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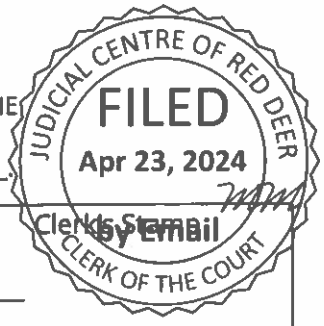

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COURT FILE NO.	2310 01422
COURT	COURT OF KING'S BENCH OF ALBERTA
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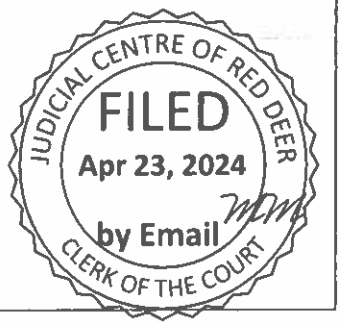

APPLICANT	MONIQUE LAGRANGE
RESPONDENT	THE BOARD OF TRUSTEES OF RED DEER CATHOLIC SEPARATE SCHOOL DIVISION
DOCUMENT	**WRITTEN BRIEF OF THE BOARD OF TRUSTEES OF RED DEER CATHOLIC SEPARATE SCHOOL DIVISION**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Teresa Haykowsky, K.C. Telephone: 780.482.9247 Fax: 780.733.9751 Email: teresa.haykowsky@mross.com File No.: 20234805

SCHEDULED FOR HEARING MAY 1-3, 2024

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PART 1 INTRODUCTION

1. The Board of Trustees of Red Deer Catholic Separate School Division ("**Board**" or "**School Board**") hereby makes these submissions in response to the request of the Applicant, former Board Trustee Monique LaGrange (the "**Applicant**" or "**Ms. LaGrange**") for judicial review of the September 26, 2023, Board Code of Conduct decision (the "**Board Decision**" or "**Motion**") supported by its October 13, 2023, reasons (the "**Reasons**") (collectively, "**Decision 1**"). The impugned decision was made following a Board trustee complaint under the Board's Code of Conduct; the Decision censured the Applicant and required her to take ameliorative steps following her reposting of a social media meme in contravention of the Code of Conduct.

2. This judicial review is not consolidated, but will be heard, with a second judicial review relating to the Board's subsequent November 14, 2023, decision regarding Ms. LaGrange. That second decision, reached after a subsequent Board trustee complaint and the Applicant's non-compliance with Decision 1 and further Board Code of Conduct breaches, disqualified the Applicant as a school Board trustee. The second decision is the subject of a separate exchange of briefs.

3. School board trustees in Alberta are regulated by the corporate school board of which they are a member. School board trustees in Alberta must comply with standards of conduct set out in their school board codes of conduct.

4. The conduct in question in this proceeding, which is not in dispute, is the Applicant's reposting of a meme (which is described in further detail in this brief). The Applicant acknowledges her conduct.

5. This proceeding is not about Catholicity / Roman Catholic values, ideology or public opinion. The issue that was before the Board, and was the sole issue relevant to Decision 1, was whether or not the Applicant's conduct was consistent with the Board's Code of Conduct.

Catholicity/Roman Catholic Values

6. The Applicant argues in her brief that a central issue is Catholicity, that is, that the Applicant's actions (i.e., her reposting of the meme) are truly reflective of Roman Catholic values, and that the Board failed to take into consideration the same in Decision 1.

7. With respect, on the facts of this matter, Catholicity is not what this proceeding was about. The issue is that the Applicant's conduct had been in violation of Board policies because it fell below Board Code of Conduct standards. On the facts of this case, reviewing the Board's Code of Conduct did not necessitate a separate inquiry into Roman Catholic doctrine.

Ideology

8. The Applicant also seeks to make this proceeding about ideology. The Applicant claimed during the Board Code of Conduct hearing that she had grave concerns about the activities and agendas of the United Nations and Planned Parenthood, and that, through reposting of the meme, she wanted to bring her concerns forward for debate and discussion. However, the issue at

hand was not about any particular ideology, nor suppression of the Applicant's viewpoint. It is whether Decision 1 - that the Applicant's conduct had been in violation of Board policies because it fell below the Code of Conduct standards and that, as a result, reasonable sanctions should be issued as against the Applicant – was as a whole reasonable, justifiable, intelligible and transparent. With respect to the Applicant, ideology is not what this proceeding is about.

Emails which Supported the Position of the Applicant

9. The Applicant also points to a number of emails in support of her conduct which she submitted to the Board the morning of the Board hearing in this matter. The Board also had before it correspondence condemning the Applicant's position.

10. It is indeed unfortunate that the Applicant disparages the correspondence which condemns her position. With the utmost of respect to the Applicant, public opinion is not what this proceeding is about. The Board did not commission professional polling or a scientific survey. The feedback before the Board, which it considered, amounted to support for both sides. The Board proceeded on the path its careful consideration had led it to.

11. This proceeding is about whether Decision 1 is reasonable. It clearly is.

12. The Board documented Reasons that were reasonable, intelligible, justifiable, transparent, and clearly linked to the conduct in question. The Board submits that this judicial review should be dismissed.

A. Background

13. The Originating Application for Judicial Review in this proceeding (the "**JR**") relates to Board Decision 1. As discussed in more detail below, Decision 1 found that the Applicant had breached the Code of Conduct of the Board codified in Board Policy 4: Trustee Code of Conduct (the "**Code of Conduct**") and the *Education Act*, SA 2012, c. E-0.3 (the "***Act***") and accordingly imposed certain sanctions.

14. The second Board decision was issued initially on November 14, 2023, with written reasons dated November 24, 2023 (collectively "**Decision 2**"). Decision 2 is the subject of a judicial review application in Action No. 2310 01396 filed December 11, 2023 ("**JR 2**"). Decision 2 disqualified the Applicant from her position as Trustee as a result of the Applicant's refusal to comply with Decision 1 and her further breaches of the Code of Conduct.

B. Scope of the Board's Participation

15. The Board acknowledges that it is the same decision-maker whose decisions are subject to review in these proceedings. Below, the Board sets out judicial guidance illustrating that, in circumstances such as these where there is no other party capable of fulsomely responding to a judicial review, the decision-maker whose decision is impugned may respond in the interests of assisting the Court in making a fully informed adjudication. In so doing, however, the tribunal is obliged to maintain a tone that reflects the importance of impartiality and does not seek to bootstrap its decision.

C. Summary of the Board's Position

16. It is the Board's submission that its decision under review in these proceedings was both procedurally fair and substantively reasonable and imposed reasonable and appropriate sanctions. Further, some of the issues raised by the Applicant with respect to the sanctions have become moot given Decision 2, which now supersedes some of the remedies sought by the Applicant herein.

17. Upon becoming aware of the Meme Posting (as defined at paragraph 22 below), the Board did initially pass a motion asking the Minister of Education to dismiss the Applicant. The Minister clarified to the Board that it was the Board's role to make such a decision. The Board accordingly met, consulted with legal counsel, and determined that the Board was able to consider the matter. The Board subsequently received a written complaint (the "**Complaint**") (seconded by another Board trustee) which triggered the September 25 and 26, 2023, Code of Conduct Board hearing (the "**Hearing**" or "**Meeting**"). The Board satisfied itself that it was able to hear and address this matter fairly and impartially, and indeed, ultimately reached a conclusion different than disqualification. The Board submits that there is no basis to determine that its process was unfair on the basis of bias, or any other ground.

Decision 1, part XII Was the Decision Procedurally Unfair? CROP para. 1(a) p. 17. **[TAB A]**

Letter to Minister of Education, September 7, 2023, CROP para. 1(d)(i)(K) p.66. **[TAB B]**

18. The Board also submits that Decision 1 was substantively reasonable. The Applicant's first challenge is to the Board's decision not to adjudicate on whether the Meme was consistent with Roman Catholic values. The Board focused on the *Act* and the Code of Conduct in reviewing the Complaint and, therefore did not find it necessary to determine whether the Meme was in contravention of Roman Catholic values. In addition, there was no expert evidence before the Board to assist in making such a determination.

Decision 1, part VIII Did the Meme Contravene Roman Catholic Values? CROP para. 1(a) p.9. **[TAB A]**

19. The Applicant also advances a number of specific challenges to the Board's findings, which the Board addresses in detail below. The Applicant challenges the Board's ability to issue, and the appropriateness of, the various sanctions issued. As detailed below, the Board's range of available sanctions under the Code of Conduct is very broad and the specific sanctions in Decision 1 were carefully considered so as to accord with the Code of Conduct breaches found.

20. Lastly, the Board submits that remedies sought by the Applicant with respect to her reinstatement as a trustee and repayment of trustee remuneration are simply not available in these proceedings, as the sanctions from Decision 1 did not disqualify the Applicant.

PART 2 FACTS

A. Background

21. The Applicant was elected as a Trustee of the Board in 2021. The School Division for which the Board is responsible serves over 10,650 students in twenty-one schools in Red Deer, Blackfalds, Sylvan Lake, Rocky Mountain House, Innisfail, and Olds, as well as an At-Home Learning Program, and supports the learning of over 1,095 students in a Traditional Home Education Program.

Decision 1, part I Background, CROP para. 1(a) p.4. **[TAB A]**

22. On or about August 27, 2023, the Trustee posted on her personal Facebook account a meme displaying two photographs which respectively showed:

(a) a group of children holding Nazi flags with swastikas; and

(b) a contemporary photograph of children holding rainbow Pride flags,

and captioned "Brainwashing is brainwashing" (collectively, the "**Meme**" or the "**Meme Posting**").

Decision 1, part I Background, CROP para. 1(a) p.4. **[TAB A]**

23. As earlier noted, the Board's process pursuant to the Code of Conduct was triggered in response to the Complaint, the Board called the Meeting as per the Code of Conduct to review the Complaint, to hear from the complainant and Ms. LaGrange, and determine if there was a breach of the *Act*, the Code of

Conduct and/or Board Policy. The complainant recused herself from deliberations and did not have any input in Decision 1.

September 7, 2023, Complaint letter CROP para. 1(c) p.19. **[TAB C]**

Minutes of a Special Meeting of the Board held September 25, 2023, CROP para. 1(e)(i) p.146. **[TAB A]**

Decision 1, part I Background, CROP para. 1(a) p.4. **[TAB A]**

24. The complainant and the Applicant were both present and were represented by counsel at the Meeting during which the Trustee was provided with a full opportunity to make submissions. Her counsel submitted written and oral arguments to the Board.

Decision 1, part II Procedure, CROP para. 1(a) pgs. 4 and 5. **[TAB A]**

25. During the Meeting, the Trustee claimed that the Meme Post was not directed toward the School Division and that the Meme was not a challenge to School Division practices.

Decision 1, part VI Position of the Respondent, CROP para. 1(a) p.7. **[TAB A]**

B. Procedure

26. Prior to the Meeting, the materials considered by Board included the following:

(a) Written Submissions of the Complainant which included:

(i) a photocopied picture of the Meme;

(ii) the Complaint;

(iii) a package of materials in support of the Complaint:

(iv) September 7, 2023, media article from the Western Standard entitled, “EXCLUSIVE: Trustee says her post was about protecting children, involving parents”;

(v) September 13, 2023, media article from the True North entitled, “Alberta trustee reprimanded for Instagram post critical of gender “indoctrination””;

(vi) a copy of Board Policy 1: Divisional Foundational Statements (“**Board Policy 1**”); the Code of Conduct (including Appendix “A” and “B”); Board Policy 3: Trustee Role Description including Appendix “A” (“**Board Policy 3**”); the CCSSA’s LIFE Framework, Statement 22358 from the Catechism of the Catholic Church, 1994;

(vii) September 7, 2023, letter to the Minister of Education, from Board Chair Hollman;

(viii) written reaction submitted to the Board in response to the Meme, which consisted of seven emails/letters from School Division employees, parents, School Division student alumni, and the Simon Wiesenthal Centre of Holocaust Studies which were critical of the Meme, and four emails from individuals who

expressed support for the Trustee's actions in relation to the Meme; and

(ix) written submissions in support of the Complaint; and

b) Written submissions from the Trustee's legal counsel.

Decision 1, part II, Procedure, CROP para. 1(a) p.4. **[TAB A]**

27. Pursuant to the Code of Conduct, the Meeting comprised an *in camera* portion which lasted for more than a full day on September 25, 2023, at which submissions were made to the Board. Board members also posed questions at the Meeting.

Decision 1, part II Procedure, CROP para. 1(a) p.5. **[TAB A]**

28. Not having completed their deliberations, the Board reconvened on September 26, 2023, to complete the same. Following the completion of their deliberations, the Board returned to a public session and voted on the Motion to sanction Ms. LaGrange. The Board voted 3-1 in favour of the Motion.

Decision 1, part II Procedure, CROP para. 1(a) p.5. **[TAB A]**

Minutes of a Special Meeting of the Board Held September 25, 2023, CROP para. 1(e)(i) p.146. **[TAB A]**

C. The Applicant's Submissions as to the Public Reaction to the Meme

29. The Applicant's brief (paragraph 56) devotes a significant amount of time to a review of some of the public reaction to the Meme. In particular, the

Applicant's brief sets out excerpts from the emails that were received by the Applicant expressing support for the Meme Posting or more generally for the positions expressed by the Applicant. Said emails were considered by the Board.

Decision 1, part IX
Did the Meme Contravene the Code of Conduct? CROP para. 1(a) p.12.
[TAB A]

30. The Board does not dispute that these emails express comments supportive of the Applicant, or more generally that some members of the public were supportive of the Applicant. However, that is not the point.

31. The Board also received correspondence that was not supportive of the Meme Posting, including a letter from the Simon Wiesenthal Centre of Holocaust Studies. The Applicant makes no mention of these communications in her brief. In the Board's view it cannot accurately be said that any consensus of public opinion can be discerned from the available evidence.

32. Further, no rigorous or scientific study or polling of public opinion was conducted. On the evidence, there was support for, and criticism of, the Meme.

Decision 1, part IX
Did the Meme Contravene the Code of Conduct? CROP para. 1(a) p.12.
[TAB A]

33. Finally, Board members are elected to make these types of determinations and are vested by the *Act* with the authority to do so. While of course the

opinions of their constituents are of vital importance to each Trustee, in the end the Board must make the best decision it can on the evidence available to it. Counting emails for and against – less than 50 communications in a community of well over 10,000 students – would have arguably been an abdication of responsibility.

PART 3 ISSUES

34. The Board has identified the following three issues arising from the Applicant's brief:

    (a) Was Decision 1 procedurally fair?

    (b) Was Decision 1 substantively reasonable?

    (c) Were the sanctions issued pursuant to Decision 1 reasonable?

35. To these issues the Board adds a fourth, namely: are the remedies sought by the Applicant available in these circumstances?

PART 4 ARGUMENT

A. Preliminary Issue: Role of the Board on Judicial Review

36. The Supreme Court of Canada ("**SCC**") in *Ontario (Energy Board) v. Ontario Power Generation Inc* ("***Ontario Energy Board***") endorsed a discretionary approach when courts evaluate whether a tribunal is entitled to standing to participate in a judicial review. The majority held that employing a discretionary approach ensures that the principles of finality and impartiality are respected without "sacrificing the ability of reviewing courts to hear useful and important information and analysis".

Ontario (Energy Board) v. Ontario Power Generation Inc, 2015 SCC 44 at para. 52. ("***Ontario Energy Board***") [**TAB 1**]

37. The following non-exhaustive factors are considered relevant to the exercise of the court's discretion in relation to the tribunal's standing:

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
>
> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
>
> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns

> may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

Ontario Energy Board at para. 59. [**TAB 1**]

38. Underpinning the above factors is the requirement for courts that exercise their discretionary power to "balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality".

Ontario Energy Board at para. 57. [**TAB 1**]

39. Having a fully informed adjudication looms largest where the judicial review application would otherwise be unopposed. In fact, in those circumstances, and where the court is concerned that something of importance will not be brought to their attention based on the particular context, "the desirability of fully informed adjudication may well be the governing consideration".

Children's Lawyer for Ontario v. Goodis, [2005] O.J. No. 1426 (ON CA) at para. 44. ("***Goodis***") [**TAB 2**]

40. An application may be "unopposed" where the tribunal's own decision is being challenged as seen in *Ontario Energy Board*, or, as touched on in factor (2) above, where there is no other respondent "able and willing to defend the merits of an administrative decision".

CS v British Columbia (Workers' Compensation Appeal Tribunal), 2019 BCCA 406 at para. 48. [**TAB 3**]

41. While impartiality remains an important consideration, it is lessened when the tribunal is the only named respondent in the review and where it is, amongst other things, tasked with regulating a specified group.

Sandhu v College of Physicians and Surgeons of Alberta, 2023 ABCA 61 at para. 41. [**TAB 4**]

42. It is in such circumstances generally appropriate for a tribunal to argue the merits of its own decision because "the need to facilitate fully informed adjudication on review is more important than maintaining tribunal impartiality". The SCC also emphasized in *Ontario Energy Board* that the judicial review process is most effective and functions best when both sides of a dispute are "argued vigorously before the reviewing court". Allowing a tribunal to make substantive submissions on the merits of the judicial review ensures that the court hears the "best of both sides of a dispute".

Aghili v. British Columbia (Workers' Compensation Appeal Tribunal), 2022 BCSC 717 at para. 16. [**TAB 5**]

Ontario Energy Board at para 54. [**TAB 1]**

43. It is appropriate for tribunals to "highlight what is apparent on the face of the record", introduce arguments that interpret or were implicit in the original decision, explain established policies and practices, and "respond to arguments raised" by a counterparty to uphold and defend its reasoning and conclusions within the initial decision.

Ontario Energy Board at paras. 46, 68 & 70. [**TAB 1**]

44. A tribunal that participates in a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. It is with this approach in mind, as well as the above legal considerations, that the Board makes these submissions to this Honourable Court to assist in its review of the Decision.

Ontario Energy Board at para. 71. [**TAB 1**]

Goodis at para. 61. [**TAB 2**]

45. In the circumstances before this Honourable Court, there is no other adversarial party able and willing to oppose the review or able to provide the necessary knowledge and expertise to fully make and respond to arguments. Like *Ontario Energy Board*, the decision being reviewed here is the Board's own decision (i.e. Decision 1). To allow this application to proceed unopposed without the Board's submissions runs contrary to the very function of the judicial review process as outlined in *Ontario Energy Board*. This Honourable Court will not see the best of both sides of the dispute, or the other side of the dispute at all.

46. Furthermore, Decision 1 was made in response to the Applicant's breaches of the Code of Conduct. As in *Ontario Energy Board*, the Board's statutory role includes safeguarding the public interest. In these circumstances, the public interest arises in relation to Alberta's school system and in the context of a school board's obligation to maintain the public's confidence in the administration of the school system, among other related obligations as set out within the *Act*.

47. The Board's knowledge and expertise will assist this Honourable Court in understanding the implications of a decision in this judicial review as it relates to the various obligations of a school board and its trustees under the *Act*. This decision is a matter of significance to both the Board and the community it serves, yet the application involves no other parties able to provide fulsome comments.

48. The Ontario Superior Court of Justice ("**ONSC**") has considered similar decisions by a school board. The ONSC heard submissions in the context of a judicial review from the responding school boards in three recent decisions. Notably, in two of those three decisions (*Del Grande v. Toronto Catholic District School Board* and *Ramsay v Waterloo Region District School Board*) the facts involved current school board trustees who had breached the board's existing code of conduct. With the submissions of the school board considered in each of these cases, the ONSC was able to make an informed decision to dismiss each application despite the procedural fairness and reasonableness arguments raised by the applicants. Although the role of a tribunal is not expressly discussed in these decisions, the SCC in *Ontario Energy Board* and the Ontario Court of Appeal in *Goodis* have both acknowledged that tribunals have in appropriate circumstances been permitted to participate as full parties.

Del Grande v. Toronto Catholic District School Board, 2023 ONSC 349 ("***Del Grande***") [**TAB 6**]

Ramsay v. Waterloo Region District School Board, 2023 ONSC 6508 **[TAB 7]**

Carolyn Burjoski v. Waterloo Region District School Board, 2023 ONSC 6506 [**TAB 8**]

Ontario Energy Board at para. 45 [**TAB 1**]

Goodis at para. 24. [**TAB 2**]

49. In these circumstances, the Board submits it has no alternative but to defend Decision 1 on its merits. In so doing, the Board commits to being mindful of the importance of impartiality and will not seek to bolster or bootstrap its prior decision.

B. Applicable Law and Policy

50. The Board's conduct is governed by the *Act*, which grants the Board jurisdiction to review trustee-related complaints, consider trustee conduct, and determine appropriate responses and remedies.

