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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

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I. INTRODUCTION[1]

Last December, the Supreme Court of Canada heard three appeals to consider the nature and scope of judicial review of administrative action and addressing the standards of review set out in *Dunsmuir*[2] and subsequent cases.[3] In anticipation of the Supreme Court's decisions, this paper will not address standards of review.

Instead, this paper will consider the following other important administrative law issues: (a) availability of, and immunity from, judicial review; (b) standing; (c) procedural fairness; (d) constitutional and *Charter* issues; (e) remedies; and (f) a miscellany of other interesting issues.

II. AVAILABILITY OF—OR IMMUNITY FROM—JUDICIAL REVIEW

Not every decision is subject to judicial review. The following are some of the important areas where the courts do not have jurisdiction.

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

2. *Dunsmuir v. New Brunswick*, 2008 SCC 9.

3. *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).

A. Parliamentary Privilege[4]

The courts do not have jurisdiction to review matters which fall within parliamentary privilege. Parliamentary privilege is constitutional in nature.[5] As a result, the *Charter* does not apply, because one part of the constitution cannot oust another part.[6]

1. *Definition of parliamentary privilege*

Parliamentary privilege has been defined as follows:[7]

- Parliamentary privilege is the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and three territories, in order for these legislators to do their legislative work.

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4. This portion of the paper is reproduced in part from a paper prepared for the Canadian Conflict of Interest Network annual meeting held in Regina, Saskatchewan on September 4 and 5, 2019.

5. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319; *Canada (House of Commons) v. Vaid*, 2005 SCC 30.

6. *Ibid*. Note the current litigation in Ontario about the validity of s. 12 of the *National Security and Intelligence Committee of Parliamentarians Act*, S.C. 2017, c. 15, s. 12, which prevents parliamentary privilege from being invoked if a member of the National Security and Intelligence Committee of Parliamentarians is prosecuted for disclosing protected information. The issue is whether an ordinary statute can do this, as opposed to a constitutional amendment. See *Alford v. Canada (Attorney General)*, 2019 ONCA 657, leave to appeal denied by SCC on 29 August 2019 (with respect to the Court of Appeal's decision that Mr. Alford does have public interest standing to raise this issue).

7. Joseph Maingot, *Parliamentary Privilege in Canada*, 2nd ed. (Montreal: Published for the House of Commons by McGill-Queen's University Press, 1997) at 12.

- It is also the necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislative assembly.

- Finally, it is the exclusive authority and power of each House of Parliament and of each legislative assembly to enforce that immunity.

Parliamentary privilege results in immunity from judicial oversight. As long as the impugned action or decision falls within an accepted category of parliamentary privilege,[8] the Parliament or a Legislative Assembly may assert parliamentary privilege. As a consequence, the authority to review the action or decision lies within the exclusive jurisdiction of Parliament or the Legislative Assembly. The action or decision is not reviewable by the courts.[9]

2. *Recognized categories of parliamentary privilege and the rule of necessity*

In order to successfully assert parliamentary privilege over a particular action or decision, the entity claiming it must first satisfy the court that its action or decision fell within an accepted category of parliamentary privilege; or, if it does not, that the impugned action or decision was necessary for the effective administration of the legislature (known as the "proof of necessity test" or the "rule of necessity").

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8. There are at least three accepted categories of parliamentary privilege: internal affairs, discipline and proceedings in Parliament: *Canada (House of Commons) v. Vaid*, 2005 SCC 30*; Boulerice v. Canada (A.G.)*, 2019 FCA 33.

9. *Canada (House of Commons) v. Vaid*, 2005 SCC 30; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39.

Accepted categories of parliamentary privilege are those actions or decisions which have been positively and authoritatively established by either the Constitution, legislation, regulations or settled jurisprudence as necessary in order to protect the dignity and efficiency of Parliament.[10]

Jurisprudence has established three accepted categories of parliamentary privilege:[11]

- the exclusive right of the House of Commons (or Legislative Assembly) and Senate to oversee and decide matters of internal affairs, including rules governing the use made of funds and resources provided to Members for the purpose of allowing them to perform their parliamentary functions;

- the exclusive right of the House of Commons (or Legislative Assembly) and Senate to regulate the conduct of its members, including imposing discipline, in order to maintain the integrity of its internal processes; and

- the right of Members to discharge their duties in Parliament (or the Legislature) and Senate, which includes the right to perform legislative and deliberative functions and the right to free speech in proceedings in Parliament (or the Legislature).

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10. See *Canada (House of Commons) v. Vaid*, 2005 SCC 30; *Singh v Attorney General of Quebec*, 2018 QCCA 257; *McIver v. Alberta (Ethics Commissioner)*, 2018 ABQB 240; *Boulerice v. Canada (A.G.)*, 2019 FCA 33.

11. *Canada (House of Commons) v. Vaid*, 2005 SCC 30; *Boulerice v. Canada (A.G.)*, 2019 FCA 33.

If the impugned conduct falls within one of the accepted categories, the conduct cannot be reviewed by the courts.

If the impugned action or decision does not fall within an accepted category of parliamentary privilege, the court will apply the rule of necessity to determine if parliamentary privilege applies in any event. The focus of the rule of necessity is whether parliamentary privilege claimed is necessary for the legislature to perform its functions effectively.

3. *Recent cases*

The concept of parliamentary privilege as a shield from judicial review has received considerable judicial attention this past year. While some of the following cases were briefly discussed in last year's paper, a short review is in order.

a. *Chagnon*

The Supreme Court of Canada recently reviewed the foundation and principles governing parliamentary privilege in *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*.[12]

In that case, the Supreme Court considered whether parliamentary privilege applied to the Québec National Assembly's right to manage its employees, and, in particular, to the President of the National Assembly—who has the same role as the Speaker in other jurisdictions. The issue was whether parliamentary privilege applied to decisions to dismiss

12. 2018 SCC 39.

security guards employed within the Assembly on the ground that they had used their employer's cameras to spy on patrons of nearby hotel rooms.

In a 6 to 2 split decision,[13] the majority found that the parliamentary privilege claimed did not fit within any accepted category. It went on to apply the necessity test and held that it had not been shown that preventing security guards from filing grievances with respect to their dismissals was necessary to preserve the dignity and efficiency of the National Assembly. Thus, parliamentary privilege did not apply.

Speaking for the majority, Justice Karakatsanis summarized the rule of necessity as follows:

> 29 In order to fall within the scope of parliamentary privilege, the matter at issue must meet the necessity test: it must be "so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body ... that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency" (*Vaid*, at para. 46).
>
> 30 The necessity test thus demands that the sphere of activity over which parliamentary privilege is claimed be more than merely *connected* to the legislative assembly's functions. The *immunity* that is sought from the application of ordinary law must also be necessary to the assembly's constitutional role. In other words, "[i]f a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist" (*Vaid*, at para. 29(5)).

b. *McIver*

In *McIver v. Alberta (Ethics Commissioner)*,[14] the Ethics Commissioner of Alberta investigated a complaint against a Member of the Legislative Assembly (MLA) for

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13. Reasons of the majority were issued by Karakatsanis J.; Justices Côté and Brown dissented.

14. 2018 ABQB 240.

comments he made during Question Period. The Ethics Commissioner concluded that the MLA had breached the *Conflicts of Interest Act* and recommended a sanction. The Commissioner's report was tabled in the legislature and a motion was brought to concur with the report and the proposed sanction. The opposition party brought a point of order to halt the proceedings pending judicial review of the Ethics Commissioner's findings. The Speaker dismissed the point of order, ruling that the Ethics Commissioner and the Legislative Assembly's actions fell within the accepted categories of parliamentary privilege over discipline and internal affairs.

The MLA applied for judicial review of the decisions. The issues raised on judicial review included whether parliamentary privilege applied to the decision of the Ethics Commissioner, the decision of the Legislative Assembly to adopt the findings and recommendations of the Ethics Commissioner, and the decision of the Speaker to dismiss the point of order.

Ashcroft J. concluded that the actual decision maker in the case was the Legislative Assembly of Alberta. She held that parliamentary privilege applied to the decision under the accepted category of the Legislative Assembly's right to govern its internal affairs and set standards for the conduct of its members, including imposing disciplinary measures. The decision was, therefore, not reviewable in court.

Moreover, Ashcroft J. extended parliamentary privilege to apply to the decisions of the Ethics Commissioner and the Speaker since both were statutory delegates of the Legislative Assembly.

Ashcroft J. also held that parliamentary privilege relating to decisions in the sphere of internal affairs and the regulation of conduct of the legislature's members applies even where it interferes with an MLA's parliamentary right to free speech. She concluded that regulating the conduct of members of the Legislative Assembly includes regulating their speech.[15]

Finally, Ashcroft J. confirmed that when an MLA believes his or her parliamentary privileges have been violated, the correct approach is to raise a question or "point" of privilege with the Speaker, not turn to the courts.[16]

c. *Boulerice*

In *Boulerice v. Canada (Attorney General)*,[17] the Federal Court of Appeal allowed the appeal by the House of Commons' management body, the Board of Internal Economy ("the Board"), and the Speaker of the House from a decision of the Federal Court to dismiss motions to strike the judicial review applications dealing with whether four Members of Parliament ("MPs") had misused parliamentary funds.

The Board decided that the MPs had inappropriately claimed $2.7 million from parliamentary funds for mailings, employment expenses, telecommunications and travel expenses and ordered the MPs to repay the money. The MPs applied for judicial review of the Board's decisions, arguing that they were arbitrary, contrary to parliamentary rules, politically motivated and made in bad faith. Justice Gagné of the Federal Court dismissed the motions

15. At para. 78.

16. At para. 55, citing Maingot, *supra* note 7, at 217 to 228.

17. 2019 FCA 33.

to strike the judicial review applications, holding that the decisions of the Board were not subject to parliamentary privilege.

The Federal Court of Appeal allowed the appeal and held that the decisions of the Board were subject to parliamentary privilege. The Court held that the Board's decisions were constitutional in nature and fell within the accepted category of parliamentary privilege regarding internal affairs.

The Supreme Court of Canada denied leave to appeal this case on July 18, 2019.

d. *Duffy*

In *Duffy v. Senate of Canada*,[18] Senator Duffy sued the Senate for over $7 million in damages for wrongfully suspending him for violating rules on living and travel expenses.[19] The suspension was based on a report from the Standing Committee on Internal Economy, Budgets and Administration.

The Senate took the position that Senator Duffy's action should be dismissed on the basis of parliamentary privilege. Justice Gomery of the Ontario Superior Court of Justice agreed and dismissed the Senator's action:

> 119 . . . I conclude that Senator Duffy's legal claim against the Senate is based on actions and speech that fall squarely within the scope of established parliamentary privilege. The decision to suspend Senator Duffy is subject to the Senate's privilege to discipline its

18. 2018 ONSC 7523.

