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ADMINISTRATIVE LAW IN 2016: UPDATE ON CASELAW, RECENT TRENDS AND RELATED DEVELOPMENTS

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I. INTRODUCTION[1]

The most interesting administrative law decisions of the past year once again highlight the increasingly complex standards of review analysis and the disagreement amongst the judiciary about which standards apply and how to apply them. Other important decisions involve the law governing solicitor-client privilege and the *Charter*, and areas such as procedural fairness and standing continue to raise interesting questions. In addition, the *Trinity Western* line of cases, as well as the recent Ontario Court of Appeal decision in *Groia*, address fundamental issues relating to the provision of legal education and the regulation of the legal profession in Canada.

II. STANDARDS OF REVIEW

Eight years ago, the Supreme Court of Canada attempted to simplify standards of review in *Dunsmuir*. However, it is readily apparent that standards of review analysis continues to be a live and vexing problem. 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

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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.

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"? Are the courts actually applying correctness masquerading as reasonableness? The wide variety of approaches suggests that there is no bright-line test for either predicting or determining the applicable standard of review, or how that applicable standard should be applied.

This part of the paper will examine three recent Supreme Court of Canada decisions which demonstrate this phenomenon—*Commission scolaire de Laval, Kanthasamy,* and *Wilson*, as well as a few other cases from the lower courts.[2] The sentiment that *Dunsmuir* hasn't magically solved all of the issues about standards of review is clearly shared by superior court judges from coast to coast: for example, in British Columbia Mr. Justice Macintosh commented that "[p]erhaps more has been written in the last 20 years or so about the standard of review than about any other topic in Canadian administrative law";[3] in Newfoundland and Labrador, Mr. Justice Orsborn noted that "...although the standard may be easily stated,

2. For other examples, see: the *Trinity Western University* decisions at the various court levels in three provinces: Nova Scotia, 2015 NSSC 25 and 2016 NSCA 59; Ontario, 2015 ONSC 4250 and 2016 ONCA 518; British Columbia, 2015 BCSC 2326 (the BC CA has heard but not yet issued its decision); *Groia v. Law Society of Upper Canada*, 2015 ONSC 686, 2016 ONCA 471; *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at para. 71; and the dissenting reasons of Abella J. in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 and *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.

3. *Unifor Local 2301 v. Rio Tinto Alcan (Kitimat Works)*, 2016 BCSC 455 at para. 6.

applying it to any particular decision can be a perplexing exercise";[4] and in Alberta Mr. Justice Slatter started a decision with the following words:[5]

> 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.

And Justice Abella, in a recent *obiter dictum*, has speculated about how standards of review might be further reformed and simplified.

A. *Commission scolaire de Laval*

In *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*,[6] the Supreme Court of Canada was dealing with an appeal from an interlocutory decision made by an arbitrator in the course of a grievance of a teacher's dismissal. The teacher had been summoned to attend a special meeting of the executive committee of the Commission on disciplinary matters. The issue was whether the teacher's judicial record was relevant to his functions as a teacher, and if it was, whether his employment should be terminated.

The executive committee first held a partially *in camera* meeting from which the public was excluded. The committee then ordered a totally *in camera* meeting to deliberate from which the teacher and his union representative were excluded. The committee then held a public meeting in which it adopted a resolution to terminate the teacher's contract of employment.

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4. *Muskrat Falls Employers' Association Inc. v. Resource Development Trades Council of Newfoundland and Labrador*, 2015 NLTD(G) 150 at para. 16.

5. *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.

6. 2016 SCC 8.

The *Syndicat de l'enseignement de la région de Laval* (the "Union") filed a grievance alleging that proper procedure had not been followed in the teacher's dismissal. The collective agreement provided that the employment relationship could be terminated "only after thorough deliberations at a meeting of the board's council of commissioners or executive committee called for that purpose". During the inquiry into the grievance, the Union called as witnesses three members of the executive committee who had been present for the *in camera* deliberations. The Commission objected to having its committee members testify, arguing that the motives of the individual committee members were irrelevant and that the principle of deliberative secrecy protected the committee members from being witnesses. The Commission also relied on the principle that motives are "unknowable" as set out in the case of *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*.[7] The Commission argued that the Union was precluded from examining the committee members individually on the motives that underlaid the decision of a collective body made by way of a written resolution. The arbitrator dismissed the Commission's objections and allowed the examination of the committee members.

The Superior Court

The Commission applied for judicial review of the arbitrator's decision. The Quebec Superior Court applied the standard of review of correctness and allowed the judicial review.[8] Delorme J. barred any testimony of the individual committee members except as regards the formal process that led to their decision that was announced at the public meeting.

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7. [1998] 3 S.C.R. 3.

8. 2012 QCCS 248.

The Court of Appeal

The Union appealed the Superior Court's decision. The majority of the Quebec Court of Appeal also applied the standard of correctness but allowed the appeal and restored the arbitrator's decision.[9] The majority held that the committee members could be examined subject to the usual limits of what is relevant.

Supreme Court of Canada

The Commission appealed to the Supreme Court of Canada. With respect to the outcome, a unanimous court dismissed the Commission's appeal and upheld the arbitrator's decision to allow examination of the committee members.[10] However, not surprisingly, the court was not unanimous on what standard of review applied.

Decision of majority

Unlike the Superior Court and the majority in the Court of Appeal, the majority of the Supreme Court of Canada applied a reasonableness standard of review to the arbitrator's decision.[11] Gascon J., writing for the majority, held that the examination of the members of the Commission's executive committee was an evidentiary issue and, as such, the arbitrator had exclusive jurisdiction over the matter under sections 100.2 and 100.12 of the *Labour*

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9. 2014 QCCA 591.

10. The reasons for judgment were given by Gascon J. with McLachlin C.J., Abella J. and Karakatsanis J. concurring. Partially concurring reasons were given by Côté J. with Wagner and Brown JJ. concurring. The only issue on which the justices disagreed was standard of review.

11. Justices Côté, Wagner and Brown concurred in the result but held that a correctness standard of review was applicable.

Code.[12] The arbitrator also had exclusive jurisdiction to interpret the terms of the collective agreement pursuant to sections 1(f) and 100 of the *Labour Code*.

Gascon J. was satisfied that the arbitrator had allowed the examination of the committee members on the basis that their testimony would be "helpful"[13] in determining whether the terms of the collective agreement and of Quebec's *Education Act*[14] governing evidence and procedure had been complied with in the course of the disciplinary proceedings. The arbitrator's decision flowed from his interpretation of the collective agreement and the *Education Act*. Section 100.12(a) of the arbitrator's home statue, the *Labour Code*, provides that an arbitrator may "interpret and apply an Act or regulation to the extent necessary to settle a grievance" and courts have held that a reviewing court owes the greatest possible deference to an interpretation of provisions of the *Education Act* by a grievance arbitrator in an educational setting. Thus, the presumption that when an administrative tribunal interprets or applies its home statute, the standard of review is reasonableness was applicable. This was reinforced by the fact that the usual standard of review of decisions of grievance arbitrators is reasonableness.[15]

Gascon J. went on to hold that the issues in this case, including those involving the principle of "unknowable" motives and deliberative secrecy, were not the type included in the narrow class of issues for which the correctness standard was applicable, such as questions of law

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12. CQLR, c. C-27.

13. In virtually every case, inadmissible evidence would be "helpful" to determining the outcome. Surely the helpfulness of the evidence cannot determine (or even be relevant to determining) the applicable standard of review.

14. CQLR, c. I-13.3.

15. At paras. 30 to 33.

that are of central importance to the legal system as a whole and are outside the decision maker's area of expertise:

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

> deliberations are based on the question whether that testimony would be relevant. With this in mind, applying the standard of correctness cannot be justified.
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> [Emphasis added.]

In reaching this conclusion, Justice Gascon noted that the Commission's decision was not of a legislative, regulatory, policy or discretionary nature decision. Rather, it was made in the specific context of a contractual relationship. Accordingly, the rationale underlying *Clearwater* did not apply.

With respect to deliberative secrecy, Justice Gascon ruled as follows:

> 37 On the other hand, as regards deliberative secrecy, its scope is well known. The appellants are not asking that this scope be expanded. Bich J.A. agreed on this point when she wrote that the appellants [TRANSLATION] "... are employing a concept here that does not apply in the circumstances" (para. 123). As a result, all the arbitrator had to do in this regard was to apply a known rule in order to decide whether deliberative secrecy shielded the executive committee's deliberations in the context of B's dismissal. In light of the arbitrator's broad jurisdiction over evidence and procedure, this does not amount to a question of law of central importance that is outside his area of expertise.
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> [Emphasis added.]

Decision of minority

The minority judgment, written by Justice Côté, held that correctness was the appropriate standard of review. The questions raised (immunity from disclosure and deliberative secrecy) were general questions of law that affect the administration of justice as a whole, involved the scope of the evidentiary rules and not just their application, and did not involve issues with respect to which the arbitrator had any particular expertise. In these circumstances, the reviewing court must be able to go beyond merely inquiring into the reasonableness of the arbitrator's decision, and must be able to substitute its own view of the

law if the arbitrator's decision is incorrect. Further, it is the importance of the legal issue that determines the applicable standard of review, not how the court might ultimately answer that legal question. Nor does the existence of a privative clause (a) determine the applicable standard of review, or (b) preclude intervention by the court on every question over which an arbitrator has jurisdiction.[16]

Côté J. cautioned against taking too narrow a view of what constitutes a general question of law that attracts a correctness standard:

> 77 My colleague Gascon J. writes that "[w]hether the examination of the members of the Board's executive committee should be allowed is ultimately an evidentiary issue" and that "a desire, like that of the appellants, to attribute an excessive scope to this Court's decisions in [*Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3] and [*Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952] does not transform this determination into a question of law that is of central importance to the legal system and is outside the arbitrator's area of expertise, such that the standard of correctness

16. Prior to *Dunsmuir*, the presence or absence of a privative clause was one of the four *Pushpanathan* factors that determined the applicable standard of review. The presence of a privative clause indicated a legislative intent for the court to show deference, but the absence of a privative clause did not automatically mean that deference was not applicable. There were many examples where the statutory delegate had jurisdiction with respect to a particular matter, but the courts nevertheless did not defer to the delegate's decision on every issue. In such a case, if there were a privative clause, it would be necessary to characterize the statutory delegate's error as "losing jurisdiction", or "making a jurisdictional error", which the privative clause did not protect from the court's intervention. More recently, the concept of "jurisdiction" has generally been narrowed to refer only to the delegate's jurisdiction to commence or deal with a matter. However, this leaves unexplained how the court itself obtains jurisdiction (or authority) to grant judicial review in the face of a privative clause where the delegate has made an error of law (even one which is central to the legal system as a whole, outside the specialized expertise of the delegate—to which the correctness standard of review applies). It also leaves unexplained the conceptual basis for the courts' intervening where reasonableness is the applicable standard of review, and the court has determined that the impugned decision is unreasonable. And it does not explain the conceptual basis for the courts' intervening where there has been a breach of natural justice or procedural fairness.

    The converse issue arises where the legislation contains a right of appeal. Although not determinative, might such a right be relevant in determining that the applicable standard of review might be correctness? See the discussion in Part H below on *Edmonton East (Capilano) Shopping Centres*.

should apply" (para. 30). It is true that the arbitrator has jurisdiction over evidentiary issues and that deference is usually owed in this regard. There are times, however, when a question concerning an area over which the arbitrator generally has full authority is of such a nature as to affect the administration of justice as a whole and relates to principles in respect of which the arbitrator has no particular expertise in that they are not specific to the arbitrator's specialized role. According to the principles stated by the Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and 60, and as the Court of Appeal noted at para. 33 of its reasons in the case at bar, [TRANSLATION] "the standard of correctness will apply to decisions of arbitrators (as to those of any administrative tribunal) in which they rule on general questions of law that are, first, of central importance to the legal system and, second, outside their specialized area of expertise in the sense of not being specific to their specialized role" (2014 QCCA 591, 69 Admin. L.R. (5th) 95 (emphasis added)).

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

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

in the case at bar is, first and foremost, a principle that motives are "unknowable" that applies to every collective decision-making body that makes a decision in writing.

80 This being said, it must be acknowledged that the application of the principles stated by this Court, at least those from *Clearwater*, does not lead to a clear result in the instant case, as can be seen from the conclusions reached by the Superior Court judge and the dissenting judge of the Court of Appeal on the merits of the case. In short, although I agree that the appellants are trying to attribute an excessive scope to *Clearwater* and *Tremblay*, their arguments are not entirely unfounded. As I mentioned above, when all is said and done, what is important is the nature of the question being raised, not how a court will answer it.

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

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

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

84 It is true that the existence of a privative clause indicates that the legislature intended to limit the review of an arbitrator's decision to a minimum. Deference to the legislature's

> intention is important in employment law matters. Nevertheless, the existence of a privative clause is not in itself determinative (*Dunsmuir*, at para. 52), nor can it preclude intervention by a court on every question over which an arbitrator has jurisdiction or that relates to the arbitrator's general jurisdiction as a decision maker (as opposed to his or her particular expertise). Section 139 of the *Labour Code*, CQLR, c. C-27, cannot preclude a court from intervening in respect of [TRANSLATION] "issues of a general nature that might be raised in the same terms before any arbitrator and any administrative tribunal, but also in any court of law, **and that cannot be resolved differently from one forum to the next**" (per Bich J.A., at para. 39 (emphasis added [by Justice Côté])).
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> 85 In short, despite the existence of a privative clause and even though the appeal arises in the context of the hearing of the evidence, over which the arbitrator has full authority, the specific questions that are raised in this case are general questions of law that, by their nature, are of central importance to the administration of justice as a whole and in respect of which the arbitrator has no particular expertise or expertise that is unique to his or her specialized role. As Bastarache and LeBel JJ. wrote, for the majority, in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60).
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> [Underlined emphasis added; bold emphasis in the original.]

Justice Gascon's reasons for disagreeing with the minority's analysis

Gascon J. disagreed with the reasoning and conclusions of the minority on the issue of standard of review:

> 38 Although my colleague Côté J. does not call the reasonableness of the arbitrator's decision into question, she finds that the standard of correctness should apply to it instead. On this point, her concurring reasons stray, in my humble opinion, from the Court's decisions in *Nor-Man*, *Alberta Teachers* and *Dunsmuir*, among others. The questions of evidence and procedure that arise here with respect to the principle that motives are "unknowable" and to deliberative secrecy in the context of an employer's collective decision-making authority are not outside the arbitrator's area of expertise. Nor does the application of that principle and of deliberative secrecy to a fact situation characteristic of a dismissal amount to a question that is detrimental to consistency in the country's fundamental legal order. Once this is established, maintaining that the concepts at issue do not fall solely within the arbitrator's expertise in the area or jurisdiction over the matter (paras. 82 and 84 of my colleague's reasons), or that one of them is a general principle of law that applies to other legal fields (para. 82 of her reasons), is not in my opinion enough to justify dispensing with the deferential standard that is required in such a case: *Nor-Man*,

> at para. 55, citing the majority in *Smith*, at para. 26, and *Dunsmuir*, at para. 60; *Mowat*, at para. 23.
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> 39 In the instant case, in light of the information available to him at the time of the summonses, and of the content of the collective agreement and the applicable legislation, the arbitrator allowed the examination of the members of the Board's executive committee in the grievance proceeding before him. It is this decision that is at issue in the judicial review proceedings, and it was reasonable. The reasons for the arbitrator's decision are transparent and intelligible, and the justification given for it is sufficient; it falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para. 47). Neither the argument that the motives were "unknowable" nor that of deliberative secrecy, on which the appellants rely, counters this conclusion. At this point, all the arbitrator has done is to allow the examination of the members of the executive committee to begin. He has not yet ruled on the relevance of specific questions, as none had been asked yet when the Board objected to the witnesses being called.
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> [Emphasis added.]

Questions

The dissonance between the majority's and the minority's analyses raises the following questions:

- Is the reasonableness of a decision by itself sufficient for it to withstand judicial review, even if the decision is incorrect in law (and even if the legal concept is central to the legal system as a whole, and even if it applies in other areas of law)?

- At what point in time is the reasonableness of a decision determined—*before* the court determines the applicable standard of review, or only *after* the applicable standard of review has been determined?[17]

- Although the majority and the minority disagreed on the applicable standard of review, they both agreed that the appeal should be dismissed. Does this lend credence to some judges' approach: so long as the outcome would be the same regardless of the standard of review, why spend any time on determining the applicable standard of review? Alternatively, if the decision is correct in any event, how could it ever be unreasonable?

- Do all questions of *evidence* always attract the reasonableness standard of review? Consider, for example, what would be the applicable standard of review to questions of solicitor-client or other legal privilege (either the scope of those privileges, or whether they apply to particular communications)?

- What is the current status of deliberative secrecy in legislative or adjudicative contexts? Or of immunity from examination of members of multi-member statutory delegates?

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17. The suggestion that the reasonableness of the impugned decision itself is relevant to determining the applicable standard of review is reminiscent (in reverse) of Justice Sopinka's statement in *Syndicat* that he first determined whether he agreed with the impugned decision (which would equate to the correctness standard of review); and only if he did not agree with the impugned decision did he need to determine whether there was any basis for deferring to the decision (which would equate to the reasonableness standard of review).

- What today is the role (if any) of a privative clause in determining the applicable standard of review? Or the existence of a statutory right of appeal?[18]

B. *Kanthasamy*

Kanthasamy v. Canada (Citizenship and Immigration)[19] raises three important issues about standards of review: (a) what effect (if any) does the requirement for leave to appeal have on the determination of the applicable standard of review; (b) how does one determine whether guidelines about how to exercise a statutory discretion are consistent with the legislation; and (c) applying the reasonableness standard of review, was the decision reasonable?

Background

The case involved an application by a 17-year-old Tamil from Northern Sri Lanka for humanitarian and compassionate relief under section 25(1) of the *Immigration and Refugee Protection Act* (the "Act") from the normal requirement that applications for permanent visas must be made from outside Canada.[20] The Reviewing Officer dismissed the application on the ground that the applicant's return to Sri Lanka would not result in "unusual and

18. *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*, SCC File No. 36403, on appeal from 2015 ABCA.

19. 2015 SCC 61.

20. S.C. 2001, c. 27. Section 25(1) gives the Minister broad discretion to "... grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected".

undeserved or disproportionate hardship". In making her decision, the Reviewing Officer relied on Ministerial Guidelines which were intended to assist Immigration Officers in determining whether there were humanitarian and compassionate considerations which warranted relief under section 25. In particular, the Guidelines contemplated that an applicant must demonstrate "unusual and undeserved" or "disproportionate" hardship for the applicant.

The Federal Court

The Federal Court applied the reasonableness standard in reviewing the Reviewing Officer's decision and dismissed the application for judicial review.[21]

Under the Act, no appeal is available from the Federal Court's decision on such an application for judicial review unless the Federal Court Judge certifies a question. Justice Kane certified the following question for the Federal Court of Appeal: "What is the nature of risk, if any, to be assessed with respect to humanitarian and compassionate considerations under section 25 of *IRPA* as amended by the *Balanced Refugee Reform Act*?"[22]

21. 2013 FC 802.

22. This question raised the interpretation of section 25(1.3), which prevented an applicant under section 25(1) from relying on grounds which had been rejected in an unsuccessful refugee application. Section 25(1.3) had been recently enacted and not yet interpreted by the Federal Court of Appeal.

