Canadian Bar Association
National Administrative Law, Labour and Employment Law Conference

November 16-17, 2018
Ottawa, Ontario

THE YEAR IN REVIEW IN ADMINISTRATIVE LAW

DAVID PHILLIP JONES, Q.C.
de VILLARS JONES LLP
Barristers & Solicitors
300 Noble Building
8540 - 109 Street N.W.
Edmonton, Alberta
T6G 1E6

Phone (780) 433-9000
Fax (780) 433-9780
dpjones@sagecounsel.com
www.sagecounsel.com

TABLE OF CONTENTS

I. INTRODUCTION[1]

The most important development in administrative law this past year is the Supreme Court of Canada's decision to grant leave to appeal in three cases to consider[2]

> ... the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, and subsequent cases. To that end, the appellants and respondents are invited to address the question of standard of review in their written and oral submission on the appeal, and shall be allowed to file and serve a factum on appeal of at most 45 pages.

The first part of this paper is devoted to some thoughts on the essential concepts which the Court will need to grapple with in performing this task.

The rest of the paper will consider recent decisions on (a) the standard of review which continue to demonstrate considerable divisions; (b) cases which were not amenable to judicial review; (c) standing; (d) procedural fairness; (e) disclosure and privilege issues; (f) *Charter* and other constitutional issues; and (g) remedies, costs, and a miscellany of other interesting issues.

---

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. *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249 (Court file No. 37896); *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249 (*sub. nom. National Football League, et al. v. Canada (Attorney General)* (Court file No. 37897); and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2017 FCA 132 (Court File No. 37748). The cases are scheduled to be heard together in December 2018, and many parties have been granted intervener status.

II. SOME THOUGHTS ON ESSENTIAL CONCEPTS FOR RE-THINKING STANDARDS OF REVIEW IN ADMINISTRATIVE LAW[3]

Unlike in *Pushpanathan* and *Dunsmuir*, the Supreme Court of Canada has given prior notice of its intention to re-think the nature and scope of judicial review of administrative action, including standards of review.[4] This has generated considerable interest in the administrative law community, and the Court has appointed two *amici curiae*[5] and permitted a large number of interveners to file briefs.[6] The following is an anticipation of what the Court will need to consider in grappling with this fundamental issue.

A. The evolution of standards of review

The Supreme Court of Canada has reviewed the law concerning standard of review about once every ten years:

---

3. An earlier version of this Part appeared in 39 Admin. L.R. (6th).

4. Note that "standards of review" is not synonymous with the "nature and scope of administrative action". The latter is a broader category which includes issues about grounds for judicial review as well as remedies.

5. Audrey Boctor and Daniel Jutras.

6. The decisions on interveners permitted to file written submissions was issued on 24 September 2018. The Court will make a decision later about which interveners will be permitted to make oral submissions.

1970—*Metropolitan Life Insurance Company*:[7] Chief Justice Cartwright for the unanimous Court adopted the House of Lords' analysis in *Anisminic*[8] that a wide category of possible errors were jurisdictional in nature and could be corrected by the reviewing court. The characterization of the error as "jurisdictional" was essential to enabling the Court to avoid the effect of the privative clause in the legislation.

1979—*New Brunswick Liquor*:[9] Justice Dickson for the unanimous Court said:

> With respect, I do not think that the language of "preliminary or collateral matter" assists in the inquiry into the Board's jurisdiction. One can, I suppose, in most circumstances subdivide the matter before an administrative tribunal into a series of tasks or questions and, without too much difficulty, characterize one of the questions as a "preliminary or collateral matter".... Underlying this sort of language is, however, another and, in my opinion, a preferable approach to jurisdictional problems, namely, that jurisdiction is typically to be determined at the outset of the inquiry.
>
> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.
>
> [Emphasis added.]

As a corollary, this case also developed the concept that the courts could review a decision within jurisdiction which was patently unreasonable.

---

7. [1970] S.C.R. 425.

8. *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 WLR 163 (HL).

9. *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 233. For a contrast, see *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 involving a preliminary jurisdictional issue (whether a rental property was a "self-contained domestic establishment").

1988—*Bibeault*:[10] Justice Beetz, for the unanimous Court, developed the "pragmatic and functional approach" for determining the intention of the Legislature about whether a particular matter/issue/question was to be within the jurisdiction of the statutory delegate to determine or a jurisdictional limitation on what the statutory delegate could definitively determine:

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question of "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"
>
> ...
>
> [T]he first step in the analysis ... involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage a pragmatic or functional analysis is just as suited to a case ... where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting jurisdiction, the first step involves determining the tribunal's jurisdiction.
>
> This development seems to me to offer three advantages. First, it focuses the Court's inquiry directly on the intent of the legislator rather than on interpretation of an isolated provision.... Second, a pragmatic and functional analysis is better suited to the concept of jurisdiction and the consequences that flow from a grant of powers.... The true problem of judicial review is to discover whether the legislator intended the tribunal's decision on those matters to be binding on the parties to the dispute, subject to the right of appeal if any…. The third and perhaps most important of the reasons why a pragmatic or functional analysis seems more advantageous is that it puts renewed emphasis on the superintending and reforming function of the superior courts. When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection: *Crevier v. Attorney General of Quebec*,

10. *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1087*ff.*

> [1981] 2 S.C.R. 220. Yet, the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning.
>
> [Emphasis added.]

1998—*Pushpanathan*:[11] Justice Bastarache, for the majority, semi-codified the pragmatic and functional approach to "standards of review analysis" into four factors:

> (i) Whether there is a privative clause which would speak in favour of a more deferential standard (although absence of a privative clause does not necessarily invoke the correctness standard).
>
> (ii) Whether the statutory delegate has greater expertise on the matter in question.
>
> (iii) The purpose of the Act as a whole, and the provision at issue in particular.
>
> (iv) The "nature of the problem"—whether a question of law or fact.

The minority[12] dissented because the issue was a question of law; the board in *Pushpanathan* could not be said to have any particular expertise in legal matters; and, therefore, the issue was whether the board's decision was correct.

2008—*Dunsmuir*:[13] Justices Bastarache and LeBel, writing for the majority:

---

11. *Pushpanathan v. Canada (M.C.I.)*, [1998] 1 S.C.R. 982. The majority consisted of Justices L'Heureux-Dubé, Gonthier, McLachlin and Bastarache.

12. Justices Cory and Major.

13. 2008 SCC 9, [2008] 1 S.C.R. 190. The majority consisted of Chief Justice McLachlin and Justices Bastarache, LeBel, Fish and Abella. Justice Binnie wrote separate concurring reasons. Justices Deschamps, Charron and Rothstein dissented.

(a) merged the "patently unreasonable" and "reasonableness *simpliciter*" standards of review into a new "reasonableness" standard which is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law;

(b) held that, while reasonableness may frequently be the applicable standard of review,[14] the correctness standard of review will apply in four categories of cases:

- questions regarding the division of powers between Parliament and the provincial legislatures, and some other constitutional questions;

- true questions of jurisdiction or *vires* in the narrow sense of whether the tribunal had the authority to explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter (as opposed to the extensive catalogue of jurisdictional errors referred to in *Metropolitan Insurance*);

14. In the subsequent decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the majority of the Court held that there was a rebuttable presumption that reasonableness is the applicable standard of review. In practice, it has become quite difficult to rebut this presumption.

- where the question at issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; and

- questions regarding the jurisdictional lines between two or more competing specialized tribunals;

as well as in other circumstances where a contextual analysis indicates a legislative intent for correctness review to apply; and

(c) held that a standard of review analysis is not required in every case; existing jurisprudence may have already identified the appropriate standard of review.[15]

Importantly, *Dunsmuir* makes it clear that not all questions of law engage the correctness standard of review. Equally, *Dunsmuir* makes it clear that reasonableness is not the universal standard of review.

B. Related issues

In addition to the linear development described above, there have been important cases about a wide range of standard of review issues, including: whether the same analysis and

15. But see the subsequent decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2013 SCC 47, [2016] 2 S.C.R. 293 where the relevant precedents were held to be inconsistent with recent developments in common law principles of judicial review.

deference applies to statutory rights of appeal;[16] determining the *vires* of delegated legislation[17] or discretionary or legislative decisions which are not adjudicative in nature;[18] whether the analysis (and the possibility of different standards of review) is to be applied to different issues or only to the statutory delegate's decision as a whole;[19] whether the absence of adequate reasons is a stand-alone ground of review,[20] and whether the court can infer reasons or consider reasons which the statutory delegate might have given;[21] whether standards of review analysis applies to procedural fairness issues;[22] whether administrative appellate bodies are to apply this type of standards of review analysis;[23] the realization that determining that reasonableness is the applicable standard of review does not automatically

---

16. For example: *Q. v. College of Physicians and Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.

17. *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *Green v. Law Society of Manitoba*, 2017 SCC 20; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 4.

18. *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710.

19. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15.

20. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.

21. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, 2011 SCC 61; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, 2013 SCC 36.

22. For example, compare *Moreau-Bérubé v. New Brunswick*, 2002 SCC 11 ("fair") with *Mission Institution v. Khela*, 2014 SCC 24 at paras. 79, 80 and 89 ("correctness").

23. For examples, see *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399; *Lum v. Council of the Alberta Dental Association and College, Review Board*, 2015 ABQB 12.

mean that the impugned decision is reasonable;[24] how "reasonableness" is to be determined and applied in particular cases;[25] whether there is a spectrum of "reasonableness";[26] whether a deferential standard of review can reconcile differing lines of (reasonable) decisions;[27] how the principles of statutory interpretation relate to the determination of the applicable standard of review, and in particular to the application of the reasonableness standard;[28] whether reasonableness could be the only standard of review;[29] and, more fundamentally, how deference relates to the Rule of Law.[30]

---

24. Any more than *NB Liquor* meant that patently unreasonable was the test for all grounds of review, or that errors in acquiring or exercising jurisdiction did not exist: see Justice Beetz in *Bibeault*, [1988] 2 S.C.R. 1048 at 1085.

25. Compare the majority and minority decisions in the Supreme Court of Canada (and the decisions in the Ontario Court of Appeal and Divisional Court) in *Groia v. Law Society of Upper Canada*, 2018 SCC 27.

26. *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247.

27. *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770.

28. *Canada (Canadian Human Rights Commission) v. Canada*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22.

29. Suggested by Justice Abella in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770.

30. See Justice Cromwell's reasons in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, 2011 SCC 61; and see the dissents in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22; and the two recent *Trinity Western* decisions, 2018 SCC 33 and 34.

Justice David Stratas from the Federal Court of Appeal has accurately described the whole area of judicial review as a "never ending construction site".[31] That may be because the issue is not simple, even though there is a human tendency to yearn for simplicity. To paraphrase Justice Beetz from *Bibeault*:[32]

> The chief problem in a case of judicial review is determining the jurisdiction [or reasonableness of the decision] of the tribunal whose decision is impugned. The courts, including this Court, have often remarked on the difficulty of the task. I doubt whether it is possible to state a simple and precise rule for identifying a question of jurisdiction [or defining what is reasonable], given the fluidity of the concept of jurisdiction [and reasonableness] and the many ways in which [jurisdiction and powers are] conferred on administrative tribunals...
>
> Considering the challenge posed by statutory interpretation even in the most favourable circumstances, the great number of rules of interpretation and their inconsistencies, it is hardly surprising that the courts have recognized how difficult it is to determine the jurisdiction [or reasonableness of a decision] of an administrative tribunal...
>
> [Parenthetical notes added.]

Now, ten years after *Dunsmuir*, the Supreme Court has decided once again to revisit the nature and scope of judicial review, including standards of review. This may be the result of the suggestion by Justice Abella in *Wilson* that "reasonableness" could become the universal standard of review. Whatever the outcome of its reconsideration of the nature and scope of judicial review, the Supreme Court will need to come to a common understanding about the essential concepts which underlie administrative law, which has often been lacking in the majority and minority judgments in its recent decisions.

---

31. The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency, February 27, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733751.

32. [1988] 2 S.C.R. 1048 at 1087*ff.*

C. Essential concepts needing to be addressed

So, what are the essential concepts which the Supreme Court of Canada will have to grapple with in reconsidering the nature and scope of judicial review of administrative action when it hears these three cases in December? It is submitted that the following questions and issues need to be addressed:

1. *What is the purpose of judicial review?*

The purpose of judicial review is to ensure that decisions and actions comply with the intention of the Legislature. Legislative intent is the "polar star" of all forms of judicial review.[33] To some extent, therefore, all judicial review is an exercise in statutory interpretation about the jurisdiction or authority of the statutory delegate: did the Legislature intend the statutory delegate to deal definitively with the particular matter in dispute, or did it intend some things to be "jurisdictional givens"?[34]

There is a tension between, on the one hand, honouring the Rule of Law,[35] and, on the other hand, giving credence to the statutory delegates upon whom the democratically elected Legislature has conferred authority to make decisions or take actions.

---

33. Justice Binnie in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 149.

34. See Justice Cromwell's discussion of this point in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner*), 2011 SCC 61.

35. Including constitutional limitations on the ability of the legislature to restrict or abolish judicial review: *Crevier v. Quebec (A.G.)*, [1981] 2 S.C.R. 220.

The Supreme Court needs to clearly articulate how the re-tooled standards of review analysis will resolve this tension and achieve the fundamental purpose of judicial review.

2. *Recognition of the sources of the courts' authority to review decisions or actions by statutory delegates*

The re-tooled analysis will need to recognize that the *courts'* own authority to perform judicial review does not arise in a vacuum.

There are two sources of the *courts'* authority to review decisions or actions by statutory delegates. First, the phrase "judicial review" historically referred to the superior courts' inherent jurisdiction to use the prerogative remedies[36] to supervise the decisions or actions by statutory delegates. Justice Slatter[37] of the Court of Appeal of Alberta has described this as "external judicial review" because there is no provision about judicial review in the delegates' statutory framework. With one exception,[38] the availability of all of the prerogative remedies requires some defect in statutory delegate's jurisdiction to do what it did. While recognizing the courts' current tendency to avoid referring to the concept of a statutory delegate's "jurisdiction", there must nevertheless be a recognition that the courts' authority to issue prerogative remedies necessarily entails determining whether the statutory delegates did or did not do what the Legislature intended. This is the conceptual basis for

36. And later, declarations.

37. In *Capilano*.

38. An error of law on the face of the record.

the courts' ability to set aside decisions that are unreasonable,[39] breach procedural fairness, are protected by a privative clause, or contain some other defect justifying the issuance of a prerogative remedy.

Secondly, some legislative schemes provide for an appeal to the courts from decisions or actions of statutory delegates. Justice Slatter has referred to this as "internal judicial review" because the source of the courts' authority to review decisions or actions by the statutory delegates is included in (*ie.* internal to) the legislative scheme.[40] In such a case, the grounds for appeal and the extent of the courts' powers on the appeal are determined (or limited) by the specific statutory provision. Without such a statutory provision, no appeal lies to the courts from a decision or action by a statutory delegate.

Since *Dr. Q.*, the Supreme Court has used the phrase "judicial review" to refer to both types of review by the courts, and has applied the same standard of review analysis to both. Doing this, however, obscures the fundamental question of where does the court in each case get authority to supervise the impugned decision or action by the statutory delegate?

For example, if "reasonableness" were to become the universal standard of review, there would still need to be recognition of the source or conceptual basis of the courts' authority

---

39. In the *Wednesbury* sense of unreasonable.

40. The legislation may also provide for appeals to an administrative body, which is another form of "internal appeal". What the administrative appellate body can do is determined by the terms of the specific legislative provision creating the appeal.