19. See *R. v. Duffy*, 2016 ONCJ 220 for decision acquitting Senator Duffy on criminal charges.

> members. The investigation of his living allowance and claims for reimbursement are protected by the Senate's privilege to manage its internal affairs. The CIBA investigation and the processes leading to the decision to suspend Senator Duffy fall within the Senate's privilege over its proceedings. Parliamentary privilege immunizes all of the decisions and conduct underlying Senator Duffy's claim against the Senate. As a result, this court has no role in judging their lawfulness or fairness.

e. *Democracy Watch v. Canada (A.G.)*

In *Democracy Watch v. Canada (A.G.)*,[20] Democracy Watch applied for judicial review of the federal Conflict of Interest and Ethics Commissioner's Declaration of Agreed Compliance Measures relating to a voluntary conflict of interest screen of a Member of Parliament.

After granting Democracy Watch public interest standing, the Federal Court of Appeal dismissed the application for judicial review of the Commissioner's decision. While the court expressed concerns about the reviewability of the Commissioner's decisions, it went on to review, and uphold, the merits of the decisions despite those concerns.

Interestingly, on the issue of whether the court was seized with a reviewable matter, the notion of parliamentary privilege was not raised. Instead the focus was on whether the Commissioner had made a legally binding decision or order as required under section 66 of the federal *Conflict of Interest Act* and section 28(1) of the *Federal Courts Act*. While not deciding the issue, the court stated that it was "hard-pressed to find any reviewable decision or order that could be the subject of judicial review".[21]

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20. 2018 FCA 194.

21. At para. 36.

The Supreme Court of Canada denied leave to appeal the court's decision on May 2, 2019.

f. *Democracy Watch*

Democracy Watch was granted public interest standing in two recent cases which dealt with applications for judicial review of the Governor in Council's appointments of Mario Dion as the federal Conflicts of Interest and Ethics Commissioner and of Nancy Belanger as the Commissioner of Lobbying.[22]

Democracy Watch challenged the appointments on three grounds: (1) they violated the statutory consultation requirements; (2) they contravened the *Conflict of Interest Act*[23]; and (3) the appointment process was procedurally unfair.

Justice Strickland of the Federal Court dismissed both applications for judicial review because she was not convinced that the Governor in Council had failed to satisfy the required level of consultation required under either the *Parliament of Canada Act* or the *Lobbying Act* before making the appointments. Also, Strickland J. held that no duty of fairness was owed to Democracy Watch.

With respect to Democracy Watch's allegations that the appointment process violated the *Conflict of Interest Act*, Strickland J. held that the Governor in Council's decision was not justiciable because it was up to Parliament to decide that process. Moreover, it was not the

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22. *Democracy Watch v. Canada (A.G.)*, 2018 FC 1290 and *Democracy Watch v. Canada (A.G.)*, 2018 FC 1291.

23. S.C. 2006, c. 9, s.2.

court's role to assess whether the Governor in Council was in a conflict of interest. That role had been entrusted by Parliament to the Ethics Commissioner and no complaint had been filed to that body. It was not open to Democracy Watch, by way of judicial review, to have the court step into the role of Ethics Commissioner.[24]

Interestingly, the issue of parliamentary privilege was not expressly discussed by Justice Strickland. Instead, she held that the issue concerning an alleged conflict of interest was not reviewable by the court because it fell within the purview of the federal conflict of interest regime and the remedies thereunder. Question: is the conflict of interest regime a particular manifestation of parliamentary privilege (see *McIver*)?

g. *Turpel-Lafond*

In contrast, the British Columbia Supreme Court did consider parliamentary privilege in the recent case of *Turpel-Lafond v. British Columbia*.[25]

In that case, the plaintiff was the Representative for Children and Youth in British Columbia. She brought an action against the government for allegedly breaching the terms of her remuneration and pension entitlement. The Attorney General applied to have her action struck on the basis of parliamentary privilege, arguing that since the plaintiff had been appointed by the Legislative Assembly, her role was an extension of the Legislative Assembly.

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24. At para. 119.

25. 2019 BCSC 51. See also *Marin v. Office of the Ombudsman*, 2017 ONSC 1687 where parliamentary privilege was held to apply to a decision regarding the appointment and removal of the Ombudsman of Ontario.

Chief Justice Hinkson dismissed the Attorney General's application. He held that the plaintiff's claims did not fall within an established category of parliamentary privilege. While a challenge concerning the plaintiff's actual appointment would have fallen under the accepted category of the Legislative Assembly's right to govern its internal affairs, the issue of enforcement of the plaintiff's contractual rights did not.

The reasoning in *Turpel-Lafond* is similar to the earlier decision of the NWT Supreme Court in *Roberts v. Commissioner of the NWT*,[26] which quashed the decision of the Legislative Assembly to terminate the appointment of the Conflict of Interest Commissioner on procedural unfairness grounds.

h. *The decision of the United Kingdom Supreme Court in the Prorogation Case*

One must mention the very recent and remarkable unanimous decision of eleven judges of the United Kingdom Supreme Court in *R (on Application of Miller) v. The Prime Minister*,[27] which held that the recommendation by the Prime Minister to the Queen to prorogue Parliament was reviewable by the courts. It was not a non-justiciable action. Judicial review was necessary in order to maintain the sovereignty of Parliament, which would be circumvented by this particular prorogation. The prorogation was for a longer time than customary in the United Kingdom; there was no evidence that such a length of time was necessary for the preparation of the Queen's Speech for the opening of the next session; the effect of the prorogation would be to deprive Parliament of the ability to deal with Brexit during the prorogation; and the Supreme Court had previously ruled that the approval of

26. 2002 NWTSC 68.

27. [2019] UKSC 41.

Parliament (not just the Executive) was required for Brexit; and the October 31st deadline for a hard Brexit was soon. Treating the matter as non-justiciable would upset the constitutional relationship between Parliament and the Executive.

It remains to be seen whether—and to what extent—this decision will have application at any level in Canada.[28]

B. Reviewability of recommendations of the Canadian Judicial Council

In *Girouard v. Canada (Attorney General)*,[29] the Canadian Judicial Council ("the Council") recommended removing Justice Girouard from the Superior Court of Quebec following an investigation into his conduct by an Inquiry Committee. A report setting out the Council's recommendation was sent to the Minister of Justice. Justice Girouard applied for judicial review of both the Inquiry Committee's report and the Council's report.

The Attorney General applied to strike the applications, arguing that the reports, and the recommendations therein, were not subject to judicial review. The Attorney General raised three arguments as to why judicial review was not available with respect to the reports:

- the Inquiry Committee and the Council were not "federal boards, commissions or other tribunals" as required under section 18 of the *Federal Courts Act*;

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28. For example, proroguing Parliament when the Government is facing a defeat on a motion of confidence (as occurred under the Harper Government); or advising the Lieutenant Governor to dissolve a provincial Legislature prior to the end of its fixed term (although the governing legislation contemplated this possibility, and a dissolution is not the same as a prorogation): *Engel v. Alberta (Executive Council)*, 2019 ABQB 490.

29. 2018 FC 865, affirmed 2019 FCA 148.

- the Inquiry Committee and Council have the status of a superior court; and

- the reports were not decisions within the meaning of section 18.1 of the *Federal Courts Act*.[30]

Chief Justice Noël rejected all three arguments and, in a unanimous judgment, the Federal Court of Appeal upheld that decision.[31] In doing so, the court reviewed the meaning of "federal board, commission or other tribunal" and discussed both the source of the Council's powers and the nature of its powers:

> 32 The term "federal board, commission or other tribunal" generally means a "body exercising statutory powers or powers under an order made pursuant to a prerogative of the Crown" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 18 (*Mikisew SCC*)). More specifically, section 2 of the FCA defines this notion as follows:
>
> > 2(1) In this Act,
> >
> > *federal board, commission or other tribunal* means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*...
>
> 33 With respect to this definition, the Supreme Court of Canada stated that it is "sweeping" and that it "goes well beyond what are usually thought of as 'boards and commissions'" (*Telezone* at paras. 3 and 50).

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30. Because the final decision to remove a judge rests with Parliament.

31. The panel consisted of Pelletier, de Montigny and Gleason JJ.A.

34 To determine whether a body is a "federal board, commission or other tribunal" within the meaning of section 2 of the FCA, this Court developed a two-step test. According to *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 (*Anisman*), the Court must determine "what jurisdiction or power" the body seeks to exercise and then "what is the source or the origin" of that jurisdiction or power (at para. 29; *Mikisew SCC* at para. 109).

35 It should also be noted that Parliament amended the definition of "federal board, commission or other tribunal" several times to explicitly exclude bodies that could otherwise be included. This is notably the case with the Senate, the House of Commons, any committee or member of either House, and the ethics commissioners of these institutions with respect to the exercise of their powers pursuant to the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 (see subsection 2(2) of the FCA).

. . .

36 The Federal Court judge set out the *Anisman* test in paragraph 96 of his reasons. Examining the statutory scheme at issue in light of the criteria established in the case law, he concluded that the Council and its committees exercise powers that are investigative in nature (at para. 97), similar to those of a commissioner of inquiry under the *Inquiries Act*, R.S.C. 1985, c. I-11 (*Inquiries Act*) (at para. 83). He also found that the source of these powers can only be found in paragraphs 60(2)(c) and (d) and subsections 63(1) and 63(4) of the Act, that is, an "Act of Parliament" within the meaning of section 2 of the FCA (at para. 97).

37 The appellant is challenging the judge's conclusions in relation to (i) the source of the powers exercised and (ii) the nature of those powers. These criticisms will be considered in turn. As the "source" of the powers is the "principal determinant" of whether a decision-maker falls within the definition of a "federal board, commission or other tribunal", this question will be dealt with first (*Mikisew SCC* at para. 109; Donald J.M. Brown and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf, (Toronto: Thomson Reuters Canada Limited, 2018) at pp. 2-50, 2-51).

The source of powers

38 Relying on *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267 (*Ruffo*), the appellant argues that the powers in dispute here are "inherent" in its members' exercise of their functions. According to the appellant, the result is that these powers are constitutional and that they are therefore not conferred by or under an "Act of Parliament" within the meaning of section 2 of the FCA.

39 These arguments do not withstand scrutiny.

40 The judge was quite correct to conclude that the only source of the powers of the Council and its committees is the Act, notably paragraphs 60(2)(c) and (d) and subsections 63(1) and 63(4). Had the Act not been adopted by Parliament, the Council

would simply not exist. Furthermore, it should be noted that it has only been in existence since 1971; before that date, judicial discipline was entrusted to *ad hoc* commissions of inquiry established by the Governor in Council. In addition, there is every reason to believe that if the roles and composition of the Council were to be modified, it would be up to Parliament and not the Council itself to make such changes through legislation. The only power granted to the Council in that respect, under subsection 61(3) of the Act, is that of making by-laws to regulate the procedure in regard to its meetings and its inquiries and investigations.

