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A Long Winding Road: Where Have We Been and Where Are We Going?

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FROM COAST TO COAST:
THE YEAR IN REVIEW IN ADMINISTRATIVE LAW

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I. INTRODUCTION[1]

The past year has once again provided a number of interesting administrative law decisions which highlight the complexities encountered in judicial reviews and appeals. Cases involving standards of review and jurisdiction have been particularly plentiful, while a number of cases dealing with standing, procedural fairness, and the *Charter* are also worthy of note.

II. STANDARDS OF REVIEW

Determining the applicable standard of review continues to be a complicated matter for reviewing courts, as well as a matter of contention for the justices of our highest court. As Justice Danyliuk of the Saskatchewan Court of Queen's Bench aptly described the bench's growing frustration with the issue:

> ...issues pertaining to selection of the appropriate standard of review continue to confound those of us who are mere foot soldiers in the trench warfare that is administrative law....[2]

The complexity of determining the applicable standard of review arises from a variety of factors. The existence of a statutory right of appeal, the presence of a statutory privative clause, the degree of specialized function or expertise of the delegate, the nature of the question being reviewed, the concepts of procedural fairness and the rule of law, the

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

2. *Risseeuw v. Saskatchewan College of Psychologists*, 2017 SKQB 8 at para. 34.

legislative intent of the enabling statute—and different judges' differing understanding of the fundamental concepts of public law—all come into play. Further complicating the matter is the notion that different standards of review can be applied to different issues in the same case. Finally, in the midst of considering all of these factors, courts must keep in mind something that Justice Brown of the Federal Court reminded us of:

> ...judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole.[3]

Thus, courts must be careful to find the balance between thoroughly reviewing a delegate's decision and overly scrutinizing every aspect of the decision looking for errors. There is little wonder why standard of review continues to present such a vexing problem for courts!

A. True questions of jurisdiction: *Guérin*, *Ready* and *West Fraser Mills*

The notion of whether an issue is a "true question of jurisdiction" that would attract the correctness standard has received a lot of judicial attention this past year. And, as will be seen from the cases below, the courts are not always in agreement about the answer.

1. *Guérin*

In *Québec (procureure générale) v. Guérin*,[4] the Supreme Court of Canada addressed the standard of review applicable to an arbitrator's decision that (1) he did not have jurisdiction

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3. *Yan v. Canada (Minister of Citizenship and Immigration)*, 2017 FC 146 at para. 19, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34.

4. 2017 SCC 42.

to hear a dispute because it was not an "arbitrable issue" and (2) the applicant had no standing to submit the matter to arbitration.

Quebec's *Health Insurance Act* (the "HIA")[5] requires that the remuneration and working conditions of health care professionals be established by way of collective bargaining. Pursuant to the HIA, an agreement[6] was entered into between the Féderation des médecins spécialistes du Québec and the Ministère de la Santé et des Services sociaux (collectively referred to as the "negotiating parties") with respect to the scheme for medical specialists. Schedule 1 of the Agreement deals with dispute resolution and differentiates between disputes with respect to fees, which are raised by physicians, and "collective disputes" which deal with any other matters relating to the Agreement, and which are raised by the Federation. Under the Agreement, only "collective disputes" are arbitrable.

In addition to the terms of the Agreement respecting dispute resolution, section 54 of the HIA provides that disputes resulting from the interpretation or application of a collective agreement are to be submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction.

The dispute in *Guérin* revolved around the eligibility of certain radiology clinics, represented by Dr. Guérin, to receive a digitization fee in order to modernize their equipment. A schedule to the Agreement (referred to as "the Protocol") sets out the eligibility criteria for the digitization fee. Under the terms of the Protocol, the negotiating parties have exclusive

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5. CQLR, c. A-29.

6. The *Accord-cadre entre le ministre de la Santé et des Services sociaux et la Féderation des médecins spécialistes du Québec aux fins de l'application de law Loi sur l'assurance maladie* (the "Agreement").

authority and full discretion to decide whether a clinic is eligible. Dr. Guérin's application for the digitization fee was denied on the basis that the corporate structure of the company which owned the clinics resulted in the laboratory equipment not being directly or indirectly owned by radiologists.

Dr. Guérin contested the decision by submitting the dispute to a council of arbitration. The arbitrator found that he did not have jurisdiction to hear the matter because it was not a "collective dispute" which was arbitrable. The arbitrator also concluded that "collective disputes" have to be submitted to a council of arbitration by the Federation, not by individual physicians. Thus, even if the issue was arbitrable, the arbitrator concluded that Dr. Guérin lacked standing to submit the dispute. Dr. Guérin applied for judicial review of the arbitrator's decision.

Quebec Superior Court

Justice Grenier of the Quebec Superior Court applied the reasonableness standard, found that the arbitrator's decision was unreasonable, and granted Dr. Guérin's motion for judicial review.[7] Grenier J. focussed on the standing issue and the wording of section 54 of the HIA and held that physicians do have standing to contest decisions of the negotiating parties by way of arbitration.

7. 2013 QCCS 6950.

Quebec Court of Appeal

The Quebec Court of Appeal dismissed the appeal. The court agreed that reasonableness was the proper standard and held that the arbitrator's decision was unreasonable.[8] Like Justice Grenier, the majority focussed on the standing issue and concluded that a physician does have standing to submit a dispute concerning the interpretation or application of the Agreement to arbitration pursuant to section 54 of the HIA. The Attorney General of Quebec appealed the decision to the Supreme Court of Canada which allowed the appeal and restored the arbitrator's decision.

The majority decision in the Supreme Court of Canada (Wagner and Gascon JJ.)

The majority, whose decision was delivered by Justices Wagner and Gascon,[9] held that the reasonableness standard applied to the arbitrator's decision with respect to both the jurisdictional and the standing issues.

a. ***Standard of review with respect to jurisdictional issue: was the dispute arbitrable?***

Justices Wagner and Gascon held that the reasonableness standard of review applied to the question of whether the dispute was arbitrable because the arbitrator was being called upon to interpret and apply the enabling statute, the Agreement and the Protocol, which were all

8. 2015 QCCA 1726, in a 2-1 split decision.

9. Chief Justice McLachlin and Justice Karakatsanis concurred. Separate reasons concurring in the result were delivered by Justices Brown and Rowe. Dissenting reasons were delivered by Justice Côté.

at the core of the arbitrator's mandate and expertise.[10] The majority rejected Dr. Guérin's argument that correctness was applicable because the matter dealt with a true question of jurisdiction or was one for which the rule of law requires the application of the correctness standard:

> 31 The courts below were right to apply the reasonableness standard. Reasonableness necessarily applies, because the council of arbitration was called upon to interpret and apply its enabling statute, the Framework Agreement and the Protocol, which are at the core of its mandate and expertise....

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10. See also *Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2017 FCA 132 in which the Federal Court of Appeal held that reasonableness is the presumed standard of review for the decision of an administrative decision-maker familiar with a frequently used statute (at para. 25) and *Gilmor v. Nottawasaga Valley Conservation Authority*, 2017 ONCA 414 in which the court held that the reasonableness standard applied where the tribunal was interpreting one of several statutes under which it was exercising authority.

    And see *Lysons v. Alberta Land Surveyors' Association*, 2017 ABCA 7, leave to appeal to SCC refused July 20, 2017, in which the Court of Appeal of Alberta applied the reasonableness standard to a Disciplinary Committee's decision and noted that:

    > ... Professional disciplinary proceedings usually involve the interpretation of the statute establishing the profession, related statutes (such as the *Surveys Act*), and the rules or codes of conduct of the profession. The governing bodies of the profession have expertise in the interpretation of these provisions, and in deciding what amounts to professional conduct. As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 44, [2008] 1 SCR 190 deference is extended to the tribunal's interpretation of "*its own statute or statutes closely connected to its function*" (emphasis added). The core issue here is what amounts to "unprofessional conduct", not the direct interpretation of a statute. The courts extend deference to professional bodies on all these issues, and generally review their decisions on a reasonableness standard...".

    But see *Belaire v. Ontario Aboriginal Housing Services Corp.*, 2017 ONSC 2839, in which the Ontario Supreme Court upheld the Landlord and Tenant Board's decision that it did not have jurisdiction to hear a rent dispute where the property was classified as a "rent-geared-to-income premises" because it was a true question of jurisdiction.

    For another case involving the standard of review to be applied when the issue involves statutory interpretation, see *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, where the court simply held that the delegate's decision could not stand based on "either standard of review" because it resulted in absurd results (at para.34).

> 32 The two arguments on which Dr. Guérin relies in asserting that the correctness standard should apply are without merit. First, as both the motion judge (at para. 26) and all the judges of the Court of Appeal (at paras. 21 and 85) recognized, it is wrong to argue that this appeal raises a true question of jurisdiction in relation to the council of arbitration .... As this Court has noted in the past, courts should "not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" .... In a similar vein, this Court has frequently stressed that, if they exist, "[t]rue questions of jurisdiction are narrow and will be exceptional" .... Such questions must be understood "in the narrow sense of whether or not the tribunal had the authority to make the inquiry"....
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> 33 It is clear, on the one hand, that the council of arbitration had jurisdiction to interpret and apply agreements entered into under the Act, such as the Framework Agreement and its schedules, including the Protocol. It therefore had the authority to make the inquiry and to determine whether Dr. Guérin's proceeding raised an arbitrable dispute under the Act and the Framework Agreement. Indeed, it is well established that the reasonableness standard applies where an arbitrator must determine, by interpreting and applying his or her enabling legislation and related documents, whether a matter is arbitrable (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 16). The fact that an arbitrator can dismiss a proceeding on the basis that it does not constitute an arbitrable dispute does not necessarily lead on its own to the conclusion that the proceeding raises a true question of jurisdiction....
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> 34 When an arbitrator interprets his or her enabling legislation to determine whether a dispute is arbitrable, applying the reasonableness standard undermines neither the rule of law nor the other constitutional bases of judicial review. In contrast, the effect of applying the correctness standard by erroneously characterizing such a question as a true question of jurisdiction would be to undermine the presumption in favour of the reasonableness standard that has been consistently recognized and endorsed by this Court in numerous cases since *Alberta Teachers*....
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> [Emphasis added and authorities omitted.]

b. *Standard of review with respect to standing: did Dr. Guérin have standing to apply for arbitration?*

The majority also applied the reasonableness standard to the standing issue, again finding that the issue was not a true question of jurisdiction:

> 35 ... the other issue, concerning Dr. Guérin's standing in this case, is not really a true question of jurisdiction either. It is true that this Court applied the correctness standard in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, in which it found that "[t]he issue [was] jurisdictional" in that it went

to whether the Canadian International Trade Tribunal could hear a complaint initiated by a non-Canadian supplier under the *Agreement on Internal Trade*, (1995) 129 Can. Gaz. I, 1323 (para. 10). Nonetheless, as the Court subsequently explained in *Alberta Teachers*, its holding in *Northrop* that the question was subject to "review on a correctness standard ... was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction" (para. 33 (emphasis added)). This interpretation, which was endorsed by a majority of this Court, is also authoritative.

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

[Emphasis added.]

c. *Rule of law argument*

The majority rejected Dr. Guérin's argument that the correctness standard was applicable pursuant to the rule of law:

37 Finally, contrary to what Dr. Guérin is now arguing in this Court, this is not a case in which the rule of law requires the application of the correctness standard. The fact that a question of law might give rise to conflicting interpretations does not on its own support a conclusion that the correctness standard applies (*Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 17). Also, Dr. Guérin cites no award in which an arbitrator adopted an interpretation contrary to that of the arbitrator in the instant case. Thus, even if conflicting lines of authority could lead to the application of the correctness standard, which is itself not always the case (*Atomic Energy*, at para. 17; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 38-39; see also *Domtar Inc. v.*

> *Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 784-801), that is, in any event, not the situation in the case at bar.
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> [Emphasis added].

Reasons of Brown and Rowe JJ. concurring in the outcome

While concurring in the result that the arbitrator's decision should be restored, Justices Brown and Rowe held that the correctness standard applied to the arbitrator's decision that the dispute was not arbitrable because the matter raised a true question of jurisdiction. In their opinion, the arbitrator was incorrect in finding that he lacked jurisdiction to hear the matter:

> 66 In brief, we are of the view that the issue of the capacity of the arbitrator to hear Dr. Guérin's matter raised a question of jurisdiction, not of arbitrability. Applying the standard of correctness, we find that the arbitrator erred in concluding that he did not have jurisdiction to hear the matter....

Justices Brown and Rowe acknowledged that questions of jurisdiction refer to the narrow sense of whether or not a delegate had the authority to make the inquiry[11] and that, since *Dunsmuir*, the jurisprudence has strictly limited the notion of true questions of jurisdiction:[12]

> 68 ... While, as we make clear below, we do not in these reasons presume to cut this Gordian knot, we maintain that the mere fact that this Court has not discerned a question of jurisdiction since *Dunsmuir* does not mean that such questions have ceased to exist, nor that we should be blind to one when it clearly manifests itself. Indeed, the consequences of

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11. At para. 67.

12. For a rare example of a court finding a true question of jurisdiction, see *Belaire v. Ontario Aboriginal Housing Services Corp*., 2017 ONSC 2839, in which the Ontario Supreme Court upheld the Landlord and Tenant Board's decision that it did not have jurisdiction to hear a rent dispute where the property was classified as a "rent-geared-to-income premises" because it was a true question of jurisdiction.

> failing to identify a jurisdictional question as such are serious: "as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is 'correct'" (*Alberta Teachers' Association*, at para. 94, per Cromwell J., concurring). This "core principl[e]" of judicial review was laid down by the Court in *Dunsmuir*....
>
> [Quotation omitted.][13]

Brown and Rowe JJ. distinguished between the concepts of jurisdiction, standing and arbitrability, holding that the majority had erred by considering the matter as one of arbitrability:

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

On the issue of standing, Justices Brown and Rowe agreed that reasonableness was the proper standard of review in this case, but noted that there are cases in which standing *is* a jurisdictional issue to which the correctness standard would apply. Specifically, these cases arise where the delegate is confined to hear disputes only from a certain class of complainants. Brown and Rowe JJ. discussed the difficulties raised by inconsistent

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13. The phrase "Gordian knot" comes from a legend about Alexander the Great, and refers to an intractable problem (disentangling an impossible knot). Instead of disentangling the knot, Alexander the Great simply cut it in half.

jurisprudence in this area and were somewhat critical of the majority for failing to fully address this aspect of the standing issue:

> 66 ... As to the matter of Dr. Guérin's standing, we agree with our colleagues Wagner and Gascon JJ. that the arbitrator's decision on this point is reviewable for reasonableness and that it was reasonable, but we approach the identification of the appropriate standard of review from a different starting point. In our view, standing questions become jurisdictional where the tribunal is confined by the terms of its statutory grant of authority to hear only from a certain class of complainants. Because this was not the case here, reasonableness review is appropriate.
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> . . .
>
> 72 ... Our colleagues Wagner and Gascon JJ. say that the arbitrator's decision that Dr. Guérin did not have standing is reviewable for reasonableness, and that it was reasonable. We agree. Their reasons, however, in our respectful view, elide two important points: first, questions of standing *can* be jurisdictional (in which case decisions thereon are reviewable for correctness); and second, this being so, further explanation of why the arbitrator's decision on standing was reviewable for reasonableness is called for.
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> 73 The first point is straightforward. Standing is often described as raising a question of jurisdiction:
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> > Administrative adjudicators must comply with the terms of their statutory grants of authority. On occasion, it may be necessary for a tribunal to determine *explicitly* whether or not the grant authorizes it to decide a particular matter. When this situation arises, as where there are two intersecting administrative schemes, or there is a question of an applicant's standing to institute proceedings, whether or not a claim is statute-barred, the resulting decision will usually be subject to review by the courts on the "correctness" standard of review. [Footnotes omitted; underlining added.] (Brown and Evans, at topic 14:4331.)
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> 74 Similarly, in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10, this Court described a question of standing as "jurisdictional". Our colleagues Wagner and Gascon JJ., citing *Alberta Teachers' Association*, at para. 33, say that the Court's conclusion in *Northrop Grumman* was the product of "pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction" (para. 35). With great respect, this explanation is simply not grounded in a tenable reading of *Northrop Grumman*. While the Court did indeed look in that case to pre-*Dunsmuir* jurisprudence, its conclusion that the matter raised a question of jurisdiction was expressed with exclusive reference to the nature of the question posed: "The issue on this appeal is jurisdictional in that it goes to whether the [Canadian International Trade Tribunal] can hear a complaint initiated by a

non-Canadian supplier under the [*Agreement on Internal Trade*]. Accordingly, the standard of review is correctness" (para. 10 (Emphasis added)).

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

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

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

> of judicial review of administrative action. [Underlining added; paras. 91 and 92.]
>
> 77 To be clear, we do not doubt the authority of *Alberta Teachers' Association* as a decision of this Court. Rather, we point out that its application is logically and practically impeded by the unresolved problem—indeed, the analytical incoherence—which Cromwell J. identified therein, and of which this case presents an obvious instance. As we say, we do not presume to cut this Gordian knot here; and nor do our colleagues. We maintain, however, that it follows from the foregoing, particularly the statements of this Court in *Dunsmuir* and *Northrop Grumman*, and from the commentary on the subject, that more needs to be said than our colleagues say about why Dr. Guérin's standing does not raise a jurisdictional question. It is not, again with respect, solely a matter of home statutes, presumed expertise and deference. Otherwise, reasonableness review of the arbitrator's decision on Dr. Guérin's standing would operate in marked tension with this Court's statement in *Northrop Grumman*. The two must be reconciled.
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> [Emphasis added in paragraph 66; all of the other emphases are in the judgment.]

The dissenting decision by Côté J.

Madam Justice Côté accepted Justices Brown and Rowe's distinction between the jurisdictional and standing issues, and would have applied the correctness standard to both. Moreover, she held that even if the reasonableness standard were applied to the standing issue, the arbitrator had erred in concluding that Dr. Guérin did not have standing:

> 83 I cannot improve on what my colleagues Brown and Rowe JJ. say on the standard of review to be applied with respect to the arbitrator's jurisdiction. I therefore concur with them on that issue. In other words, I am of the opinion that the determination of whether it was open to the arbitrator to hear the case of the respondent, Dr. Ronald Guérin, raises a true question of jurisdiction, and that the appropriate standard in this regard is correctness. I agree with Brown and Rowe JJ. that the arbitrator erred in concluding that he did not have jurisdiction to hear the case before him.
>
> 84 I have also read what my colleagues Brown and Rowe JJ. say on the standard of review to be applied on the issue of the respondent's standing, but in my view, their reasoning should have led them to conclude that, in this case, the appropriate standard in this regard is correctness. There are circumstances in which the issue of standing is a question of jurisdiction, and in such a case, the appropriate standard of review is correctness (*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10). In the case at bar, I am of the opinion that whether the respondent

> had standing is a question of jurisdiction, because the arbitrator's interpretation of the *Health Insurance Act*, *CQLR, c. A-29* ("HIA"), and the *Accord-cadre entre le ministre de la Santé et des Services sociaux et la Fédération des médecins spécialistes du Québec aux fins de l'application de la Loi sur l'assurance maladie* ("Framework Agreement") leads to the conclusion that he cannot hear any dispute submitted by a medical specialist, except one with respect to fees.
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> 85 However, even if the reasonableness standard is applied on this issue, I am of the opinion that the arbitrator erred in concluding that the respondent did not have standing in this case....

In Justice Côté's view, even if a reasonableness standard was applied, the arbitrator's decision could not stand because the arbitrator had mischaracterized the nature of the dispute and misinterpreted the HIA by taking an overly restrictive approach to section 54 of the HIA.[14]

2. *Ready*

Ready v. Saskatoon Regional Health Authority[15] dealt with whether the Practitioner Staff Appeals Tribunal (the "Appeals Tribunal") had jurisdiction to hear an appeal concerning the termination of employment of a physician employed by the Saskatoon Regional Health Authority (the "Health Authority").