    Perhaps anomalously, some statutes provide for "judicial review" (as opposed to an appeal). The usual purpose for such a legislative provision is to shorten the time period within which an application for judicial review can be made (for example, reviewing decisions by labour arbitrators or information and privacy commissioners).

to set aside a decision or action which it determines to be "unreasonable". For example, where does the court get authority to set aside a decision or action which it determines to be "unreasonable"—particularly in the face of a privative clause? Conversely, there would need to be recognition that determining that an administrative decision is "reasonable" does not in and of itself mean that the Legislature intended the statutory delegate to make that decision. So while it is fashionable for the courts to avoid referring to (lack of) "jurisdiction" when a statutory delegate's decision or action is set aside by the courts, that, nevertheless, is the constitutional basis for judicial review.

3. *The distinction between grounds for review and standards of review*

There also needs to be a recognition that there is a distinction between the grounds for judicial review (the types of errors that would cause the court to intervene) and the applicable standard of review (the intensity with which the court will examine the alleged error).[41]

4. *What is the justification for deference?*

A re-tooled standards of review analysis must articulate why and when should the courts defer to a statutory delegate's decision or action (which is the essence of applying the reasonableness standard of review), as opposed to substituting their own decision (which is

41. One particular area of confusion is "unreasonable" in the *Wednesbury* sense as a ground for review and "unreasonable" under *Dunsmuir* as the standard for reviewing a whole host of alleged grounds.

the essence of the correctness standard of review). Doing this will require a conceptual justification for deference (absent a specific statutory provision prescribing deference).[42]

Deference is frequently justified on the basis that the statutory delegate has greater "expertise" than the courts. One can easily justify deference where the initial decision-maker is better placed or better qualified to make the impugned decision—such as findings of fact or technical matters involving expertise[43] which the court does not have. One can also justify deference to decisions involving the exercise of discretion,[44] and all the more when the issue

---

42. Such as a privative clause, or a statutory provision prescribing a deferential standard of review (for example, in certain provisions in the B.C. *Administrative Tribunals Act*). Indeed, how will the Court's re-worked standards of review relate to statutory provisions prescribing the standard of review?

43. As opposed to experience. See Justice Rowe's caveat at paragraph 129 in *West Fraser*:

> 129 I would add a further comment. In para. 9, the Chief Justice quotes D. J. Mullan to the effect that reasonableness review recognizes "the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" ("Establishing the Standard of Review : The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; *Dunsmuir*, at para. 49). This is an over-generalization that obscures rather than enlightens. I would agree that "working day to day" with an administrative scheme can build "expertise" and "field sensitivity" to policy issues and to the weighing of factors to be taken into account in making discretionary decisions. But how does "working day to day" give greater insight into statutory interpretation, including the scope of jurisdiction, which is a matter of legal analysis? The answer is that it does not. This is one of the myths of expertise that now exist in administrative law (*Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th)1, at para. 94).

There needs to be some basis for asserting that a statutory delegate has expertise—just assuming or saying so is not sufficient.

44. And all the more when the issue is policy-laden or the decision or action is taken by a politically-accountable person like a Minister or Cabinet.

is policy laden or the decision or action is taken by a politically accountable person like a Minister or Cabinet.

However, much more difficult questions arise when it is suggested that the court should defer on questions of law. Why? Why does post-*Dunsmuir* jurisprudence restrict the courts to correcting only those errors of law that are general in nature, central to the administration of the judicial system, and outside the expertise of the statutory delegate (all three of these being required)? Why is Canadian law different from the law of England in this respect? Why is there a presumption that a deferential standard of review applies to a statutory delegate's interpretation of its home statute[45] regardless of the nature of the provision in question (recalling Justice Cromwell's observation that limitations are very often contained in the home statute)?

Any re-thinking of standards of review will necessarily have to grapple with the justification for a deferential standard of review, and particularly when applied to questions of law.

In addition, there needs to be a justification for the courts to apply a more deferential standard of review on statutory appeals in the administrative law context compared to the standard applicable to questions of law in normal litigation.[46]

---

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

46. See *Housen v. Nikolaisen*, 2002 SCC 33.

5. *What will be the relationship between the principles of statutory interpretation and any new deferential standard of review?*

Assuming the result of the Supreme Court's reconsideration will include at least one deferential standard of review (such as reasonableness), there needs to be a rationalization of the relationship between that standard of review and the principles of statutory interpretation.

Applying the principles of statutory interpretation results in the correct interpretation of the legislative provision in question (as determined by the highest court to deal with the issue). This causes no difficulty if a particular alleged error of law engages the correctness standard of review. However, if the particular error engages the reasonableness standard of review, applying the principles of statutory interpretation to determine whether the statutory delegate's interpretation is "reasonable" really entails a determination that the interpretation is "correct"[47]—correctness in the guise of reasonableness. How will the re-tooled standards of review analysis resolve this dissonance?

6. *What sorts of decisions will the re-worked standard apply to?*

Will there be one overarching standard, or different standards applicable to different types of issues?

---

47. *Wilson v. Atomic Energy of Canada*, 2016 SCC 29.

Adjudicative ones? Constitutional ones (division of powers, *Charter*, constitution similar in principle to that of the UK)? Procedural fairness?[48] Exercise of power to make delegated legislation?[49] Exercises of discretion?

7. *How will one know if the standard is met?*

Whatever the outcome of re-thinking standards of review analysis, the court needs to provide some explanation of why a particular standard is or isn't met in any particular case. For example, if reasonableness is the applicable standard of review in a particular case, what makes the impugned decision reasonable or unreasonable?[50] Recent jurisprudence is riddled with many 5:4 or 4:3 decisions reaching different conclusions about whether the impugned decision was reasonable. This makes it hard to predict outcome, which is one of the purposes of the law—so that future litigation can be avoided.

---

48. The standard for determining whether a particular procedure was fair must be "fairness", not correctness or reasonableness: see *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at para. 103; *Khosa*, 2009 SCC 12 at para. 43; *Waterman v. Waterman*, 2014 NSCA 110 at para. 23.

49. Compare the different approaches in *Calgary Taxi*, *Catalyst*, *Katz*, and *Sobeys*.

50. Will there be a *range* of reasonableness (notwithstanding *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247)? Will there be a range of reasonableness standards (so one might speak of "*a* reasonableness standard of review") or just *the* reasonableness standard of review whose content might vary according to the context?

8. *Is it possible to describe one a standard of review which can be easily applied?*

Given the wide range of different types of decisions and actions by very different types of statutory delegates, is it possible to find a formula of words that will be so predictive that it will operate like a mathematical formula, or be capable of being applied by artificial intelligence? Or is the whole nature of the enterprise intensely contextual requiring the application of fundamental concepts, principles and guidelines, requiring judgment?

Justice Abella in *Wilson* suggested that perhaps reasonableness could be the uniform standard of review. This would require clarity about whether "reasonableness" is determined by reference to the structure and content of the legislative scheme in question (that is, whether there are any limits to what the statutory delegate may do) or is it a free-standing concept that would permit anything reasonable in that particular area regardless of the statutory structure.

In *West Fraser*, Justice Brown contemplated that the existing binary system of standards of review might need more flexibility:[51]

> **123** I add this. The foregoing reasons are driven ... by the understanding of questions of jurisdiction as stated in this Court's jurisprudence, particularly in *Dunsmuir*. While the

51. In *Bell v. 7262591*, 2018 FCA 174, Justice Nadon described a similar approach as follows:

> [88] The degree of deference owed is gleaned from the statutory interpretation exercise. Consideration should be given to what Parliament has said about the structure of the tribunal or agency, the tenure and mandate of its decision makers, whether it is a large standing body with large professional staff, or individual *ad hoc* decision makers. Subordinating a statute to a broad and uncritical presumption of expertise in all aspects of a tribunal's mandate, with the consequential displacement of Parliament's express expectation that the courts are to perform a role in demarcating the boundaries of its legislation, lies at the heart of much of the tension in the current jurisprudence.

> category and definition of jurisdictional questions in *Dunsmuir* have occasionally been doubted (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 42) or marginalized as "narrow", "exceptional" and "rare" (*Alberta Teachers*, at para. 39; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 26; and *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 42), the framework in *Dunsmuir*, as a matter of *stare decisis*, continues to govern the treatment of such questions.
>
> **124** This is not to say that all is well. I accept that, in many cases, the distinction between matters of statutory interpretation which implicate truly jurisdictional questions and those going solely to a statutory delegate's application of its enabling statute will be, at best, elusive. More generally, while binary standards of review are suitable for appellate review under *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, more flexibility – that is, something focussing more closely on intensity of review, rather than binary categories – might better account for the unavoidably varying contextual considerations that arise in judicial review of administrative decisions. Such contextual considerations could include the breadth of discretion contained in the statutory grant, the nature of the decision, the nature of the decision maker, and the stakes for the affected parties. (See, e.g., *Pham v. Secretary of State for the Home Department*, [2015] UKSC 19, [2015] 1 W.L.R. 1591, at para. 107, per Lord Sumption.) Such an approach, which other jurisdictions have applied, has also found favour in some Canadian appellate courts: *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 90-92; *Mills v. Workplace Safety and Insurance Appeals Tribunal*, 2008 ONCA 436, 237 O.A.C. 71, at para. 22. I see nothing in this general principle – that the framework for deciding the standard of review should allow for sufficient flexibility to reflect the varied nature of administrative bodies, the questions before them, their decisions, their expertise and their mandates – that is inconsistent with the dual constitutional functions performed by judicial review: upholding the rule of law, and maintaining legislative supremacy (*Dunsmuir*, at paras. 27 and 30).

The challenge will be to restate the approach in a way which can be readily understood and readily applied by administrators, clients, counsel, and the courts.

III. RECENT CASES ON STANDARDS OF REVIEW

Of course, notwithstanding the Supreme Court of Canada's plan to reconsider the nature and scope of judicial review of administrative action as addressed in *Dunsmuir*, it rendered several important decisions in the last year involving standards of review. As has so often recently been the case, the Court has continued to be sharply divided about the characterization of the presenting issue, the selection of the applicable standard of review, and its application. Some examples of this dissonance include:

- *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*,[52] where the majority[53] of the Supreme Court of Canada held that the statutory delegate was unreasonable in concluding that the Quebec *Charter of human rights and freedoms*[54] did not impose a duty to accommodate employees injured on the job who were governed by the *Act respecting industrial accidents and occupational diseases*.[55] By contrast, the minority[56] would have applied the correctness standard of review, although reaching the same result as the majority to remit the matter back to the statutory delegate. (This case is considered more fully below in the section dealing with the *Charter*.)

---

52. 2018 SCC 3.

53. The majority decision was written by Justice Abella and concurred in by Chief Justice McLachlin and Justices Karakatsanis, Wagner and Gascon.

54. CQLR, c. C-12.

55. CQLR, c. A-3.001.

56. Justices Rowe and Côté.

- *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*[57] dealt with a land claim by the Williams Lake Indian Band and the framework for determining whether the federal Crown owed, and had breached, a fiduciary obligation giving rise to liability. The majority of the Supreme Court of Canada applied the reasonableness standard because the Specific Claims Tribunal was interpreting its home statute to decide whether the grounds advanced related to a legal obligation of the Crown,[58] and there was no constitutional issue. The majority held that the tribunal's decision was reasonable, although to a considerable extent it supplemented the reasons given by the tribunal in order to reach this result. While Justice Rowe and Côté largely agreed with the majority's decision and the applicability of the of the reasonableness standard of review, they dissented from part of the decision because they differed about the extent to which the court could supplement the reasons given by the tribunal,[59] and would have remitted one issue to the tribunal for reconsideration. Justice Brown (with Chief Justice McLachlin concurring) dissented in entirety because they held that a constitutional issue was involved, which engaged the correctness standard of

57. 2018 SCC 4.

58. The majority consisted of Justices Abella, Moldaver, Karakatsanis, Wagner and Gascon. Justices Côté and Rowe dissented in part and Chief Justice McLachlin and Justice Brown dissented.

59. See more detailed discussion below about sufficiency of reasons.

review,[60] and the tribunal's decision was incorrect. (This case is considered further below with respect to sufficiency of reasons.)

- *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*[61] involved a challenge to a decision by the Workers' Compensation Board which found West Fraser Mills guilty of failing to ensure the safety of forestry workers and imposed an administrative penalty on the company under British Columbia's *Workers' Compensation Act*. The primary issues were whether the Board had jurisdiction (a) to make certain regulations regarding occupational health and safety, and (b) to apply an administrative penalty to the "owner" of property who was not the "employer" of the injured worker but was the "employer" of other workers covered by the Act. Again the Court split 6 to 3. The majority applied the reasonableness standard of review in determining both issues, and upheld the Board's decision as being reasonable.[62] Justice Côté (with Justice Brown) held the regulation to be *ultra vires* using the correctness standard of review, and in the alternative would have held it to be patently unreasonable[63]

---

60. Justice Rowe agreed (at paragraph 139) that correctness would have been the applicable standard of review if the case involved interpreting the *British Columbia Terms of Union*, which is constitutional in nature, but did not characterize the issue as involving an interpretation of the *Terms of Union*.

61. 2018 SCC 22. See also *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 in which the Federal Court of Appeal applied the reasonableness standard to a decision of the Copyright Board certifying royalty rates.

62. The majority consisted of Chief Justice McLachlin, and Justices Abella, Moldaver, Karakatsanis, Wagner and Gascon. Justices Côté, Brown and Rowe dissented. The decision is discussed more fully below in the section dealing with Jurisdiction.

63. Patent unreasonableness is the standard of review specified by the B.C. *Administrative Tribunals Act*.

for the Board to have imposed the administrative penalty on West Fraser because it was not the employer of the injured worker. Justice Rowe held that the regulation was *intra vires*[64] but agreed with Justice Côté that the imposition of the administrative penalty was unreasonable. (This case is considered further below with respect to the test for determining the validity of regulations.)

- *Canada (Human Rights Commission) v. Canada (Attorney General)*,[65] where the majority[66] of the Supreme Court applied the reasonableness standard of review to decisions of the Canadian Human Rights Tribunal which held that complaints made to it regarding alleged discriminatory practices by Indian and Northern Affairs Canada were a direct attack on the *Indian Act* and legislation is not a "service" covered by the *Canadian Human Rights Act*. The majority[67] held that the Tribunal was interpreting its home statute; therefore there was a presumption that the reasonableness standard of review applied; that presumption was not rebutted; and the tribunal's decision was reasonable. On the other hand, Justices Côté and Rowe would have applied the correctness standard of review after reviewing the context of the legislation, including the absence of a privative clause

64. Justice Rowe also expressed the caveat that a statutory delegate's working day to day with an administrative scheme does not give it greater insight into statutory interpretation, including the scope of its jurisdiction: paragraph 129.

65. 2018 SCC 31.

66. The majority consisted of Chief Justice McLachlin, and Justices Abella, Moldaver, Karakatsanis, Wagner and Gascon. Justices Côté and Rowe concurred in the result, but would have applied the correctness standard: see paras. 70 to 90. Justice Brown concluded that the Tribunal's decision could withstand scrutiny under either the reasonableness or correctness standard: see paras. 108 to 115.

67. The majority decision was written by Justice Gascon and concurred in by Chief Justice McLachlin and Justices Abella, Moldaver, Karakatsanis, and Wagner.

and the need to ensure consistent decisions by human rights tribunals about whether legislation is a "service" covered by human rights legislation. In their view, the tribunal's decision was correct. While Justice Brown agreed that the tribunal's decision was both correct and reasonable, he warned that "euthanizing" any category of true questions of jurisdiction would undermine the rule of law under which the courts have final say on jurisdictional limits of a tribunal's authority. Eliminating the possibility that contextual review could demonstrate correctness is the appropriate standard of review is inconsistent with being faithful to legislative intent.