41 As rightly noted by the respondent the AGC, the *Anisman* analysis implies that this Court must focus on the source of the powers conferred on the *body* that exercises them– in this case, the Council, not its members. In any event, even if the powers conferred on chief justices were to be taken into account, the same conclusion applies in this case.

42 The appellant's argument that its powers are constitutional since they are inherent to the office of chief justice is based on the following passage from *Ruffo*:

> [57] . . . It must not be forgotten that a large part of the chief judge's role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents. Many aspects of this role derived from judicial tradition without being transferred to legislation. Therefore, the fact that there was no explicit legislation on ethics until quite recently does not mean we can doubt the continuity that marked the development of the chief judge's responsibilities in this regard. It accordingly cannot be argued that the supervisory powers conferred on the chief judge by . . . s. 96 [of the *Courts of Justice Act*, R.S.Q., c T-16 then in force] were assigned spontaneously by the legislature; in my view, they must rather be seen as the expression of a reality that is consistent with general practice and gradual developments over time.
>
> [58] This opinion is shared by the American author . . . Geyh, who asserts that the chief judge's supervisory powers over ethics are inherent in the exercise of his or her functions and need not be conferred by specific statutory provisions . . . . I agree.
>
> [Emphasis in original.]

43 However, to understand its real import, this excerpt from *Ruffo* should be put in its original context. Those comments were made by Justice Gonthier, on behalf of the majority, in response to the argument that the chief judge of the Court of Québec should not be allowed to lay a complaint with the Conseil de la magistrature against a judge of his court because it would go against the principles of judicial impartiality and independence. It is in this very specific context that the comments reproduced above were made and should be understood. This is clear from the paragraph that follows:

> [59] We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard.
>
> [Emphasis added.]

44 What we understand from this passage is that the only inherent power of a chief justice identified by the Supreme Court in *Ruffo* with respect to judicial discipline is that of *laying a complaint* against one of the judges under his or her supervision. There is nothing to suggest that this power should necessarily include that of holding an inquiry into such a complaint. Moreover, when chief justices act in such a way, they do so by reason of their role as coordinators of the court in their division. In other words, if this power is "inherent," it is so with respect to their functions as chief justices, which are essentially administrative functions (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 99), not their functions as judges (if that were the case, every judge would be granted this power). Nor does that decision mention that a chief justice would have such power in respect of judges other than those of his or her court. The Council's powers are not limited in this manner.

45 In *Ruffo*, the Court never cited any "constitutional origin" for the functions of chief justices, contrary to the appellant's arguments in paragraph 44 of its memorandum. It is also interesting to note that at no point in that decision does the Court refer to section 96 of the *CA 1867*. In short, the appellant reads into the Court's decision in *Ruffo* something that it does not say.

46 In summary, the Council's investigative power is strictly statutory. This means that if the Act were to be repealed, the Council and, certainly, the chief justices would not be empowered to conduct inquiries or investigations, summon witnesses and compel them to give evidence during these investigations or inquiries. The only procedure provided for by the Constitution to remove a superior court judge from office is that set out in subsection 99(1) of the *CA 1867*.

> The nature of powers
>
> 47 With regard to the second criterion, the appellant claims that the powers and jurisdiction of its members are judicial in nature. In that respect, the appellant argues that the exercise of those powers is not subject to judicial review. In support of this argument, the appellant draws this Court's attention to various passages from, notably, *Therrien (Re)*, 2001 SCC 35 (*Therrien*) and *Valente v. The Queen*, [1985] 2 S.C.R. 673 (*Valente*). It also states that the motions judge was wrong to distinguish this case from *Minister of Indian Affairs and Northern Development v. Ranville et al.* [1982] 2 S.C.R. 518 (*Ranville*) on the sole ground that the Council's powers are exercised collectively. The appellant further argues that the fact that Council members can have substitutes and the fact that lawyers can sit on inquiry committees established by the Council is in no way determinative.
>
> 48 These arguments must be rejected.

In its decision, the court distinguished between "investigative" powers and "judicial" powers[32] and rejected the Council's arguments that it fell within the exception contained in section 2 of the *Federal Courts Act* relating to section 96 of the *Constitution Act, 1867* or the deeming provision contained in section 63(4) of that Act.[33]

C. The law of groups[34] or private contracts

Traditionally, there has been a separation between public functions derived from statutory authority (with respect to which public law remedies and judicial review are generally available) and private functions derived from contractual arrangements (with respect to which public law remedies and judicial review are generally not available).

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32. At paras. 49 to 68.

33. At paras. 75 to 96.

34. The term used by Justice Perell of the Ontario Superior Court of Justice in the Ontario trilogy of cases.

1. Three recent Ontario cases

A trilogy of cases from Ontario discusses the availability of judicial review to decisions made by private groups or organizations. The applications for judicial review in *Arriola v. Ryerson Students' Union*,[35] *Naggar v. The Student Association at Durham College and UOIT*,[36] and *Zettel v. University of Toronto Mississauga Students' Union*[37] were heard together and all dealt with applications for judicial review brought by students of publicly funded universities and members of student unions. In decisions released simultaneously, all three applications were dismissed.

The cases dealt with applications for judicial review of decisions by student unions or associations refusing to officially recognize campus clubs organized by the applicants. Justice Perell of the Ontario Superior Court of Justice dismissed the applications on the basis that the principles of private law, not public law, applied. In *Arriola*, he stated:

> 49 Unless they are sufficiently infused with a public element, the activities and decisions of associations be they incorporated or unincorporated voluntary associations, including charities, social clubs, fraternities, sororities, yacht, golf, tennis, curling clubs, etc., athletic organizations, schools, religious societies, trade unions, professional guilds, political parties, or NGOs (non-governmental organizations), are governed by private not public law.
>
> 50 Where the decisions or activities of an association are challenged in court, to determine whether the matter is within the purview of public law, the court should examine a variety of factors in the particular circumstances of the case, including: the character of the matter for which review is sought; the nature of the decision-maker and its responsibilities; the extent to which a decision is founded in and shaped by law as opposed to private discretion; the association's relationship to statutory schemes or governments or public authorities; the

35. 2018 ONSC 1246.

36. 2018 ONSC 1247.

37. 2018 ONSC 1240.

extent to which the association is an agent of government or is directed, controlled or significantly influenced by a public entity; the suitability of public law remedies; the existence of a compulsory power; and whether the activities or decisions of the association has a significant public dimension.

. . .

53 Where the affairs of an association are governed by private law, a court has only a limited jurisdiction to review the conduct and decisions of associations, and the court will only do so if a significant private law right or interest is involved. If a significant private law right or interest is involved; for example if a member of the association has been expelled or lost his or her membership status, been deprived of his or her membership privileges, or his or her ability to pursue vocations and avocations associated with the association, the court does not review the merits of the association's conduct or decision but reviews whether the purported expulsion or loss of membership or of membership privileges was carried out according to the applicable rules of the association and with the principles of natural justice,[38] and without *mala fides*.

54 The court may get involved in the affairs of an association when the matter is of sufficient importance to deserve the intervention of the court and where the remedy sought is susceptible of enforcement by the court. The court retains a limited jurisdiction to review the procedural integrity of the association's action even if the constitution or rules of the association purport to oust any jurisdiction in the court. The court may decline its jurisdiction and treat the court proceeding as premature where it is shown that internal procedures and remedies of the association have not been exhausted.

55 The court has the jurisdiction to enforce the contractual rights between an association and it members and the contractual rights of the members between or among themselves. The court has the jurisdiction to interpret the contracts that define the rights of the members in respect of the association's operations. The relationship between national associations and their incorporated local units is contractual and the members of the local association are taken to have accepted the national constitution as a contract binding on them and all the members both of the local and national organization. A provision in a local unit's constitution that the national constitution governs in cases of inconsistency means that a provision in the local unit's constitution would be invalid if inconsistent with the national constitution.

56 To determine whether the association has acted in accordance with its rules, the principles of natural justice and without *mala fides*, the court must understand the institutional framework of the association and the sources of its rules, which depending on

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38. But the Supreme Court of Canada's subsequent decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, made it clear that procedural fairness is not a stand-alone ground for judicial review in cases involving voluntary organizations. Therefore, this conclusion by Perell J. is arguably incorrect.

the association may have a variety of sources including contract, statute, and custom and tradition.

[Footnotes in original omitted.]

Perell J. summarized his conclusions as follows:

59 Although the public law remedies of *certiorari*, *mandamus*, and prohibition are not available for the judicial review of the activities of an association, courts use the private law remedies of injunctions and declarations instead. If a member of an association is expelled by the association in breach of contract, the court will grant a declaration that the association's action is *ultra vires* and it will grant an injunction if necessary to protect the contractual, employment, or proprietary rights of the member.

60 To conclude this discussion of the law of groups, the above survey of the case law about the law of groups reveals that courts tend to employ an analytical framework that progresses through a series of five issues.

61 First, the court determines whether the association that is before the court has a public stature or importance that exposes it to scrutiny in accordance with the principles of public administrative law, in which case the court judicially reviews the decision of the association in accordance with the principles of public law. Depending on the nature of the association, public law may include the application of the *Canadian Charter of Rights and Freedoms*.

62 Second, if the court concludes that public law does not apply, the court determines whether the group is the type of group in which the members of the group would not have envisioned that the members had a contractual relationship one to another, in which case, the court will decline to exercise its jurisdiction. For examples, the members of an informal book club, an informal social club, or a family tree club would not envision that their promises were legally enforceable because they would have no intention to contract. In other words, the second question for the court to decide is whether any private law applies to the association before the court.

63 Third, if the court concludes that private law applies, then the court determines whether there is some reason for the court to decline or postpone the exercise of its jurisdiction. For example, the court may decline to exercise its private law (or its public law) jurisdiction where the dispute resolution mechanisms of the association have not been exhausted.

64 Fourth, if the court concludes that private law applies and there is no reason to decline to exercise the court's jurisdiction, the court determines whether the members of the group have breached the contract among the group and the members of the group.

> 65 Fifth, if the court concludes that private law applies and there is no reason to decline to exercise the court's jurisdiction, the court determines whether there has been any violation of the principles of natural justice.[39]

See also the decision in *Beaucage v. Métis Nation of Ontario*.[40]

2. A particular application: judicial review does not apply to political parties

In *Trost v. Conservative Party of Canada*,[41] a full panel of the Ontario Divisional Court held that a decision made by a political party was not subject to judicial review. The case involved an application by a former candidate for the leadership of the Conservative Party of Canada, Bradley Trost. Trost challenged a decision of the Leadership Election Organizing Committee fining him $50,000 for contravening the rules of the leadership contest. Trost argued that the decision made by the Committee was not taken by the appropriate official and applied for judicial review of the decision.