The Health Authority terminated Dr. Ready's employment. He appealed to the Appeals Tribunal which set aside the Board's decision. The Health Authority appealed the Appeal Tribunal's decision to the Court of Queen's Bench, which allowed the appeal and restored

14. Paras. 87 to 111.

15. 2017 SKCA 20.

the Health Authority's decision.[16] In addition to allowing the appeal on its merits, the chambers judge held that the Appeals Tribunal lacked jurisdiction to hear Dr. Ready's appeal from the Health Authority's decision. Dr. Ready appealed to the Saskatchewan Court of Appeal.

One of the issues before the Saskatchewan Court of Appeal was whether the chambers judge erred in applying a correctness standard of review to the Appeal Tribunal's decision that it had jurisdiction to adjudicate Dr. Ready's grievance.

In a 2-1 split decision, the Court of Appeal dismissed the appeal. The decision is a superb illustration of a court being divided on the standard of review issue.

Reasons of Ottenbreit J.A.

On the issue of standard of review, Justice Ottenbreit (who wrote the majority reasons) agreed with the chambers judge that the issue of the Appeal Tribunal's jurisdiction to deal with Dr. Ready's termination was a "true issue of jurisdiction" that attracted the correctness standard.

Ottenbreit J.A. thoroughly reviewed how the law concerning "true questions of jurisdiction" has evolved since *Dunsmuir*.[17] He noted that the concept of a true question of jurisdiction

16. 2014 SKQB 273.

17. At paras. 63 to 78.

has been significantly narrowed over the past decade and drew the following conclusions from the jurisprudence:[18]

> 69 ... [I]f a tribunal appears to be entering into an inquiry not intended by the Legislature, pursuing an illegitimate objective or engaging in actions that clearly defy the limits of its statutory authority rather than pursuing a valid statutory purpose on the basis of an enabling statute, which includes a broad grant of power to achieve that purpose, the reviewing court may be faced with a true question of jurisdiction....[19]
>
> 70 ... [B]oundary jurisdiction issues, for example, whether the tribunal has jurisdiction over an issue as opposed to the courts, raise a true question of jurisdiction.[20]

Despite the scope of true questions of jurisdiction having been significantly narrowed by post-*Dunsmuir* jurisprudence, Ottenbreit J.A. concluded that such issues can still arise (although they rarely do) and the concept is still important in administrative law:[21]

> 75 Whither the true question of jurisdiction? In my view, the concept serves an important purpose in the administrative law world. The concept is fundamental to a healthy and robust rule of law and remains faithful to the *dicta* in *Dunsmuir* that it is the court's responsibility to ensure that tribunals do not overreach their lawful powers.
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> 76 Based on the foregoing jurisprudence, true questions of jurisdiction are raised where boundary issues with other tribunals, boards or courts are in play. Where there is a question of whether the legislation gives the tribunal the authority to decide or act, or where actions

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18. But see *Belaire v. Ontario Aboriginal Housing Services Corp*., 2017 ONSC 2839, in which the Ontario Supreme Court upheld the Landlord and Tenant Board's decision that it did not have jurisdiction to hear a rent dispute where the property was classified as a "rent-geared-to-income premises" because it was a true question of jurisdiction.

19. Citing *Manitoba v. Russell Inns Ltd.*, 2013 MBCA 46.

20. Citing *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 397.

21. At paras. 73 to 75, citing from *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47; and *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 39.

> or objectives engaged in by the tribunal clearly defy the limits of its statutory authority, true questions of jurisdiction may arise.
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> 77 As a final observation, it is important to remember that true questions of jurisdiction are distinguishable from issues involving interpretation by a tribunal of its own statute or statutes closely connected to its function, with which it will have particular familiarity. Such questions are presumed to be questions of law and subject to a reasonableness standard of review (*ATA* at para 34; *Edmonton City* at para 22).

In case he was wrong in holding the issue was a true question of jurisdiction, Ottenbreit J.A. went on to decide what standard of review would arise from applying a contextual standard of review analysis as set out in *Dunsmuir*. Again, he concluded that correctness would be applicable.[22]

Thus, Justice Ottenbreit concluded that the reasonableness standard of review had been rebutted and the applicable standard of review for the Appeal Tribunal's decision on its jurisdiction was correctness (both because the issue before it was a true question of jurisdiction and, alternatively, because the correctness standard was revealed by the contextual analysis approach).

Reasons of Ryan-Froslie J.A.

Madam Justice Ryan-Froslie concurred with Justice Ottenbreit in the result, but disagreed on what standard of review should be applied, concurring with the dissenting judgment by Madam Justice Jackson. Ryan-Froslie J.A. held that the issue concerning the Appeal Tribunal's jurisdiction was not a true question of jurisdiction that attracted the correctness standard but that reasonableness was the proper standard of review. She then concluded that

22. At paras. 104 to 168.

the decision of the Appeals Tribunal that it had jurisdiction to hear Dr. Ready's appeal was unreasonable.[23]

Dissenting reasons of Jackson J.A.

Justice Jackson was of the view that the proper standard of review on the issue of the Appeal Tribunal's jurisdiction to hear Dr. Ready's appeal was reasonableness. She disagreed with Ottenbreit J.A. that the matter raised a true question of jurisdiction. But, unlike Justice Ryan-Froslie, she concluded that the Appeal Tribunal's decision was reasonable and would have allowed the appeal.[24]

Jackson J.A. reviewed the case law and the statutory framework governing the Appeals Tribunal and concluded that:

> 264 In my respectful view, and contrary to the opinion of the Chambers judge, the Tribunal was required to decide whether Dr. Ready is "a person ... aggrieved by a decision" of the SRHA made in relation to the "termination" of his appointment to the active practitioner staff or the "amending, suspending or revoking" of his privileges. It is a decision that the Legislature has given to the Tribunal to decide. This wording creates what is called a preliminary question of jurisdiction, but it is not a true question of jurisdiction *that requires review for correctness*, according to Supreme Court jurisprudence.
>
> 265 Where a person appeals to an administrative tribunal, and the tribunal must decide whether the person falls on one side of a jurisdictional line, a true question of jurisdiction does not arise (see Joseph Robertson, Peter Gall, and Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Markham: LexisNexis, 2014) at 44). Asking the question and making it referable to the existence of a contract does not change the analysis. For example, one could make the question specific to Dr. Ready's case: Can doctors who are employed by a health authority under a contract apply to the Tribunal when they are dismissed and retain their privileges but are unable to use them? It is still not a true question of jurisdiction.

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23. See paras. 348 to 390.

24. See paras. 225 to 343.

> 266 This same point was made in *Affinity Credit Union v United Food and Commercial Workers Local 1400*, 2015 SKCA 22, 382 DLR (4th) 671 [*Affinity*]. In *Affinity*, the question was as follows: Can an employee, who was temporarily occupying an out-of-scope position, grieve her dismissal—in the context of the case presented to an arbitrator? Clearly, this question required the arbitrator to determine whether the employee could grieve her dismissal. The majority of the Court held that such a question was *not* a true jurisdictional question commanding a correctness review. In short, determining whether Dr. Ready has a right of appeal does not make it a true jurisdiction question commanding a correctness review.
>
> 267 In my view, the appeal before us is one of those cases that exemplify the problems associated with retaining the concept of a true question of jurisdiction, except for precise categories, such as where courts and tribunals have concurrent jurisdiction or where the Legislature has made clear its intention that the courts are required to review a tribunal's decision on a correctness basis. To use the words from *Edmonton East*, the Tribunal (in this case) may hear a complaint from a person claiming to be aggrieved. The issue is simply one of interpreting the *Bylaws* in the course of carrying out its mandate of hearing and deciding complaints.
>
> 268 Thus, I conclude that the Chambers judge erred when he held that the Tribunal lacked jurisdiction to hear the appeal and that its decision in that regard commanded a correctness review.

3. *West Fraser Mills*

West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)[25] involved two issues: (a) whether the regulation in question was valid, and (b) the breadth of an administrative penalty provision in that regulation. The unanimous Court of Appeal held that the first issue was a true jurisdictional question which engaged the correctness standard of review, but the second issue was not and therefore engaged the patent unreasonableness standard of review.[26]

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25. 2016 BCCA 473.

26. Section 58(2)(a) of the B.C. *Administrative Tribunals Act* prescribes the patent unreasonableness standard of review for questions of law which are protected by a privative clause. The *ATA* was enacted before *Dunsmuir* merged the patent unreasonableness and reasonableness *simpliciter* standards of review. If the case had arisen in a different province or in a context not governed by

(continued...)

Although both parties had agreed that the correctness standard of review applied to the issue about the validity of the regulation, Justice Groberman (writing for the unanimous court) felt that the following commentary was warranted given the "current pre-occupation" of the courts with standards of review:

> 42 Both West Fraser and the Board agree that the Court is required to review the statutory *vires* of the regulation on a standard of "correctness"—*i.e.*, they agree that this Court owes no deference to either the Board or the WCAT in respect of the issue. I agree. The current pre-occupation of administrative law with standard of review analysis, however, suggests that something more should be said about the issue.
>
> 43 Canadian courts have generally applied a standard of correctness to the determination of statutory *vires*. In Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (updated to December 2015), (Toronto: Carswell), the authors say, at §15:3221:
>
> > Courts apply the standard of correctness when deciding whether delegated legislation is *ultra vires*. In that regard, a distinction has been drawn between a decision to enact subordinate legislation, and the legality or *vires* of the subordinate legislation itself. And although there has been some authority for the proposition that a standard-of-review analysis ought to be undertaken, the Court in *Dunsmuir* has stated that where a question is one of true *vires*, the standard of review is always correctness. Accordingly, it follows that where the issue is one of *vires*, such an analysis is unnecessary.
> >
> > [Footnotes omitted.]
>
> 44 Some courts have suggested that the Supreme Court of Canada has signalled a change in the standard of review for statutory *vires* cases in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64. The standard of review analysis discussed in *Dunsmuir v. New Brunswick*, 2008 SCC 9 was not specifically mentioned in that case. The absence of any mention has led some courts to treat statutory *vires* questions as being subject to a unique standard of review, outside the usual categories of "correctness" and "unreasonableness": *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160 at para. 28; *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59 at paras. 42-46.

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26. (...continued)
the *ATA*, it is probable that the applicable standard of review to the second issue would have been reasonableness in the *Dunsmuir* sense.

45 In my view, *Katz Group* is primarily concerned with issues of statutory interpretation, and not with the standard of review *per se*. *Katz Group* establishes certain key interpretive principles that must be applied in statutory *vires* cases, which I would summarize as follows:

i. a regulation is presumed to be *intra vires* the empowering statute. The onus is on a person challenging the *vires* of a regulation to demonstrate that it is *ultra vires*;

ii. where a statute confers powers to make regulations, those powers are to be construed broadly and purposively; and

iii. an impugned regulation should, where possible, be interpreted in a manner that falls within the scope of the regulation-making power set out in the statute.

46 While these principles militate against findings that a regulation is *ultra vires*, they do not suggest that courts should assume a posture of deference to regulation-makers. In the absence of any need for deference to the regulation-maker, it seems to me appropriate to characterize the standard of review as one of "correctness".

47 It is, unfortunately, not entirely clear on this appeal whether the judicial review in respect of the *vires* of the regulation is taken against the WCAT or against the Board. The WCAT clearly ruled on statutory *vires* in its decision, and the petition in this matter was initially brought only against the WCAT. In the Supreme Court, however, the WCAT took the position that it did not have jurisdiction to consider the *vires* of the regulation—a position noted at para. 14 of the chambers judge's reasons. The WCAT repeats that position in its factum before this Court, though no party has addressed the issue in argument. The Board was added as a party in the court below, apparently to ensure that its action in enacting s. 26.2(1) of the Regulation could be reviewed.

48 The *Administrative Tribunals Act*, S.B.C. 2004 c. 45, does not apply to the Board, so if this proceeding is properly characterized as a judicial review of the Board's enactment of the regulation, the standard of review is correctness. Parts of the *Administrative Tribunals Act* do, however, apply to the WCAT. In particular, s. 245.1(w) of the *Workers Compensation Act*, makes Part 9 (except s. 59) of the *Administrative Tribunals Act* (which deals with "Accountability and Judicial Review") applicable to it. Section 58 of the *Administrative Tribunals Act* is within Part 9....

49 Sections 254 and 255 of the *Workers Compensation Act*, together, constitute a "privative clause" in respect of the WCAT as that term is defined in the *Administrative Tribunals Act*. The privative effect of those sections is very broad. It might be thought, therefore, that s. 58(2)(a) of the *Administrative Tribunals Act* would apply (assuming this proceeding is properly characterized as a judicial review of the WCAT decision), and that the standard of review would be "patent unreasonableness". The chambers judge instead considered the issue of the *vires* of the regulation to be "constitutional", and so found the standard of review to be that set out in s. 58(2)(c)—a standard of "correctness".

50 I agree that s. 58(2)(c) is the applicable provision when the issue is the *vires* of a regulation. There are constitutional limits on the degree to which privative clauses may oust

> the jurisdiction of superior courts to supervise the work of an administrative tribunal. True questions of *vires* are always treated as being subject to a correctness standard: see *Dunsmuir v. New Brunswick* at para. 59. The privative provisions of the *Workers Compensation Act* must be interpreted as not giving the WCAT exclusive jurisdiction to determine the *vires* of a regulation. Accordingly, this matter does not fall under s. 58(2)(a), but rather under s. 58(2)(c).
>
> 51 In the result, whether this proceeding is characterized as a judicial review of the WCAT decision or a judicial review of the Board's enactment of the regulation, the standard of review is correctness.

The Supreme Court of Canada has granted leave to appeal this decision.[27]

B. Questions of central importance to the legal system as a whole: *University of Calgary* and *Lizotte*

1. *University of Calgary*

Alberta (Information and Privacy Commissioner) v. University of Calgary[28] involved the interpretation of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIPP)[29] and in particular whether the Commissioner has authority to compel production of records over which a party has claimed solicitor-client privilege. The aspect of the case dealing with solicitor-client privilege will be discussed below, but the case is also important for the differing decisions in the Supreme Court of Canada about the applicable standard of review.

By way of background, the University was being sued by a former employee for constructive dismissal. The employee made a request under section 7 of FOIPP for certain records in the

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27. Leave was granted on May 4, 2017.

28. 2016 SCC 53.

29. R.S.A. 2000, c. F-25.

possession of the University. The University refused to produce some of the records, claiming that they were protected by solicitor-client privilege. A delegate of the Commissioner ordered the production of records in order to verify that the privilege was being properly asserted. The University applied for judicial review of that decision. At first instance, Justice C.M. Jones applied the correctness standard of review and upheld the Commissioner's decision.[30] The University appealed Jones J.'s decision and the Court of Appeal unanimously allowed the appeal.[31] Like Jones J., the Court of Appeal applied the correctness standard of review. However, the Court of Appeal held that the Commissioner was incorrect in ordering the production of documents over which solicitor-client privilege had been claimed. The Commissioner appealed the decision to the Supreme Court of Canada.

The central issue before the Supreme Court of Canada was whether s. 56(3) of FOIPP, which requires a public body to produce required records to the Commissioner "[d]espite ... any privilege of the law of evidence", allowed the Commissioner to review documents over which solicitor-client privilege was claimed. The Supreme Court of Canada held it did not and dismissed the Commissioner's appeal. On the issue of standard of review, five of the seven judges[32] agreed with the lower courts that the proper standard of review was correctness because the question concerning solicitor-client privilege was of central

30. 2013 ABQB 652.

31. 2015 ABCA 118.

32. Justices Côté, Moldaver, Karakatsanis, Wagner and Gascon were all of the view that correctness was the proper standard.

importance to the legal system as a whole and outside the Commissioner's specialized area of expertise.[33]

Cromwell J. did not address standards of review in his reasons, but assumed that correctness was the proper standard without deciding the issue.[34]

Abella J. dissented on the issue of standard of review, and held that reasonableness should be applied to the Commissioner's decision because the delegate was applying its expertise in interpreting its own enabling statute,[35] but held that the Commissioner's order to produce was unreasonable because the University had provided sufficient justification for solicitor-client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta.

2. *Lizotte*

In the companion case of *Lizotte v. Aviva Insurance Company of Canada*,[36] the Supreme Court held that litigation privilege is also "a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces", and therefore also applied the correctness standard of review.

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33. At para. 20.

34. At para. 75.

35. At para. 130 to 136.

36. 2016 SCC 52.

C. Standard of review for determining the validity of subordinate legislation: *Green v. Law Society of Manitoba, Sobeys West, and West Fraser Mills*

There has been some confusion about the standard of review applicable when determining the validity of subordinate legislation. To what extent (if any) did the Supreme Court of Canada's decision in *Katz Group* change the reasonableness standard enunciated in *Catalyst Paper*?

1. *Green*

In *Green v. Law Society of Manitoba*,[37] the Supreme Court of Canada considered whether the Manitoba Law Society could impose rules on its members that coupled a mandatory continuing professional development program with a possible suspension for failing to meet the program's requirements. The court also considered the appropriate standard of review to be applied when considering the validity of rules made by a law society.

The Law Society advised a member that he would be suspended if he did not report his completion of continuing professional development within 60 days. The member did not respond, but rather, he challenged the validity of the Rules of the Law Society of Manitoba dealing with continuing professional development. The member sought a declaration that the Rules were invalid on the ground that they were unfair because they imposed a suspension without a right to a hearing or a right to appeal. Interestingly, the member did not apply for judicial review of the Law Society's decision to suspend him.

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37. 2017 SCC 20.

The applications judge dismissed the member's application, holding that the impugned rules fell within the Law Society's legislative mandate.[38] The Manitoba Court of Appeal upheld that decision.[39] In a 5 to 2 split decision, the Supreme Court of Canada dismissed the appeal.

Despite disagreeing on the outcome, all seven justices agreed that the correct standard of review of the Law Society's rules was reasonableness. Speaking for the majority, Wagner J. stated:

> 20 In my view, the standard applicable to the review of a law society rule is reasonableness. A law society rule will be set aside only if the rule "is one no reasonable body informed by [the relevant] factors could have [enacted]": *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 24. This means "that the substance of [law society rules] must conform to the rationale of the statutory regime set up by the legislature": *Catalyst Paper*, at para. 25; see also *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 25.
>
> 21 Rules made by law societies are akin to bylaws passed by municipal councils...[40]
>
> . . .
>
> 22 ... In the case at bar, the legislature specifically gave the Law Society a broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest. The Act empowers the benchers of the Law Society to make rules of general application to the profession, and in doing so, the benchers act in a legislative capacity.
>
> 23 Further, reasonableness is the appropriate standard because many of the benchers of the Law Society are elected by and accountable to members of the legal profession. While it is true that the public does not directly vote for the benchers, the rules the benchers make apply only to members of the profession. Thus, McLachlin C.J.'s comments in *Catalyst Paper* in the context of municipal bylaws are apt here as well: "... reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable" (para. 19).

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38. 2014 MBQB 249.

39. 2015 MBCA 67.

40. Citing from McLachlin C.J.'s decision in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2.

> 24 Beyond the specific guidance provided in *Catalyst Paper*, which I find applicable in the instant case, the general principles developed by the Court in respect of the standard of review also support the argument that reasonableness is the appropriate standard. The Law Society acted pursuant to its home statute in making the impugned rules, and in such a case there is a presumption that the appropriate standard is reasonableness: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 34 and 39. The Law Society must therefore be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 50 and 87.
>
> 25 Additionally, the Law Society has expertise in regulating the legal profession "at an institutional level": *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 33. This Court has previously recognized that self-governing professional bodies have particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions: *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 887.
>
> [Emphasis added.]