- *Groia v. Law Society of Upper Canada*[68] dealt with an appeal from a decision of the Ontario Court of Appeal with a disciplinary panel's decision that Groia was guilty of professional misconduct by virtue of in-court incivility. In a 5-to-4 split decision, the majority of the Supreme Court of Canada held that the statutory delegate's decision should be reviewed on the reasonableness standard, and that the Law Society's decision was unreasonable.[69] Justice Côté would have applied the correctness standard of review,[70] but concurred in setting aside the Law Society's decision. Justices Karakatsanis, Gascon and Rowe agreed with the majority that reasonableness was the applicable standard of review, but dissented about the outcome because they would have held the impugned decision to be reasonable. The Court did not remit the matter back to the Law Society for re-

68. 2018 SCC 27.

69. Justice Moldaver wrote the majority decision, which was concurred in by Chief Justice McLachlin and Justices Abella, Wagner and Brown.

70. Because the conduct in question occurred in a courtroom, that context bringing it within the residual category for correctness review identified in *Dunsmuir*.

determination. One might think that this decision is another example of "correctness in the guise of reasonableness", like *Wilson*.

- The companion cases of *Law Society of British Columbia v. Trinity Western University* and *Trinity Western University v. Law Society of Upper Canada*[71] dealt with decisions by two provincial law societies denying accreditation to a proposed law school. The majority[72] of the Supreme Court of Canada adopted the reasonableness standard of review in deciding (a) whether the law societies' decisions were *intra vires*[73] and (b) if so, whether they violated section 2 of the *Charter*. The majority concluded that the law societies had jurisdiction to make the decisions in question, which did not breach the *Charter* because they represented a proportionate balance between the freedom of religion and the statutory objectives of the law societies. In a separate decision, Chief Justice McLachlin agreed that reasonableness was the applicable standard of review, and that the law societies had jurisdiction to make the impugned decision. However, she disagreed with the majority's analytical framework for the *Charter* question, although she agreed with the outcome. For different reasons, Justice Rowe reached the same conclusion as the Chief Justice. Justices Côté and Brown dissented with respect to the *vires* issue, the *Charter* analysis, and the outcome.

---

71. 2018 SCC 32 and 33.

72. The majority consisted of Justices Abella, Moldaver, Karakatsanis, Wagner and Gascon issuing joint reasons. Chief Justice McLachlin issued concurring reasons. Justice Rowe issued reasons concurring in the result. Justices Côté and Brown issued joint dissenting reasons.

73. The Nova Scotia courts had struck down a similar decision by the Nova Scotia Barristers Society as being *ultra vires*, but this was not appealed to the Supreme Court of Canada. Other provincial law societies dealt with the issue differently (for example, the rules of the Law Society of Alberta accept anyone with a common law degree from a Canadian university approved by the Federation of Law Societies of Canada).

(These decisions will be discussed further below, particularly with respect to the difference between "*Charter* rights" compared with "*Charter* values" and the analytical framework for determining whether administrative decisions are *Charter*-compliant.)

IV. STANDARD OF REVIEW FOR DETERMINING THE VALIDITY OF SUBORDINATE LEGISLATION—THE FIRST ISSUE IN *WEST FRASER MILLS*

For some time, there have been two lines of cases with respect to the test (or standard of review) for determining whether regulations are *intra vires*.[74] This was the first issue in Supreme Court of Canada's decision in *West Fraser Mills*,[75] and it probably hasn't definitively settled the issue.

Background

Section 225 of the *Workers' Compensation Act (British Columbia)*[76] ("the Act") provides:

> 225 (1) In accordance with its mandate under this Part, the Board may make regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment.

---

74. Compare *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485 (correctness) with *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (reasonableness). And see Justice Brown's discussion of the analytical issues at paragraphs 56-74 in *West Fraser Mills*.

75. 2018 SCC 22.

76. R.S.B.C. 1996, c. 492.

> (2) Without limiting subsection (1), the Board may make regulations as follows:
>
> (a) respecting standards and requirements for the protection of the health and safety of workers and other persons present at a workplace and for the well-being of workers in their occupational environment;
>
> (b) respecting specific components of the general duties of employers, workers, suppliers, supervisors, prime contractors and owners under this Part....

Note that this is both a very broad regulation-making power, and subjective: "the Board may make regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment."

Pursuant to section 225, the Board adopted the *Occupational Health and Safety Regulation* ("the Regulation"). Section 26.2(1) of that Regulation imposes a duty on owners, as defined under the Act, to ensure that forestry operations are planned and conducted in accordance with the Regulation and safe work practices:

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

In 2010, a tree faller was fatally struck by a rotting tree while working at a forestry site licensed to West Fraser Mills. The faller was not employed by West Fraser Mills, but rather by an independent contractor working on the site. The Board investigated the accident and decided that West Fraser Mills had failed to ensure that all activities on the site were planned and conducted in a manner consistent with section 26.2(1) of the Regulation. The Board imposed an administrative penalty of $75,000 on West Fraser pursuant to section 196 of the Act.

West Fraser Mills appealed the Board's decision, arguing that (1) section 26.2 of the Regulation was *ultra vires* the jurisdiction of the Board because it imposed liability and potential penalties on owners of forestry work sites using independent contractors (as opposed to employers); and (2) an administrative penalty could only be levied against "employers" and not "owners". The Workers' Compensation Appeal Tribunal,[77] British Columbia Supreme Court[78] and the Court of Appeal[79] all upheld the Board's decision.[80]

In a 6-to-3 split decision, the Supreme Court dismissed West Fraser Mills' appeal.

***The majority's decision—reasonableness (or perhaps correctness?) standard of review and the regulation is* intra vires**

Writing for the majority, Chief Justice McLachlin applied the reasonableness standard of review to determining whether section 26.2(1) was authorized by section 225. She characterized the issue as follows:[81]

> 10 **The question before us is whether s. 26.2(1) of the Regulation represents a reasonable exercise of the Board's delegated regulatory authority.** Is s. 26.2(1) of the Regulation within the ambit of s. 225 of the Act? Section 225 of the Act is very broad. Subsection (1) empowers the Board to make "regulations the Board considers necessary or advisable in relation to occupational health and safety and occupational environment". This makes it clear that the Legislature wanted the Board to decide what was necessary or

77. 2013 CanLII 79509.

78. 2015 BCSC 1098.

79. 2016 BCCA 473.

80. Although it upheld the Board's decision, the Appeal Tribunal did reduce the administrative penalty by 30% because of West Fraser Mills' positive prior record.

81. Justices Abella, Moldaver, Karakatsanis, Wagner and Gascon concurred. Justices Côté, Brown and Rowe dissented.

> advisable to achieve the goal of healthy and safe worksites and pass regulations to accomplish just that. The opening words of subsection (2) – "Without limiting subsection (1)" – confirm that this plenary power is not limited by anything that follows. In short, the Legislature indicated it wanted the Board to enact whatever regulations it deemed necessary to accomplish its goals of workplace health and safety. The delegation of power to the Board could not be broader.
>
> 11 **From this broad and unrestricted delegation of power we may conclude that any regulation that may reasonably be construed to be related to workplace health and safety is authorized by s. 225 of the Act.** The Legislature, through s. 225 of the Act, is asking the Board to use its good judgment about what regulations are necessary or advisable to accomplish the goals of workplace health and safety. A regulation that represents a reasonable exercise of that judgment is valid: *Catalyst*, at para. 24; *Green*, at para. 20.
>
> 12 **Determining whether the regulation at issue represents a reasonable exercise of the delegated power is, at its core, an exercise in statutory interpretation, considering not only the text of the laws, but also their purpose and the context. The reviewing court must determine if the regulation is "inconsistent with the objective of the enabling statute or the scope of the statutory mandate" to the point, for example, of being "'irrelevant', 'extraneous' or 'completely unrelated'"**: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 24 and 28. **To do this, the Court should turn its mind to the typical purposive approach to statutory interpretation and seek an "interpretative approach that reconciles the regulation with its enabling statute":** *Katz*, at para. 25.
>
> [Bold in the original. Underlining added.]

McLachlin C.J. went on to consider the principles of statutory interpretation and concluded that section 26.2(1) of the Regulation was authorized by section 225 of the Act. She noted that section 26.2(1) fell within the broad wording of section 225 and was also consistent with other provisions of the Act, including section 230(2)(a) which allows the Board to make regulations that apply to any "persons working in or contributing to the production of an industry" and section 111 which provides that the Board's mandate includes making regulations in support of the purposes of Part 3 of the Act which is to promote occupational health and safety in the workplace in broad terms."[82] McLachlin C.J. concluded:

---

82. At para. 14.

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

Nevertheless, the Chief Justice then went on to conclude that the regulation was *intra vires* even if the correctness standard of review had been used, given the broad and subjective nature of the regulation-making power:

> 23 It is true that this Court, in *Dunsmuir*, referred to prior jurisprudence to indicate that true questions of jurisdiction, which some suggest the present matter raises, are subject to review on a standard of correctness – noting, however, the importance of taking a robust view of jurisdiction. Post-*Dunsmuir*, it has been suggested that such cases will be rare : *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 33. We need not delve into this debate in the present appeal. **Where the statute confers a broad power on a board to determine what regulations are necessary or advisable to accomplish the statute's goals, the question the court must answer is not one of *vires* in the traditional sense, but whether the regulation at issue represents a reasonable exercise of the delegated power**, having regard to those goals, as we explained in *Catalyst* and *Green*, two recent post-*Dunsmuir* decisions of this Court where the Court unanimously identified the applicable standard of review in this regard to be reasonableness. **In any event, s. 26.2(1) of the Regulation plainly falls within the broad authority granted by s. 225 of the Act as an exercise of statutory interpretation**. This is so even if no deference is accorded to the Board and if we disregard all of the external policy considerations offered in support of its position.
>
> [Bold emphasis added.]

***Dissenting reasons by Justice Côté—correctness standard of review and the regulation is* ultra vires**

Carefully reviewing the two lines of cases, Justice Côté disagreed with the majority's approach in applying the reasonableness standard of review for the following reasons:

Standard of Review

56 Correctness is the appropriate standard of review for determining whether a regulator exceeded the scope of its statutory authority to promulgate regulations. The first question in this appeal is jurisdictional in nature: whether the Board has the authority to adopt a regulation of this nature *at all*. This is not a challenge to the merits or the substance of a regulation. This inquiry lends itself to only one answer: either the Board acted within its powers, or it did not. There is no "reasonable" range of outcomes when a court is asked to determine whether the Board – which possesses only the authority that is delegated to it by statute – exercised its legislative powers in accordance with its mandate. In this context, correctness simply means that a reviewing court must engage in a *de novo* analysis of the regulator's statutory authority to promulgate regulations, applying the usual approach to statutory interpretation, and determine whether the impugned regulation falls within that grant of authority.

57 This appeal highlights an important distinction between actions taken by a regulator in an adjudicative capacity and actions taken by a regulator in a legislative capacity – a distinction that is central to the policy concerns that animate judicial review and the traditional standard of review analysis.

58 A regulator (in this case, the Board) acts in an adjudicative capacity when it resolves case-specific disputes that are brought before it in accordance with its statutory mandate and applicable law. It is in this context that a tribunal may bring technical expertise to bear or exercise discretion in accordance with policy preferences. It is also in this context that there may exist a range of reasonable conclusions, as it may not be possible to say that there is one "single 'correct' outcome" for any given dispute (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2009] 1 S.C.R. 190, at para. 146, per Binnie J.).

59 On the other hand, a regulator acts in a legislative capacity when it enacts subordinate legislation pursuant to a statutory grant of power. The scope of the body's regulation-making authority is a question of pure statutory interpretation: Did the legislature permit that body to enact the regulation at issue, or did the body exceed the scope of its powers? **A regulator does not possess greater expertise than the courts in answering this question. Moreover, a challenge to a regulator's exercise of legislative powers involves no case-specific facts and no direct considerations of policy, as the merits of the impugned regulation are not at issue.** In this context, respect for legislative intent – a cornerstone of judicial review – requires that courts accurately police the boundaries of delegated power.

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

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

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

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

63 *United Taxi* squarely governs this case. It recognized the distinction between legislative and adjudicative power (see also *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 51) and the imperative of applying correctness review where there is a direct challenge to the *vires* of a regulation. This is why *Dunsmuir* held that true questions of jurisdiction *must* be reviewed on the standard of correctness. **Unlike exercises of adjudicative power, which may be reviewed for reasonableness under *Dunsmuir* and its progeny, depending on the particular context, questions of *vires* can attract only one answer.** As a result, lower courts have generally understood the enactment of subordinate legislation to be subject to correctness review. See D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 15-58 to 15-59, in which the authors write, "[c]ourts apply the standard of correctness when deciding whether delegated legislation is *ultra vires*", at p. 15-58. See also *Noron Inc. v. City of Dieppe*, 2017 NBCA 38, 66 M.P.L.R. (5th) 1, at para. 11; *Gander (Town) v. Trimart Investment Ltd.*, 2015 NLCA 32, 368 Nfld. & P.E.I.R. 96, at para. 14; *1254582 Alberta Ltd. v. Edmonton (City)*, 2009 ABCA 4, 448 A.R. 58, at para. 12; *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, at para. 57; *Cargill Ltd. v. Canada (Attorney General)*, 2014 FC 243, 450 F.T.R. 102, at para. 56; *Broers v. Real Estate Council of Alberta*, 2010 ABQB 497,

489 A.R. 219, at para. 29; *Algoma Central Corp. v. Canada*, 2009 FC 1287, 358 F.T.R. 236, at para. 66. Indeed, in this case, it is instructive that the trial court (2015 BCSC 1098, 2 Admin. L.R. (6th) 148), the Court of Appeal (2016 BCCA 473, 405 D.L.R. (4th) 621), West Fraser, and the Board all agreed that correctness was the appropriate standard of review for the *vires* question.

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

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

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

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

recognizing that there can be only one answer to the question of whether a regulator exceeded its mandate in promulgating an impugned regulation.

68 In fact, *Katz* supports the case for correctness review. First, nowhere in *Katz* did the Court purport to depart from the traditional reasonableness/correctness framework. One would expect such a significant doctrinal development, if it occurred, to be announced rather than implied. To the extent that *Katz* did not openly state the standard of review, it should not be read as *sub silentio* overturning this Court's express holding in *United Taxi*, reaffirmed in *Dunsmuir*, that the *vires* of a regulation is subject to correctness review.

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

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

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

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

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

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

Applying the correctness standard of review, Justice Côté held the regulation to be *ultra vires*:

> 75 Section 26.2(1) of the Regulation is *ultra vires* because it impermissibly conflates the duties of owners and employers in the context of a statutory scheme that sets out separate and defined obligations for the relevant workplace entities. Therefore, it does not accord with the Board's enabling legislation and falls beyond the scope of the Board's delegated powers.

Justice Brown—correctness standard of review but the regulation is intra vires

In an important analytical discussion, Justice Brown would have held that correctness was the applicable standard of review for determining whether the regulation was *intra vires*:

> **112** While I agree with the Chief Justice that the Workers' Compensation Board of British Columbia had the authority to adopt s. 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Reg. 296/97, I arrive at that conclusion via different reasoning.
>
> **113** The Chief Justice says, at para. 23, that "[i]t is true" that *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, stated that true questions of jurisdiction "are subject to review on a standard of correctness". But with respect, that significantly downplays what this Court *actually* said in *Dunsmuir*, which was that "[a]dministrative bodies must ... be correct in their determinations of true questions of jurisdiction or *vires*" : para. 59 (emphasis added). Further, it is no answer to West Fraser's jurisdictional objection to say, as the Chief Justice also says, at para. 23, that "such [truly jurisdictional] cases will be rare". This is a particularly inadequate response where, as here, the Chief Justice does not herself doubt the jurisdictional quality of the issue at bar. Indeed, the issue is elided altogether by the statement that "[w]e need not delve" into whether the Board's authority in this case to adopt s. 26.2(1) is such a question, since "the question the [reviewing] court must answer is not

one of *vires* in the traditional sense, but whether the regulation at issue represents a reasonable exercise of the delegated power": para. 23.