51. The preamble of the *Act* unambiguously supports the importance of inclusiveness and respect in the provision of education to Alberta students:

> WHEREAS students are entitled to welcoming, caring, respectful and safe learning environments that respect diversity and nurture a sense of belonging and a positive sense of self;
>
> WHEREAS the Government of Alberta recognizes the importance of an inclusive education system that provides each student with the relevant learning opportunities and supports necessary to achieve success

Act preamble. **[TAB 9]**

52. These recitals are reflected in clauses 9 and 10 of Board Policy 1:

> 9. The schools will foster the mental and physical well-being of all students through:
>
> 9.1 Selection of appropriate programs which emphasize physical, leisure activities; and
>
> 9.2 A respect for the worth and dignity of the individual.
>
> 10. The schools will foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality.
>
> Board Policy 1, CROP para. 1(d)(i)(E) p.39. **[TAB D]**

53. Section 2 of the *Act* states:

> **Limitations**
>
> 2. The exercise of any right or the receipt of any benefit under this Act is subject to the limitations that are reasonable in the circumstances under which the right is being exercised or the benefit is being received.
>
> *Act* s. 2. [**TAB 9**]

54. Section 33 of the *Act* imposes statutory duties on the Board, some of which are:

(a) develop and implement a school trustee code of conduct;

(b) establish and maintain governance and organization structures that promote student well-being and success, and monitor and evaluate their effectiveness;

(c) ensure that each student enrolled in a school operated by the board and each staff member employed by the board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging;

(d) establish, implement and maintain a policy respecting the board's obligation under subsection (1)(d) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour; and

(e) to provide a statement of purpose that provided a rationale for the student code of conduct, with a focus on welcoming, caring, respectful and safe learning environments.

Act, ss. 33(1)(k), (h), (d), (2) and (3)(d)(i). **[TAB 9]**

55. School board trustees in Alberta must adhere to their codes of conduct. This requirement is contained in Board Policy 1 and is a statutory requirement under the *Act* pursuant to s. 34(c) which states:

> 34(c) A trustee of a board, as a partner in education, has the responsibility to [...] comply with the board's code of conduct [...].

Act s. 34(c). **[TAB 9]**

56. This requirement is also contained at clause 6.20 of Board Policy 3.

Board Policy 3, CROP para.1(d)(i)(G) p.53. **[TAB E]**

57. Finally, school boards have an obligation to enforce a minimum of standard of conduct expected of trustees. This principle is noted in the *Del Grande* decision and is equally applicable here:

> (…) the Board has a statutory obligation to promote student well-being and a positive and inclusive school climate. The Board also has an obligation to enforce a minimum standard of conduct expected of its Trustees. All Trustees have an obligation to comply with the *Code of Conduct* and to assist the Board in fulfilling its duties. Sanctioning the Applicant for making disrespectful comments was not contrary to the *Education Act*, but consistent with the *Act's* statutory objectives.

Del Grande at para. 81 **[TAB 6]**.

58. The Board's mission statement is as follows:

> The Red Deer Catholic Separate School Division is committed to supporting inclusive communities that foster care and compassion of students, families and staff with a complete offering of learning opportunities delivered within the context of Catholic teachings and tradition, and within the means of the Division.

Board Policy 1, CROP para.1(d)(i)(E) p.38. **[TAB D]**

59. The purpose of the Board's mission statement is to govern the interactions within the School Division and among members of the School Division including Board members. Board Policy 1 sets forth beliefs that are meant to

govern the interactions of the School Division as stewards of Catholic education, including Belief 10 which reads:

> The schools will **foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students**, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. **Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality**. [Emphasis added.]

Board Policy 1, CROP para.1(d)(i)(E) p.39. **[TAB D]**

60. Administrative Procedure 103 - Welcoming, Safe and Caring, Inclusive and Respectful Learning Environments ("**AP 103**") details how the Division Foundational Statements are to be carried out by School Division staff. Among other things, a "Christ-centered, welcoming, caring, respectful and safe learning environment **that respects diversity, equity and human rights and fosters a sense of inclusion and belonging**" is to be maintained. [Emphasis added.]

Decision 1, IV Board Policy and Compliance with the *Education Act*, CROP para. 1(a) p.7. **[TAB A]**

61. The Code of Conduct states that the Board "commits itself and its members to conduct that meets the highest ethical standards." In doing so it is expected that all Board members treat others with mutual respect and affirm the worth of each person. The preamble to the Code of Conduct includes the following:

> That trustees are the children's advocates and their first and greatest concern is the best interest of each and every one of these children without distinction as to who they are or what their background may be. [Emphasis added.]
>
> Code of Conduct, CROP para. 1(d)(i)(F) p.42.

62. Consequences for the failure of an individual trustee to adhere to the Code of Conduct are specified in Appendix A to the Code of Conduct, which sets out a range of sanctions and remedial measures, which supplement the disqualification sanction at s. 87(1)(c) of the *Act*.

C. Standard of Review

63. The Board does not dispute the position of the Applicant that the applicable standard of review of Decision 1 is reasonableness, in accordance with the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("***Vavilov***"). **[TAB 10]**

64. As earlier stated, the Board states that Decision 1 was reasonable.

D. Issue 1: Decision 1 Was Procedurally Fair

65. The Applicant's brief (paragraphs 19-25) makes two assertions in support of the argument that Decision 1 was procedurally unfair:

(a) The Applicant alleges that the Board failed to follow its own procedures in the correct order; and

(b) The Applicant alleges that the Board exhibited bias by prejudgment.

66. In support of the position that the Board prejudged the matter before it, the Applicant refers to the companion cases of *Old St. Boniface* and *Save Richmond Farmland* and argues that by forming "an opinion on the matter prior to its participation" in hearing the Complaint, the Board prejudged the matter.

Old St. Boniface Residents Assn. Inc. v Winnipeg (City) [1990] SCR 1170 ("***Old. St. Boniface***"). **[TAB 11]**

Save Richmond Farmland Society v Richmond (Township) [1990] SCR 1213 **[TAB 12]**

67. However, forming an opinion is not the test for prejudgment amounting to impermissible bias; rather, the test as set out on *Old St. Boniface* is as follows:

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact**, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged**. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. [Emphasis added]

Old St. Boniface at p.1197 **[TAB 11]**

68. With respect, forming an opinion in advance of hearing the matter, without more, does not give rise to procedural unfairness on the grounds of bias or prejudgment. The Applicant must also demonstrate that this opinion "cannot be dislodged". The Applicant has not suggested that this is the case here. The Board was capable of hearing the matter and changing any preformed opinions it may have had, if any.

Old St. Boniface at p.1197 **[TAB 11]**

69. The Board expressly addressed these allegations in Decision 1 and this response continues to comprehensively address the Applicant's concerns:

> The Trustee argued that these proceedings are tainted by procedural unfairness and bias, and as such, should be stayed. The Board has carefully considered this argument and dismissed the stay of proceedings request.
>
> The foundation of this argument is that, prior to the commencement of the Code of Conduct complaint process, the Board initially passed a motion asking the Minister of Education to dismiss the Trustee. This process was undertaken based on the Board's initial misunderstanding that the Minister was responsible for the review and assessment of the Trustee's conduct. However, the Minister's response informed the Board that this process was in fact the Board's responsibility.
>
> Subsequently, a letter of complaint was filed which triggered the Code of Conduct hearing under Appendix "A" of the Code of Conduct. Prior to the Meeting, each Board member hearing this matter conducted a serious and self-reflective assessment of its ability to hear the matter impartially and without bias. Each Board member determined that they held an open mind and were able to fairly and impartially hear the Trustee's arguments,

> consider them without pre-determination, and render a fair decision.
>
> The proof of this ability is the outcome of the hearing. Although the Trustee's argument (reflected in her written submissions at paragraphs 96 to 99) focused on the Trustee's objection to the possibility of her disqualification or Trustee removal - including arguments as to the unconstitutionality of the relevant section of the *Education Act* – ultimately the Board did not decide that disqualification or removal was the appropriate sanction. Instead, the above-described Motion was passed.
>
> The Board finds that:
>
> 1. the careful and considered self-assessment by each Board member who heard this matter, concluding each maintained an open mind and was able to be impartial; and
>
> 2. the fact that the Board's ultimate decision was not, in fact, the same sanction as initially referenced in the request to the Minister of Education,
>
> shows that the Board's decision in this case is not tainted by procedural unfairness or bias. Accordingly, the Board declines to stay these proceedings or the Decision.
>
> Decision 1, XII Was the Decision Procedurally Unfair? CROP para. 1(a) p.17. **[TAB A]**

70. It is again worth noting that the complainant did not participate in the Board deliberations; the complainant only participated in the role of a complainant.

71. The Board notes the Applicant's choice of inflammatory language in paragraph 24 of her brief. The Board denies that its carefully considered sanctions were "intentionally humiliating" and notes that there is no evidence to support this allegation, which is uncited in the Applicant's brief.

72. The Board is also mindful that the arguments of the Applicant in this respect would mean that the Complaint could not be heard at all. This outcome would obviously be inconsistent with the Board's statutory mandate as outlined in the *Act* to implement its Code of Conduct.

Act s. 33(1)(k) **[TAB 9]**

73. The Applicant also argues at paragraphs 19-21 of her brief that the Board failed to follow its own procedures (namely the Code of Conduct). This argument is founded upon the same conduct which it is alleged amounted to prejudgment, specifically, writing a letter to the Minister of Education prior to hearing the matter. For the reasons outlined above, it is submitted that there was no prejudgment. As the above procedural outline also illustrates, the Board's proper process was followed (of note, the complaint process was not triggered when the letter to the Minister of Education had been sent).

E. Issue 2: Decision 1 is Substantively Reasonable

74. The Applicant's brief advances numerous arguments in support of the assertion that Decision 1 was not reasonable. First, the Applicant asserts that it was not reasonable for the Board to decline to make a finding on the issue of Roman Catholic values. The Applicant then advances numerous specific issues with the findings of breaches of the Code of Conduct. The Board will respond to each in turn.

75. At paragraphs 26-29, the Applicant argues that the Board's handling of the Applicant's assertion that the Meme Posting was consistent with Roman Catholic values was "incoherent and contradictory" (para. 29) and amounted

to a failure to "meaningfully grapple" with the evidence (para. 27). The Board respectfully disagrees.

76. The context of this issue is very important. The Applicant posted the Meme to bring forward, in her words, concerns with a United Nations "agenda" and how that is infiltrating "our schools." The Board accordingly concluded that resolution of the issue before it did not require it to reach a conclusion on the question of Roman Catholic values. Notably, the Applicant posted a picture that related to the Nazi era (an era that pre-dated the United Nations) and a picture of the Pride flag. As the Board noted in its reasons at page 11:

> Further, the complex and nuanced position which the Trustee is attempting to advance is simply not made clear in a Meme which is limited to two photographs and three words. Had the Trustee wished to communicate this concept, communication methods set out in Board Policies 3 and 4 should have been used. The Trustee had an obligation to ensure her communication was in accordance with Board policy.
>
> Decision 1, XI Did the Meme Contravene the Code of Conduct? CROP para. 1(a) p.9. **[TAB A]**

77. On the facts and evidence, the Board addressed this issue succinctly and reasonably:

> Both the Complainant and the Respondent made submissions with respect to whether the Meme and its content were contrary to Roman Catholic values. No expert evidence was adduced at the Meeting with respect to Roman Catholic values in this context. The Complainant's submissions did include the CCSSA's LIFE Framework and a section from The Catechism of the Catholic Church, 1994.

> In any event, the Board focused on the *Education Act* and the Code of Conduct in reviewing the Complaint and, therefore, did not find it necessary to determine whether the Meme was in contravention of Roman Catholic values.
>
> To be clear, the Board's decision does not turn on whether the Meme contravened Roman Catholic values and the Board does not make a finding in this respect
>
> Decision 1, VIII Did the Meme Contravene Roman Catholic Values? CROP para. 1(a) p.9. **[TAB A]**

78. Further, the Board lacked the evidentiary foundation required to make an adjudication on the issue. This was a substantively reasonable determination which was supported by written reasons that were justifiable, transparent and intelligible.

> Decision 1, VIII Did the Meme Contravene Roman Catholic Values? CROP para. 1(a) p.9. **[TAB A]**

79. At paragraphs 30-35 of the Applicant's brief, the Applicant argues that there are no reasons expressly in support of the conclusion that clauses 1 and 6.18 of Policy 3 were breached by the Applicant. The Board acknowledges that these two particular clauses were not expressly addressed in Decision 1, however, the Board submits that the basis for finding a breach of both is adequately set out in the reasons without the need to supplement them. The Board also submits that, simply because clause 6.18 states that the trustees "…will contribute to a positive and respectful learning and working culture…", it does not follow that the clause is unenforceable. A clear example of a failure to so contribute, as reflected in these circumstances and clearly documented

in the Board's reasons, is subject to the Board's regulatory powers for trustee conduct purposes.

80. The Board notes in this regard support from the leading case of *Vavilov* to the effect that the Board is not required to itemize a response to every single argument, allegation and piece of evidence brought forward by the parties before it, where its reasons, reviewed contextually and holistically, demonstrate the basis for the decision:

> A reviewing court must bear in mind that **the written reasons given by an administrative body must not be assessed against a standard of perfection**. **That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside**: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings. [emphasis added]
>
> …
>
> **The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered.** For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body**. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency**. Opposing parties may have made

> concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member. [emphasis added]
>
> …
>
> **Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis"** (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). **To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice.** However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39. [emphasis added].

Vavilov paras 91, 94 and 128. **[TAB 10]**

81. The Applicant next argues (paragraphs 36-38) that it was not reasonable for the Board to have found a breach of clause 6.2 of Policy 3. The Applicant argues that this clause cannot reasonably be interpreted to require any problem whatsoever to be put to the Board. Further, the Applicant herself explained her actions as arising from concerns about ideologies that must be

questioned and challenged – and yet failed to follow the Code of Conduct in doing so.

Decision 1, part VI Position of the Respondent, CROP para. 1(a) p.7. **[TAB A]**

82. At paragraphs 39-43, the Applicant argues that it was unreasonable to find that clause 6.4 of Policy 3 was breached because the Applicant "…did not believe her post would create an issue for the Board." The Board has two observations in response. First, the Applicant during the Meeting stated that, at the time she had posted the Meme, she did not consider the interests of the Board or give consideration to the potential public perception of the Board. This is quite different from not believing that the Meme would create an issue, a conclusion which requires taking specific consideration of the interests of those other parties. Second, the Board approaches matters such as this in a holistic and contextual fashion, rather than addressing each Code of Conduct breach in an entirely distinct silo. Had the Applicant complied with her obligations in this specific case, as discussed above, to bring matters to the Board, to the extent that she may have been unclear on the Board's reaction to the Meme, she would have become aware of the Board's views in advance of making the Meme public.

Decision 1, IX Did the Meme Contravene the Code of Conduct? CROP para. 1(a) pp. 9 and 15. **[TAB A]** (Also see Section iii. Clause 6.4 of Board Policy 3, 2nd last para.) **[TAB E]**

83. At paragraphs 44-45 of the Applicant's brief, the Applicant argues that clause 1 of Policy 4 has not been breached because none of the above clauses were breached. Evidently, the Board disagrees. For ease of reference, that clause states as follows:

> Trustees shall carry out their responsibilities as detailed in Policy 3 – Role of the Trustee with reasonable diligence.
>
> Code of Conduct clause 1, CROP para.1(d)(i)(F) p.42. **[TAB F]**

84. At paragraphs 46-49 of the Applicant's brief, the Applicant argues that clause 10 of Policy 4 was not breached because, as the Applicant interprets that clause, it is intended to prevent a particular ward from being privileged by a trustee. That interpretation is inconsistent with the plain wording of the clause, and certainly the Board's interpretation of the clause cannot be said to have been unreasonable.

85. At paragraphs 50-51 of the Applicant's brief, the Applicant states that clause 22 of Policy 4 was not breached because the Applicant's use of social media in this case was personal. With respect, this claim is simply not credible. The Applicant, an elected school board trustee, posted a Meme which clearly depicts young children in a classroom setting. The Applicant herself explained her action at the Meeting as bringing forward an important topic for discussion and consideration, to address what the Applicant considered an objectionable ideology in Alberta schools. Again, the Applicant *is an elected school board trustee publicly posting pictures relating to children with the express intent of stimulating discussion and consideration*. There is no reasonable basis on which to assert that the Meme Posting reflects solely personal social media use.

Decision 1, VI Position of the Respondent, CROP para. 1(a) p 8. **[TAB A]**

86. At paragraphs 52-71 of the Applicant's brief, the Applicant argues that clause 6 of Policy 4 cannot have been found to have been breached because the conduct of the Applicant cannot be referred to as unlawful, unprofessional or undignified.

87. The central thrust of the Applicant's lengthy argument is that these determinations are subjective and require some objective basis for assessment, which the Applicant then appears to suggest should be determined on the basis of the volume or quantity of public comments (i.e. the emails). The Board has addressed the issue of public comments above. In addition, the Board notes the denigration of those who expressed comments opposed to the Meme Posting, including teachers, at paragraphs 59-60. Notably, the comments of the Simon Wiesenthal Centre occasion no response.

88. The Board has never refused to acknowledge, or ignored, that members of the community were supportive of the Meme, which was clearly stated by the Board in the passage quoted above from Decision 1. Others were not. The Board's statutory obligations are to safeguard the interests of all members of the Division community in accordance with the Code of Conduct and other Board policies, and those obligations are only heightened in the context of a recognized vulnerable group – such as the LGBTQ2S+ community. Protecting the members of the student community in any vulnerable group is the Board's responsibility. In that regard, the Board reviewed the issues before it on the

basis of how a "reasonable person" would view the Meme. The Board's subjective views simply did not enter into the analysis.

Code of Conduct clause 1, CROP para.1(d)(i)(F) p.42. **[TAB F]**

Board Policy 1, Mission, CROP para. 1(d)(i)(E) p.38. **[TAB D]**

89. At paragraphs 68-69 of the Applicant's brief, the Applicant takes issue with the Board's citing of the *Del Grande* decision and argues that the facts of that case are not the same as those here. They are not. The Board's submission is that the principles espoused in *Del Grande* are of assistance in understanding the obligations and responsibilities of an elected school board trustee, however, ultimately the Board's role is determined by the Code of Conduct and the *Act*.

90. In summary the Board carefully drafted reasons that were intelligible, transparent and justifiable, and tethered to the conduct in question.

Decision 1, IX Did the Meme Contravene the Code of Conduct? CROP para. 1(a) p.9. **[TAB A]**

F. Issue 3: The Sanctions Issued Pursuant to Decision 1 were Reasonable

91. At paragraphs 72 – 90 of the Applicant's brief, the Applicant disputes the Board's ability to issue sanctions 1(a) and 1(c) through 1(e) of the Motion as adopted in Decision 1. It does not appear that the Applicant disputes the Board's ability to issue the sanctions at 1(b) or 1(f).

92. As Decision 1's sanctions have been superseded by the second Board decision (which is addressed in the second judicial review brief), the Board uses the past tense in this section of its brief.

93. First, the Applicant advances the argument generally that none of the sanctions issued by the Board that she challenges were supported by either the *Act* or the Code of Conduct. At paragraph 74 the Applicant states that the Code of Conduct "…enumerates only censure and removal from Board appointments." This is not correct. The actual wording of the Code of Conduct, Appendix A, clause 9 is:

> A violation of the Code of Conduct may result in the Board instituting, **without limiting what follows**, any or all of the following sanctions… [Emphasis added].
>
> Code of Conduct clause 1, CROP para.1(d)(i)(F) p.48. **[TAB F]**

94. Further, while the *Act* may not specifically enumerate every potential type of sanction that may be issued, it requires the Board to implement a Code of Conduct, which the Board did. The Board chose to use the words "without limiting what follows" (i.e. expansive language) in the Code of Conduct to encompass available sanctions. The Board of course acknowledges that any sanction it imposes must be reasonable and proportional, but disagrees with the Applicant's argument that to be an available sanction the particular sanction must be expressly prescribed; this was addressed in Decision 1:

> In the Board's view, the Decision was made carefully and with full consideration of the evidence and argument presented to it and reflects an appropriate balancing of the Trustee's ability to hold and express beliefs with the

> Board's statutory mandate to provide a safe and inclusive environment for its students. The Decision was accordingly reasonable as measured by the principles brought forward by the Trustee.
>
> Decision 1, XI Is the Decision Reasonable? CROP para. 1(a) p. 17.

