ADMINISTRATIVE LAW IN 2017:
UPDATE ON CASELAW, RECENT TRENDS AND RELATED DEVELOPMENTS

PART II—TWO ADDITIONAL CASES

Garneau Community League v. Edmonton (City)
2017 ABCA 374

-and-

Barreau du Québec v. Quebec (Attorney General)
2017 SCC 56

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW 2017

PART II: TWO ADDITIONAL CASES

In addition to the cases noted in my annual paper, the following very recent decisions also deserve comment.

1. *Garneau Community League v. Edmonton (City)—Capilano (Round Two)*

A year ago, in November 2016, the Supreme Court of Canada issued a sharply divided five-to-four decision in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Limited*.[1]

The majority and the minority differed fundamentally on (a) the standard of review applicable where a statute specifically provides a right of appeal to the courts; (b) whether the four "correctness" categories in *Dunsmuir* are descriptive or exhaustive; (c) whether the presumption that reasonableness is the applicable standard of review when the statutory delegate is interpreting its home statue can be rebutted; (d) whether context is relevant to standards of review analysis, (e) what constitutes "expertise" ; and (f) the concept of "a true jurisdictional question".

I discussed the decisions in *Capilano* in Part II to last year's paper.[2]

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1. 2016 SCC 47.

2. http://sagecounsel.com/administrative-law-2016-part-ii-additional-case/

In *Garneau Community League v. Edmonton (City)*,[3] the Court of Appeal of Alberta has squarely joined issue with the majority's reasoning in *Capilano*. The case dealt with a question of statutory interpretation involving the power of the Subdivision and Development Appeal Board to vary zoning guidelines set out by City Council in a statutory plan. The Court unanimously held that the SDAB did not have this power, quashed its decision, and remitted the matter back to be considered in light of those guidelines. In writing the main decision on the merits, Justice Strekaf noted that the Court of Appeal of Alberta had previously held that the standard of review of decisions made by a subdivision and development appeal board was correctness, with some deference on questions of law if the expertise of the board is engaged with respect to the particular question at issue as well as the application of the law to particular sets of facts.[4] She held that it was not necessary to determine whether the majority's judgment in *Capilano* had changed that standard of review, because the SDAB's decision had to be set aside regardless of whether the standard of review was correctness or reasonableness.

While concurring in the result, both Justice Slatter and Justice Watson took the opportunity to issue *obiter* reasons which push back strongly against the majority's reasoning in *Capilano*.

Justice Slatter

Justice Slatter was of the view that correctness was the applicable standard of review, not reasonableness, and the majority's decision in *Capilano* did not implicitly overrule the existing Alberta jurisprudence on this point.

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3. 2017 ABCA 374.

4. Paragraph 9.

> [78] ... The question accordingly arises whether *Capilano Shopping Centres* has implicitly overruled the planning cases like *McCauley Community League* and *Cameron Corp.* [which established the correctness standard of review].
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> [79] The short answer is that *Capilano Shopping Centres* does not provide the answer.... The Supreme Court of Canada remains sharply divided on this issue, and has signalled that a reconsideration of the standard of review paradigm is overdue. In [the Court of Appeal's decision in] *Capilano Shopping Centres* at para. 11, I suggested that the day had not yet come when the applicable standard of review could be determined without detailed analysis. That day still has not come.

Justice Slatter repeated his previous concern that there is an important distinction between those multiple decisions makers which have a unifying institutional framework and those which have concurrent functions without such a unifying institutional framework.

> [80] The issue presented by the present appeal can be described generically as determining the standard of review applicable when a single statutory provision must be interpreted by multiple decision makers. Some decision makers have a unifying institutional presence. Even though those decision makers may sit in different panels, they have an ability to bring uniformity to the interpretation of their home statutes. Examples are the labour boards, the privacy commissioners, and the human rights commissioners. Each jurisdiction generally has only one of these, even though their work might be performed by different panels and individuals. They have the ability to discuss commonly recurring problems, and achieve consistency in interpretation: *Consolidated Bathurst Packaging Ltd v. International Woodworkers of America*, [1990] 1 SCR 282.
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> [81] These unitary institutional decision makers can be contrasted with the concurrent subdivision and development board involved in cases like this, and the assessment review board in *Capilano Shopping Centres*. Each municipality has its own such board, each of which must nevertheless interpret the same statutory provision, and (often) the same uniformly drafted planning regulations. There is no unified institutional "board" that can provide any consistency to interpretation. The Legislature could not have intended that the statute have one meaning in one municipality, but a different meaning elsewhere in the Province. The Legislature has provided for a direct appeal to the Court of Appeal on questions of law. Is that not a signal that the Court of Appeal, by applying a correctness standard, is intended to be the unifying force?