114 To that, I offer three points in response. **First, the issue of the Board's authority to adopt s. 26.2(1) is "an issue of *vires* relating to subordinate legislation":** *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2018 FCA 58, at para. 80. **The question of whether a statutory delegate is authorized to enact subordinate legislation is therefore manifestly jurisdictional "in the traditional sense", *as this Court's jurisprudence understands such questions*. In other words, this issue does not go to the *reasonableness* of the Board's decision to adopt s. 26.2(1), but rather to its *authority* to do so.** This falls squarely within the class of questions described by this Court in *Dunsmuir*, at para. 59, as arising "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter".

115 Secondly, courts have almost always applied "the standard of correctness when deciding whether delegated legislation is *ultra vires*": D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 15-58 to 15-59; see also *United Taxi Driver's Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, *Noron Inc. v. City of Dieppe*, 2017 NBCA 38, 66 M.L.P.R. (5th) 1, at para. 11; *Gander (Town) v. Trimart Investments Ltd.*, 2015 NLCA 32, 368 Nfld. & P.E.I.R. 96, at para. 14; *1254582 Alberta Ltd. v. Edmonton (City)*, 2009 ABCA 4, 448 A.R. 58, at para. 12; *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, at para. 57; *Broers v. Real Estate Council of Alberta*, 2010 ABQB 497, 489 A.R. 219, at para. 29; *Algoma Central Corp. v. Canada*, 2009 FC 1287, 358 F.T.R. 236, at para. 66.

116 This is confirmed by the Court's own jurisprudence. In *Dunsmuir*, it referred approvingly to its earlier statement in *United Taxi Drivers' Fellowship* where (as here) the issue was whether the City of Calgary was authorized under the relevant statute to enact subordinate or delegated legislation. In that case, bylaws limiting the number of taxi plate licences. This was, the Court said, at para. 5, a question of jurisdiction which is always to be reviewed for correctness. This is because a central judicial function is to ensure that statutory delegates such as the Board act only within the bounds of authority granted to them by the legislature. This understood, the label matters little. **Howsoever one characterizes this question – as one of jurisdiction, *vires* or even as a species of a question of law – the principle remains the same. Public power must always be authorized by law. It follows that no statutory delegate, in enacting subordinate legislation (that is, *in making law*), may ever exceed its authority. The rule of law can tolerate no departure from this principle:** *Dunsmuir*, at para. 29.

117 Thirdly, I respectfully disagree with the Chief Justice's framing of the issue before the Court as being whether the Board's adoption of s. 26.2(1) represents a reasonable exercise of its delegated power under the *Workers' Compensation Act*, *R.S.B.C. 1996, c. 492*. **While the judicial role properly and necessarily includes seeing that statutory delegates operate within the bounds of their grant of authority, the overall "reasonableness" of *how* a statutory delegate has chosen to exercise its lawful authority**

is *not* the proper subject of judicial attention. In short, while the Board's *authority* to regulate is (and must be) reviewable, the Board's chosen *means* of regulation are – subject to what I say below about *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 – **a matter for the Board, and not for this or any other court.**

118 The Chief Justice's reasons on this point go well beyond this Court's judgment in *Catalyst* by effectively recognizing a new generalized basis for judicial review of *the regulatory means chosen* by statutory delegates acting within the bounds of their grant of legal authority. By way of explanation, unreasonableness, as a ground recognized in *Catalyst* for invalidating an action by a statutory delegate, operates narrowly (and only once *vires* has been established). As this Court explained in *Catalyst*, at paras. 21 and 24, the sorts of measures which, in the context of municipal bylaws, would be illegitimate for municipal councillors to take are those which are unreasonable in the sense described by Lord Russell C.J. in *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.):

> But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." [pp. 99-100]

Unreasonableness, in the sense affirmed in *Catalyst*, therefore concerns factors or considerations which have long been understood as illegitimate in the context of municipal governance (e.g. *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299), and not factors which might lead a reviewing court to think a measure "unreasonable" in the sense of being merely unnecessary or inadvisable in light of the goals of a particular enabling statute.

119 The point merits restating: the issue before us is not directed to whether the regulation "represents a reasonable exercise of the delegated power": Chief Justice McLachlin's reasons, at para. 23. **Rather, the issue is whether the Board *is authorized to adopt* the Regulation at issue. I note that the parties in the present appeal and the courts below all viewed the s. 26.2(1) issue as a matter of jurisdiction or *vires*.**

120 It follows that I also reject the Chief Justice's sidestepping of the jurisdictional inquiry in favour of a review of various contextual factors which are said to support reasonableness review: Chief Justice McLachlin's reasons, at paras. 19-21. **If the Board's adoption of s. 26.2(1) presents a jurisdictional question – which the Chief Justice does not deny – such contextual factors are irrelevant.**

121 I agree, however, with the Chief Justice that s. 225 of the Act, which empowers the Board to make regulations it "considers necessary or advisable in relation to occupational health and safety and occupational environment" is sufficiently broad to

> **support the conclusion that the Board's adoption of s. 26.2(1) of the Regulation is *intra vires*.**
>
> [Bold emphasis added.]

Justice Brown agreed with Justice Côté's interpretation that the regulation did not authorize imposing an administrative penalty on an owner who was not the employer of the injured worker.

Reasons of Justice Rowe

With some qualifications, Justice Rowe agreed with the majority's approach to the first issue, and agreed that the regulation was *intra vires*.[83]

Justice Rowe also agreed with Justice Côté's interpretation that the regulation did not authorize imposing an administrative penalty on an owner who was not the employer of the injured worker.

Conclusion

In light of paragraph 23 of the majority's decision recognizing the broad and subjective nature of the regulation in question, it is not possible to state that the Supreme Court of Canada has definitively held that reasonableness is the applicable standard of review for determining whether regulations are *intra vires* the enabling legislation.

---

83. Although he dissented with respect to the interpretation of the regulation permitting an administrative penalty to be imposed on an owner who was not the employer.

V. THE SECOND ISSUE IN *WEST FRASER MILLS*—WHETHER THE ADMINISTRATIVE PENALTY COULD BE IMPOSED ON AN "OWNER" WHICH WAS NOT THE "EMPLOYER"

The second issue in *West Fraser* involved determining whether the proper interpretation of the regulation allowed for the imposition of an administrative penalty on an "owner" which was not the "employer" of the injured worker.

All of the judges agreed that the patently unreasonableness standard applied to this issue.[84]

Writing for the majority, Chief Justice McLachlin concluded that the Appeal Tribunal's interpretation of section 196 was not patently unreasonable:

> 30 The Board imposed an administrative penalty on West Fraser Mills pursuant to s. 196(1) of the Act, which permits the Board to penalize an "employer". West Fraser Mills submits that it was not an "employer" in relation to the fatality, but only an "owner", and hence cannot be penalized under s. 196(1) of the Act. West Fraser Mills was an employer under the Act on other sites, and indeed employed a person to supervise this particular site. However, it submits that, because the events in question led to its breach as an "owner", it therefore cannot be penalized separately as an "employer".
>
> 31 The Tribunal found that s. 196(1) of the Act allows the Board to issue an administrative penalty against an entity that is an "employer" under the Act, even if the impugned conduct could also lead to consequences for the entity as the owner of a worksite. At the worksite where the incident occurred, West Fraser Mills was both an owner and an employer as defined by the Act. As an owner of the forest license, it had sufficient knowledge and control over the workplace to enable it to ensure the health and safety of workers at the worksite locations. Its obligation in that regard was not limited to the health and safety of its own employees. The Tribunal held that as both an employer and as an owner, West Fraser Mills' duty extended to ensure the health and safety of all workers and to take sufficient precautions for the prevention of work-related injuries.

84. Because it was prescribed by the B.C. *Administrative Tribunals Act*.

32 **The question is whether the Tribunal's interpretation of s. 196(1) to enable a penalty against West Fraser Mills qua "employer" was patently unreasonable. I conclude that the decision cannot be said to reach the high threshold imposed by the standard of patent unreasonableness – being "openly, clearly [or] evidently unreasonable", or to "border on the absurd":** *Vandale*, at para. 42; *Voice*, at para. 18.

33 West Fraser Mills mounts arguments against the Tribunal's interpretation of s. 196(1) on the basis that, once the events in question were deemed to constitute an "owner's" breach, s. 196(1) was not available.

34 First, it argues that the wording and context of s. 196(1) push against an interpretation that allows a penalty against an "employer" in its capacity as an "owner". The Act distinguishes between "employers" and "owners" and lays out the duties of each: ss. 115 and 119.

35 Second, it asserts that the Legislature made specific choices about who to target in the enforcement provisions laid out in the Act. Some provisions apply to an "employer" only: ss. 186.1, 196(1) and 196.1. Others apply more broadly to a "person" in the sense of 'anyone': ss. 194, 195 and 198. To read "employer" broadly to capture breaches committed by an entity in its role as an "owner" in light of this drafting is idiosyncratic, it contends.

36 Third, West Fraser Mills points out that s. 123 of the Act provides that where an entity acts as both an employer and an owner "in respect of one workplace", it must meet the duties of both. This suggests that the Legislature anticipated overlap between functions, but only where the functions are linked by the same workplace**.** West Fraser Mills argues that the Tribunal did not find that there was an employment-like relationship between West Fraser Mills and the tree faller, and that this case is therefore distinguishable from *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 98 B.C.L.R. (4th) 1, upon which the Tribunal relied.

37 However, these arguments are not conclusive. They support one way of interpreting s. 196(1) – a plausible but narrow way. They are countered by other arguments that support the broader interpretation of s. 196(1) that the Tribunal chose.

38 A second plausible interpretation of s. 196(1) – one more supportive of the goal of promoting safety and the overall operation of the scheme – is available. On this interpretation, West Fraser Mills, while it was the "owner" of the license to log on the site, was also an "employer" in relation to the worksite and the fatality that occurred. The evidence, accepted by the Tribunal and not challenged here, showed that West Fraser Mills employed persons to carry out the duties imposed by s. 26.2(1) of the Regulation. Those employees had responsibilities directly related to the worksite where the accident occurred. In this sense, West Fraser Mills was an "employer" for purposes of s. 196(1) because there is a factual link between West Fraser Mills' activities and choices as an employer of individuals meant to monitor the worksite and the incident that occurred. More broadly, West Fraser Mills had statutory and regulatory duties with respect to this particular site that, as a corporation, it could discharge only as an employer.

39 **The difference between the two interpretations comes down to this. The first interpretation – the logical extension of the interpretation urged by West Fraser Mills – holds that s. 196(1), in these circumstances, would apply only to the actual employer of the person injured or killed in the accident, which would exclude West Fraser Mills. The second interpretation says s. 196(1) extends to employers under the Act generally and therefore would include owners who employ people to fulfill their duties with respect to the worksite where the accident occurred, which would include West Fraser Mills. Both interpretations posit an actual connection to the specific accident at issue. One limits itself to the employment relationship *with the person injured*, while the other extends to employment with respect to the *worksite that led to the accident and injury*.**

40 So we arrive at the crux of the debate. The Tribunal had before it two competing plausible interpretations of s. 196(1) (although it did not articulate the options precisely as I have). One was a narrow approach that would undermine the goals of the statute. The other was a broad approach, which both recognized the complexity of overlapping and interacting roles on the actual worksite and would further the goals of the statute and the scheme built upon it. The Tribunal chose the second approach. Was this choice "openly, clearly [and] evidently unreasonable" so as to border on the absurd? I cannot conclude that it was.

41 Courts reviewing administrative decisions are obliged to consider, not only the text of the law and how its internal provisions fit together, but also the consequences of interpreting a provision one way or the other and the reality of how the statutory scheme operates on the ground: see e.g. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 61. This is particularly the case where the standard of review is patent unreasonableness. Practical justifications and the avoidance of impacts that would undermine the objects of the statute may close the door to a conclusion that a particular interpretation "borders on the absurd" or is "openly, clearly [and] evidently unreasonable".

42 In this case, the respective consequences of the competing interpretations mitigate against finding that the interpretation chosen by the Tribunal is patently unreasonable. The same is true when one considers the intended operation of the scheme.

43 First, as already discussed, a broad interpretation of s. 196(1) to include employers under the Act whose conduct can constitute a breach of their obligations as owners will best further the statutory goal of promoting workplace health and safety and deterring future accidents. This broad interpretation supports the statutory purpose, which, again, is "to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety": s. 107 of the Act. There is a connection between increased remedies against owners who hold duties as employers for given workplaces and increased occupational health and safety. The general scheme of the Act is to hold both owners and employers responsible in an overlapping and cooperative way for ensuring worksite safety.

44 Second, this interpretation is responsive to the reality that maintaining workplace safety is a complex exercise involving shared responsibilities of all concerned. By contrast, a narrow interpretation of s. 196(1) would hold only one actor – the actual employer of the person injured – responsible for what is, in fact, a more complex joint set of interactions that, in combination, produced the accident.

45 Third, and crucially, while it is true that s. 196(1) can be engaged on the basis of an employer's failure to comply with its specific obligations as an "employer" under the Act and any applicable regulations (by virtue of subsection (b)), the provision is not limited to such circumstances. Employers can also be subject to a penalty under s. 196(1) if they fail "to take sufficient precautions for the prevention of work related injuries or illnesses" (s. 196(1)(a)) or if "the employer's workplace or working conditions are not safe" (s. 196(1)(c)). Section 196(1)(c) in particular indicates the Legislatures choice to focus, not on the specific relationship between the impugned employer and the victim of a workplace accident, but on the relationship between the employer and the worksite that led to the accident and injury.

46 Seen in this light, it is not specifically West Fraser Mills' violation of s. 26.2(1) of the Regulation (in its role as owner) that triggers s. 196(1). Instead, the same failures that led to the infraction under s. 26.2(1) can be separately seen as either a failure "to take sufficient precautions" or as an indication that the "workplace or working conditions are not safe" (or perhaps both). The same misconduct may attract multiple sanctions. For example, the negligence of a forest license owner in particular factual scenarios could amount to a breach of s. 26.2(1) of the Regulation as well as a "fail[ure] to take sufficient precautions" under s. 196(1) of the Act. Indeed, it was at least partly on this basis that the penalty was initially imposed on West Fraser Mills and deemed appropriate by the Tribunal.

47 **The Tribunal's approach in this regard is supported by prior jurisprudence. In my view, the Tribunal did not err in relying on *Petro-Canada*.** *Petro-Canada* held that it was reasonable for the Board to conclude that the corporate employer/owner of various service stations had obligations as an employer under s. 115 of the Act for those diverse workplaces because it exercised sufficient control over them. Here, West Fraser Mills had sufficient knowledge and control over the worksite in question to render it responsible for the safety of the worksite. It was not erroneous for the Tribunal to rely on *Petro-Canada*, which would suggest that West Fraser Mills' obligations with respect to the worksite were not limited to concerns about the health and safety of *its own* employees.

48 It is true that the Tribunal in this case did not find an employment-like relationship between West Fraser Mills and the fatally injured faller, but, as discussed above, it did find a relationship between West Fraser Mills and the safety of the worksite – West Fraser Mills employed an individual whose job it was to monitor the worksite in a manner consistent with West Fraser Mills' duties under the Act. West Fraser Mills' relationship to the safety of the worksite was not solely that of an owner; West Fraser Mills was implicated in the fatality as an "employer". Therefore, it was not "absurd" for the Tribunal to interpret s. 196(1) to apply in this case, and to find that West Fraser Mills failed in its role as an

employer under the Act, given both West Fraser Mills' link to the worksite and the factual basis underlying the s. 26.2(1) infraction.

49 **Finally, while the Tribunal did not put the matter precisely as I have in these reasons, this is not fatal. It cannot be denied that the Tribunal understood the debate that it was tasked to resolve; it recognized the big picture and understood the implications of competing interpretations of s. 196(1). It understood and discussed the fundamental choice it faced – the choice between a narrow, textual approach and a broader, more contextual approach. Its decision is reasoned and presents a justiciable basis for review. Reviewing courts are entitled to supplement the reasons of an administrative body, within appropriate limits:** *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 16-18. This case clearly falls within those limits.