95. The Applicant next argues that sanction 1(a) was contrary to the Board's later expressions inviting the Applicant to bring forward educational issues for discussion and debate. It was not. Sanction 1(a) censured the Applicant from participating on Board committees. Paragraph 3 of the Motion clearly indicated that Ms. LaGrange was free to bring matters to the whole Board for debate and discussion. There was no inconsistency.

96. The Applicant raises no concern with sanction 1(b).

97. The Applicant next argues that sanction 1(c) was overbroad and would prohibit legitimate public statements regarding the Holocaust or the LGBTQ2S+ community. This argument again seeks to examine each individual element of Decision 1 in separate silos, when the Board adopted a holistic and contextual approach. The Applicant was free to bring matters to the Board for debate and discussion. There is no basis to conclude that, had the Applicant wished to express sentiments (for example) recognizing the gravity of International Holocaust Day on behalf of the Board, that the Board would not have been accommodating. Further, if such hypothetical future social media post were not a "public statement" then it would not have run afoul of the sanction.

98. In addition, any attempt by the Board to limit only certain types of public statements by the Applicant, would inevitably have devolved into debates about subjective opinions, one of the very concerns the Applicant herself has raised.

99. The Applicant next argues that sanction 1(d) sought to extinguish her sincerely held religious beliefs. Sanction 1(d) in fact required the Applicant to enroll in specified training to remind her of her role and responsibilities as a school board trustee and to assist the Trustee to make better decisions in any further communications, including on social media. It did not purport to require her to change her beliefs, nor would such a condition be within the Board's jurisdiction or possible to enforce. It is difficult to understand the Applicant's objections to hearing views differing from her own. Surely there can be no issue in being exposed to a diversity of opinion, which is what the Board attempted to accomplish through this section of the Motion. The Board also notes that the Motion directed the Superintendent of Schools to arrange for all Trustees to meet with the Friends of Simon Weisenthal Centre and to receive training.

100. With respect to sanction 1(e), the Applicant argues that requiring her to issue an apology required her to lie, and violated her conscience and religious beliefs notwithstanding that the Applicant has advanced no *Charter* arguments in her brief.

101. The apology required the Applicant to recognize the "inappropriateness" of her actions and that she was "deeply sorry for having offended anyone." Neither of these conditions required Ms. LaGrange to lie or otherwise violate

her conscience. Her actions breached the Code of Conduct, which the Board explains in Decision 1, and so were inappropriate regardless of the sincerity of her belief. Apologizing to those who were offended equally does not require the holding or changing of any particular belief, only the recognition that by her conduct the Applicant may have caused offense to Division students and staff. Public acknowledgement of this was also needed to address public concerns surrounding the Meme, and maintain public confidence in the Board and school system more generally. As reflected by the wording, the Board went to some lengths to craft a sanction that would not require the Applicant to recant her personal beliefs.

Minutes of a Special Meeting of the Board held September 25, 2023, CROP para. 1(e)(i) p.146. **[TAB A]**

102. The Applicant takes no issue with sanction 1(f).

G. Some Remedies Sought by the Applicant Are Inappropriate

103. At paragraphs 91(b) and (c) of the Applicant's brief, the Applicant seeks orders reinstating her as a trustee and requiring her to receive payments to trustees missed during the time she was disqualified.

104. Decision 1 did not disqualify the Applicant. This sanction is at issue in the second judicial review proceeding and is not appropriately dealt with here. Even if Decision 1 were quashed, Ms. LaGrange's reinstatement could not follow as there was no disqualification as a result of Decision 1. The Board's position is that the second Board decision could only be quashed if Decision 1 were also found to be unreasonable, as the second Board Decision turns in

part on the Applicant's non-compliance with Decision 1, but quashing Decision 1 alone does not necessarily mean that the second decision would also be unreasonable.

PART 5 COSTS

105. The Board submits that it should be entitled to its costs for each of these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 19th day of April 2024.

McLENNAN ROSS LLP

Per: _____
Teresa Haykowsky, K.C.

Per: _____
Kathleen Garbutt

LIST OF AUTHORITIES

LIST OF KEY EVIDENCE

Document Description	Certified Record of Proceeding Reference	TAB
Decision 1 of the Board of Trustee of the Red Deer Catholic Separate School Board at pg. 3 of the Minutes of a Special Meeting of the Board held September 25, 2023	Para. 1(a)	A
Minutes of a Special Meeting of the Board held September 25, 2023	Para. 1(e)(i)	A
Letter to Minister of Education, September 7, 2023	Para.1(d)(K)	B
September 7, 2023, Complaint Letter	Para. 1(c)	C
Board Policy 1	Para. 1(d)(i)(E)	E
Board Policy 3	Para 1(d)(i)(G)	F
Code of Conduct	Para. 1(d)(i)(F)	G

Ontario Energy Board *Appellant*

v.

Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals *Respondents*

and

Ontario Education Services Corporation *Intervener*

Commission de l'énergie de l'Ontario *Appelante*

c.

Ontario Power Generation Inc., Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 et Society of Energy Professionals *Intimés*

et

Corporation des services en éducation de l'Ontario *Intervenante*

Indexed as: Ontario (Energy Board) *v.* Ontario Power Generation Inc.

2015 SCC 44

File No.: 35506.

2014: December 3; 2015: September 25.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 78.1(5), (6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether

Répertorié : Ontario (Commission de l'énergie) *c.* Ontario Power Generation Inc.

2015 CSC 44

N° du greffe : 35506.

2014 : 3 décembre; 2015 : 25 septembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Services publics — Électricité — Décision d'un organisme de réglementation des services publics relativement à l'établissement de tarifs — Demande d'un service public en vue d'obtenir le recouvrement de dépenses de rémunération faites ou convenues grâce aux tarifs établis par la Commission de l'énergie de l'Ontario — La Commission avait-elle l'obligation d'employer une méthode particulière axée sur la prudence pour apprécier les dépenses du service public? — Le refus de la Commission d'approuver 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public était-il raisonnable? — Loi de 1998 sur la Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, art. 78.1(5), (6).

Droit administratif — Organismes et tribunaux administratifs — Appels — Qualité pour agir — La Commission de l'énergie de l'Ontario a-t-elle agi de manière inappropriée en se pourvoyant en appel et en faisant valoir

Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

le caractère raisonnable de sa propre décision? — A-t-elle tenté de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale?

En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que le service public touche des paiements qui correspondent à ses dépenses. La Commission a refusé certains paiements sollicités par Ontario Power Generation (« OPG ») dans sa décision sur la demande d'établissement des tarifs pour la période 2011-2012. Elle a en fait refusé à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public au motif que ces dépenses étaient en rupture avec celles d'organismes comparables dans le secteur réglementé de la production d'énergie. Les juges majoritaires de la Cour divisionnaire de l'Ontario ont rejeté l'appel d'OPG et confirmé la décision de la Commission. La Cour d'appel a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs.

La thèse d'OPG en l'espèce veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence doit s'appliquer à son bénéfice. La Commission prétend pour sa part que la loi ne l'oblige pas à employer quelque méthode fondée sur le principe de la prudence et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses convenues, mais bien des dépenses prévues.

OPG exprime en outre des préoccupations sur la participation de la Commission à l'appel de sa propre décision et fait valoir que la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée et que l'organisme a tenté de se servir de l'appel pour s'auto-justifier en formulant de nouveaux arguments à l'appui de sa décision initiale. La Commission soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli. La décision de la Cour d'appel est annulée et celle de la Commission est rétablie.

La juge en chef McLachlin et les juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon : Se pose en premier lieu la question du caractère approprié de la participation de la Commission au pourvoi. Les préoccupations relatives à la participation d'un tribunal administratif à l'appel de sa propre décision ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes. Vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Qui plus est, dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige. Les considérations suivantes permettent de délimiter l'exercice du pouvoir discrétionnaire de la cour de révision : les dispositions législatives portant sur la structure, le fonctionnement et la mission du tribunal en cause et le mandat du tribunal, à savoir si sa fonction consiste soit à trancher des différends individuels opposant plusieurs parties, soit à élaborer des politiques, à réglementer ou à enquêter, ou à défendre l'intérêt public. L'importance de l'équité, réelle et perçue, milite davantage contre la reconnaissance de la qualité pour agir du tribunal administratif qui a exercé une fonction juridictionnelle dans l'instance. Il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

L'application de ces principes à la situation considérée en l'espèce mène à la conclusion qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. La Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait d'autre choix que de prendre part à l'instance pour que sa décision

a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and

soit défendue au fond. Aussi, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Sa participation au pourvoi n'avait rien d'inapproprié en l'espèce.

La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir, alors que l'autojustification touche à la teneur des prétentions. Un tribunal s'autojustifie lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire. Un tribunal ne peut défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle. Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire, un tribunal ne puisse profiter d'un contrôle judiciaire pour modifier, changer, nuancer ou compléter ses motifs. Même s'il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, la cour de révision étant alors saisie des arguments les plus convaincants à l'appui de chacune des thèses, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Dans la présente affaire, la Commission n'a pas indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant la Cour. Les arguments qu'elle a invoqués en appel n'équivalent pas à une autojustification inadmissible.

La question de fond est celle de savoir si la Commission a employé une méthode appropriée pour refuser à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération. L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins. Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en

utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs — but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no-hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood

capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prescrit pas la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et du consommateur lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Suivant cette loi, il incombe cependant au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables. Il semble donc contraire au régime législatif de présumer que la décision du service public de faire les dépenses était prudente. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter la méthode à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

La question à trancher est celle de savoir si la Commission était tenue à l'application d'un critère excluant le recul et présumant la prudence pour décider si les dépenses de rémunération du personnel étaient justes et raisonnables. Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Toutefois, aucun élément du régime législatif n'appuie l'idée que la Commission devrait être tenue en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence de sorte que la seule décision de ne pas l'appliquer pour apprécier des dépenses convenues rendrait déraisonnable sa décision sur les paiements. Lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements.

Lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue. Dans la présente affaire, il convient mieux de voir dans

as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing them. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable

les dépenses de rémunération dont le recouvrement a été refusé à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux de ses syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conservait une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Cependant, la Commission n'était pas tenue d'appliquer un principe de prudence donné pour apprécier ces dépenses. Il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Présumer la prudence aurait été incompatible avec le fardeau de la preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses.

Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG de ces dépenses et en refusant le recouvrement de celles-ci. Puisque les dépenses en cause sont des dépenses d'exploitation, il est peu probable que le refus essuyé dissuade OPG de faire de telles dépenses à l'avenir, car les dépenses de la nature de celles dont le recouvrement a été refusé sont inhérentes à l'exploitation d'un service public. Aussi, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de

for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended to send a clear signal that OPG must take responsibility for improving its performance. Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

Per Abella J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a "prudence review". The application of a prudence review does not shield

rémunération d'un service public. La Commission n'entend aucunement, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés syndiqués. Il n'était pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre de ces catégories.

Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il visait à signifier clairement à OPG qu'il lui incombe d'accroître sa performance. L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

La juge Abella (dissidente) : La Commission a rendu une décision déraisonnable en ce qu'elle n'a pas appliqué la méthode qu'elle avait elle-même établie pour déterminer le montant de paiements justes et raisonnables. Elle a à la fois méconnu le caractère contraignant en droit des conventions collectives liant Ontario Power Generation et les syndicats et omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles.

Dans ses motifs, la Commission a dit recourir à deux examens pour arrêter le montant de paiements justes et raisonnables. En ce qui concerne les « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter, la Commission a expliqué qu'elle examinait ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombait au service public d'en démontrer le caractère raisonnable. Cependant, une démarche différente était suivie pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission a expliqué

these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast

qu'elle appréciait ces dépenses en se livrant à un « contrôle de la prudence ». L'application du principe de la prudence ne soustrait pas ces dépenses à tout examen, mais elle présume que les dépenses ont été faites de manière prudente.

Toutefois, au lieu d'appliquer la méthode qu'elle avait elle-même établie, la Commission a considéré *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables sans se demander s'il s'agissait en partie de dépenses pour lesquelles la société ne pouvait prendre de mesures de réduction. Par son omission d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission a méconnu à la fois son propre cadre méthodologique et le droit du travail.

Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire. Ces conventions ne laissaient pas seulement au service public peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

Or, en appliquant la méthode qu'elle avait dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission a en fait obligé Ontario Power Generation à prouver le caractère raisonnable de toutes ses dépenses de rémunération et a conclu que l'entreprise n'avait présenté ni preuve convaincante, ni documents ou analyses qui justifiaient les barèmes de rémunération. Si elle avait eu recours à l'approche qu'elle avait dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent

costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

donc être assimilées à juste titre à des dépenses prévues. La Commission n'a toutefois tiré aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation étaient fixes et dans quelle proportion elles demeuraient assujetties au pouvoir discrétionnaire du service public. Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce sens.

En choisissant un critère éminemment susceptible de confirmer l'hypothèse de la Commission selon laquelle les dépenses issues de négociations collectives sont excessives, on se méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas. Même si la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont justes et raisonnables et, à l'intérieur de certaines limites, de définir la méthode utilisée pour établir le montant de ces paiements, dès lors qu'elle a établi une telle méthode, elle doit à tout le moins l'appliquer avec constance.

En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation ne peut savoir comment déterminer les dépenses et les investissements à faire et de quelle manière les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

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By Rothstein J.

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Je serais donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et de renvoyer l'affaire à la Commission pour réexamen.

Jurisprudence

Citée par le juge Rothstein

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Glenn Zacher, *Patrick Duffy* and *James Wilson*, for the appellant.

John B. Laskin, *Crawford Smith*, *Myriam Seers* and *Carlton Mathias*, for the respondent Ontario Power Generation Inc.

Richard P. Stephenson and *Emily Lawrence*, for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000.

Paul J. J. Cavalluzzo and *Amanda Darrach*, for the respondent the Society of Energy Professionals.

Mark Rubenstein, for the intervener.

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Glenn Zacher, *Patrick Duffy* et *James Wilson*, pour l'appelante.

John B. Laskin, *Crawford Smith*, *Myriam Seers* et *Carlton Mathias*, pour l'intimée Ontario Power Generation Inc.

Richard P. Stephenson et *Emily Lawrence*, pour l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000.

Paul J. J. Cavalluzzo et *Amanda Darrach*, pour l'intimée Society of Energy Professionals.

Mark Rubenstein, pour l'intervenante.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ. was delivered by

[1] ROTHSTEIN J. — In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

[2] OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

[3] OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence

Version française du jugement de la juge en chef McLachlin et des juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon rendu par

[1] LE JUGE ROTHSTEIN — En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario (« Commission ») l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que l'entreprise touche des paiements qui correspondent à ses dépenses. Le présent pourvoi vise la décision de la Commission de refuser certains paiements à Ontario Power Generation Inc. (« OPG ») par suite de sa demande d'approbation de tarifs pour la période 2011-2012. Plus particulièrement, la Commission a refusé d'approuver des dépenses de 145 millions de dollars au titre de la rémunération du personnel affecté aux installations nucléaires au motif que le coût de la main-d'œuvre d'OPG était en rupture avec celui d'organismes comparables dans le secteur réglementé de la production d'énergie.

[2] OPG en a appelé devant la Cour divisionnaire de l'Ontario, dont les juges majoritaires ont rejeté l'appel et confirmé la décision de la Commission. OPG s'est alors adressée à la Cour d'appel de l'Ontario, qui a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs. La Commission interjette aujourd'hui appel devant notre Cour.

[3] OPG soutient que le refus de la Commission d'approuver ces dépenses de rémunération de ses employés est déraisonnable. Sa thèse veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence

methodology, OPG argues that its decision was unreasonable.

[4] The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

[5] OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

[6] The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

[7] In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility

doit s'appliquer à son bénéfice. La Commission n'ayant pas eu recours à pareille méthode pour se prononcer sur la prudence d'OPG, sa décision serait déraisonnable.

[4] La Commission rétorque que la loi ne l'oblige pas à employer quelque méthode pour appliquer le « principe de la prudence » et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses « convenues », mais bien des dépenses prévues.

[5] OPG déplore par ailleurs que la Commission soit partie à l'appel de sa propre décision. Selon elle, la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée, et la Commission tente de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale.

[6] La Commission fait valoir que la Cour a circonscrit la faculté qu'elle avait de plaider en appel lorsqu'elle lui a reconnu tous les droits d'une partie au moment d'autoriser le pourvoi. Subsidiairement, elle soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

[7] Il convient mieux, à mon sens, de voir dans les dépenses de rémunération qui ont été refusées à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conserve une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Je ne crois cependant pas, malgré ce qu'affirme OPG, que la Commission était tenue d'appliquer un principe de prudence donné pour apprécier les dépenses. La *Loi de 1998 sur la*

costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

[8] In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

[9] Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

[10] Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

[11] The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board in regulating electricity, which include:

1. (1) . . .

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the

Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, et ses règlements connexes accordent à la Commission une grande latitude dans le choix d'une méthode pour apprécier les dépenses d'un service public, sous réserve de l'obligation de faire en sorte que, au final, les paiements qu'elle ordonne soient justes et raisonnables vis-à-vis à la fois du service public et du consommateur.

[8] Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en refusant de les approuver.

[9] En ce qui concerne la participation de la Commission au pourvoi, je ne crois pas qu'il soit inapproprié qu'elle défende la justesse de sa décision, ni que les arguments qu'elle invoque en appel équivalent à une « autojustification » inadmissible.

[10] Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir la décision de la Commission.

I. Cadre réglementaire

[11] La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* fait de la Commission un organisme de réglementation investi du pouvoir de surveiller, entre autres choses, la production d'électricité en Ontario. Son article premier énonce les objectifs de la Commission dans la réglementation de l'électricité, dont les suivants :

1. (1) . . .

1. Protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité.

2. Promouvoir l'efficacité économique et la rentabilité dans les domaines de la production, du transport, de la distribution et de la vente d'électricité ainsi que de la gestion de la demande d'électricité et faciliter le maintien d'une industrie de l'électricité financièrement viable.

La Commission doit donc s'acquitter de sa fonction de réglementation dans le souci d'établir un équilibre entre l'intérêt du consommateur, d'une part,

electricity industry. The Board's role has also been described as that of a "market proxy": 2012 ONSC 729, 109 O.R. (3d) 576, at para. 54; 2013 ONCA 359, 116 O.R. (3d) 793, at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, at para. 48.

[12] One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

(5) The Board may fix such other payment amounts as it finds to be just and reasonable,

(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; . . .

[13] Section 78.1(6) provides: ". . . the burden of proof is on the applicant in an application made under this section".

[14] As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that the amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

[15] This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on

et l'efficacité et la viabilité financière du secteur de l'électricité, d'autre part. On lui attribue aussi un rôle de « substitut du marché » (2012 ONSC 729, 109 O.R. (3d) 576, par. 54; 2013 ONCA 359, 116 O.R. (3d) 793, par. 38). Sa fonction consiste alors à reproduire au mieux les forces auxquelles serait soumis un service public dans un contexte concurrentiel (*Toronto Hydro-Electric System Ltd. c. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, par. 48).

[12] L'un des leviers les plus puissants dont dispose la Commission pour atteindre ses objectifs réside dans son pouvoir de fixer le montant des paiements que touche l'entreprise pour la prestation du service. Voici l'extrait pertinent du par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* :

(5) La Commission peut fixer les autres paiements qu'elle estime justes et raisonnables :

a) dans le cadre d'une requête en vue d'obtenir une ordonnance prévue au présent article, si elle n'est pas convaincue que le montant du paiement qui fait l'objet de la requête est juste et raisonnable; . . .

[13] Le paragraphe 78.1(6) dispose pour sa part : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du présent article ».

[14] Suivant mon interprétation de ces dispositions, le service public demande des paiements pour une période à venir (appelée « période de référence »). La Commission fait droit à la demande, sauf lorsqu'elle n'est pas convaincue que les paiements demandés sont justes et raisonnables. Lorsqu'elle n'en est pas convaincue, le par. 78.1(5) lui permet de déterminer les paiements qui lui paraissent justes et raisonnables.

[15] Dans l'arrêt *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, la Cour a eu l'occasion de se prononcer sur le sens d'un libellé législatif semblable. Elle a alors statué que la tarification « juste et raisonnable » était celle [TRADUCTION] « qui, dans les circonstances, était juste pour le

the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

[16] This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, 319 N.R. 171.

[17] This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators, but merely to observe that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

consommateur, d'une part, et qui permettait à l'entreprise d'obtenir un juste rendement sur les capitaux investis, d'autre part » (p. 192-193).