The panel[42] concluded that the Divisional Court lacked the jurisdiction to hear the application for judicial review (in this case, an application seeking an order in the nature of *certiorari* and *mandamus*) because:

- The matter arose from a contract. Trost had signed a contract in which he agreed to respect the leadership contest rules and abide by the disciplinary process.

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39. *Ibid.*

40. 2019 ONSC 633.

41. 2018 ONSC 2733.

42. Consisting of Morawetz, Swinton and Broad JJ.

- The decision-maker was a political party. Political parties are not governmental actors and they do not exercise public responsibilities. They are private organizations.

- The impugned decision was based on the rules of the leadership contest, not a law or regulation.

- The powers of political parties are not derived from the government; they are derived from the parties' own constitution and rules governing their relationship with their members.

- Political parties are not controlled or significantly influenced by public entities.

In making this decision, the Divisional Court expressly disagreed with a previous decision of the Ontario Superior Court which held that judicial review was available against a decision of the New Democratic Party made in the course of a leadership contest.[43]

43. *Graff v. New Democratic Party*, 2017 ONSC 3578.

3. Another particular application: judicial review not available in the context of the *Indian Residential Schools Settlement Agreement*

See *J.W. v. Canada (Attorney General),*[44] and the case comment by Paul Daly[45] querying whether a contextual approach about the nature of the function being exercised would be preferable to a categorical approach about whether the source of the power in question is statutory or contractual.

D. Prosecutorial discretion

The Federal Court recently held that the Director of Public Prosecution's decision not to offer an invitation to negotiate a remediation agreement[46] was not subject to judicial review. In *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*,[47] Justice Kane held that the Director's decision to offer—or not offer—a remediation agreement was made in the exercise of prosecutorial discretion and was not subject to judicial review. She also held that the Director, in its exercise of prosecutorial discretion, was not a federal board, commission

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44. 2019 SCC 20.

45. "The Limits of Public Law: *J.W. v. Canada (Attorney General)* in (2019) 32 *Canadian Journal of Administrative Law and Practice*.

46. Also known as a deferred prosecution agreement. Section 715.3(1) defines a remediation agreement as "*an agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of agreement*."

47. 2019 FC 282.

or other tribunal.[48] In her decision, Kane J. noted the negative consequences of importing administrative law principles into the criminal justice system.[49]

III. STANDING

A. Public interest standing

The issue of public interest standing has been addressed by the Supreme Court of Canada in two landmark decisions: *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*[50] and *Delta Air Lines Inc. v. Lukács*.[51]

Those cases make it clear that, in exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in the matter; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the matter before the courts.

This year, courts have granted public interest standing in a number of noteworthy cases:

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48. At paras. 162 to 173.

49. At paras. 82 to 86.

50. 2012 SCC 45.

51. 2018 SCC 2.

- In the first of a series of cases involving the same Applicant, *Democracy Watch v. Canada (A.G.)*,[52] Democracy Watch was granted public interest standing to apply for judicial review of the federal Conflict of Interest and Ethics Commissioner's Declaration of Agreed Compliance Measures relating to a voluntary conflict of interest screen of a Member of Parliament.

- In the second and third cases, Democracy Watch was granted public interest standing in two recent cases dealing with applications for judicial review of the Governor in Council's appointments of Mario Dion as the federal Conflicts of Interest and Ethics Commissioner and of Nancy Belanger as the Commissioner of Lobbying.[53]

- In the fourth case, *Democracy Watch v. Canada (Attorney General)*,[54] Democracy Watch was granted public interest standing to apply for judicial review of a decision of the interim Commissioner of Lobbying about whether the Aga Khan had breached the Lobbyist's Code of Conduct by hosting Prime Minister Trudeau and his family and friends on a private island.

- In *Alford v. Canada (Attorney General)*,[55] the Ontario Court of Appeal reversed a decision of the Ontario Superior Court which denied public interest standing to

52. 2018 FCA 194.

53. *Democracy Watch v. Canada (A.G.)*, 2018 FC 1290 and *Democracy Watch v. Canada (A.G.)*, 2018 FC 1291.

54. 2019 FC 388.

55. 2019 ONCA 657.

the appellant to advance a challenge to the *National Security and Intelligence Committee of Parliamentarians Act* on the grounds that it contravened the principles of parliamentary privilege. In granting public interest standing, the court held that the appellant:

> 4 ...raises a serious issue, suitable for adjudication. He has demonstrated a genuine interest in this issue, having published on the topic and having participated in committee hearings relating to the legislation. The challenge he wishes to bring is a reasonable and effective way to bring the matter before the court. He is highly competent and able to represent the constitutional issues at stake, and clearly motivated to do so. There can be no concern that he is a busybody or that his interest is purely academic. He sees this challenge as an issue of public importance impacting on fundamental principles of democracy.

Public interest standing was denied, however, in *Zoocheck Canada Inc. v. Alberta (Minister of Agriculture and Forestry)*.[56] In that case, the Court of Appeal of Alberta upheld a lower court decision which denied Zoocheck Canada Inc. public interest standing to apply for judicial review of a decision of the Minister of the Environment on the basis that all three factors weighed against granting public interest standing.

B. Private interest standing

Of course, the issue of private interest standing has also received judicial attention.

56. 2019 ABCA 208.

1. *Makis*

In *Makis v. College of Physicians and Surgeons, Complaint Review Committee*,[57] the applicant applied for judicial review of a decision of the Complaint Review Committee to dismiss a complaint he filed against a colleague. The College of Physicians and Surgeons challenged the applicant's standing, arguing that the *Health Professions Act (Alberta)* provides for an internal appeal process but no further right of appeal to the court and that a complainant who has been afforded an appeal under a professional regulatory statute has no standing to apply for judicial review on the merits when a complaint has been dismissed, except on the grounds of procedural fairness.

Justice Sulyma of the Court of Queen's Bench of Alberta accepted the College's argument and held that the applicant, being the complainant in a matter that was dismissed, did not have standing to challenge the reasonableness or merits of the decision to dismiss the complaint. His only standing was to challenge the procedural fairness of the decision and no breach of the duty of fairness had been shown.

Leave to appeal Justice Sulyma's decision was granted on September 13, 2019, but only on the issue of whether there had been a breach of procedural fairness.[58]

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57. 2019 ABQB 582. See also *Tran v. College of Physicians and Surgeons of Alberta*, 2018 ABCA 95.

58. 2019 ABCA 341.

2. *AUPE*

The Alberta court also addressed private interest standing in *Alberta Union of Provincial Employees v. Northern Alberta Institute of Technology*.[59] In that case, the court upheld a decision of the Alberta Labour Relations Board that the Union did not have standing to challenge the constitutionality of section 12(1)(ii) of the *Employee Relations Act (Alberta)* because it excluded certain employees from the bargaining unit contrary to the employees' right to freedom of association under section 2 of the *Charter*.

The court held that the Union had no standing to assert collective rights on behalf of the excluded employees.

3. *HE v. APEGA*

In *HE v. APEGA Appeal Board*,[60] Justice Khullar of the Alberta Court of Appeal added the Investigative Committee which had investigated and prosecuted the applicant before he was found guilty of unprofessional conduct as a respondent in the appeal of the decision. The decision finding the applicant guilty of misconduct was made by the Discipline Committee and was upheld by the Appeal Board. The applicant named only the Appeal Board as a respondent in his appeal to the court. The Appeal Board applied to have the Investigative Committee added as a respondent. Justice Khullar was satisfied that she had the power as a single justice to add the Investigative Committee as party in that the court has the power

59. 2018 ABQB 236.

60. 2019 ABCA 298.

to control its own processes.[61] She concluded that the importance of providing an adversarial context for the appeal panel strongly favoured adding the Investigative Committee as a respondent and that the Investigative Committee was likely the best-positioned and only party to make certain arguments responding to the appeal.

IV. PROCEDURAL FAIRNESS

A. Adjudicative independence, bias, consultation and preparation of reasons

The case of *Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)*[62] is a fascinating decision in which the applicant received an anonymous letter stating that the executive chair of the former Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO") had improperly interfered with a decision of the Licence Appeal Tribunal ("LAT") that the applicant did not qualify for enhanced compensation for having suffered "catastrophic impairment" in a motor vehicle accident. Following receipt of the letter, the applicant attempted to obtain more information about the decision-making process and ultimately applied for judicial review of the decision.

The Ontario Divisional Court granted the applicant's application and set aside the decision of the LAT, holding that the LAT's decision-making process did not meet the minimum standards required to ensure the existence and appearance of adjudicative independence.[63]

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61. At para. 12.

62. 2019 ONCA 518.

63. 2018 ONSC 3790.

The court made no finding on whether an actual impropriety had occurred. The LAT and SLASTO appealed to the Ontario Court of Appeal.

The Court of Appeal dismissed the appeal. The court rejected the appellant's argument that the Divisional Court had incorrectly articulated and applied the test for reasonable apprehension of bias by using the term "informed, cautious observer" in place of "informed person". The court stated that while it was "*unfortunate that the term was used, as it may appear to introduce an unknown element to the test ... on a review of the court's reasons as a whole, it is plain that it correctly articulated the test for a reasonable apprehension of a lack of independence...*".[64]

The court then went on to discuss the law regarding consultations in the course of preparing reasons and the trilogy of Supreme Court of Canada decisions on the issue.[65] The court stated:

> 27 The guiding principle from the trilogy is that the decision-maker must be free to decide cases "in accordance with his own conscience and opinions": *Consolidated-Bathurst*, at p. 332. *Consolidated-Bathurst* establishes that discussions with colleagues are permissible even though they raise the possibility of "moral suasion," and that adjudicators are entitled to consider the opinion of their colleagues in the interest of adjudicative coherence: at pp. 331-33. The court also recognized that consultation could allow the adjudicator to benefit from the acquired experience of the entire board and foster coherence in the board's jurisprudence: at pp. 326-28. At the same time, the court concluded that any procedure or practice that unduly restricted independence would be contrary to the rules of natural justice: at p. 323. Accordingly, procedures that "effectively compel or induce" decision-makers to decide against their own conscience and opinions are impermissible: at p. 333.

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64. At para. 24.

65. *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] S.C.R. 952, and *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4.

28 To reconcile the demands of decision-making by administrative tribunals with procedural fairness, the court held that full-board consultation was permissible if accompanied by appropriate safeguards. As Gonthier J. stated, the question is whether the "safeguards attached to this consultation process are...sufficient to allay any fear of violations of the rules of natural justice": *Consolidated-Bathurst*, at para. 53. *Consolidated-Bathurst* establishes that the fact that the board's chair or other board members lack any *de jure* power to impose their opinion on other board members is not a sufficient safeguard, as procedures may still "effectively compel or induce" members to decide against their conscience and opinions: at p. 333. Accordingly, the court must examine the "actual structure of the machinery created to promote collegiality" and "determine the *actual situation* prevailing in the body in question": *Tremblay*, at pp. 968 and 973 (emphasis in original).