50 For these reasons, I conclude that the Tribunal's interpretation of s. 196(1), which covers West Fraser Mills as it operated with respect to the worksite where the fatality occurred, is not patently unreasonable.

[Bold emphasis added.]

Justice Côté's dissent on the second issue

Justice Côté took the view that the Act created two separate "silos of responsibilities"—owners and employers—which could not overlap:

83 Read together, ss. 115 and 119 create separate silos of responsibility, whereby the duties ascribed to employers and owners are tethered to their unique roles and capacities to ensure workplace safety. Employers, for example, are in the best position to ensure that workers are informed of known or reasonably foreseeable safety hazards because of their direct supervisory relationship with their employees – i.e., they are in the best position to assume responsibilities relating to the activities that occur at the workplace during the course of employment. Owners are in the best position to assume macro-level responsibilities pertaining to the workplace more generally – for instance, ensuring that the premises are adequately maintained. This is the manner in which the legislature went about achieving its goal of protecting health and safety at workplaces in the province.

Côté J. held that the Board's decision to impose a penalty against West Fraser Mills was patently unreasonable[85] because there was no nexus between the underlying violation as an owner and the imposition of an administrative penalty which was applicable only to employers.[86] She stated:[87]

> 97 On a plain reading of [section 196], the Board may only impose an administrative penalty on "an employer", not on an owner or any other entity. The wording also makes clear that the underlying violation must have occurred when the offender was acting in the capacity of an employer. This is what the statute means when it says that "the employer has failed to take sufficient precautions" and that "the employer has not complied with this Part, the regulations or an applicable order". An employer fully complies with applicable law where it satisfies the obligations that are assigned to employers.
>
> 98 The Tribunal read this provision to apply to an owner, so long as that owner is also an employer at the workplace – even if it satisfied all of the duties and obligations assigned to employers under the Act and the Regulation. This was erroneous....
>
> [Emphasis added.]

Justices Brown and Rowe agreed with Justice Côté's dissent on the second issue.

VI. MATTERS OUTSIDE THE JURISDICTION OF THE COURTS

Disappointing as it may be to administrative law *afficionados*, the courts do not have jurisdiction to deal with every type of dispute.

---

85. Patent unreasonableness is the standard of review prescribed by the B.C. *Administrative Tribunals Act*.

86. At paras. 93 to 110.

87. Chief Justice McLachlin addressed and disagreed with this approach at paragraphs 16-21 of the majority's decision.

A. *Wall*

In a case involving the availability of judicial review against religious organizations, the Supreme Court of Canada overturned the decision of the Court of Appeal of Alberta in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*.[88]

Background

In 2014, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses ("the Committee") disfellowshipped Wall from the congregation after he admitted to having engaged in sinful behaviour and was considered to be insufficiently repentant. Wall appealed to the Appeal Committee and the Watch Tower Bible and Tract Society of Canada, both of which upheld the Committee's decision. Wall then applied for judicial review of the Committee's decision on the basis that the decision was procedurally unfair and had negatively impacted his employment as a realtor. The Committee raised a preliminary argument that the court did not have jurisdiction to review decisions of religious organizations.

The chambers judge held that the court 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.[89] Wilson J. also questioned whether the Committee's processes were procedurally fair. The Committee appealed Wilson J.'s decision.

---

88. 2018 SCC 26. For a decision dealing with the jurisdiction of courts to judicially review decisions of sports organizations, see *Islington Rangers Soccer League v. Toronto Soccer Assn.*, 2017 ONSC 6229 in which the Ontario Superior Court held that it did have the jurisdiction to judicially review a decision of the Toronto Soccer Assn. disqualifying a team from a league championship game.

89. Unreported (April 16, 2015; Docket: 1401 10225; Wilson J.).

In a 2-1 split decision, the Court of Appeal of Alberta dismissed the appeal.[90] The majority of the Court held that courts may intervene in decisions of voluntary organizations concerning membership where property or civil rights are at issue. In addition, the Court held that courts have jurisdiction to intervene in the decisions of voluntary organizations when there has been a breach of the rules of natural justice or the complainant has exhausted the organization's internal processes.[91] The Committee appealed to the Supreme Court of Canada.

In a unanimous decision, the Supreme Court of Canada allowed the appeal and held that the originating application for judicial review should be quashed. The primary issue before the Supreme Court was whether the Court had jurisdiction to judicially review the disfellowship decision on the basis of procedural unfairness. Writing for the Court, Justice Rowe identified several reasons why the decisions of the lower courts could not stand:

> 2 For the reasons that follow, I would allow the appeal. Mr. Wall sought to have the Judicial Committee's decision reviewed on the basis that the decision was procedurally unfair. There are several reasons why this argument must fail. First, judicial review is limited to public decision makers, which the Judicial Committee is not. Second, there is no free-standing right to have such decisions reviewed on the basis of procedural fairness. In light of the foregoing, Mr. Wall has no cause of action, and, accordingly, the Court of Queen's Bench has no jurisdiction to set aside the Judicial Committee's membership decision. Finally, the ecclesiastical issues raised by Mr. Wall are not justiciable.
>
> [Emphasis added.]

Rowe J. discussed each of these reasons in turn. On the requirement for the decision-maker to be public, he stated:

---

90. 2016 ABCA 255 (Paperny and Rowbotham JJ.A, Wakeling JA dissenting).

91. See paras. 15 to 22.

> 13 The purpose of judicial review is to ensure the legality of state decision making: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 24 and 26; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 237-38; *Knox v. Conservative Party of Canada*, 2007 ABCA 295, 422 A.R. 29, at paras. 14-15. Judicial review is a public law concept that allows s. 96 courts to "engage in surveillance of lower tribunals" in order to ensure that these tribunals respect the rule of law: *Knox*, at para. 14; *Constitution Act, 1867*, s. 96. The state's decisions can be reviewed on the basis of procedural fairness or on their substance. The parties in this appeal appropriately conceded that judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution.
>
> 15 Further, while the private law remedies of declaration or injunction may be sought in an application for judicial review (see, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2)(b); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1., s. 2(1)(2); *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 2 and 3(3)), this does not make the reverse true. Public law remedies such as *certiorari* may not be granted in litigation relating to contractual or property rights between private parties: *Knox*, at para. 17. *Certiorari* is only available where the decision-making power at issue has a sufficiently public character: D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:2252.

Rowe J. then considered the jurisprudence involving the availability of judicial review against decisions of churches and other voluntary organizations:

> 17 Although the public law remedy of judicial review is aimed at government decision makers, some Canadian courts, including the courts below, have continued to find that judicial review is available with respect to decisions by churches and other voluntary associations. These decisions can be grouped in two categories according to the arguments relied on in support of the availability of judicial review. Neither line of argument should be taken as authority for the broad proposition that private bodies are subject to judicial review. Both lines of cases fail to recognize that judicial review is about the legality of state decision making.
>
> 18 The first line of cases relies on the misconception that incorporation by a private Act operates as a statutory grant of authority to churches so constituted: *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191 (Div. Ct.), at para. 21; *Davis v. United Church of Canada* (1992), 8 O.R. (3d) 75 (Gen. Div.), at p. 78. The purpose of a private Act is to "confer special powers or benefits upon one or more persons or body of persons, or to exclude one or more persons or body of persons from the general application of the law": Canada, Parliament, House of Commons, *House of Commons Procedure and Practice* (2nd ed. 2009), by A. O'Brien and M. Bosc, at p. 1177. Thus, by its nature, a private Act is not

a law of general application and its effect can be quite limited. The federal *Interpretation Act*, R.S.C. 1985, c. I-21, s. 9, states that "[n]o provision in a private Act affects the rights of any person, except only as therein mentioned and referred to." For instance, *The United Church of Canada Act* (1924), 14 & 15 Geo. 5, c. 100, gives effect to an agreement regarding the transfer of property rights (from the Methodist, Congregationalist and certain Presbyterian churches) upon the creation of the United Church of Canada; it is not a grant of statutory authority.

19 A second line of cases that allows for judicial review of the decisions of voluntary associations that are not incorporated by any Act (public or private) looks only at whether the association or the decision in question is sufficiently public in nature: *Graff v. New Democratic Party*, 2017 ONSC 3578, at para. 18 (CanLII); *Erin Mills Soccer Club v. Ontario Soccer Assn.*, 2016 ONSC 7718, 15 Admin. L.R. (6th) 138, at para. 60; *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881, 327 O.A.C. 29, at paras. 17-18. These cases find their basis in the Ontario Court of Appeal's decision in *Setia v. Appleby College*, 2013 ONCA 753, 118 O.R. (3d) 481. The court in *Setia* found that judicial review was not available since the matter did not have a sufficient public dimension despite some indicators to the contrary (such as the existence of a private Act setting up the school) (para. 41).

20 In my view, these cases do not make judicial review available for private bodies. Courts have questioned how a private Act – like that for the United Church of Canada – that does not confer statutory authority can attract judicial review: see *Greaves v. United Church of God Canada*, 2003 BCSC 1365, 27 C.C.E.L. (3d) 46, at para. 29; *Setia*, at para. 36. The problem with the cases that rely on *Setia* is that they hold that where a decision has a broad public impact, the decision is of a sufficient public character and is therefore reviewable: *Graff*, at para. 18; *West Toronto United Football Club*, at para. 24. These cases fail to distinguish between "public" in a generic sense and "public" in a public law sense. In my view, a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Again, judicial review is about the legality of state decision making.

21 Part of the confusion seems to have arisen from the courts' reliance on *Air Canada* to determine the "public" nature of the matter at hand. But, what *Air Canada* actually dealt with was the question of whether certain public entities were acting as a federal board, commission or tribunal such that the judicial review jurisdiction of the Federal Court was engaged. The proposition that private decisions of a public body will not be subject to judicial review does not make the inverse true. Thus it does not follow that "public" decisions of a private body – in the sense that they have some broad import – will be reviewable. The relevant inquiry is whether the legality of state decision making is at issue.

22 The present case raises no issues about the rule of law. The Congregation has no constating private Act and the Congregation in no way is exercising state authority.

Next, Rowe J. considered the jurisdiction of courts to review decisions of voluntary associations for procedural fairness and concluded that there is no freestanding right to procedural fairness. (This point is discussed further below.)

Finally, Rowe J. touched on the issue of justiciability:

> 32 This appeal may be allowed for the reasons given above. However, I also offer some supplementary comments on justiciability, given that it was an issue raised by the parties and dealt with at the Court of Appeal. In addition to questions of jurisdiction, justiciability limits the extent to which courts may engage with decisions by voluntary associations even when the intervention is sought only on the basis of procedural fairness. Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?
>
> 33 Lorne M. Sossin defines justiciability as
>
> > a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
> >
> > (*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012) at p. 7)
>
> Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.
>
> 34 There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).
>
> 35 By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of

his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding: Court of Appeal reasons, at paras. 82-84, per Wakeling J.A.

36 This Court has considered the relevance of religion to the question of justiciability. In *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, at para. 41, Justice Abella stated: "The fact that a dispute has a religious aspect does not by itself make it non-justiciable." That being said, courts should not decide matters of religious dogma. As this Court noted in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50, "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." The courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them: see *Demiris v. Hellenic Community of Vancouver*, 2000 BCSC 733, at para. 33 (CanLII); *Amselem*, at paras. 49-51.

37 In *Lakeside Colony*, this Court held (at p. 175 (emphasis added)):

> In deciding the membership or residence status of the defendants, the court must determine whether they have been validly expelled from the colony. **It is not incumbent on the court to review the merits of the decision to expel.** It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without *mala fides*. This standard goes back at least to this statement by Stirling J. in *Baird v. Wells* (1890), 44 Ch. D. 661, at p. 670:
>
> > The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bona fide*.

The foregoing passage makes clear that the courts will not consider the merits of a religious tenet; such matters are not justiciable.

38 In addition, sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine. For instance, the *Organized to Do Jehovah's Will* handbook (2005) outlines the procedure to be followed in cases of serious wrongdoing: "After taking the steps outlined at Matthew 18:15, 16, some individual brothers or sisters may report to the elders cases of unresolved serious wrongdoing" (p. 151). The courts lack the legitimacy and institutional capacity to determine whether the steps outlined in Matthew have been followed. These types of procedural issues are also not justiciable. That being said, courts may still review procedural rules where they are based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles: *Marcovitz*, at para. 47. But here, Mr. Wall has not shown that his legal rights were at stake.

39 **Justiciability was raised in another way.** Both the Congregation and Mr. Wall argued that their freedom of religion and freedom of association should inform this Court's decision. The dissenting justice in the Court of Appeal made comments on this basis and

> suggested that religious matters were not justiciable due in part to the protection of freedom of religion in s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*. As this Court held in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, **the *Charter* does not apply to private litigation. Section 32 specifies that the *Charter* applies to the legislative, executive and administrative branches of government:** *ibid.*, at pp. 603-4. **The *Charter* does not directly apply to this dispute as no state action is being challenged, although the *Charter* may inform the development of the common law:** *ibid.*, at p. 603. In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute.
>
> [Bold emphasis added.]

B. Parliamentary privilege

In *McIver v. Alberta (Ethics Commissioner)*,[92] Justice Ashcroft ruled that parliamentary privilege applied to the report and recommendation of the Ethics Commissioner, which was accepted by the Legislative Assembly, which excluded the jurisdiction of the Court to review those decisions.

The same result was reached by the Quebec Court of Appeal in *Singh v. Quebec (Attorney General)*,[93] which involved the authority of the National Assembly to exclude kirpans from its precincts.

In both cases, the courts held that the *Charter* did not apply to take matters outside of parliamentary privilege so as to give the courts jurisdiction.

---

92. 2018 ABQB 240.

93. 2018 QCCA 257. Leave to appeal to the Supreme Court of Canada has been applied for.

By contrast, see *Chagnon v. Syndicat de la fonction pubique et parapublique du Québec*,[94] where the Supreme Court of Canada held that parliamentary privilege did not apply to the termination of security guards for cause because that was not so closely and directly connected to the Assembly's constitutional functions that immunity from the applicable labour relations functions was required in order to fulfill those functions. Accordingly, the union could grieve the dismissal and parliamentary privilege did not prevent the arbitrator from having jurisdiction with respect to that grievance.

C. Jurisdiction of the federal court

Oceanex

Oceanex Inc. v. Canada (Transport)[95] dealt with the definition of "federal board, commission or other tribunal" under the *Federal Courts Act*.

The case involved an application for judicial review brought by Oceanex challenging a decision of the Crown corporation, Marine Atlantic Inc. ("MAI"), regarding freight rates. Oceanex alleged that the Minister of Transport had wrongfully permitted MAI to charge rates that were heavily subsidized, and which competed unfairly with and were detrimental to Oceanex.

Oceanex brought its application in Federal Court. An issue arose about whether the impugned decision was made by MAI or the Minister of Transport; and if MAI made the

94. 2018 SCC 39. Justice Karakatsanis wrote the majority judgment. Justices Côté and Brown dissented and would have held parliamentary privilege did apply in this circumstance.

95. 2018 FC 250.

decision, whether it was a federal board, commission or other tribunal as defined by the *Federal Courts Act*.

Madam Justice Strickland concluded that the freight rate decision was made by MAI and that the legislative framework did not require the Minister of Transport to set or approve the freight rates. On the issue of whether MAI was a federal board, commission or other tribunal, Strickland J. held that MAI did not fall within the definition of a federal board, commission or tribunal because it was not exercising a power conferred on it by or under an act of Parliament or order made pursuant to Crown prerogative and, therefore, the Federal Court did not have the jurisdiction to hear the case.