[16] Dès lors, le service public doit pouvoir à long terme recouvrer, grâce à la tarification approuvée, ses dépenses d'exploitation et ses coûts en capital, ces derniers s'entendant alors de tous les coûts liés aux capitaux investis par le service public. Le pourvoi vise principalement les dépenses d'exploitation. Si leur recouvrement n'est pas autorisé, le service public n'obtient pas l'équivalent du coût du capital, soit le rendement exigé par les investisseurs pour investir dans le service public. Le rendement exigé équivaut à celui qu'ils pourraient réaliser sur un investissement comportant un risque comparable. À long terme, à moins que le service public réglementé ne puisse obtenir l'équivalent du coût du capital, les nouveaux investissements seront découragés et l'entreprise ne pourra accroître ses activités, ni même les poursuivre. Ce sont non seulement ses actionnaires, mais aussi ses clients, qui en souffriront (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149).

[17] Évidemment, la Commission n'est pas tenue pour autant d'accepter toute dépense avancée par le service public, et le rendement obtenu par les actionnaires n'est pas non plus garanti. À court terme, ce rendement peut fluctuer, notamment lorsque la consommation d'électricité est supérieure ou inférieure à celle prévue. De même, le refus d'approuver des dépenses d'exploitation dont le service public a convenu aura un effet défavorable sur le rendement des actions. Je n'entends pas me livrer à une analyse détaillée de la manière dont le coût du capital-actions devrait être considéré par les organismes qui réglementent les services publics, mais seulement faire observer que tout refus d'approuver une dépense dont un service public a convenu a un effet sur le rendement des actions. Cet effet justifie une grande attention au vu de la nécessité qu'un service public attire les investissements à long terme et réinvestisse ses bénéfices afin de survivre et de fonctionner de manière efficace et rentable, conformément aux objectifs légaux de la Commission applicables à la réglementation de l'électricité en Ontario.

[18] As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

[19] Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

[20] In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

[21] OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

[22] It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated

[18] Rappelons qu'il incombe au service public de convaincre la Commission du caractère juste et raisonnable des paiements qu'il sollicite. S'il n'y parvient pas, la Commission peut rejeter la demande en partie à raison du montant qui, selon elle, n'est pas juste et raisonnable.

[19] En cas de refus d'approbation, le service public peut renoncer, si cela lui est possible, aux dépenses d'exploitation en cause. S'il ne peut y renoncer, ses actionnaires absorbent le déficit en touchant un rendement inférieur à celui prévu, c'est-à-dire le coût du capital-actions pour le service public. Il appartient dès lors à la direction de ce dernier de faire en sorte que ses dépenses correspondent à celles que la Commission tient pour justes et raisonnables.

[20] Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

II. Faits

[21] OPG est le plus grand producteur d'énergie de l'Ontario, et sa tarification est réglementée par la Commission. Elle a vu le jour en 1999 et fait partie des entreprises qui ont succédé à Ontario Hydro. Elle exploite des installations nucléaires et hydroélectriques soumises à la réglementation de la Commission qui produisent environ la moitié de l'électricité consommée dans la province. Son unique actionnaire est la province d'Ontario.

[22] Son effectif se compose d'environ 10 000 personnes pour ses activités réglementées, dont 95 p. 100 travaillent dans le secteur nucléaire. Environ 90 p. 100 des employés affectés à ses activités

businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

[23] Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

> OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.

(A.R., vol. III, at p. 215)

[24] As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 ("Board 2008-2009 Decision") (online), at pp. 5-6.

réglementées sont syndiqués, dont approximativement les deux tiers sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 (« STTSE »), et le tiers par Society of Energy Professionals (« Society »).

[23] Dès ses débuts en tant que service public indépendant, OPG a eu conscience de l'importance d'accroître sa performance d'entreprise. Dans le cadre de mesures générales prises à cette fin, elle a entrepris de comparer le rendement de son secteur nucléaire à celui de centrales comparables dans le monde. Dans un protocole d'accord intervenu avec la province d'Ontario le 17 août 2005, OPG a pris l'engagement suivant :

> [TRADUCTION] OPG visera l'amélioration constante de son secteur nucléaire et de ses services internes. Elle comparera sa performance dans ces domaines à celle de l'exploitation des réacteurs CANDU à travers le monde ainsi qu'à celle des producteurs privés et publics d'électricité d'origine nucléaire appartenant au quartile supérieur en Amérique du Nord. Sa priorité première sera d'améliorer l'exploitation de son parc nucléaire actuel.

(d.a., vol. III, p. 215)

[24] Dans la toute première demande qu'elle a présentée à la Commission en 2007 pour la période de référence 2008-2009, OPG a sollicité l'approbation de « recettes nécessaires » se chiffrant à 6,4 milliards de dollars; ce poste correspond [TRADUCTION] « aux recettes dont l'entreprise a besoin au total pour le paiement de toutes ses dépenses susceptibles d'approbation et, également, pour recouvrer tous les coûts liés aux capitaux investis » (L. Reid et J. Todd, « New Developments in Rate Design for Electricity Distributors », dans G. Kaiser et B. Heggie, dir., *Energy Law and Policy* (2011), 519, p. 521). Il s'agissait d'une majoration d'un milliard de dollars par rapport à ce qu'OPG avait demandé et obtenu en application du régime de réglementation en vigueur avant que la Commission ne soit investie de son pouvoir de réglementation vis-à-vis d'elle (EB-2007-0905, décision motivée, 3 novembre 2008 (« décision 2008-2009 de la Commission ») (en ligne), p. 5-6).

[25] The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. ("Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

[26] In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

[27] On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

[25] La Commission a estimé qu'OPG ne satisfaisait pas aux attentes de son unique actionnaire quant à la performance de son secteur nucléaire et qu'elle avait peu fait pour comparer sa performance à celle de ses pairs, alors qu'elle s'y était engagée dès 2005. De fait, la seule preuve d'une démarche en ce sens présentée par OPG dans le cadre de sa demande d'approbation de tarifs était un rapport établi par Navigant Consulting Inc. en 2006 (« rapport Navigant ») et selon lequel l'effectif d'OPG dépassait de 12 p. 100 celui de ses pairs. La Commission a conclu qu'OPG n'avait pas donné suite aux recommandations du rapport Navigant, ni commandé d'études comparatives ultérieures pour évaluer sa performance (décision 2008-2009 de la Commission, p. 27 et 30). Elle a aussi jugé les coûts d'exploitation d'OPG aux installations nucléaires de Pickering [TRADUCTION] « bien supérieurs à la moyenne du secteur » (p. 29). Elle a donc refusé d'approuver 35 millions de dollars au chapitre des recettes nécessaires et enjoint à OPG de réaliser des études comparatives pour étayer ses demandes ultérieures (p. 31).

[26] Pour expliquer l'importance de la comparaison, la Commission dit ce qui suit : [TRADUCTION] « La raison pour laquelle le protocole d'accord insiste sur la conduite d'une étude comparative est qu'une telle étude peut faire et fait ressortir toute inefficacité ou absence d'accroissement de la productivité » (décision 2008-2009 de la Commission, p. 30).

[27] Le 5 mai 2010, peu avant qu'OPG ne dépose sa deuxième demande d'approbation de tarifs — qui est l'objet du pourvoi —, le ministre de l'Énergie et de l'Infrastructure de l'Ontario a écrit au président-directeur général du service public afin que ce dernier fasse état, dans sa demande, [TRADUCTION] « d'efforts concertés pour trouver des moyens de réaliser des économies et mette l'accent sur les postes de dépense qui sont essentiels à l'exploitation sûre et fiable de ses actifs existants et de ses installations projetées déjà en cours de réalisation » (d.a., vol. IV, p. 38).

[28] On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

[29] OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

[30] A substantial portion of OPG's wage and compensation expenses was fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

[28] Le 26 mai 2010, OPG a déposé sa demande de paiements pour la période de référence 2011-2012. Elle a présenté à l'appui deux rapports de ScottMadden Inc., un cabinet-conseil en gestion générale spécialisé dans la comparaison et la planification opérationnelle d'installations nucléaires. Le rapport de la phase 1 compare la performance opérationnelle et financière d'OPG à celle d'autres entreprises à partir de mesures de la performance dans le secteur d'activité. Le rapport final de la phase 2 porte sur les objectifs d'accroissement de la performance dans l'optique d'une amélioration de l'exploitation du secteur nucléaire. OPG a collaboré avec ScottMadden pour l'établissement des rapports des phases 1 et 2, qui ont respectivement été publiés les 2 juillet et 11 septembre 2009.

[29] La demande visait la période allant du 1er janvier 2011 au 31 décembre 2012. OPG y demandait l'approbation de recettes nécessaires de 6,9 milliards de dollars, soit une augmentation de 6,2 p. 100 par rapport aux recettes d'alors compte tenu des tarifs approuvés pour la période précédente. Des 6,9 milliards de dollars sollicités au titre des recettes nécessaires, 2,8 milliards auraient été affectés à la rémunération, dont environ 2,4 milliards dans le secteur nucléaire.

[30] Une grande partie des dépenses d'OPG au chapitre des salaires et de la rémunération était déterminée par des conventions collectives intervenues avec les syndicats (STTSE et Society). Lors du dépôt de la demande, OPG était liée par une convention collective conclue avec le STTSE en vigueur d'avril 2009 à mars 2012, alors que la convention collective qui la liait à Society avait expiré le 31 décembre 2010. Ces conventions collectives prévoyaient des augmentations annuelles de salaires se situant entre 2 et 3 p. 100, auxquelles s'ajoutait 1 p. 100 pour les changements d'échelon et l'avancement. Après l'audition de la demande par la Commission dans la présente affaire, un arbitre a ordonné l'application d'une nouvelle convention collective liant OPG et Society à compter du 3 février 2011. La convention collective prévoyait des augmentations de salaires de 1 à 3 p. 100.

III. Judicial History

A. *Ontario Energy Board: 2011 LNONOEB 57 (QL) ("Board Decision")*

[31] In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (para. 73). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

[32] The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (para. 350). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

[33] Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of

III. Historique judiciaire

A. *Commission de l'énergie de l'Ontario (2011 LNONOEB 57 (QL) (« décision de la Commission »))*

[31] Dans sa décision relative à la demande d'approbation de tarifs d'OPG pour la période de référence 2011-2012, la Commission dit que le règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 ») et l'art. 78.1 de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* lui confèrent un vaste pouvoir discrétionnaire quant [TRADUCTION] « au choix d'une méthode indiquée pour fixer des tarifs justes et raisonnables » (para. 73). Elle reconnaît que différents principes peuvent s'appliquer selon qu'il s'agit du recouvrement de dépenses prévues ou de l'examen après coup de dépenses déjà faites. Pour statuer sur la demande dont elle était saisie, il convenait de tenir compte de tout élément de preuve que la Commission jugeait pertinent pour apprécier le caractère raisonnable des recettes nécessaires d'OPG.

[32] La Commission refuse d'approuver les 6,9 milliards de dollars demandés par OPG au titre des recettes nécessaires, les réduisant de 145 millions de dollars pour la période référence [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (par. 350). Cette décision défavorable tient surtout à l'opinion de la Commission selon laquelle OPG compte trop d'employés et ses niveaux de rémunération sont excessifs.

[33] Au sujet de la taille de l'effectif, la Commission relève que, selon une étude comparative qu'OPG a elle-même commandée (le rapport final de la phase 2 de ScottMadden), la dotation de certains postes peut être réduite, voire supprimée. Elle recommande à OPG de revoir sa structure organisationnelle et de réaffecter du personnel ou de supprimer des postes au cours des années suivantes. Vingt à vingt-cinq pour cent du personnel d'OPG devait en effet partir à la retraite entre 2010 et 2014 et il était possible de recourir davantage à la sous-traitance. Au chapitre de la rémunération, elle estime qu'OPG n'a pas présenté d'éléments convaincants pour justifier que les salaires de son personnel opérationnel

industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. *Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576*

[34] OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test — that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

[35] The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

> The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms

se situent au 75e percentile des salaires versés dans le secteur selon une étude de Towers Perrin. Selon la Commission, ils devraient se situer au 50e percentile, soit le même que pour le personnel de direction. Pour décider de la réduction qui s'impose, elle reconnaît qu'OPG pourrait ne pas être en mesure, pendant la période de référence, de réaliser des économies de 145 millions de dollars par la réduction de sa seule masse salariale à cause des conventions collectives en vigueur.

B. *Cour supérieure de Justice de l'Ontario, Cour divisionnaire (2012 ONSC 729, 109 O.R. (3d) 576)*

[34] OPG a fait appel de la décision au motif que celle-ci était déraisonnable et mal motivée. Elle a soutenu que la Commission aurait dû appliquer le principe de l'investissement prudent, c'est-à-dire que, dans son examen des dépenses de rémunération, elle aurait dû seulement s'interroger sur la prudence de conclure, à l'époque, les conventions collectives qui commandaient ces dépenses. Elle a ajouté que la Commission aurait dû présumer que les dépenses étaient prudentes.

[35] La décision de la formation de trois juges de la Cour divisionnaire est partagée. Au nom des juges majoritaires, la juge Hoy (aujourd'hui Juge en chef adjointe de l'Ontario) conclut que la décision de la Commission est raisonnable, car il était possible à la direction d'OPG de réduire ultérieurement ses dépenses globales de rémunération dans le respect des conventions collectives. L'application stricte du principe de l'investissement prudent n'aurait pas permis à la Commission d'atteindre son objectif, d'origine législative, de favoriser la rentabilité de la production d'électricité. Vu la présence de « deux monopoles », il importait particulièrement que la Commission exerce son pouvoir de fixer des tarifs justes et raisonnables :

> [TRADUCTION] Les conventions collectives sont intervenues entre un monopole réglementé qui refile ses coûts au consommateur et qui n'est pas soumis à la concurrence, et deux syndicats qui représentent environ 90 p. 100 des salariés et qui constituent presque un second monopole

inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

[36] Justice Aitken dissented, finding that,

to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. *Ontario Court of Appeal: 2013 ONCA 359, 116 O.R. (3d) 793*

[37] The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4 (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

étant donné les conditions héritées d'Ontario Hydro et le fait qu'il serait extrêmement difficile d'exploiter des installations nucléaires sans les salariés. [par. 54]

[36] Dissidente, la juge Aitken opine que,

[TRADUCTION] dans la mesure où les coûts [de rémunération des employés du secteur nucléaire] étaient déterminés à l'avance, c'est-à-dire qu'ils étaient arrêtés par des conventions collectives conclues avant la demande et la période de référence, OPG devait seulement prouver la prudence ou le caractère raisonnable de la décision de conclure ces conventions au vu des circonstances connues ou qui auraient pu raisonnablement être prévues au moment de prendre la décision. [par. 83]

Elle aurait statué que l'omission de la Commission d'appliquer séparément et expressément le principe de la prudence à la partie des dépenses de rémunération du secteur nucléaire dont elle avait convenu, jumelée à son appréciation avec le recul du caractère raisonnable de ces dépenses, a rendu la décision de la Commission déraisonnable.

C. *Cour d'appel de l'Ontario (2013 ONCA 359, 116 O.R. (3d) 793)*

[37] La Cour d'appel de l'Ontario infirme le jugement de la Cour divisionnaire et renvoie le dossier à la Commission. Elle établit une distinction entre les dépenses prévues et les dépenses convenues, ces dernières correspondant à celles que le service public [TRADUCTION] « a convenu d'acquitter pendant [la période de référence] » et qu'il « ne peut modifier ou réduire pendant cette période, généralement à cause d'obligations contractuelles » (par. 29). Même si les dépenses n'ont pas à être acquittées dans l'immédiat, comme en l'espèce, celles qui, « par contrat, doivent être acquittées pendant la période de référence constituent néanmoins des dépenses convenues, même si elles n'ont pas encore été acquittées » (par. 29). La Cour d'appel statue que la Commission doit, dans son examen de ces dépenses, appliquer le principe de la prudence énoncé dans *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4 (par. 15-16). En ne respectant pas ce précédent et en obligeant OPG à « modifier des dépenses qu'elle ne peut juridiquement modifier », la Commission a agi déraisonnablement (par. 37).

IV. Issues

[38] The Board raises two issues on appeal:

1. What is the appropriate standard of review?

2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

[39] Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

[40] It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. *The Appropriate Role of the Board in This Appeal*

(1) Tribunal Standing

[41] In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and

IV. Questions en litige

[38] La Commission soulève deux questions dans le cadre du pourvoi :

1. Quelle est la norme de contrôle applicable?

2. Sa décision de retrancher 145 millions de dollars des recettes nécessaires d'OPG est-elle raisonnable?

[39] Devant notre Cour, OPG fait valoir que la Commission outrepasse le rôle qui sied à un tribunal administratif dans le cadre d'un appel de sa propre décision, ce qui soulève la question supplémentaire suivante :

3. La Commission a-t-elle agi de manière inacceptable en se pourvoyant en tant que partie à l'appel en l'espèce?

V. Analyse

[40] Il convient en toute logique d'examiner d'abord le caractère approprié de la participation de la Commission au pourvoi. J'examinerai ensuite la norme de contrôle applicable, puis la question de fond de savoir si la décision de la Commission est raisonnable.

A. *Le rôle qui sied à la Commission dans le cadre du pourvoi*

(1) La qualité pour agir d'un tribunal administratif

[41] Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern Utilities* »), sous la plume du juge Estey, notre Cour se demande pour la première fois en quoi la participation d'un décideur administratif à l'appel ou au contrôle de sa propre décision peut soulever des doutes sur son impartialité. Pour reprendre les propos du juge Estey, « [u]ne participation aussi active ne peut que jeter le discrédit sur l'impartialité d'un tribunal administratif lorsque l'affaire lui est renvoyée ou lorsqu'il est saisi d'autres procédures

issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: ". . . it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

[42] The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

[43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

[44] This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

concernant des intérêts et des questions semblables ou impliquant les mêmes parties » (p. 709). Il ajoute que le tribunal administratif avait déjà le loisir de s'expliquer clairement dans sa décision initiale et « [qu'il] enfreint de façon inacceptable la réserve dont [il doit] faire preuve lorsqu'[il] particip[e] aux procédures comme partie à part entière » (p. 709).

[42] Dans *Northwestern Utilities*, notre Cour statue finalement que la portée des observations que pouvait présenter l'Alberta Public Utilities Board — qui, à l'instar de la Commission de l'énergie de l'Ontario, jouissait légalement du droit d'être entendue en appel devant une cour de justice (voir la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 33(3)) — était limitée. Le juge Estey fait remarquer ce qui suit :

> Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître. [p. 709]

[43] Dans *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983, qui porte sur le contrôle judiciaire d'une décision de la commission des relations de travail de la Colombie-Britannique, notre Cour approfondit la question de la qualité pour agir d'un organisme administratif. Même si les juges majoritaires qui ont entendu le pourvoi n'adoptent pas d'approche particulière pour se prononcer, le juge La Forest, avec l'appui du juge en chef Dickson, reconnaît qu'un tribunal administratif a qualité non seulement pour expliquer le dossier et faire valoir son point de vue sur la norme de contrôle applicable, mais aussi pour soutenir que sa décision est raisonnable.

[44] Cette conclusion repose sur la nécessité de faire en sorte que la cour de révision rende un jugement parfaitement éclairé sur la décision du tribunal administratif. Le juge La Forest invoque l'arrêt *B.C.G.E.U. c. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), p. 153, pour avancer que le tribunal administratif est le mieux placé pour attirer l'attention de la cour

those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

(*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

[45] Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) ("*Goodis*"), at para. 24.

[46] A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in G. Kaiser and B. Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

[47] In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision

sur les considérations, enracinées dans la compétence ou les connaissances spécialisées du tribunal, qui peuvent rendre raisonnable ce qui autrement paraîtrait déraisonnable à quelqu'un qui n'est pas versé dans les complexités de ce domaine spécialisé.

(*Paccar*, p. 1016)

Toutefois, le juge La Forest conclut que le tribunal administratif ne peut aller jusqu'à défendre le bien-fondé de sa décision (p. 1017). Sa thèse ne convainc pas une majorité de ses collègues, mais la juge L'Heureux-Dubé, dissidente, qui se prononce elle aussi sur la qualité pour agir du tribunal administratif, souscrit à son analyse sur le fond (p. 1026).

[45] Juridictions de première instance et d'appel ont tenté tant bien que mal de concilier les opinions exprimées par les juges de la Cour dans les arrêts *Northwestern Utilities* et *Paccar*. De fait, même si notre Cour n'est jamais expressément revenue sur *Northwestern Utilities*, elle a parfois autorisé un tribunal administratif à participer à l'instance à titre de partie à part entière sans expliquer sa décision (voir p. ex. *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Ellis-Don Ltd. c. Ontario (Commission des relations de travail)*, 2001 CSC 4, [2001] 1 R.C.S. 221; *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952; voir également *Ontario (Children's Lawyer) c. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) (« *Goodis* »), par. 24).