2. *Sobeys West*

Alberta College of Pharmacists v. Sobeys West Inc.[41] involved a policy imposed by the Alberta College of Pharmacists to prohibit inducements, such as Air Miles, being given to patients obtaining a drug or professional service from a pharmacist, pharmacist technician or licensed pharmacy ("the Policy"). Sobeys sought judicial review of the College's decision to implement the Policy, arguing that it was *ultra vires* because it contravened section 3(2) of the *Health Professions Act*[42] which prohibits the regulation of professional fees by the College.

At first instance, Justice Ouellette released two sets of reasons: one on the proper standard of review to be applied and one on the merits of the case. In the standard of review

41. 2017 ABCA 306.

42. RSA 2000, c. H-7.

decision,[43] Ouellette J. concluded that the proper standard to be applied to the College's decision to implement the Policy was correctness on the basis that true questions of *vires* always attract a standard of correctness. Ouellette J. was of the view that enacting the Policy was an exercise of legislative power by the Council of the College. Ouellette J.'s decision on standards of review is particularly interesting because both parties were in agreement, and argued in court, that reasonableness was the proper standard to be applied.

In the merits decision,[44] Ouellette J. held that the Policy was *ultra vires* the jurisdiction of the College because it amounted to controlling the way commercial entities operate and compete amongst themselves. Thus, in his view, the Policy had a clear and direct economic function which was outside the scope of the College's authority and the Policy was *ultra vires* the College under the *Health Professions Act*.

The College appealed both decisions to the Court of Appeal of Alberta. On the issue of standard of review, a unanimous panel[45] held that Ouellette J. had erred by applying the correctness standard. The Court of Appeal held that, in light of the Supreme Court of Canada's decision in *Green v. Law Society of Manitoba*,[46] the proper standard of review to be applied to the College's decision to implement the Policy was reasonableness.

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43. 2016 ABQB 138.

44. 2016 ABQB 232.

45. The panel consisted of Justices Berger, McDonald and Strekaf.

46. 2017 SCC 20. The Court also noted a similar decision by the British Columbia Court of Appeal in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, 382 BCAC 126, leave to appeal dismissed at [2016] SCCA No. 116, in which the court held that the proper standard of review was reasonableness.

3. *West Fraser Mills*

On the other hand, as noted above, in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*[47] the British Columbia Court of Appeal held that correctness is the applicable standard of review in determining the validity of regulations because it is a true question of jurisdiction. Leave to appeal to the Supreme Court of Canada has been granted in that case.

D. Applicability to questions of procedural fairness: *Risseeuw*

Several cases this past year addressed a question which has long been subject to uncertainty: does the standard of review analysis have to be done in cases involving alleged procedural unfairness? Although some of the cases assert that correctness is the applicable standard of review (presumably because the Court decides whether it agrees with the procedure which was used—agreement being the essence of correctness), a significant number of other cases hold that the correctness/reasonableness standard of review analysis is not applicable or required in cases involving issues of procedural unfairness (presumably because the standard

47. 2016 BCCA 473.

by which such cases are measured is "fairness").[48] One case from Saskatchewan stands out due to the length and thoroughness of the trial judge's decision.

In *Risseeuw v. Saskatchewan College of Psychologists*,[49] Justice Danyliuk of the Saskatchewan Court of Queen's Bench concluded that, at least in Saskatchewan, the whole notion of standards of review analysis is "moot" or inapplicable if the dispute is one which involves procedural fairness:

> 33 ... I have considered *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249. At paragraph 74, Justice Arbour ruled that where an application for judicial review raises procedural fairness or natural justice issues, "no assessment of the appropriate standard of review" is required. The reviewing court should simply conduct "an assessment of the procedures and safeguards required in a particular situation". One of the prior precedents cited by Arbour J. in this regard is a Saskatchewan case that reached the Supreme Court, *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653.
>
> 34 While issues pertaining to selection of the appropriate standard of review continue to confound those of us who are mere foot soldiers in the trench warfare that is administrative

48. For recent examples, see *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson*, 2017 NSCA 46 in which the Nova Scotia Court of Appeal held that no standard of review analysis was required where the complaint was based upon a denial of procedural fairness, citing *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92 (at para. 24); *O'Connell (Registrar of Motor Vehicles for the Province of New Brunswick) v. Maxwell*, 2016 NBCA 37, in which the New Brunswick Court of Appeal stated that the proper analytical approach in cases involving procedural fairness does not require standard of review analysis (at para. 29); and *Tran v. College of Physicians and Surgeons of Alberta*, 2017 ABQB 337 in which the Alberta Court of Queen's Bench held that "[i]ssues of procedural fairness are not subject to a traditional standard of review analysis", citing *Institute of Chartered Accountants of Alberta v. Barry*, 2016 ABCA 354 (at para. 29). But see *Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2017 FCA 132 in which the Federal Court of Appeal held that the law concerning what standard of review applies to issues of procedural fairness remains unsettled (at para 13) and *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24 in which the Nova Scotia Court of Appeal applied the correctness standard to a question involving bias (at para. 20). And see *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*, 2017 NSCA 72, where the court applied the reasonableness standard to the issue of whether a delegate's refusal to grant an adjournment resulted in procedural unfairness.

49. 2017 SKQB 8.

> law, in my view the standard can even be seen as moot when it comes to issues of procedural fairness... .[50]
>
> [Emphasis added.]

After thoroughly reviewing a plethora of inconsistent case law, Danyliuk J. openly acknowledged that his decision could very well be subject to appeal:

> 45 Thus, on this point I find myself standing in a central place where I can neither take a step toward the applicant (correctness) nor the respondent (reasonableness). Rather, I take a step to the side to assess this substantive issue (procedural fairness) on the basis outlined in the authorities cited above. It is my view that while, generally, this decision of the respondent must be considered within the context of correctness, the tribunal is to be afforded a measure of deference; thus, I am applying a hybrid standard of review.
>
> 46 The respondent needs to have afforded to the applicant, and to have duly considered and applied, the principles of natural justice and procedural fairness. Failing to do that will neither be rigidly categorized as "incorrect" nor "unreasonable", but simply wrong.
>
> 47 I fully appreciate that this is a somewhat different stance, which may in itself invite appellate review in this particular case. I get it. But this is an evolving area of the law. Appellate commentary is certainly not something to be avoided; indeed, the hope is that clarity and precision can be brought to a legal area Justice Stratas describes as a never-ending construction site, with barely-finished structures constantly being torn down and new shinier ones being erected. Our black robes notwithstanding, I have no desire to be a judicial magpie, always flying toward the brightest new building on the administrative law construction site. Surely an appropriate and workable standard of review can be found at the confluence of common sense and legal theory.

In a different aspect of his decision, Danyliuk J. applied the reasonableness standard to the issue about whether the delegate had acted in excess of its jurisdiction—on the basis that the

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50. Danyliuk J. went on to cite extensively from recent decisions of the Nova Scotia Supreme Court in *Brown v Nova Scotia (Environment)*, 2016 NSSC 319 and the Saskatchewan Court of Appeal in *Eagle's Nest Youth Ranch Inc. v Corman Park (Rural Municipality #344)*, 2016 SKCA 20. Danyliuk J. also referred to the paper by Justice David Stratas of the Federal Court of Appeal which was published on February 17, 2016, entitled "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency".

delegate was interpreting its home statute and dealing with its core function—and to the issue of whether the delegate's decision had an evidentiary base.

E. The nature of the question and the interpretation of standard form contracts: *Ledcor*

In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*,[51] the Supreme Court of Canada addressed the standard of review to be applied to a standard form insurance contract.

The case dealt with a claim by a general contractor, Ledcor, against an insurer for the costs of replacing windows that had been scratched during the cleaning process. The insurer denied coverage on the basis of an exclusion in the policy for the "cost of making good faulty workmanship". Ledcor sued the insurer.

The trial judge, Justice Clackson, reviewed the insurance contract and held that the exclusion clause was ambiguous and that the rule of *contra proferentem* applied against the insurers.[52] He held in favour of Ledcor. The Court of Appeal of Alberta reversed Clackson J.'s decision.[53] Applying a standard of review of correctness, the Court of Appeal held that the clause was not ambiguous and that Clackson J. had improperly applied the rule of *contra proferentem*.

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51. 2016 SCC 37.

52. 2013 ABQB 585.

53. 2015 ABCA 121.

The Supreme Court of Canada unanimously allowed the appeal and restored Justice Clackson's decision. Eight of the nine judges agreed that the standard of review for reviewing his decision was correctness; the other judge would have applied the standard of palpable and overriding error.[54]

The majority decision (delivered by Wagner J.)

The majority took this case as an opportunity to clarify and expand on the principles previously enunciated in *Sattva Capital Corp*.[55] More specifically, it held that the interpretation of a standard form contract should be recognized as an exception to the court's ruling in *Sattva* that contractual interpretation is a question of mixed fact and law subject to the reasonableness standard of review:

> 4 In my opinion, the appropriate standard of review in this case is correctness. Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.
>
> . . .
>
> 20 These appeals present an opportunity to clarify how *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, applies to the interpretation of standard form contracts, sometimes called contracts of adhesion.
>
> 21 In *Sattva*, Rothstein J. held that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (para. 50). As a result, the palpable and overriding error standard of review applies to a trial court's interpretation of a contract: *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 21-24. However, Rothstein J. acknowledged that the

54. Chief Justice McLachlin and Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, and Brown all agreed on this point. Justice Cromwell concurred with the result but held that the appropriate standard of review was that of palpable and overriding error.

55. 2014 SCC 53.

> correctness standard of review still applies to the "rare" extricable questions of law that arise in the interpretation process, such as "the application of an incorrect principle, the failure to consider a required element of a legal test, [page38] or the failure to consider a relevant factor": *Sattva*, at paras. 53 and 55, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21. This is consistent with the jurisprudence on the standard of review for questions of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36. However, in this case, the Court of Appeal did not purport to identify an extricable question of law that arose in the interpretation process. Rather, it concluded that the interpretation of the contract itself should be reviewed for correctness, despite *Sattva*'s holding that contractual interpretation is a question of mixed fact and law and is owed deference on appeal: paras. 18-19.
>
> 22 Appellate courts have disagreed on whether this Court's holding in *Sattva* on the standard of review of contractual interpretation applies to standard form contracts. Many appellate courts have held that *Sattva* does not apply, and have conducted correctness review....
>
> 23 In other cases, however, courts of appeal have applied *Sattva* and have deferred to trial courts' interpretations of standard form contracts....
>
> 24 I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.
>
> [Emphasis added; authorities omitted.]

The majority noted the need to consider the statements made in *Sattva* in their full context and concluded that, while contractual interpretation is generally a question of mixed fact and law, situations involving standard form contracts are more appropriately classified as a question of law in most circumstances.[56]

The court also emphasized the importance of precedential value of a court decision when characterizing the nature of the question:

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56. At paras. 25 to 35.

41 The definition of questions of law—"questions about what the correct legal test is" (*Southam*, at para. 35)—does not preclude classifying some questions of contractual interpretation as questions of law. There is no bright-line distinction between questions of law and those of mixed fact and law. Rather, "the degree of generality (or 'precedential value')" is the key difference between the two types of questions: *Sattva*, at para. 51. As Iacobucci J. stated in *Southam*, at para. 37:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact... . Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

42 Contractual interpretation is often the "pure application" of contractual interpretation principles to a unique set of circumstances. In such cases, the interpretation is not "of much interest to judges and lawyers in the future" because of its "utter particularity". These questions of contractual interpretation are appropriately classified as questions of mixed fact and law, as the Court explained in *Sattva*.

43 However, the interpretation of a standard form contract could very well be of "interest to judges and lawyers in the future". In other words, the interpretation itself has precedential value. The interpretation of a standard form contract can therefore fit under the definition of a "pure question of law", *i.e.*, "questions about what the correct legal test is": *Sattva*, at para. 49; *Southam*, at para. 35. Establishing the proper interpretation of a standard form contract amounts to establishing the "correct legal test", as the interpretation may be applied in future cases involving identical or similarly worded provisions.

Finally, the court commented on the differing roles between trial judges and appellate courts:

35 The law of standard of review—including the distinction between questions of law and those of mixed fact and law—seeks to achieve an appropriate division of labour between trial and appellate courts in accordance with their respective roles. The main function of trial courts is to resolve the particular disputes before them: *Housen*, at para. 9. Appellate courts, however, "operate at a higher level of legal generality": *Association des parents ayants droit de Yellowknife v. Northwest Territories (Attorney General)*, 2015 NWTCA 2, 593 A.R. 180, at para. 23. They ensure that "the same legal rules are applied in similar situations", as the rule of law demands: *Housen*, at para. 9. Appellate courts also [page43] have a law-making function, which requires them to "delineate and refine legal rules": *ibid.*

> 36 These particular functions of appellate courts—ensuring consistency in the law and reforming the law—justify reviewing pure questions of law on the standard of correctness. By contrast, appellate courts defer to findings of fact in part because they can discharge their mandate without second-guessing trial courts' factual determinations: *Housen*, at paras. 11-14. For questions of mixed fact and law, the correctness standard applies to extricable errors of law (such as the application of an incorrect principle) because, again, a review on the standard of correctness is necessary to allow appellate courts to fulfill their role. However, where it is "difficult to extricate the legal questions from the factual", appellate courts defer on questions of mixed fact and law: *Housen*, at para. 36; see also paras. 33-35.

In summary, the majority concluded that:

> 46 *Sattva* should not be read as holding that contractual interpretation is always a question of mixed fact and law, and always owed deference on appeal. I would recognize an exception to *Sattva*'s holding on the standard of review of contractual interpretation. Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

Decision of Cromwell J.

While concurring with the result that the trial judge's decision should be restored, Justice Cromwell held that the applicable standard of review was palpable and overriding error because the issue on the appeal was a question of mixed law and fact:

> 100 The standard of review aspect of the Court's judgment in *Sattva* must be understood in the context of the Court's broader jurisprudence on standard [page69] of review in civil appeals. At least since *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the standard of appellate review has turned on the nature of the question being reviewed. Questions of law are reviewed for correctness and questions of fact for palpable and overriding error. *Housen* also holds that applying a legal standard to the facts is a mixed question of law and fact and is generally reviewable on appeal for palpable and overriding error: paras. 26-37. So, in a negligence case such as *Housen*, that is the standard that generally governs appellate review of the trial court's application of the legal standard of negligence to the evidence.
>
> 101 I say "generally" because *Housen* recognized that this would not always be so. In some cases, the trial court's application of a legal standard to the facts will attract correctness

review on appeal. This will be the case when the basis for a finding under review can be traced to a pure legal error, such as a wrong characterization of the legal standard or the failure to consider a required element of the applicable standard. In cases of this sort, the reviewing court can "extricate" a purely legal question from the trial court's analysis and having done so, apply to that purely legal question the correctness standard of appellate review: paras. 31-33. These sorts of cases are fairly rare, however. As *Housen* cautioned, it is often difficult to extricate the legal questions from the factual and therefore appellate courts should not be quick to find extricable legal errors in the trial court's application of a legal standard to the facts: para. 36.

. . .

102 I review these basic points of *Housen* because, as I see it, the Court's decision in *Sattva* [page70] brought appellate review in contract cases within this general standard of review framework. To put it in *Housen*'s terms, applying the text of a contract to a particular fact situation involves applying the legal standard set by the contract to the facts of the situation at hand. This interpretative process, therefore, generally gives rise to a mixed question of law and fact and should be reviewable on appeal for palpable and overriding error.

103 *Sattva* explained that this was an appropriate development for two related reasons. First, contractual interpretation is not simply a question of ascribing an abstract legal meaning to the words, but rather of understanding those words in their full context. Second, this process of interpretation should generally be considered to be the application of a legal standard to the facts; in other words, contractual interpretation is generally a mixed question of law and fact which, under the Court's standard of review jurisprudence, is generally reviewed for palpable and overriding error. Both of these related reasons, as we shall see, apply to interpreting all types of contracts.

104 Consider the first reason. Contract interpretation cannot be understood as a process of determining the "legal" and immutable meaning of the text. "[W]ords alone do not have an immutable or absolute meaning" and therefore contractual interpretation does not often turn on ascribing immutable legal meanings to the contractual words: *Sattva*, at para. 47. Rather, the meaning of words often turns on context, such as the purpose of the agreement and the nature of the relationship between the parties: para. 48. Taking those sorts of contextual considerations into account—sometimes called the surrounding circumstances or the factual matrix—requires the court to understand the text of the agreement in light of them, not simply to ascribe purely legal meanings to the words taken in isolation. Thus, just as the Court in *Housen* cautioned against too readily finding that applying a legal standard to the facts gives rise to a purely legal question, the Court [page71] in *Sattva* cautioned that interpretation does not often give rise to a pure question of law. Interpretation is rarely a matter of ascribing some immutable legal meaning to the text considered apart from the surrounding circumstances.

105 A number of appellate courts and my colleague Wagner J. are of the view that this first rationale underlying *Sattva* does not apply to cases interpreting standard form contracts: *Vallieres v. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28, at paras. 11-13; *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281, at paras. 28-30; *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R.

(6th) 1, at para. 273, per McDonald J.A.; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at paras. 40-41; *Monk v. Farmers' Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710, at paras. 22-24; *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173, at para. 34 (CanLII); and *Sankar v. Bell Mobility Inc.*, 2016 ONCA 242, at para. 26 (CanLII). I respectfully disagree.

. . .

108 Unlike my colleague, I do not read this aspect of *Sattva* as holding that contractual interpretation is not generally a pure question of law simply because it involves assessing a "factual matrix" relating to negotiation. Rather, as I have discussed, *Sattva* sees contractual interpretation as not being a pure question of law because it involves understanding the words used in light of a number of contextual factors beyond negotiation, including the purpose of the agreement, the nature of the relationship, the market in which the parties are operating, and so forth. While the words have a consistent meaning, how they apply to the myriad of situations that may arise will most often turn on these sorts of contextual factors. My colleague's interpretative analysis of the standard form contract before us in this case shows that this is so. That analysis relies on the nature of the particular work alleged to be faulty; the nature and cause of the particular damage in issue; the purpose of the contract; the market in which it operates (i.e. the construction industry); the parties' reasonable expectations; and commercial reality.

Cromwell J. was of the view that the majority's proposed exception to the rule set out in *Sattva* did not conform to the general principles of appellate review in civil cases:

114 My colleague proposes an "exception" to *Sattva*'s holding: if an appeal involves the interpretation of a standard form contract, the interpretation itself is of precedential value and there is no meaningful factual matrix specific to the parties to assist the interpretation process, then the interpretation is a question of law and subject to correctness review (para. 46). I do not support the creation of this "exception".

115 As I have outlined, the general principles of appellate review in civil cases turn on characterizing the nature of the question being reviewed as one of fact, law or mixed law and fact. The distinction between questions of pure law and questions of mixed law and fact turns on where the question is located along a "spectrum of particularity": *Housen*, at para. 28. Questions of law are concerned with general legal propositions: *Housen*, at para. 28, [page75] citing *Southam*, at para. 37. As stated in *Housen* and repeated in *Sattva*, examples include applying an incorrect principle, failing to consider a required element of a legal test, or the failure to consider a relevant factor: *Sattva*, at para. 53.

116 As I see it, the three elements of the proposed exception do not assist in deciding whether the question is sufficiently general in nature so as to attract correctness review. Whether or not a contract is a standard form does not, as I see it, tell us anything about the degree of generality of the particular interpretative principle in issue in a particular case.