Mikisew Cree First Nation

In *Mikisew Cree First Nation v. Canada (Governor General in Council)*,[96] the Supreme Court of Canada held that the Federal Court does not have jurisdiction to consider judicial review of the legislative process.

In 2012, two pieces of legislation that had significant impact on Canada's environmental protection regime were introduced into Parliament. The Mikisew Cree First Nation brought an application for judicial review in Federal Court, arguing that the Crown had failed to properly consult with them in the legislative process. The Mikisew argued that the Crown owed a duty to consult with them because the legislation had the potential to adversely affect their treaty rights to hunt, trap and fish. In a unanimous decision, the court held that the duty to consult does not apply to the law-making process. All nine justices agreed that the

96. 2018 SCC 40.

constitutional principles of separation of powers and parliamentary sovereignty make it generally inappropriate for courts to scrutinize the law-making process. Justice Karakatsanis wrote:[97]

> [2] ... Two constitutional principles – the separation of powers and parliamentary sovereignty – dictate that it is rarely appropriate for courts to scrutinize the law-making process. The process of law-making does not only take place in Parliament. Rather, it begins with the development of legislation. When ministers develop legislation, they act in a parliamentary capacity. As such, courts should exercise restraint when dealing with this process. Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy. It would also transpose a consultation framework and judicial remedies developed in the context of executive action into the distinct realm of the legislature. Thus, the duty to consult doctrine is ill-suited to the law-making process; the law-making process does not constitute "Crown conduct" that triggers the duty to consult.

The Court concluded that the duty to consult doctrine did not apply to the legislature and that the Federal Court was not validly seized of the application, and suggested that declaratory relief would be a more appropriate remedy.

VII. STANDING

The issue of public interest standing was addressed by the Supreme Court of Canada in *Delta Air Lines Inc. v. Lukács*[98] and by the Federal Court and provincial superior courts in a couple of other noteworthy decisions.

---

97. Justice Karakatsanis gave reasons concurred with by Chief Justice Wagner and Justice Gascon. Justice Abella gave separate concurring reasons that were concurred in by Justice Martin. Justices Brown J. and Rowe J. gave separate concurring reasons that were concurred in by Justices Moldaver and Côté.

98. 2018 SCC 2.

A. *Delta Air Lines*

Delta Air Lines v. Lukács is important because of its discussion about the test for public interest standing in proceedings of statutory delegates.

Background

The case involved a complaint filed by an airline passenger with the Canadian Transportation Agency ("the Agency") alleging that Delta Air Lines' practices in relation to the transportation of obese passengers were discriminatory and contrary to section 111(2) of the federal *Air Transportation Regulations*. The Agency dismissed the complaint on the basis that the complainant, who himself was not obese, lacked standing because he had not satisfied the test for either private or public interest standing as developed by and for the courts of civil jurisdiction. With respect to private interest standing, the Agency concluded that the complainant lacked standing because he was not obese and so he could not claim to be "aggrieved" or "affected" or to have some other "sufficient interest" in the matter. The complainant was found to lack public interest standing on the basis that his complaint did not challenge the constitutionality of legislation or the illegal exercise of an administrative authority.

Federal Court of Appeal

The complainant appealed the Agency's decision to the Federal Court of Appeal, where the complainant acknowledged that he did not have private interest standing, so the court only addressed public interest standing.

In a unanimous decision, the Federal Court of Appeal allowed the appeal, holding that a strict application of the law of standing—and a strict application of the tests for standing before courts of civil jurisdiction—were inconsistent with the Agency's enabling statute.[99] The Court of Appeal also held that it was contrary to the Agency's objective to refuse to examine a complaint based solely on whether a complainant had standing and that, by refusing to examine the complaint on the basis of standing, the Agency had unreasonably fettered its discretion. It ordered the matter to be remitted back to the Agency to determine whether it would hear or dismiss the complaint on grounds other than standing. Delta Air Lines appealed to the Supreme Court of Canada.

The Supreme Court of Canada

In a 6-to-3 split decision, the Supreme Court of Canada held that the Agency's decision was unreasonable, allowed the appeal in part and remitted the matter back to the Agency to reconsider the matter in its entirety, whether on the basis of standing or otherwise.

99. 2016 FCA 220 (Webb, Scott and de Montigny JJ.A.).

The majority decision

Writing for the majority, Chief Justice McLachlin held that section 37 of the *Canada Transportation Act*[100] gives the Agency broad discretion to hear and determine complaints.[101] Adopting a standard of review of reasonableness, McLachlin C.J. concluded that the Agency did not reasonably exercise its discretion when dismissing the complaint. She cited two reasons why the Agency's decision was unreasonable. First, McLachlin C.J. noted that the Agency had improperly presumed that public interest standing was available and then applied a test for public interest standing that could never be met in the circumstances. The complaint was against a private company, and such a complaint, by its very nature, could never amount to a challenge to the constitutionality of legislation or the illegality of administrative action. In conferring broad discretion on the Agency to hear or dismiss complaints, Parliament could not have intended the imposition of a standing test that could never be met. Moreover, the Agency's application of the test for public interest standing was inconsistent with the rationale behind public interest standing, which is for the courts to exercise discretion, where appropriate, to allow more plaintiffs to have standing in court proceedings. By not maintaining a flexible approach to the standing issue, the Agency had unreasonably fettered its discretion.

Secondly, McLachlin C.J. held that the Agency's total denial of public interest standing was inconsistent with a reasonable interpretation of the Agency's legislative scheme.

---

100. S.C. 1996, c. 10. Section 37 provides:

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

101. Justices Wagner, Gascon, Côté, Brown and Rowe concurred. Justices Abella, Moldaver and Karakatsanis dissented.

McLachlin C.J. addressed each of these reasons as follows:

> 14 In this case, the Agency had discretion under s. 37 of the Act to determine whether to hear Dr. Lukács' complaint. The Agency did not advert to this discretion, however, and appeared to approach the standing question as if bound by the tests for standing as applied in civil courts. As such, it found that it would hear the complaint only if Dr. Lukács could satisfy the test for either private interest standing or public interest standing.
>
> 15 The Agency held that to establish private interest standing, complainants must show that they are "aggrieved", "affected", or have some other "sufficient interest" (para. 64). While the Agency appears to have accepted that a complainant does not need to have suffered discrimination, it held that the complainant does need to be a person to whom the impugned policy applies. Dr. Lukács, who was not a "'large person' for the purpose of Delta's policy", did not therefore have private interest standing (*ibid.*).
>
> 16 Nor, the Agency held, could Dr. Lukács claim public interest standing. The Agency stated the relevant test as follows, at para. 68:
>
> 1. Is there a serious issue as to the validity of the legislation?
>
> 2. Is the party seeking public interest affected by the legislation or does the party have a genuine interest as a citizen in the validity of the legislation?
>
> 3. Is there another reasonable and effective manner in which the issue may be brought to the court?
>
> The Agency recognized this Court's direction in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524, at para. 36, that these factors are not technical requirements and must be weighed cumulatively. Nonetheless, the Agency proceeded to deny standing based on a rigid application of the second factor of the test. It concluded that standing must be denied because the complaint was "not related to the constitutionality of legislation or to the non-constitutionality of administrative action" (para. 74).
>
> 17 This brings us to the first problem: the Agency applied a test for public interest standing that could arguably never be satisfied. One of the Agency's functions is the regulation of air carriers, which are private, non-governmental actors. Any valid complaint against an air carrier would impugn the terms and conditions established by a private company. A complaint regarding these terms and conditions can never, by its very nature, be a challenge to the constitutionality of legislation or the illegality of administrative action. In sum, the Agency suggests the availability of public interest standing to bring a complaint of this type and then, in the same breath, precludes any possibility of granting it. The imposition of a test that can never be met could not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints.

18 The Agency's application of the test is also inconsistent with the rationale underlying public interest standing. In determining whether to grant public interest standing, courts must take a "flexible, discretionary approach": *Downtown Eastside*, at para. 1. This requires balancing the preservation of judicial resources with access to justice: *ibid.* at para. 23. The whole point is for the court to use its discretion, where appropriate, to allow more plaintiffs through the door. As the Agency rightly put it, the objective is to hear from those plaintiffs or complainants "with the most at stake" (para. 52). The Agency's decision in this case, however, exhibits no balancing; it does not allow those with most at stake to be heard. Rather, it uses public interest standing simply to bar access. *Downtown Eastside* makes clear that at least *some* plaintiffs will be granted public interest standing. The Agency's decision, in contrast, allows *no* complainants to have public interest standing. The Agency did not maintain a flexible approach to this question and in so doing unreasonably fettered its discretion. While the public interest standing test was designed to protect courts' discretion, the Agency eliminated any of its own discretion under this test.

19 The second problem with the decision is that the impact of the tests for private and public interest standing, applied as they were in this decision, cannot be supported by a reasonable interpretation of how the legislative scheme is intended to operate. Applying these tests in the way the Agency did would preclude any public interest group or representative group from ever having standing before the Agency, regardless of the content of its complaint. A complaint by the Council of Canadians with Disabilities, like the one brought in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, would not be heard. In effect, only a person who is herself targeted by the impugned policy could bring a complaint.

20 This is contrary to the scheme of the Act. Parliament has seen fit to grant the Agency broad remedial authority. Section 5(d) of the Act requires the Agency to promote accessible transportation. And ss. 111 and 113 of the Regulations allow the Agency to act to correct discriminatory terms and conditions before passengers actually experience harm. Indeed, these provisions empower the Agency to investigate based on a complaint or of its own motion. To refuse a complaint based solely on the identity of the group bringing it prevents the Agency from hearing potentially highly relevant complaints, and hinders its ability to fulfill the statutory scheme's objective. This does not mean that every complaint from a public interest group must be heard. It is unreasonable, however, for the Agency to apply a test that would prevent it from hearing the complaint of any such group.

21 For these reasons, I conclude that the Agency's decision fails to meet the indicia of reasonableness enumerated in *Dunsmuir*.

The dissenting judgment

The dissenting judgment was delivered by Justice Abella.[102] Abella J. would have allowed the appeal, holding that the Agency's decision was reasonable in all of the circumstances:

> 41 The Federal Court of Appeal found that the Agency's decision to dismiss the complaint based on the public interest standing test developed by the courts was unreasonable. It concluded that since tribunals are entitled to use less formal procedures, they *should* use standing rules that are less formal than the ones used by courts. The issue was returned to the Agency to determine whether it would inquire into Mr. Lukács' complaint on a basis other than the rules of standing developed by the courts.
>
> 42 In my respectful view, based on the purposes and provisions in its governing statute, while the Agency is not *required* to apply the same standing rules used by courts, nothing in its governing statute prevents it from doing so. Nor is its conclusion that Mr. Lukács lacked standing unreasonable. I would therefore allow the appeal.
>
> Analysis
>
> 43 The issue is whether the Agency can develop and apply its own standing rules and, if so, whether they can be similar to those applied by courts. All of the parties agree that reasonableness is the applicable standard of review.
>
> 44 The intention of Parliament was for the Agency to have the authority to interpret and apply its wide-ranging governing statute dealing with national transportation issues, address policy, and balance the multiple and competing interests before it (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at para. 107). There is nothing in the Agency's mandate that circumscribes its ability to determine how it will decide what cases to hear.
>
> 45 Like the courts, the Agency is entitled to apply a gatekeeping or screening mechanism that is principled and for the same principled reason, namely, to avoid an arbitrary and undisciplined *ad hoc* approach to standing. And, like the courts, a principled gatekeeping function enables the Agency to balance, in a transparent and effective manner, the various competing interests and demands before it, such as access and resources.
>
> 46 The Agency's approach to public interest standing is based on this Court's jurisprudence and reflects traditional gatekeeping rationales:

---

102. Justices Moldaver and Karakatsanis concurred.

> ... applying standing to public law accomplishes three key objectives. First, it ensures that scarce judicial resources are economized. Second, it ensures that the most urgent cases (those that actually affect people, as opposed to theoretical cases) are heard as quickly and efficiently as possible. Finally, it ensures that the best evidence is before the decision maker: the evidence of someone actually affected.

(*Lukacs v. Porter Airlines Inc.*, Canadian Transportation Agency, Decision No. 121-C-A-2016, April 22, 2016, at para. 19; see also *Amalgamated Transit Union, Local 279 (Re)*, Canadian Transportation Agency, Decision No. 431-AT-MV-2008, August 20, 2008.)

47 Mr. Lukács argued, however, that the courts' law of standing is inappropriate in a tribunal context because, in his view, the assumptions that justify the use of standing in the civil courts context are absent. His argument, at its core, is for universal standing, namely that everyone who brings a claim before the Agency is entitled to have it heard.

48 This claim for universal standing ignores why standing rules exist. As Cromwell J. explained in *Downtown Eastside*, "it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter" (para. 1). Standing rules allow tribunals to preserve and properly allocate scarce judicial resources, screen out "the mere busybody", and ensure that contending points of view are fully canvassed (*Downtown Eastside*, at para. 25).

49 Standing rules also ensure that tribunals have the "benefit of contending points of view of the persons most directly affected by the issue" (*Downtown Eastside*, at para. 29).

50 And, as in courts, standing enables a tribunal to economize and prioritize its resources, and ensure that it benefits from contending points of view that are advanced by those best placed to advance them. And all this to ensure that the most timely and effective use can be made of a tribunal's ability to implement its mandate.

51 Requiring a tribunal to adjudicate even marginal or inadequately substantiated complaints, on the other hand, grinds the operation of a tribunal to a halt and can be "devastating" to private litigants. As Cory J. warned in *Canadian Council of Churches*:

> It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants. [p. 252]

52 The fact that a tribunal's governing legislation has a public interest dimension does not preclude it from adopting similar rules of standing to those used by the courts. All tribunals have a public interest mandate because all legislation does. This does not mean that all litigants who want to bring a claim can automatically do so. The question is what the tribunal's enabling legislation mandates or precludes (L. Sossin, "Access to Administrative

Justice and Other Worries", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2nd ed. 2013), 211, at p. 214).

53 Parliament has given the Agency wide discretion to choose, according to its own institutional constraints and demands, how it will promote its overall mandate to regulate and adjudicate national transportation issues. That discretion is found in ss. 17, 25 and 37 of the *Canada Transportation Act*, S.C. 1996, c. 10. Under s. 37 of the *Act*, the Agency has the authority to determine which complaints it will inquire into:

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

The Agency's power to process and resolve complaints is framed in discretionary language. The Agency *may* inquire into, hear and determine a complaint. I agree with Mr. Lukács that anyone can *bring* a complaint, but his view that there is no discretion to decide which complaints to hear reads out the word "may" from s. 37.

54 Under s. 17 of the *Act*, the Agency may make its own rules about how it carries on its work, as well as the manner of and procedures for dealing with matters before the Agency. It states:

> 17 The Agency may make rules respecting
>
> (a) the sittings of the Agency and the carrying on of its work;
> (b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
> (c) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

These rules are codified in the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 ("*Rules*").

55 Under s. 5(1) of the *Rules*, the *Rules* are to be interpreted so as to facilitate the optimal use of Agency and party resources, and the promotion of justice. Examining the Agency's mandate through the lens of efficiency, Dawson J.A. noted that "[e]fficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances" (*Lukács v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186, at para. 54). Formulating and applying screening or gatekeeping rules represents one way in which the Agency can legitimately realize these goals.

56 And, under s. 25 of the *Act*, the Agency has "all the powers, rights and privileges that are vested in a superior court" to deal with "all matters necessary or proper for the exercise of its jurisdiction", including compelling the attendance and examination of witnesses,

ordering the production and inspection of documents, entering and inspecting property and enforcing its orders. Like s. 17 of the *Act*, s. 25 reflects a choice on the part of Parliament to grant the Agency expansive, discretionary authority to manage its own processes and procedures, including judicial powers.