[46] Dans un certain nombre de décisions, les cours d'appel se sont attaquées à la question et, [TRADUCTION] « pour la plupart, elles sont désormais plus enclines à autoriser un tribunal administratif à participer au contrôle judiciaire ou à l'appel, prévu par la loi, de sa propre décision » (D. Mullan, « Administrative Law and Energy Regulation », dans G. Kaiser et B. Heggie, 35, p. 51). Le survol de trois arrêts de juridictions d'appel suffit à établir la raison d'être de ce revirement.

[47] Dans *Goodis*, le Bureau de l'avocate des enfants demandait à la cour de ne pas reconnaître ou de restreindre la qualité pour agir du Commissaire

was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.), at para. 32.

(*Goodis*, at para. 34)

[48] The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and

à l'information et à la protection de la vie privée dont la décision faisait l'objet d'une demande de contrôle. La Cour d'appel de l'Ontario a refusé de se montrer formaliste et d'appliquer une règle fixe qui aurait obligé le tribunal administratif à s'en tenir à des observations d'un certain type et elle a adopté plutôt une approche contextuelle et discrétionnaire (*Goodis*, par. 32-34). Elle a conclu que l'approche catégorique n'avait pas de fondement rationnel et a fait remarquer qu'une telle approche pouvait avoir des conséquences fâcheuses :

> [TRADUCTION] Par exemple, la règle catégorique qui refuse au tribunal administratif la qualité pour agir lorsque la contestation allègue le déni de justice naturelle peut priver la cour d'observations capitales lorsque la contestation se fonde des défaillances alléguées de la structure ou du fonctionnement du tribunal administratif, car ce sont des sujets sur lesquels ce dernier est particulièrement bien placé pour formuler des observations. De même, la règle qui reconnaît à un tribunal administratif la qualité pour défendre sa décision au regard du critère de la raisonnabilité, mais non du critère de la décision correcte, permet le débat inutile et empêche le débat utile. Parce que le meilleur moyen d'établir la raisonnabilité d'une décision peut être de démontrer qu'elle est correcte, une règle fondée sur cette distinction semble au mieux ténue, comme l'affirme le juge Robertson dans *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 1386 c. Bransen Construction Ltd.*, [2002] A.N.-B. nº 114, 249 R.N.-B. (2e) 93 (C.A.), par. 32.

(*Goodis*, par. 34)

[48] La Cour d'appel statue qu'il faut voir dans les arrêts *Northwestern Utilities* et *Paccar* la source de [TRADUCTION] « considérations fondamentales » qui doivent guider l'exercice de son pouvoir discrétionnaire eu égard au contexte de l'affaire (*Goodis*, par. 35). Les deux considérations les plus importantes, selon ces arrêts, sont « la nécessité de faire en sorte que la cour rende une décision parfaitement éclairée sur les questions en litige » (par. 37) et « celle d'assurer l'impartialité du tribunal administratif » (par. 38). La cour doit limiter la participation du tribunal administratif lorsque cette participation est de nature à miner la confiance

to what extent the tribunal should be permitted to make submissions: paras. 36-38.

[49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

[50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

[51] A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern*

ultérieure des citoyens dans son objectivité. La Cour d'appel énumère les considérations — sur lesquelles je reviendrai — qui jouent dans la décision d'autoriser ou non le tribunal administratif à présenter des observations et dans la détermination de la mesure dans laquelle il lui est permis de le faire, le cas échéant (par. 36-38).

[49] Dans *Canada (Procureur général) c. Quadrini*, 2010 CAF 246, [2012] 2 R.C.F. 3, le juge Stratas relève deux considérations qui, en common law, limitent selon lui la participation éventuelle d'un tribunal administratif à l'appel de sa propre décision : le caractère définitif et l'impartialité. Le principe du caractère définitif veut qu'un tribunal ne puisse se prononcer de nouveau dans une affaire une fois qu'il a rendu sa décision, motifs à l'appui. J'y reviendrai plus en détail, car j'estime que ce principe se rapporte plus directement à l'« autojustification » de sa décision par le tribunal administratif qu'à sa qualité pour agir comme telle.

[50] Le principe de l'impartialité entre en jeu lorsque le tribunal administratif défend une thèse en appel car, dans certains cas, sa décision peut lui être renvoyée pour réexamen. Le juge Stratas conclut que « [l]es observations que le tribunal administratif présente dans une instance en contrôle judiciaire et qui plongent trop loin, trop intensément ou trop énergiquement dans le bien-fondé de l'affaire soumise au tribunal administratif risquent d'empêcher celui-ci de procéder par la suite à un réexamen impartial du bien-fondé de l'affaire » (*Quadrini*, par. 16). Il conclut toutefois au final que les principes applicables n'imposaient pas de « règles absolues », et il souscrit à l'approche discrétionnaire de la Cour d'appel de l'Ontario dans *Goodis* (*Quadrini*, par. 19-20).

[51] L'arrêt *Leon's Furniture Ltd. c. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110, constitue un troisième exemple récent où une cour de justice est appelée à se pencher sur le sujet. Leon's Furniture a contesté la qualité du commissaire intimé de plaider sur le fond en appel (par. 16). La Cour d'appel de l'Alberta estime elle aussi que le droit applicable doit donner suite aux considérations fondamentales soulevées dans

Utilities but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

[53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court

l'arrêt *Northwestern Utilities*, mais que la question de la qualité pour agir d'un tribunal administratif relève néanmoins d'un pouvoir discrétionnaire qu'il faut exercer eu égard aux éléments contextuels applicables (par. 28-29).

[52] Les considérations énoncées par notre Cour dans *Northwestern Utilities* témoignent de préoccupations fondamentales quant à la participation d'un tribunal administratif à l'appel de sa propre décision. Or, ces préoccupations ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire préconisée dans *Goodis*, *Leon's Furniture* et *Quadrini* offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes (voir N. Semple, « The Case for Tribunal Standing in Canada » (2007), 20 *R.C.D.A.P.* 305; L. A. Jacobs et T. S. Kuttner, « Discovering What Tribunals Do : Tribunal Standing Before the Courts » (2002), 81 *R. du B. can*. 616; F. A. V. Falzon, « Tribunal Standing on Judicial Review » (2008), 21 *R.C.D.A.P.* 21).

[53] Plusieurs considérations militent en faveur d'une démarche discrétionnaire. En particulier, vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Par exemple, il peut être en mesure d'expliquer en quoi une certaine interprétation de la disposition législative en cause peut avoir une incidence sur d'autres dispositions du régime de réglementation ou sur les réalités factuelles et juridiques de son domaine de spécialisation. Il pourrait être plus difficile d'obtenir de tels éléments d'information d'autres parties.

[54] Dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Le contrôle judiciaire se révèle optimal lorsque les deux facettes du litige sont vigoureusement défendues devant la cour de révision. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de

ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42.

[57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige.

[55] Les tribunaux administratifs canadiens tiennent nombre de rôles différents dans les contextes variés où ils évoluent, de sorte que la crainte d'une partialité de leur part peut être plus ou moins grande selon l'affaire en cause, ainsi que la structure du tribunal et son mandat légal. Dès lors, les dispositions législatives portant sur la structure, le fonctionnement et la mission d'un tribunal en particulier sont cruciales aux fins de l'analyse.

[56] Le mandat de la Commission, comme celui des tribunaux administratifs qui lui sont apparentés, la différencie des tribunaux administratifs appelés à trancher des différends individuels opposant plusieurs parties. Dans le cas de ces derniers, [TRADUCTION] « l'importance de l'équité, réelle et perçue, milite davantage » contre la reconnaissance de leur qualité pour agir (*Henthorne c. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, par. 42).

[57] Par conséquent, je suis d'avis qu'il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

[58] Dans la présente affaire, le par. 33(3) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit à titre préliminaire que « [l]a Commission a le droit d'être représentée par un avocat lors de l'audition de l'appel » devant la Cour divisionnaire. Cette disposition ne confère pas expressément à la Commission une qualité pour agir qui permet de faire valoir le bien-fondé de sa décision en appel, ni ne limite expressément la thèse qu'elle peut défendre à la présentation d'arguments relatifs à la compétence ou à la norme de contrôle comme le fait la disposition en cause dans l'affaire *Quadrini* (voir par. 2).

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[60] Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute

[59] Au vu de cette analyse de la qualité pour agir d'un tribunal administratif, lorsque le texte législatif applicable n'est pas clair sur ce point, la cour de révision s'en remet à son pouvoir discrétionnaire pour délimiter les attributs du tribunal administratif en appel. Voici quelles sont, entre autres, les considérations — relevées par les juridictions et les auteurs précités — qui délimitent l'exercice de ce pouvoir discrétionnaire :

(1) lorsque, autrement, l'appel ou la demande de contrôle serait non contesté, il peut être avantageux que la cour de révision exerce le pouvoir discrétionnaire qui lui permet de reconnaître la qualité pour agir du tribunal administratif;

(2) lorsque d'autres parties sont susceptibles de contester l'appel ou la demande de contrôle et qu'elles ont les connaissances et les compétences spécialisées nécessaires pour bien avancer une thèse ou la réfuter, la qualité pour agir du tribunal administratif peut revêtir une importance moindre pour l'obtention d'une issue juste;

(3) le fait que la fonction du tribunal administratif consiste soit à trancher des différends individuels opposant deux parties, soit à élaborer des politiques, à réglementer ou enquêter ou à défendre l'intérêt public influe sur la mesure dans laquelle l'impartialité soulève des craintes ou non. Ces craintes peuvent jouer davantage lorsque le tribunal a exercé une fonction juridictionnelle dans l'instance visée par l'appel, et moins lorsque son rôle s'est révélé d'ordre plutôt réglementaire.

[60] Au vu de ces considérations, je conclus qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. Premièrement, la Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait donc d'autre choix que de prendre part à l'instance pour que sa décision soit défendue au fond. Contrairement à d'autres provinces, l'Ontario n'a nommé aucun défenseur des droits des clients des services publics,

with acting to safeguard the public interest — with few alternatives but to participate as a party.

[61] Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[62] The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

[63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e.

si bien que la Commission — qui est légalement garante de l'intérêt public — n'avait pas vraiment d'autre avenue que celle de se constituer partie à l'instance.

[61] Deuxièmement, la Commission a pour mandat de réglementer les activités de services publics, y compris ceux qui appartiennent au domaine de l'électricité. Son mandat de réglementation est large. Au nombre de ses nombreuses fonctions, mentionnons l'octroi de permis aux participants du marché, l'approbation de nouvelles installations de transport et de distribution et l'autorisation des tarifs exigés des consommateurs. Dans la présente affaire, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Il s'agit d'une situation différente de celle où le tribunal administratif est habilité à trancher un différend entre deux parties, le souci d'impartialité pouvant alors militer davantage contre la qualité d'agir comme partie à part entière.

[62] L'objet de la réglementation est un autre élément qui milite en faveur de la pleine reconnaissance de la qualité pour agir de la Commission, puisque la crainte d'apparence de partialité est faible en l'espèce. Pour reprendre les propos du juge Doherty dans *Enbridge*, par. 28, [TRADUCTION] « [à] l'instar de tout organisme réglementé, je suis certain que [la Commission] donne parfois raison à Enbridge et lui donne parfois tort. J'ose croire qu'Enbridge comprend parfaitement le rôle de l'organisme de réglementation et sait que [la Commission] statue sur chaque demande en fonction des faits qui lui sont propres ». Je conclus donc que la participation de la Commission au pourvoi n'a rien d'inapproprié. Reste à savoir si les arguments de la Commission sont appropriés.

(2) L'autojustification

[63] La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif (ci-après le « tribunal ») est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la

jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

[65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

[66] By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to

qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir (p. ex. des prétentions relatives à sa compétence ou à la justesse de sa décision), alors que l'« autojustification » touche à la teneur des prétentions.

[64] Suivant le sens attribué à cette notion par les cours de justice qui l'ont examinée dans le contexte de la qualité pour agir, un tribunal « s'autojustifie » lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire (voir p. ex. *United Brotherhood of Carpenters and Joiners of America, Local 1386 c. Bransen Construction Ltd.*, 2002 NBCA 27, 249 R.N.-B. (2e) 93). Autrement dit, un tribunal ne pourrait [TRADUCTION] « défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle » (*Goodis*, par. 42).

[65] Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, le tribunal ait statué définitivement et que son travail soit terminé, « à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire » (*Quadrini*, par. 16, citant *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848). Partant, la cour a conclu qu'un tribunal ne peut profiter d'un contrôle judiciaire pour « modifier, changer, nuancer ou compléter ses motifs » (*Quadrini*, par. 16). Dans l'arrêt *Leon's Furniture*, le juge Slatter affirme qu'un tribunal peut [TRADUCTION] « offrir différentes interprétations de ses motifs ou de sa conclusion, [mais] non tenter de remanier ses motifs, invoquer de nouveaux arguments ou se prononcer sur des questions de fait que ne soulève pas déjà le dossier » (par. 29).

[66] En revanche, le juge Goudge conclut, dans l'arrêt *Goodis*, avec l'accord de tous ses collègues, que même si la commissaire invoque un argument qui ne figure pas expressément dans sa décision initiale, elle peut le soulever en appel. Il reconnaît que [TRADUCTION] « [l']importance de décisions bien étayées pourrait être compromise si un tribunal pouvait simplement offrir, à l'appui de sa décision attaquée devant une cour de justice,

support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

[67] There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

[68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also

des motifs différents, plus convaincants, voire opposés » (par. 42), mais il conclut finalement que la commissaire peut présenter un nouvel argument dans le cadre d'un contrôle judiciaire. Le nouvel argument n'est toutefois « pas incompatible avec les motifs formulés dans la décision, car on peut en effet affirmer qu'il en fait implicitement partie » (par. 55). « La commissaire pouvait donc soulever l'argument devant la Cour divisionnaire, et celle-ci pouvait en tenir compte pour se prononcer » (par. 58).

[67] Les deux thèses avancées sur l'autojustification se défendent. D'une part, il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, car la cour de révision est alors saisie des arguments les plus convaincants à l'appui de chacune des thèses (Semple, p. 315). Cela demeure vrai même si ces arguments ne figurent pas dans la décision initiale. D'autre part, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Permettre au tribunal de présenter de nouveaux arguments en appel ou dans le cadre du contrôle judiciaire de sa décision initiale peut aussi amener les parties à conclure que le processus n'est pas équitable. Il peut surtout en être ainsi lorsque le tribunal est appelé à trancher des différends opposant deux personnes privées, puisque la présentation de nouveaux arguments en appel peut donner l'impression que le tribunal « se ligue » contre l'une des parties. Or, je le rappelle, il ne convient généralement pas que le tribunal doté d'un tel mandat participe en tant que partie à l'appel.

[68] Je ne suis pas convaincu que la formulation en appel de nouveaux arguments qui interprètent la décision initiale ou qui l'étayaient implicitement, mais non expressément, va à l'encontre du principe du caractère définitif. De même, il n'est pas contraire à ce principe de permettre au tribunal d'expliquer à la cour de révision quelles sont ses politiques et pratiques établies, même lorsque les motifs contestés n'en font pas mention. Le tribunal n'a pas à les expliquer systématiquement dans chaque décision à la seule fin de se prémunir contre une allégation d'autojustification advenant qu'il

respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[71] I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> . . . if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone

soit appelé à les préciser en appel ou en contrôle judiciaire. Il peut aussi répondre aux arguments de la partie adverse dans le cadre du contrôle judiciaire de sa décision car il le fait dans le but de faire confirmer sa décision initiale, non de rouvrir le dossier et de rendre une nouvelle décision ou de modifier la décision initiale. L'effet de la décision initiale demeure inchangé même lorsque le tribunal demande sa confirmation en offrant une interprétation de cette décision ou en invoquant des motifs qui la sous-tendent implicitement.

[69] Cependant, je ne crois pas qu'un tribunal devrait avoir la possibilité inconditionnelle de présenter une thèse entièrement nouvelle dans le cadre d'un contrôle judiciaire, car lui reconnaître cette faculté pourrait l'exposer à des allégations d'iniquité et nuire au prononcé de décisions bien motivées au départ. Je suis d'avis qu'il y a un juste équilibre entre ces considérations et celles voulant que la cour de révision entende les arguments les plus convaincants de chacune des parties lorsqu'il est permis au tribunal d'offrir différentes interprétations de ses motifs ou de ses conclusions ou de présenter des arguments qui sous-tendent implicitement ses motifs initiaux (voir *Leon's Furniture*, par. 29; *Goodis*, par. 55).

[70] Je ne crois pas que, dans la présente affaire, la Commission a indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant notre Cour. Dans son mémoire en réplique, la Commission signale — à juste titre, selon moi — que ses observations mettent simplement en évidence ce qui ressort du dossier ou répondent aux arguments des intimées.

[71] J'exhorte toutefois la Commission et, de façon générale, tout tribunal qui se constitue partie à une instance à se soucier du ton qu'il adopte lors du contrôle judiciaire de sa décision. Comme le fait remarquer le juge Goudge dans l'arrêt *Goodis*,

> [TRADUCTION] le tribunal administratif qui veut faire valoir son point de vue lors du contrôle judiciaire de sa décision [doit] porte[r] une attention particulière au ton qu'il adopte. Bien qu'il ne s'agisse pas d'un motif précis pour lequel sa qualité pourrait être restreinte, il ne

of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

[72] In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. *Standard of Review*

[73] The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act, 1998*, the Board's home statute, a standard of reasonableness presumptively applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35. Nothing in this case suggests the presumption should be rebutted.

[74] This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the

fait aucun doute que le ton des observations proposées offre une toile de fond à cet égard. Le tribunal qui désire contester une demande de contrôle judiciaire sera utile à la cour dans la mesure où ses observations permettront d'éclaircir les questions et où elles seront fondées sur ses connaissances spécialisées, au lieu d'être empreintes d'un parti pris agressif contre la partie adverse. [par. 61]

[72] En l'espèce, la Commission a généralement présenté des arguments utiles dans le cadre d'un débat contradictoire, mais respectueux. Une mise en garde s'impose toutefois selon moi en ce qui concerne l'affirmation de la Commission selon laquelle l'application du critère de l'investissement prudent [TRADUCTION] « ne changerait vraisemblablement pas l'issue de l'affaire » si la décision lui était renvoyée pour réexamen (m.a., par. 99). Une telle affirmation peut, si elle est poussée trop loin, faire douter de l'impartialité du tribunal au point où une cour de justice serait justifiée d'exercer son pouvoir discrétionnaire et de limiter la qualité pour agir du tribunal de manière à préserver son impartialité.

B. *Norme de contrôle*

[73] Les parties conviennent que la norme de contrôle qui s'applique aux actes de la Commission lorsqu'elle fait appel à son expertise pour fixer les tarifs et approuver des paiements sur le fondement de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* est celle de la décision raisonnable. Je suis d'accord. En outre, dans la mesure où l'issue du pourvoi repose sur l'interprétation de cette loi — la loi constitutive de la Commission —, l'application de la norme de la décision raisonnable doit être présumée (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 30; *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161, par. 35). Rien ne donne à penser en l'espèce que la présomption soit réfutée.

[74] Le pourvoi fait intervenir deux notions distinctes de ce qui est « raisonnable ». L'une est liée à la norme de contrôle : en appel, la Cour doit apprécier la « justification [. . .], [. . .] la transparence et [. . .] l'intelligibilité » du raisonnement de la

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. *Choice of Methodology Under the Ontario Energy Board Act, 1998*

[75] The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

[76] The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

[77] The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of O. Reg. 53/05 expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, methodology, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act".

Commission et se demander si la décision appartient « aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » (*Dunsmuir*, par. 47). L'autre est d'origine législative : la Commission doit utiliser son pouvoir de fixation des tarifs de manière à établir un équilibre qu'elle considère juste et raisonnable entre les intérêts du service public et ceux des consommateurs. Je m'efforce ci-après de respecter cette distinction.

C. *Choix de la méthode suivant la Loi de 1998 sur la Commission de l'énergie de l'Ontario*

[75] La question de savoir si le refus de la Commission d'approuver le recouvrement de certaines dépenses est raisonnable ou non dépend du lien de ce refus avec les pouvoirs légaux et réglementaires de la Commission d'approuver des paiements au service public et de répercuter ces paiements sur les tarifs exigés des consommateurs. Les pouvoirs généraux de la Commission en matière de fixation des tarifs et des paiements sont énoncés précédemment à la rubrique « Cadre réglementaire ».