The Federal Court of Appeal

The Federal Court of Appeal dismissed the appeal.[23] Justice Stratas, writing for the unanimous court, dealt with standard of review as follows:

> **(3) What is the appropriate standard of review?**
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> [30] In the past year, the Supreme Court in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) considered the standard of review of a visa officer's decision under the Act. This is analogous to the case at bar: there is no ground to distinguish what the Supreme Court said in *Agraira*. However, *Agraira* appears to depart inexplicably from earlier Supreme Court of Canada jurisprudence in one respect.
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> [31] A decision made under the Act is subject to judicial review only if leave is granted by the Federal Court (subsection 72(1) of the Act). The Federal Court's decision on the judicial review cannot be appealed unless the Federal Court certifies a serious question of general importance (paragraph 74(*d*) of the Act). This case, like *Agraira* has proceeded to this Court on the basis of a certified question from the Federal Court. In this case, as in *Agraira*, the certified question asks a question that requires an interpretation of a provision of the Act.
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> [32] This Court has consistently taken the view that where a certified question asks a question of statutory interpretation, this Court must provide the definitive interpretation without deferring to the administrative decision-maker. Then, this Court must assess whether there are grounds to set aside the outcome reached by the administrative decision-maker on the facts and the law. In a subsection 25(1) matter, that part of the decision – one involving fact-finding and factually-based exercises of discretion – is reviewed on the deferential standard of reasonableness.
>
> [33] Until *Agraira*, the Supreme Court approached immigration matters in the same way. The Supreme Court assessed whether this Court correctly answered the stated question on statutory interpretation. See e.g., *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 (CanLII), [2005] 2 S.C.R. 706. Then it proceeded to assess, on the basis of the deferential reasonableness standard, whether there were grounds to set aside the outcome reached. On that part of the review, the Supreme Court has emphasized the need for "considerable deference [to] be accorded to immigration officers exercising the powers conferred by the legislation," given "the fact-specific nature of the inquiry, [subsection 25(1)'s] role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language": *Baker v. Canada (Minister*

23. 2014 FCA 113 (Stratas, Blais and Sharlow, JJ.A.).

of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paragraph 62.

[34] In *Agraira*, the Supreme Court conducted reasonableness review on the administrative decision-maker's decision on the statutory interpretation issue, ignoring the fact that the case proceeded in this Court in response to a certified question from the Federal Court. It did not vet this Court's answer to the stated question.

[35] There is nothing in the Supreme Court's reasons in *Agraira* to explain this apparent change in approach. For that reason, until some clarification from the Supreme Court is received, it is my view that this Court should continue to follow its practice of providing the definitive answer to a certified question on a point of statutory interpretation. In reaching that conclusion, I note that the Supreme Court in *Agraira* did not say or suggest that this Court's practice was wrong.

[36] In this Court, providing the definitive answer to a certified question on a point of statutory interpretation is the functional equivalent of engaging in correctness review. But this is merely an artefact of having a certified question put to us. It is not a comment on the standard of review of Ministers' interpretations of statutory provisions generally.

[37] As for issues other than statutory interpretation, the Federal Court adopted reasonableness review on the outcome reached by the Officer on the record of evidence before her. In light of the comments made in *Agraira* on the standard of review for that sort of matter, I conclude that the Federal Court properly selected the standard of review.

Justice Stratas then went on to hold that the guidelines were consistent with the requirements of section 25(1), but noted that they were only guidelines—not rules—and could not (and did not) fetter the Reviewing Officer's discretion:

[50] Before leaving the interpretation of subsection 25(1) of the Act, it is necessary to say a few words about the meaning of "unusual and undeserved, or disproportionate hardship". In my view, the decided cases show that the factors set out in section 5.11 of the processing manual, above, are a reasonable enumeration of the types of matters that an Officer must consider when assessing an application for humanitarian and compassionate relief under subsection 25(1) of the Act. They encompass the sorts of consequences that, depending on the particular facts of particular cases, might meet the high standard of hardship associated with leaving Canada, associated with arriving and staying in the foreign country, or both.

[51] That being said, I wish to caution against Officers applying the processing manual and, in particular, the factors listed in section 5.11 of the processing manual as if they describe a closed list of circumstances.

> [52] The processing manual is an administrative guideline, nothing more. Administrative guidelines are desirable when dealing with a provision such as this, as they promote consistency in decision-making: *Hawthorne*, *supra*; *Eng v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 596 (CanLII). This manual goes some way toward shedding light on the meaning of "unusual and undeserved, or disproportionate hardship". Indeed, the Federal Court regularly upholds Officers' determinations that are based on a sensitive consideration of these factors that are live on the facts before them.
>
> [53] However, the processing manual is not law: administrative policy statements are only a source of guidance and in no way amend the provisions of the Act or the Regulations (see *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2). It would be reviewable error for an Officer to see the processing manual as presenting a closed list of factors to consider and, in that way, to regard the processing manual, and not subsection 25(1), as the law. That would constitute an impermissible fettering of discretion: see, *e.g.*, *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 (CanLII). Such an approach might leave presently unforeseeable but deserving situations out in the cold.
>
> [54] I adopt the following caution sounded in this very context by my colleague, Dawson J. (as she then was) in *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956 (CanLII) at paragraph 4:
>
> > It is well settled law that policy guidelines are appropriate so long as they do not fetter the discretion of an individual officer. This is because the exercise of discretion implies the absence of a rule dictating the result in each case. Each case must be looked at individually, on its own merits. Guidelines are not to be regarded as being exhaustive or definitive. Guidelines are to be no more than a statement of general policy or a rough rule of thumb [citation omitted].
>
> [55] Officers must always scrutinize the particular facts before them and consider whether the applicant is personally and directly suffering unusual and undeserved, or disproportionate hardship, regardless of whether the type of hardship is specifically mentioned in the processing manual.

On the question of whether the guidelines were consistent with section 25(1), Justice Stratas rejected Mr. Kanthasamy's broader interpretation of section 25(1):

> [56] Mr. Kanthasamy submitted that the test under subsection 25(1) is broader than that set out above [and reflected in the guidelines]. He submitted that this Court should follow two authorities that adopted such an approach: *Yhap v. Canada (Minister of Employment and Immigration)*, [1990] 1 F.C. 722 (T.D.) and *Chirwa v. Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 338 (I.A.B.).

[57] I do not agree that the Federal Court in *Yhap*, read in whole, adopted a test different from that applied by the Federal Court in other cases. In *Yhap*, the Court held the scope of discretion was "wide", which undoubtedly it is (at page 739). It considered the processing manual to provide useful assistance to officers in the exercise of their discretion. It warned that the officers must not take the text of the processing manual and "consider it a limitation on the category of humanitarian and compassionate factors" (at page 741). It warned that the officers must direct their minds to the "humanitarian and compassionate circumstances" and "not to a set of criteria which constitute inflexible limitations on the discretion conferred by the Act." In the end, it applied the unusual and undeserved, or disproportionate hardship test.

[58] I do acknowledge that in *Yhap*, in isolated words not subsequently adopted, the Federal Court suggested that broader reasons of public policy might come to bear. And in *Chirwa*, the Board suggested that compassionate considerations are "those facts established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another - so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*". In my view, however, these isolated words do not correctly express the test under subsection 25(1) of the Act.

[59] The Federal Court has repeatedly rejected such a broad interpretation of subsection 25(1): *Reis v. Canada (Citizenship and Immigration)*, 2012 FC 179 (CanLII); *Jung v Canada (Minister of Citizenship and Immigration)*, 2009 FC 678 (CanLII) and *Aoanan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 734 (CanLII).

[60] I agree with these more recent decisions of the Federal Court. The isolated words in *Yhap* and *Chirwa* take subsection 25(1) beyond permitting relief in situations of very significant hardship (as described above) to situations where one's subjective view of the equities is aroused. That goes beyond the role of subsection 25(1) within the scheme of the Act. It would take even broader words, such as "equitable and just", to import such an expansive standard into subsection 25(1) of the Act.

[61] For completeness, I would add that a finding that an applicant has established humanitarian and compassionate grounds under subsection 25(1) of the Act does not automatically mean that the applicant is entitled to relief. The Minister can refuse to allow the exception when he is of the view that public interest reasons shaped by "the general context of Canadian laws and policies on immigration", especially those set out in section 3 of the Act, supersede humanitarian and compassionate reasons. See *Legault*, *supra* at paragraphs 17-18; *Pannu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1356 (CanLII) at paragraph 29.

Finally, Justice Stratas considered the Reviewing Officer's decision, held that the Reviewing Officer had not treated the items in the guidelines as a closed list but had weighed all the evidence, and held that the Reviewing Officer's decision was reasonable.

The Supreme Court of Canada

In a 5 to 2 split decision, the majority of the Supreme Court of Canada allowed Mr. Kanthasamy's appeal.

With respect to the first issue, Justice Abella, writing for majority,[24] held that the fact that the Federal Court had certified a question did not determine that correctness was the applicable standard of review in answering that question:

> 42 In considering the standard of review, this Court "step[s] into the shoes" of the reviewing court: *Agraira*, at para. 46. This means that the question for this Court is whether the reviewing court identified the appropriate standard of review and applied it properly: *Agraira*, at para. 45.
>
> 43 In this case, the Federal Court applied a reasonableness standard. The Federal Court of Appeal, however, concluded that the appropriate standard of review was correctness because there was a certified question. It suggested that this Court's approach in *Agraira*, where the standard of review was reasonableness despite the presence of a certified question, was at odds with the prior case law. I respectfully disagree.
>
> 44 The Federal Court of Appeal refers to one case from this Court to support this point: *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706. This case is not particularly helpful. It was decided before *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, there was no discussion of the impact of a certified question on the issue of standard of review, and the parties asked that correctness be applied: para. 71. In any event, the case law from this Court confirms that certified questions are not decisive of the standard of review: *Baker*, at para. 58; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at para. 23. As the Court said in *Baker*, at para. 12, the certification of a question of general importance may be the "trigger" by which an appeal

24. Chief Justice McLachlin and Justices Cromwell, Karakatsanis and Gascon concurred.

> is permitted. The subject of the appeal is still the judgment itself, not merely the certified question. The fact that the reviewing judge in this case considered the question to be of general importance is relevant, but not determinative. Despite the presence of a certified question, the appropriate standard of review is reasonableness: *Baker*, at para. 62.
>
> [Emphasis added.]

By contrast, Justice Moldaver J., writing for the minority,[25] did not find it necessary to decide whether the standard of review applicable to the Reviewing Officer's *interpretation* of section 25(1) was correctness or reasonableness. If she had applied the test set out in his reasons for the exercise of ministerial discretion under section 25(1)—that is, his interpretation of section 25(1)—the Reviewing Officer would inevitably have come to the same result.[26]

With respect to the second issue, all of the judges acknowledged that the guidelines were not legally binding, were not mandatory, and could not fetter the discretion contained in section 25(1). Neither judgment specifically finds that the guidelines are *ultra vires*. In effect, however, both judgments implicitly found the ministerial guidelines—or at least the Reviewing Officer's interpretation and application of them—not to be consistent with their respective (but different) interpretations of section 25(1).[27]

With respect to the third issue, the majority held that the Reviewing Officer's decision was unreasonable in light of the majority's interpretation of section 25(1). Justice Abella starts her analysis as follows:

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25. Justice Wagner concurred.

26. Paragraph 87.

27. Justice Abella discusses the purpose and interpretation of section 25(1) at paragraphs 9 through 41. Justice Moldaver discusses the role, interpretation and application of section 25(1) at paragraphs 88 through 109, and 144.

> [45] Applying that standard, in my respectful view, the Officer failed to consider Jeyakannan Kanthasamy's circumstances as a whole, and took an unduly narrow approach to the assessment of the circumstances raised in the application. She failed to give sufficiently serious consideration to his youth, his mental health and the evidence that he would suffer discrimination if he were returned to Sri Lanka. Instead, she took a segmented approach, assessed each factor to see whether it represented hardship that was "unusual and undeserved or disproportionate", then appeared to discount each from her final conclusion because it failed to satisfy that threshold. Her literal obedience to those adjectives, which do not appear anywhere in s. 25(1), rather than looking at his circumstances as a whole, led her to see each of them as a distinct legal test, rather than as words designed to help reify the equitable purpose of the provision. This had the effect of improperly restricting her discretion and rendering her decision unreasonable.
>
> [Emphasis added.]

Justice Abella went on to dissect and criticize numerous aspects of the Reviewing Officer's decision in detail.[28] She then concluded:

> [60] Finding that no single factor amounted to hardship that was "unusual and undeserved or disproportionate", the Officer ultimately concluded that humanitarian and compassionate relief was not warranted. But these three adjectives are merely descriptive, not separate legal thresholds to be strictly construed. Finally, the Officer not only unreasonably discounted both the psychological report and the clear and uncontradicted evidence of a risk of discrimination, she avoided the requisite analysis of whether, in light of the humanitarian purpose of s. 25(1) of the *Immigration and Refugee Protection Act*, the evidence *as a whole* justified relief. This approach unduly fettered her discretion and, in my respectful view, led to its unreasonable exercise.
>
> [Emphasis added.]

Justice Moldaver strongly disagreed with Justice Abella's approach:

> D. The Reasonableness of the Officer's Decision
>
> [110] Mr. Kanthasamy submits, and my colleague agrees, that the Officer did not exercise her discretion reasonably in denying his H&C application. According to my colleague, the Officer erred in her overall approach by considering the relevant factors on a piecemeal

28. Paragraphs 46 through 59.

> basis and by treating the hardship test, identified in the Guidelines, as an all-inclusive "distinct legal test", thereby fettering her discretion (para. 45). Additionally, she takes issue with certain aspects of the Officer's reasons, maintaining that the Officer failed to properly assess several points raised by Mr. Kanthasamy.
>
> [111] With respect, I cannot agree. In my view, the Officer's decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, and was therefore reasonable. Decision making under s. 25(1) is highly discretionary and is entitled to deference. Care must be taken not to overly dissect or parse an officer's reasons. Rather, reasonableness review entails respectful attention to the reasons offered or which could be offered in support of a decision (*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 48; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708, at paras. 11-12).
>
> [112] In particular, I am concerned that my colleague has not given the Officer's reasons the deference which, time and again, this Court has said they deserve. In her reasons, she parses the Officer's decision for legal errors, resolves ambiguities against the Officer, and reweighs the evidence. Lest we be accused of adopting a "do as we say, not what we do" approach to reasonableness review, this approach fails to heed the admonition in *Newfoundland and Labrador Nurses*—that reviewing courts must be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fatal (para. 17). As is the case with every other court, this Court has no licence to find an officer's decision unreasonable simply because it considers the result unpalatable and would itself have come to a different result.

Justice Moldaver considered that the Reviewing Officer considered the evidence as a whole and did not fetter her discretion:

> [113] As I have stated, to obtain H&C relief, an applicant bears the onus of demonstrating, having regard to all of the circumstances, that decent, fair-minded Canadians aware of the exceptional nature of H&C relief would find it simply unacceptable to deny the relief sought. In evaluating the application, the decision maker must not segment the evidence and require that each piece either rise above this threshold or be discounted entirely. Rather, the decision maker must fairly consider the totality of the circumstances and base the disposition on the evidence as a whole. Likewise, the decision maker must not fetter his or her discretion by applying the Guidelines—the "unusual and undeserved or disproportionate hardship" framework—as a strict legal test to the exclusion of all other factors. In my view, the Officer's decision does not fall down on either basis.
>
> [114] It is true that the Officer's reasons address each of Mr. Kanthasamy's submissions separately, and discuss the level of hardship associated with each factor. This is not an example of improper segmentation, however, but rather an uncontroversial method of legal

analysis. In fact, had the Officer *failed* to discuss each factor individually, and instead simply listed the facts and stated her conclusion on the evidence as a whole, this appeal might well have been before us on the basis of insufficient reasons.

[115] The issue, therefore, is not whether the Officer analyzed the factors individually, but whether in doing so she failed to step back and consider the evidence as a whole. I find no such error in the Officer's reasons. She stated that she "reviewed and considered the grounds" raised by Mr. Kanthasamy, and "considered all information and evidence regarding this application in its entirety". In the July addendum, she listed seven additional pieces of evidence received from Mr. Kanthasamy, and stated that she "reviewed all of the evidence mentioned [therein] in conjunction with the evidence [she] previously reviewed". It is apparent that the Officer gave careful consideration to the full record in reaching her determination.

[116] Moreover, the Officer's use of the "unusual and undeserved or disproportionate hardship" standard to guide her analysis was entirely appropriate. As I have stated above, while the Guidelines do not establish the applicable test, the hardship analysis is neither irrelevant nor inappropriate. The degree of hardship demonstrated by the applicant is highly probative. In many cases, a hardship analysis may be dispositive. The decision maker must simply avoid applying the standard from the Guidelines in a way that fetters his or her discretion or causes relevant evidence to be improperly discounted.

[117] In my view, the Officer gave full and fair consideration to each of the factors supporting Mr. Kanthasamy's application....

. . .

[121] Taken as a whole, the Officer's decision denying Mr. Kanthasamy's H&C application is transparent. She provided intelligible reasons for concluding that he did not meet his onus of establishing, on balance, that he should be permitted to apply for permanent residency from within Canada for H&C reasons. She did not use the hardship framework in a way that fettered her discretion or caused her to discount relevant evidence. Her conclusions are reasonable, and well-supported by the record before her.

[122] At bottom, it was open to the Officer to find that the record did not justify relief under s. 25(1). While aspects of Mr. Kanthasamy's situation warrant sympathy, sympathetic circumstances alone do not meet the threshold required to obtain relief. I find no error in the Officer's approach requiring this Court's intervention.

Questions

- Many statutes require leave to bring an appeal to the court from the decision of an administrative tribunal. Often such appeals are restricted to questions of law (or "law or jurisdiction"). An Alberta example is the requirement for leave to appeal a decision of a municipal subdivision and development appeal board to the Court of Appeal. The mere fact that leave has been granted does not—in and of itself—determine the standard of review which the court would then apply in determining the appeal. This is similar to the certification requirement in immigration matters for there to be an appeal from the Federal Court to the Federal Court of Appeal.

- Although both the majority and the minority characterize their decisions as relating to the *reasonableness* of the Reviewing Officer's decision, they make that appraisal by reference to their respective (and different) proper interpretations of section 25(1) of the Act. On the one hand, isn't this just correctness masquerading as reasonableness? In reality, isn't this applying a correctness standard of review to the interpretation of that statutory provision—which is exactly what Justice Stratas did in the Federal Court of Appeal?

- This phenomenon seems to particularly occur where the issue in question engages a matter of statutory interpretation, and the principles of statutory interpretation yield only one "correct" interpretation.[29]

- This phenomenon should not occur where the decision being reviewed is discretionary in nature, which should engage the reasonableness standard of review—unless the nature, scope or ambit of the discretion is an issue (as in the present case, and was also the issue in *Agraira*).[30]

C. *Wilson*

The issue in *Wilson v. Atomic Energy of Canada Ltd.*[31] was whether a federally-regulated employer can terminate a non-unionized employee without cause by paying adequate severance, or could only dismiss such an employee for cause. Labour adjudicators have disagreed on this issue for at least twenty years. Ruling on this as a preliminary issue, the adjudicator decided that such employees could only be dismissed for cause.