57 The Federal Court of Appeal in this case acknowledged that the Agency has the discretion not to hear every case:

> As recently stated by this Court in *Lukacs v. Canada (Transport Agency)*, 2016 FCA 202 (F.C.A.) at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency "may" inquire into, hear and determine a complaint. There is no question ... that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources.
> 2016 FCA 220, 408 D.L.R. (4th) 760, at para. 16)

Yet after accepting that the Agency has discretionary gatekeeping authority, the Federal Court of Appeal went on to constrain that discretion by saying that the gatekeeping exercise could not be based on the approach used by courts.

58 The legislature has given the Agency wide discretionary authority over how to exercise its mandate. It is not a fettering of discretion for a tribunal to exercise this discretionary authority differently from how a reviewing court would exercise it. This, with respect, results in the court unduly fettering the Agency's discretion, not the Agency fettering its own.

59 There is no doubt that one can envision other tests for standing, but once we accept that gatekeeping is a legitimate exercise of the Agency's discretion in accordance with its mandate, what is the court's authority for replacing the Agency's test with one it prefers? As McIntyre J. cautioned in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, when he wrote: "... courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility" (para. 7).

60 A tribunal's standing rules will not necessarily survive scrutiny simply because the tribunal is authorized by statute to develop its own procedures. But when a tribunal like the Agency chooses to apply and exercise its broad legislative mandate by borrowing an approach long sanctioned by the courts as an effective and principled way to determine which cases it will hear, reviewing courts should not be overly eager to substitute their own vision of how that tribunal's procedural mandate should be applied. To do so, in effect, undermines not only the legitimacy of the standing rules developed and applied by the courts, it undermines public confidence in the tribunal by suggesting it lacks the indicia of an adjudicative body with sufficient institutional maturity to apply the same rules as a court. Put colloquially, if it's good enough for the courts, it's good enough for tribunals. I

recognize that the application of court-like procedures to the tribunal context may not, in certain circumstances, be appropriate, but where, as here, the adopted procedures flow from the same concerns and rationales, I see no reason for a tribunal to feel immunized from access to a procedure courts have found helpful.

61 This does not mean that tribunals are *required* to follow the same procedures courts use, but when they do, this should not be a stand-alone basis for quashing them. Unless we are prepared to say that the courts' standing rules are inappropriate, I see no reason to conclude that their propriety is diminished when applied by a tribunal. In this case, the Agency developed its standing rules in full accordance with its legislative mandate. There is no basis for interfering with them.

62 There is no doubt that the test for public interest standing is a high threshold and results in some individuals or groups being unable to raise issues they consider significant. Yet courts routinely apply this threshold as a transparent way to determine the most effective use of their time, resources and expertise. No less are tribunals entitled to apply high thresholds in order to preserve their ability to manage resources and expertise in accordance with their mandate. Access to justice demands that courts and tribunals be encouraged to, not restrained from, developing screening methods to ensure that access to justice will be available to those who need it most in a timely way (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87). That is why courts developed standing rules in the first place.

63 The test applied by the Agency effectively foreclosed Mr. Lukács' ability to make out a case for public interest standing in this case. But, in my respectful view, that does not end the matter. The question to be determined is whether the outcome reached by the Agency was reasonable. Mr. Lukács has brought a complaint with no underlying facts, no representative claimants and no argument. He wants to engage the Agency in a fishing expedition that will have the effect of distracting it from its ability to exercise its mandate on behalf of those with a *prima facie* legitimate claim.

64 Even if the Agency had applied the lower public interest standing test proposed by Mr. Lukács, I do not see how he would have been successful in having his complaint inquired into. It is therefore unnecessary to remit the matter back to the Agency. His complaint regarding Delta's practices is purely theoretical, his interest in the issues is academic and the proposed suit does not constitute an effective and reasonable means of bringing the issue before the Agency. He submitted no evidence that any of Delta's passengers, including the passenger whose email he relied on, had actually been affected by the issue he raised before the Agency. In fact, he submitted no evidence at all even though the Agency has an open complaint procedure whereby complainants are invited to make and substantiate their complaints through an accessible online application.

65 Nor has he provided any explanation for why a passenger affected by Delta's practices could not have submitted his or her own application to the Agency, "thereby provid[ing] the Agency with direct and concrete evidence upon which to adjudicate" (*Porter*, at para. 65). Such direct and concrete evidence seems all the more necessary given the Agency's decision dealing with, and Mr. Lukács' acknowledged familiarity with the Agency's best known

> disability case, setting out the "one-person - one-fare" policy, which states that "the determination of whether a person is disabled by reason of obesity is dependent on the facts and circumstances in each individual case and must be assessed on a case-by-case basis" (*Norman Estate v. Air Canada*, Decision No. 6-AT-A-2008, January 10, 2008, at para. 128).
>
> 66 The Agency's decision to deny Mr. Lukács' complaint on the basis that he lacked standing was therefore reasonable in all the circumstances.

Chief Justice McLachlin did not agree with Justice Abella's overall approach, arguing that Abella J.'s justifications could not be used to supplement the Agency's reasons,[103] but she did agree that the Court of Appeal had erred in holding that standing rules could not be considered by the Agency in its reconsideration of the complaint:

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

B. *Good Spirit School Division*

Public interest standing was also involved in *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan*.[104]

---

103. See discussion about supplementary reasons under the heading "Procedural Fairness—*Audi Alteram Partem*".

104. 2017 SKQB 109.

Background

The case arose when a public school district in Saskatchewan decided to close a community school and a group of Roman Catholic parents successfully petitioned the Minister of Education to form a Roman Catholic school division and re-open the school as part of the newly formed school division. Despite the new school being a Roman Catholic school, the majority of the students attending it were non-Roman-Catholic. The school, however, received funding from the provincial government on the basis of total enrolment, regardless of the religious affiliation of the students.

The Plaintiff ("GSSD"), a public school board, brought a constitutional action seeking a declaration that the legislative provisions implementing the education funding scheme in Saskatchewan[105] are unconstitutional to the extent that they provide funding to educate non-Roman-Catholic students attending Catholic separate schools. GSSD raised both constitutional and *Charter* arguments.

A preliminary issue arose about whether GSSD had standing to advance a constitutional claim and/or to mount a *Charter* argument. Simply put, the question was "on whose behalf [was] GSSD speaking, and, therefore, seeking standing?"[106] A previous judge had declined GSSD's application to make its claim a representative action[107] but the defendants argued that the proposed testimony of GSSD's witnesses, all members of public school boards, was a disguised attempt to broaden the litigation beyond GSSD's interests.

---

105. Sections 53, 85, 87 and 310 of *The Education Act, 1995* and sections 3 and 4 of *The Education Funding Regulations*.

106. At para. 100.

107. Decision of Justice Mills.

Referring extensively to Justice Cromwell's decision in the *Eastside Sex Workers* case, Layh J. of the Saskatchewan Court of Queen's Bench held that GSSD did have public interest standing:

> 147 In summary, I find that GSSD has met the requisite tests to be granted standing. To disallow standing on such a vital question with such broad importance to the province would be tantamount to leaving an legal lacuna respecting governmental action, alleged to be unconstitutional, without judicial review.

C. *Canadian Council for Refugees*

Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)[108] also addressed public interest standing.

Background

The case dealt with whether the Canadian Council for Refugees, Amnesty International, and the Canadian Council of Churches (collectively, "the Organizations") met the test for public interest standing in a case involving the decision of a Canadian Border Services Agency officer that a family was not eligible to be referred to the Refugee Protection Division. The application challenged the constitutionality of certain provisions of the *Immigration and Refugee Protection Act*[109] and the *Immigration and Refugee Protection Regulations*,[110] as well as the ongoing designation of the United States as a "Safe Third Country". The Respondents argued that the Organizations did not meet the test for public interest standing

108. 2017 FC 1131.

109. S.C. 2001, c. 27, s. 101(1)(e).

110. SOR/2002-227, s. 159.3.

and that they had improperly purported to be applicants because they had failed to seek a grant of standing from the Court before being listed as applicants in the notice of application.

Decision of Diner J.

Mr. Justice Diner of the Federal Court rejected the Respondents' argument and held that the Organizations did meet the test for public interest standing. Diner J. stated that while it is, in some cases, appropriate to make determinations about standing at a preliminary stage, it is not always necessary for a preliminary motion to be brought—a party may assert standing by being named as a party in the notice of application and the issue can be left to the judge hearing the application.

Diner J. continued his analysis by stating that the moving party bears the onus on a motion to strike for lack of standing:

> 22 The moving party bears the onus on a motion to strike for lack of standing (*League for Human Rights of B'nai Brith Canada v Canada*, 2008 FC 146 at para 13, rev'd on other grounds in 2008 FC 732 [*B'Nai Brith* (FC)]). The test to be used on such a motion is whether it is ""plain and obvious" that the application for judicial review is "bereft of success" because the impugned party has no standing (*Apotex* at para 11, cited recently in *Arctos Holdings Inc v Canada (Attorney General)*, 2017 FC 553 at para 46 [*Arctos*]). If the answer to this question is "yes", then the motion succeeds and the application is dismissed or the party without standing is struck out. Such a finding may only be made in exceptional cases (*Arctos* at para 45).
>
> 23 If, on the other hand, it is not plain and obvious that the party has no standing, then the motion to strike fails. In that case, the matter of standing is not actually decided, but rather is left to the judge hearing the application (*Arctos* at para 75; *Apotex* at para 24).
>
> 24 The jurisprudence also instructs that the Court may exercise its discretion to fully and finally determine the question of standing on a preliminary motion, i.e. before the hearing of the application. In such cases, the Court must be satisfied that determination at the preliminary stage is appropriate; if it is not, the issue should be heard with the merits of the application (*Apotex* at para 13). The discretion to make a determination of standing at an

> early stage of the proceeding must be explicitly exercised, but should only be exercised sparingly (*Apotex* at paras13-14). Ultimately, the overriding consideration is, again, that judicial review applications should proceed summarily and not be encumbered by interlocutory motions (*JP Morgan* at paras 47-48).

Diner J. was satisfied that this was an appropriate case to decide standing at a preliminary stage because he did not "foresee any relevant grounds with respect to the test for public interest standing, that would be better canvassed at the hearing".[111] He went on to discuss the test for public interest standing and concluded that the Organizations did satisfy the test:

> Conclusion
>
> 74 The issues raised in this judicial review are important nationally, and transcend the immediate interests of the individual parties. Having exercised my discretion to determine – with final effect – the question of public interest standing, I find that test has been met: the Application raises a serious justiciable issue in which the Organizations have a genuine interest. That issue will be reasonably and effectively litigated with the Organizations' participation as parties. Accordingly, the Organizations are granted public interest standing, and the Respondents' request to strike them as parties to this Application is denied.

D. *Oceanex Inc.*

Although Justice Strickland ultimately held in *Oceanex Inc. v. Canada (Transport)*[112] that the Federal Court did not have jurisdiction because the decision in question was not made by a "federal board, commission or other tribunal", as an alternative she considered whether Oceanex had standing to bring the application. Although she held that Oceanex was not directly affected by the matter at issue (and therefore did not fit within section 18.1(1) of the *Federal Courts Act*), it nevertheless did meet the test for public interest standing as enunciated in *Downtown Eastside*.

---

111. At para. 28.

112. 2018 FC 250.

VIII. PROCEDURAL FAIRNESS—*AUDI ALTERAM PARTEM*

There are several interesting recent cases involving procedural fairness.

A. Procedural fairness not a stand-alone ground for court intervention

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall[113] raised the issue about whether courts can correct breaches of procedural fairness in the absence of some other basis for bringing the issue to the court: there is no free-standing right to procedural fairness when there is no underlying legal right:

> 12 Courts are not strangers to the review of decision making on the basis of procedural fairness. However, the ability of courts to conduct such a review is subject to certain limits. These reasons address three ways in which the review on the basis of procedural fairness is limited. First, judicial review is reserved for state action. In this case, the Congregation's Judicial Committee was not exercising statutory authority. **Second, there is no free-standing right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake.** Third, even where review is available, the courts will consider only those issues that are justiciable. Issues of theology are not justiciable.
>
> . . .
>
> 24 Even if Mr. Wall had filed a standard action by way of statement of claim, his mere membership in a religious organization – where no civil or property right is granted by virtue of such membership – should remain free from court intervention. **Indeed, there is no free standing right to procedural fairness with respect to decisions taken by voluntary associations. Jurisdiction cannot be established on the sole basis that there is an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures.**

113. 2018 SCC 26.

25 The majority in the Court of Appeal held that there was such a free standing right to procedural fairness. However, the cases on which they relied on do not stand for such a proposition. Almost all of them were cases involving an underlying legal right, such as wrongful dismissal (*McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (C.A.); *Pederson v. Fulton*, 1994 CanLII 7483 (Ont. S.C. (Gen. Div.)), or a statutory cause of action (*Lutz v. Faith Lutheran Church of Kelowna*, 2009 BCSC 59). Another claim was dismissed on the basis that it was not justiciable as the dispute was ecclesiastical in nature: *Hart v. Roman Catholic Episcopal Corp. of the Diocese of Kingston*, 2011 ONCA 728, 285 O.A.C. 354.

26 In addition, it is clear that the English jurisprudence cited by Mr. Wall similarly requires the presence of an underlying legal right. In *Shergill v. Khaira*, [2014] UKSC 33, [2015] A.C. 359, at paras. 46-48, and *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175 (C.A.), the English courts found that the voluntary associations at issue were governed by contract. I do not view *Shergill* as standing for the proposition that there is a free-standing right to procedural fairness as regards the decisions of religious or other voluntary organizations in the absence of an underlying legal right. Rather, in *Shergill*, requiring procedural fairness is simply a way of enforcing a contract (para. 48). Similarly, in *Lee*, Lord Denning held that "[t]he jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied" (p. 1180).

27 **Mr. Wall argued before this Court that *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, could be read as permitting courts to review the decisions of voluntary organizations for procedural fairness concerns where the issues raised were "sufficiently important", even where no property or contractual right is in issue. This is a misreading of *Lakeside Colony*. What is required is that a *legal right* of sufficient importance – such as a property or contractual right – be at stake:** see also *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586. It is not enough that a matter be of "sufficient importance" in some abstract sense. As Gonthier J. pointed out in *Lakeside Colony*, the legal right at issue was of a different nature depending on the perspective from which it was examined: from the colony's standpoint the dispute involved a property right, while from the members' standpoint the dispute was contractual in nature. Either way, the criterion of "sufficient importance" was never contemplated as a basis to give jurisdiction to courts absent the determination of legal rights.

28 Mr. Wall argues that a contractual right (or something resembling a contractual right) exists between himself and the Congregation. There was no such finding by the chambers judge. No basis has been shown that Mr. Wall and the Congregation intended to create legal relations. Unlike many other organizations, such as professional associations, the Congregation does not have a written constitution, by-laws or rules that would entitle members to have those agreements enforced in accordance with their terms. In *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229, at paras. 22-25, the Court of Appeal of Alberta ruled that membership in a similarly constituted congregation did not grant any contractual right in and of itself. The appeal can therefore be distinguished from *Hofer v. Hofer*, [1970] S.C.R. 958, at pp. 961 and 963, *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555,

at pp. 566 and 568, and *Lakeside Colony*, at p. 174. In all of these cases, the Court concluded that the terms of these voluntary associations were contractually binding.

29 **Moreover, *mere* membership in a religious organization, where no civil or property right is formally granted by virtue of membership, should remain outside the scope of the *Lakeside Colony* criteria.** Otherwise, it would be devoid of its meaning and purpose. In fact, members of a congregation may not think of themselves as entering into a legally enforceable contract by merely adhering to a religious organization, since "[a] religious contract is based on norms that are often faith-based and deeply held": R. Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008), 42 S.C.L.R. (2d) 37, at p. 45. Where one party alleges that a contract exists, they would have to show that there was an intention to form contractual relations. While this may be more difficult to show in the religious context, the general principles of contract law would apply.