> The absence of a "factual matrix" is not of much assistance either. All contracts have a context which is important for their interpretation. As I mentioned earlier, aspects of the transaction such as its purpose and the market or industry in which it operates are important for interpreting all contracts, and so is the nature of the allegedly faulty work and the damage allegedly resulting from it. The absence of facts about negotiations does not mean that there are no contextual matters that inform the interpretative process and therefore tend to make it a mixed question of law and fact.
>
> 117 The third element of the proposed exception—whether the interpretation has precedential value—seems to me to simply ask the critical question, which is concerned with the level of generality of a legal principle, in a different and unhelpful way. Questions of law are reviewed on appeal for correctness because the decisions on such questions have precedential value: these sorts of decisions ensure uniformity among similar cases and serve the law-making function of appellate courts (*Housen*, at paras. 8-9). The more general the principle, the more the precedential value. To ask the question in terms of precedential value rather than the generality of the legal principle in issue seems to me to simply pose the key question in a different way and in one that simply sends the [page76] analysis back to the question of degree of generality.
>
> 118 As my colleague's interpretive analysis shows, there are important contextual elements—surrounding circumstances—that inform how the text should be applied to the facts. This is not a case where there are no such contextual factors to consider. Focusing on the question of the generality of the legal principle in issue, I do not see a good case for correctness review on that basis either.
>
> . . .
>
> 125 I conclude that there are important surrounding circumstances that inform the interpretation of standard form contracts and that the legal principle is not of much precedential value. In short, the issue here involves applying a legal standard to a set of facts and did not give rise to any extricable question of law.

One might compare this analysis with the Supreme Court of Canada's decision in *Wilson v. Atomic Energy of Canada*[57] and *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionelles)*,[58] which are pure administrative law cases, where the majority of the court declined to apply the correctness standard of review to sort out which of two conflicting lines of authority should govern.

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57. 2016 SCC 29, [2016] 1 S.C.R. 160.

58. [1993] 2 S.C.R. 756.

F. Cases involving jurisdictional questions where standard of review was not addressed or decided

Curiously, there are a number of recent cases which involve questions of jurisdiction where the courts did not address the applicable standard of review. For examples, see *Ernst v. Alberta Energy Regulator*[59] (involving a question about whether s. 24 *Charter* damages are available in the face of a statutory immunity clause protecting actions by the Alberta Energy Regulator), and *Green v. Alberta Teachers' Association*[60] (involving a question about the effect of a privative clause on the availability of judicial review where the issue involved a rule enacted by the Association).

In the very recent decision in *Tran v. Canada (Public Safety and Emergency Preparedness)*,[61] Justice Côté for the Court did not identify the applicable standard of review, but was satisfied that "... the phrase "term of imprisonment" in s. 36(1) of the *IRPA* cannot, by either standard of review, be understood to include conditional sentences".

G. Commentary

It is apparent that there is still a live debate about the existence, scope and application of the correctness standard of review. Although the Court in *Dunsmuir* recognized that there are circumstances where the statutory delegate must be correct, there was a strong tendency for the Court to prefer to apply the reasonableness standard of review whenever it could (*Alberta Teachers' Association*). Indeed, the Court sometimes used the reasonableness standard of

59. 2017 SCC 1.

60. 2016 ABCA 237.

61. 2017 SCC 50, at para. 34.

review to find something unreasonable when it really meant it was incorrect ("correctness masquerading as reasonableness": *Mowat*, *Wilson*), particularly in cases involving statutory interpretation where there was only one right answer. While an incorrect interpretation of a statute cannot be reasonable, the converse is not true (at least some reasonable interpretations may not be correct). The recent cases continue to highlight the division between those judges who accept that there are jurisdictional limitations on the powers of statutory delegates, whose actions can (indeed must) be corrected; and those who would apply the reasonableness standard in all cases of judicial review. Justice Abella suggested the latter as the next step in simplifying judicial review (*Wilson*). Interestingly, none of the recent cases takes up her suggestion.

III. JURISDICTION

Apart from issues about the applicable standard of review, the number of cases this past year raising interesting jurisdictional issues is quite remarkable. Some of the cases deal with the jurisdiction of statutory delegates to deal with a particular matter; others deal with the court's own jurisdiction.

Cases dealing with the jurisdiction of statutory delegates

A. *Guérin*

As noted above, *Québec (procureure générale) v. Guérin*[62] dealt with an arbitrator's jurisdiction to hear disputes. The majority reiterated the importance of the arbitrator's defining the subject matter that is central to the dispute:

> 39 Any decision-maker required to resolve a dispute must first define the subject matter or essential character of the dispute (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 52). In the case at bar, the arbitrator concluded that the subject matter of Dr. Guérin's proceeding was a declaration recognizing the laboratories for the period at issue in the application.
>
> 40 In reaching this conclusion, the arbitrator did not confine himself to Dr. Guérin's description of the issue in his notice of dispute, that is, that the dispute [TRANSLATION] "concerns the interpretation and application of section 4.[2](iv) of the Protocol" (notice of dispute, at para. 1). He also considered the conclusions being sought, and in particular the request for a declaration "that the medical imaging laboratories [represented by Dr. Guérin] should be recognized ... as of June 1, 2009" and that the physicians working there were "therefore entitled to the digitization fee" as of that date (notice of dispute, conclusions). The arbitrator found on this basis that what Dr. Guérin actually wanted him to do was to rule on the recognition of the laboratories in place of the negotiating parties. Given that the subject matter of the dispute thus related to the interpretation of the recognition mechanism established by the Protocol, the arbitrator did not need to analyze the provisions of the Framework Agreement and the Act with respect to the arbitration process, or the provisions of the Protocol setting out the eligibility criteria for the digitization fee. He instead focused on the provisions of the Framework Agreement and the Protocol that confer the authority to determine eligibility for the fee on the negotiating parties.
>
> 41 In considering the motion for judicial review, the Superior Court and the Court of Appeal were limited to determining whether the arbitration award was reasonable, including in relation to the subject matter of the dispute. As the dissenting judge in the Court of Appeal indicated, the motion judge and the majority of the Court of Appeal were in error in instead reformulating the subject matter to find that the dispute related to the interpretation and application of the conditions for eligibility for recognition and to Dr. Guérin's standing (motion judge's reasons, at paras. 19-20; C.A. reasons, at paras. 38-39). By altering the issue in this way, they failed to show the council of arbitration the deference they owed it.

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62. 2017 SCC 42.

. . .

> 42 The arbitrator concluded that he did not have jurisdiction to rule on whether the laboratories should be recognized. According to his interpretation of the Protocol, the negotiating parties had reserved for themselves the authority to decide whether to recognize a laboratory, and had in so doing excluded that decision from the arbitration process. In his opinion, if he were to rule on the dispute, he would in effect be substituting his own opinion for that of the negotiating parties and circumventing the decision-making mechanism they had negotiated. In short, the arbitrator held that the proceeding did not raise an arbitrable dispute.

As noted above, Justices Brown and Rowe made a distinction between (a) jurisdiction to hear the matter and (b) arbitrability.

B. *Green v. Law Society of Manitoba*

Green v. Law Society of Manitoba[63] dealt with the ability of the Law Society of Manitoba to impose rules on its members that coupled a mandatory continuing professional development program with possible suspension for failing to meet the program's requirements.

Green sought a declaration that the rules were invalid on the ground that they were unfair because they imposed a suspension without a right to a hearing or a right to appeal. He did not apply for judicial review of the Law Society's decision to suspend him.

The applications judge dismissed Green's application, holding that the impugned rules fell within the Law Society's legislative mandate.[64] The Manitoba Court of Appeal upheld that decision.[65] In a 5 to 2 decision, the Supreme Court of Canada dismissed the appeal.

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63. 2017 SCC 20.

64. 2014 MBQB 249.

65. 2015 MBCA 67.

Speaking for the majority, Justice Wagner stated:[66]

> 1 A lawyer's professional education is a lifelong process. Legislation is amended, the common law evolves, and practice standards change as a result of technological advances and other developments. Lawyers must be vigilant in order to update their knowledge, strengthen their skills, and ensure that they adhere to accepted ethical and professional standards in their practices.
>
> 2 This appeal concerns a basic component of a lawyer's education: continuing professional development ("CPD"). At issue is whether The Law Society of Manitoba ("Law Society") can impose rules that couple a mandatory CPD program with a possible suspension for failing to meet the program's requirements.
>
> 3 I agree with the courts below that the Law Society has the authority to do so. The Law Society is required by statute to protect members of the public who seek to obtain legal services by establishing and enforcing educational standards for practising lawyers. CPD programs serve this public interest and enhance confidence in the legal profession by requiring lawyers to participate, on an ongoing basis, in activities that enhance their skills, integrity and professionalism. CPD programs have in fact become an essential aspect of professional education in Canada. Most law societies across the country have implemented compulsory CPD programs.
>
> 4 But educational standards can ensure consistency of legal service only if lawyers adhere to them. If a lawyer fails to complete the required hours of training ("CPD hours") even after having been warned, temporarily suspending him or her until those hours are completed is a reasonable way to ensure compliance. This suspension is administrative, not punitive, in nature.
>
> 5 The appeal should be dismissed. The impugned rules with respect to CPD are reasonable in light of the importance of CPD programs and the Law Society's broad rule-making authority over the maintenance of educational standards.

However, Justices Abella and Côté dissented. In reasons delivered by Abella J., they agreed that the Law Society had authority to require its members to complete mandatory professional development ("jurisdiction"), but held that the real issue in the case was whether the Law Society's rule that members who did not comply with the rule are *automatically* suspended was reasonable. They held it was not reasonable because the rule was inconsistent

66. Chief Justice McLachlin, and Justices Moldaver, Karakatsanis, and Gascon concurred. Justices Abella and Côté dissented.

with the Law Society's mandate to protect the public's confidence in the legal profession because it gratuitously—and therefore unreasonably—impairs public confidence in the lawyer (perhaps confusing a disciplinary suspension with an administrative one).[67]

C. *Ready*

Also discussed above, *Ready v. Saskatoon Regional Health Authority*[68] raised the issue of the jurisdiction of the Practitioner Staff Appeals Tribunal (the "Appeals Tribunal") to hear an appeal from a decision of the Saskatoon Regional Health Authority to terminate the employment of a physician.

The jurisdictional issue related to whether a grievance tribunal mandated to hear appeals respecting practitioner status, hospital privileges and discipline had the authority to make determinations affecting private employment contracts entered into between a health authority and a physician.

In a decision that focussed primarily on the issue of what standard of review applied, the Saskatchewan Court of Appeal, in a 2-1 split decision, held that the Appeal Tribunal did not have jurisdiction to hear the matter.

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67. At paras. 72*ff*.

68. 2017 SKCA 20.

D. *Wall*

In *Wall v. Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*,[69] the Court of Appeal of Alberta considered whether the Court of Queen's Bench had jurisdiction to hear an application for judicial review of a decision of the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses (the "Committee") to expel Wall from the congregation.

The chambers judge, Mr. Justice Wilson, held that the Court of Queen's Bench did have jurisdiction to hear the judicial review application because the disfellowship had an economic impact on Wall and his property and civil rights had been impacted.[70] Justice Wilson also questioned whether the Committee's processes were procedurally fair.

In a 2-1 split decision, the Court of Appeal dismissed the appeal. The majority, consisting of Justices Paperny and Rowbotham, rejected the argument that courts may only interfere in the affairs of religious groups if property or civil rights are at stake and held that courts also have jurisdiction when there has been a breach of the rules of natural justice or the complainant has exhausted the organization's internal processes.[71]

Mr. Justice Wakeling dissented, holding that the Highwood Congregation was a private entity that was not subject to judicial review. Moreover, Wakeling J.A. was of the view that even

69. 2016 ABCA 255.

70. Unreported (April 16, 2015; Docket: 1401 10225).

71. See paras. 15 to 22.

if the Congregation was subject to judicial review, there was no justiciable issue because Wall's civil or property rights had not been affected.[72]

Leave to appeal the Court of Appeal's decision has been granted by the Supreme Court of Canada.[73]

E. *West Fraser Mills*

The British Columbia Court of Appeal addressed a jurisdictional issue in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*.[74] The Court upheld a decision of the British Columbia Supreme Court to dismiss an application for judicial review of a decision of the Workers' Compensation Appeal Tribunal. The central issue was whether the Workers' Compensation Board had authority to make a regulation governing safe work practices and imposing liability (and penalties) on owners of forestry work sites using independent contractors (as opposed to employers).

The Court of Appeal dismissed the appeal and held that the Board had broad powers to make regulations for the protection of the health and safety of workers. The impugned regulation was within the Board's jurisdiction.[75]

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72. See paras. 39 to 48 and 68 to 141.

73. Leave was granted on April 13, 2017.

74. 2016 BCCA 473.

75. See paras. 52 to 66.

The Supreme Court of Canada has granted leave to appeal this decision.[76]

F. *Democracy Watch*

Democracy Watch v. British Columbia (Conflict of Interest Commissioner)[77] involved the jurisdiction of the British Columbia Supreme Court to hear a judicial review petition made by Democracy Watch with respect to decisions made by the Conflict of Interest Commissioner ("the Commissioner") concerning fundraising activities of the Premier.[78] The Commissioner applied for an order dismissing the petition for judicial review, arguing that the court did not have jurisdiction to hear the petition. In particular, the Commissioner argued that his decisions with respect to the Premier's fundraising activities were immunized from judicial review by legislative privilege.

Justice Affleck allowed the Commissioner's application and held that the court did not have jurisdiction to hear the petition for judicial review. He rejected the argument of Democracy Watch that legislative privilege did not apply because the impugned conduct occurred while the Premier was acting in her role as President of the Executive Council, not as a member of the Legislature. While referring to Democracy Watch's argument as having "superficial plausibility", Affleck J. concluded that he did not have jurisdiction to hear the petition for judicial review. The Commissioner had authority to investigate, give an opinion on and, in appropriate circumstances, make a recommendation with respect to the conduct of both

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76. Leave was granted on May 4, 2017.

77. 2017 BCSC 123.

78. The Commissioner decided that it was not a real or apparent conflict of interest for the Premier of British Columbia to receive annual payments from the BC Liberal Party while fundraising for the Party was done at exclusive events with special access to the Premier being sold for high amounts.

elected members of the Legislative Assembly and appointed members of the Executive Council. The Commissioner's decisions were not subject to judicial review:

> 33 The petitioner's argument has a superficial plausibility but I cannot agree with it. The *Act* is directed to potential conflicts of interest by "members". The definition of member is intended to encompass both those who are elected members of the Legislative Assembly and those who are appointed to the Executive Council but who have not been elected to the Legislature. In our system of government a person may be appointed to the Executive Council (the Cabinet as it is commonly described), even though that person has not been elected to the Legislature. If a complaint is made that such a person is in a conflict of interest the Commissioner is authorized by the *Act*, to investigate and to give an opinion and perhaps a recommendation. I do not, however, read the definition of "member" to mean that the Commissioner is clothed with authority to investigate an executive decision by a member of the Executive Council and then report to the Legislature, and perhaps recommend a penalty to be imposed on that person.
>
> 34 The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, provides a means for an aggrieved person to seek judicial review of the exercise of a statutory power of decision. That may include a decision of the Executive Council or one of its members. If the Legislature had intended that the *Act* also provide the Commissioner with the power to investigate, report to the Legislature and perhaps recommend a penalty to be imposed on a member of the Executive Council, for an executive decision, I would expect the Legislature to have said so expressly. It did not.
>
> 35 Nor do I accept the petitioner's submission that *Dunsmuir* has application to the present matter. *Dunsmuir* dealt with judicial review of decisions made by administrative tribunals. An "officer of the Legislature" cannot be equated to an administrative tribunal.
>
> 36 There is an abundance of high authority against the petitioner's position on jurisdiction. It is for the Legislature to consider the conduct of its officers, when they are performing their assigned role, not the courts.
>
> 37 I will add that the Commissioner is authorized by the *Act* to do no more than conduct an inquiry; arrive at an opinion, and in the appropriate circumstance make a recommendation to the Legislative Assembly. It is then for the Legislature, not the Commissioner, if it chooses to do so to exercise discipline authority over its members. An opinion of the Commissioner has no legal consequence unless and until the Legislature acts on it.

The matter has been appealed to the Court of Appeal, which heard the appeal last month.

G. *Sobeys West*

The decision in *Alberta College of Pharmacists v. Sobeys West Inc.*,[79] discussed above under "Standards of Review", addressed the jurisdictional issue of whether a policy imposed by the Alberta College of Pharmacists which prohibits inducements, such as Air Miles, and loyalty programs being offered to patients (the "Policy") was *ultra vires* the jurisdiction of the College. Sobeys sought judicial review of the College's decision to implement the Policy, arguing that it was *ultra vires* because it contravened section 3(2) of the *Health Professions Act*[80] which prohibits the regulation of professional fees by the College.

In his decision on the merits,[81] Ouellette J. held that the Policy was *ultra vires* the jurisdiction of the College because it amounted to controlling the way commercial entities operate and compete amongst themselves. That is, the Policy had a clear and direct economic function which was outside the scope of the College's authority and the Policy was, therefore, *ultra vires* the College under the *Health Professions Act*.

The College appealed that decision to the Court of Appeal of Alberta. The Court of Appeal allowed the appeal and held that the policy was *intra vires* the jurisdiction of the College. In a unanimous judgment,[82] the Court held that:

> 77 In this case, the College was authorized under the [*Health Professions Act*] to adopt a code of ethics and standards for its regulated members, which, read broadly, includes the regulation of activities like inducements associated with the dispensing and sale of drugs

79. 2017 ABCA 306.

80. RSA 2000, c. H-7.

81. 2016 ABQB 232.

82. Of Justices Berger, McDonald and Strekaf.

> and the provision of professional services. In similar circumstances and similar legislation, the British Columbia Court of Appeal in *Sobeys West Inc. v. College of Pharmacists of British Columbia* concluded at para. 56 that "there can be no doubt that 'public interest' in this context extends to the maintenance of high ethical standards and professionalism on the part of the profession."
>
> 78 In our view, it was an overreach to have construed the policy as being *ultra vires* of the College based upon the provisions of the [*Health Professions Act*]. To the contrary, as discussed below, like the British Columbia Court of Appeal in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, we find that the Policy does "conform to the rationale of the statutory regime set up by the legislature" (*Catalyst* at para. 25), and therefore, it cannot be said to be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose (*Katz* at para. 28).
>
> 79 In the result, we hold that the Policy was *intra vires* of the College.

Cases dealing with the court's jurisdiction

H. *Windsor*

In *Windsor (City) v. Canadian Transit Co.*,[83] the Supreme Court of Canada considered whether the Federal Court had jurisdiction to decide whether a company engaged in works and undertakings for the general advantage of Canada had to comply with municipal bylaws and repair orders with respect to several residential properties that it owned. Canadian Transit applied to the Federal Court for declarations to the effect that it had certain rights under federal legislation[84] which superseded municipal bylaw and repair orders. Justice Shore of the Federal Court held that he did not have jurisdiction to make such declarations

83. 2016 SCC 54.

84. *An Act to incorporate the Canadian Transit Company*, S.C. 1921, c. 77, ss. 2, 8.

and struck Canadian Transit's application.[85] The Federal Court of Appeal set aside Justice Shore's decision.[86]

In a 5-4 split decision, the Supreme Court allowed the appeal and held that the Federal Court did not have jurisdiction to decide whether the company was bound to comply with municipal bylaws. Speaking for the majority, Karakatsanis J. considered the essential nature of the company's claim and reviewed the role and jurisdiction of the Federal Court.[87] She discussed the differing roles of the provincial superior courts and the Federal Court:

> 32 The provincial superior courts recognized by s. 96 "have always occupied a position of prime importance in the constitutional pattern of this country" (*Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 327, per Estey J.). Provincially administered (s. 92(14)) and federally appointed (ss. 96 and 100), they weave together provincial and federal concerns and act as a strong unifying force within our federation. As courts of general jurisdiction, the superior courts have jurisdiction in all cases except where jurisdiction has been *removed* by statute (*Québec Téléphone v. Bell Telephone Co. of Canada*, [1972] S.C.R. 182, at p. 190). The inherent jurisdiction of the superior courts can be constrained by legislation, but s. 96 of the *Constitution Act, 1867* protects the essential nature and powers of the provincial superior courts from legislative incursion (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 18; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 15).
>
> 33 The Federal Court, by contrast, has only the jurisdiction it has been *conferred* by statute. It is a statutory court, created under the constitutional authority of s. 101, without inherent jurisdiction. While the Federal Court plays a critical role in our judicial system, its jurisdiction is not constitutionally protected in the same way as that of a s. 96 court. It can act only within the constitutional boundaries of s. 101 and the confines of its statutory powers. As this Court noted in *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 331, "[b]ecause the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts, the language of the [*Federal Court Act*] is completely determinative of the scope of the Court's jurisdiction."
>
> [Footnotes deleted.]