Although the Supreme Court has twice recently applied the reasonableness standard of review in cases involving this model of decision-making (*Capilano* and in *Wilson v. Atomic*

Energy of Canada),[5] Justice Slatter noted that the Supreme Court was sharply split on this issue and specifically did not abandon the analytical framework set out in *Dunsmuir*. Nor did it subsequently abandon *Dunsmuir* in *Guérin*.[6]

> [88] The short answer is that *Capilano Shopping Centres* does not provide the final answer. The reasonableness standard of review adopted in *Wilson* and *Capilano Shopping Centres* may be justified by a conventional application of the *Dunsmuir* analysis. The outcome, however, is difficult to justify when measured in light of the applicable legal principles. If the underlying analysis is revisited, a different outcome may emerge.

For Justice Slatter, the underlying question is "What is judicial review?" What is the purpose of judicial review?"[7] After referring to *Dunsmuir's* explanation that judicial review maintains the rule of law so that the standard of review is determined by reference to legislative intent, Justice Slatter then asks why legislative intent appears to be irrelevant where there is an express statutory right of appeal to the court. Invoking "deference" as a universal mantra does not reveal the answer to this question.

> [93] Rhetoric about deference has overtaken the analysis, and too frequently an attempt is made to fix the standard of review without remembering that "standard of review" is merely a means to an end, not an end in itself. Rigidity has appeared in the *Dunsmuir* analysis. The rebuttable presumptions in *Dunsmuir*, such as the one that interpretations of the tribunal's home statute are reviewed for reasonableness, are turning into conclusive presumptions. *Capilano Shopping Centres* at para. 32 (citing *Movement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 46, [2015] 2 SCR 3] accepted that the presumption of reasonableness can be rebutted if the legislative context shows correctness was intended, but refused to apply that concept in a most obvious circumstance. *Dunsmuir*'s four categories calling for a correctness review are shrinking, and any attempt to identify new categories is resisted without reference back to the underlying principles. Even attempts to refine

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5. 2016 SCC 29, [2016] 1 SCR 770.

6. *Quebec (Attorney General) v. Guérin*, 2017 SCC 42 (discussed in Part I of this paper).

7. By "judicial review", one should include not only the courts' inherent power of judicial review at common law ("external judicial review" as identified by Justice Slatter in *Capilano* in the Court of Appeal) and the courts' function when hearing a statutory appeal ("internal judicial review"). Although earlier there might have been a distinction between these two court functions, they have linguistically been merged since the Supreme Court of Canada's decision in *Dr Q*, 2003 SCC 19, [2003] 1 S.C.R. 226.

> categories such as "questions of law of importance to the legal system" and "interpretation of the home statute" are strongly resisted.

Justice Slatter then criticized deference-because-of-expertise, where the statutory delegate clearly does not have greater expertise than the courts:

> [94] The rhetoric about deference is perhaps matched by the rhetoric about "expertise". Administrative decision makers undoubtedly develop an expertise, but the interpretation of statutes is not at the core of tribunal expertise. The superior courts have generally greater, but at least equal expertise in interpreting statutes. When the Legislature provides a direct appeal to the superior courts, does that not signal a recognition of the superior court's expertise on questions of law, and also invite the exercise of that expertise by the courts? If the Legislature thought that "deference" was the overriding consideration, why is an appeal allowed at all?
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> [95] If legislative intent is the basis of judicial review and the related standard of review, why is the existence of a statutory right of appeal of so little consequence? Why would the Legislature allow for appeals only on "questions of law or jurisdiction", and only after appeals are screened [by requiring leave], if it was not intended that the Court of Appeal would actually engage those questions of law? ... As previously noted, it cannot be the legislative intent that public statutes mean different things in different parts of the province. In a related but analogous context, the Supreme Court accepted in *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 9-10, [2002] 2 SCR 235 that appellate courts perform legitimate law-settling and law-making roles. It is part of the legitimate role of appellate courts to ensure that the same legal rules are applied in similar situations. For that same reason, the standard of review of correctness should be applied when many tribunals have to interpret the same statute.
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> [Emphasis added.]

