

VIII. CONCLUSION

There is a continual ebb and flow of administrative law cases, dealing with a wide assortment of issues. Administrative law is certainly continuing to evolve. It is always interesting to see how the courts deal with new issues and creative re-stating of old issues. There continues to be a lot of work for counsel!