[76] L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins.

[77] Or, la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prévoit ni à l'art. 78.1 ni à quelque autre article la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et des consommateurs lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Certes, sous réserve de certaines exceptions prévues au par. 6(2), le par. 6(1) du règlement 53/05 permet expressément à la Commission de [TRADUCTION] « définir la forme, la méthode, les hypothèses et les calculs utilisés pour rendre une ordonnance qui établit le montant du paiement aux fins de l'article 78.1 de la Loi ».

[78] As a contrasting example, para. 4.1 of s. 6(2) of O. Reg. 53/05 establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were prudently incurred" and that "the financial commitments were prudently made": para. 4.1 of s. 6(2). The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

[78] En revanche, la disposition 4.1 du par. 6(2) du règlement 53/05 prescrit le recours à une méthode particulière lorsque la Commission examine [TRADUCTION] « les dépenses faites et les engagements financiers fermes pris dans le cadre de la planification et de la préparation relatives à la réalisation d'installations nucléaires projetées ». La Commission doit être convaincue que « les dépenses ont été faites de manière prudente » et que « les engagements financiers ont été pris de manière prudente » (la disposition 4.1 du par. 6(2)). La disposition établit donc un cadre précis où l'analyse de la Commission est axée sur la prudence de la décision de faire certaines dépenses ou de convenir de certaines dépenses. L'absence d'un libellé en ce sens dans la disposition générale qu'est le par. 6(1) constitue un autre motif de considérer que le règlement confère à la Commission un large pouvoir discrétionnaire quant à la méthode à employer pour ordonner un paiement lorsque les dispositions particulières du par. 6(2) ne s'appliquent pas.

[79] Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor O. Reg. 53/05 expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

[79] Pour ce qui concerne la question de savoir si la présomption de prudence doit s'appliquer aux décisions d'OPG de faire des dépenses, ni la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, ni le règlement 53/05 n'établissent expressément une telle présomption. D'ailleurs, suivant cette loi, il incombe au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables (par. 78.1(6) et (7)). Il semble donc contraire au régime législatif de présumer que la décision de faire des dépenses est prudente.

[80] Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998*: ". . . the burden of proof is on the applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just

[80] La juge Abella conclut que l'examen des dépenses d'OPG par la Commission aurait dû consister à « contrôl[er] la prudence des dépenses après coup et [à] appliqu[er] la présomption réfutable selon laquelle elles étaient raisonnables » (par. 150). Or, une telle approche est contraire au régime législatif. La Commission jouit certes d'une grande marge de manœuvre quant au choix d'une méthode, mais elle n'a pas la faculté d'inverser le fardeau de la preuve établi au par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du

and reasonable. The Board has broad discretion to determine the methods it may use to examine costs — it just cannot shift the burden of proof contrary to the statutory scheme.

[81] In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at para. 40 (concerning telecommunication rate-setting), quoting *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. *Characterization of Costs at Issue*

[82] Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be

présent article ». Il ne s'ensuit pas, bien sûr, que le requérant doit systématiquement prouver le caractère juste et raisonnable de chacune de ses dépenses, individuellement. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter les méthodes à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

[81] La cour de justice appelée à contrôler la décision de la Commission d'approuver ou non des paiements à un service public doit se demander si la conclusion de la Commission selon laquelle un paiement d'un certain montant est « juste et raisonnable » tant pour le service public que pour le consommateur est raisonnable ou non. Cette approche concorde avec les décisions de notre Cour sur l'établissement de tarifs dans d'autres secteurs réglementés où l'organisme de réglementation dispose d'un pouvoir discrétionnaire qui lui permet de recourir à une méthode ou à une autre. Dans ces décisions, la Cour signale que « [l]'obligation d'agir est une question de droit, mais le choix de la méthode est une question relevant de l'exercice du pouvoir discrétionnaire et à l'égard de laquelle, selon le texte de loi, aucun tribunal judiciaire ne peut intervenir » (*Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 40 (tarification des télécommunications), citant *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (C.S.C.), p. 13 (tarification du transport ferroviaire des marchandises)). Certes, de nos jours, il faut voir dans ces propos la reconnaissance du pouvoir d'une cour de justice d'intervenir lorsqu'elle estime que l'exercice du pouvoir discrétionnaire a débouché sur une décision déraisonnable. Reste donc à décider si la méthode d'analyse retenue par la Commission pour refuser d'approuver les dépenses en l'espèce a rendu sa décision déraisonnable selon la norme du paiement « juste et raisonnable ».

D. *Qualification des dépenses en cause*

[82] Les dépenses prévues sont celles que le service public n'a pas encore acquittées et qu'un pouvoir discrétionnaire lui permet de renoncer à faire.

made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

Lorsque leur approbation est refusée, le service public peut soit modifier ses plans et renoncer aux dépenses, soit les faire malgré le refus étant entendu qu'elles seront assumées par les actionnaires plutôt que par les consommateurs. À l'opposé, les dépenses convenues sont celles que ses actionnaires et lui n'auront d'autre choix que d'assumer si l'organisme de réglementation refuse de permettre leur recouvrement et d'approuver les paiements sollicités. Cela peut advenir lorsque le service public a déjà déboursé la somme en cause ou qu'il a pris un engagement contraignant ou était assujetti à d'autres obligations qui écartent tout pouvoir discrétionnaire lui permettant de ne pas acquitter la somme ultérieurement.

[83] There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

[83] Les parties ne s'entendent pas sur la qualification des dépenses que la Commission a refusé d'approuver. Selon cette dernière, les dépenses de rémunération pour la période de référence sont des dépenses prévues dans la mesure où elles n'ont pas encore été acquittées. OPG soutient plutôt qu'il s'agit de dépenses convenues puisqu'elle est tenue par contrat de verser les sommes en cause au moment où elles deviennent exigibles. Ce désaccord est important car le contrôle de la prudence « sans recul », sur lequel je reviendrai plus en détail, a vu le jour dans le contexte de dépenses « convenues ». Il est en effet absurde d'appliquer ce critère lorsque le service public peut encore décider, en fin de compte, de faire ou non les dépenses; la décision de convenir de ces dépenses n'a pas encore été prise. Par conséquent, lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue.

[84] In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility

[84] En l'espèce, au moins une partie des dépenses de rémunération jugées excessives par la Commission était imputable à des conventions collectives qu'OPG avait conclues avant la présentation de sa demande et qui faisaient en sorte que sa masse salariale globale dépasse le 75e percentile pour des emplois comparables dans d'autres services publics. Les conventions collectives laissaient

regarding overall compensation rates or staffing levels — OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements — and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

[85] However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

[86] Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. *The Prudent Investment Test*

[87] In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has

peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, OPG devait respecter ceux établis par les conventions collectives et elle ne jouissait d'une marge de manœuvre que pour les conditions qui n'étaient pas ainsi régies. Par conséquent, les dépenses liées aux barèmes de rémunération et aux niveaux de dotation imposés par les conventions collectives étaient des dépenses convenues.

[85] La Commission conclut cependant que les dépenses de rémunération pour la période de référence ne sont pas toutes déterminées par les conventions collectives et qu'elles ne sont donc pas toutes convenues, car OPG dispose d'une certaine marge de manœuvre pour gérer globalement les niveaux de dotation en fonction du départ prévu d'employés d'âge mûr. Toutefois, la décision de la Commission ne précise pas quel pourcentage exact des 145 millions de dollars refusés au chapitre de la rémunération pourrait être recouvré grâce à la réduction naturelle du nombre d'employés ou à d'autres ajustements, ni quel pourcentage serait nécessairement assumé par le service public et son actionnaire. Par conséquent, les dépenses refusées en l'espèce doivent être considérées comme des dépenses convenues, du moins en partie. Il est déraisonnable d'y voir en totalité des dépenses prévues étant donné l'effet contraignant des conventions collectives sur OPG.

[86] Après avoir établi que les dépenses refusées sont, du moins partiellement, des dépenses convenues, il faut déterminer si la Commission a agi de façon raisonnable en appliquant le critère de l'investissement prudent sans exclure le recul. J'examine donc maintenant l'historique jurisprudentiel du critère de l'investissement prudent et les données méthodologiques y afférentes.

E. *Le critère de l'investissement prudent*

[87] Décider si la méthode de la Commission était raisonnable en l'espèce exige de se pencher sur l'historique du critère de l'investissement prudent (parfois appelé « contrôle de la prudence » ou « critère de la prudence ») pour déterminer ses origines, le situer dans le contexte et savoir quelle portée lui

been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

[88] American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 54.

[89] The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn.1.

[90] In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev.* 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

ont attribué les services publics, les organismes de réglementation et les rédacteurs législatifs.

(1) Jurisprudence américaine

[88] La jurisprudence américaine a joué un rôle important dans l'application du critère de l'investissement prudent aux services publics réglementés. Rappelons d'abord l'observation de notre Cour selon laquelle, « [b]ien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question » (*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 54).

[89] L'application du critère de l'investissement prudent aux services publics réglementés s'origine de l'opinion concordante du juge Brandeis, de la Cour suprême des États-Unis, datant de 1923 et selon laquelle les services publics ont droit à la déférence lorsqu'ils cherchent à recouvrer [TRADUCTION] « un investissement qui, normalement, serait considéré comme raisonnable » (*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1).

[90] Dans les décennies qui ont suivi, les organismes de réglementation américains chargés de l'examen de dépenses déjà faites par les services publics ont généralement appliqué soit le critère axé sur [TRADUCTION] « l'emploi et l'utilité », soit le critère de « l'investissement prudent » (J. Kahn, « Keep *Hope* Alive : Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs » (2010), 22 *Fordham Envtl. L. Rev.* 43, p. 49). À chacun de ces critères correspond une approche différente pour déterminer quelles dépenses peuvent équitablement et raisonnablement être refilées aux consommateurs. Le critère de l'emploi et de l'utilité permet au service public d'obtenir un rendement, mais seulement sur l'investissement qui est réellement employé et qui se révèle utile à l'exploitation de l'entreprise, étant entendu que les consommateurs ne doivent pas être tenus de payer pour un investissement dont ils ne bénéficient pas.

[91] By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test — a test that allows for payments related to investments that may not be used or useful — it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

[92] The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

[91] Au critère de l'investissement prudent correspond l'approche retenue par le juge Brandeis et selon laquelle des dépenses peuvent être recouvrées si elles ne sont pas imprudentes compte tenu de ce qu'on sait au moment où est fait l'investissement ou la dépense (Kahn, p. 49-50). Bien qu'il puisse sembler problématique du point de vue de la protection des intérêts des consommateurs d'adopter le critère de l'investissement prudent — dans la mesure où il autorise un paiement pour un investissement qui n'a été ni employé ni utile —, ce critère permet aux organismes de réglementation d'atténuer les possibles effets draconiens du critère de l'emploi et de l'utilité, lequel impose un lourd fardeau au service public. Par exemple, refuser le recouvrement d'un mauvais investissement qui paraissait raisonnable au moment où il a été fait risque de compromettre la santé financière du service public et d'avoir un effet dissuasif sur l'investissement ultérieur de capitaux par ce dernier. Pareil résultat peut ensuite entraîner des conséquences négatives pour les consommateurs, dont les intérêts à long terme sont mieux servis si le secteur de l'électricité est à la fois dynamique, efficace et viable. Par conséquent, un organisme de réglementation peut recourir au critère de l'investissement prudent afin d'établir un juste équilibre entre les intérêts des consommateurs et ceux du service public (voir Kahn, p. 53-54).

[92] Les États ont eu recours à des approches différentes pour établir le fondement légal de la réglementation des services publics. Certains ont permis aux organismes de réglementation d'appliquer le critère de l'investissement prudent, alors que d'autres ont légiféré pour écarter le recouvrement de capitaux investis qui n'étaient [TRADUCTION] « ni employés ni utiles au public » (*Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), p. 302). Fait à signaler, dans cette affaire où on lui demandait si des paiements « justes et raisonnables » à un service public nécessitaient, sur le plan constitutionnel, que le critère de l'investissement prudent s'applique aux dépenses déjà faites, la Cour suprême des É.-U. a conclu que « [l']élévation d'une seule méthode de tarification au rang de norme constitutionnelle écarterait inutilement d'autres avenues dont pourraient bénéficier à la fois consommateurs et investisseurs » (p. 316).

[93] American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

> . . . we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.

(*U.S. West Communications, Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), at p. 274)

[94] Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) Canadian Jurisprudence

[95] Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

[96] In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837, Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

[93] Les cours de justice américaines ont aussi reconnu que, dans certains contextes, des aspects du critère de l'investissement prudent peuvent se révéler moins justifiables. Par exemple, saisie du contrôle judiciaire de coûts transférés à un service public par une entreprise affiliée non réglementée, la Cour suprême de l'Utah s'est demandé s'il était justifié de présumer que les coûts étaient raisonnables et elle a conclu par la négative :

> [TRADUCTION] . . . nous ne pensons pas que les dépenses de l'affiliée devraient être présumées raisonnables. Bien que la pression exercée par un marché concurrentiel puisse nous permettre de présumer, faute d'une preuve contraire, que les dépenses d'une entreprise non affiliée sont raisonnables, on ne peut en dire autant des dépenses d'une affiliée qui ne sont pas faites dans le cadre d'une opération sans lien de dépendance.

(*U.S. West Communications, Inc. c. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), p. 274)

[94] Il appert donc de la jurisprudence américaine que le critère de l'investissement prudent s'est révélé utile pour arriver à un résultat juste et raisonnable, mais qu'il ne saurait constituer un élément obligatoire de la réglementation des services publics dont l'application s'impose même lorsqu'aucune disposition législative ne le prévoit.

(2) Jurisprudence canadienne

[95] Sous l'impulsion de la jurisprudence américaine, plusieurs organismes de réglementation et cours de justice du Canada se sont aussi penchés sur le rôle du contrôle de la prudence et ont parfois appliqué une variante du critère de l'investissement prudent. Je passerai en revue certaines de leurs décisions dans le but non pas de répertorier toutes les applications du critère, mais bien de faire état de la manière dont on l'a appliqué dans différents contextes.

[96] Dans l'arrêt *British Columbia Electric Railway Co. c. Public Utilities Commission of British Columbia*, [1960] R.C.S. 837, le juge Martland relève que, suivant la loi en cause, l'organisme de réglementation est tenu à ce qui suit lorsqu'il fixe des tarifs :

(*a*) . . . shall consider all matters which it deems proper as affecting the rate: [and]

(*b*) . . . shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]

(Quoting *Public Utilities Act*, R.S.B.C. 1948, c. 277, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

[97] In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

. . . prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. . . . Hindsight is not applied in assessing prudence. . . . A utility's decision is

[TRADUCTION]

(*a*) . . . considérer tout élément qu'il juge susceptible d'influer sur les tarifs; [et]

(*b*) . . . tenir dûment compte, notamment, de la protection du public contre les tarifs excessifs qui excèdent ce qui est juste et raisonnable en contrepartie du service de la nature et de la qualité de celui fourni et de l'obtention par le service public d'un rendement juste et raisonnable sur les biens qu'il affecte à la prestation du service ou qu'il acquiert à cette fin de manière prudente et raisonnable, selon leur valeur d'expertise. [p. 852]

(Citant *Public Utilities Act*, R.S.B.C. 1948, c. 227, al. 16(1)*b*) (abrogé S.B.C. 1973, c. 29, art. 187).)

Le juge Martland conclut de ce libellé que l'organisme de réglementation [TRADUCTION] « appelé à se prononcer sur la fixation de tarifs jouit d'un pouvoir discrétionnaire absolu quant aux éléments qu'il juge susceptibles d'influer sur les tarifs, mais qu'il doit, lorsqu'il établit la tarification, satisfaire aux deux exigences expressément prévues à l'al. (*b*) » (p. 856). Ainsi, l'organisme de réglementation est tenu par cette loi de faire en sorte que le public ne paie que ce qui est juste et raisonnable et que le service public obtienne un rendement juste et raisonnable sur la valeur des biens qu'il a utilisés *ou acquis de manière prudente et raisonnable*. Cette protection légale expresse du recouvrement du coût des biens acquis avec prudence offre un exemple de libellé législatif sur le fondement duquel notre Cour a conclu à l'existence d'une obligation non discrétionnaire d'assurer au service public un rendement juste sur les immobilisations qu'il a utilisées ou acquises avec prudence.

[97] En 2005, la Nova Scotia Utility and Review Board (« NSUARB ») a examiné puis adopté la définition du critère de l'investissement prudent proposée par l'Illinois Commerce Commission :

[TRADUCTION] . . . la prudence est la norme de diligence qu'une personne raisonnable aurait respectée dans la situation rencontrée par la direction du service public au moment où elle a dû prendre les décisions. [. . .] Le recul est exclu lorsqu'il s'agit d'apprécier la prudence. [. . .]

prudent if it was within the range of decisions reasonable persons might have made. . . . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

[98] The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

[99] In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

– Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

La décision du service public est prudente si elle fait partie des décisions qu'une personne raisonnable aurait pu prendre. [. . .] La norme de la prudence reconnaît que des personnes raisonnables peuvent sincèrement différer d'opinions sans pour autant que l'une ou l'autre soit imprudente.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 (« *Nova Scotia Power 2005* »), par. 84 (CanLII))

La NSUARB conclut alors que, [TRADUCTION] « [a]près examen de la jurisprudence, [. . .] la définition d'imprudence proposée par l'Illinois Commerce Commission constitue un critère raisonnable susceptible d'application en Nouvelle-Écosse » (par. 90). Elle se demande notamment si la stratégie récente d'achat de carburant du service public a été prudente, et elle répond par la négative (par. 94). Elle ne se dit cependant pas tenue d'appliquer le critère de l'investissement prudent.

[98] En 2012, la NSUARB a renouvelé son adhésion au critère de l'investissement prudent (*Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 (« *Nova Scotia Power 2012* »), par. 143-146 (CanLII)). Dans cette affaire, le service public dont les arguments faisaient l'objet de l'examen [TRADUCTION] « a confirmé que, selon lui, il s'agit du critère que la commission devrait appliquer » (par. 146). La NSUARB a ensuite appliqué le critère de la prudence pour décider si plusieurs décisions opérationnelles du service public avaient été prudentes ou non, et elle a conclu que certaines d'entre elles ne l'avaient pas été (par. 188).

[99] En 2006, dans l'arrêt *Enbridge*, la Cour d'appel de l'Ontario se penche sur la teneur du critère de l'investissement prudent. Cet arrêt revêt un intérêt particulier pour deux raisons. Premièrement, la Cour d'appel y circonscrit précisément l'application du critère :

[TRADUCTION]

– La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.

– To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

– Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

– Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

[100] Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether Enbridge's requested rate increase was just and reasonable,

the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

[101] However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether

– Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.

– Le recul est exclu de l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.

– La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision. [par. 10]

[100] Deuxièmement, elle donne plusieurs fois à entendre que le recours au critère de l'investissement prudent est nécessaire pour se prononcer sur les dépenses convenues. Plus précisément, elle signale que pour décider du caractère juste et raisonnable de l'augmentation des tarifs demandée par Enbridge,

[TRADUCTION] la [Commission] était tenue de soupeser les intérêts opposés d'Enbridge et des consommateurs. Pour ce faire, elle devait appliquer ce qu'on appelle dans le domaine de la réglementation des tarifs des services publics le critère de la « prudence ». Enbridge était en droit de recouvrer ses coûts au moyen d'une augmentation de ses tarifs, mais seulement si la décision derrière ces coûts était « prudente ». [par. 8]

La Cour d'appel ajoute que la Commission a appliqué le [TRADUCTION] « bon critère » (par. 18). Ces affirmations tendent à indiquer que, selon la Cour d'appel, le contrôle de la prudence est fondamental et nécessaire afin que les paiements soient justes et raisonnables.

[101] Or, dans cette affaire, la Cour d'appel n'était pas directement saisie de la question de savoir si, dans ce contexte, l'application du critère de la prudence était nécessaire à l'appréciation du caractère juste et raisonnable des paiements. En fait, les parties s'entendaient [TRADUCTION] « pour l'essentiel sur la démarche qui devait être celle de la Commission pour apprécier la prudence d'une décision d'un

the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

[102] The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exist different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *2005* and *2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

[103] However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment

service public » (par. 10). La question en litige était celle de savoir si la Commission avait eu recours à cette démarche de manière raisonnable. En ce sens, l'affaire *Enbridge* s'apparente à *Nova Scotia Power 2012* : les deux concernent l'application du critère de la prudence lorsqu'aucune des parties ne soutient qu'une autre démarche aurait pu raisonnablement s'appliquer.