Federal Court

The employer brought an application for judicial review. Adopting the reasonableness standard of review, the Federal Court disagreed with the adjudicator's interpretation of the

29. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 ("Mowat"); *McLean v. British Columbia Securities Commission*, 2013 SCC 67.

30. *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36.

31. 2016 SCC 29.

relevant statute, held that the adjudicator's decision that Wilson had been unjustly dismissed was therefore unreasonable, and quashed the adjudicator's decision.[32]

The Federal Court of Appeal

The employee appealed. Although the parties had agreed that reasonableness was the applicable standard of review, the Federal Court of Appeal unanimously held that correctness was the applicable standard of review. Applying this standard, it held that the adjudicator's interpretation of the statute was incorrect, and therefore confirmed the quashing of the adjudicator's decision.[33]

With respect to the selection of the applicable standard of review, Justice Stratas had the following analysis:

> [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.

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32. 2013 FC 733 (O'Reilly, J.). The Federal Court also rejected a prematurity argument (the adjudicator had not yet issued the final decision on remedy).

33. 2015 FCA 17 (Stratas, Webb and Near, JJ.A.). The Federal Court of Appeal also rejected the prematurity argument.

[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 (CanLII), 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.
>
> [Emphasis added.]

Nevertheless, Justice Stratas also observed that the outcome would have been the same if the reasonableness standard of review had been applied:

> [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.

Supreme Court of Canada

In a 6-to-3 split decision, the majority of the Court applied the reasonableness standard of review,[34] held that the arbitrator's interpretation was not unreasonable, allowed the employee's appeal, and restored the adjudicator's decision. By contrast, the dissenting judgment[35] would have applied the correctness standard of review, would have determined which of the competing interpretations of the statute is correct, and would have dismissed the appeal (because the adjudicator had erred in interpreting the statute).

The division between the majority and the minority displays a significant divergence and provides considerable food for thought about (a) when the correctness standard of review is to be applied in reviewing questions of law, (b) the role of the court in determining whether a statutory delegate's interpretation of a statute is correct or reasonable, and (c) the rule of law.

In addition, Justice Abella's decision contains a lengthy *obiter* speculating about the contemporary complexities of standards of review, aimed at starting a discussion about how this area of law might be reformed and simplified. However, none of the other judges (even those in the majority who concurred in the outcome) was prepared to embark on such an endeavour.

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34. Again, the parties had submitted that reasonableness was the applicable standard of review.

35. Côté and Brown JJ. wrote the dissent, which was concurred in by Moldaver J.

Justice Abella's decision for the majority

Justice Abella started by accepting the parties' submission that reasonableness was the applicable standard of review, while reiterating that the actual decision about the applicable standard of review is for the court to make, not the parties.

In doing so, however, she rejected the Federal Court of Appeal's suggestion that there might be different gradations of reasonableness, if that standard of review were applied:

> [18] Nor do I accept the position taken in this case by the Federal Court of Appeal that even if a reasonableness review applied, the Adjudicator should be afforded "only a narrow margin of appreciation" because the statutory interpretation in this case "involves relatively little specialized labour insight". As this Court has said, the reasonableness standard must be applied in the specific context under review. But to attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference within it, unduly complicates an area of law in need of greater simplicity.

After her *obiter* about possible reforms to standards of review analysis (discussed below), Justice Abella then purported to apply the courts' "usual approach" to reasonableness:

> [39] But as previously noted, in this case we need not do more than apply our usual approach to reasonableness. The issue here is whether the Adjudicator's interpretation of ss. 240 to 246 of the Code was reasonable. The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the Code. The alternative approach of severance pay in lieu falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" because it completely undermines this purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them. The rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator.
>
> [40] Adjudicator Schiff's decision was, therefore, reasonable.

Justice Abella then undertook a lengthy examination of the history and purpose of the statutory provisions in question to justify her conclusion about the reasonableness of the adjudicator's decision. With respect, however, she effectively concluded that the adjudicator's interpretation of the provisions was correct—even though she only characterized it as being "reasonable":

> [68] AECL's argument that employment can be terminated without cause so long as minimum notice or compensation is given, on the other hand, would have the effect of rendering many of the Unjust Dismissal remedies meaningless or redundant. The requirement to provide reasons for dismissal under s. 241(1), for example, would be redundant. And, if an employee were ordered to be reinstated under s. 242(4)(b), it could well turn out to be a meaningless remedy if the employer could simply dismiss that employee again by giving notice and severance pay. These consequences result in statutory incoherence. Only by interpreting ss. 240 to 246 as representing a displacement of the employer's ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense.
>
> [69] That is how the 1978 provisions have been almost universally applied, including—reasonably—by the Adjudicator hearing Mr. Wilson's complaint. It is an outcome that is anchored in parliamentary intention, statutory language, arbitral jurisprudence, and labour relations practice. To decide otherwise would fundamentally undermine Parliament's remedial purpose. I would allow the appeal with costs throughout and restore the decision of the Adjudicator.

The dissenting decision

The three dissenting judges strongly differed from the majority with respect to both the applicable standard of review (correctness rather than reasonableness), and the correct interpretation of the statutory provisions in question, which they described as a "narrow and distilled legal issue".[36] While they accepted that there are situations where deference is

36. Paragraph 76.

appropriate on questions of law,[37] the minority emphasized the importance of the Rule of Law in judicial review of administrative action, particularly with respect to questions of statutory interpretation; the utility of having the court decide which of the two competing streams of adjudicators' interpretations was correct; and the unsatisfactory nature of the result of deferring to a particular adjudicator's interpretation if it was only reasonable (but not correct) if other interpretations might also be reasonable.

With respect to the selection of the applicable standard of review, the minority agreed with the majority that parties cannot make this determination by agreement; the applicable standard of review is a question of law which the court must determine for itself.[38]

In selecting correctness as the applicable standard of review, the minority emphasized the importance of the Rule of Law:

> II. Rule of Law Concerns Justify Correctness Review in This Case
>
> [79] In our view, this case exposes a serious concern for the rule of law posed by presumptively deferential review of a decision-maker's interpretation of its home statute. In the specific context of this case, correctness review is justified. To conclude otherwise would abandon rule of law values in favour of indiscriminate deference to the administrative state.
>
> [80] This Court has recognized that, where deference is owed, a decision-maker's interpretation of the law will be reasonable if it falls within a range of intelligible, defensible outcomes: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para. 47. As a general proposition, we agree.
>
> [81] However, deferring in this way on matters of statutory interpretation opens up the possibility that different decision-makers may each reach opposing interpretations of the same provision, thereby creating "needless uncertainty in the law [in the sense that]

37. Paragraph 80. In which case, deference would be applied if the decision-maker's interpretation of the law fell within the range of intelligible, defensible outcomes.

38. Paragraph 77.

individuals' rights [are] dependent on the identity of the decision-maker, not the law": J. M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 C.J.A.L.P. 101, at p. 105. This concern was raised forcefully by Stratas J.A. at the Federal Court of Appeal in the present case, and has been expressed elsewhere: see, *e.g.*, *Altus Group Ltd. v. Calgary (City)*, 2015 ABCA 86 (CanLII), 599 A.R. 223, at paras. 31-33; *Abdoulrab v. Ontario Labour Relations Board*, 2009 ONCA 491 (CanLII), 95 O.R. (3d) 641, at para. 48; *Taub v. Investment Dealers Assn. of Canada*, 2009 ONCA 628 (CanLII), 98 O.R. (3d) 169, at paras. 65-67.

[82] In theory, these disagreements can last forever. Administrative decision-makers are not bound by the principle of *stare decisis*, and many decision-makers—like the labour adjudicators in the present case—lack an institutional umbrella under which issues can be debated openly and a consensus position can emerge.

[83] This is precisely what has occurred in the present case. For decades, labour adjudicators across the country have come to conflicting interpretations of the unjust dismissal provisions of Part III of the Code. These conflicting interpretations go to the heart of the federal employment law regime: is an employer ever permitted to dismiss a non-unionized employee without cause? Some adjudicators say yes. Some say no. Lower courts have found both interpretations to be reasonable: see, *e.g.*, Federal Court reasons and *Pierre v. Roseau River Tribal Council*, 1993 CanLII 2974 (FC), [1993] 3 F.C. 756 (T.D.).

[84] The rule of law and the promise of orderly governance suffer as a result. When reasonableness review insulates conflicting interpretations from judicial resolution, the identity of the decision-maker determines the outcome of individual complaints, not the law itself. And when this is the case, we allow the caprice of the administrative state to take precedence over the "general principle of normative order": *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 (CanLII), [2007] 1 S.C.R. 873, at para. 20; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 71; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at pp. 747-52.

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

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

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

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

[88] Finally, the existence of lingering disagreements amongst decision-makers undermines the very basis for deference. It makes little sense to defer to the interpretation of one decision-maker when it is clear that other similarly situated decision-makers—whose decisions are equally entitled to deference—have reached a different result. To accord deference in these circumstances privileges the expertise of the decision-maker whose decision is currently subject to judicial review over the expertise of other similarly situated decision-makers without any compelling reason for doing so.

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

[90] Such a lingering disagreement exists in this case. While the majority says that "almost all" of the adjudicators have adopted the interpretation of the legislative scheme that was

> accepted by the adjudicator in this case (at para. 46), there is a significant line of cases adopting the opposite interpretation: ...
>
> [91] This is not an exhaustive list, but serves merely to illustrate that discord exists in the adjudicative jurisprudence on the issue of whether the Code permits an employer to dismiss an employee without cause. It is the existence of this discord that undermines the rule of law and justifies correctness review in this case. Further, this is a matter of general importance, defining the basis of the employment relationship for thousands of Canadians. We would also add that questions regarding the dismissal of federal employees do not fall exclusively within the jurisdiction of labour adjudicators. As we will explain below, civil courts also possess jurisdiction over some of these matters. The narrow and distilled question of law raised by this case goes to the very heart of the federal employment relationship. Consistency in defining the nature of this relationship is therefore required.
>
> [92] We turn now to the merits, applying a correctness review for the reasons set out above.
>
> [Emphasis added.]

With respect to the correct interpretation of the statutory provisions in question, the minority embarked on an extensive analysis about the history of the provisions, their purpose, the application of the principles of statutory interpretation, and why the majority's interpretation was incorrect. They concluded as follows:

> IV. Conclusion
>
> [149] We agree with the Federal Court and the Federal Court of Appeal that the *Canada Labour Code* does not prohibit all federally regulated employers from dismissing employees without cause. It follows that the adjudicator's decision should be set aside. We would therefore dismiss the appeal.

Questions

- As a matter of terminology, given that there is only one reasonableness standard of review, it must be wrong to speak of "*a* reasonableness standard of review", as opposed to "*the* reasonableness standard of review".

- Notwithstanding purporting to apply the reasonableness standard of review, didn't Justice Abella and the rest of the majority actually apply the correctness standard? Didn't they determine what they thought the statute actually meant, and then conclude that any other interpretation was unreasonable? Is this conceptually coherent?

- What would have happened with the converse result—if the majority had interpreted the statute the way the minority did, and then applied the reasonableness standard of review? All that we would know then is that their interpretation was reasonable—with the implication that other interpretations could also be reasonable. We would not be able to conclude that their interpretation was correct.

- Curiously, the majority does not refer to the Court's earlier decision in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionelles)*, [1993] 2 S.C.R. 756, which held that the fact that there were two contradictory lines of authority does not matter if deference applied (in that case, patent unreasonableness, being before *Dunsmuir*).

- This case is a perfect example of the kinds of problems which arise from the interface between the principles of statutory interpretation and the selection of the applicable standard of review.

  Because *Dunsmuir* recognized only four circumstances in which the reviewing court should apply the correctness standard of review (in particular, only where

a question of law is of central importance to the legal system as a whole which is outside the decision-maker's area of expertise),[39] and the decision in *Alberta Teachers' Association* case[40] created a *rebuttable presumption* that reasonableness is the applicable standard of review where the statutory delegate is interpreting or applying its home statute,[41] a court is left with only two analytical choices if the principles of statutory interpretation inexorably cause the court to differ from the interpretation adopted by the statutory delegate: either (a) find some way for correctness to be the applicable standard of review,[42] or (b) apply the reasonableness standard of review and conclude that the statutory delegate's interpretation is unreasonable.[43] In such a case, either method of analysis will result in the statutory delegate's decision being set aside. But one may query whether the latter method is really "correctness masquerading as reasonableness".

- The majority's decision does not really address the minority's concerns about using the reasonableness standard of review in these circumstances.

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39. The other circumstances which *Dunsmuir* identified for the application of the correctness standard of review are: constitutional questions involving the division of powers; true questions of jurisdiction or *vires*; questions regarding the jurisdictional lines between two or more competing specialized tribunals.

40. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61.

41. With which it may have some experience, but no particular *expertise* that would be relevant to the interpretation of the provision.

42. This is what the minority did in both *Laval* and *Wilson*.

43. This is what the majority did in *Kanthasamay* and *Wilson*.

- Of course, even if all of the judges apply the same standard of review, different judges may reach different conclusions about the interpretation resulting from the application of the principles of statutory interpretation.[44] This is what occurred in *Kanthasamy*, where all of the judges applied reasonableness standard of review, but the majority and the minority reached opposite conclusions about whether the impugned decision was reasonable.

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

The Supreme Court of Canada has heard an appeal but (as of the writing of this paper) has not yet issued its decision in *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)*.[45]

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

44. This is what occurred in *Kanthasamy*—the majority found the Reviewing Officer's decision unreasonable by comparison to the majority's interpretation of the statutory provision, whereas the minority found it to be reasonable by comparison to the minority's (different) interpretation of the provision.

45. SCC File No. 36403, on appeal from 2015 ABCA.

> "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.
>
> [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.)[46] 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

46. 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.

standard of review to be used by the appellate body (though the mere existence of a statutory 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.[47] 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.[48]

The Supreme Court of Canada has heard the appeal, but not yet issued its decision. 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[49] 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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47. The Alberta *Workers' Compensation Act* contains both a privative clause and a right of appeal: sections 13.1(9) and 13.4.

48. 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.).

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

E. Standard of review where there is an internal administrative appeal

The question has relatively recently arisen about what standard of review (if any) should be used by an administrative appellate body hearing an appeal from an initial decision-maker.

1. *Lum*

Lum v. Council of the Alberta Dental Assn. and College Review Panel[50] dealt with an application for judicial review of a decision by a Review Panel which upheld the Registrar's refusal to register Lum as a dentist in Alberta.

Lum raised issues regarding standards of review on two levels: the first level concerned the standard of review to be applied on the internal review conducted by the Review Panel; the second level concerned the standard of review to be applied by the court reviewing the decision of the Review Panel.

Graesser J. held that reasonableness (not correctness) was the applicable standard to be applied by an internal administrative appeal body in reviewing the decision of an administrative tribunal of first instance.[51]

With respect to the standard of review to be used by a *court* when reviewing decisions by a specialized tribunal (either on a statutory appeal or on an application for judicial review, and whether the initial decision-maker or the appellate decision-maker), Justice Graesser applied

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50. 2015 ABQB 12.

51. *Lum* relied on the factors set out in *Newton v. Criminal Trial Lawyer's Association*, 2010 ABCA 399.

different standards of review to different issues: reasonableness to the issue of good character and reputation (because it was a question of mixed fact and law) but correctness to the issue involving statutory interpretation and interpretation of the Mobility Agreement.

The Court of Appeal of Alberta affirmed Graesser J.'s decision.[52]

2. *Huruglica*

Huruglica[53] involved an appeal by the Minister from a judicial review judgment which held in favour of the three respondents in a refugee hearing.

The Refugee Protection Division ("RPD") had dismissed the claims on the basis that the respondents had failed to rebut the presumption of state protection. On appeal, the Refugee Appeal Division ("RAD") found that the RPD's decision was reasonable. In choosing the appropriate standard of review, the RAD used the framework developed in *Newton v. Criminal Trial Lawyers' Association* and the factors set out in that case.[54]

The Federal Court

In the Federal Court, Justice Phelan started by holding that the RAD's selection of the reasonableness standard for its role on appeal was itself reviewable on the standard of correctness because this question of law was one of general interest to the legal system as a

52. 2016 ABCA 154.

53. 2016 FCA 93. See also *Canada (Citizenship ad Immigration) v. Singh*, 2016 FCA 96.

54. Which are also discussed in *Lum*, above.

whole that had particular significance outside the refugee law context. He referred to both *Newton* and *Halifax (Regional Municipality) v. United Gulf Developments Ltd.*[55]

With respect to the standard of review to be used by the RAD on an appeal from the RPD, Phelan J. went on to note that the reasonableness standard was adopted to recognize the division of powers between the executive and the judiciary, a concept that is of lesser importance and applicability in this case which involved an administrative appeal body.[56] In his view, the relationship between the RAD and the RPD was "more akin to that between a trial court and an appellate court but further influenced by the much greater remedial powers given to the appellate tribunal".[57] Accordingly, he held that the RAD should have reviewed the RPD's decision for correctness.

Phelan J. then certified a question regarding the proper scope of review by the RAD on an appeal from a decision of the RPD.[58]

The Federal Court of Appeal

Writing for the unanimous court, Justice Gauthier started by examining the recent direction by the Supreme Court of Canada in *Kanthasamy* about the role of the Federal Court of Appeal itself, particularly with respect to the certified question:

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55. 2009 NSCA 78.

56. At paragraph 43.

57. At paragraph 44.

58. The certified question was: "Was it reasonable for the RAD to limit its role to a review of the reasonableness of the RPD's findings of fact (or mixed fact and law), which involved no issue of credibility?"

> A. What is the standard of review to be applied by this Court, particularly in respect of the certified question?
>
> [26] When reviewing a decision of the Federal Court on a judicial review application, this Court must determine if the judge chose the appropriate standard(s) of review for the issue(s) before him and if he applied it (them) correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII) at paras. 45-47, 2013 2 S.C.R. 559 [*Agraira*]. The latter involves "stepping into the shoes" of the judge. This Court's focus will thus be on the decision of the RAD.
>
> [27] That said, the interveners particularly insisted that this Court should give the correct answer to questions that have been certified pursuant to subsection 74(d) of the IRPA. In their written and oral submissions, they relied on this Court's decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2014 FCA 113 (CanLII) at paras. 30-37, [2015] 1 F.C.R. 335. However, since then, the Supreme Court has reversed this decision: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII), 391 D.L.R. (4th) 644 [*Kanthasamy*]. The Supreme Court confirmed that despite the fact that a certified question may well be of general importance to the refugee law system, it is not a type of question that falls within the exceptions to the application of the standard of reasonableness: *Kanthasamy* at para. 44.
>
> [28] *Kanthasamy* will obviously have a tremendous impact, given that for many years, the Federal Court resorted to the certification process under subsection 74(d) to settle divergent interpretations or disagreements on legal issues of general importance. This Court's providing the correct answer to certified questions appears to have been welcomed, particularly by the IAD and the RPD, who saw it as helpful in carrying out their functions.
>
> [29] The legislator is obviously empowered to set the standard of review that it wants to see applied to questions certified pursuant to subsection 74(d) of the IRPA. However, this must be done very clearly. Should the legislator wish to continue the system that was in place before *Kanthasamy*, it would be required to amend the IRPA and clarify its intention that certified questions be reviewed on a correctness standard.
>
> [Emphasis added.]