29 The Supreme Court also outlined specific rules that govern the practice of full-board consultation. In *Consolidated-Bathurst*, the court found it "obvious" that "no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision": at p. 332. Likewise, in *Tremblay*, the court found that the tribunal president's ability to refer a matter for plenary discussion without the permission of the adjudicator was a sufficient basis to find an appearance of a lack of independence: at p. 974. As a result, *Ellis-Don* held that it was a basic principle that only the adjudicators could request consultation and that their superiors in the administrative hierarchy could not impose it on them: at para. 29. This conclusion is consistent with leading treatises. As Sara Blake states in *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis, 2017), at pp. 116-117:

> A process for compulsory consultation... is not acceptable. The decision to consult must be up to the decision makers. It should not be imposed on them. If they do not wish to consult, they must be truly free to choose not to do so. Compulsory consultation creates an appearance [of] constraint on their freedom to decide the case.

30 The appellants attempt to distinguish the LAT's review process from the full-board meetings the trilogy considered on two bases. First, they submit that the review process was purely focused on the quality of the written decision, unlike the full-board meetings that involved reviewing policy choices and the ultimate result. Second, they submit that the same moral suasion concerns are not present in the review process because only a maximum of four reviewers are involved and it is a simple editorial exercise. I would reject these submissions for the following reasons.

31 First, it is inaccurate to characterize the review process as a purely qualitative or editorial exercise. Mr. Cowan's evidence was that reviewers did comment on whether the correct legal test and jurisprudence has been identified and applied. *Ellis-Don* emphasized that the procedural safeguards were required to protect a decision-maker's ability to decide questions of law independently from compulsion by other members of the tribunal: at para. 29.

> 32 Second, the fact that fewer people were involved in the review than in the full-board consultations the trilogy considered does not assist the appellants. The fact remains that the executive chair occupies the most superior level of authority within the LAT and SLASTO. It should be recalled that the executive chair undertakes any reconsideration of the LAT adjudicators' decisions and holds power over the reappointment of individual adjudicators under s. 14(4) of *ATAGAA*. That subsection provides:
>
> > Chair to recommend appointments, reappointments
> >
> > No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.
>
> 33 The appellants submit that the moral suasion concern related to the executive chair's power over reappointment would be equally strong even if the adjudicator requested review by the executive chair. This submission should be rejected. As *Tremblay* and *Consolidated-Bathurst* recognize, adjudicators are more likely to feel free to decide according to their own conscience and opinions if the consultation occurs at their own request: *Consolidated-Bathurst*, at pp. 334-335 and *Tremblay*, at p. 974.
>
> 34 Third, it is also important to note that this court and other courts have found the principles from the trilogy on full-board consultation relevant to cases dealing with other review processes for draft decisions. In the context of review of draft reasons by counsel to a disciplinary committee, this court in *Khan* relied on *Tremblay* for the principle that compulsion to consult with others may cause the appearance of independence to be lost: *Khan*, at pp. 673-74. Similarly, in *Bovbel v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 563 (C.A.), the Federal Court of Appeal relied on *Consolidated-Bathurst* and *Tremblay* to evaluate whether the Immigration and Refugee Board's practice of encouraging board members to submit their reasons for review by staff lawyers gave rise to a reasonable apprehension of bias.
>
> 35 I would therefore reject the submission that the Divisional Court erred in its application of the trilogy.

The court also rejected the appellants' argument that the Divisional Court had erred by considering the fact that SLASTO lacked a written peer-review policy, contrary to its enabling legislation:

38 I accept that ss. 7-8 of *ATAGAA* do not require SLASTO to publish a written peer review policy. Section 7(2) of *ATAGAA* only requires a tribunal to describe the functions of the members, the skills and qualifications required to be appointed a member, and a member code of conduct. SLASTO did publish a code of conduct, as well as descriptions of the vice-chair and member positions. The appellants are also correct that the Supreme Court upheld the Ontario Labour Relations Board's practice of full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* despite the Board's lack of a written policy governing those consultations, and that the Supreme Court found a reasonable apprehension of bias in *Tremblay* even though there was a written policy that protected adjudicative independence.

39 Despite the foregoing, the Divisional Court was still entitled to find the absence of such a policy significant when it considered the adequacy of LAT's procedural safeguards. The absence of a formal policy protecting the adjudicator's right to decline to participate was significant in an environment where the procedure manual made no reference to the voluntariness of review by the executive chair and Mr. Cowan's own evidence was that adjudicators were expected to participate in the review process. While Mr. Cowan's evidence was that there was no means to compel adjudicators to participate, he did not give evidence that SLASTO communicated to adjudicators that they were free not to have their drafts reviewed by the executive chair. The principal safeguard the appellants point to is the executive chair's inability to lawfully compel the adjudicator to change her mind. However, *Consolidated-Bathurst* establishes that this is not a sufficient safeguard: at p. 333.

40 Further, the absence of a written policy on full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* and its presence of such a policy in *Tremblay* do not assist the appellants. The Ontario Labour Relations Board's practice of full-board consultations was well-known to board members and litigants before the board, as it was described in a 1971 government report and in legal treatises: *Consolidated-Bathurst*, Sopinka J., dissenting (but not on this point), at pp. 290-91. In particular, both board members and litigants knew that only the hearing panel could request a full-board meeting and it could not be centrally imposed: Gonthier J., writing for the majority, at pp. 316-17.

41 In contrast, in this case, the Divisional Court found there was no evidence that adjudicators were aware that they had the right to refuse a review by the executive chair and that the process gave them no opportunity to refuse: at para. 28. The absence of a written policy was thus significant because it confirmed that the LAT had not communicated to adjudicators that they had the right to refuse. As for *Tremblay*, all it establishes is that a formal policy that protects adjudicative independence will not be an adequate safeguard if it is disregarded in practice: at pp. 972-73. The presence of the formal policy likely would have been a relevant consideration in *Tremblay* but for the evidence that the tribunal was disregarding it in practice.

42 The SLASTO code of conduct and the position descriptions for the member and vice-chair positions undermine the appellants' position. The appellants point to the guarantee of adjudicative independence in these documents. However, the code of conduct simply states that "[m]embers should be independent in decision-making" and makes no mention of a member's right to refuse a review by the executive chair. This provides no evidence to undermine the Divisional Court's finding that members were not advised of their right to

> refuse. Moreover, the member position description confirms the Divisional Court's finding that members were expected to submit their decisions for peer review and were not advised of their right to refuse. Under the heading "Key Duties," the description states "A Member, where appropriate ... submits draft decisions for, and participates in, peer and other decision reviews before they are issued in accordance with SLASTO policy".

Finally, the court rejected the appellants' argument that the Divisional Court had failed to apply a holistic approach in rendering its decision and held that the Divisional Court had correctly found that the executive chair's imposition of the review on the adjudicator's decision breached the rules set out in the trilogy and that the review process lacked appropriate procedural safeguards.

B. Applicability to private organizations

The trilogy of cases from Ontario discussed above—*Arriola v. Ryerson Students' Union*,[66] *Naggar v. The Student Association at Durham College and UOIT*,[67] and *Zettel v. University of Toronto Mississauga Students' Union*[68]—suggest that the rules of natural justice apply to private organizations, albeit to a modest extent (even if judicial review is not the appropriate remedy: see *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*):[69]

> 65 Fifth, <u>if the court concludes that private law applies and there is no reason to decline to exercise the court's jurisdiction, the court determines whether there has been any violation of the principles of natural justice</u>.

66. 2018 ONSC 1246.

67. 2018 ONSC 1247.

68. 2018 ONSC 1240.

69. 2018 SCC 26.

In discussing the fifth point to the case at hand, Perell J. concluded:

> 72 There also have been no breaches of natural justice. As the survey of the case law above notes, the principles of natural justice as they apply to associations are flexible and the scope of what is required for due and fair process depends upon the nature of the association and the nature of what is in issue.
>
> 75 There is no entitlement to Student Group status, and a very modest procedure is all that is required to satisfy the requirements of natural justice. In the case at bar, RSU's procedures were ample and perhaps by comparison more fulsome than the procedures in the companion cases to this judgment.
>
> 76 I see no bias or *mala fides*. It is unfortunate that Ms. Bartlett received threatening calls while Mr. Arriola's and Ms. Godlewski's appeal was pending, but the issues that concerned the RSU were already out in the open and being debated between Mr. Arriola and the RSU officials before the threats.
>
> 77 The evidence does not support any suggestion of *mala fides* or arbitrary, capricious decision-making. RSU had policies and procedures, and it was entitled to question Mr. Arriola and Ms. Godlewski about their plans for MIAS on campus. The RSU officers were not satisfied by the answers, and they were entitled to make up their own mind without being second-guessed by the court.
>
> 78 In my opinion, there was no breach or violation of the private law principles that govern the relationships among associations like the RSU and its members.
>
> [Footnotes omitted; emphasis added.]

V. CONSTITUTIONAL AND *CHARTER* ISSUES

The interplay of administrative law and constitutional law (including the *Charter*) continues to attract judicial attention.

A. *Reference re pan-Canadian Securities Regulation*

In *Reference re Pan-Canadian Securities Regulation*,[70] the Supreme Court of Canada was considering the constitutionality of the implementation of the pan-Canadian securities regulation, which aimed to establish a national cooperative capital markets regulatory system. The system involved the passing of both provincial (or territorial) legislation, which would deal with the day to day aspects of the securities trade, and federal legislation, which would deal with preventing and managing systemic risk and establish criminal offences relating to financial markets and establish a national securities regulator. The issues were whether the proposed system was unconstitutional because it a created a single regulator with the power to pass regulations and whether the proposed federal legislation fell with Parliament's jurisdiction over trade and commerce.

In a unanimous decision, the Supreme Court of Canada held that the proposed system was constitutional. It did not improperly fetter the provincial legislatures' sovereignty or entail an impermissible delegation of law-making authority. Likewise, the draft federal legislation did not exceed Parliament's power over trade and commerce.

B. *Mazraani*

The Supreme Court of Canada addressed language rights—and the right for participants to speak freely in the language of their choice in court proceedings—in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*[71] The appellant had been terminated from his position at Industrial Alliance and, because he was classified as self-employed, the

70. 2018 SCC 48.

71. 2018 SCC 50.

Canada Employment Insurance Commission found that he did not qualify for employment insurance. The Canada Revenue Agency upheld the Commission's decision. The appellant, who was English speaking, appealed the decision to the Tax Court. In those proceedings, several witnesses and the respondent's legal counsel asked to speak in French but the judge persuaded them to speak in English because the appellant did not understand French.