In addition to *Housen v. Nikolaisen*, one might refer to the Supreme Court of Canada's decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*,[8] where the court held correctness to be the applicable standard of review for a standard form insurance contract, for precisely the same reason Justice Slatter articulates.

Justice Slatter concluded as follows:

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8. 2016 SCC 37.

> [96] In conclusion, "The day has not yet come". Absent some direction on the fundamental purposes of judicial review, and specifically of direct statutory appeals from tribunals to superior courts, there is no reason to revise or replace the [correctness] standard of review set out in cases like *McCauley Community League* and *Cameron Corp.* The standard of review set out in these decisions is sound in principle and consistent with the proper role of the superior courts in the system of administrative justice. The selected standard of review properly balances the relative expertise of the different parts of the system, extends appropriate deference, and is consistent with the legislative intent. The standard of review should be correctness. Neither *Wilson* nor *Capilano Shopping Centres* preclude[s] that outcome.

Justice Watson

Justice Watson was also of the view that *Capilano* did not change the existing jurisprudence that correctness was the applicable standard of review for questions of law or jurisdiction coming to the Court of Appeal under s. 688 of the *Municipal Government Act*.

While the Supreme Court of Canada stated in *Agraira v. Canada (Public Safety and Emergency Preparedness*)[9] that there may sometimes be a need to revisit a previously established standard of review if it is inconsistent with recent developments in the common law principles of judicial review, the *situation* in *Capilano* was entirely different from that in *Garneau*, even though both cases involved statutory appeals to the court on questions of law or jurisdiction with leave.[10] In *Capilano*, the appeal to the court was contained in Part 11 of the Act ("Assessment Review Boards") which created an administrative structure to ensure that property tax assessments were "fair and equitable"—a concept which implies some discretion. By contrast, in *Garneau*, the appeal to the court was contained in Part 17 of the Act ("Planning and Development") which created another administrative structure creating a framework for regulating the use of property. The type of decision or type or

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9. 2013 SCC 36 at para 48, [2013] 2 SCR 559.

10. In *Garneau*, the statutory appeal provision was contained in s. 688 of the *MGA*. In *Capilano*, the statutory provision was contained in s. 470 (which incidentally was amended after the decision in *Capilano*).

category of questions which arise in an appeal under Part 17 are quite different from those which arise under Part 11. The legislative context of the appeal in Part 17 is what determines that correctness is the applicable standard of review, rebutting any presumption under either *Dunsmuir*[11] or *Alberta Teachers' Association*[12] that the reasonableness standard should apply.[13]

> [57] It follows from this jurisprudential history that it remains open to this Court to reconsider the standard of review for the types of questions and types of decisions of Boards that may arise within the meaning of s 688 of the *MGA*.
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> [58] In my respectful view, this Court is not commanded by the Supreme Court in *Capilano* to now apply reasonableness review to extricable Board interpretations of legal terms of art in bylaws or regulations, let alone in the *MGA* itself, as if the meaning of those words *in law* can be differently interpreted from Board to Board and case to case according to the discretion of the Board. In my respectful view, to apply reasonableness to such points would hazard the efficacy of the rule of law in these contexts. Saying so is not to invite large scale intervention by this Court on such topics. Indeed, the pre-screening factor of leave to appeal is a signal by the Legislature that whether or not jurisdiction exists for correctness review [by the court], it is not to occur merely in the presence of arguable error of law or jurisdiction. An overly intrusive approach by this Court has not happened before and I do not call for the whirlwind now.
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> [Italics in original.]

Justice Watson then observed that "expertise" is not a factor which could justify a different meaning being given to legal terms of art imbedded in scores or municipal bylaws across Alberta.[14] Further, the Legislature had stood back while the Court had for many years used

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11. 2008 SCC 9, [2008] 1 SCR 19.

12. 2011 SCC 61, [2011] 3 SCR 654.

13. For authority about the determinative nature of the legislative context, Justice Watson referred to paragraph 62 in *Dunsmuir*; paragraph 33 in *Alberta Teachers*; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161; paragraph 25 in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187; paragraph 24 in *Capilano*, which in turn refers to paragraph 46 in *Saguenay* and paragraph 16 in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283.