Justice Gauthier then considered what standard of review should have been applied by the court when reviewing the decision by the RAD—and concluded that it should have been reasonableness, not correctness:

B. What was the proper standard of review to be applied by the judge to the issue before him?

[30] The appellant strongly argues that the judge chose the wrong standard of review. The judge's conclusion in that respect, as well as the precedents on which he relied (*Newton* and *United Gulf*), did not take into consideration all of the relevant Supreme Court of Canada decisions – especially those issued since 2011. Neither the judge nor the other two provincial courts of appeal turned their mind to the presumption that reasonableness applies to all questions of law arising from the interpretation of an administrative body's home statute: see, for example, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895 [*McLean*]; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160; and *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40 (CanLII), [2014] 2 S.C.R. 135 [*CN v. Canada*]. The Minister submits that the judge misconstrued the limited exceptions where the standard of correctness may be applied. I agree with these submissions.

[31] With all due respect to the judge and his colleagues in the Federal Court who have agreed with his selection of standard of review, I simply cannot conclude that a question of law involving the interpretation of an administrative body's home statute so as to determine its appellate role has any precedential value outside of the specific administrative regime in question: see, among others, *Alvarez v. Canada (Citizenship and Immigration)*, 2014 CF 702 (CanLII), 2014 FC 702, [2014] F.C.J. No. 740; *Yetna v. Canada (Citizenship and Immigration)*, 2014 FC 858 (CanLII), [2014] F.C.J. No. 906; *Spasoja v. Canada (Citizenship and Immigration)*, 2014 FC 913 (CanLII), [2014] F.C.J. No. 920 [*Spasoja*]; *Bahta v. Canada (Citizenship and Immigration)*, 2014 FC 1245 (CanLII), [2014] F.C.J. No. 1278; *Sow v. Canada (Citizenship and Immigration)*, 2015 FC 295 (CanLII), 252 A.C.W.S. (3d) 316; *Bellingy v. Canada (Citizenship and Immigration)*, 2015 FC 1252 (CanLII), 260 A.C.W.S. (3d) 566. In fact, this logically relates to the argument put forth by the respondents and the interveners that it is not useful to look at decisions regarding the role of administrative appeal bodies other than those created under the *IRPA*: see also the Federal Court Reasons at para. 53.

[32] Just as legal principles applicable to cost awards and to time limitations have been found to fall within the expertise of the administrative bodies involved in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII) at para. 25, [2011] 3 S.C.R. 471 and *McLean* at para. 21, defining the scope of its appellate function (or its standard of review) must be within the RAD's expertise.

[33] I cannot agree with the respondents' position that the issue before the judge was a true jurisdictional question. The respondents framed the issue as involving the overlapping ability of both the RPD and the RAD to exercise their sole and exclusive jurisdictions in making findings of fact, law and mixed fact and law on the same set of evidence. However, the Supreme Court has warned against an expansive interpretation of what it deems to be "true questions of jurisdiction", as well as questions of overlapping or competing jurisdiction between two administrative bodies. In my view, there is no question here that falls under the scope of such exceptions. I agree with the position taken by other judges of

> the Federal Court, such as Justice Luc Martineau in *Djossou v. Canada (Citizenship and Immigration)*, 2014 FC 1080 (CanLII), [2014] F.C.J. No. 1130 [*Djossou*] and Justice Jocelyne Gagné in *Akuffo v. Canada (Citizenship and Immigration)*, 2014 FC 1063 (CanLII), [2014] F.C.J. No. 1116, that this is not a question of true *vires*.
>
> [34] Lastly, the Supreme Court made it clear in *Kanthasamy* that a question of general importance to the refugee law system does not fall under any of the other exceptions to the standard of reasonableness set out in Dunsmuir.
>
> [35] I thus conclude that the judge erred in his selection of the standard of review applicable to the case before him, and that the proper standard ought to be that of reasonableness.
>
> [Emphasis added.]

Justice Gauthier then needed to determine the reasonableness of the RAD's decision about the scope of its powers (or the standard of review it should apply) in hearing the appeal. He noted that there is no one legislative model prescribing the powers of an internal administrative appellate body:

> [46] I do not find the decision in *Newton* particularly useful. I believe that the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the *IRPA* read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the *IRPA* and its object (Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983)). The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the *IRPA* and the role of the RAD.
>
> . . .
>
> [49] When the legislator designs a multilevel administrative framework, it is for the legislator to account for considerations such as how to best use the resources of the executive and whether it is necessary to limit the number, length and cost of administrative appeals. As will be discussed, the legislative evolution and history of the *IRPA* shed light on the policy reasons that guided the creation of the RAD and the role it was intended to fulfil. These policy considerations are unique to the RPD and the RAD. Thus, one should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies.

> [50] To be clear, I am not saying that the standard of reasonableness will never apply in appeals to administrative appeal bodies. In fact, there are examples where the legislator clearly expresses an intention that such a standard be applied: see, for example, subsection 18(2) and section 33 of the *Commissioner's Standing Orders (Grievances and Appeals) Regulation*, SOR/2014-289, adopted pursuant to the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10; subsection 147(5) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (see Appendix A). This last provision was reviewed and construed by this Court in *Cartier v. Canada (Attorney General)*, 2002 FCA 384 (CanLII) at paras. 6-9, [2003] 2 F.C.R. 317.
>
> [51] Rather, what I am saying is that one cannot simply decide that this standard will apply on the basis of one's own assessment of factors (e) and (f) listed in *Newton* (see paragraphs 10, 15 and 16 above). One must seek instead to give effect to the legislator's intent.
>
> [52] With this in mind, I will now proceed with my statutory analysis, looking first at the relevant purpose and object of the *IRPA*.
>
> [Emphasis added.]

Justice Gauthier then proceeded on a lengthy analysis of the legislative scheme, its purpose, object, and history. He concluded as follows:

> [103] I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.
>
> [104] Thus, the RAD erred by applying the reasonableness standard to the RPD's analysis of the objective evidence regarding state protection and to its conclusion in that respect. I would, therefore, dismiss the appeal with costs to the respondents.

Questions and comments

- It must be right that the legislature can design many different types of internal administrative appeals, and that the legislator's intention is key to determining the nature and scope of any particular appeal. There is no one model.

- This case is another example where the principles of statutory interpretation can only yield one (correct) interpretation. Given that reasonableness was the applicable standard of review, any contrary interpretation must be unreasonable.

- Or would it be more straightforward to say that correctness should have been the standard of review for this is a pure question of law? (Even though this particular question of law did not fit within any of the four categories identified in *Dunsmuir* that engage the correctness standard.)

- If correctness were the applicable standard of review, would that eliminate the dissonance between answering the question which was certified and treating the matter as an appeal from an application for judicial review (ignoring the question which was certified)?

- Could one treat the certified question like a stated case, where one expects the court itself to provide the correct answer?

F. Justice Abella's Obiter about possible reforms to standards of review

What is most remarkable about *Wilson*, however, is Justice Abella's lengthy *obiter* discussion about the complexity and confusion surrounding standards of review analysis and her starting proposal of a simplified process:[59]

> 19 But while it is true that the standard of review in this case falls easily into our jurisprudence, it seems to me that some general comments about standard of review are worth airing, albeit in *obiter*. There are undoubtedly many models that would help simplify the standard of review labyrinth we currently find ourselves in. I offer the following proposal as an option only, for purposes of starting the conversation about the way forward. Because it is only the beginning of the conversation, which will benefit over time from submissions from counsel, this proposal is not intended in any way to be comprehensive, definitive, or binding.
>
> 20 A substantial portion of the parties' factums and the decisions of the lower courts in this case were occupied with what the applicable standard of review should be. This, in my respectful view, is insupportable, and directs us institutionally to think about whether this obstacle course is necessary or whether there is a principled way to simplify the path to reviewing the merits.
>
> 21 For a start, it would be useful to go back to the basic principles set out in *Dunsmuir*, under which two approaches were enunciated for reviewing administrative decisions. The first is deferential, and applies when there is a range of reasonable outcomes defensible on the facts and law. This is by far the largest group of cases. Deference is succinctly explained in *Dunsmuir* as follows:
>
> > 7 It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.
> >
> > 8 [para. 48]

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59. Although Abella J. delivered the majority judgment, Chief Justice McLachlin and Justices Karakatsanis, Wagner, Gascon and Cromwell, although concurring in the result reached by Abella J., expressly refused to endorse her obiter comments calling for a reconsideration of the current standard of review framework (at paras. 70 to 73).

22 The reason for the wide range is, as Justice John M. Evans explained, because "[d]eference ... assumes that there is no uniquely correct answer to the question": "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101, at p. 108. The range will necessarily vary. As Chief Justice McLachlin noted, reasonableness "must be assessed in the context of the particular type of decision making involved and all relevant factors" and "takes its colour from the context": *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at paras. 18 and 23, citing with approval *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 59.

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

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

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

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

> The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel,

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

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

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

> As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of

> administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.
>
> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> [paras. 27-28]

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

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

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

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

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

33 Approaching the analysis from the perspective of whether the outcome falls within a range of defensible outcomes has the advantage of being able to embrace comfortably the

animating principles of both former categories of judicial review. Courts can apply a wider range for those kinds of issues and decision-makers traditionally given a measure of deference, and a narrow one of only one "defensible" outcome for those which formerly attracted a correctness review. Most decisions will continue to attract deference, as they did in *Dunsmuir*, which means, as Justice Evans noted

> [that] a court may be more likely to conclude that a range of reasonable interpretative choices exists, and that deference is meaningful, when the tribunal's authority is conferred in broad terms. If, for example, a tribunal is authorized to make a decision on the basis of the public interest, a reviewing court may well decide that the tribunal has a range of choices in selecting the factors it will consider in making its decision. At this point, questions of law shade imperceptibly into questions of discretion. Reasonableness review permits the court to determine whether the factors considered by the tribunal are rationally related to the generally multiple statutory objectives. It is not the court's role to identify the factors to be considered by the tribunal, let alone to reweigh them. [Footnote omitted; p. 110.]

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

35 But there may be rare occasions where only one "defensible" outcome exists. In *Mowat*, for example, this Court found that the ordinary tools of statutory interpretation made it clear that the administrative body under review did not have the authority to award costs in a specific context. In the particular circumstances of that case, no other result fell within the range of reasonable outcomes. Similarly, this Court has set aside decisions when they fundamentally contradicted the purpose or policy underlying the statutory scheme: *Halifax*.

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

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

38 Even if, however, there proves to be little appetite for collapsing the two remaining standards of review, it would, I think, still be beneficial if the template so compellingly

> developed in *Dunsmuir*, were adhered to, including by applying the residual "correctness" standard only in those four circumstances *Dunsmuir* articulated.
>
> [Emphasis added; footnotes omitted.]

As noted above, the other members of the majority specifically disclaimed supporting Justice Abella's *obiter*. The Chief Justice and Justices Karakatsanis, Wagner and Gascon did so in the following terms:

> [70] ... We appreciate Justice Abella's efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability. However, as it is unnecessary to do so in order to resolve this case, we are not prepared to endorse any particular proposal to redraw our current standard of review framework at this time.

Justice Cromwell was not prepared to embark on this exercise for this reason:[60]

> [72] ... [I]n my respectful view, our standard of review jurisprudence does not need yet another overhaul and ... as a result, I respectfully disagree with the

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60. Justice Cromwell also specifically agreed with Justice Abella's confirmation that there is only one standard of reasonableness:

> [73] The second and related point is to underline my agreement with para. 18 of Justice Abella's reasons in which she rejects the Federal Court of Appeal's approach of attempting "to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference". Of course, reasonableness, while "a single standard" nonetheless "takes its colour from the context": see, *e.g., Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, at para. 18; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII), [2013] 2 S.C.R. 458, at para. 74. Reasonableness must, therefore, "be assessed in the context of the particular type of decision making involved and all relevant factors": *Catalyst Paper Corp.*, at para. 18. However, in my opinion, developing new and apparently unlimited numbers of gradations of reasonableness review—the margins of appreciation approach created by the Federal Court of Appeal—is not an appropriate development of the standard of review jurisprudence.

> approach that Justice Abella develops in *obiter*. In my view, *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, sets out the appropriate framework for addressing the standard of judicial review. No doubt, that framework can and will be refined so that the applicable standard of review may be identified more easily and more consistently. But the basic *Dunsmuir* framework is sound and does not require fundamental re-thinking.

Questions and comments

- *Dunsmuir* did not invent the correctness standard of review. Issues about when the correctness standard of review should be applied arose long before *Dunsmuir*—for example, by Justice Dickson in *C.U.P.E. v. NB Liquor*,[61] Justice Beetz in *Bibeault*,[62] and Justice Bastarache in *Pushpanathan*.[63]

- However, *Dunsmuir* in 2008 at least presumptively restricted the application of the correctness standard of review to four particular categories of cases[64]—and that has been the subject of enduring criticism. Just like the

61. *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

62. *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., Local 298*, [1988] 2 S.C.R. 1048.

63. *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982.

64. The four categories are: (1) constitutional questions regarding the division of powers, (2) "true questions of jurisdiction or *vires*", (3) questions of general law that are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", and (4) "questions regarding the jurisdictional lines between two or more competing specialized tribunals". In addition, *Dunsmuir* recognized that the starting point for determining the applicable standard of review was precedent—what standard of review had previously been established for the particular question involved? This opens the possibility that precedent could have identified correctness as the applicable standard of review for a particular question that would not otherwise have fitted within the four categories set out in *Dunsmuir* (but see the important subsequent qualification in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2015 SCC 39, where the Court seems to indicate that pre-*Dunsmuir* precedent can only continue if it is consistent with "recent developments in the common law principles of judicial review"). Appeals in the
(continued...)

courts after 1979 rebelled against the assumption that the decision in *C.U.P.E. v. NB Liquor* established deference as the sole standard of review or assumed that there could not be any jurisdictional errors, the jurisprudence after 2008 has frequently illustrated the need for the correctness standard of review to be applied in other circumstances beyond the four categories identified in *Dunsmuir*. See the minority's decision in *Wilson*.

- Justice Abella is right to observe that the constitutional requirement that judicial review cannot be completely suppressed (*Crevier*[65]) does not necessarily dictate how many standards of review there must be. For example, there was no constitutional impediment to *Dunsmuir* reducing the number of standards of review from three to two, by amalgamating the patent unreasonableness and reasonableness *simpliciter* standards. However, adopting a single, universal deferential standard of review does have the dangerous possible consequence that the courts will abandon their constitutional obligation to ensure that statutory delegates act within the scope of authority granted to them by the legislature—undercutting the Rule of Law, as the minority in *Wilson* observed.

- Justice Abella contemplates that a single reasonableness standard of review could accommodate the courts' ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, *as in*

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64. (...continued)
utility regulatory area in Alberta are an example where pre-*Dunsmuir* precedent identified correctness as the applicable standard of review, even though reasonableness probably would have been the result under *Dunsmuir*. The Court of Appeal has continued to apply correctness.

65. *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

the four categories singled out for correctness review in Dunsmuir. This, of course, contemplates that the four categories in *Dunsmuir* are the only circumstances in which correctness should be applied.[66] As the minority indicate, *Wilson* does not fit within any of those four categories—but there are other circumstances in which the correctness standard needs to be applied.[67] Are the four categories in *Dunsmuir* exclusive, or illustrative?

- Is Justice Abella right in saying that applying the principles of statutory interpretation "will usually attract a wide range of reasonable outcomes", and therefore deference should be applied in reviewing the interpretation adopted by the statutory delegate. However, going back to first principles, while deference makes perfect sense where an impugned administrative decision is discretionary in nature (by definition, a discretionary decision could have more than one possible "right" outcome), in my view it is simply wrong to assume that statutes "usually" have a wide range of interpretations, or that the interpretation of statutes is a discretionary exercise (best left to the statutory delegate). It is not obvious to me that the reasonableness standard of review (or deference) should always or even ever apply where the issue centres on the interpretation of a statute (even "home statutes").[68] Of course, if the statutory provision is truly ambiguous (a relatively rare situation, given the principles of statutory interpretation), it might be appropriate for the court to defer to the

66. Paragraph 38.

67. For example: sorting out conflicting statutory interpretations by statutory delegates (*Wilson*), or questions of law which are important to a particular area of law (such as property assessment, or the regulation of utilities) but do not concern the legal system as a whole (*Kanthasamay*).

68. Recall Justice Cromwell's judgment in the *Alberta Teachers's Association* case that jurisdiction-limiting provisions will very often be found in the home statute itself.

interpretation adopted by the statutory delegate if the statutory delegate had some demonstrable expertise with respect to that issue. However, the principles of statutory interpretation very often yield only one interpretation, and it is not obvious why the court would defer in such a circumstance to a different interpretation adopted by a statutory delegate.

- It is also not obvious that it is conceptually coherent to conclude that there is only one "defensible" interpretation that is "reasonable", but refuse to characterize that interpretation as being the "correct" one. This approach is correctness masquerading as reasonableness. Why not call a spade a spade?

- Is Justice Abella right to assume that there will only be "rare occasions" where there is only one defensible statutory interpretation? *Kanthasamy*, *Wilson* and *Mowat* are all recent examples of precisely such a circumstance.

- How would Justice Abella's *obiter* work in the converse situation? What would have been the result if the majority had interpreted the statute the way the minority did, applied the reasonableness standard of review, and held that the decision was reasonable? All that one would then know is that the decision-maker's interpretation was reasonable—but with the lingering implication that other interpretations could also be reasonable. One would not be able to conclude that the decision-maker's interpretation was correct. This leaves one with the unsatisfactory result which occurred in *Domtar*—two reasonable results, which the court would not resolve. Is this outcome acceptable?

- Justice Abella's *obiter* does not squarely address the concerns expressed by the minority about why the reasonableness standard of review is inconsistent with the Rule of Law where the issue involves statutory interpretation or another important question of law.

- What is the role of legislative intent in Justice Abella's *obiter*?

- Might legislative intent be that it is the business of the courts is to determine questions of law, and let them get on with doing this? The English courts do not defer on questions of law, but determine the correct answer—and that conceptual approach does not appear to have imperilled the effectiveness of the administrative system in that country.

- Ultimately, the fundamental question ultimately is: what are the criteria and circumstances in which the court should determine the correct answer to a question of law?[69]

For a different appreciation of the issues involved in standards of review, see Justice David Stratas' thought-provoking paper "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency".[70]

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69. Virtually all of this particular controversy involves questions of law. There is very little argument that deference—the reasonableness standard of review—applies when the court is reviewing findings of fact, or the result of a discretionary or policy decision. (Of course, different judges may differ about how the reasonableness standard of review applies in such circumstances, whether the impugned decision is or is not reasonable.)

70. Published electronically on the Social Science Research Network at file:///G:/FILES%20OPEN/58xx%20DPJ/5897%20Recent%20Developments/Stratas%20Paper/papers.htm

III. STANDING

Issues about standing typically 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. This past year, a couple of cases dealing with a tribunals' standing to make submissions are worthy of note. And, interestingly, there are a couple of cases dealing with standing in other contexts.