(3) Conclusion sur le critère de l'investissement prudent

[102] Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Il existe certes des formulations différentes du contrôle de la prudence, mais l'arrêt *Enbridge* précise en détail quelle peut être la démarche d'un organisme de réglementation appelé à décider si, au moment où le service public les a faites ou en a convenu, les dépenses étaient prudentes ou non. Le plus souvent, le contrôle de la prudence excluant le recul s'applique aux coûts en capital, mais l'arrêt *Enbridge* et les décisions *Nova Scotia Power* (*2005* et *2012*) montrent qu'il s'applique aussi aux dépenses d'exploitation. Je ne vois aucune raison de principe d'interdire à un organisme de réglementation d'appliquer le critère de la prudence aux dépenses d'exploitation.

[103] Toutefois, aucun élément du régime législatif ou de la jurisprudence applicable ne me paraît appuyer l'idée que la Commission devrait être *tenue* en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence énoncé dans l'arrêt *Enbridge*, de sorte que la seule décision de ne pas l'appliquer pour apprécier la prudence de dépenses convenues rendrait déraisonnable sa décision sur les paiements. Notre Cour n'est pas non plus justifiée de créer pareille obligation. Je le répète, lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers

amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

[104] To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

[105] This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred: see *British Columbia Electric Railway Co*. Under such a framework, the regulator's methodological discretion may be more constrained.

moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements (règlement 53/05, par. 6(1)).

[104] En résumé, il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Comme nous l'avons vu, présumer la prudence serait incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec le recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses. Je précise toutefois que la présente décision ne doit pas être interprétée de façon à permettre aux organismes de réglementation de refuser à leur guise d'approuver des dépenses convenues. Le contrôle de la prudence de dépenses convenues peut, dans bien des cas, constituer un bon moyen de faire en sorte que les services publics soient traités équitablement et demeurent aptes à obtenir les investissements de capitaux requis. Comme je l'explique plus loin, en ce qui a trait plus particulièrement aux coûts en capital convenus, le contrôle de la prudence offre le plus souvent un moyen raisonnable d'établir un équilibre entre les intérêts du consommateur et ceux du service public.

[105] Cette conclusion sur le pouvoir de la Commission de décider de sa démarche découle du régime législatif qui régit son fonctionnement. D'autres régimes législatifs prévoient expressément que l'organisme de réglementation en cause est tenu d'indemniser le service public de certaines dépenses découlant de décisions prudentes (voir l'arrêt *British Columbia Electric Railway Co.*). Selon ces autres cadres législatifs, le pouvoir discrétionnaire qui permet à l'organisme de réglementation de décider de sa démarche peut être plus restreint.

(4) Application to the Board's Decision

[106] In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

[107] First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach (with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

[108] Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

(4) Application à la décision de la Commission

[106] En l'espèce, la Commission refuse à OPG le recouvrement au total de 145 millions de dollars au titre des dépenses de rémunération dans le secteur nucléaire, sur deux ans. Rappelons qu'il faut considérer que ces dépenses constituent, du moins en partie, des dépenses convenues. Compte tenu de la nature de ces dépenses en particulier et des circonstances dans lesquelles le service public en a convenu, je ne saurais conclure que la Commission a agi déraisonnablement en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG à leur égard.

[107] Premièrement, il s'agit de dépenses d'exploitation, et non de coûts en capital. Les coûts en capital, en particulier ceux qui se rapportent par exemple à l'accroissement de la capacité ou à l'amélioration des installations actuelles, comportent souvent un risque et peuvent ne pas être nécessaires, à strictement parler, à la production à court terme du service public. Ces coûts peuvent néanmoins constituer un investissement judicieux pour le bon fonctionnement et la viabilité ultérieurs de ce dernier. Dès lors, le contrôle de la prudence, qui exclut le recul (et présume ou non la prudence, selon les dispositions législatives applicables), peut jouer un rôle particulièrement important pour faire en sorte que le service public ne soit pas dissuadé d'investir de manière optimale dans le développement de ses installations.

[108] Les dépenses d'exploitation, comme celles visées en l'espèce, diffèrent des coûts en capital. Il est peu probable que le refus de les approuver dissuade OPG d'en faire à l'avenir, car les dépenses de la nature de celles qui ont été refusées sont inhérentes à l'exploitation d'un service public. Certes, une décision comme celle rendue par la Commission en l'espèce peut faire hésiter OPG à convenir de dépenses relativement élevées au chapitre de la rémunération, mais tel était précisément l'effet voulu par la Commission.

[109] Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

[110] By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

[111] Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

[109] Deuxièmement, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Le contrôle de la prudence tire son origine de l'examen de décisions d'effectuer certains investissements, notamment pour accroître la capacité; il s'agit souvent de décisions isolées prises à la lumière d'un ensemble de données alors connues ou supposées.

[110] À l'opposé de celles issues de telles décisions, les dépenses de rémunération convenues d'OPG découlent d'une relation continue dans le cadre de laquelle OPG devra négocier ultérieurement les barèmes de rémunération avec les mêmes parties. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Le contrôle de la prudence se révèle tout simplement moins indiqué lorsque la Commission n'entend pas seulement indemniser le service public des engagements déjà pris, mais aussi réguler les dépenses qui seront faites dans l'avenir. En fin de compte, le refus de la Commission ne vise pas que des dépenses convenues, mais bien la totalité des dépenses de rémunération considérées globalement. Même si la Commission reconnaît qu'OPG n'avait peut-être pas de pouvoir discrétionnaire lui permettant de réduire ses dépenses à raison du montant total refusé, le refus de la Commission vise à inciter OPG à la maîtrise constante de ses dépenses de rémunération.

[111] Après que la Commission eut signifié à OPG que ses dépenses d'exploitation lui paraissaient préoccupantes (voir la décision 2008-2009 de la Commission, p. 28-32), il n'était pas déraisonnable qu'elle se montre plus stricte dans l'examen des dépenses de rémunération du service public afin d'en assurer la régulation réelle à l'avenir. Le fait que la Commission dit refuser l'approbation [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350) montre qu'elle a bel et bien conscience des répercussions actuelles de son refus.

[112] The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at para. 350. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

[112] Le caractère raisonnable du refus de la Commission d'approuver des dépenses de 145 millions de dollars au titre de la rémunération tient à ce qu'elle reconnaît qu'OPG était liée dans une certaine mesure par les conventions collectives dans sa prise de décisions en matière de personnel et dans la fixation des barèmes de rémunération, et à ce qu'elle en tient compte pour déterminer la somme totale refusée (décision de la Commission, par. 350). La souplesse méthodologique dont bénéficie la Commission lui permet d'éviter les extrêmes. Lorsque le service public ne peut réduire ses dépenses, la prise en charge de celles-ci peut, si le dossier s'y prête, être modérée ou répartie entre les actionnaires du service public et les consommateurs. La modération opérée par la Commission en l'espèce montre que, en refusant d'approuver les dépenses sans recourir formellement à un contrôle de la prudence excluant le recul, elle ne perd pas de vue la nécessité de veiller à ce que tout refus ne soit pas injuste envers OPG ni, assurément, à ce qu'il ne nuise pas à sa viabilité.

[113] Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

[113] Dans ses motifs de dissidence, la juge Abella reconnaît que, lors du contrôle de la prudence, la Commission peut, du moins dans certaines circonstances, refuser des dépenses convenues (par. 152). Elle dit toutefois craindre qu'un tel refus puisse « mettre en péril la garantie d'un service d'électricité fiable » (par. 156). Le refus d'une somme importante ou opposé sans discernement pourrait exposer à un tel risque, mais il se peut aussi que l'organisme de réglementation fasse ce que la Commission fait en l'espèce, c'est-à-dire modérer son refus en tenant compte des réalités auxquelles fait face le service public.

[114] There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its

[114] Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public. La coexistence du droit à la négociation collective des employés du service public et du pouvoir de la Commission de fixer le montant des paiements pour les dépenses de rémunération indique que ni l'un ni l'autre n'a

obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

préséance. La Commission ne peut empiéter sur les conventions collectives en ordonnant au service public de manquer aux obligations qu'elles lui imposent, mais les conventions collectives ne priment pas l'obligation de la Commission d'assurer un équilibre juste et raisonnable entre le service public et les consommateurs.

[115] Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at para. 75. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

[115] La juge Abella affirme que l'examen des dépenses convenues auquel se livre la Commission à partir d'éléments de recul paraît contredire ce que l'organisme affirme précédemment dans sa décision. La Commission écrit en effet qu'elle prendra en compte tout élément de preuve pertinent pour apprécier les dépenses prévues, mais qu'elle s'en tiendra à un examen sans recul pour ce qui concerne les dépenses à l'égard desquelles OPG [TRADUCTION] « ne pouvait prendre de mesures de réduction » (décision de la Commission, par. 75). À mon sens, on peut en conclure qu'elle recourt à une démarche raisonnable pour l'analyse de dépenses que l'on peut assimiler avec assurance soit à des dépenses prévues, soit à des dépenses convenues. Cependant, toutes les dépenses ne sont pas susceptibles d'une distinction aussi nette par la Commission lorsqu'il s'agit d'apprécier le montant des paiements pour une période de référence.

[116] With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

[116] En ce qui a trait aux dépenses de rémunération en cause, la Commission refuse de préciser quelle partie de la somme totale refusée correspond à des dépenses prévues et quelle partie correspond à des dépenses convenues pour les besoins de son analyse. Le juge Hoy fait observer que, [TRADUCTION] « [v]u la complexité de l'activité d'OPG et l'autonomie de gestion dont elle jouit, [la Commission] n'a pas tenté de déterminer avec précision le montant dont les dépenses de rémunération prévues d'OPG auraient pu être réduites dans le contexte des conventions collectives en vigueur » (motifs de la C. div., par. 53). En somme, la Commission ne départage pas les dépenses de rémunération totales entre celles qui sont « prévues » et celles qui sont « convenues ». Elle considère plutôt que les dépenses de rémunération refusées se composent à la fois de dépenses prévues et de dépenses convenues sur lesquelles la direction conservait une certaine maîtrise, mais non une maîtrise totale.

[117] It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at paras. 73-75, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

[118] Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

[119] Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has . . . imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at

[117] Il n'est pas déraisonnable que la Commission considère que la prévision du taux d'attrition du personnel constitue en soi une entreprise incertaine et qu'elle n'est pas en mesure de microgérer les décisions d'affaires qui relèvent des dirigeants d'OPG. Dès lors, toute tentative de prédire la mesure exacte dans laquelle OPG pourrait abaisser ses dépenses de rémunération (autrement dit, quelle partie de ces dépenses est prévue) serait empreinte d'incertitude. Il n'est donc pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche est compatible avec l'analyse de la Commission figurant aux par. 73-75 de sa décision et correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre des catégories mentionnées dans cette analyse.

[118] Tout au long de ses motifs, la juge Abella rappelle que les dépenses découlant des conventions collectives ne peuvent être rajustées. Je n'en disconviens pas. Cependant, lorsqu'elle opine que les conventions collectives « rend[ent] *illégale* la modification par le service public [. . .] des barèmes de rémunération et des niveaux de dotation » à l'égard de son personnel syndiqué (par. 149 (en italique dans l'original)), d'aucuns pourraient en conclure que la Commission tente de quelque manière de s'immiscer dans l'exécution des obligations d'OPG suivant les conventions collectives. Il importe de ne pas oublier que la Commission n'entend pas, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés.

[119] Enfin, la remarque de ma collègue selon laquelle la Commission canadienne de sûreté nucléaire (« CCSN ») « [a] impos[é] [. . .] des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires » (par. 127) importe peu quant aux questions soulevées en l'espèce. Bien que le régime établi par la CCSN impose sûrement des conditions

pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

[120] I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

[121] I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

The following are the reasons delivered by

[122] Abella J. (dissenting) — The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned

d'exploitation et de dotation aux installations nucléaires (voir dossier OPG, p. 43-46), nul élément des motifs de la Commission et nulle plaidoirie devant notre Cour n'indiquent que le refus de la Commission entraînera le non-respect des dispositions de la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9.

[120] Je rappelle qu'il est essentiel qu'un service public obtienne à long terme l'équivalent du coût du capital. Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il vise à [TRADUCTION] « signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350). L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

VI. Conclusion

[121] Je conclus que la Commission n'a pas agi de manière inappropriée en se pourvoyant en tant que partie en appel; elle n'a pas non plus agi déraisonnablement en refusant d'approuver les dépenses de rémunération en cause. Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir celle de la Commission.

Version française des motifs rendus par

[122] La juge Abella (dissidente) — La Commission de l'énergie de l'Ontario a été mise sur pied en 1960. Son mandat était alors d'établir les tarifs applicables à la vente et au stockage de gaz naturel et d'autoriser les projets de construction de pipelines. Au fil du temps, ses compétences et ses fonctions ont évolué. En 1973, le législateur lui a confié la responsabilité d'examiner les tarifs d'électricité puis de faire rapport au ministre de l'Énergie. Pendant cette

Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

[123] A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder — the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

[124] As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, s. 78.1(2); O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act, 1998*, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": O. Reg. 53/05, s. 6(1); *Ontario Energy Board Act, 1998*, paras. 1 and 2 of s. 1(1).

[125] Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in

période, en Ontario, le marché de l'électricité était peu réglementé. Il était dominé par la société d'État Ontario Hydro, qui possédait des installations de production d'énergie fournissant plus de 90 p. 100 de l'électricité dans la province (Ron W. Clark, Scott A. Stoll et Fred D. Cass, *Ontario Energy Law : Electricity* (2012), p. 134; *Rapport annuel 2011*, Bureau du vérificateur général de l'Ontario, p. 1 et 72).

[123] À la fin des années 1990, une série de mesures législatives a été adoptée en vue d'axer le secteur de l'électricité sur le marché et de le soumettre à la concurrence. Ontario Hydro a été scindée en cinq entités. L'une d'elles, Ontario Power Generation Inc., s'est vu confier l'actif de production d'électricité de l'ancienne société Ontario Hydro. Elle a été constituée en société commerciale dont le seul actionnaire est la province d'Ontario (Clark, Stoll et Cass, p. 5-7 et 134).

[124] Depuis le 1er avril 2008, la Commission est légalement investie du pouvoir de fixer les paiements pour l'électricité produite par les installations prescrites que possède Ontario Power Generation (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, L.O. 1998, c. 15, ann. B, par. 78.1(2); règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 », art. 3). Suivant le régime législatif, Ontario Power Generation est tenue de faire une demande à la Commission pour obtenir l'approbation de paiements « justes et raisonnables » (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 78.1(5)). La Commission établit sa propre méthode pour déterminer ce qui constitue des paiements « justes et raisonnables » au regard des objectifs législatifs qui consistent à maintenir une « industrie de l'électricité financièrement viable » et à « protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité » (règlement 53/05, par. 6(1); *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, dispositions 1 et 2 du par. 1(1).

[125] Ontario Power Generation demeure le plus grand producteur d'électricité de la province. L'Ontario Hydro Employees' Union (auquel a succédé le Syndicat des travailleurs et travailleuses du secteur

the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

[126] Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

[127] The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

[128] On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs — wages, benefits, pension servicing, and annual incentives — to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

[129] In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs — costs that the utility has estimated for

énergétique) a été accrédité comme agent négociateur auprès de l'entreprise dans les années 1950, alors que Society of Energy Professionals l'a été à son tour en 1992 (Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (en ligne), art. 6.2). Le personnel d'Ontario Power Generation affecté à ses activités réglementées se compose aujourd'hui d'environ 10 000 personnes, dont 90 p. 100 sont syndiquées. Deux tiers de ces employés syndiqués sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, un tiers par Society of Energy Professionals.

[126] Le syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals avaient tous deux conclu des conventions collectives avec Ontario Hydro avant la création d'Ontario Power Generation. Lorsqu'elle a succédé à Ontario Hydro, Ontario Power Generation a hérité de la totalité des obligations issues de ces conventions (*Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, c. 1, ann. A, art. 69), qui la lient et l'empêchent de réduire unilatéralement les niveaux de dotation ou les barèmes de rémunération.

[127] La Commission canadienne de sûreté nucléaire, un organisme fédéral indépendant chargé de faire respecter la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9, impose également des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires.

[128] Le 26 mai 2010, Ontario Power Generation a demandé à la Commission d'approuver des recettes nécessaires se chiffrant à 6 909,6 millions de dollars pour la période allant du 1er janvier 2011 au 31 décembre 2012, dont 2 783,9 millions devaient être affectés à la rémunération du personnel — salaires, avantages sociaux, prestations de retraite et incitatifs annuels (EB-2010-0008, p. 8, 49 et 80).

[129] Dans sa décision, la Commission dit soumettre à [TRADUCTION] « deux types d'examen » les dépenses du service public. En ce qui concerne les dépenses prévues — par le service public, pour une

a future period and which can still be reduced or avoided — the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review . . . conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

[130] The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

[131] On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and

période ultérieure et qu'il est toujours possible de réduire ou d'éviter —, la Commission soutient qu'il incombe à Ontario Power Generation de démontrer leur caractère raisonnable. En revanche, pour ce qui est des dépenses à l'égard desquelles « [l]a société ne pouvait prendre de mesures de réduction », à savoir les dépenses convenues, la Commission dit qu'elle effectuera « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence », c'est-à-dire une présomption selon laquelle les dépenses du service public sont raisonnables (p. 19).

[130] La Commission ne fait aucune distinction entre les dépenses de rémunération qui sont réductibles et celles qui ne le sont pas. Elle soumet plutôt toutes les dépenses de rémunération à l'appréciation qu'elle réserve aux dépenses prévues réductibles et elle refuse d'approuver les paiements demandés à raison de 145 millions de dollars au motif que les barèmes de rémunération et les niveaux de dotation sont trop élevés.

[131] En appel, les juges majoritaires de la Cour divisionnaire confirment l'ordonnance de la Commission. Dans ses motifs dissidents, la juge Aitken conclut que la décision de la Commission est déraisonnable, car elle n'applique pas la bonne approche aux dépenses de rémunération, lesquelles constituent, par l'effet de conventions collectives contraignantes en droit, des dépenses fixes et non ajustables. Selon elle, la Commission [TRADUCTION] « regroupe » plutôt toutes les dépenses de rémunération et ne fait aucune distinction entre celles qui découlent d'obligations contractuelles obligatoires et celles qui n'en découlent pas. Comme elle l'affirme :

[TRADUCTION] Premièrement, j'estime que les dépenses de rémunération du secteur nucléaire [d'Ontario Power Generation], pour une période ultérieure, assujetties à une contrainte en raison de conventions collectives qui s'appliquaient avant la demande et la période de référence, constituent des dépenses déjà faites qui doivent faire l'objet d'un contrôle de la prudence après coup, en deux étapes. Deuxièmement, dans l'analyse (mais pas nécessairement dans l'appréciation finale) des dépenses de rémunération du secteur nucléaire dont fait état la demande, la [Commission] était tenue de faire une distinction entre les dépenses déjà effectuées et d'autres

not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

réellement prévues, mais non préétablies. Troisièmement, à mon avis, la [Commission] devait soumettre à un contrôle de la prudence la partie des dépenses de rémunération du secteur nucléaire qui découlait de contrats obligatoires conclus avant la demande et la période de référence. Pour ce qui est des autres facteurs présidant à la rémunération globale du secteur nucléaire, la [Commission] pouvait, en se fondant sur toute la preuve disponible, décider s'ils étaient raisonnables ou non. Quatrièmement, si un contrôle de la prudence avait été effectué, des éléments de preuve auraient pu raisonnablement permettre à la [Commission] de conclure à la réfutation de la présomption de prudence en ce qui a trait aux éléments issus des conventions collectives qui influaient sur les dépenses. Malheureusement, je constate que nulle part dans sa décision la [Commission] ne se livre à une telle analyse. Elle regroupe sans distinctions toutes les dépenses de rémunération du secteur nucléaire. Elle considère qu'elles ont toutes la même origine et qu'aucune ne découle d'obligations contractuelles auxquelles [Ontario Power Generation] était tenue par une convention collective conclue avant la demande et la période de référence. Enfin, j'estime que, lorsqu'elle se penche sur le caractère raisonnable de la rémunération globale du secteur nucléaire, la [Commission] commet l'erreur de tenir compte d'éléments de preuve ayant vu le jour après la conclusion des conventions collectives pour apprécier le caractère raisonnable des barèmes de rémunération et d'autres dispositions contraignantes des conventions collectives. [par. 75]

[132] The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

[132] La Cour d'appel souscrit à l'unanimité à la conclusion de la juge Aitken et statue que [TRADUCTION] « les dépenses de rémunération en cause devant la [Commission] étaient des dépenses convenues » qu'il aurait donc fallu apprécier en présumant leur prudence. Elles reconnaissent toutes deux qu'il était loisible à la Commission de conclure que la présomption était réfutée en ce qui concerne les obligations contractuelles obligatoires, mais qu'elle a agi déraisonnablement en ne tenant pas compte de la nature immuable des coûts fixes.