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85. 2014 FC 461.

86. 2015 FCA 88.

87. At paras. 24 to 71. Chief Justice McLachlin, and Justices Cromwell, Wagner and Gascon concurred.

Karakatsanis J. went on to discuss and apply the test set out in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc*.[88] for determining whether the Federal Court has jurisdiction in a given case. She concluded that it was clear and obvious that the Federal Court lacked jurisdiction to hear Canadian Transit's application. The company's application was struck.

Justices Moldaver, Côté, and Brown delivered dissenting reasons holding that the Federal Court did have the required statutory grant of jurisdiction:[89]

> 118 ... This case involves a federal company, created under a specially enacted federal statute, whose sole function under the statute is to operate a federal undertaking and whose claim for declaratory relief focusses exclusively on its right to carry out its statutory mandate free from unconstitutional constraints imposed by municipal bylaws. As the Federal Court of Appeal concluded, the Federal Court has jurisdiction to hear the Company's application. We are satisfied that the *ITO* test is met: there is a statutory grant of jurisdiction under s. 23(c) of the *Federal Courts Act*, and valid federal law is essential to the disposition of the case. It follows that we would dismiss the appeal, with costs to the Company.
>
> 119 That is the end of the matter so far as this Court is concerned. It remains for the Federal Court to decide whether it should exercise its jurisdiction to hear the Company's application, or decline to do so in favour of the Superior Court (see *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at paras. 37-38; *Federal Courts Act*, s. 50(1)). Whether the Superior Court would be a [page666] more appropriate forum for the resolution of the issues raised in this application was not argued before us. But the parties do not dispute that the Superior Court also has the jurisdiction to decide these issues.
>
> 120 In deciding whether to exercise its jurisdiction, the Federal Court should consider the factors set out by this Court in *Strickland*, including whether the Company has an adequate and effective recourse in a forum in which litigation is already taking place, expeditiousness, and the economical use of judicial resources (para. 42). Three observations in this regard are apposite. First, the applications judge commented that the Superior Court—where proceedings were already commenced (albeit four months after the Company had already filed its application for declaratory relief in the Federal Court) and over which the City had carriage—offered the Company an adequate alternative forum 2014 FC 461, 455 F.T.R. 154, at para. 21). In this vein, we find it significant that the arguments that the Company wishes to make in support of its claim—namely, that the City's bylaws are inapplicable pursuant

88. [1986] 1 S.C.R. 752. See paras. 34 to 71.

89. Which were delivered by Moldaver and Brown JJ.

> to the doctrine of interjurisdictional immunity—could have been made in the context of those proceedings. Second, as the intervener the Attorney General of Canada submitted, the interests of justice are not well served by permitting parties to bring multiple proceedings before different courts seeking identical relief. And finally, the Superior Court may well furnish a not merely adequate but more effective forum to dispose of this case than the Federal Court, because it will involve the application of municipal law, in which the Superior Court has considerable institutional experience.
>
> 121 In short, there may be good reason for the Federal Court to decline to hear the Company's application. Indeed, it would be open to the Federal Court to question the value of this separate application, given the delay and increased cost it has brought to the litigation between the City and the Company.

Abella J. delivered separate dissenting reasons holding that the test set out in *ITO-International* had been met.[90]

I. *Green v. ATA*

The issue in *Green v. Alberta Teachers' Association*[91] was whether the court had jurisdiction to hear an application for judicial review in the face of a privative clause.

The case arose from an internal appeal from a professional disciplinary decision. A Hearing Committee had found Green guilty of professional misconduct for criticizing another teacher's teaching practice to school administration without giving prior notice to the teacher. Green appealed that decision to the Professional Conduct Appeal Committee ("Appeal Committee") which came to a 2-2 decision on whether to allow the appeal. Notwithstanding

90. At paras. 122 to 131.

91. 2016 ABCA 237. See also *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCCA 473, discussed above, for discussion on the impact of a privative clause.

the tie vote, the Appeal Committee dismissed the appeal without seeking submissions on the issue of whether a decision to dismiss an appeal could be rendered on a tie vote.[92]

Green applied for judicial review of the Appeal Committee's decision. Mr. Justice Clackson of the Alberta Court of Queen's Bench dismissed the application.[93] While Clackson J. agreed that it was "disturbing" for a professional organization engaged in professional disciplinary hearings to give itself an advantage (by deciding ties would be decided in favour of the organization), he held that the role of the court on judicial review was to decide whether the process was unfair, not whether it was distasteful.

Clackson J. also held that even if the Appeal Committee had erred in dismissing the appeal on a tie vote, he had no authority to intervene given section 57 of the *Teaching Profession Act*[94] which includes a privative clause insulating decisions from judicial review except on questions of jurisdiction. Green appealed to the Court of Appeal.

The Court of Appeal allowed Green's appeal, holding that Clackson J. had erred in interpreting the privative clause:

> 25 In *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, the Supreme Court definitively set out the approach that courts must take when faced with a privative clause seeming to oust or limit judicial review. The majority found that a "full" privative clause does not mean what it says—*i.e.*, that judicial review is precluded. Rather, the presence or absence of a privative clause is merely a factor that goes to the appropriate standard of review. In this way, a privative clause—and particularly, a strongly worded one—indicates

92. Section 83(3) of the General Bylaws of the Alberta Teachers' Association stated that "unless otherwise specified, the votes or decisions of any Committee or panel shall be by a majority of those participating in the vote or decision".

93. 2015 ABQB 379.

94. RSA 2000, c. T-2.

that the legislator intended courts to adopt a deferential standard of review (*i.e.* "reasonableness"). The Supreme Court majority in *Dunsmuir* wrote at para. 52:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

26 In this case, the chambers judge considered the privative clause contained in section 57 of the *Act* and concluded that a judicial review assessing the reasonableness of the Appeal Committee's decision was unavailable.

27 In our opinion, the chambers judge erred.

28 In *Dunsmuir*, the privative clause at issue was more strongly worded than the one in this case, as not even questions of jurisdiction were reserved. Furthermore, in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 774-75, 105 DLR (4th) 385, the Supreme Court considered a similar privative clause to the one at issue in this case, which purported to limit review of a tribunal's decisions except on questions of jurisdiction. The Supreme Court found that courts could nonetheless review such decisions for (what was then) patent unreasonableness.

29 Those observations were an echo of the Supreme Court's recognition for the first time in *Crevier v. Quebec (Attorney General)*, [1981] 2 SCR 220 "that a provincially constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction." (at p. 236)

30 We would add only that the rule of law is also a constitutional principle that may justify reviewing an administrative decision in spite of a privative clause purporting to preclude such review. The majority in *Dunsmuir* at para. 28 invoked the rule of law to justify the availability of judicial review in some circumstances notwithstanding the legislative grant of broad powers to administrative decision-makers:

> [28] 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.
>
> 31 We conclude that the privative clause does not preclude judicial review of the decision of the Appeal Committee which, we are persuaded, exceeded its jurisdiction.

One might compare this with the decision of the Supreme Court of Canada in *Ernst*[95] which involved a statutory immunity clause (as opposed to a privative clause), discussed below.

J. *A. v. Edmonton Police Service*

In *A. v. Edmonton Police Service*,[96] the Court of Appeal of Alberta considered the jurisdiction of the Court of Queen's Bench to hear an application for judicial review of a decision of the Law Enforcement Review Board when there was a statutory provision providing for an appeal to the Court of Appeal.

The trial judge held that she did not have jurisdiction to conduct a judicial review.[97] The applicant appealed that decision.

The Court of Appeal unanimously allowed the appeal, holding that section 28.1 of the *Judicature Act*[98] provides for the substantive right to judicial review. The inherent power of the superior courts to review a statutory delegate's decision could not be excluded. Instead of addressing whether or not she had jurisdiction to hear the application, the reviewing judge

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95. *Ernst v. Alberta Energy Regulator*, 2017 SCC 1.

96. 2017 ABCA 38.

97. 2015 ABQB 697 (Justice Sulyma).

98. RSA 2000, c. J-2.

should have asked whether the court should exercise its discretion to hear the judicial review application since judicial review is a discretionary remedy.

The court went on to discuss the court's discretion to allow judicial review even when a statutory right of appeal exists, especially where the scope of the right to appeal is limited:

> [12] ... An application for judicial review generally should be declined if an adequate statutory right of appeal exists: *Foster v Alberta (Transportation and Safety Board)*, 2006 ABCA 282 at para 14, 276 DLR (4th) 233, citing *Harelkin v University of Regina*, [1979] 2 SCR 561, 96 DLR (3d) 14. This Court in *Foster* at para 14 summarized a number of the factors to be considered in an assessment of whether a right of appeal is an adequate alternate remedy....
>
> 13 In this case, section 18 of the *Police Act* provides for appeals from the LERB directly to the Court of Appeal with permission of a judge of this Court. The statutory right of appeal is restricted, however, to questions of law. Permission to appeal will be granted only on significant issues of law with a reasonable chance of success: see *Zalaski v Law Enforcement Review Board*, 2013 ABCA 347, 561 AR 136; *Alberta (Workers' Compensation Board) v Appeals Commission*, 2005 ABCA 276, 258 DLR (4th) 29.
>
> 14 Where, as here, the scope of a statutory right of appeal is limited, the issue of whether the statutory appeal is an adequate alternate remedy to judicial review is less settled. Before us, both the appellant and the respondent Chief of Police agreed that in these circumstances judicial review ought not to be precluded. They both submit that where a right of appeal does not include the right to appeal on issues of mixed fact and law in the absence of an extricable legal issue, the adequate alternate remedy principle does not limit the discretion of the courts to entertain applications for judicial review that raise issues of mixed fact and law.
>
> 15 In our view, the analysis is more complex and nuanced than that. It requires a careful review of the legislation and the intention of the legislature in granting the right of statutory appeal in the terms set out. Because the reviewing judge incorrectly concluded she had no jurisdiction to entertain the judicial review application, she did not thoroughly analyze these considerations. We have not been presented with thorough argument on the subject, given the agreement of the parties on appeal that the judicial review should have been heard. In the absence of analysis from the court below and thorough argument in this Court, we decline to determine the adequate alternate remedy point on this record. We are prepared, for the purpose of this appeal only, to accede to the agreement of the parties that judicial review of the decision of the LERB was available and appropriate. A definitive determination by this Court as to whether, or how, the discretion to hear a judicial review

> ought to be exercised in circumstances such as these must await a proper record in another case.
>
> [Emphasis added.]

K. *Abbass*

A similar issue arose in *Abbass v. Western Health Care Corp.*,[99] where the Newfoundland and Labrador Court of Appeal allowed an appeal from a decision of an applications judge in which he declined to exercise his jurisdiction to hear a *habeas corpus* application.

The issue was whether *habeas corpus* was available to challenge the legality of a person's detention under Newfoundland's *Mental Health Care and Treatment Act* (the "Act")[100] given that the statute contained a specific provision giving a means for a detained individual to seek release from detention.[101]

The Court of Appeal held that the applications judge had incorrectly declined to exercise his jurisdiction to hear the *habeas corpus* application.[102] The alternate procedure available under the Act was not "complete, comprehensive, and expert"[103] and it was at least arguable that the admission and detention of the applicant was not lawfully authorized. The Court stated:

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99. 2017 NLCA 24 (by the Court which consisted of Green C.J., Rowe and White JJ.A. Justice Rowe did not participate in the judgment because in the meantime he had been elevated to the Supreme Court of Canada.

100. SNL 2006, c. M-9.1.

101. Under Part II of the Act.

102. The court applied a standard of review of correctness to the applications judge's decision.

103. As discussed in *May v. Ferndale Institution*, 2005 SCC 82.

> 11 Generally speaking, *habeas corpus* should *prima facie* be available whenever the legality of a detention is brought into question. Access to it is enshrined in section 10(c) of the *Canadian Charter of Rights and Freedoms*. Blackstone described it as "the great and efficacious writ in all manner of illegal confinement" (Blackstone, *Commentaries of the Laws of England* (Oxford: Clarendon Press, 1768),Vol. 3, p. 131; emphasis added) and Newfoundland's seventh chief justice, Sir Francis Forbes, writing in 1829 when subsequently serving as Chief Justice of New South Wales, called it "a high prerogative writ and so much the right of the subject as to render it compulsory on the judges ... to grant it (quoted in Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass: Belknap Press, 2010), p. 82, citing *In re Jane New*, Dowling, Select Cases, v. 2, Archives Office of NSW, 2/3462, [1829] NSWSupC 11; emphasis added). Thus, it becomes important to define the circumstances where this "great writ of liberty" should legitimately be denied. The Canadian cases have indicated that there are some limited exceptions to the general rule of availability. One of them is where there is an alternative efficacious procedure available for addressing the applicant's claims of illegal detention. Whether the procedure under consideration falls within the defined exception is a question of law on which the judge hearing the *habeas corpus* application must be correct.
>
> 12 If the exception, on a correct analysis, does apply, then the judge has a discretion (but not a duty) to decline to grant the remedy. That decision is reviewable on the same standard as any other discretionary decision. See *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (NFCA) at paragraph 33.

The Court allowed the appeal and remitted the matter back to the Trial Division for continuation of the hearing.[104]

IV. STANDING

The issue of standing has not gone un-litigated this year. The following noteworthy cases deal with the issue of a party's standing to appeal or bring applications or to participate in proceedings.

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104. The court held it was not appropriate for it to make a determination on the merits of the *habeas corpus* application because the record may be incomplete (at para. 56).

A. *Guérin*

One of the issues in *Québec (procureure générale) v. Guérin*[105] was whether Dr. Guérin had standing to submit the dispute concerning eligibility for a digitization fee to arbitration. The arbitrator held that he did not. Both the motions judge and the majority of the Quebec Court of Appeal held that Dr. Guérin did have standing pursuant to section 54 of the *Health Insurance Act* (the "HIA") which provides that disputes resulting from the interpretation or application of a collective agreement are to be submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction.

On appeal to the Supreme Court of Canada, the court identified the issues in the case as both jurisdictional and related to standing. The majority[106] held that the arbitrator's decision that Dr. Guérin did not have jurisdiction—because the dispute was not arbitrable—was reasonable and should be restored. Because of this finding, it was unnecessary for the court to address the standing issue in detail. Nonetheless, the majority did address standing and concluded that Dr. Guérin did not have standing:

> 50 In light of this conclusion [on jurisdiction], it is not strictly necessary to address the second issue, that of standing. Indeed, this was not a determinative aspect of the arbitration award. On the other hand, it was essentially on this issue that the Superior Court and the majority of the Court of Appeal based their conclusion that the decision was unreasonable. With respect, we are of the opinion that it was in any event reasonable for the arbitrator to conclude that Dr. Guérin did not have standing because, under the Framework Agreement and the Act, only the Fédération can submit such a dispute to a council of arbitration....

105. 2017 SCC 42. See also *Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2017 FCA 132 in which the Federal Court of Appeal held that reasonableness is the presumed standard of review for the decision of an administrative decision-maker familiar with a frequently used statute: at para. 25.

106. Reasons delivered by Justices Wagner and Gascon. Chief Justice McLachlin and Justice Karakatsanis concurred.

> 51 On this point, the arbitrator noted that the Act gives the Fédération a monopoly of representation that permits it to negotiate the terms of the Protocol and to bind all its members, who cannot then contest the outcome of the negotiation by way of arbitration. In his view, this means that Dr. Guérin did not have standing to submit his dispute. We are of the opinion that the arbitrator's decision on this point, albeit brief, and although it in some respects confused this issue with that of whether the dispute was arbitrable, was also reasonable.
>
> 52 As the arbitrator mentioned, medical specialists are bound by the provisions of the Framework Agreement, which the negotiating parties entered into legally (ss. 19 and 21 of the Act; Framework Agreement, sch. 1, s. 3.1). Nothing precludes that agreement from delimiting the recourse to arbitration provided for in the Act. The only limits in this respect are those of the provisions of the Act that specifically indicate situations in which a health professional may submit a notice of dispute directly to a council of arbitration: where the RAMQ has refused a payment or required the reimbursement of an amount, or in the case of a disagreement related to a professional services contract with a health institution (ss. 22.0.1 and 22.2 of the Act). The negotiating parties reiterated these two situations in their arbitration procedure, but for other disagreements related to the application of the Framework Agreement, they provided, as it was open to them to do, that only the Fédération may submit a collective dispute (Framework Agreement, sch. 1, ss. 20.2 to 20.5).
>
> 53 Under the Framework Agreement, therefore, the Fédération is [TRANSLATION] "the only organization representing medical specialists" both for the negotiation and for the application of any agreement entered into under s. 19 of the Act (Framework Agreement, sch. 1, s. 3.1). The Fédération thus exercises all recourses of the members it represents, with the exception of those that are expressly reserved for medical specialists by the Act or the Framework Agreement (*Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 41). In short, except in the case of a dispute with respect to fees, medical specialists are always represented by the Fédération in arbitration proceedings.
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> [Emphasis added.]

Justices Brown and Rowe concurred with the majority in the result but discussed whether standing was a jurisdictional issue in this case. They held it was not, but made it clear that standing could be a jurisdictional issue in other cases, for example where the delegate is confined by the terms of its grant to hear only from a certain class of complainants.[107]

Madam Justice Côté dissented on the issue of standing, concluding that regardless of whether a reasonableness or correctness standard of review was applied, the arbitrator's decision that

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107. At paras. 69 to 82. See also discussion under "Jurisdiction" above.

Dr. Guérin lacked standing could not stand because it was based on (1) a mischaracterization of the nature of the dispute and (2) a misinterpretation of s. 54 of the HIA.[108]

B. *Alberta (Attorney General) v. Alberta (Provincial Court)*

In *Alberta (Attorney General) v. Alberta (Provincial Court)*,[109] Judge Malin, an Alberta Provincial Court judge, had denied a request by the police for an order requiring production of financial institution client records. The Crown applied to the Court of Queen's Bench for an order quashing Judge Malin's order. The Court of Queen's Bench allowed the Crown's application, quashed Judge Malin's decision and mandated issuance of the production order.[110] Judge Malin sought to appeal the Court of Queen's Bench decision. The Crown applied to have the appeal dismissed for want of jurisdiction.

The Court of Appeal of Alberta allowed the Crown's application. A unanimous court[111] held that Judge Malin did not have standing to appeal the Court of Queen's Bench decision. The court stated the issue as follows:

> 7 ... the decisive question here is whether the Judge can appeal to this Court on his own behalf to debate the accuracy in law of his own decision or to challenge the accuracy in law of the Decision of the superior court. He has purported to do both. This involves a jurisdictional issue, namely whether the Judge has standing, whether private or public interest, to appeal the Decision.

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108. At paras. 86 to 111.

109. 2016 ABCA 396. See also *R. v. Penunsi*, 2016 NLCA 50.

110. 2015 ABQB 728.