The Tax Court ruled in favour of the appellant. Industrial Alliance appealed to the Federal Court of Appeal, which allowed the appeal on the basis that the language rights of the witnesses and counsel had been violated and ordered a new trial. The appellant appealed to the Supreme Court of Canada.

In a unanimous decision, the Supreme Court of Canada upheld the Federal Court of Appeal's decision. The court noted the constitutional protection of language rights provided in section 133 of the *Constitution Act, 1867*, section 19 of the *Charter*, as well as sections 14 and 15 of the *Official Languages Act*.

C. *Begum*

In *Begum v. Canada (Minister of Citizenship and Immigration)*,[72] the Federal Court of Appeal reviewed the correct legal test to apply in determining whether an applicant's right to equality under section 15 of the *Charter* had been violated.

> 48 . . .the Court in *Kapp* re-articulated the three-stage analysis into a two-step process: 1) Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground(s)?; and 2) Does the distinction impose a burden or deny a benefit by perpetuating or reinforcing a prejudice or a disadvantage?

72. 2018 FCA 181.

> 49 This approach has since been consistently applied: see *Withler* at para. 30; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 at para. 188; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61 at paras. 186, 324 and 418 [*Quebec v. A*]; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 19-20 [*Taypotat*]; *Centrale des syndicats du Quebec v. Quebec (Attorney General)*, 2018 SCC 18 at para. 22. Acknowledging that the concept of human dignity is abstract and subjective and therefore difficult to operationalize, and that a comparator analysis is somewhat artificial, the Court emphasized that the four contextual factors set out in Law must be seen not as a formalistic test, but as a way of focusing on the central concern of section 15, that is, combating discrimination both in terms of perpetuating disadvantage and stereotyping (*Kapp* at paras. 23-24).

The Supreme Court of Canada refused leave to appeal on April 18, 2019.

D. *Schmidt*

In *Schmidt v. Canada (Attorney General)*,[73] the Federal Court had dismissed the applicant's application for declaratory relief concerning the meaning of three legislative provisions[74] that required a Minister to "ascertain" or "examine" whether proposed legislation was "inconsistent" with or unduly trespassed on the rights guaranteed by the *Charter* or the *Canadian Bill of Rights*. The Federal Court of Appeal upheld that decision, with the following interesting remarks concerning the parliamentary process in enacting legislation that is consistent with the Constitution and the *Charter*:

> 78 Part of the surrounding context is what the House of Commons has adopted for itself when vetting private members' bills, which are not subject to the examination provisions. The House will only pass bills that clearly do not violate the *Charter*: see the affidavit evidence in the appeal book, vol. 2 at pp. 457-458 and 927-928. If the appellant's interpretation of the examination provisions is correct, it would seem perverse that the House would adopt a laxer standard than the examination provisions require for government

73. 2018 FCA 55 (*per* Stratas J., concurred in by Near and Rennie JJ.A.).

74. Two statutory provisions and one regulation.

bills. More likely is that the House adopted a standard commensurate with the one in the examination provisions.

79 Another important element of context is found in legislative history. In 1960, Parliament enacted the examination provision found in section 3 of the *Canadian Bill of Rights*. From 1960 to 1985, consistent with the high threshold for reporting an inconsistency to the House of Commons, only one report under this examination provision was made. In 1985, Parliament amended the *Department of Justice Act* to include the examination provision now found in section 4.1. If Parliament believed that the reporting threshold in section 3 of the *Canadian Bill of Rights* was too high, it could have enacted a different threshold in section 4.1 of the *Department of Justice Act*. It did not. It used wording that is virtually identical to that in section 3 of the *Canadian Bill of Rights*.

80 An important part of the context that affects the interpretation of the examination provisions is the relationship between the executive, Parliament, and the judiciary—in other words, the separation of powers, a fundamental part of our constitutional arrangements: *Ref. re Remuneration of Judges of the Prov. Court of P.E.I.; Ref. re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 54. The examination provisions were enacted against this backdrop and must be interpreted in a manner consistent with it.

81 I agree with the Federal Court's description of this backdrop (at paras. 277-278):

> To each his own obligation: the Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities.
>
> As Deputy Minister of Justice Pentney said in his affidavit at paragraph 84 and during his testimony before the Court:
>
> > The examination standard must therefore reflect the role of Parliament in our constitution. Elected governments shape policy and introduce legislation as they think best, while remaining mindful of the outer boundaries set by the *Constitution* and by guaranteed rights. Parliament debates and enacts legislation, including giving consideration to its consistency with the *Constitution* and the *Bill of Rights*; Courts have the ultimate responsibility to decide whether legislation is constitutional. The credible argument standard is intended to allow each Branch of Government to perform its appropriate role in ensuring that guaranteed rights are respected.
>
> This system is referred to as "checks and balances". The actions of each branch, when they assume their respective roles, create multiple checks and balances, all

> of which aim to ensure that our laws are compliant with the rights guaranteed by the *Charter* and the *Bill of Rights*. As Professor emeritus Peter W. Hogg was referred to saying previously [Peter Hogg, *Constitutional Law of Canada*, 5th ed., vol. 2 (Scarborough: Carswell, 2007), referred to at para. 189 of the Federal Court's reasons], the main safeguards of civil liberties in Canada are the democratic character of Canadian political institutions, the independence of the judiciary, and a legal tradition of respect for civil liberties. Each component has a vital role to play in ensuring our laws are properly enacted and respect our rights.

82 It is no part of the formal job of the Minister of Justice and the Attorney General of Canada to give legal advice to Parliament regarding whether or not proposed legislation is constitutional. Neither the Minister of Justice nor the Attorney General of Canada are legal advisors to Parliament.

. . .

84 Parliamentarians may ask the Minister and the Attorney General for their views on the constitutionality of proposed legislation and the Minister and the Attorney General may choose to answer. But Parliamentarians have access to legal advice and support from Law Clerks and other sources: see the affidavit evidence at appeal book, vol, 1 at pp. 399-421. It is not as if Parliamentarians are bereft of access to legal advice and so the examination provisions were enacted to give them that access.

85 Under our system of government, the executive is accountable to the elected members of Parliament and, should legal proceedings be later brought, to the judiciary. The executive has the power to propose policies to Parliament in the form of bills for Parliament's consideration. It is entitled to propose bills that may violate *Charter* rights and freedoms but which pursue pressing and substantial objectives and, thus, may be saved under section 1.

86 A good example of this is seen by *An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)*, S.C. 1997, c. 30, which amended the Criminal Code to include ss. 278.1 to 278.91, which deal with the production of records in sexual offence proceedings. Before this Act was enacted, it was known as Bill C-46. In broad measure, Bill C-46 implemented the dissenting reasons—not the majority reasons—of the Supreme Court in its *Charter* decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235. Thus, it ran the substantial risk of being found to be unconstitutional. But Bill C-46 was found to be constitutional: *R. v. Mills*, [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1.

87 Put bluntly, the executive is not limited to proposing measures that are *certain* to be constitutional or *likely* to be constitutional. Rather, as a constitutional matter, in the words of the Federal Court (at para. 177), it is entitled to put forward proposed legislation that, after a "robust review of the clauses in draft legislation" is "defendable in Court." As *Mills* demonstrates, this is not a standpoint unfriendly to constitutional standards. Again, as mentioned at para. 36 above, the *Charter* is a document suffused with balances—not

unequivocal, unqualified guarantees of rights and freedoms. And it is a standpoint that recognizes that after proposed legislation is placed before Parliament, there is considerable scope for investigation, questioning and debate in Parliament as to how it may be viewed against guaranteed rights and freedoms; in particular, we see this in the proceedings and often rich deliberations of Parliamentary Committees on proposed legislation. And in the end result, courts have their constitutional role to play too.

88 The Federal Court put it well when it stated that under our system of government, consistency with guaranteed rights is not the sole responsibility of the Executive, the Minister of Justice and the Attorney General of Canada. Rather (at para. 279), "it is an ideal to be strived for collectively and attained through the concerted efforts of the three branches of government working towards a common goal."

89 Another contextual factor supporting the respondent's interpretation of the examination provisions is the nature of the public service and the conventions surrounding it. To administer and implement laws and to prepare legislative proposals that ministers wish to put to Parliament, the executive relies on the public service: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122 at p. 470 S.C.R. In Canada, public servants are subject to a convention of political neutrality: *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321 at p. 86 S.C.R.; preamble to the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13. This neutrality supports the threshold for reporting that the respondent urges upon us: one that supports the Minister in performing her duties and not one that purports to dictate how she should exercise her powers: see the evidence at appeal book, vol. 3 at pp. 1128-1129.

90 In my view, the respondent's view of the examination provisions is also supported by the nature of constitutional law and the giving of advice concerning it. Constitutional law is a variable, debatable and frequently uncertain thing.

91 Constitutional authorities are not necessarily good precedent in later cases. Courts can now depart more readily from earlier constitutional precedents: *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

92 The constitutional law can change. A few examples will suffice to show this. In section 15 of the *Charter*, compare *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; 170 D.L.R. (4th) 1 with *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 and *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 346. On subsection 24(2) and the exclusion of evidence, compare *R. v. Stillman*, [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193 and *R. v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 with *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. On the territorial scope of the *Charter*, compare *R. v. Cook*, [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 at paras 25 and 46-48 with *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 103-113. On the meaning of "detention" under section 10, compare *R. v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655 with *Grant*, above. On the use of *Charter* values,

compare *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 with *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 and with *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. On the scope of language rights, compare *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406 with *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193. On subsection 11(*b*) of the *Charter*, compare *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355 with *R. v. Morin*, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1 with *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Many more examples can be cited.

93 Adding to the uncertainty is the fact that the Supreme Court sometimes overrules its own constitutional authorities. Recent examples include *Carter*, above (effectively overruling *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342); *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (overruling *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513); *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 (overruling *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161); *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 (overruling *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193).

94 Sometimes, the methodology of analyzing a constitutional issue can change drastically or a different outcome is reached by characterizing the problem differently: for example, compare the analysis of so-called "positive rights" in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224, *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 and *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295. While section 7 of the *Charter* does not protect economic rights or a right to a job (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407, 124 D.L.R. (4th) 127), sometimes section 7 can have the effect of allowing a person to keep her job and the economic interests associated with it (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, 152 D.L.R. (4th) 577).

95 Sometimes definitive constitutional statements end up being not so definitive. In 2007, we all thought that the doctrine of interjurisdictional immunity could not apply to new situations and was restricted to those already covered by precedent: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. But in a few short years, we were proven to be wrong: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467.

96 Sometimes, despite decades of silence in the case law, constitutional rights, statuses and entitlements—never before imagined—simply pop up with little advance warning: see, *e.g.*, *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Reference re Supreme Court Act, ss. 5 and 6*, 2014

SCC 21, [2014] 1 S.C.R. 433. Sometimes rights are given exactly the meaning their framers intended: see, *e.g.*, *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18. But sometimes not: see, *e.g.*, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

97 And sometimes there is a stalemate on points of constitutional law: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 where the Court split 1-1-1-1-1; *R. v. Rahey*, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, where the Court split 2-2-2-2; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385 where six separate reasons were written by seven Justices.