30 Before the chambers judge, Mr. Wall also argued his rights are at stake because the Judicial Committee's decision damaged his economic interests in interfering with his client base. On this point, I would again part ways with the courts below. **Mr. Wall had no property right in maintaining his client base. As Justice Wakeling held in dissent in the court below, Mr. Wall does not have a right to the business of the members of the Congregation:** Court of Appeal reasons, at para. 139. For an illustration of this, see *Mott-Trille v. Steed*, [1998] O.J. No. 3583 (C.J. (Gen. Div.)), at paras. 14 and 45, rev'd on other grounds, 1999 CanLII 2618 (Ont. C.A.).

31 **Had Mr. Wall been able to show that he suffered some detriment or prejudice to his legal rights arising from the Congregation's membership decision, he could have sought redress under appropriate private law remedies.** This is not to say that the Congregation's actions had no impact on Mr. Wall; I accept his testimony that it did. Rather, the point is that in the circumstances of this case, the negative impact does not give rise to an actionable claim. As such there is no basis for the courts to intervene in the Congregation's decision-making process; in other words, the matters in issue fall outside the courts' jurisdiction.

[Bold emphasis added.]

B. Ability of court to supplement reasons

Two recent Supreme Court of Canada decision involve the ability of the courts to supplement the reasons given by a statutory delegate.

1. *Delta Air Lines*

In *Delta Air Lines Inc. v. Lukács*,[114] the majority, in reasons delivered by Chief Justice McLachlin, held that the court cannot merely supplement a decision-maker's reasons:

> 22 Delta acknowledges that the Agency's reasons are deficient. It argues, however, that the reviewing court is required to examine not only the reasons given, but the reasons that *could* be given to support the Agency's decision: see *Alberta Teachers*, at para. 53; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12. Specifically, it urges this Court to look to the justifications for denying standing enumerated in *Lukács v. Porter Airlines Inc.*, Canadian Transportation Agency, Decision No. 121-C-A-2016, April 22, 2016.
>
> 23 Supplementing reasons may be appropriate in cases where the reasons are either non-existent or insufficient. In *Alberta Teachers*, no reasons were provided because the issue had not been raised before the decision maker (para. 51). In *Newfoundland Nurses*, the reasons were alleged to be insufficient (para. 8). These authorities are distinguishable from this case, where the Agency provided detailed reasons that enumerated and then strictly applied a test unsupported by the statutory scheme.
>
> 24 The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in *Alberta Teachers* when he cautioned:
>
> > The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" [para. 54, quoting *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56].
>
> **In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.**

114. 2018 SCC 2.

> 25 **In my view, this is not a case where merely supplementing the reasons can render the decision reasonable.** The Agency clearly stated a test for public interest standing and applied that test. The Agency could have adapted the test so that the complainants under its legislative scheme could actually meet it. Of course, it could also have exercised its discretion without any reference to standing at all. But it did neither of these things. **The reviewing court must not do them in the Agency's place for three principal reasons.**
>
> 26 **First,** to do so would require erasing the public interest standing test and its application, as set out by the Agency, and replacing them with reasons and justifications formulated by this Court. Delta has not pointed to any administrative law authority that would justify this approach.
>
> 27 **Second,** it would undermine, if not negate, the vital role of reasons in administrative law. *Dunsmuir* still stands for the proposition that reviewing courts must look at both the reasons *and* the outcome. While this does not require "two discrete analyses" (*Newfoundland Nurses*, at para. 14), it means that reasons still matter. **If we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole consideration. With that approach, as long as the reviewing court could come up with some possible justification – even if it contradicted the reasons given by the administrative body – the decision would be reasonable. This goes too far. It is important to maintain the requirement that where administrative bodies provide reasons for their decisions, they do so in an intelligible, justified, and transparent way.**
>
> 28 Finally, this would amount to the reviewing court assuming the role of the Agency by developing and applying a complaints procedure under the Act. It would be ironic to allow the appeal in the name of deference and then stipulate how the Agency should determine when to hear a complaint: see *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11.
>
> [Bold emphasis added.]

2. *Williams Lake*

In *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*,[115] Justices Rowe and Côté dissented from part of the decision because they differed about the extent to which it could supplement non-existent or inadequate reasons given by the tribunal:

115. 2018 SCC 4.

142 Where they are provided, reasons are an essential focus for reviewing courts as they describe both the result and – crucially – the justificatory process used to reach that result. Reasons are the roadmap to understanding both how and why a decision under review was reached. Where they are required by statute or proffered as a matter of practice, they often demonstrate the reasonableness of the decision in question. Conversely, as stated in *Edmonton (City)*, **"[w]hen a tribunal does not give reasons, it makes the task of determining the justification and intelligibility of the decision more challenging": para. 36. This is why deficient or insufficient reasons will often cast doubt on the reasonableness of the decision under review.** As the goal of reasonableness review is to "understand why the tribunal made its decision" and "determine whether [its] conclusion is within the range of acceptable outcomes", reasons that allow for neither will be hard pressed to meet the requirements of justification, transparency and intelligibility: *Newfoundland Nurses*, at para. 16.

143 It is not that reasons need attain a uniform standard of perfection. In many cases, reviewing courts will have a certain latitude to uphold administrative decisions that would, under stricter scrutiny, be deficient in their justification. In so doing, reviewing courts pay "respectful attention to the reasons offered or which could be offered in support of a decision": *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286. As the Court explained in *Newfoundland Nurses*, many "decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist": para. 13. Because of this, "[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis": *ibid.*, at para. 16. With this in mind, rather than engage in "a line-by-line treasure hunt for error", reviewing courts may look beyond the words of the reasons to consider the decision as an "organic whole": *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54.

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

145 The power of reviewing courts to supplement deficient reasons in this way, however, is not limitless. In *Alberta Teachers*, Justice Rothstein warned against the risk of excessive deference in the face of reasons "which could be offered in support of a

decision": para. 54; see also *Dunsmuir*, at para. 48. Writing for a majority of the Court, he stated:

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

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

. . .

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

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

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

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

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

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

155 A clear proposition can be drawn from the interplay of *Alberta Teachers* and *Newfoundland Nurses*. When the implied line of reasoning is obvious – in light of the record or similar decisions, for example – supplementing may well be an appropriate means of paying "respectful attention to the reasons offered or which could be offered in support of a decision: *Dunsmuir*, at para 48. However, when faced with an absence of analysis on an essential element such that the implied line of reasoning is inconclusive or, as here, completely obscure, the reviewing court should not impute its

> ***own* justification as a means of upholding the decision: *Delta Air Lines*, at para. 27. Supplementary reasons must build upon those actually provided by the legislature's chosen decision-maker. They should not spring from the judicial imagination *ex nihilo*.**
>
> Remedy
>
> **156 When faced with reasons that are deficient for their failure to explain or justify an essential element of their analysis, reviewing courts should typically remit the matter for further consideration.** This does no more than call upon decision-makers to carry out the task assigned to them by statute. One exception relates to instances where remitting would serve no useful purpose, as the range of reasonable outcomes only allows for a single result, which the reviewing court provides. This exception does not apply here.
>
> **157** Accordingly, I would remit the matter to the Tribunal for further reasons on whether – and how – the obligations and liabilities of the Colony pursuant to s. 14(1)(b) of the Act "became" those of the federal Crown pursuant to s. 14(2)....
>
> [Bold emphasis added; underlining in original.]

IX. PRIVILEGE

Legal privilege, disclosure and privacy continue to be important issues in administrative law:

- *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*.[116]
- *University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)*.[117]
- *Barker v. Ontario (Information and Privacy Commissioner)*.[118]

116. 2018 ONCA 559, reversing 2017 ONSC 642.

117. 2018 SKCA 34, reversing 2017 SKQB 140.

118. 2017 ONSC 7564.

X. CONSTITUTIONAL AND *CHARTER* ISSUES

A number of recent decisions involve the interplay of administrative law and constitutional law (including the *Charter*). One of the difficult issues continues to be the concept of "*Charter* values" as opposed to the actual rights contained in and protected by the *Charter*.

A. *Trinity Western*

As noted above, in the two *Trinity Western* cases,[119] the majority of the Supreme Court of Canada held[120] that the decisions of the Law Society of British Columbia and Law Society of Upper Canada to deny approval to a proposed law school which required students and faculty to sign a mandatory covenant prohibiting sexual intimacy outside heterosexual marriage represented a proportionate balance between freedom of religion and the Law Societies' statutory objectives.

B. *Ewert*

Ewert v. Canada[121] dealt with whether the use of psychological and actuarial assessment tools to make decisions concerning an Indigenous inmate's psychopathy and risk of recidivism breached the inmate's rights under sections 7 and 15 of the *Charter*.

---

119. 2018 SCC 32 and 2018 SCC 33.

120. The majorities in both cases consisted of Chief Justice McLachlin and Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon and Rowe. Dissenting reasons were delivered by Justices Côté and Brown.

121. 2018 SCC 30, reversing in part 2016 FCA 203.

The Supreme Court of Canada held that, while the reliance on the impugned tools breached section 24(1) of the *Corrections and Conditional Release Act*,[122] sections 7 and 15 of the *Charter* were not violated. In a 7 to 2 split decision,[123] the majority concluded that Ewert had failed to establish that the Correctional Service of Canada's reliance on the impugned tools with respect to Indigenous offenders had no rational connection to the government objective or that it amounted to discrimination.

The majority rejected Ewert's argument that a new principle of fundamental justice—that the state must obey the law—should be established.

C. *Caron*

The Supreme Court of Canada decision in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*[124] dealt with whether the duty to accommodate provisions contained in the Quebec *Charter of human rights and freedoms*[125] applied when an employee was injured on the job. The majority[126] concluded that the *Quebec Charter* does apply to situations where the employee is injured in the workplace and the matter is governed

---

122. S.C. 1992, c. 20. Section 24(1) requires the Correctional Service of Canada to "take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible".

123. The majority consisted of Chief Justice McLachlin and Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown. Justices Côté and Rowe dissented in part.

124. 2018 SCC 3.

125. CQLR, c. C-12, ss. 10 and 16.

126. The majority consisted of Chief Justice McLachlin, and Justices Abella, Karakatsanis, Wagner and Gascon. Justices Côté and Rowe agreed that the matter should be remitted back for a determination of whether the employer discharged its duty to accommodate, but refused to apply a blanket presumption of conformity of the Act with the Quebec *Charter*.

by the *Act respecting industrial accidents and occupational diseases*.[127] The majority held that the duty to reasonably accommodate disabled employees is a "fundamental tenet of Canadian and, more particularly, Quebec labour law."[128] While the majority recognized that the duty to accommodate is not unlimited, it held that the duty "requires accommodation to the point that an employer is able to demonstrate that it could not have done anything else reasonable or practical to avoid the negative impact on the individual".[129]

D. *Good Spirit School Division*

Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan[130] discussed the historical and constitutional framework under which school funding decisions are made and the impact such funding decisions have on the rights guaranteed under sections 2(a) and 15 of the *Charter*. In particular, the issue before the court was whether the funding of non-Roman-Catholic students attending a public school was a right protected by section 93 of the *Constitution Act, 1867*.

Justice Layh of the Saskatchewan Court of Queen's Bench provided a thorough review of the constitutional background and establishment of two separate and distinct school boards —public and Roman Catholic—as entrenched in section 93.[131] He concluded that the

---

127. CQLR, c. A-3.

128. At para. 22.

129. At para. 27.

130. 2017 SKQB 109.

131. See paras. 73 to 82.

funding of non-minority faith students was not a protected right under section 93(1) and violated sections 2(a) and 15 of the *Charter*. The decision has been appealed.

XI. REMEDIES

There have been some interesting cases discussing remedies this year.

- *Ewert v. Canada*[132] discussed whether it was appropriate for the court to issue a declaration that correctional authorities had breached their statutory obligation to ensure that information about offenders was accurate by using psychological and actuarial assessment tools to make decisions about Indigenous inmates in their custody. The majority of the court[133] concluded that, while a declaration is a narrow remedy, it was appropriate to issue a declaration where the court has jurisdiction to hear the issue, the dispute is real and not theoretical, the party raising the issue has a genuine interest in its resolution and the respondent has an interest in opposing the declaration sought.[134] It should be noted that the minority would not have issued a declaration, holding that the proper remedy for breach of a statutory duty by a public authority is judicial review.[135]

---

132. 2018 SCC 30.

133. The majority consisted of Chief Justice McLachlin, and Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown. Justices Côté and Rowe dissented.

134. See paras. 81 to 90.

135. See paras. 126 and 127.

- The prerogative remedy of *habeas corpus* was discussed in *E.D. v. Central Health*.[136] In particular, the issues in *E.D.* were whether *habeas corpus* was available in circumstances where the applicant had already been released by other means and whether *habeas corpus* was the proper avenue for review of the justification for an involuntary detention under the *Mental Health Care and Treatment Act*.[137] Justice Peddle concluded that *habeas corpus* was available as a remedy where the applicant had been detained in a psychiatric unit against her will even after being decertified even though she had since been released.

- The case of *Rakuten Kobo Inc. v. Canada (Commissioner of Competition)*[138] discussed the court's discretion to decline to hear an application for judicial review where there is an adequate alternative remedy and forum. Chief Justice Crampton reviewed the considerations set out in *Strickland*[139] that are relevant to a court's determination of whether to exercise its discretion to hear a judicial review application.

XII. COSTS

Several decisions dealing with costs also deserve mention.

---

136. 2018 NLSC 24.

137. S.N.L. 2006, c. M-9.1.

138. 2018 FC 64.

139. *Strickland v. Canada (Attorney General)*, 2015 SCC 37. See also *797175 Alberta Ltd. v. Calgary (City)*, 2017 ABQB 18.

- The British Columbia Court of Appeal costs decision in *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*[140] discussed the court's discretion to depart from the ordinary rule as to costs, especially in cases involving public interest litigation. The court ordered the parties, including a not-for-profit organization, to bear their own costs.

- In *Shawnigan Residents Association v. British Columbia (Director, Environmental Management Act)*,[141] the British Columbia Supreme Court discussed the need to be "substantially successful" in the litigation in order for a party to be entitled to a costs award. The court reduced the costs awarded to the successful party where the successful party had made several unsuccessful arguments that prolonged the hearing and added to its complexity.[142] Mr. Justice Sewell also discussed the principles applicable to an award of special costs which may be awarded if the court concludes that a party has engaged in reprehensible conduct in the course of the litigation. He held that pre-litigation conduct could not be taken into account for the purposes of a special costs award but awarded special costs where the party had been disingenuous in document disclosure in the course of the litigation.

- The costs decision in *Good Spirit School Division No. 2014 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of*

140. 2018 BCCA 228.

141. 2018 BCSC 121.

142. The court awarded the successful party two-thirds of its party and party costs.

Saskatchewan[143] is worth a read in its entirety. The court awarded costs of over $800,000 against the Government of Saskatchewan. Justice Layh held that there was no reason to delay making a costs award until the appeal on the merits decision was heard, but acknowledged that any costs order made would "almost assuredly join the appeal on the substantial matters".[144] He went on to compare an award of "special costs" in cases involving public interest and a costs award based on a multiple of the Tariff, choosing the latter approach. Layh J. was critical of the Government's handling of the litigation, especially its challenge to the applicant's standing in a case involving important constitutional questions which the Government itself initiated. Layh J. also addressed the reimbursement of disbursements, particularly the costs of expert reports.

XIII. CONCLUSION

Administrative law continues to be an intricate, fascinating, important area with many interesting developments and interesting applications of its principles. The Supreme Court of Canada's decisions in the December trilogy will undoubtedly provide significant food for thought about the nature and scope of judicial review of administrative action, and its intensity. Stay tuned!

---

143. 2018 SKQB 30. The decision on the merits of the case was discussed under the headings "Standing" and "Constitutional and *Charter* Issues".

144. At para. 24.