111. The panel consisted of Fraser C.J.A., and Watson and Greckol, JJ.A.

The court held that Judge Malin lacked both private and public interest standing and gave a number of reasons for this conclusion. The court held Malin J. had no *private interest standing* because:

- the proceedings were criminal in nature and had no personal implications for Judge Malin;
- the *Criminal Code* did not authorize Judge Malin's putative appeal;
- the *Criminal Rules* did not authorize or justify Judge Malin's putative appeal;
- the common law did not support Judge Malin's putative appeal; and
- administrative law principles did not support Judge Malin's putative appeal.

The court held Judge Malin had no *public interest standing* because:

- Judge Malin had no real stake or genuine interest in the case; and
- the appeal was not a reasonable and effective way to bring the issues before the court.

The court also identified a number of policy concerns which weighed against recognizing a provincial court judge's right to appeal his or her own decisions:[112]

- it would allow the judge to expand on, defend, or qualify the judge's own reasons;
- procedural changes allowing for such appeals should be made through the legislature, not the courts;
- a reasonable apprehension of bias would arise;

112. See also *R. v. Penunsi*, 2016 NLCA 50.

- the principle of *stare decisis* would be undermined; and
- the rule of law would be undermined.

By comparison, see the decision of the Quebec Court of Appeal in *Conseil de la justice administrative c. Robins*,[113] where the decision-maker was given standing to appeal from an application for judicial review on the basis of the Supreme Court of Canada's decision in *Ontario Energy*.[114]

C. *Beaver*

In *Law Society of Alberta v. Beaver*,[115] the Court of Appeal of Alberta addressed the standing of the Law Society to seek an injunction barring suspended lawyers from engaging in the practice of law, including acting as agents.

The unanimous court held that the Law Society did have the proper standing:

> 30 We recognize that, at common law, the traditional rule was that only the Attorney General had standing to restrain a public wrong. Because it is the Attorney General who is tasked with acting in the public interest, no private litigant could seek to enforce public rights unless they could show a special injury: Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 147. Of course, an important exception has since been carved out under the common law for "public interest standing" in certain cases: *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at 145-146, 149-152; *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at 617-618, 631.
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> 31 As far as public regulatory bodies are concerned, however, the common law itself offered no standing to restrain wrongs or potential wrongs committed under its regulatory

113. 2017 QCCA 952.

114. *Ontario Energy v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147.

115. 2016 ABCA 290.

framework. This is, in part, because the scope of "public interest standing" is typically restricted to those who seek to challenge or restrain certain kinds of *state* action: see *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 23, 31-33, 49, [2012] 2 SCR 524. To the extent that a public regulatory body seeks to restrain a public wrong committed by a private person, the traditional view was to deny standing absent a specific statutory provision allowing for injunctive relief: see, for example, *Public Accountants Council for Province of Ontario v Premier Trust Co.* (1963), 42 DLR (2d) 411 (Ont HCJ) at 418-423; *Architects' Association of New Brunswick v Architectural Designers and Associates Ltd., and Savoie* (1979), 27 NBR (2d) 400 (QB) at paras 7-20.

32 This narrow view of standing has been criticized, and rightly so in our view, it being "difficult to see why a public body charged with the responsibility for enacting or enforcing delegated legislation should not be able to sue if injunctive relief is otherwise appropriate": Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 2015) at 3-30. After all, public bodies like the LSA are not ordinary litigants—they are tasked with enforcing professional standards with the objective of protecting the public. On that basis, courts have found an implied statutory right to seek an injunction where necessary to meet the aims of the legislation: *College of Physicians & Surgeons of Manitoba v Morgentaler* (1986), 28 DLR (4th) 283 (Man CA) at 286-287, aff'g (1985), 22 DLR (4th) 256 (Man QB) at 272 on this point; see also *Insurance Council of Manitoba v Tomlinson et al.*, 2007 MBCA 143 at para 27, 220 Man R (2d) 258. This ground for standing is not dissimilar to the implied statutory right of a public body to seek an injunction where, though not seeking to address a public wrong, it is needed to perform the body's statutory responsibilities: see *Broadmoor Special Hospital Authority and Another v Robinson*, [2000] 1 WLR 1590 (EWCA) at paras 25, 31.

33 We endorse this less restrictive approach to standing. It is this simple: Who better than the LSA to step in and protect the public from actions of its members who have been suspended by the LSA? The LSA is not simply an officious busybody. Therefore, even if the *Act* contained no express authority for the LSA to seek an injunction or even if the circumstances did not fall within the scope of s 111, the LSA, as the regulator of members of the legal profession, could nevertheless obtain standing to seek an injunction on the basis of such an implied statutory right. Of course, the *Act* here does allow for statutory injunctions, and in such cases, the question of alternate grounds for an injunction rarely arise.

[Emphasis added.]

D. *Tran*

Tran v. College of Physicians and Surgeons of Alberta[116] raised the issue of whether a complainant has standing to seek judicial review of a decision by the Complaint Review Committee of the College of Physicians and Surgeons to confirm the dismissal of a complaint against a physician.

Tran had complained to the College about care that was provided to her 96 year-old mother. The Complaints Director dismissed the complaint and on an internal appeal the Complaint Review Committee upheld the decision. Tran sought judicial review of that decision.

Justice Ross of the Alberta Court of Queen's Bench held that although Tran had limited standing to raise issues of procedural unfairness before the Complaint Review Committee, she did not have standing to seek review of the reasonableness of the Committee's decision on the merits. Ultimately, Ross J. dismissed the application for judicial review.

E. *P & S Holdings*

In 2015, the Federal Court refused to grant standing to the applicants to participate in the medical marijuana production licencing process in *P & S Holdings Ltd. v. Canada, et al.*[117] 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 either a statutory or common law right to participate

116. 2017 ABQB 337.

117. 2015 FC 1331.

in the licensing process. The Federal Court of Appeal has now affirmed that decision,[118] holding that the applicants' concerns were adequately addressed in the municipal zoning process. The Court of Appeal held that the Legislature had intentionally left the Marihuana for Medical Purposes Regulations silent as to the participatory rights of opponents to a licence.[119]

V. PROCEDURAL FAIRNESS

Although there have been no ground-breaking cases this past year involving allegations of procedural unfairness, several cases are worthy of note due to the uniqueness of the question raised or the facts themselves.

A. *Audi Alteram Partem*

1. *O'Connell*

In *O'Connell (Registrar of Motor Vehicles for the Province of New Brunswick) v. Maxwell*,[120] Quigg J.A. of the Court of Appeal of New Brunswick reminded us of the importance of procedural fairness in all cases involving the decision of a statutory delegate, no matter how inconsequential it may seem:

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118. 2017 FCA 41.

119. The Federal Court of Appeal also affirmed MacTavish J.'s decision that the appellants had no common law right to be heard pursuant to the rules of procedural fairness.

120. 2016 NBCA 37.

> Fueling any legal doctrine are the foundational principles of natural justice and equal treatment under the law. These principles are not diminished because the subject matter of a case may be objectionable in the community. The doctrine of procedural fairness lies at the heart of administrative law in Canada. Our legal system heralds impartial justice and rejects trial by public opinion.

The case dealt with an appeal from a reviewing judge's decision that the Registrar had acted unreasonably and unfairly in his decision to revoke Maxwell's personalized licence plate on the ground it was "erroneously issued".[121] The reviewing judge held that the Registrar had breached the principles of procedural fairness by making the decision to revoke the licence plate without giving Maxwell an opportunity to respond in any meaningful way.[122] Maxwell had not been provided with a copy of a complaint and the only conversation which took place between Maxwell and the Registrar appeared to have taken place after the decision had been made.

The Court of Appeal upheld the reviewing judge's decision, holding that in failing to allow Maxwell to know the case against him and make representations, the Registrar had failed to respect the most minimal requirements of procedural fairness.

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121. The license plate belonged to Mr. Maxwell, a criminal defence lawyer who was known to frequently defend persons charged with impaired driving. The personalized plate read: "DUI DR". Under the application scheme for personalized licence plates, the Registrar of Motor Vehicles has discretion to refuse to issue personalized plates that are socially unacceptable, offensive, or not in good taste.

122. In an unreported decision dated June 24, 2015.

2. *Hyson*

In *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson*,[123] the Nova Scotia Court of Appeal upheld a decision of the reviewing judge that an Appeal Board had breached procedural fairness by conducting "independent research" including the review of "*Hills Criteria for Causation*", "the *AMA Guides to the Evaluation of Permanent Impairment*", and the websites "drugbank.ca" and "notifbutwhen.ca" without affording Hyson the opportunity to respond to such evidence. The Court of Appeal held that the Appeal Board's failure to advise Hyson of its review of these extraneous materials breached the principle of *audi alteram partem* ("hear the other side" and the right to know the case to be met). The Court of Appeal rejected the argument that a tribunal with specialized medical knowledge has the right to reference extraneous information much like a court can reference case law or legal authors not cited by the parties. The court made it clear that it was not the reference to the materials that was the issue, it was the Appeal Board's failure to advise Hyson of the information and give her the ability to respond to it.[124]

3. *Saskatoon Co-operative Association Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*

Similarly, in *Saskatoon Co-operative Association Limited v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*,[125] the Saskatchewan Court of Appeal considered whether the Saskatchewan Labour Relations Board had breached procedural fairness by (1) conducting *ex parte* research by consulting a union website to determine the

123. 2017 NSCA 46.

124. At paras. 46 and 47.

125. 2016 SKCA 94, leave to appeal to SCC refused.

historical relationship between two unions and (2) improperly hearing the parties because one member of the Board was not physically present when the Board adjourned to deliberate and was without materials that had been filed during oral argument.

The Court of Appeal held that the Board had breached the principle of *audi alteram partem* by consulting the union website to support its conclusion without affording the parties an opportunity to make further submissions.[126] The Board's decision was quashed and a new hearing was ordered.

4. *P & S Holdings*

In *P & S Holdings Ltd. v. Canada, et al.*,[127] the Federal Court of Appeal upheld the reviewing judge's decision that the appellants, who owned property adjacent to a proposed medical marijuana production facility, had no standing to participate in the medical marijuana production licencing process. The court also held that the Minister of Health did not owe a duty of fairness to the appellants which would give rise to a duty to be heard in the licensing process.

126. The Court of Appeal disagreed with the reviewing judge on this issue, who had held that the review of the website did not result in any change to the Board's approach and that, while technically there had been a breach of the principle of *audi alteram partem*, it had no practical effect on the decision and no prejudice had occurred (see 2015 SKQB 84).

127. 2017 FCA 41, affirming 2015 FC 1331.

5. *Teamsters Canada*

In *Teamsters Canada Rail Conférence v. C.P.R.*,[128] the majority of the Quebec Court of Appeal required sufficient reasons for an arbitration award, notwithstanding that it was just rendered for the parties, because insufficient reasons made the decision incomprehensible and therefore unreasonable.

6. *3230813 Nova Scotia Ltd.*

In *Halifax (Regional Municipality) v. 3230813 Nova Scotia Ltd.*,[129] the Nova Scotia Court of Appeal overturned a reviewing court's decision holding that a refusal to grant an adjournment amounted to procedural unfairness. The court held that the trial judge had failed to conduct the necessary contextual analysis to define the duty of fairness in the circumstances.

B. The Rule against Bias

1. *Lysons*

In *Lysons v. Alberta Land Surveyors' Association*,[130] the Court of Appeal of Alberta held that the fact that the legal counsel who prosecuted Lysons on a disciplinary offence was retained by the Association and acted for it on a regular basis did not amount to a reasonable apprehension of bias. The Court of Appeal stated:

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128. 2017 QCCA 479.

129. 2017 NSCA 72.

130. 2017 ABCA 7.

> 9 ... Some lawyers appear frequently before particular courts or tribunals, and over time they will develop a reputation (for better or for worse). None of this is objectionable or even avoidable. The Council is not required to retain unknown and inexperienced lawyers on disciplinary matters, and is entitled to rely on its long-standing legal advisors. There is no indication on the record that the Council was in any respect unable to apply its independent, professional judgment to the issues before it....
>
> 10 Counsel for the Association appropriately supported the decision of the Discipline Committee upon the appeal to the Council under the authority of s. 59(1) of the *Land Surveyors Act*. There was nothing inappropriate about counsel's involvement, and the principles in *Clayre v Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2005 ABCA 59, 363 AR 114 are not engaged. Lawyers are expected to advance the interests of their clients, and the fact that they "take sides" does not in any sense amount to "bias" or "conflict of interest".

2. *MacLean*

Another noteworthy decision on bias is *Nova Scotia (Attorney General) v. MacLean*.[131] In that case, it came to light during the course of a Board of Inquiry under the *Human Rights Act*[132] that fifteen years earlier the Board Chair had written two letters concerning matters alleged to be similar to the ones raised in the present complaint. The Board Chair refused to recuse himself and the Attorney General appealed that decision.

The Nova Scotia Court of Appeal dismissed the appeal. The Court of Appeal noted the strong presumption of judicial impartiality and the heavy burden of proof upon the party making the allegation of bias to present "cogent evidence establishing serious grounds sufficient to justify a finding that the decision-maker should be disqualified on account of bias".[133] It also noted that the issue of whether a reasonable apprehension of bias is "highly

131. 2017 NSCA 24.

132. R.S.N.S. 1989, c. 214.

133. At para. 39.

fact specific" and the entire context of the case must be taken into account.[134] In this case, the court held that there was no reasonable apprehension of bias and outlined three categories of reasons for its decision:

- the alleged similarity of issues was not persuasive as the earlier correspondence written by the Board Chair dealt with a Criminal Code Review Board, not a human rights complaint;

- there was no connection with the parties or questionable link between the Board Chair and the populations, parties or subject matter joined in the current dispute; and

- the lengthy passage of time between the previous correspondence and the current complaint meant that a reasonable, informed person would not be concerned about bias.

VI. SOLICITOR-CLIENT AND OTHER LEGAL PRIVILEGES

The Supreme Court of Canada has issued two more decisions which address solicitor-client privilege and litigation privilege in the administrative law context.[135]

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134. *Ibid.*

135. In addition to the earlier 2016 decisions in *Chambre des Notaires* and *Thompson*. Note that *Chambre* raised a *Charter* issue, and the Supreme Court read down the unambiguous wording of the *Income Tax Act* to hold that it could not apply to records which were protected by solicitor-client privilege. *Thompson* involved the same statutory language as *Chambre*, the Court's decision was issued the same day, and the Supreme Court reached the same conclusion even though *Thompson* did not directly raise a *Charter* challenge to the legislation. Neither *Lizotte* nor the
(continued...)

A. *Lizotte*

In *Lizotte v. Aviva Insurance Company of Canada*,[136] Lizotte was the assistant syndic (the "syndic") of the Chambre de l'assurance de dommages (the "Chamber"). In the course of a professional misconduct inquiry, Lizotte asked Aviva Insurance Company of Canada to send her a complete copy of its claim file with respect to an insured. Aviva refused to do so, asserting that some of the requested documents were protected by litigation privilege. The syndic filed a motion for a declaratory judgment, arguing that the relevant statutory provision created an obligation on Aviva to produce "any ... document concerning the activities of a representative whose professional conduct is being investigated by the Chamber" and that this was sufficient to lift the privilege. The syndic argued that litigation privilege is distinguishable from solicitor-client privilege, that it is less important and not absolute, and should be applied more flexibly.

The Quebec Superior Court concluded that litigation privilege cannot be lifted without an express provision.[137] The Court of Appeal upheld the Superior Court's judgment, holding that even though litigation privilege is distinguishable from solicitor-client privilege, it is to the same extent a fundamentally important principle that cannot be overridden without express language.[138]

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135. (...continued)
University of Calgary cases raised a *Charter* challenge, as opposed to an issue of statutory interpretation. The lesson from *Chambre* is that even a crystal clear, unambiguous statutory provision overriding solicitor-client privilege will not survive a *Charter* challenge.

136. 2016 SCC 52.

137. 2013 QCCS 6397.

138. 2015 QCCA 152.

In a unanimous judgment, the Supreme Court of Canada dismissed the appeal. Speaking for the court, Justice Gascon reviewed the principles governing litigation privilege and concluded:

> 4 ...Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.
>
> 5 The requirements established in *Blood Tribe* apply to litigation privilege. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect. Because the section at issue provides only for the production of "any ... document" without further precision, it does not have the effect of abrogating the privilege. It follows that Aviva was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.

B. *University of Calgary*

Alberta (Information and Privacy Commissioner) v. University of Calgary[139] involved the interpretation of Alberta's *Freedom of Information and Protection of Privacy Act* ("FOIPP")[140] and, in particular, whether the Information and Privacy Commissioner (the "Commissioner") had the authority to compel production of records over which a party claimed solicitor-client privilege.

At first instance, Justice C.M. Jones held that the Commissioner did have authority under FOIPP to order production of documents for the purposes of verifying claims of solicitor-

139. 2016 SCC 53.

140. R.S.A. 2000, c. F-25.

client privilege.[141] In a unanimous decision, the Court of Appeal of Alberta reversed Justice Jones' decision.[142] The Supreme Court of Canada dismissed the Commissioner's appeal.

The majority judgment (delivered by Côté J.)

Speaking for the majority, Côté J. concluded:[143]

> 2 I conclude that s. 56(3) [of FOIPP] does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. As this Court held in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal. In the present case, the provision at issue does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. It is well established that solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved into a substantive protection. Therefore, I am of the view that solicitor-client privilege is not captured by the expression "privilege of the law of evidence". Moreover, a reading of s. 56(3) in the context of the statute as a whole also supports the conclusion that the legislature did not intend to set aside solicitor-client privilege. Further, even if s. 56(3) could be construed as authorizing the Commissioner to review documents over which privilege is claimed, this was not an appropriate case in which to order production of the documents for review. Consequently, I would dismiss the appeal.
>
> [Emphasis added.]

Decision by Cromwell J.

Although Justice Cromwell agreed that the appeal should be dismissed, he did not agree that the Commissioner lacked the authority to compel production for review of records over which solicitor-client privilege was asserted. In his view, FOIPP did give the Commissioner

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141. 2013 ABQB 652.

142. 2015 ABCA 118.

143. Justices Moldaver, Karakatsanis, Wagner and Gascon concurred. Justices Cromwell and Abella each gave separate reasons.

the authority to order production of such records. He also disagreed with the majority's conclusion that solicitor-client privilege is a "legal privilege" different from a "privilege of the law of evidence":

> 72 ... The Commissioner has the authority to order a public body to produce for review any record required by the Commissioner "[d]espite ... any privilege of the law of evidence": s. 56(3). This, in my view, is an explicit legislative grant of power which should be respected, not evaded.
>
> 73 Whatever other principles and presumptions of statutory interpretation are engaged, statutory interpretation must be anchored in the words chosen by the legislature read in their full context. In my respectful view, to hold as my colleague Justice Côté would that solicitor-client privilege is a "legal privilege" but not a "privilege of the law of evidence" in *FOIPP* is not justified by the text or context of the legislation or by the principle of interpretation that the legislature must use clear language to authorize any abrogation of solicitor-client privilege. Rather, the words of the enactment, read in context, evince a clear intention to permit the Commissioner, subject to judicial review, to order production for inspection of records over which solicitor-client privilege is claimed. To hold otherwise abandons the modern approach to statutory interpretation repeatedly endorsed by the Court and, under the guise of "restrictive" interpretation, undermines legislative policy choices which, absent constitutional constraint, legislatures are entitled to make.

Nevertheless, Justice Cromwell agreed that the Commissioner's appeal should be dismissed.

Decision of Abella J.

Justice Abella also agreed that the appeal should be dismissed. She, however, disagreed about the standard of review to be applied with respect to the Commissioner's decision. While the majority applied the correctness standard, Abella J. was of the view that the reasonableness standard should be applied. Nevertheless, Abella J. concluded that the Commissioner's decision to order disclosure of the documents was unreasonable.