A. Standing to make submissions

Standing in the first context was addressed by the Supreme Court of Canada last year in the *Ontario Energy Board* case.[71] There, the court set out a principled basis for exercising discretion to permit decision-makers to have standing to make submissions in judicial reviews or appeals from their decisions in certain circumstances. The court rejected the categorical restriction from *Northwestern Utilities* against any tribunal participation in favour of the broader, 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*. However, as the court in *Ontario Energy Board* made clear, standing is very much a matter within the court's discretion. This is illustrated in the following cases.

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71. *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44.

1. *Alberta (Attorney General)*

In *Alberta (Attorney General) v. Provincial Court of Alberta*,[72] a provincial court judge had dismissed an application to order a financial institution to disclose certain information respecting accounts. The application had been brought by a police detective working on a fraud investigation. The Attorney General of Alberta applied for judicial review of the provincial court judge's decision. The lawyer for the provincial court judge argued that either the judge himself or the provincial court should have full standing to argue the merits of the case. Madam Justice Read of the Alberta Court of Queen's Bench disagreed, holding that a provincial court is not an administrative tribunal that would attract the administrative principles regarding standing:

> 7 In my view, the argument proceeds on a wrong premise. The Provincial Court is not an administrative tribunal. Rather it is a court of record. The *Provincial Court Act*, RSA 2000, c P-31, s 2(3) makes this clear.
>
> 8 That it is not an administrative tribunal is also made clear statutorily in section 10(b) of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3. This statute regulates authorities entitled to exercise statutory powers in Alberta, specifically including statutory administrative tribunals. However, section 10(b) of that *Act* clearly establishes that the Provincial Court of Alberta is not a "decision maker" as this term is used in the legislation. The relevant provision reads as follows:
>
> > (b) "decision maker" means an individual appointed or a body established by or under an Act of Alberta to decide matters in accordance with the authority given under that Act, but does not include
> >
> > (i) The Provincial Court of Alberta or a judge of that Court ...
>
> 9 Given that the Provincial Court is not an administrative tribunal, it is my view that *Ontario (Energy Board)* has no applicability to the present case.

72. 2015 ABQB 728.

Read J. went on to conclude that if she was wrong in holding that a court is not an administrative tribunal, she would not exercise her discretion to permit the court to have standing in this case.

2. *University of British Columbia*

The case of *University of British Columbia v. Kelly*[73] also dealt with whether the British Columbia Human Rights Commission had standing to make submissions in a judicial review application challenging one of its decisions. The University argued that the court should take the strict approach set out in Northwestern Utilities and deny the Tribunal standing.

Silverman J. of the British Columbia Supreme Court disagreed with the University and exercised his discretion in favour of granting the Tribunal standing to make submissions on limited issues which included:

- outlining the proceedings which were before it, and the issues on judicial review;

- making submissions on the court's role on judicial review, the standards of review, and the relief available on judicial review; and

- making submissions on the nature of the question, which would impact the standard of review.

73. 2015 BCSC 1731, aff'd 2016 BCCA 271.

Silverman J. denied costs to the Tribunal, stating that the issue of standing has become much more common in recent years and is still a developing area of the law. Despite being unsuccessful, the University was not to be penalized with costs where the question of standing—particularly with respect to making submissions on the nature of the question—was a legitimate and important issue.

The British Columbia Court of Appeal recently dismissed the appeal, but did not discuss the issue of standing.[74]

B. Standing to appeal or bring applications

Song

In *Song v. Westwood Plateau Golf & Country Club*,[75] the issue was whether the British Columbia Human Rights Commission had standing to apply to strike portions of the plaintiffs' notice of civil claim. The Tribunal was not a party to the action and had not applied for intervener status.

The plaintiffs had filed a complaint with the Tribunal alleging that Westwood had discriminated against them on the basis of race. The Tribunal dismissed the complaint finding that there was no reasonable prospect of success because the materials filed with the complaint did not support racial discrimination. The plaintiffs applied for judicial review of the Tribunal's decision. One year later, the plaintiffs filed their civil claim against

74. The appeal decision dealt with the merits of the applicant's case which involved a claim of discrimination on the basis of disability and with a cross-appeal on damages.

75. 2015 BCSC 1884, aff'd 2016 BCCA 110.

Westwood. The notice of civil claim did not name the Tribunal as a party, but did refer to defamation and other civil wrongs allegedly committed by the Tribunal and also alleged bias against the Tribunal. The Tribunal applied to strike the paragraphs in the notice of civil claim which dealt with its conduct and decision on the basis that they were a collateral attack on its decision and, therefore, an abuse of process. The plaintiffs argued that the Tribunal had no standing to bring the application.

The British Columbia Supreme Court recognized the uniqueness of the situation—the Tribunal in this case was not a party or an intervener. This was not an application for judicial review of the Tribunal's decision, but, rather, was a civil claim against a third party. Myers J. exercised his discretion in favour of the Tribunal and granted the Tribunal standing to bring the application. The Tribunal was allowed to make submissions, and in the end result, Myers J. struck the portions of the civil claim which dealt with the Tribunal's conduct, holding that an application for judicial review of the Tribunal's decision was the proper procedure.

C. Other cases involving standing

1. *Warman*

Warman v. Law Society of Alberta[76] involved an application by the Law Society for summary judgment in an application for judicial review on the basis that complainants in a law society disciplinary matter lacked standing to challenge the decision of the Conduct Committee which discontinued the disciplinary proceedings against the member.

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76. 2015 ABCA 368.

The majority of the Court of Appeal (Picard and Costigan JJ.) dismissed the Law Society's application for summary judgment, without making a definitive ruling about the standing issue.[77] In a lengthy examination of standing in the professional discipline context, Justice Waking concluded that the complainants did not have standing, and would have allowed the summary judgment application.

2. *P & S Holdings Ltd.*

In *P & S Holdings Ltd. v. Canada, et al.*,[78] the Federal Court refused to grant standing to the applicants to participate in the medical marijuana production licencing process. The applicants owned property adjacent to a proposed medical marijuana production facility. Mactavish J. held that, while the applicants had the right to, and did, participate in the land use planning process, they did not have standing to participate in the licencing process. She rejected the applicants' argument that, as a matter of natural justice and procedural fairness, they were entitled to be heard because the proposed facility would interfere with the use and enjoyment of their property and would compromise the health, safety and security of visitors to their property. The applicants had neither a statutory nor common law right to participate in the licensing process.

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77. The *ratio* of the majority's decision:

> We have read, in draft form, the memorandum of judgment of our colleague, Wakeling J.A. We respectfully disagree with his conclusion that the appeal should be allowed. The issue on this appeal is whether the respondents' position that they have standing to challenge the decision of the Conduct Committee is so devoid of merit that it should be summarily dismissed under Rule 7.3(1) of the *Alberta Rules of Court*. In our view, the answer is no. The respondents' position is not so devoid of merit that it should be foreclosed by summary judgment. The law as it relates to the unique facts of this appeal is unsettled. It is appropriate and important that the legal issues raised be dealt with by a court that has the benefit of a complete record.

78. 2015 FC 1331.

IV. PROCEDURAL FAIRNESS

A. *Audi Alteram Partem*

1. *0927613 B.C. Ltd.*

In *0927613 B.C. Ltd. v. 0941187 B.C. Ltd.*,[79] the British Columbia Court of Appeal held that there are no special rules of procedure for self-represented parties during arbitration.

The parties had entered into a joint venture agreement for a real estate development. A dispute arose and the matter went to arbitration which was ultimately decided in favour of the appellant. The respondent was initially represented by legal counsel, but by the date of the actual arbitration hearing, was self-represented. The principal of the respondent chose not to attend the hearing and offered no explanation for his lack of attendance. The respondent then sought to have the arbitrator's decision set aside on the basis of "arbitral error" which, pursuant to the *Arbitration Act*,[80] includes a failure to observe the rules of natural justice.

The chambers judge allowed the application and set aside the arbitrator's decision.[81] The court held that the arbitrator had breached the rules of procedural fairness to the self-represented party and that a miscarriage of justice would occur if the arbitral order was

79. 2015 BCCA 457.

80. R.S.B.C. 1996, c. 55, s. 1.

81. New Westminster Docket No. S157728, August 21, 2014.

allowed to stand. In particular, the chambers judge held that the arbitrator had failed to consult with both parties before setting hearing dates, failed to give the respondent full opportunity to present its case, and failed to explain to the self-represented party "the procedural situation in which he found himself".

The appellant appealed to the British Columbia Court of Appeal, arguing that the chambers judge erred in fact in finding that the arbitrator had breached the duties of procedural fairness and erred in law in the content of the rules of natural justice applying to a self-represented litigant.

The British Columbia Court of Appeal allowed the appeal. Speaking for a unanimous court, Madam Justice Smith held that the chambers judge appeared to have "misunderstood or neglected to consider a significant body of evidence with respect to what had transpired before the arbitrator...".[82] She found that the unrepresented party had indeed been consulted about hearing dates and had ample opportunity to present his case but chose not to.

More importantly, Smith J. rejected the notion that there are special rules of procedure for self-represented parties or that the content of the rules of natural justice or procedural fairness were somehow expanded or enhanced:

> 64 There are no special rules of procedure for a self-represented party in an arbitration proceeding beyond the basic procedural requirements for any arbitration: an impartial arbitrator, procedural fairness of notice, and a fair or reasonable opportunity to make submissions and to respond to the other side's case. As this Court noted in *Burnaby (City) v. Oh*, 2011 BCCA 222 at para. 36, self-represented litigants do not have "some kind of special status" that allows them to ignore rules of procedure. In *Murphy v. Wynne*, 2012 BCCA 113 at para. 16, Madam Justice Neilson, relying on comments of Mr. Justice Chiasson in *Stark v. Vancouver School District No. 39*, 2012 BCCA 41 (in Chambers) and

82. At paragraph 52.

> *Shebib v. Victoria (City)*, 2012 BCCA 42 (in Chambers), observed that "[w]hile it is important unrepresented litigants have a full opportunity to avail themselves of our court processes, all litigants must keep within the bounds of those processes." These comments in my view apply equally to an arbitration forum that has been chosen by the parties for the resolution of their dispute.
>
> 65 In the context of a court proceeding, the Canadian Judicial Council in its *Statement of Principles on Self-Represented Litigants and Accused Persons*, (Ottawa: Canadian Judicial Council, 2006) mandates fairness so as to ensure "equality according to law" in the sense of giving every litigant a fair opportunity to present their case. It also, however, imposes an obligation on self-represented parties to be respectful and familiarize themselves with the relevant practices and procedures of the court process. These principles, in my view, apply equally to the arbitration process. While some latitude is to be given to self-represented parties who may not understand or be unfamiliar with the arbitration process, an arbitrator, like a judge, is not required to ensure that a self-represented party participate in a proceeding if that party chooses not to do so. In short, an arbitrator does not have any special obligations to a self-represented party beyond the natural justice requirements owed to any party. The overarching test is fairness.

2. *Muskrat Falls*

In *Muskrat Falls Employers' Association Inc. v. Resource Development Trades Council of Newfoundland and Labrador*,[83] a labour arbitrator gave no reasons for his decision which interpreted a collective agreement regarding the number of bargaining unit supervisory personnel the employer was required to hire. The employer sought judicial review of the arbitrator's decision.

The Supreme Court of Newfoundland and Labrador (Trial Division) dismissed the application. Orsborn J. held that, *despite the complete lack of reasons*, the arbitrator's decision fell within a range of acceptable outcomes; the absence of reasons did not provide

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83. 2015 NLTD(G) 150. See also *Walton et al. v. Alberta Securities Commission*, 2014 ABCA 273 where the Court of Appeal of Alberta reiterated that the adequacy of reasons is not a stand-alone basis for finding a decision unreasonable.

a basis on which to set aside the arbitrator's decision. In so finding, Orsborn J. relied heavily on the Supreme Court of Canada's decision in Newfoundland and Labrador Nurses' Union:[84]

> 18 The decision in *Newfoundland and Labrador Nurses' Union*, in my view, casts a different light on the review analysis. There is a clear direction to reviewing courts to attempt to fill in any gaps in the tribunal's reasons and, as a starting point, to assume that the outcome is correct notwithstanding any deficiency in the reasons...
>
> . . .
>
> 20 The decision instructs the reviewing judge not to analyze the outcome and the reasoning process separately, but to look at the decision as a whole...
>
> 21 ...[I]t seems to me that the Court is directing reviewing judges to be less concerned about the reasoning process than about the actual outcome...
>
> 22 The decision of the arbitrator in Newfoundland and Labrador Nurses' Union was described by the trial judge as "completely unsupported by any chain of reasoning that could be considered reasonable"; (as reproduced in 2013 NLCA 13 at para. 5). The dissenting judge in the Court of Appeal said "Here, I might have said reasons were absent" (2010 NLCA 13 at para. 44). The majority of the Court of Appeal acknowledged that the arbitrator's pattern of thought was not clear from the "skeletal discussion" in the decision, but concluded that, from reading the decision as a whole, the arbitrator was "fully alive to the question in dispute".
>
> 23 The Supreme Court of Canada agreed that the arbitrator had provided reasons for his decision...
>
> 24 In conclusion, the judgment adopts the 'alive to the issue' concept referred to by the Court of Appeal – at paragraph 26:
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> > 26 In this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. ...
>
> 25 The Newfoundland and Labrador Nurses' Union decision instructs that if an arbitrator is 'alive to the question at issue', and has crafted a reasonable outcome, a reviewing court should not interfere. I take this to mean that if it is apparent that the arbitrator has

84. 2011 SCC 62, where the Supreme Court exhorted reviewing courts to "seek to supplement [the decision-maker's reasons] before [seeking] to subvert them." And *Dunsmuir* contemplates that reasonableness review could involve considering the reasons which could have been offered by the decision-maker, even if they weren't.

> understood the question raised by the grievance and has answered the question raised by the grievance, an outcome within the range of reasonable outcomes will be considered reasonable, even in the absence of reasons.
>
> 26 The decision thus suggests that, at least in the labour relations grievance arbitration context, an arbitrator's reasons, or lack thereof, have little role to play in assessing a decision for reasonableness. Unless the offered reasons demonstrate an "egregious error", a reviewing court should be very hesitant to find unreasonableness in the reasoning of the arbitrator. In balancing any faults in the reasoning process and expediency in decision-making, the balance will favour expediency.
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> [References omitted]

2. *UFCW, Local 401*

By contrast, in *United Food and Commercial Workers, Local 401, v. XL Foods Inc. (Calgary Beef Plant)*,[85] an arbitrator had dismissed a grievance and the union applied for judicial review of that decision. The reviewing judge quashed the arbitrator's decision on the ground of inadequate reasons.[86] The employer appealed to the Court of Appeal of Alberta.

The Court of Appeal dismissed the appeal and took the opportunity to discuss the role and expertise of arbitrators and their requirement to gives reasons for their decisions. On the role of arbitrators, the unanimous court stated:

> 8 Arbitrators provide a valuable service to employers and trade unions who enter into collective agreements. They resolve disputes arising from the collective agreement that the contracting parties are unable to resolve.
>
> 9 These adjudicators draw on a sophisticated body of arbitral case law contributed to by leading academics and lawyers that has developed over the last seventy years.

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85. 2016 ABCA 31. But see *Walton et al. v. Alberta Securities Commission*, 2014 ABCA 273 where the Court of Appeal of Alberta reiterated that the adequacy of reasons is not a stand-alone basis for finding a decision unreasonable.

86. 2014 ABQB 704.

10 The community of employers and trade unions entrust this important decision-making task to a cadre of professional arbitrators because they have confidence that this group of lawyers has the legal training required to make rational determinations and the good judgment needed to select a fair outcome from the pool of possible logical solutions.

11 But the consumers of arbitral services expect adjudicators to explain why they opted for the outcomes they settled on. They are not prepared to accept the disposition just because their makers are learned. This is not the tradition in a community governed by the rule of law.

On the requirement to gives reasons, the Court of Appeal, the court stated:

42 The procedural fairness doctrine requires a labour arbitrator hearing a grievance that brings into question the obligation of an employer to provide termination pay to employees whose layoff rights have expired and have lost their status as employees to explain why he or she decided the grievance in the manner he or she did.

43 This is so for two reasons.

44 First, the consequences of a decision for those whose interests are engaged is significant. The workers and the union are keenly interested. The former have lost their jobs and termination pay will provide them with some income security while they search for a new job. The latter has a statutory obligation to protect the interests of those they represent and it is the union that has advanced this grievance. The employer is also directly affected by the outcome of the grievance. If the arbitrator upholds the grievance, the company will have to pay more termination pay.

45 Second, the adjudicator's decision is not immune from judicial review. Section 145(2) of the *Labour Relations Code* permits a dissatisfied party to apply for judicial review. This fact makes reasons necessary from the perspective of the court tasked with the responsibility of reviewing the adjudicator's decision.

46 A party adversely affected by a decision must be able to assess its cogency in order to decide whether it displays any deficiencies that might cause a court to set it aside. "It is the mark of a good arbitrator that the loser knows why he lost. Disputants do not expect a forensic lottery when they ask a third party to help them resolve their differences".

47 There is a beneficial by-product of insisting that an adjudicator provide reasons. The adjudicator's decision-making is improved by the discipline associated with the production of written reasons. "[I]f a line of thought is suspect, the printed page increases the likelihood many times that the defect will be detected".

[Footnotes omitted.]

B. The Rule against Bias

In *DeMaria v. Law Society of Saskatchewan*,[87] the issue was whether a panel of the Admissions and Education Committee of the Law Society of Saskatchewan had demonstrated a reasonable apprehension of bias when it denied the appellant's application for membership into the Law Society. A reviewing court had held it had not.[88]

The appellant was a student-at-law who, during the term of his articles, had been the subject of academic sanction by reason of the nature of his participation in the bar admission program and questions about his character and suitability to become a lawyer. Due to appellant's history, the Executive Director of the Law Society referred his application for admission to the Committee, which in turn, ordered a hearing before a three-person panel which included Benchers. The panel refused admission and the appellant asked the Benchers to review that decision. The Benchers upheld the panel's decision and that decision was upheld on judicial review.

The appellant appealed to the Saskatchewan Court of Appeal on a number of grounds. However, the unanimous court decided the only ground with any merit at all was the issue of whether the Benchers had demonstrated a reasonable apprehension of bias and the court focussed its decision on that.

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87. 2015 SKCA 106.

88. 2013 SKQB 178.

The court first reiterated the *National Energy Board* test[89] and went on to apply that test to the facts and in the context of this case.

The appellant in this case argued that a reasonable apprehension of bias arose due to actions of the Benchers which included eating breakfast with the Law Society's in-house counsel before the hearing, allowing counsel to remain in the hearing room with the Benchers for several minutes after the hearing, disregarding the appellant's objection to the appearance of the Law Society's in-house counsel at the review hearing, and taking seven months to issue a decision. In addition, the appellant raised the facts that one Bencher's name was deleted from the list of Benchers on the Law Society's website, one Bencher made negative statements about the appellant and appellant's employer and discussed the appellant's case when interviewing a prospective employee and one Bencher was a 'friend' of the Law Society's in-house counsel on Facebook.

The court found that the evidence did not support the appellant's factual allegations and rejected his argument that a reasonable apprehension of bias had been demonstrated.

The court then moved to consider the possibility of institutional bias:

> 30 The Supreme Court in *International Woodworkers of America, Local 2-69 v Consolidated Bathurst Packaging Ltd.*, [1990] 1 SCR 282 at 323, said:
>
> > ...the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an

89. "Is there a *reasonable* basis to conclude that an *informed* person, viewing the matter *realistically and practically*—and *having thought the matter through*—would hold a reasonable apprehension of bias?"