98 And so far, only for convenience, I have restricted myself to Supreme Court jurisprudence, the jurisprudence at the top of the judicial apex. Much more fodder can be found in the jurisprudence of courts of appeal, to say nothing of first-instance courts. They also frequently revise, adjust and tweak their jurisprudence. And conflicts in their jurisprudence frequently arise and remain unresolved. This adds to the uncertain terrain the Minister must explore when she assesses proposed legislation under the examination provisions.

99 Parliament must be taken to have drafted the examination provisions knowing the practical nature of the Minister's task. Under the examination provisions, the Minister has to assess proposed legislation against the case law of many different jurisdictions: four federal courts, thirteen jurisdictions' courts of appeal, superior courts and provincial/territorial courts all supervising the vast and variable terrains of federal provincial, and territorial law. Obviously, the law may not be the same across Canada. In the absence of guidance from the Supreme Court on a point, courts of appeal may differ. Even where there is a controlling authority from the Supreme Court of Canada, courts of appeal may interpret and implement the authority differently. The outcome of a constitutional case may well depend on where the constitutional challenge is brought, something that simply cannot be predicted.

100 It also must be appreciated that under the examination provisions the Minister is assessing only proposed legislation. She does not know the nature of a constitutional challenge that might be brought against a provision with any degree of certainty. As is well-known, the outcome of constitutional litigation often turns on the facts of the case (*Mackay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385) but at the time she assesses proposed legislation, the Minister does not know the facts that may be offered in support of a challenge. She can only imagine possible challenges and speculate. This is a very difficult environment in which to make constitutional assessments with any certainty and to give any estimates of the probability of a finding of unconstitutionality.

101 One thing, however, is perfectly clear: even in this difficult, uncertain, speculative environment, some proposed legislation may be so deficient that the Minister can conclude with confidence that no credible arguments can be made to support it.

> 102 In the examination provisions, Parliament must be taken to have imposed an obligation on the Minister that the Minister can practically meet, not one that is impossible to meet.
>
> 103 So in conclusion, I ask this question: given the nature of constitutional law and litigation and the practical obstacles facing the Department of Justice, what is more likely? That the examination provisions require the Minister to reach a definitive view, settle upon probability assessments and report when she concludes that proposed legislation is "likely" unconstitutional? Or that the examination provisions require the Minister to report whenever there is no credible argument supporting the constitutionality of proposed legislation?
>
> 104 I would suggest the latter. Given the uncertain, difficult jurisprudential terrain of constitutional law and the time when the Minister is expected to assess proposed legislation, the only responsible, reliable report that could be given under the examination provisions is when proposed legislation is so constitutionally deficient, it cannot be credibly defended. I consider the Minister's view of what the examination provisions require to be acceptable and defensible. Indeed, as I have said earlier, I consider the Minister's view to be correct.

The Supreme Court of Canada denied leave to appeal *Schmidt* on April 4, 2019.

E. *Ouellette*

The case of *Ouellette v. Law Society of Alberta*[75] considered the availability of damages for an alleged *Charter* breach. Ouellette had been disbarred from the Law Society and his attempt to appeal the decision to the internal appeal body was late and he chose not to pursue the appeal. Instead, Ouellette chose to sue the Law Society seeking (1) a declaration that the Law Society's decision to disbar him was *void ab initio* due to long term, systemic bias against him, (2) reinstatement, and (3) *Charter* damages on the basis that the Law Society had violated sections 7 and 11(d) of the *Charter* by adhering to a process that was unfair and biased. The Law Society successfully applied to have the claim against it struck on the basis that there was no claim in law. Ouellette appealed that decision.

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75. 2019 ABQB 492, affirming 2018 ABQB 52.

Justice Phillips of the Alberta Court of Queen's Bench dismissed the appeal.[76] One of the grounds for dismissal was that the court was not the appropriate forum and that Ouellette had tried to circumvent the statutory appeal process. Phillips J. rejected the argument that the superior court was the more appropriate forum because it was the only forum in which *Charter* damages could be awarded. Justice Phillips held that neither section 7 or 11 were engaged in this case. Ouellette's life had not been threatened, there was no threat to his liberty and section 7 "does not guarantee economic interests in terms of the right to practise a chosen profession".[77] Nor does it protect a fair process in disciplinary proceedings. Likewise, there were no penal consequences to the Law Society's decision that would attract section 11 of the *Charter* as professional disciplinary proceedings did not trigger section 11.

F. *Yashcheshen*

In *Yashcheshen v. University of Saskatchewan*,[78] the Saskatchewan Court of Appeal held that section 15 of the *Charter* did not apply to the University's admission policy requiring applicants to its Faculty of Law to write the Law School Admission Test ("LSAT"). The applicant argued that she was unable to write the LSAT due to a disability and that the University's requirement violated her equality rights under section 15 of the *Charter*. The chambers judge denied the applicant's application. The Court of Appeal upheld that decision, finding that the *Charter* does not apply to the LSAT aspect of the admissions policy

76. Justice Phillips also dismissed the application made by the applicant's son for damages arising out of the loss of parental guidance.

77. At para. 52.

78. 2019 SKCA 67 (*per* Richards, C.J.S. with Caldwell and Leurer JJ.A. concurring).

because the University is not government and its admission policy to require an LSAT score was not governmental in nature.

VI. REMEDIES

Like last year, there have been some interesting cases discussing remedies this year.

- In *Canada (Public Safety and Emergency Preparedness) v. Chhina*,[79] the Supreme Court of Canada considered whether the prerogative remedy of *habeas corpus* is available from provincial superior courts, or whether the review/appeal process under the *Immigration and Refugee Protection Act* provides "a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus*" and is no less advantageous. In a 6 - 1 decision, the Supreme Court held that the applicant was entitled to have his application for *habeas corpus* heard and that the chambers judge had erred by declining jurisdiction.

- In *Calin v. Canada (Public Safety and Emergency Preparedness)*,[80] the Federal Court discussed the appropriate test for an interlocutory mandatory injunction in the context of a release from detention under the *Immigration and Refugee Protection Act*. The court noted that the test for mandatory interlocutory injunctions varies from the general test for injunctions in that the applicant is

79. 2019 SCC 29 (Karakatsanis, J. writing for the majority; Abella J. dissenting).

80. 2018 FC 731 (Mr. Justice Annis).

merely required to demonstrate an elevated threshold beyond that of the application not being frivolous or vexatious rather than that a serious issue is at stake. The court noted the test set out in the 2018 case of *R. v. Canadian Broadcasting Corp.*,[81] which dealt with a publication ban in a criminal law matter, entails "showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice". However, the court held that, in the context of detentions under the *Immigration and Refugee Protection Act*, the better test was whether there was "a likelihood or probability of success on the underlying application".

- *Nada v. Canada (Citizenship and Immigration)*[82] considered whether the Minister of Citizenship and Immigration is under a public duty to grant citizenship or whether it was proper to suspend the granting of citizenship pending resolution of an investigation regarding citizenship of the applicant's father. Justice Mosely held that the Minister's decision to suspend the granting of citizenship was reasonable, the Minister had no public duty to act and the test for *mandamus* was not met.

- *Ouellette v. Law Society of Alberta*,[83] discussed above, considered the availability of damages under section 24 of the *Charter* as well as other non-*Charter* remedies such as a declaration and reinstatement into the Law Society. The

81. 2018 SCC 5. See also *Moore v. The Law Society of British Columbia*, 2018 BCSC 386.

82. 2019 FC 590 (Mr. Justice Mosley).

83. 2019 ABQB 492, affirming 2018 ABQB 52.

applicant was a lawyer who had been disbarred from the Law Society and who alleged systemic bias against him and breach of his section 7 and 11 *Charter* rights. A Master had struck the applicant's claim as having no claim in law. The Alberta Court of Queen's Bench upheld that decision. On the issue of *Charter* damages, Justice Phillips held that sections 7 and 11 of the *Charter* did not apply but even if they did, damages would not be an appropriate remedy for the reasons set out in *Ernst v. Alberta Energy Regulator*:[84] specifically, that there was an adequate alternative remedy and that an award of damages would undermine the effectiveness of the Law Society and hinder effective governance. On the issue of private remedies, Phillips J. agreed with the findings of the Master that the Law Society did not owe a private law duty of care to the applicant who was an individual member of a profession alleging negligence in connection with a disciplinary hearing.[85]

VII. MISCELLANEOUS

A. Collateral attacks

In *Zoocheck Canada Inc. v. Alberta (Minister of Agriculture and Forestry)*,[86] the Court of Appeal of Alberta briefly addressed the issue of collateral attacks. The court held that an

84. 2017 SCC 1.

85. Justice Phillips also dismissed the application made by the applicant's son for damages arising out of the loss of parental guidance.

86. 2019 ABCA 208.

application for public interest standing to bring an application for judicial review of the Minister's decision to renew a zoo's permit pursuant to the *Wildlife Act Regulation* was not a collateral attack on a previous proceeding seeking a declaration that the zoo was in breach of section 2 of the *Animal Protection Act*. The fact that the proceedings were both motivated by the same concern and raised similar issues did not make the second application a collateral attack on the first.

In *Ouellette v. Law Society of Alberta*,[87] the Court of Queen's Bench held that allowing the applicant to sue the Law Society for *Charter* damages and other private law remedies instead of exhausting the statutory appeal process would amount to condoning a possible collateral attack.

B. Issue estoppel

The case of *Student X v. Acadia University*[88] provides a useful discussion on issue estoppel. A student accused the applicant of sexually assaulting her, and filed a disciplinary complaint pursuant to the provisions contained in the university's Non-Academic Judicial Policy. The applicant was ultimately found not guilty. The complainant then filed a complaint with the school's Equity Office. The applicant sought an injunction against the investigation of the equity complaint on the basis that the matter was *res judicata* and an abuse of process.

Justice Warner of the Nova Scotia Supreme Court noted that the facts of this case were unique in that they involved two proceedings before two different administrative tribunals

87. 2019 ABQB 492, affirming 2018 ABQB 52.

88. 2018 NSSC 70.

(as opposed to most cases which dealt with two court proceedings or one administrative proceeding followed by a court proceeding). The accepted approach to issue estoppel set out in *Danyluk*, therefore, had to be slightly modified to take into account additional considerations, including the extent to which the administrative processes (evidentiary and truth-finding procedures and standards) differed between the two tribunals. Warner J. ultimately dismissed the application for an injunction and the university was allowed to proceed with its investigation under its Equity Policy.