C. *Imperial Oil*

In an earlier case, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*,[144] the Court of Appeal of Alberta held that settlement discussions were protected by legal privilege, and were not required to be disclosed to access applicants under FOIP. That case did not involve an issue about the authority of the Commissioner to require production of the privileged records to her, but it does illustrate that there are other legal privileges besides solicitor-client privilege and litigation privilege which are protected from disclosure (and from forced production to the Commissioner).

D. *Lee*

The British Columbia Court of Appeal decision in *British Columbia (Attorney General) v. Lee*[145] also addressed solicitor-client privilege. The case dealt with the unintentional disclosure of privileged information.

In response to an access to information request made under British Columbia's *Freedom of Information and Protection of Privacy Act*,[146] nineteen pages of privileged email correspondence between a government lawyer and employees of a government agency were mistakenly produced. Several days later, the Attorney General asserted solicitor-client privilege over the documents. The respondents took the position that the documents were not privileged, and that even if they were, privilege had been waived by their disclosure. The

144. 2014 ABCA 231.

145. 2017 BCCA 219.

146. R.S.B.C. 1996, c. 165, s. 14.

reviewing judge held that some of the documents were privileged and privilege had not been waived by the mistaken production.

On appeal, the British Columbia Court of Appeal unanimously held that all nineteen pages were subject to solicitor-client privilege and that privilege had not been waived. The court ordered all of the nineteen pages to be returned or destroyed and that the respondents must refrain from making any further use of the privileged documents.

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

There have been a number of other interesting recent decisions involving the interface of administrative law and the *Charter* and other constitutional issues.

A. *Ernst*

In *Ernst v. Alberta Energy Regulator*,[147] the Supreme Court of Canada considered the availability of damages as a remedy for a *Charter* breach made by a statutory delegate.

In 2007, Ernst filed a statement of claim against EnCana Corporation, the Government of Alberta and the Alberta Energy Regulator (the "Board") alleging that she had suffered property damage as a result of EnCana's fracking activities. In her statement of claim, Ernst sought:[148]

147. 2017 SCC 1.

148. The Supreme Court of Canada decision only dealt with the claim for *Charter* damages.

- damages against EnCana for damage to the water supply on her property allegedly caused by EnCana's fracking activities;

- damages against the Government of Alberta for negligently failing to respond to her complaints about EnCana's activities notwithstanding that it owed a duty to protect her water supply;

- damages against the Board for negligently administering the regulatory scheme under the former *Energy Resources Conservation Act* (the "Act");[149] and

- *Charter* damages against the Board for breaching her right to freedom of expression under s. 2(b) of the *Charter* by restricting her communications with the Board.[150]

The Board applied to have portions of Ernst's claims struck out for failing to disclose a reasonable cause of action. It relied on the immunity clause found in section 43 of the Act,[151]

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149. R.S.A. 2000, c. E-10.

150. The Board had imposed restrictions on Ernst's contact with its staff. Ernst claimed the restrictions were imposed because she had been publicly critical of the Board and had referred to Weibo Ludwig (an activist who had been convicted for carrying out bombings and other destructive acts against Alberta oil industry facilities).

151. Section 43 provided:

> No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

Note that this section has been repealed and replaced by section 27 of the *Responsible Energy Development Act* which has similar wording.

arguing that section 43 provided a complete bar to both the negligence and *Charter* damages claims against the Board.

The case management judge, Chief Justice Wittman of the Alberta Court of Queen's Bench, found that the negligence action against the Board should be struck because there was no private law duty of care owed to Ernst by the Board. This aspect of Wittman C.J.'s decision was affirmed by the Court of Appeal of Alberta and was not appealed.

Wittman C.J. also held that section 43 of the Act barred Ernst's claim for *Charter* damages and that if Ernst wanted to challenge the validity of section 43, she was required to give notice to the Alberta Attorney General but had failed to do so.[152] In any event, he held that section 43 barred a claim for *Charter* damages.

Ernst appealed Chief Justice Wittman's decision to the Court of Appeal of Alberta. In her Notice of Appeal, she answered the question of whether the constitutional validity of an act or regulation was being challenged in the negative but added that "...the appeal, however, does relate to a claim being made under s. 24 of the *Canadian Charter of Rights and Freedoms*". Ernst also wrote a letter to the Attorneys General of Alberta and Canada in which she explained that she was not challenging the constitutionality of section 43, but was challenging whether section 43 applied to *Charter* claims against the Board.

The Court of Appeal of Alberta unanimously dismissed Ernst's appeal.[153] The panel held that section 43 barred Ernst's claims against the Board in negligence and for *Charter*

152. 2013 ABQB 537.

153. 2014 ABCA 285. The panel consisted of Justices Côté, Watson and Slatter.

damages and struck out the claims. Ernst appealed the decision with respect to the claim for *Charter* damages to the Supreme Court of Canada.[154]

In her submissions at all court levels, both oral and written, Ernst conceded that section 43, on its face, barred her claim for *Charter* damages. The issue she brought before the Supreme Court was whether section 43 was constitutionally inapplicable or inoperable to the extent that it barred a claim against the Board for *Charter* damages. In addition, in her appeal to the Supreme Court, Ernst revised her claim to add a challenge to the constitutional validity of section 43.

The Supreme Court of Canada dismissed Ernst's appeal. But, the decision was far from unanimous. In summary:

- Justices Cromwell, Karakatsanis, Wagner and Gascon dismissed the appeal and held that the claim for *Charter* damages should be struck out. They held that it was plain and obvious that section 43, on its face, barred a claim against the Board for *Charter* damages. Also, Ernst had not discharged the burden of showing that section 43 was unconstitutional. Therefore, section 43 applied and the claim for *Charter* damages was barred. Moreover, in this case, *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board, so section 43 did not limit the availability of such a remedy under the *Charter* and the provision was not unconstitutional.

- Justice Abella also held that the appeal should be dismissed because section 43 barred Ernst's claim for *Charter* damages. However, because Ernst did not

154. Ernst did not appeal the court's decision dealing with the negligence claim against the Board.

challenge the constitutionality of section 43 in the prior proceedings, and in the absence of proper notice and a full evidentiary record, Justice Abella held that the court should not entertain the constitutional argument about whether section 43 was constitutionally valid. Moreover, Justice Abella held that the appropriate means of Ernst raising her concerns was through judicial review, not an action for *Charter* damages. Ernst was making an improper collateral attack on the constitutional validity of section 43.

- Chief Justice McLachlin, and Justices Moldaver, Brown and Côté would have allowed the appeal. They held that, in deciding whether a claim for *Charter* damages should be struck out on the basis of a statutory immunity clause, it was first necessary to determine whether is was plain and obvious that *Charter* damages could not be an appropriate and just remedy in the circumstances of the particular case. Here, it was not plain and obvious that *Charter* damages could not be an appropriate and just remedy. Likewise, it was not plain and obvious that section 43 barred Ernst's claim for *Charter* damages. As a result, it was not necessary to consider the constitutional validity of section 43.

B. *Stewart*

In *Stewart v. Elk Valley Coal Corp.*,[155] the Alberta Human Rights Tribunal had dismissed Stewart's claim of workplace discrimination on the basis of disability. Stewart had argued that he was terminated because of his addiction to cocaine. The Tribunal dismissed the complaint, holding that Stewart had been terminated for breaching the employer's policy of disciplining or terminating employees where treatment of dependency or addiction was not

155. 2017 SCC 30, affirming 2015 ABCA 225.

sought by the employee until after an accident. That is, the Tribunal decided that Stewart had been terminated for breaching the employer's policy, not because of his addiction. The Alberta Court of Queen's Bench and Court of Appeal both held that the Tribunal's decision was reasonable.

In an 8 to 1 decision, the Supreme Court of Canada dismissed the appeal. The majority judgment, delivered by Chief Justice McLachlin,[156] agreed with the lower courts that the Tribunal's conclusion that the reason for the termination was breach of the employer's policy, not the addiction, was reasonable. It was also reasonable for the Tribunal to conclude that a *prima facie* case of discrimination had not been made out.

Justices Moldaver and Wagner gave separate but concurring reasons.[157] They held that the Tribunal's conclusion that Stewart's addiction was not a factor in his termination was unreasonable. However, they were satisfied that the Tribunal had reasonably held that the employer had met its obligation to accommodate Stewart to the point of undue hardship.

Justice Gascon dissented, holding that the employer's drug policy did *prima facie* discriminate against employees suffering from addiction and that the Tribunal's decision was unreasonable.[158]

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156. With Justices Abella, Karakatsanis, Côté, Brown and Rowe concurring.

157. At paras. 48 to 57.

158. See paras. 58 to 145.

C. *Morasse*

Although not a *Charter* case *per se*, *Morasse v. Nadeau-Dubois*[159] dealt with the impact that contempt of court provisions found in Quebec's *Code of Civil Procedure* have on a person's liberty. In particular, the issue was whether a contempt charge brought by a private citizen against another individual met the procedural and substantive safeguards required by law to ensure that the liberty interests of the person accused of contempt were fully protected.

Nadeau-Dubois was the spokesperson for a student group that organized protests and picket lines at various post-secondary institutions across Quebec over proposed increases in tuition fees. Morasse, a student at one of the institutions where picketing took place, obtained a provisional injunction mandating free access to the building in which his classes were held. During a television interview, Nadeau-Dubois made comments defending the use of student picket lines and criticizing "a minority of students" for using the courts to circumvent the majority's collective decision to strike. Morasse filed a motion of contempt against Nadeau-Dubois, alleging that he had incited others to breach the provisional injunction order he had obtained. A Superior Court judge found Nadeau-Dubois guilty of contempt and sentenced him to community service. Nadeau-Dubois appealed and the Quebec Court of Appeal set aside the conviction. Morasse appealed to the Supreme Court of Canada.

In a 6-3 decision, the Supreme Court of Canada dismissed the appeal and upheld Nadeau-Dubois's acquittal.[160] The majority, in a judgment delivered by Justices Abella and Gascon, held that, because a charge of contempt can result in a penalty of imprisonment, and,

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159. 2016 SCC 44.

160. The majority consisted of Chief Justice McLachlin and Justices Abella, Gascon, Cromwell and Karakatsanis. Moldaver J. gave separate but concurring reasons. Justices Wagner, Côté and Brown dissented.

therefore impact an individual's liberty, the formal procedural requirements for contempt proceedings must be strictly complied with. Courts should view contempt proceedings as a measure of last resort and use them only where it is genuinely necessary to safeguard the administration of justice.[161] In this case, Nadeau-Dubois had not been given adequate notice of the contempt charge and Morasse had not proven that Nadeau-Dubois knew about the particular injunction order that he was accused of inciting others to disobey.

Justice Moldaver concurred in the result but only because he felt it would have been procedurally unfair for him to overturn the Court of Appeal's decision. In his view, Nadeau-Dubois had intended to incite students to breach any and all injunctions, but because the case proceeded on the basis of referring to a particular injunctive order, it was necessary that Nadeau-Dubois had knowledge of the particular order involved and that had not been proven.

Justice Wagner delivered dissenting reasons.[162] He started his reasons by noting that, although the power to punish for contempt must be exercised as a last resort, it must be used where doing so is necessary to protect the rule of law, freedom of expression and democracy. He went on to decide that the contempt conviction in this case was justified and it was not necessary to prove that Nadeau-Dubois had specific knowledge of the particular order of injunction involved. Wagner J. focussed on the need to preserve the rule of law in a democratic society and noted that contempt orders are important tools to ensure that social order prevails over chaos and respect for the authority of the courts is maintained.[163]

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161. At para. 21.

162. Justices Côté and Brown concurred.

163. At paras. 80 to 83.

Accordingly, Wagner J. stated that the real issue in the case should not be reduced to a simple question of procedure and burden of proof.[164]

Interestingly, Wagner J.'s dissenting reasons were the only ones to address freedom of expression, an issue which had been argued vigorously by the parties (and the intervenors) and addressed by the Court of Appeal.[165] Wagner's comments are worth repeating:

> 122 Before I turn to the sentence, I believe it will be appropriate to comment briefly on the issue of freedom of expression, which was argued vigorously by the parties and the interveners and to which the Court of Appeal devoted several paragraphs of its decision (paras. 73-76). Given that the right to express opinions in public is protected by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and also, in Quebec, by s. 3 of the *Charter of human rights and freedoms*, CQLR, c. C-12, the Court of Appeal stressed that it was important [TRANSLATION] "to be aware of this in assessing what was said in order to reduce the risk of having a chilling effect on the exercise of this fundamental right or indirectly imposing a form of censorship" (para. 76).
>
> 123 The importance of freedom of expression and of the protection of that freedom in a democratic society can never be overstated, and I agree entirely with the concern expressed by the Court of Appeal about the need to protect freedom of expression in all its forms to the fullest extent possible. However, the idea of associating incitement to breach a court order with the legitimate exercise of freedom of expression is disconcerting. The impugned judgment and the remarks that gave rise to it have nothing to do with protecting freedom of expression. One may not use the exercise of one's freedom of expression as a pretext for inciting people to breach a court order. Other remedies exist for contesting the validity of a court's decision.
>
> 124 The rule of law underpins our freedoms and is the very foundation of the *Canadian Charter* (*B.C.G.E.U.*), the preamble to which states: "... Canada is founded upon principles that recognize ... the rule of law". Indeed, the rule of law is the reason why our freedoms, including freedom of expression, continue to thrive today. Wood J. explained this eloquently in *Bridges*:
>
> > Everything which we have today, and which we cherish in this free and democratic state, we have because of the rule of law. Freedom of religion and freedom of expression exist today because of the rule of law. Your right to hold the beliefs you do, to espouse those beliefs with the fervour

164. At para. 83.

165. At paras. 122 to 126.

> which you do, and to attempt to persuade others to your point of view, exists only because of the rule of law. Without the rule of law there is only the rule of might. Without the rule of law the *Canadian Charter of Rights and Freedoms*, which some of you sought to invoke, would be nothing but another piece of parchment adrift in the timeless evolution of man's history. [p. 156]

125 Therefore, ensuring compliance with orders made by the courts, and thereby maintaining the authority and credibility of the courts, has the effect of reinforcing the rule of law and, by extension, our fundamental freedoms, including freedom of expression:

> Over the centuries our laws have been built up to give the greatest protection to all classes of our society and only through the medium of the freedom and independence of the courts are these privileges protected. Once our laws are flouted and orders of our courts treated with contempt the whole fabric of our freedom is destroyed. We can then only revert to conditions of the dark ages when the only law recognized was that of might. One law broken and the breach thereof ignored is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.

(*Canadian Transport Co. v. Alsbury* (1952), 6 W.W.R. (N.S.) 473 (B.C.S.C.), at p. 478, aff'd [1953] 1 D.L.R. 385 (B.C.C.A.), aff'd in *Poje*.)

126 In the trial judge's view, the respondent, by inciting others to disobey court orders, was in reality promoting anarchy and encouraging civil disobedience (para. 95). In light of the principles set out above, he was therefore interfering with the very freedoms he was claiming to exercise, since he was undermining the courts' ability to enforce them.

D. *Gehl*

The central issue in *Gehl v. Canada (Attorney General)*[166] was whether Gehl was entitled to be registered as an Indian under the *Indian Act* (the "Act").[167] Gehl alleged that section 6 of

166. 2017 ONCA 319.

167. RSC 1985, c. 1-5.

the Act and the proof of paternity policy (the "Policy")[168] of the Registrar for Aboriginal Affairs and Northern Development Canada (the "Registrar") violated her rights under section 15 of the *Charter* by drawing a distinction between offspring of illegitimate children who did not know the identity of their paternal grandfather and the offspring of legitimate Indians.[169] The trial judge dismissed Gehl's claim.[170] Gehl appealed to the Ontario Court of Appeal.

The Court of Appeal unanimously allowed the appeal. Two judges, Justices Lauwers and Miller, held that the appeal should be allowed solely on the basis of administrative law principles and that it was unnecessary to consider the *Charter* arguments. Lauwers and Miller JJ.A. concluded that the Registrar's decision denying Gehl status was unreasonable.

The third judge, Justice Sharpe, viewed it as unnecessary to rule on the constitutional validity of section 6 of the Act, but did consider the *Charter* arguments as they pertained to the Policy. He held that the Policy was not consistent with *Charter* values.

Justices Lauwers and Miller commented on the preference for deciding cases like *Gehl* on administrative law principles where possible:[171]

> 76 ... We make two substantive observations on our colleague's proposal to resolve the appeal through the application of *Charter* values. First, where a case can be resolved without

168. At the time of Gehl's initial protest of the decision denying her Indian status, the Policy had no statutory force, was not published or made available to the public, and was marked "Draft for Discussion Purposes Only". It was an informal, internal document adopted by the Registrar to assist departmental officials when making decisions on status entitlement.

169. She later abandoned the claim regarding the constitutional validity of section 6 of the Act.

170. 2015 ONSC 3481.

171. See also *Forget v. Transport Canada*, 2017 FC 620.

reference to *Charter* values, prudence suggests they should not be invoked. In our view, a *Charter* values analysis would unnecessarily inject subjectivity and uncertainty into the legal analysis. Second, there is no need to resort to *Charter* values to displace any deference that an appellate body might owe to the original decision-maker, because in Dr. Gehl's case no deference is owed to the Registrar....

77 Dr. Gehl has abandoned her constitutional challenge to the legislation and is now focused on whether the Registrar's decision, which applied a rule later formalized into a policy, deprives her of rights under the legislation. As we have explained, any child who is unable to identify either her father or mother is denied the benefits of registration because of an evidential rule that in some circumstances frustrates the purpose of the statute. As our colleague rightly points out, the difficulty faced by a claimant who is unable to identify a parent will almost always be in establishing the identity of a father. But the unreasonableness of the Registrar's decision does not turn on whether the unknown parent is the mother or father, and is not best described as a matter of discrimination or inequality. The decision would be no less unreasonable if Dr. Gehl had been denied registration because of an inability to identify her biological mother or grandmother. The appeal to *Charter* values does not add anything to the substantive administrative law analysis, as we noted above, and does no work in reaching the outcome.

78 Our objection to the use of *Charter* values in this appeal is not simply because it is unnecessary to the result. There are good reasons why the role that *Charter* values can play in judicial reasoning has been carefully circumscribed. One reason is the risk that an appeal to *Charter* values can pre-empt *Charter* rights analysis, and thus risk subordinating *Charter* rights. A party bringing a *Charter* challenge is entitled to a judicial determination of whether the *Charter* right has been limited, and the government must have the opportunity to argue that such a limit is justified under s. 1 of the *Charter*: *Symes v. Canada*, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, at para. 105 (QL) [*per* Iacobucci J.]. Our colleague's reasons elide the two distinct legal concepts of *Charter* rights and *Charter* values.

79 Furthermore, there is good reason to maintain a modest role for *Charter* values in judicial reasoning generally and in statutory interpretation specifically. *Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective—and value laden—nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.

80 With respect to the identification and selection of *Charter* values, it must be noted that they are not a discrete set, like *Charter* rights, which were the product of a constitutional settlement and are easily ascertained by consulting a constitutional text. The identification of *Charter* values has been *ad hoc*. Sometimes (as in our colleague's reasons) they track the language of an enumerated right, in this case, equality.