> administrative tribunal...to abide strictly by the rules applicable to courts of law.

In other words, the courts apply the reasonable apprehension of bias test to the facts of a matter in a way that is responsive to the institutional context in which the impugned decision-makers operate.

31 In this case, the context in which all of this occurred appreciably blunts any sharp edge to Mr. DeMaria's remaining evidence. For example, as the Chambers judge observed: "...the unique regulatory structure and prevailing jurisprudence did not place [the Law Society's in-house counsel] off-side before the Benchers and does not restrict the Law Society's participatory rights on judicial review." To this observation I would add that the Law Society's in-house counsel, among other capacities, acts as legal advisor to the Executive Director of the Law Society and to the Law Society itself, prosecutes all instances of lawyer misconduct, handles general litigation involving the Law Society, and prosecutes instances of unauthorised practice of law. In other words, the lawyer who fills that in-house position wears many hats.

The court noted that the Law Society had enacted rules and a system which was less than perfect:

34 ...the system was set up such that in-house counsel for the Law Society might be called upon on the same day at the same Benchers' meeting to give legal advice *to the Benchers*–in their role as the directing-minds of the Law Society–and then to later make submissions *before the Benchers*–in their role as adjudicators–*on behalf of the Law Society* in an administrative or disciplinary hearing. In other words, the Law Society had not structured its affairs under its old *Rules* so as to clearly preclude the 'disturbing' possibility that counsel who has made submissions before the Benchers might then advise them in respect of the same matter: *2747-3174 Québec Inc. c Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 124 [*Québec (Régie des permis d'alcool)*].

35 I do not mean to suggest that the rules ought to specifically preclude counsel from acting in one of these two capacities. That, for a law society, should be a common sense practice regularly exercised to preserve at least the *appearance* of procedural fairness in administrative and disciplinary proceedings. But, recognising the risk and the obvious institutional limitations at play here, the Benchers should have been *particularly* keen to abstain at all times when acting as adjudicators from public displays of too-cosy familiarity with the Law Society's counsel, whether in-house or a retained private lawyer, in all administrative and disciplinary matters. As is evident from the facts of this case, behaviour of that nature not only undercuts the *appearance* of procedural fairness, but is unseemly in an adjudicator sitting in judgment of the *integrity* or *character* of another individual. If anyone ought to know better, it is those persons who are statutorily charged with setting and upholding standards of practice and conduct for the legal profession; but, that is also what–

> in some measure–saves this matter from giving rise to a *reasonable* apprehension of bias, as I will explain later. But, in order to do that, I need to clearly lay out the groundwork for the explanation.

However, the court concluded that any institutional bias argument was secondary, at best, to the allegations of actual bias:

> 39 Nonetheless, on the whole of what remains relevant and material to the question of bias, I find the evidence frames an *allegation* of an *apprehension* of bias–one that is based on the relationship between the Benchers and the Law Society's in-house counsel. Because of this–but to a lesser degree–the evidence may also be taken to suggest an apprehension of bias on the basis of institutional arrangements; but, I find this to be secondary to, and subsumed under, the first basis for the allegation. Moreover, Mr. DeMaria has not alleged that a reasonable apprehension of bias might arise in *a substantial number of cases* similar to his: *Québec (Régie des permis d'alcool)*, at para. 44. With that groundwork, I turn to review the Chambers judge's decision on this issue, beginning with the allegation against the A&E Panel.

Overall, the court was satisfied that the chambers judge had not erred by rejecting the bias argument even though she had, in fact, found some improper conduct had taken place:

> 41 This suggests the Chambers judge in fact concluded the circumstances did give rise to an objective *impression* or *perception* of impropriety, but that she had reasoned away from this conclusion on a subjective basis, referring particularly to the A&E Panel chairman's state of mind when he was communicating on an *ex parte* basis with the Law Society's in-house legal counsel. In this way, the Chambers judge could be seen to have turned the focus of her appraisal to the chairman's *actual* ability to keep an open mind and away from what an informed bystander would *reasonably perceive*. If so, this was in error.
>
> 42 As Cory J. explained in *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 636, the applicable test is one for a reasonable *apprehension* of bias:
>
> > The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an *unbiased appearance* is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of

> members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. *The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator*.
>
> (Emphasis added)

43 Similarly, in *Huerto v College of Physicians and Surgeons of Saskatchewan* (1996), 133 DLR (4th) 100 (Sask CA) at 104, Cameron J.A. observed that the test is "*largely an objective rather than a subjective one*, and it imports standards of reasonableness, which in turn imports a measure of discretion in the judge called upon to apply it" (emphasis added).

44 However, notwithstanding this, the Chambers judge's decision is correct. I say this because I find no *reasonable* basis to conclude that an *informed* person, viewing the matter *realistically and practically*–and *having thought the matter through*–would hold a reasonable apprehension of bias on the part of the chairman of the A&E Panel. No doubt, the chairman's golf invitation was an imprudent and out-of-place addition to a surprisingly *ex parte* email, which had delivered the A&E Panel's unreleased final decision to counsel for a party. But, that evidence is insufficient to supplant the *strong* presumption that the chairman had acted fairly and impartially *in reaching* that final decision. Unlike the case in *United Enterprises Ltd. v Saskatchewan (Liquor and Gaming Licensing Commission)*, [1997] 3 WWR 497 (Sask QB), this is a single transgression–a careless slip of familiarity–that is explicable (but, this is not to say it can be overlooked) given the context of the institutional limitations and administrative arrangements at the Law Society.

45 In my assessment, the relevant evidence is insubstantial and does not support a *reasonable* apprehension of bias, except–perhaps–to the 'very sensitive or scrupulous conscience'. Put another way, in the light of a *strong* presumption of impartiality and the institutional context at play here, the impugned conduct–a single flippant display of familiarity between a Bencher and the in-house counsel for the Law Society–simply would not demonstrate to a *reasonable* and *informed* person that the chairman had not been open to persuasion on the evidence and arguments presented in Mr. DeMaria's case. Benchers are, for the most part, educated and trained in the law. For that reason, Benchers are more than passingly familiar with the requirements of procedural fairness and natural justice, including the requirement that decision-makers remain independent and impartial. And, by reason of their professional training and experience with the adversarial process, they are skilled at compartmentalising their minds, expertly divorcing themselves from friendship and affinity to dispassionately assess a matter on the basis of advocacy and reasoned argument on the facts and law. In the result, I cannot say the evidence makes out a *real* likelihood or probability of bias on the part of the chairman; and "a mere suspicion is not enough" (see *S. (R.D.)* at para. 112).

Likewise, the court agreed with the chambers judge that no institutional bias had been made out:

47 ...In my assessment, the evidence, when considered *realistically* and *practically* in the institutional context of the matter, does not give rise to a *reasonable* apprehension of bias on the part of the Benchers.

48 I say this for largely the same reasons as arose in my assessment of the allegation of an apprehension of bias on the part of the chairman of the A&E Panel (particularly at paragraph 45). Without repeating that analysis, I would emphasise that the administrative arrangements established under the old *Rules* were inherently fraught with tension between the various roles played by the Benchers and the Law Society's in-house counsel. The evidence here is sparse, but it does indicate that administrative hearings of this nature could occur in the *midst* of convocation–the official name for a Benchers' meeting–but were held *in camera*, after excluding Law Society personnel from the meeting. Although not ideal for the reasons identified in *Québec (Régie des permis d'alcool)*, this arrangement is understandable in the context of the institutional limitations of the Law Society. But, that does not detract from the tension and, to an *uninformed* observer or one having a 'very sensitive or scrupulous conscience', the institutional overlap of these functions (prosecutor and legal advisor; adjudicators and directing-minds) at the same meeting might seem untoward. However, once the observer is informed of the context and has thought the matter through, the fact the Benchers were seen with counsel opposite to Mr. DeMaria before his hearing falls short of meeting the threshold for a *reasonable* apprehension of bias.

49 Lastly, in today's world, a reasonable and informed person would place little or no weight on the fact a Bencher is 'friends' on Facebook with the Law Society's in-house counsel. Without more, that unadorned fact is indicative of nothing more than the two individuals know each other, which would be presumed in any event from their respective offices within the corporate structure of the Law Society. This fact does not add anything to the balance.

50 At the end of the day, the Law Society admissions hearing process was not ideal and its execution in this case certainly had its shortcomings–and, for that reason, Mr. DeMaria was right to fearlessly raise his allegations of bias–but the circumstances simply do not amount to a *reasonable* apprehension of bias. On the whole, the evidence does not reasonably suggest anyone other than the A&E Panel or the Benchers made their respective decisions or that they were improperly influenced by their relationship with the Law Society's in-house counsel. Moreover, an *informed* person, viewing this matter *realistically and practically* in its proper context–and having thought the matter through–would not conclude it was more likely than not that the A&E Panel or the Benchers had not decided the matter impartially (*National Energy Board*).

51 For these reasons, I would sustain the Chambers judge's finding and dismiss this ground of appeal.

V. DISCLOSURE AND PRIVILEGE

A. Solicitor-client privilege

There are a number of recent decisions which address solicitor-client privilege in the administrative law context.

1. *Canada (Attorney General) v. Chambre des notaires du Québec*

In *Canada (Attorney General) v. Chambre des notaires du Québec*,[90] the Supreme Court of Canada was dealing with an appeal from a decision of the Quebec Court of Appeal upholding a decision which declared unconstitutional and invalid the "requirement procedure" set out in the *Income Tax Act (Canada)*[91] (the "Act") as it applies to notaries and lawyers.

The "requirement procedure" in the Act enables tax authorities to require any person to provide information or documents for any purpose related to the administration of the Act. Section 232 of the Act provides that accounting records are exempt from the definition of solicitor-client privilege.[92] Several Quebec notaries received requirements to provide

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90. 2016 SCC 20.

91. R.S.C. 1985, c. 1.

92. Section 232(1) of the Act provides that:

> ... solicitor-client privilege means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this

(continued...)

documents and other information relating to their clients to the Minister of National Revenue pursuant to section 231.2 of the Act for tax collection or audit purposes. The Chambre des notaires du Québec (the "Chambre") sought a declaration against the Attorney General of Canada and the Canada Revenue Agency that the sections of the Act dealing with requirement procedure and excluding accounting documents from professional secrecy (or solicitor-client privilege) were unconstitutional—in violation of sections 7 and 8 of the *Charter*—and of no force and effect. The Quebec Superior Court allowed the application[93] and the Quebec Court of Appeal upheld the Superior Court's decision.[94] The Court of Appeal held that the accounting records exemption from the definition of solicitor-client privilege was unconstitutional pursuant to section 52 of the *Constitution Act, 1982* and of no force and effect with respect to Quebec notaries and lawyers for all information and documents protected by solicitor-client privilege. The Attorney General and Canada Revenue Agency appealed to the Supreme Court of Canada.

In a unanimous judgment written by Wagner and Gascon JJ., the Supreme Court dismissed the appeal. The court rejected the argument that the Canadian tax system is based on the principle of self-reporting and self-assessment and that the tax authorities must, therefore, rely on broad powers of audit to ensure the system's integrity.[95] The court also rejected the argument that, because the requirements under the Act are issued in an administrative

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92. (...continued)
section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication."

[Emphasis added.]

93. 2010 QCCS 4215.

94. 2014 QCCA 552. The Court of Appeal set aside the Superior Court's decision in part.

95. Of course, every administrative agency would assert that access to solicitor-client privileged information is necessary to the fulfilment of its statutory mandate.

context— and not a criminal one—taxpayers have a lower expectation of privacy. The court held that the requirement provisions contained in the Act violated section 8 of the *Charter* as they applied to Quebec notaries and lawyers and were of no force and effect.

In rendering its decision, the court confirmed that solicitor client-privilege is a principle of fundamental justice within the meaning of section 7 of the *Charter* and of fundamental importance to the Canadian justice system. Solicitor-client privilege, therefore, must remain as "close to absolute as possible".[96] The court also confirmed that a requirement under the Act constitutes a seizure within the meaning of section 8 of the *Charter.*

The court's section 8 analysis provides an excellent discussion of the interplay between section 8 and professional secrecy or solicitor-client privilege:

> 27 Section 8 of the *Charter* does not explicitly protect professional secrecy. Rather, it protects against unreasonable searches and seizures. There are two questions that must be answered to determine whether a government action was contrary to s. 8. The first is whether the government action intruded upon an individual's reasonable expectation of privacy. If it did, it constitutes a seizure within the meaning of s. 8. The second is whether the seizure was an unreasonable intrusion on that right to privacy (*R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 33; *Lavallee*, at para. 35). In the case at bar, the first step is not really problematic, as the Court held in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, that a requirement under s. 231(3) of the *ITA* (now s. 231.2(1)) constitutes a seizure within the meaning of s. 8 (pp. 641-42).
>
> 1(1) Reasonable Expectation of Privacy
>
> 28 On the first question, it should be remembered that professional secrecy, which started out as a mere rule of evidence, became a substantive rule over time (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 875-76; *Smith v. Jones*, [1999] 1 S.C.R. 455, at paras. 48-49; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574,

96. At paragraph 5. However, the court held it was unnecessary in this case to conduct a section 7 analysis because the section 8 analysis led to the conclusion that the impugned provisions were unconstitutional: see paras. 25 and 26.

at para. 10). The Court now recognizes that this rule has deep significance and a unique status in our legal system (*R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 28 and 31-33; *Smith*, at paras. 46-47). In *Lavallee*, the Court reaffirmed that the right to professional secrecy has become an important civil and legal right and that the professional secrecy of lawyers or notaries is a principle of fundamental justice within the meaning of s. 7 of the *Charter* (para. 49). Moreover, professional secrecy is generally seen as a "fundamental and substantive" rule of law (*R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 39). Because of its importance, the Court has often stated that professional secrecy should not be interfered with unless absolutely necessary given that it must remain as close to absolute as possible (*Lavallee*, at paras. 36-37; *McClure*, at para. 35; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, at para. 27; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32, at para. 15).

29 From this perspective, Blanchard J. was right to note that [TRANSLATION] "[t]he fundamental importance of the right to professional secrecy of lawyers is a cornerstone not only of our judicial system but, more broadly, of our legal system" (para. 86).

30 In this respect, professional secrecy has a deep significance regardless of the nature of the legal advice being sought or the context in which it is sought (*Smith*, at para. 46). We therefore conclude, contrary to the argument of the AGC and the CRA, that for the purposes of the analysis under s. 8 of the *Charter*, the civil and administrative context of the requirement scheme does not diminish the taxpayer's expectation of privacy for information that is protected by professional secrecy.

31 It is true that this Court stated in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, that it might be appropriate to find that there is a lower expectation of privacy in an administrative context and therefore to apply a "less strenuous and more flexible" standard of reasonableness in determining whether a seizure is constitutional (pp. 506-7). To justify its reasoning in that case, the Court stated that "there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course" (p. 507). In such cases, the routine performance of the activities in question often involves the inspection by agents of the state of premises or documents that would otherwise be considered private. Since the state is therefore expected to have access to information for regulatory purposes, it would make no sense to find that, on the one hand, the disclosure of such information is normal but that, on the other, the expectation of privacy associated with the information is extremely high.

32 The situation is very different when information protected by professional secrecy is involved. The nature of such information means that it cannot be disclosed by a notary or a lawyer in any regulatory context. Even if the information may be obtained from a third party or may be a type of information that taxpayers must regularly provide to the tax authorities, it is presumed to be protected by professional secrecy while in the hands of a notary or a lawyer and is therefore exempt from seizure (*Maranda*, at paras. 33-34). The key difference between the situation in the case at bar and the one in *Thomson Newspapers* lies

in the fact that here, the party in possession of the information is the notary or the lawyer, not the person who is subject to the regulatory framework. We are therefore of the opinion that, with certain rare exceptions, the general rule is that information protected by professional secrecy that is in the possession of a legal adviser is immune from disclosure (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 37; *Smith*, at para. 51; *McClure*, at paras. 34-35.

33 Moreover, the Court confirmed in *FLS* that the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is always high, regardless of whether the question arises in a civil, administrative or criminal context. ...

. . .

35 In our view, therefore, it is well established that a client of a notary or a lawyer has a reasonable expectation of privacy for information and documents that are in the possession of the notary or lawyer and in respect of which a requirement is issued. Indeed, the Court wrote in *Lavallee* that "[a] client has a reasonable expectation of privacy in all documents in the possession of his or her lawyer, which constitute information that the lawyer is ethically required to keep confidential" (para. 35).

1(2) Unreasonable Intrusion on the Right to Privacy

36 In answering the second question from *Edwards* in respect of an unreasonable seizure that is contrary to s. 8, the courts must balance the interests at stake, namely an individual's privacy interest on the one hand and the state's interest in carrying out a search or seizure on the other. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Court stated in this regard "that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement" (pp. 159-60).

37 Here again, however, where the interest at stake is the professional secrecy of legal advisers, which is a principle of fundamental justice and a legal principle of supreme importance, the usual balancing exercise under s. 8 will not be particularly helpful (*Lavallee*, at para. 36). As the Court observed in *Goodis*, "[w]hile a fact-specific balancing may have been appropriate in *Fuda* [*v. Ontario (Information and Privacy Commissioner)* (2003), 65 O.R. (3d) 701 (Div. Ct.)], it cannot, having regard to this Court's categorical jurisprudence, apply where the records involve communications between solicitor and client" (para. 18).

38 In *Lavallee*, the Court stated that "solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance" (para. 36). In *Smith*, the Court noted that "[t]he disclosure of the privileged communication should generally be limited as much as possible" (para. 86). This means that any legislative provision that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable

(*Lavallee*, at para. 36). Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case (*Goodis*, at para. 20). In short, "[t]he appropriate test for any document claimed to be subject to solicitor-client privilege is 'absolute necessity'" (*Goodis*, at para. 24). Stringent standards must therefore be adopted to protect it. A procedure will withstand *Charter* scrutiny only if its impact on the professional secrecy of legal advisers is minimal, as minimal impairment "has long been the standard by which this Court has measured the reasonableness of state encroachments on solicitor-client privilege" (*Lavallee*, at para. 37).

39 Thus, where professional secrecy is in issue, what matters is not the context in which a privileged document or privileged information could be disclosed to the state, but rather the fact that the document or information in question is privileged. It is important that a client consulting a legal adviser feel confident that there is little danger that information or documents shared by the client will be disclosed in the future regardless of whether the consultation takes place in the context of an administrative, penal or criminal investigation: "The lawyer's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients" (*Foster Wheeler*, at para. 34).

40 From this perspective, it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected (*Maranda*, at paras. 30-33; *Foster Wheeler*, at para. 38). The line between facts and communications may be difficult to draw (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 941). For example, there are circumstances in which non-payment of a lawyer's fees may be protected by professional secrecy (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 30). The Court has found that "[c]ertain facts, if disclosed, can sometimes speak volumes about a communication" (*Maranda*, at para. 48). This is why there must be a rebuttable presumption to the effect that "all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42).

41 It follows that we must reject the argument of the AGC and the CRA that some information, particularly information found in accounting records, constitutes facts rather than communications and is therefore always excluded from the protection of solicitor-client privilege as defined in s. 232(1) of the *ITA*.