C. Statutory interpretation

The case of *Schmidt v. Canada (Attorney General)*[89] was discussed above under the heading "Constitutional and *Charter* Issues". However, the case is also worthy of note for its analysis of the principles of statutory interpretation that govern when it is the decision-maker, not the courts, interpreting legislative provisions:

> 24 The Supreme Court has given much guidance on how courts should interpret legislative provisions. However, it has never definitively and explicitly told us how administrative decision-makers should interpret legislative provisions. Implicitly, though, it has. Without exception, when the Supreme Court has conducted reasonableness review of administrative decision-makers' interpretations of legislative provisions, it assesses their interpretations using the methodology it has told courts to use.
>
> 25 What is that methodology? Legislative provisions are to be interpreted in accordance with their text, context and purpose: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.
>
> 26 In undertaking the interpretive task we must also be mindful that these provisions are to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects": *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12. And both the

89. 2018 FCA 55.

English and French versions of each statute are equally authoritative statements: *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 54.

27 We analyze the text, context and purpose with a view to discerning "what the legislation authentically means": *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at para. 48; *Canada v. Cheema*, 2018 FCA 45 at para. 80.

28 This must be done objectively and dispassionately without regard to extraneous considerations such as personal policies or political preferences. We must not drive for results we personally prefer, fasten onto what we like and ignore what we don't, or draw upon what we think is best for Canadians or Canadian society. Common to these practices is an improper focus on what we want the legislation to mean rather than on what the legislation authentically means: *Williams*, at para. 48.

29 Put another way, "the proper focus when interpreting legislation is, and must always be, on what the legislator actually said, not on what one might wish or pretend it to have said": *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 202 (per Brown J., McLachlin C.J. concurring, the other Justices not disagreeing with the statement).

30 This Court recently put this same idea as follows:

> Judges are only lawyers who happen to hold a judicial commission. Just like the people they serve, judges are unelected and are bound by legislation. What, then, is the right of judges to avert their eyes from the authentic meaning of legislation enacted by the elected and, instead, to choose a meaning that accords with their own particular views[...]
>
> (*Cheema* at para. 79; see also *Williams* at para. 49.)

31 On a similar note, this Court also put it this way:

> Absent a successful argument that legislation is inconsistent with the Constitution, judges—like everyone else—are bound by the legislation. They must take it as it is. They must not insert into it the meaning they want. They must discern and apply its authentic meaning, nothing else.
>
> How do we go about this? As the authorities suggest, we are to investigate the text, context and purpose of the legislation as objectively and fairly as we can. On this, especially when investigating the purpose, we have assistance: the *Interpretation Act*, R.S.C. 1985, c. I-2, canons of statutory construction known to both legislative drafters and courts, and other legitimate aids to interpretation such as—in certain circumstances and with appropriate caution—extraneous,

> contemporaneous materials (e.g., regulatory impact or official explanatory statements), legislative debates, and legislative history.
>
> (*Williams* at paras. 50-51.)

32 In interpreting legislation, one can assess the likely effects or results of rival interpretations to see which accords most harmoniously with text, context and purpose. This is appropriate:

> The judge is assessing effects or results not to identify an outcome that accords with personal policies or political preferences. Rather the judge is assessing them against the standard, accepted markers of text, context and purpose in order to discern the authentic meaning of the legislation. For example, if the effect of one interpretation offends the legislative purpose but the effect of another interpretation does not, the latter may be preferable to the former.
>
> (*Williams* at para. 52.)

33 The legislation at issue in this case bears upon the *Charter*. In a case like this, the danger of personal policies or political preferences illegitimately injecting themselves into the interpretive process is high—the *Charter* arouses strong views and passions in some.

34 Many take the view that the *Charter* is part of a living tree that should grow and expand. Thus, any measure that relates to the *Charter*, such as the legislation before us, should be interpreted in order to promote the greatest possible advancement of *Charter* rights and freedoms generally. By way of example, the intervener, the Canadian Civil Liberties Association, urges that the reporting threshold for reports of inconsistency with the *Charter* should be lowered significantly so that more reports are made and a more intense consideration of *Charter* issues takes place during the legislative process, perhaps eliminating the burdens of *Charter* litigation for would-be *Charter* claimants.

35 On this subject, we are dealing with legislative provisions that, among other things, require the vetting of proposed legislation for inconsistency with the *Charter*. In interpreting these provisions, we must be on guard not to adopt a one-sided view of the *Charter* at the behest of any party. The *Charter* is a document suffused with balances. Take the opening section as an example. It tells us that the *Charter* guarantees rights and freedoms. But it also tells us that this is subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." And the Constitution of which it is a part—our supreme law under section 52 of the *Constitution Act, 1982*—is not just a "living tree capable of growth and expansion," but also one whose "growth and expansion [is] within its natural limits": *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, [1930] D.L.R. 98 at pp. 106-107 D.L.R.

F. Conducting reasonableness review

36 How should one conduct reasonableness review of an administrative decision-maker's interpretation of legislative provisions? On this, the Supreme Court has given us a little guidance.

37 Legislative provisions come in all types, for many purposes. Some are very exact in their wording and possess little or no ambiguity in their meaning. For those, we would expect there to be very few permissible acceptable and defensible interpretive options available to the administrative decision-maker—perhaps even just one: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38.

38 Others are more loosely worded, with ambiguity, using phrases such as "in its opinion," "in its discretion," "in the public interest," and "when reasonable," and, thus, many more permissible, acceptable and defensible options are available to the administrative decision-maker: Frank A.V. Falzon, Q.C., "Statutory Interpretation, Deference and the Ambiguous Concept of 'Ambiguity' on Judicial Review," C.L.E. B.C. conference, November 16, 2015. Because of the breadth and ambiguity of these sorts of phrases, the administrative decision-maker trying to discern their meaning will have much regard to context and purpose. And some administrative decision-makers are very well placed to appreciate context and purpose due to their specialization, experience and expertise.

39 It must be remembered that reasonableness is a deferential standard: *Dunsmuir* at para. 47. We must be on guard not to do what some call "disguised correctness review." This Court explained this concept as follows:

> Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter—correctness review.

(*Delios v. Canada (Attorney General)*, 2015 FCA 117, 72 N.R. 171 at para. 28.)

40 Thus, when reviewing courts review administrative decision-makers' interpretations of legislative provisions, they must take care not to interpret the legislative provisions in a definitive way and then use that definitive interpretation as a yardstick to measure what the administrator has done.

D. Costs

The Court of Appeal of Alberta's decision in *Zuk v. Alberta Dental Assn. and College*[90] dealt with the awarding of costs where success is divided between the parties. The court declined to award costs on an issue-by-issue basis but assessed costs based on the number and nature of the issues to determine if one party had been "substantially successful".

VIII. CONCLUSION

As we wait for the Supreme Court's decision in the December trilogy, courts across the country continue to render interesting and remarkable decisions in the area of administrative law. Once again, stay tuned!

90. 2018 ABCA 398.

ADDENDUM

OCTOBER 16, 2019

As mentioned in the introduction to this paper, in December 2018, the Supreme Court of Canada heard three appeals with an aim to consider the nature and scope of judicial review of administrative action and addressing the standards of review set out in *Dunsmuir* and subsequent cases. As of writing, the Supreme Court's decisions in those appeals have not yet been released and administrative law practitioners, commentators and adjudicators must continue to wait for the much longed-for clarification on standards of review.

In the meantime, the following two quotes, one from a federal court justice and one from a justice of the Alberta Court of Queen's Bench, sharply illustrate the need for clarification and a plea for common sense on the issue of deference:

a. In a judicial review application challenging the Minister's decision to deny the applicant a study permit, Justice Roy of the Federal Court began his analysis with the following statements:[91]

> 16 A visa officer is certainly entitled to rely on common sense and rationality. As I have said before, we do not check common sense at the door when entering a courtroom. What is not allowed is to make a decision based on intuition or a hunch; if a decision is not sufficiently articulated, it will lack transparency and intelligibility required to meet the test of reasonableness. That, I am afraid, is what we are confronted with here.
>
> 17 Our law is very much concerned with arbitrariness, which is the antithesis of reasonableness. Indeed, the prohibition against arbitrariness is one of the principles of fundamental justice which is at the heart of section 7 of the *Canadian Charter of Rights and Freedoms*...

91. *Demyati v. Canada (Minister of Citizenship and Immigration)*, 2018 FC 701.

. . .

> 19 In *Komolafe v Canada (Citoyenneté et Immigration)*, 2013 FC 431, our Court acknowledged that reviewing courts must show a willingness to connect the dots to reach a decision on reasonableness. However, there must be dots in the first place...Here, the dots do not suffice to connect them such that a clear picture emerges without filling many blanks on the basis of speculation.
>
> [Emphasis added. Text of regulation and case authority omitted.]

b. In a case involving a grievance from termination of employment, which took over eight years and two judicial review applications to be resolved, Justice Clackson of the Court of Queen's Bench of Alberta dismissed the application for judicial review of the arbitrator's decision by concluding:[92]

> [9] Does the result defy reason and common sense? As I have said, it does not. Plainly, the result arrived at by the Moreau panel was one that resulted from rational consideration of the evidence and arguments. As to logic and common sense, it is essential to remember that common sense is a means of predicting or analysing behaviour based on generalized knowledge and accepted norms. Where, as here, there is specific evidence to inform the decision maker, it behooves the decision maker to apply its mind to that evidence. To the extent that leads to a result which seems to fly in the face of common sense, that reflects on the inadequacy of the common sense and not the reasonableness of the decision.

Hopefully, the Supreme Court's decisions in the trilogy will satisfy these types of pleas for common sense and clarify the requirement on reviewing courts to "connect the dots".

There are a few other cases addressing standards of review that deserve mention while we wait for the Supreme Court's decisions in the trilogy:

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92. *Alberta Health Services v. Health Sciences Association of Alberta*, 2018 ABQB 56.

- In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*,[93] Gascon J. described jurisdiction as being on "life support" and confirmed that applying the correctness standard on the basis that an issue is of "central importance to the legal system as a whole" should only be done in exceptional circumstances.

- In *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*,[94] the Supreme Court considered the meaning of "true questions of jurisdiction" in holding that the President of the National Assembly's decision regarding the dismissal of three security guards at the Quebec National Assembly involved the question of whether parliamentary privilege applied and, thus, attracted a standard of correctness.

- The Saskatchewan Court of Appeal, in *Saskatchewan Government and General Employees' Union v. Saskatchewan (Ministry of Environment)*,[95] considered whether a standard of correctness was justified in the context of reviewing an arbitrator's decision on whether the correct legal test for discrimination had been made out. The arbitrator had introduced a requirement of arbitrariness to the test but the court found that the arbitrator's doing so had no effect on the result of the decision and did not justify a correctness standard.

93. 2018 SCC 31.

94. 2018 SCC 39.

95. 2018 SKCA 48.