81 Other times *Charter* values have been formulated at a much higher level of abstraction —as concepts such as justice, liberty, autonomy or dignity: *Loyola High School v. Quebec*

> *(Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. The meaning of these concepts—and their juridical application—is both contestable and contested. Philosophers have debated the requirements of justice, for example, for thousands of years. The same could be said of many other *Charter* values.
>
> 82 With respect to their operation in judicial reasoning, problems can arise from a lack of clarity about the subordinate relationship of *Charter* values to *Charter* rights, the plurality of *Charter* values, and their uncertain relationship to each other and to constitutional and common law principles. Unlike *Charter* rights, which are largely negative and will thus rarely conflict, multiple *Charter* values can simultaneously apply in a given dispute, and can easily be in conflict. In this case, for example, although equality seems like an apposite value, it is a capacious concept that goes beyond the legal right established in s. 15 of the *Charter*. Every conception of equality, as the Supreme Court noted in adopting the words of J.H. Schaar in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, "is at once a psychology, an ethic, a theory of social relations, and a vision of the good society" (at para. 26 (QL)). The *Charter* value of equality potentially competes and conflicts with the autonomy and liberty of native bands, principles that were identified as *Charter* values in *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at paras. 44-48, and which, according to the s. 1 *Charter* evidence tendered in this case, informed the compromise that underlies s. 6 of the *Indian Act*.
>
> 83 In light of these and other problems, the Supreme Court has limited the role *Charter* values can play in statutory interpretation. In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 28, 60-66, the Supreme Court held that *Charter* values have no role in the interpretation of legislation unless the text is ambiguous, in the sense that one or more meanings are available that are equally in accordance with the intentions of the statute: see, most recently, *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 25. Absent such ambiguity, *Charter* values have no role to play in statutory interpretation. This stance reinforces our view that a *Charter* values analysis should be avoided where it is not necessary to the outcome sought by the party.

E. Constitutional aspects of a privative clause: *Green v. ATA*

Green v. Alberta Teachers' Association,[172] dealt with an appeal from a professional disciplinary decision. A Hearing Committee found Green guilty of professional misconduct for criticizing another teacher's teaching practice to school administration without giving

172. 2016 ABCA 237. See also *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2016 BCCA 473, discussed above, for discussion on the impact of a privative clause.

prior notice to the teacher. Green appealed that decision to the Professional Conduct Appeal Committee ("Appeal Committee") which came to a 2-2 decision on whether to allow the appeal. Notwithstanding the tie vote, the Appeal Committee dismissed the appeal without seeking submissions on the issue of whether a decision to dismiss an appeal could be rendered on a tie vote.[173]

Green applied for judicial review of the Appeal Committee's decision. Mr. Justice Clackson of the Alberta Court of Queen's Bench dismissed the application. While Clackson J. agreed that it was "disturbing" for a professional organization engaged in professional disciplinary hearings to give itself an advantage (by deciding ties would be decided in favour of the organization), he held that the role of the court on judicial review was to decide whether the process was unfair, not whether it was distasteful.

Clackson J. also held that even if the Appeal Committee had erred in dismissing the appeal on a tie vote, he had no authority to intervene given section 57 of the *Teaching Profession Act*[174] which includes a privative clause insulating decisions from judicial review except on questions of jurisdiction. Green appealed to the Court of Appeal.

The Court of Appeal allowed Green's appeal, holding that Clackson J. had erred in interpreting the privative clause:

> 25 In *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, the Supreme Court definitively set out the approach that courts must take when faced with a privative clause seeming to oust or limit judicial review. The majority found that a "full" privative clause

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173. Section 83(3) of the General Bylaws of the Alberta Teachers' Association stated that "unless otherwise specified, the votes or decisions of any Committee or panel shall be by a majority of those participating in the vote or decision".

174. RSA 2000, c. T-2.

does not mean what it says—*i.e.*, that judicial review is precluded. Rather, the presence or absence of a privative clause is merely a factor that goes to the appropriate standard of review. In this way, a privative clause—and particularly, a strongly worded one—indicates that the legislator intended courts to adopt a deferential standard of review (*i.e.* "reasonableness"). The Supreme Court majority in *Dunsmuir* wrote at para. 52:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

26 In this case, the chambers judge considered the privative clause contained in section 57 of the *Act* and concluded that a judicial review assessing the reasonableness of the Appeal Committee's decision was unavailable.

27 In our opinion, the chambers judge erred.

28 In *Dunsmuir*, the privative clause at issue was more strongly worded than the one in this case, as not even questions of jurisdiction were reserved. Furthermore, in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 774-75, 105 DLR (4th) 385, the Supreme Court considered a similar privative clause to the one at issue in this case, which purported to limit review of a tribunal's decisions except on questions of jurisdiction. The Supreme Court found that courts could nonetheless review such decisions for (what was then) patent unreasonableness.

29 Those observations were an echo of the Supreme Court's recognition for the first time in *Crevier v. Quebec (Attorney General)*, [1981] 2 SCR 220 "that a provincially constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction." (at p. 236)

30 We would add only that the rule of law is also a constitutional principle that may justify reviewing an administrative decision in spite of a privative clause purporting to preclude such review. The majority in *Dunsmuir* at para. 28 invoked the rule of law to justify the availability of judicial review in some circumstances notwithstanding the legislative grant of broad powers to administrative decision-makers:

> [28] 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.
>
> 31 We conclude that the privative clause does not preclude judicial review of the decision of the Appeal Committee which, we are persuaded, exceeded its jurisdiction.

VIII. A MISCELLANY OF OTHER DEVELOPMENTS

A. Mootness

- In *Abbass v. Western Health Care Corp.*,[175] the Newfoundland and Labrador Court of Appeal heard an appeal despite the fact that the matter was moot. Abbass had been detained under Newfoundland and Labrador's *Mental Health Care and Treatment Act*. He applied for an order of *habeas corpus* and the applications judge held he had no jurisdiction to make the order because there was a statutory review mechanism in the Act. Abbass appealed that decision, but before the appeal was heard, he was released from detention, so the matter of the application judge's jurisdiction had become moot. The Court of Appeal held that this was an appropriate case for them to determine the appeal despite the mootness. The court was of the view that the issue of the application judge's jurisdiction to order *habeas corpus* was "of such general importance for similar cases in the future that the Court should nevertheless hear and determine the appeal".[176]

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175. 2017 NLCA 24.

176. At para. 4.

B. Time limits, delay and adequacy of service

- *Wang v. Complaints Inquiry Committee*[177] dealt with whether the appellant, Wang, was out of time to appeal a decision of a disciplinary appeal panel (the "Appeal Panel"). Of central importance to the case was whether Wang had been adequately served with the decisions of the Appeal Panel. She had changed her address of record to an address in Nova Scotia and the decisions had been couriered to that address and signed for by a third party. The decisions were also sent to Wang's former counsel. The Court of Appeal of Alberta held that there was a "strong presumption of service",[178] and struck Wang's appeal. The court discussed the adequacy of service on former counsel:

> 8 The appellant submits that service on her former counsel is of no consequence, because s. 132 requires service on her. Where a participant in proceedings retains a lawyer, and that lawyer goes on the record, that lawyer is the authorized agent of the participant. The implied authority of that lawyer will generally include receiving service of documents on behalf of the participant: *Standard Life Assurance Co. (Trustee of) v R & M Construction Co.* (1996), 141 Nfld & PEIR 323 at para. 34, 137 DLR (4th) 1 (Nfld CA). That is so if only because of the rule preventing a lawyer from directly contacting the client of the other lawyer. The implied authority arises here ....

- The case of *Risseeuw v. Saskatchewan College of Psychologists*[179] is most notable for Justice Danyliuk's comments on the requirement to conduct a

177. 2017 ABCA 305.

178. At para. 7.

179. 2017 SKQB 8.

standards of review analysis in cases involving procedural unfairness. However, the issue of delay was also addressed. Risseeuw was applying for judicial review of the College's decision to deny her full practicing membership. She had applied four times and this case dealt with her second application for judicial review. Two years had passed between the College's decision and the time that Risseeuw filed her application. Justice Danyliuk held that, while there was no hard and fast rule about what constitutes undue delay in Saskatchewan, the delay in this case was undue considering Risseeuw's previous history of applying for judicial review (and presumed knowledge of the process) and the fact that there was no explanation for the delay. While the College had not been prejudiced by the delay, there was no reason that Risseeuw couldn't have applied within six months[180] and there was a need for certainty in the professional decision-making process. Risseeuw's application was dismissed for undue delay.

C. The record

- In *Alberta College of Pharmacists v. Sobeys West*,[181] the judge at first instance allowed Sobeys' request to be allowed to add further documentation to be considered at the judicial review. The documentation included material that was not before the Council of the College when it enacted the impugned policy prohibiting loyalty programs and inducements to pharmacy patients and some predated the Council's decision to implement the policy by many years. Other documentation was "fresh evidence". The Court of Appeal held that the

180. Note that in Alberta the general six month time limit in the *Rules of Court* for bringing an application for judicial review cannot be extended by the Court: Rule 3.15.

181. 2017 ABCA 306.

reviewing judge had erred by allowing the additional evidence to be adduced by Sobeys and on relying upon the evidence to the extent he may have.[182]

- In *Ready v. Saskatoon Regional Health Authority*,[183] the Saskatchewan Court of Appeal admitted affidavits filed by intervenors as they provided "valuable context to the issues" and spoke to the "importance of the matters" raised.[184]

D. Intervenors

- The Court of Appeal of Alberta discussed the test for intervenor status in *Suncor Energy Inc. v. Unifor Local 707A*.[185] Of particular note, Justice Paperny addressed the amount of weight that should be given to fact that the applicants were granted intervenor status in the court below:

> 15 In my view, there is an additional factor that militates in favour of the application to intervene, and that is the fact that two of the applicants were granted intervenor status in the court below. This factor has received little judicial consideration, and is not listed in the relevant factors set out by this Court in *Pedersen*. It is, in my view, deserving of comment.
>
> 16 It is clear that, in Alberta, applicants who have been granted intervenor status in the court below are not automatically parties, nor intervenors, on appeal. They must apply again to obtain intervenor status on appeal: see rule 14.58 (2). In other words, being granted intervenor status in the court below does not amount to intervenor status by right on appeal.

182. At paras. 67 to 71, citing *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 and *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41.

183. 2017 SKCA 20.

184. At para. 2.

185. 2016 ABCA 265.

17 In *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14, 358 DLR (4th) 100, the court commented that the Yukon Court of Appeal, as part of its jurisdiction to control its own process, is entitled to determine whether and to what extent an intervention will be allowed on appeal. The court held that a decision by the court below to allow a person to intervene before it does not serve to give that person rights on appeal: para 11.

18 A somewhat different view was taken by the Federal Court of Appeal in *Canada (Attorney General) v Canadian Wheat Board*, 2012 FCA 114, 432 NR 383. Mainville J explicitly found that some deference was owed to the decision of the court below to grant intervenor status there. He said, at para 9:

> ...Where leave to intervene has already been granted in the Federal Court, barring a fundamental error in the decision granting leave, some material change in the issues on appeal, or important new facts bearing on the intervention, I do not see why this Court should not rely on the findings of the Federal Court with respect to the intervention or exercise its discretion to grant leave differently from the Federal Court. I rely for this proposition on the considered opinion of my colleague Stratas J.A. in *Global[ive] Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 119.

19 The relevant statements in *Globalive* are at para 5:

> I grant the motion for leave to intervene in the appeal in this Court for the following reasons:
>
> a. In my view, absent fundamental error in the decision in the Federal Court to grant the moving parties leave to intervene, some material change in the issues on appeal, or important new facts bearing on the issue, this Court has no reason to exercise its discretion differently from the Federal Court. No one has submitted that there is fundamental error, material change or important new facts.
>
> b. It is evident from the reasons of the Federal Court that the moving parties' submissions were relevant to the issues and useful to the Court in its determination.

20 I would not say that an appellate court is required to grant permission to intervene in the absence of demonstrable error in the court below in having done so. This Court retains its jurisdiction to control its own procedure and to determine whether to allow an intervention on appeal, regardless of whether intervention was permitted in the court below.

> However, that intervenor status was granted in the court below is, in my view, a factor to consider in determining an application to intervene on appeal. I would add to the list of factors set out in *Pedersen* the following considerations where the applicants were granted intervenor status below:
>
> (a) the role taken by the intervenors in the court below;
>
> (b) whether the submissions of the intervenors were necessary or helpful in informing the decision being reviewed;
>
> (c) whether the issues on appeal are the same as in the court below, or whether the issues as framed on appeal could continue to impact the applicants' interests;
>
> (d) whether the particular perspective of the applicants can continue to inform the discussion as now framed on appeal.
>
> 21 In this case I am satisfied that the interests of the applicants and the assistance they can provide in the appeal remain substantially the same as in the court below. While the extent of the value of their participation is not apparent from the reasons of the reviewing judge, it cannot be said that the issues on which they were given leave to intervene are no longer the subject of discussion or debate on appeal. The issues have not narrowed or been eliminated on appeal. Accordingly, I am exercising my discretion and granting permission to intervene to the applicants on the terms provided. Their participation is limited to one joint factum and to the following issues; the threshold required by the Supreme Court of Canada in *Irving Pulp & Paper Ltd* concerning the degree of evidence required to establish a workplace problem, and the group to be examined in assessing if there is a problem.

E. *De novo* hearings

- In a case with a lengthy history, the Manitoba Court of Queen's Bench dismissed an application for judicial review of a statutory delegate's decision which denied the applicant a *de novo* hearing in *Dorn v. Association of Professional Engineers and Geoscientists of Manitoba*.[186] The court reviewed

186. 2017 MBQB 36.

the principles to be applied in deciding whether an appeal right involves a *de novo* hearing:

> 36 The principles to be applied in deciding whether an appeal right involves a *de novo* hearing or a hearing on the record are referenced in two Manitoba cases: *Brian Neil Friesen Dental Corp. v. Director of Companies Office (Manitoba)*, 2011 MBCA 20, [2011] M.J. No. 50 (QL), and *Michele Santarsieri Inc. v. Manitoba (Deputy Minister of Finance)*, 2015 MBCA 71, 389 D.L.R. (4th) 209. *Santarsieri* follows and applies *Friesen*. While both cases are dealing with appeals from administrative decision makers to the court, in my view the same principles apply to the case before me.
>
> 37 First, the fact that the appeal provision does not state that the appeal will be a *de novo* hearing means that the right of appeal is presumed to be a right to a hearing on the record. See *Friesen* at para. 32, and *Santarsieri* at para. 4. I do not accept the applicant's argument that the reference in section 53(3) to the incorporation of sections 40 to 45 means that the appeal provision is not silent. I agree with the respondent that an appeal may involve an application to present fresh evidence, where these provisions may be applicable. The reference to sections 40 to 45 does not import the requirement for a *de novo* hearing into the appeal provision. The appeal provision remains silent. A hearing on the record is presumed.
>
> 38 Second, the appeal provision must be considered in context. See *Friesen* at para. 34, and *Santarsieri* at para. 4. The nature of the hearing appealed from and the decision maker involved are relevant. Under the ***Act***, the hearing before the panel of the discipline committee involves an adversarial procedure where the parties have the right to be represented by counsel (section 39(3)), present evidence and cross-examine witnesses (section 41(1)). The evidence is to be recorded (section 41(3)). The panel is composed of at least three members of the discipline committee, including members of the Association and a lay person (section 39(1)). The panel has expertise. The panel is required to issue reasons for its decision (section 49(1)) and is required to forward to the registrar the record of the proceedings, consisting of all of the evidence presented before it, including exhibits, documents and recordings (section 49(2)). The legislation clearly contemplates a full hearing before the panel with extensive procedural safeguards. It also contemplates that the hearing will be recorded and that the record will be preserved and transmitted to the registrar of the Association. This is consistent with an appeal on the record of the discipline committee hearing.
>
> 39 Third, policy considerations are relevant. See *Santarsieri* at para. 66. An effective and efficient discipline process mandates respect for the discipline committee as a decision-making tribunal with expertise. It is

> appropriate that the decisions of this tribunal, made following a full hearing where the investigated person is afforded full procedural rights, be afforded deference on appeal.

F. Professional discipline and the role of professional regulatory bodies

- In *Robson v. Law Society of Upper Canada*,[187] the Ontario Court of Appeal struck out a claim of negligent investigation against the Law Society as disclosing no cause of action. The court held that section 9 of the *Law Society Act*[188] provided statutory immunity to Law Society officials and employees and the Law Society offered no private law duty of care to the applicant which would give rise to a claim of negligent investigation. The Law Society had an obligation to investigate the conduct of lawyers.[189]

- In *Law Society of Alberta v. Beaver*,[190] the Court of Appeal upheld an injunction which prohibited Beaver, a suspended lawyer, from engaging in practicing law, including acting as an agent. The court held that the injunction was not overly broad and that suspended lawyers are not entitled to act as agents.

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187. 2017 ONCA 468.

188. R.S.O. 1990, c. L.8.

189. Citing *Edwards v. Law Society of Upper Canada* (2000), 48 O.R., (3d) 329 (C.A.), affirmed 2011 SCC 80.

190. 2016 ABCA 290.

- In *Alberta Veterinary Medical Association v. Sandhu*,[191] the Court of Appeal of Alberta granted the Association's application to have Dr. Sandhu's appeal dismissed pursuant to Rule 14.74 of the Alberta *Rules of Court* which permits dismissal of an appeal if the appeal is frivolous, vexatious, without merit or improper, or the appeal or any step in the appeal is an abuse of process. The court found it had no statutory authority to stay or dismiss the appeal council's findings of guilt or the sanctions imposed and that Dr. Sandhu had not exhausted the administrative appeal processes and remedies available to him. The court also held that the appeal council's decision that it had jurisdiction to deal with the matter despite the fact that an alleged statutory time limit had passed was reasonable. Finally, the court declined to take jurisdiction because an internal appeal was already scheduled and was imminent. It would not be in the interests of justice or a prudent use of court resources.

- Last year's decision by the Ontario Court of Appeal in *Groia v. The Law Society of Upper Canada*[192] gave a lengthy discussion about professional misconduct, regulation of the legal profession and the test for incivility. The Court of Appeal 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 Court of Appeal also upheld the penalties imposed by the tribunal—a one-month suspension and adverse costs award amounting to $200,000. The Supreme Court of Canada has granted leave to appeal that decision, and the hearing is scheduled for November 2017.[193]

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191. 2016 ABCA 336.

192. 2016 ONCA 471.

193. [2016] SCCA No. 310.

G. Discovery of the Crown

- In *Canada (Attorney General) v. Thouin*,[194] the Supreme Court of Canada clarified that the Crown is only required to submit to discovery in an action in which it is a party pursuant to the *Proceedings Against the Crown Act*. That Act has no application if the Crown is not a party to the action; accordingly, as a matter of Crown prerogative, it cannot be subjected to discovery as a third party, even if it has information which might be relevant to the lawsuit. There may, however, be an issue about whether a particular entity is or is not an agent of the Crown, which is entitled to immunity from non-party discovery. This limitation may be important in actions involving governmental entities.

H. Amendments to the Alberta *Labour Relations Code*

Alberta has amended the *Labour Relations Code* to replace statutory judicial review of labour arbitration awards with a review by the Labour Relations Board on the basis of (a) procedural unfairness or (b) the award is "unreasonable because of a lack of intelligibility or transparency, or because it falls outside the range of possible acceptable outcomes that are defensible in respect of the facts and law".[195] There is then an appeal to the Court of Appeal with leave.[196] What will be the standard of review which the Court of Appeal will apply to a decision by the Labour Board reviewing a decision by an arbitrator?

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194. 2017 SCC 46.

195. Section 145(2), as amended by Bill 17 (*Fair and Family-Friendly Workplaces Act*).

196. Section 145(3).

IX. CONCLUSION

Has administrative law become akin to trench warfare?[197] Are administrative law lawyers and trial judges mere trench soldiers?[198] Regardless of how these questions are answered, it is clear that administrative law has not become any simpler. Administrative law is not just a mathematical formula that will automatically crank out answers; facts, clear thinking, and advocacy are very important to the outcome.

197. As suggested by Justice Danyliuk in *Risseeuw v. Saskatchewan College of Psychologists*, 2017 SKQB 8 at para. 34.

198. *Ibid.*