42 This being said on the applicable principles, the Chambre argued in particular, at every stage of the litigation, that Quebec notaries have a distinct role and face an even greater risk that information or documents they disclose in response to a requirement will be protected by professional secrecy. With respect, we are of the view that there are strong similarities between the common law's solicitor-client privilege and professional secrecy in the civil law. Nationwide, the Court's decisions with respect to the professional secrecy of legal advisers have been consistent. It would not be appropriate to change that approach in the case at bar.

The court went on to discuss the constitutional defects in the requirement scheme under the Act. In particular, it noted an absence of notice to the client, the burden on legal advisers and that the disclosure was not absolutely necessary. It also noted that all of the defects could be easily mitigated and remedied by way of measures that are compatible with the upholding solicitor-client privilege.[97]

Next, the court went on to consider the constitutionality of section 232(1)—the section which exempts accounting records from the definition of solicitor-client privilege. The court held that this section too violated section 8:

> 69 The Court of Appeal held that the accounting records exception also infringes the rights guaranteed by s. 8 of the *Charter*. We agree with this conclusion, too.
>
> 70 Even though we have concluded that the requirement scheme is contrary to s. 8 for the reasons and to the extent mentioned above, whether this exception is constitutional remains an important issue. In the companion case, *Canada (National Revenue) v. Thompson*, 2016 SCC 21, we find that the definition in s. 232(1) creates a valid exception to solicitor-client privilege on the basis of the rules of interpretation enunciated in *Blood Tribe*. Therefore, even if Parliament remedies the defects we have identified in the general requirement scheme, the application of that exception in the context of a requirement could nonetheless result in the disclosure of information that is normally "privileged" as defined by the courts. A separate analysis regarding the exception is therefore necessary in this case.
>
> 71 No matter how it is viewed, the exception set out in the definition of "solicitor-client privilege" does not withstand constitutional scrutiny. The abrogation of professional secrecy in respect of the accounting records of lawyers in a scheme that allows such documents to be seized gives the state access to a whole range of information that would otherwise be exempt from the duty to disclose and therefore exempt from seizure. The Minister has not satisfied us that giving the state access to a range of information that is normally protected by professional secrecy is absolutely necessary to meet the *ITA*'s objectives. In the absence of absolute necessity and given that there is no possibility of judicial review to ensure that professional secrecy is protected, the accounting records exception infringes s. 8 of the *Charter* by allowing the unreasonable seizure of information found in the accounting records of notaries or lawyers.

97. See paras.44 to 68.

1(1) Accounting Records and Protected Information

72 It is well established that the accounting records of notaries and lawyers are inherently capable of containing information that is protected by professional secrecy. In *Descôteaux*, the Court quoted the following passage from John Henry Wigmore (*Evidence in Trials at Common Law* (McNaughton rev. 1961), vol. 8, s. 2292): "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure" (pp. 872-73). In *Foster Wheeler*, the Court observed that "[i]t would be inaccurate to reduce the content of the obligation of confidentiality to opinions, advice or counsel given by lawyers to their clients" (para. 38). In *Maranda*, noting the importance of the information that can be extracted from particulars as seemingly neutral as the amount of the fees paid by a client, the Court concluded that "the fact consisting of the amount of the fees must be regarded, in itself, as information that is ... protected" (para. 33). The Court thus acknowledged that, even where accounting information includes no description of work, it may in itself, if disclosed, reveal confidential and privileged information.

73 Whether a document or the information it contains is privileged depends not on the type of document it is but, rather, on its content and on what it might reveal about the relationship and communications between a client and his or her notary or lawyer. If lawyers' fees can reveal privileged information, it is difficult to see why this could not also be the case for accounting records. Such records will not always contain privileged information, of course, but the fact remains that they may contain some, so their disclosure could involve a breach of professional secrecy. This is sufficient for the purposes of our analysis.

74 From this perspective, it is important to note that clients' names may appear in accounting records that contain information about amounts received by and owed to a notary or a lawyer. In some cases, those names may be privileged, since the fact that a person has consulted a notary or a lawyer may reveal other confidential information about the person's personal life or legal problems (*Lavallee*, at para. 28; G. Geddes, "The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege" (1999), 47 *Can. Tax. J.* 799, at pp. 805-6; Lederman, Bryant and Fuerst, at p. 939). Accounting records may also include a description of the mandate the notary or lawyer was given and for which a statement of account was submitted to the client. In other cases, the notary or lawyer may include numerous particulars about the work he or she performed, including the topic of the consultation with the client. Finally, a legal adviser might keep his or her books of account and other accounting records related to the statements of account sent to clients and the amounts owed by clients in such a way as to reveal certain aspects of the litigation strategy that was adopted in a given case.

75 This being the case, the outright exclusion of the accounting records of notaries and lawyers from the protection of professional secrecy as set out in the definition of "solicitor-client privilege" in s. 232(1) of the *ITA* causes a problem. Although the definition expressly provides that an accounting record includes "any supporting voucher or cheque", the expression "accounting record of a lawyer" is not defined in the *ITA*. Section 230(2.1) of

the *ITA* does require lawyers to keep records and books of account, but it does not specify what information those records must contain. This lack of precision creates a real risk that a wide variety of documents, some of which may contain information protected by professional secrecy, will be disclosed in response to a requirement. The expression "accounting record of a lawyer" is open to multiple interpretations. Some of these interpretations could lead a court to conclude that such records cannot be considered to contain any privileged information, while others could lead to the opposite conclusion (*Organic Research Inc. v. Minister of National Revenue* (1990), 111 A.R. 336 (Q.B.)).

76 Moreover, this lack of precision of the expression "accounting record of a lawyer" in terms of the documents practitioners must keep, the format they must be kept in and the level of detail they must contain creates a risk that different legal advisers will include different information in their accounting records. The risk that a client's privileged information might be exposed as a result of the exception may therefore vary greatly.

1(2) Constitutional Analysis

77 In *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, the Court noted that "whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter" (para. 34). In this appeal, we are not being asked to answer this question for all cases in which a legislature expresses a clear and unequivocal intention to abrogate professional secrecy in respect of a class of documents or information. The question in the case at bar is limited to whether an abrogation of that privilege that has the effect of permitting the seizure of documents that would otherwise be protected by professional secrecy constitutes an infringement of the right to be secure against unreasonable seizure guaranteed by s. 8.

78 In our view, for the exception at issue in this case, the answer must be yes. The exception is broad and undefined, as it permits the seizure of any accounting record of a notary or a lawyer. As a result of s. 231.7 of the *ITA*, the effect of the exception is stark. Once a court finds that a document is an accounting record, it must order that the document be disclosed regardless of whether it would be considered privileged in the absence of the exception. In other words, for all practical purposes, the exception removes from the court's jurisdiction the determination of whether accounting records in respect of which a requirement has been issued are privileged.

79 At the hearing in this Court, the AGC and the CRA, no doubt aware of this problem, argued for the first time that judges nonetheless have some "residual discretion" in such cases. They argued that a judge considering a ministerial application for disclosure can exercise this "discretion" to exclude privileged documents from the seizure of accounting records of a notary or a lawyer. We reject this argument. It conflicts with the actual wording of the accounting records exception and with the meaning of s. 231.7. Neither of those provisions mentions such a "residual discretion". The definition of "solicitor-client privilege" in s. 232(1) results, rather, in a complete abrogation of professional secrecy in respect of one class of documents, namely the accounting records of notaries and lawyers.

80 To determine whether an abrogation of professional secrecy in the context of a seizure is constitutional, a court must consider what characterizes professional secrecy as a substantive right. More specifically, the third factor of the substantive rule from *Descôteaux* is of decisive importance in such a case. According to Lamer J., when a law authorizes someone to do something that might interfere with the right to confidentiality that results from professional secrecy, "the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation" (p. 875 (emphasis added)).

81 Thus, a legislative provision cannot, by abrogating professional secrecy, authorize the state to gain access to information that is normally protected, where the abrogation is not absolutely necessary to achieve the purposes of the legislation. If the provision does so, the seizure will be unreasonable and contrary to s. 8 of the *Charter*. This rule prevents the state from giving itself, with a clear intention to create a statutory exception to professional secrecy, the authority to gain untrammelled access to documents that are normally privileged even though the state's operations are facilitated only minimally by access to the information.

82 This is consistent with the emphasis frequently placed by the Court on ensuring that professional secrecy always remains as close to absolute as possible (*McClure*, at para. 35). Limits on professional secrecy must take into account the duty recognized by the Court to minimize impairments (*Maranda*, at para. 14; *Goodis*, at para. 24). This Court's decisions have narrowly circumscribed the situations in which and the reasons for which professional secrecy may be set aside without the client's consent. In every case, professional secrecy will be set aside only if the court is of the view that it is absolutely necessary to do so, and only for a very specific purpose. Even then, the exceptions must be precisely defined.

83 For example, in legal proceedings, where professional secrecy prevents an accused from making full answer and defence, it can be set aside only if the innocence of the accused is at stake (*R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at pp. 43-45; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, at para. 69; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 607; *Brown*). Likewise, where concerns about the health and well-being of individuals make it necessary to infringe professional secrecy, "the interference must be no greater than is essential to the maintenance of security" (*Solosky*, at p. 840). In *Smith*, the Court upheld the requirement that privileged documents be disclosed only on the basis of a clear, serious and imminent danger (para. 84). Major J., dissenting on another point, agreed that a more permissive standard that authorizes "completely lifting the privilege and allowing [the client's] confidential communications to his legal advisor to be used against him in the most detrimental ways will not promote public safety, only silence" (para. 23). Any other conclusion would undermine the main rationale for professional secrecy: the need to maintain a legal system that ensures that individuals have access to specialists who will represent their interests and with whom they can be completely honest about their legal problems and needs.

84 The potential scope of the expression "accounting record of a lawyer" is therefore problematic from the standpoint of the absolute necessity test. The exception set out in the definition of "solicitor-client privilege" in s. 232(1) of the *ITA* does not distinguish the many forms that information in an accounting record can take. For now, all information in an accounting record is to be disclosed in response to a requirement regardless of the form or the content of the record. The information may therefore have nothing to do with the Minister's power of audit and collection, and the Minister may not need it in order to achieve his or her objective under the *ITA*. In fact, nothing in the arguments of the AGC and the CRA suggests why, to achieve the purposes of the *ITA*, it would be absolutely necessary to set aside professional secrecy for such a wide range of documents rather than, for example, doing so only in respect of the amounts paid and owed by clients.

85 It is true that in the companion case, *Thompson*, the Minister argues that, when a requirement is sent to a lawyer whose own tax liability is the subject of an assessment, access to clients' names may be necessary in order for the amounts owed by the lawyer to be collected and for the Minister to fulfil the Minister's duties under the *ITA*. Nevertheless, we note that, in the absence of a definition of "accounting record of a lawyer" in the *ITA*, it is impossible to distinguish an accounting record that contains only a client's name and the amount the client owes the lawyer from one that contains much more information about the nature of the activities a lawyer has engaged in for a client under a mandate for professional services. When the Minister requests access to a lawyer's accounting records by means of a requirement, all such records must be disclosed, even if they contain information that will not help the CRA collect the amounts it is owed.

86 In closing, we would add that a conclusion that the exception is valid could have unfortunate consequences that transcend this appeal. The *ITA* sets only a vague limit on what the CRA can do in requesting access to information by means of a requirement: the information must be necessary "for any purpose related to the administration or enforcement of this Act" (s. 231.2(1)). There appear to be no restrictions on sharing the information with government agencies and other public players as long as the CRA does so for a purpose related to the administration or enforcement of the *ITA*.

87 As a result, there is a real risk that, even if an audit or a collection action under the *ITA* does not directly target clients, information that the CRA obtains about them could be used against them in other circumstances. Within the CRA, for example, information disclosed in response to a requirement could be used to start investigations concerning clients' income tax returns. In our view, it would be unacceptable to allow the state to make use of an administrative procedure in order to obtain information that would otherwise be protected by professional secrecy, and then allow it to use that information for other purposes simply because Parliament excluded a lawyer's accounting records from the definition of "solicitor-client privilege".

Finally, the court concluded that none of the section 8 violations could be saved by section 1 of the *Charter*.[98]

Ultimately, the court held that the requirement scheme in the Act infringed section 8 of the *Charter* and was unconstitutional insofar as it applied to notaries and lawyers in Quebec in their capacities as legal advisors. It was ordered that the statutory provisions be "read down" so as to exclude notaries and lawyers from the scope of their operation.

2. *Thompson*

In the companion case, *Canada (National Revenue) v. Thompson*,[99] the Supreme Court of Canada again dealt with the purported exclusion of lawyers' accounting records from the protection of "solicitor-client privilege" as defined in section 232(1) of the *Income Tax Act* (the "Act"). Thompson was a lawyer from Alberta against whom the Minister took enforcement action under the Act. The CRA sent Thompson a requirement pursuant to section 231.2(1) of the Act. Thompson refused to provide details about his accounts receivable claiming that the information was protected by solicitor-client privilege. He filed a notice of constitutional question, asking the Federal Court to rule on whether section 231.2(1) could be interpreted and applied to require a lawyer to divulge privileged information about his or her clients to the CRA. Thompson also claimed that the requirement constituted an unreasonable search or seizure contrary to section 8 of the *Charter*.

98. See paras. 88 to 91.

99. 2016 SCC 21.

The Federal Court ruled that the client names and financial information contained in Thompson's accounting records were not shielded from disclosure by solicitor-client privilege and that no breach of section 8 had been established.[100]

The Federal Court of Appeal allowed Thompson's appeal in part, holding that there could be rare circumstances in which a lawyer's accounting records contained privileged information, possibly with respect to clients' names.[101] It sent the matter back to the Federal Court to determine whether any client names in Thompson's accounts receivable listing were protected by solicitor-client privilege. The Court of Appeal dismissed the section 8 challenge.

The Supreme Court of Canada allowed the appeal. In doing so, the court made the following comments about solicitor-client privilege and the principles of statutory interpretation:

> A. Solicitor-Client Privilege
>
> 16 Given that this appeal turns on the interpretation of a statutory provision purporting to define solicitor-client privilege in a particular manner for the purposes of the *ITA*, it will be important to make some preliminary remarks about the nature of this privilege as developed by the courts.
>
> 17 Solicitor-client privilege has evolved from being treated as a mere evidentiary rule to being considered a rule of substance and, now, a principle of fundamental justice (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 34; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 49; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, at para. 11; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 8 and 84). The obligation of confidentiality that springs from the right to

100. No. T-1180-12, October 31, 2012.

101. 2013 FCA 197.

solicitor-client privilege is necessary for the preservation of a lawyer-client relationship that is based on trust, which in turn is

> indispensable to the continued existence and effective operation of Canada's legal system. It ensures that clients are represented effectively and that the legal information required for that purpose can be communicated in a full and frank manner (*R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289 ...).

(*Foster Wheeler*, at para. 34)

18 In *Descôteaux*, one of the earliest cases in which this Court acknowledged that solicitor-client privilege involves a substantive right, Lamer J., as he then was, elaborated on the various aspects of the privilege as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [p. 875]

The third and fourth elements of this substantive rule have together been interpreted to support the proposition that an intrusion on solicitor-client privilege must be permitted only if doing so is absolutely necessary to achieve the ends of the enabling legislation (*Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32, at para. 24).

19 Although *Descôteaux* appears to limit the protection of the privilege to communications between lawyers and their clients, this Court has since rejected a category-based approach to solicitor-client privilege that distinguishes between a fact and a communication for the purpose of establishing what is covered by the privilege (*Maranda*, at para. 30). While it is

true that not everything that happens in a solicitor-client relationship will be a privileged communication, facts connected with that relationship (such as the bills of account at issue in *Maranda*) must be presumed to be privileged absent evidence to the contrary (*Maranda*, at paras. 33-34; see also *Foster Wheeler*, at para. 42). This rule applies regardless of the context in which it is invoked (*Foster Wheeler*, at para. 34; *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 289).

20 In the case at bar, therefore, we cannot conclude at the outset that Mr. Thompson's communications with his clients are distinct from financial records that disclose various facts about their relationships in order to determine whether solicitor-client privilege covers those facts. Absent proof to the contrary, all of this information is *prima facie* privileged, and therefore confidential.

21 With these general principles in mind, we will now turn to the interpretation of the purported exception to "solicitor-client privilege" contained in the definition of that term in s. 232(1) *ITA*.

B. Blood Tribe Criteria for Statutory Interpretation

22 The Minister contends that s. 232(1) of the *ITA*, particularly when read in conjunction with ss. 231.2 and 231.7, evinces a clear and unambiguous parliamentary intent to abrogate solicitor-client privilege over information found in "accounting record[s] of a lawyer". Mr. Thompson disputes this position. The parties' disagreement turns primarily on whether, as is required by this Court's decision in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, an appropriately restrictive interpretation of the impugned definition can lead to the conclusion that the legislature intended to define solicitor-client privilege so as to exclude a class of documents from its protection.

23 *Blood Tribe* was a case that involved statutory interpretation. The issue was whether s. 12 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"), could be read so as to permit the Privacy Commissioner to have access, for the purpose of ensuring compliance with the *PIPEDA*, to information that would otherwise be protected by solicitor-client privilege. Section 12 (now s. 12.1) gave the Privacy Commissioner the authority to compel a person to produce any records the Commissioner considered necessary for the investigation of a complaint "in the same manner and to the same extent as a superior court of record", and "whether or not it is or would be admissible in a court of law". The Commissioner argued that this language should be read as permitting her to have access to documents which would otherwise be confidential by virtue of being privileged.

24 Binnie J., writing for the Court, held that such an interpretation of s. 12 was untenable in light of the shift of solicitor-client privilege from being merely a rule of evidence to becoming one of substance (*Blood Tribe*, at para. 2). He explained that

> legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read not to include solicitor-client documents: *Lavallee*, at para. 18; *Pritchard*, at para. 33. This case falls squarely within that principle. [Emphasis deleted; para. 11.]

This conclusion aligned perfectly with the Court's earlier pronouncement in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, that "[l]egislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively" and that this privilege may not be abrogated by inference (para. 33).

25 The parties therefore agree that it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, although these might provide supporting context where the language of the provision is already sufficiently clear. If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect.

26 In contrast to s. 12 of the *PIPEDA*, which did not explicitly grant the Privacy Commissioner the power to obtain and review documents in respect of which solicitor-client privilege was claimed, the definition of "solicitor-client privilege" in s. 232(1) *ITA* is unequivocal. It lays out what is protected when the privilege is invoked to oppose a compliance order under s. 231.7. The definition includes the words "except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be ... a communication" covered by solicitor-client privilege, which means that accounting records are explicitly excluded from the scope of the privilege for the purpose of the *ITA*.

27 Consequently, once a court has determined that a document over which solicitor-client privilege is being asserted is an accounting record of a lawyer, s. 232(1) is clearly intended to bypass the traditional protection associated with solicitor-client privilege, which means that the document can then be seized and inspected by the Minister. We will disregard for now the issue of whether this definition of the privilege corresponds to the broader scope of the right that has been established in the jurisprudence since s. 232(1) (then s. 126A(1) of the *Income Tax Act*, R.S.C. 1952, c. 148) was amended in 1965 (*An Act to amend the Income Tax Act and the Federal-Provincial Fiscal Arrangements Act*, S.C. 1965, c. 18, s. 26). Whether Parliament may define what is privileged generally, in light of the evolving and expanded understanding of this right, is a different question, to which we will return below.