14. Paragraph 63.

the correctness standard of review under s. 688, and had not enacted legislation to change that state of affairs.[15] That result should not be accomplished by blindly applying the presumption from *ATA*:

> [67] ... [I]t should not be the case that an analytical tool developed in *Alberta Teachers* to assist analysis of the scope of judicial review at common law, howsoever useful and authoritative as such tool may be, should by itself be taken to sweep aside the role of the province's highest Court to ensure legality and consistency in compliance with law and exercise of ... jurisdiction by these lay Boards. When it comes to predictable and coherent interpretation and application of legal terms of art contained in bylaws or when it comes to keeping the Boards in compliance with the terms (and limits) of their legislative authority, long experience instructs that land owners and land developers will not be served by a forensic lottery on such topics.
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> . . .
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> [73] In my respectful view, if there is to be further movement in law on the topic of standard of review ..., that movement should be towards a method of identification of what are the extricable questions of law or jurisdiction for which Parliament or a Legislature or the common law would expect or demand a single answer....

Commentary

It is very clear from the *obiter* reasons of Justices Slatter and Watson that they do not accept that *Capilano* establishes a general principle that reasonableness is the invariable standard of review where there is a statutory appeal to the courts on questions of law or jurisdiction (particularly where leave is required). Legislative intent is critical to determining the applicable standard of review. Indicators of legislative intent include the legislative context, including the existence of a right of appeal to the courts;[16] the grounds of appeal (that is, the nature of the question which the court is to determine); and the need in a particular case for there to be one ("correct") answer to that question which is to be applied by all of the multiple decision-makers involved in performing the same statutory function. An

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15. Paragraph 65.

16. Perhaps also to internal administrative appellate bodies?

irrebuttable presumption of "deference" to all administrative decision-makers cannot be justified, conflicts with the conceptual and historical foundations of judicial review, is contrary to the rule of law, and is not helpful in maintaining public confidence in the administrative state. We have courts for a reason, and the underlying question is: What did the Legislature intend the court to do in any particular circumstance?

Many of the recent Supreme Court of Canada decisions on standard of review are 5:4 or 4:3. It may be that the turnover in the membership of the Court will shift where the majority lies, and result in the minority's analytical framework for judicial review becoming the majority. Time will tell. In the meantime, commentators and counsel are going to continue to very closely analyze the rhetoric used by the judges to see if it actually supports the results arrived at in a particular case, is transferrable or distinguishable to other cases, or creates a general rule—or indeed a completely different analytical framework for determining the applicable standard of review (that is, what the Legislature intended the court to do).

2. *Barreau du Québec v. Quebec (Attorney General)*

The issue in *Barreau du Québec v. Quebec (Attorney General)*[17] was whether the Minister of Employment and Social Solidarity (the "Minister") could use a non-lawyer to (a) prepare motions and written submissions, and (b) make oral representations in front of the social affairs division of the Administrative Tribunal of Quebec (the "ATQ").

Section 128 of the *Act respecting the Barreau du Québec* provides that (a) preparing a notice, motion, proceeding or other similar document is the "exclusive prerogative" of the practising

17. 2017 SCC 56.

advocate and solicitor,[18] and (b) reserves pleading or act[ing] before courts *or tribunals* to practising advocates (not solicitors).[19] However:

- section 128(2)(a)(5) gives the Minister or his delegate the right "to be represented to plead or act in his ... name" before the social affairs division of the ATQ, and

- section 129(b) provides that section 128 does not affect rights that are specifically defined and granted to any person by another law.

Further, section 102 of the *Act respecting administrative justice* grants the Minister or his delegate the right to be represented by the person of his choice before the social affairs division of the ATQ.

In the case in question, a non-advocate had prepared, signed and filed the Minister's written applications in front of the ATQ. The opposing individuals challenged the right of the Minister to have a non-advocate do this, and asked for judgment in their favour on the merits of the issue in question. The ATQ dismissed the individuals' challenge, holding that s. 102 of the *Act respecting administrative justice* authorized the Minister to use a non-advocate to do everything needed to represent the Minister, both preparing written material and appearing at the hearing, and this did not conflict with s. 128 of the *Act respecting the Barreau du Québec*. The Superior Court granted applications for judicial review. The Court of Appeal reversed.

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18. Section 128(1)(b).