28 The legislative history of s. 232(1) lends further support to an interpretation to the effect that Parliament intended to exempt a lawyer's accounting records from the protection of solicitor-client privilege. Parliament introduced a general definition of "solicitor-client

privilege" into the *ITA* by enacting s. 126A(1) (now s. 232(1)) in 1956 (*An Act to amend the Income Tax Act*, S.C. 1956, c. 39, s. 28). At that time, the definition was functionally the same as the one now found in s. 232(1), but without the accounting records exception:

> (e) "solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence.

29 However, in the 1962 case *In re Income Tax Act*, [1963] C.T.C. 1 (B.C.S.C.) ("*Brown*"), leave to appeal to this Court refused, [1965] S.C.R. 84, the British Columbia Supreme Court concluded that to the extent that trust account records and other accounting or bookkeeping records maintained by lawyers might contain privileged information, the Minister could not obtain them by means of an order made by a court under what was then s. 126A(5)(*b*) (pp. 5-7). Sullivan J. pointed out that "[i]f it were the intention of Parliament to make all records of a solicitor available to inspection by taxation people then it would be a simple matter to so provide by appropriate legislation" (p. 5).

30 Not too long after that, in 1965, Parliament amended the definition of "solicitor-client privilege" to introduce the current exemption for accounting records. When asked to explain why the exemption was being added, the Minister of Finance stated: "... it became evident as a result of a court decision that the definition of solicitor-client privilege was deficient" (*House of Commons Debates*, vol. III, 3rd Sess., 26th Parl., June 25, 1965, at p. 2875). It is thus difficult to consider the intention behind this amendment to be anything other than to address the refusal in *Brown* to require the disclosure of privileged information by enacting an express legislative provision permitting such a disclosure.

31 We would add that to find that s. 232(1) of the *ITA* is not indicative of a clear legislative intent to exempt certain documents from the protection of solicitor-client privilege would be to deprive the *ITA*'s definition of this privilege of any functional meaning. The *ITA* creates a self-assessment system which "depends for its success upon the taxpayers' honesty and integrity in preparing their returns. While most taxpayers undoubtedly respect and comply with the system, the facts of life are that certain persons will attempt to take advantage of the system and avoid their full tax liability" (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 648). A system that enables the Minister to have access to books and records in relation to a taxpayer's personal and business affairs is thus crucial to the Minister's ability to verify the veracity of a taxpayer's return (*Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643, at para. 20). Yet as the Minister points out, excluding some of these records from the Minister's scrutiny could enable lawyers and their clients to hide misreporting and tax evasion behind the veil of solicitor-client privilege. According to the Minister, access to the records, such as client names, is necessary to effectively determine their financial liability to the taxpayer for collection purposes.

32 It is thus clear to us that if Parliament's intent in defining "solicitor-client privilege" in s. 232(1) *ITA* as it has were not to exempt accounting records from the protection of this privilege, that definition and the apparent exemption would essentially serve no purpose. This would violate the presumption against tautology, according to which "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain" (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 211, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831 at p. 838). Instead, every word has "a specific role to play in advancing the legislative purpose" (Sullivan, at p. 211). Given that legislation must be read in its entire context and having regard to the legislative purpose and scheme (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578), it is at the very least important to ensure that our characterization of the legislative intent underlying the definition of solicitor-client privilege in s. 232(1) is not incompatible with the purpose of the Minister's audit and enforcement powers as they are structured in the *ITA*.

33 If we consider the express language of the definition of "solicitor-client privilege" in s. 232(1) together with the provision's legislative history, Parliament's intent to define this privilege so as to exclude a lawyer's accounting records from its protection could hardly be clearer. Even the most restrictive interpretation of the provision leads to this conclusion, as the definition in s. 232(1) must be read in tandem with the *ITA*'s other provisions relating to the production of documents. In this regard, we note that, contrary to what the intervener the Canadian Bar Association suggests, it would be inappropriate to read the definition so restrictively as to conclude that it can apply only to documents that are already not protected by solicitor-client privilege. As we explained above, such an interpretation would disregard the legislative intent behind the definition and render it functionally meaningless.

34 In short, in contrast to how the statutory provision at issue in *Blood Tribe* could be interpreted, the only interpretation of the definition of "solicitor-client privilege" in s. 232(1) that takes account of the history of the provision and the purpose of the broader scheme into which it is incorporated is that the provision is intended to permit the Minister to have access to lawyers' accounting records even if they contain otherwise privileged information.

The court concluded:

36 It is equally important to note that in *Chambre des notaires* we hold that the *ITA*'s requirement scheme, insofar as it applies to lawyers and notaries, infringes s. 8 of the *Charter* and that the infringement cannot be justified under s. 1. Given that the scheme is invalid to that extent, the request made to Mr. Thompson under that scheme is now foreclosed.

37 It is possible that Parliament will amend ss. 231.2 and 231.7 to remedy the constitutional defects of the requirement scheme. Even if it does not do so, however, there are other situations in which courts could be asked to determine whether certain information

> is covered by solicitor-client privilege and, if they find that the privilege does not apply, to order that the information be disclosed. As a result, we find that it will be helpful in the instant case to address the appropriateness of the remedy granted to Mr. Thompson by the Federal Court of Appeal.
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> 38 In light of our conclusions in *Chambre des notaires* that the purported exception in the definition of "solicitor-client privilege" in s. 232(1) of the *ITA* is constitutionally invalid and that any court order for the disclosure of documents cannot be taken to include privileged information, we are of the view that the Federal Court of Appeal acted appropriately in sending Mr. Thompson's case back to the Federal Court to have it determine whether any information in the accounting records sought by the CRA was privileged and therefore exempt from disclosure.
>
> 39 Still, solicitor-client privilege is a right that belongs to, and can only be waived by, a client of a legal professional (*Lavallee*, at para. 39; *Chambre des notaires*, at para. 45). In both *Lavallee*, at para. 40, and *Federation of Law Societies of Canada*, at paras. 48-49, this Court noted that a lawyer is not the alter ego of his or her client, so it is the client and not the lawyer who must be given an opportunity to assert the privilege over the information sought by the state. A court must act to facilitate the client's ability to do so.
>
> 40 The Federal Court of Appeal's order would therefore have been insufficient to safeguard the rights of Mr. Thompson's clients. In order to properly afford clients the opportunity to raise their right to solicitor-client privilege, they must be notified when a court considers making any order requiring the disclosure of what might be privileged information. They must also be afforded the opportunity to decide whether they wish to contest the disclosure of the information requested by the state, and if they do wish to do so, they must be permitted to make submissions in that regard on their own behalf. Thus, should Parliament choose to modify the existing *ITA* disclosure scheme in order to remedy its constitutional defects, a court assessing a request for access to presumptively privileged information will need to ensure that the clients whose information is being sought can participate in the process of asserting the protections that apply to them.

3. *Two other SCC cases with reserved decisions*

The Supreme Court has heard but (as of the date of writing) has not yet issued decisions in two other cases that involve solicitor-client privilege in the administrative context:

- *Karine Lizotte, in her capacity as assistant syndic of the Chambre de L'assurance de dommages v. Aviva Insurance Company of Canada, et al.*, Case No. 36373 (heard on 24 March 2016).

- *Information and Privacy Commissioner of Alberta v. Board of Governors of the University of Calgary*, Case Number No. 69443 (heard on 1 April 2016).

4. *Suncor Energy Inc.*

In *Alberta v. Suncor Energy Inc.*,[102] the Ministry of Labour sought an order compelling Suncor to provide information and records related to a workplace fatality. Suncor claimed both litigation privilege and solicitor-client privilege. At issue was the scope of the Occupational Health and Safety authority to request information from a party that has been created or collected during an investigation that the same party was statutorily mandated to conduct.

Justice Manderscheid of the Alberta Court of Queen's Bench held that:

a. Suncor's investigation into the fatality had a dual purpose: regulatory (pursuant to a statutory requirement) and litigation. The fact that a dual purpose for the investigation existed did not *ipso facto* extinguish nor abrogate Suncor's right to claim legal privilege. Where the claimant is able to establish that the *dominant purpose* for conducting the investigation was in contemplation of litigation, litigation privilege will still apply.[103]

b. In this case, the Ministry failed to demonstrate that Suncor had not conducted its internal investigation in contemplation of litigation. Documents and information that

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102. 2016 ABQB 264.

103. At paragraph 44.

had been created and collected during the internal investigation for the dominant purpose of litigation were covered by litigation privilege.

c. Suncor was directed to meet with a Referee and explain the evidentiary basis for which it was claiming privilege with respect to requested documents, and the Referee would make recommendations to the court as to whether litigation privilege applied.

B. Deliberative Secrecy

The case of *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*[104] was discussed at length under standards of review. The case is also interesting with respect to the principles of deliberative secrecy.

The majority of the Supreme Court of Canada—in a judgment delivered by Gascon J.—concluded that it was within the powers of the arbitrator to allow examination of members of the executive committee on the motives for their decision to terminate a teacher. The court was satisfied that the arbitrator had allowed the examination of the committee members on the basis that their testimony would be helpful in determining whether the terms of the collective agreement and of Quebec's *Education Act*[105] governing evidence and procedure had been complied with in the course of the disciplinary proceedings.

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104. 2016 SCC 8.

105. CQLR, c. I-13.3.

VI. ADMINISTRATIVE LAW, THE CONSTITUTION AND THE *CHARTER*

In addition to the *Chambre des notaries du Québec* and *Thompson* cases discussed under the topic of privilege, there have been several cases of interest in which Constitutional or *Charter* provisions are at issue.

- As discussed above, in the companion cases of *Canada (Attorney General) v. Chambre des notaires du Québec*[106] and *Canada (National Revenue) v. Thompson*,[107] the Supreme Court of Canada has held that the requirement scheme contained in the *Income Tax Act*, which exempted accounting records from the definition of solicitor-client privilege, infringed section 8 of the *Charter*.

- The Alberta case of *Canada (Attorney General) v. E.F.*[108] dealt with the complex issue of physician assisted suicide. E.F. brought an application in the Alberta Court of Queen's Bench for judicial authorization allowing her a physician assisted death pursuant to the exemption granted under the *Carter 2016* decision of the Supreme Court of Canada. In such cases, the role of the court is to ascertain whether the applicant fell within the class of people who have been granted a constitutional exemption from the *Criminal Code* provisions banning assisted suicide during the period in which the Federal

106. 2016 SCC 20.

107. 2016 SCC 21.

108. 2016 ABCA 155.

Parliament was drafting physician assisted suicide legislation. One of the issues was whether the constitutional exemption only applied to those persons suffering from a terminal illness. The motions judge held it did not and the Court of Appeal of Alberta agreed. A second issue was whether the exemption included persons whose medical condition was psychiatric in nature. The motions judge held that it did and the Court of Appeal agreed.

- The case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resources Operations)*[109] dealt with a claim by the Ktunaxa Nation that the Minister had violated their freedom of religion under section 2 of the *Charter* and breached his duty to consult and accommodate Aboriginal rights under section 35 of the *Constitution Act, 1982* when he approved a Master Development Agreement for the development of a year round ski resort. An application for judicial review of the Minister's decision had been dismissed and the British Columbia Court of Appeal dismissed the appeal, holding that the Minister's decision did not violate section 2(a) of the *Charter* and that the Minister had met his duty to consult and accommodate. The Supreme Court of Canada has granted leave to appeal this decision.

- In *Taman v. Canada (Attorney General)*,[110] the Public Service Commission had denied the applicant's request for permission and a leave of absence to seek nomination and be a candidate in the federal election. The applicant applied for judicial review of that decision and argued that the decision violated her rights under section 2(b) and 2(d) of the *Charter*, as well as

109. 2015 BCCA 352, leave to appeal to SCC granted March 17, 2016.

110. 2015 FC 1155.

section 3. Madam Justice Kane held that the decision did violate the applicant's *Charter* rights, but that it was saved under section 1 of the *Charter* because it reflected a proportionate balancing of the *Charter* rights with the principle of political impartiality in the public service.

- As discussed under the topic of standards of review, the *Trinity Western University* line of cases raises important questions about balancing the rights to freedom of religion with the right to equality. In the recent Nova Scotia Court of Appeal decision, the court held that the *Charter* did not apply to Trinity Western University because it was a private university.[111] The decisions from the Nova Scotia, Ontario and British Columbia Courts of Appeal will undoubtedly be appealed to the Supreme Court of Canada.

- Last year, the Court of Appeal of Alberta's decision in *Stewart v. Elk Valley Coal Corp.*[112] held that an employer's termination of an 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. The Supreme Court of Canada has granted leave to appeal that decision.[113]

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111. 2016 NSCA 59 at para. 61.

112. 2015 ABCA 225.

113. 2015 S.C.C.A .No. 389.

VII. A MISCELLANY OF OTHER DEVELOPMENTS

A. Jurisdiction

- In *Goodman v. Canada (Minister of Citizenship and Immigration)*,[114] the Refugee Board found that the respondent was inadmissible to Canada. He applied to the Minister to exercise his discretion and grant Ministerial relief. He also brought an application for judicial review of the Board's decision. The Federal Court stayed the respondent's application for judicial review until 15 days after the applicant received the Minister's decision.

  The Minister appealed the order granting the stay, arguing that the Federal Court had committed a jurisdictional error by exceeding its jurisdiction by taking away the Minister's discretion to await the outcome of the judicial review before making his own decision on whether Ministerial relief should be granted.

  The Federal Court of Appeal dismissed the appeal. Nothing in the Act required the Minister to wait for the outcome of a judicial review proceeding before rending a decision on Ministerial relief; the Minister does not have discretion to determine the order in which decisions are made. The Federal Court exercised it jurisdiction in deciding whether to grant the stay in the interests of justice.

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114. 2016 FCA 126.

- The case of *Di Pietro v. Law Society of the Northwest Territories*[115] dealt with whether the Executive Director of the Law Society had exceeded her jurisdiction by amending the applicant's status as a member of the Law Society. The Law Society argued that the Executive Director was merely correcting an error which had granted the applicant membership status that he was not entitled to. Smallwood J. held that the Executive Director did not have the statutory authority to change the applicant's status and remitted the matter back the Law Society for reconsideration.

- In *Saskatchewan (Attorney General) v. Ballantyne*,[116] the Saskatchewan Court of Queen's Bench held that a provincial court judge had erred in declining jurisdiction to hear and rule on applications for peace bonds. The requirement of consent of the Attorney General was satisfied by the Director of the High Risk Offender Unit of the Ministry of Justice since the Attorney General had properly delegated the authority to consent to the Director.

- *Cst. A. v. Edmonton (City) Police Service*[117] dealt with whether the Alberta Court of Queen's Bench had jurisdiction to review a decision of the Law Enforcement Review Board. Sulyma J. held that the court did not have jurisdiction to hear a judicial review application of a dismissal decision because the applicant had proceeded through the disciplinary process set out in the *Police Act* which provided a direct appeal to the Court of Appeal of

115. 2016 NWTSC 11.

116. 2015 SKQB 393.

117. 2015 ABQB 697.

Alberta. The *Police Act* gives no role to the Court of Queen's Bench in such matters.

- The case of *Gendre v. Fort Macleod (Town)*[118] dealt with an application by a town mayor for a declaration that certain resolutions and a bylaw enacted by the town council were passed in bad faith and, therefore, outside the scope of the council's jurisdiction. The resolutions and bylaw in question removed the mayor's authority to chair council meetings, to sign bylaws, to call special meetings, and to sit on boards and committees. The council described the resolutions and bylaw as sanctions to address misconduct by the mayor. The applicant argued that the resolutions and bylaw were passed for the improper purpose of punishing him for the expressing of contrary opinions and being critical of town administration. The court held that the council had not acted in bad faith or otherwise outside of its jurisdiction. The application was dismissed.

- In *French v. Newfoundland and Labrador (Royal Newfoundland Constabulary)*,[119] Justice Adams of the Newfoundland and Labrador Supreme Court dismissed an application for judicial review to set aside a disciplinary tribunal's decision. The applicant had argued that the charges against him were statute-barred and, therefore, the tribunal had no jurisdiction to proceed. Adams J. held that it was reasonable for the tribunal to conclude that the charges were not statute barred and that it had jurisdiction to hear the matter.

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118. 2015 ABQB 623.

119. 2016 NLTD(G) 53.

The fact that another decision-maker might find the limitation period had expired did not render the tribunal's decision unreasonable.

B. Mootness

- In *Saskatchewan (Attorney General) v. Ballantyne*,[120] the Saskatchewan Court of Queen's Bench heard an application for judicial review dealing with a provincial court's refusal to exercise her jurisdiction to hear peace bond applications even though the matter was moot. The court held that there remained an adversarial context to the issue and that the subject was a proper use of judicial resources given that the judge's decision had impact on the law governing applications for peace bonds in general.

C. Injunctive relief

- In *UAlberta Pro-Life v. University of Alberta*,[121] the applicants sought an "interim-interim" injunction, a temporary injunction and a permanent injunction to restrain the University from applying its rules and policies, including the Code of Student Conduct, partially and selectively to the applicants, from implementing policies which restrict unpopular or controversial expression on campus and from imposing security fees or other restrictions on the applicants due to their controversial views. The applicants also sought an order of *mandamus* requiring the University to ensure the applicant's ability to freely promote its message, to apply the Code of Conduct

120. 2015 SKQB 393.

121. 2015 ABQB 719.

in a fair and unbiased manner, to uphold the rule of law and to fulfill its duties to protect the applicant's freedom of expression. Graesser J. denied the order of *mandamus* on the ground that the applicant had not applied for judicial review. He also denied injunction relief. He applied the tripartite test established in *RJR-MacDonald Inc.* and concluded the test for injunctive relief had not been met.

D. Abuse of process

- In *Harrison v. Law Society of British Columbia*,[122] the British Columbia Court of Appeal held that an appeal from a dismissal of an application for judicial review constituted an abuse of process because it was being used to collaterally attack the final decision of the lower court.

E. Professional misconduct

- The Ontario Court of Appeal gave a lengthy discussion of professional misconduct, regulation of the legal profession and the test for incivility in *Groia v. The Law Society of Upper Canada*.[123] The court affirmed a disciplinary tribunal's finding that Groia had engaged in professional misconduct on the basis of his in-court conduct towards opposing counsel. The penalty imposed by the tribunal—a one month suspension and adverse costs award amounting to $200,000—were also upheld.

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122. 2015 BCCA 258.

123. 2016 ONCA 471.

F. The record

- *Sobeys West Inc. v. College of Pharmacists of British Columbia*[124] involved a prohibition against pharmacists providing loyalty points for prescriptions. The British Columbia Court of Appeal held that affidavit evidence that was not before a tribunal should not have been included in the record on judicial review.

- The parallel case in Alberta involves important issues about who determines the public interest about this prohibition—the professional regulatory body, or the court—and the applicable standard of review.[125]

VIII. CONCLUSION

In a year where there were not a lot of ground-breaking administrative law cases decided, the court still gave administrative law practitioners and scholars plenty to read and analyze!

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124. 2016 BCCA 41.

125. *Sobeys West Inc. v. Alberta College of Pharmacists*, 2016 ABQB 138. The decision is under appeal.