19. Section 128(2)(a).

The majority decision

Justice Brown, writing the decision for the eight judges in the majority,[20] applied the presumption that reasonableness was the applicable standard of review and held that the ATQ's interpretation was reasonable. The presumption applied because the ATQ was interpreting its home statute. Although important, the issue was not a question of central importance to the legal system as a whole (even though it affected the exclusive role of advocates), so the presumption was not rebutted. Further, the interpretation of s. 102 of its statute fell within the ATQ's expertise.[21] In addition, this was not a situation where the two statutes conflicted,[22] which might have engaged the correctness standard of review to sort out that conflict, but rather only required an interpretation about how the two statutes could work together. Finally, a contextual analysis indicated that the legislature intended the ATQ to use a non-judicial process, and the legislation authorized the ATQ to decide "any question of law or fact necessary for the exercise of its jurisdiction", which clearly covered any question relating to the Minister's right to be represented before the social affairs division. In the result, Justice Brown did not agree with the interpretation proposed by the Barreau,[23] and held that the ATQ's interpretation was reasonable.

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20. The majority consisted of Chief Justice McLachlin and Justices Abella, Moldaver, Karakatasanis, Wagner, Gascon, Brown and Rowe.

21. Justice Brown simply made this assertion at paragraph 18, without any explanation about what was the "expertise" of the ATQ or how this particular question fell within that "expertise".

22. *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591.

23. Paragraph 41.

The dissent

Justice Côté dissented. She was of the view that the question was of central importance to the legal system as a whole, and lay outside the expertise of the ATQ, so the correctness standard of review should be applied. This was one of the correctness categories recognized in *Dunsmuir*. Further, a contextual analysis indicated that this particular question of law had nothing to do with the purpose of the ATQ's social affairs division, and was not within its expertise, so no deference was warranted. With respect to the suggestion that there was no precedent where a contextual analysis rebutted the presumption in favour of the reasonableness standard of review, Justice Côté observed:

> [64] It is true that there has as yet been no precedent in which this Court rebutted the presumption in favour of the reasonableness standard on the basis of the factors of the contextual analysis from *Dunsmuir*. However, this cannot have the effect of calling into question a clear rule that the Court has reaffirmed on several occasions: a contextual analysis may rebut the presumption in favour of the reasonableness standard (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R.895, at para. 22; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publisher of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16; *Mouvement laïque*, at para. 46; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 32).
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> [65] The absence of a precedent in which the outcome of the contextual analysis has served to rebut the presumption cannot prevent this Court from applying the principles from *Dunsmuir*. In this regard, I endorse the following comment by Lord Denning:
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> > What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both.
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> > *(Packer v. Packer*, [1953] 2 All E.R. 127, at p. 129)

The presence of a privative clause in the *Act respecting administrative justice* is not determinative of the standard of review: *Dunsmuir* at paragraph 52.

In Justice Côté's view, the presumption of reasonableness cannot be sanctified to such an extent that one loses sight of the fact that it is rebuttable.[24]

Applying the correctness standard of review, Justice Côté was of the view that only one interpretation of the provisions in the *Act respecting the Barreau du Québec* was possible. The relevant provisions in both Acts were enacted simultaneously, so the word "represented" must have the same meaning in both Acts. Had the legislature intended, it could have provided for exceptions to s. 128(1)(b) to permit non-advocates persons to prepare and draw up written documents—parallel to the exceptions contained in s. 128(2)(a) relating to oral representations; it did not do so. All that section 102 of the *Act respecting administrative justice* does is to identify who the non-advocate persons are who can make oral representations on behalf of the Minister—it does not go further and authorize any non-advocate to prepare and draw up written documents on behalf of the Minister.[25]

Accordingly, Justice Côté would have reversed the Court of Appeal and reinstated the Superior Court's quashing of the ATQ's interpretation and decision.

Commentary

Both the majority and the dissent used the existing analytical framework for determining the applicable standard of review—there is no suggestion of any new or radically different approach.

Given his past decisions, one might think it surprising that Justice Brown applied the presumption that reasonableness is the applicable standard of review. Why is the role of

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24. Paragraph 66.

25. See paragraphs 88*ff*.

lawyers not a question of central importance to the legal system as a whole? What precise expertise did the ATQ have about this question, and why is that expertise greater than the courts'?

When (if ever) is a contextual analysis of the legislative framework appropriate to determine the intent of the legislature, and therefore the applicable standard of review? Are the references in the previous cases to a contextual analysis meaningless? Is the presumption about the reasonableness standard of review irrebuttable in practice?

Given Justice Brown's statement[26] that he did not agree with the Barreau's interpretation, is this really another case of "correctness masquerading as reasonableness"?

Finally, if the correctness standard of review had been used by the majority, would it have changed the outcome (given their interpretation, which was different from Justice Côté's)?

November 30, 2017.

26. At paragraph 41.