[133] I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs

[133] Je suis d'accord. Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les dépenses de rémunération

were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": para. 75.

[134] In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

[135] Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002), at p. 481; see also *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93.

[136] The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being

d'Ontario Power Generation étaient donc en très grande partie préétablies et ne pouvaient être rajustées par l'entreprise au cours de la période considérée. Il s'agit précisément du type de dépenses que la Commission qualifie, dans sa décision, de dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » et qui doivent faire l'objet d'un « contrôle de la prudence comportant l'application d'une présomption de prudence » (par. 75).

[134] Soit dit tout en respect, la Commission rend une décision déraisonnable en ne reconnaissant pas le caractère contraignant en droit et non réductible des dépenses auxquelles le service public s'était engagé lors de la signature des conventions collectives et en omettant de soumettre ces dépenses au contrôle qui s'imposait pourtant selon elle à leur égard.

Analyse

[135] Conformément au par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, sur demande d'Ontario Power Generation, la Commission fixe le montant des paiements « justes et raisonnables » auxquels a droit le service public. Dans le contexte de la réglementation des services publics, l'expression « justes et raisonnables » traduit l'objectif qui consiste à [TRADUCTION] « naviguer entre les récifs » que sont, d'une part, les tarifs excessifs imposés au consommateur et, d'autre part, la rétribution insuffisante du service public (*Verizon Communications Inc. c. Federal Communications Commission*, 535 U.S. 467 (2002), p. 481; voir aussi *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, p. 192-193).

[136] La méthode retenue par la Commission pour déterminer le montant des paiements « justes et raisonnables » auxquels a droit Ontario Power Generation prend en partie appui sur la notion de « prudence ». En droit réglementaire, la prudence offre un [TRADUCTION] « fondement juridique pour se prononcer sur le respect des obligations des services publics liées à l'intérêt public, plus particulièrement en ce qui concerne le processus de tarification » (Robert E. Burns et autres, *The Prudent Investment Test in the 1980s*, rapport NRRI-84-16, The National Regulatory Research Institute, avril 1985, p. 20). Apparue

used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown. [Emphasis added.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn. 1, per Brandeis J., dissenting)

[137] The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be

au début du 20e siècle, cette notion jurisprudentielle visait à remédier à la [TRADUCTION] « complexité paralysante » des approches différentes utilisées par les organismes de réglementation pour arrêter des montants « justes et raisonnables », et elle présumait que le service public réglementé avait agi raisonnablement (*Verizon Communications*, p. 482). Ainsi, comme l'explique le juge Brandeis dans un extrait bien connu datant de 1923 :

> [TRADUCTION] L'emploi de l'expression « investissement prudent » n'est pas décisif. L'établissement de la base de tarification ne devrait pas exclure les investissements qui, dans des circonstances ordinaires, seraient considérés raisonnables. Cet emploi vise plutôt à exclure les dépenses qui pourraient être jugées malhonnêtes ou manifestement excessives ou imprudentes. On peut supposer que tout investissement considéré a été fait dans l'exercice d'un jugement raisonnable, sauf preuve du contraire. [Je souligne.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1, le juge Brandeis (dissident))

[137] La présomption de prudence constitue le point de départ de l'examen que la Commission appelle [TRADUCTION] « contrôle de la prudence ». Lorsqu'elle entreprend ce contrôle de la prudence, la Commission applique un « ensemble bien établi de principes » :

[TRADUCTION]

- La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.
- Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.
- Le recul est exclu dans l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.
- La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et

based on facts about the elements that could or did enter into the decision at the time.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), at para. 55, citing *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), at para. 3.12.2.)

[138] This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4, at paras. 8 and 10-12.

[139] In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence — and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.

reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), par. 55, citant *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), par. 3.12.2.)

[138] Dans *Enbridge Gas Distribution Inc. (Re)*, par. 3.12.1 à 3.12.5, conf. par *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4, par. 8 et 10-12, la Commission et la Cour d'appel de l'Ontario considèrent ce contrôle — qui comporte l'application d'une présomption de prudence et exclut le recul — comme la méthode appropriée pour fixer des tarifs « justes et raisonnables ».

[139] Toutefois, dans la présente affaire, la Commission choisit de ne pas soumettre toutes les dépenses à un contrôle de la prudence. Elle dit plutôt recourir à deux examens. Le premier s'appliquerait aux « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter. Dans ses motifs, la Commission explique qu'elle examine ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombe au service public de démontrer le caractère raisonnable de ses dépenses :

[TRADUCTION] Lors de l'examen des dépenses prévues, il incombe à la société d'établir le bien-fondé de sa demande et d'étayer son allégation selon laquelle ces dépenses sont raisonnables. Elle doit fournir un large éventail d'éléments de preuve en ce sens, notamment des analyses de rentabilité et de tendances, des données de référence, etc. Le critère applicable n'est pas celui de la malhonnêteté, de la négligence ou de la perte menant au gaspillage, mais bien celui du caractère raisonnable. Et dans l'appréciation du caractère raisonnable, la Commission n'est pas tenue d'examiner uniquement les données qui intéressent [Ontario Power Generation]. Elle a le pouvoir discrétionnaire de conclure que les dépenses prévues sont déraisonnables au vu de la preuve, laquelle peut se rapporter à l'analyse coût/bénéfice, à l'incidence sur les consommateurs, aux comparaisons avec d'autres entités ou à autre chose.

The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [paras. 74-75]

[140] A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [para. 75]

[141] In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

This issue concerns expenditures which have largely already been incurred by the company. . . . Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

[142] As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket

L'avantage d'une période de référence ultérieure est qu'elle permet à la société de connaître à l'avance la décision de la Commission concernant le recouvrement de dépenses prévues. Par exemple, lorsque des dépenses sont refusées, la société peut modifier ses plans en conséquence. Autrement dit, l'actionnaire n'a pas nécessairement à assumer un coût (à moins que la société ne décide, en tout état de cause, de maintenir les dépenses jugées excessives). [par. 74-75]

[140] Selon la Commission, une démarche différente serait suivie pour les dépenses à l'égard desquelles la société ne pouvait [TRADUCTION] « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission explique qu'elle jauge ces dépenses en se livrant à un « contrôle de la prudence » qui comporte l'application d'une présomption selon laquelle les dépenses ont été faites de manière prudente :

[TRADUCTION] Des considérations quelque peu différentes entreront en jeu lors d'un contrôle de la prudence après coup. La dépense que la Commission refusera alors d'approuver sera nécessairement assumée par l'actionnaire. La société ne pourra plus prendre de mesures de réduction à son égard. C'est pourquoi la Commission estime qu'il existe une différence entre les deux types d'examen, le contrôle après coup constituant un contrôle de la prudence assorti d'une présomption de prudence. [par. 75]

[141] À titre d'exemple, dans *Enersource Hydro Mississauga Inc. (Re)*, la Commission conclut qu'elle doit effectuer un contrôle de la prudence pour apprécier les dépenses qu'Enersource a déjà faites :

[TRADUCTION] Le présent dossier porte sur des dépenses que la société a déjà faites en grande partie. [. . .] Comme il est question de dépenses antérieures qui sont aujourd'hui contestées, la Commission doit effectuer un contrôle de la prudence. [par. 55]

[142] Comme le dit la Commission dans ses motifs, il est logique de soumettre à un contrôle de la prudence des dépenses convenues, car refuser d'approuver des dépenses auxquelles Ontario

for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

[143] The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce" (para. 75). The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts . . . will take time" (paras. 346 and 352), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

[144] The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

Power Generation ne peut se soustraire oblige le service public à acquitter sur ses propres deniers des dépenses déjà faites. Cela pourrait nuire au bon fonctionnement d'Ontario Power Generation et l'amener à restructurer ses liens avec les milieux financiers et ses fournisseurs de services, voire à faire faillite (voir Burns et autres, p. 129-165). Dès lors, [TRADUCTION] « les coûts en capital et les tarifs seraient supérieurs à ce qu'ils auraient été si une sanction modérée avait résulté de l'application du principe de prudence », de sorte que le consommateur ontarien serait contraint de payer des tarifs d'électricité plus élevés (Burns et autres, p. vi).

[143] Le présent pourvoi a donc pour objet la décision de la Commission de considérer *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables, sans se demander s'il s'agit en partie de dépenses pour lesquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » (par. 75). La Commission ne les qualifie pas à proprement parler de dépenses prévues, mais lorsqu'elle affirme que « les conventions collectives peuvent rendre ardue l'élimination rapide de certains postes » et que « modifier des conventions collectives [. . .] prend du temps » (par. 346 et 352), elle considère clairement qu'il s'agit de dépenses théoriquement compressibles. De plus, l'omission de soumettre celles-ci au contrôle de la prudence qu'elle dit pourtant s'appliquer aux dépenses non réductibles confirme l'assimilation des obligations issues de négociations collectives à des obligations ajustables.

[144] La Commission ne dit pas pourquoi elle estime que les dépenses de rémunération issues des conventions collectives constituent des dépenses prévues ajustables, mais par l'adoption de son approche, elle empêche Ontario Power Generation de bénéficier de l'application de sa méthode d'appréciation qui considère différemment les dépenses convenues. À mon humble avis, en omettant d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission méconnaît à la fois son propre cadre méthodologique et le droit du travail.

[145] Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

[146] Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL).

[147] The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

[148] Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and

[145] Ontario Power Generation était partie à des conventions collectives obligatoires qui étaient intervenues avec le Syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals et qui s'appliquaient pendant la plus grande partie de la période considérée. À l'époque de la demande, elle avait déjà conclu une convention collective avec le Syndicat des travailleurs et travailleuses du secteur énergétique pour la période comprise entre le 1er avril 2009 et le 31 mars 2012.

[146] La convention collective intervenue avec Society of Energy Professionals et imposant la médiation-arbitrage pour le règlement des différends pendant des négociations collectives a expiré le 31 décembre 2010. Par suite d'une impasse dans les négociations, les conditions d'une nouvelle convention collective pour la période du 1er janvier 2011 au 31 décembre 2012 ont été imposées par voie d'arbitrage obligatoire (*Ontario Power Generation c. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL)).

[147] Les conventions collectives conclues avec les deux syndicats prescrivaient les barèmes de rémunération des employés syndiqués, réglementaient rigoureusement les niveaux de dotation aux installations d'Ontario Power Generation et limitaient le pouvoir du service public de réduire unilatéralement ses barèmes de rémunération et ses niveaux de dotation. Par exemple, la convention collective conclue avec le Syndicat des travailleurs et travailleuses du secteur énergétique prévoyait qu'il n'y aurait aucun licenciement pendant la durée de son application. Bien au contraire, Ontario Power Generation serait contrainte soit de réaffecter tout employé excédentaire, soit de lui offrir une indemnité de départ selon les barèmes établis au préalable par le service public et le syndicat (« Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union », 1er avril 2009 au 31 mars 2012, art. 11).

[148] De même, la convention collective conclue avec Society of Energy Professionals limitait grandement le pouvoir du service public de négocier et de déterminer les barèmes de rémunération. À l'expiration de cette convention le 31 décembre 2010,

the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of 3 per cent on January 1, 2011, 2 per cent on January 1, 2012, and a further 1 per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

[149] The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

[150] Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: para. 347. Had the Board used the approach it said it would use for costs the company had "no opportunity . . . to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

le service public défendait la position de son unique actionnaire, la province d'Ontario, à savoir l'exclusion de toute augmentation nette des salaires pendant les deux années suivantes. Les parties n'ont pu parvenir à un accord, de sorte que le dossier a été renvoyé à l'arbitrage obligatoire comme convenu lors de négociations précédentes. Dans sa décision, l'arbitre Kevin M. Burkett a ordonné une augmentation générale des salaires de 3 p. 100 le 1er janvier 2011, de 2 p. 100 le 1er janvier 2012 et, en sus, de 1 p. 100 le 1er avril 2012 (*Ontario Power Generation c. Society of Energy Professionals*, par. 1, 9 et 28).

[149] Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire (*Loi de 1995 sur les relations de travail*, art. 56). Il était donc interdit à Ontario Power Generation de réduire unilatéralement les niveaux de dotation, les salaires ou les avantages sociaux de ses employés syndiqués. Contrairement à ce qu'affirment les juges majoritaires (par. 84), ces conventions ne laissaient pas seulement « peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble », elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

[150] En appliquant la méthode qu'elle a dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission oblige en fait Ontario Power Generation à prouver le caractère raisonnable de ses dépenses et conclut que l'entreprise n'a présenté ni [TRADUCTION] « preuve convaincante », ni « documents ou analyses » qui justifient les barèmes de rémunération (par. 347). Si elle avait eu recours à l'approche qu'elle a dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

[151] Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act, 1998* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

[151] Contrairement à ce que soutiennent les juges majoritaires, appliquer le contrôle de la prudence à ces dépenses de rémunération serait difficilement « incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ». Considérer que le par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit un fardeau de preuve aussi strict a essentiellement pour effet d'empêcher totalement la Commission d'effectuer des contrôles de la prudence, alors qu'elle en a effectués sans difficulté dans le passé et qu'elle a affirmé — comme dans ses motifs en l'espèce — qu'il y a lieu de soumettre les dépenses convenues à « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence ». Or, suivant le raisonnement des juges majoritaires, comme le contrôle de la prudence présume toujours la prudence, la Commission ne verrait pas seulement sa marge de manœuvre réduite sur le plan méthodologique, mais elle contreviendrait aussi à la Loi.

[152] The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation's] unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

[152] L'application du principe de la prudence ne soustrait pas les dépenses de rémunération du service public à tout examen. Comme le fait remarquer la Cour d'appel, le contrôle de la prudence

> [TRADUCTION] n'écarte pas la possibilité que la [Commission] puisse contrôler les barèmes de rémunération applicables aux employés syndiqués d'[Ontario Power Generation] ou le nombre de leurs postes. Lors d'un tel contrôle, il peut ressortir de la preuve, d'une part, que la présomption selon laquelle les dépenses ont été faites de manière prudente doit être écartée et, d'autre part, que les barèmes de rémunération et les niveaux de dotation convenus ne sont pas raisonnables; cependant, la [Commission] ne peut se prononcer avec le recul, mais doit tenir compte de ce qui était connu ou qui aurait dû l'être à l'époque. Le contrôle de la prudence admet un tel résultat et permet à la [Commission] de s'acquitter de son mandat légal et de jouer son rôle de substitut du marché tout en assurant un juste équilibre entre les intérêts d'[Ontario Power Generation] et ceux de ses clients. [par. 38]

[153] The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant

[153] L'affirmation des juges majoritaires selon laquelle, « si le législateur avait voulu que les dépenses [. . .] issues [de conventions collectives] se répercutent inévitablement sur les consommateurs, il

the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

[154] It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

[155] Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's

n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public » (par. 114), laisse perplexe. Le législateur ne voulait pas que *toute* dépense se répercute « inévitablement » sur les consommateurs. Son intention était de donner à la Commission le pouvoir d'arrêter des paiements justes et raisonnables en fonction des engagements actuels et projetés d'Ontario Power Generation. Ni les conventions collectives ni aucune autre obligation contractuelle ne devaient « inévitablement » se répercuter sur qui que ce soit. Cependant, elles devaient inévitablement peser dans la balance. Or, c'est précisément la nature unique des engagements contraignants qu'a invoquée la Commission lorsqu'elle a affirmé qu'elle soumettrait ces dépenses à un contrôle différent.

[154] Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent donc être assimilées à juste titre à des dépenses prévues. La Commission ne tire toutefois aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation sont fixes et dans quelle proportion elles demeurent assujetties au pouvoir discrétionnaire du service public. La Commission ne tire pour ainsi dire aucune conclusion de fait quant à savoir dans quelle mesure l'entreprise pouvait réduire ses dépenses de rémunération issues des conventions collectives. Au contraire, comme le souligne la juge Aitken, la Commission [TRADUCTION] « regroupe » sans distinctions toutes les dépenses liées à la rémunération, reconnaît que la réduction de celles issues des conventions collectives « prend[rait] du temps » et « [serait] ardue », et considère qu'elles sont globalement ajustables.

[155] Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce

words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": para. 75.

[156] Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

[157] The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

[158] In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine

sens. Pour reprendre les propos des juges majoritaires, ces dépenses correspondent à des « obligations qui écartent tout pouvoir discrétionnaire [. . .] permettant [au service public] de ne pas acquitter la somme ultérieurement » (par. 82). Selon la propre méthode de la Commission, les dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » bénéficient d'une « présomption de prudence » (par. 75).

[156] Refuser d'approuver des dépenses qu'Ontario Power Generation est juridiquement tenue d'acquitter en raison de ses conventions collectives obligerait le service public et son seul actionnaire, la province d'Ontario, à combler la différence en puisant ailleurs. Ontario Power Generation pourrait notamment être forcée de réduire ses investissements dans l'accroissement de sa capacité et dans l'amélioration de ses installations. Et, comme il s'agit du plus grand producteur d'électricité de l'Ontario, un tel refus pourrait non seulement nuire à la « viabilité financière » du secteur de l'électricité de la province, mais également mettre en péril la garantie d'un service d'électricité fiable.

[157] Les juges majoritaires tiennent cependant pour acquis que la relation continue entre Ontario Power Generation et les syndicats devrait conférer à la Commission, relativement aux dépenses de rémunération issues de négociations collectives, un pouvoir de refus plus grand que celui dont elle bénéficie dans le cadre d'une analyse qui exclut le recul et présume la prudence. Ils font droit également à la conclusion de la Commission selon laquelle les dépenses de rémunération issues de négociations collectives auxquelles Ontario Power Generation a participé pourraient être [TRADUCTION] « excessives » et concluent donc que la Commission a agi raisonnablement en écartant le principe de la « prudence » pour arriver à sa conclusion. Leur approche ne trouve aucun appui, pas même dans la méthode que la Commission établit elle-même pour déterminer le montant de paiements justes et raisonnables.

[158] En tout respect pour l'opinion contraire, en choisissant un critère éminemment susceptible de confirmer l'hypothèse que les dépenses issues de négociations collectives sont excessives, on se

whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

[159] I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the . . . methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board* (2004), 319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

[160] In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements

méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient, soit dit tout en respect, à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas.

[159] Je reconnais que la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont « justes et raisonnables » et, à l'intérieur de certaines limites, de [TRADUCTION] « définir la [. . .] méthode » utilisée pour établir le montant de ces paiements (règlement 53/05, art. 6; *Loi de 1998 sur la Commission de l'Énergie de l'Ontario*, art. 78.1). Cela dit, dès lors qu'elle a établi une méthode pour déterminer ce qui est juste et raisonnable, la Commission doit à tout le moins l'appliquer avec constance (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149 (CanLII), par. 30-32, le juge Rothstein). Pour autant, les conventions collectives ne « priment » pas le pouvoir de la Commission de fixer les paiements, mais une fois que la Commission a choisi une méthode pour exercer son pouvoir discrétionnaire, elle doit s'y tenir. En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation serait vouée à l'incertitude quant à la démarche à suivre pour déterminer les dépenses et les investissements à faire et quant à la manière de les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster.

[160] En refusant d'approuver des dépenses de 145 millions de dollars au motif qu'Ontario Power Generation pouvait réduire ses barèmes de rémunération et ses niveaux de dotation, la Commission a méconnu le caractère contraignant en droit des

and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

[161] I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed, ABELLA J. *dissenting.*

Solicitors for the appellant: Stikeman Elliott, Toronto.

Solicitors for the respondent Ontario Power Generation Inc.: Torys, Toronto; Ontario Power Generation Inc., Toronto.

Solicitors for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent the Society of Energy Professionals: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the intervener: Jay Shepherd Professional Corporation, Toronto.

conventions collectives et a omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

[161] Je suis donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et, à l'instar de la Cour d'appel, de renvoyer l'affaire à la Commission pour qu'elle la réexamine à la lumière des présents motifs.

Pourvoi accueilli, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Stikeman Elliott, Toronto.

Procureurs de l'intimée Ontario Power Generation Inc. : Torys, Toronto; Ontario Power Generation Inc., Toronto.

Procureurs de l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intimée Society of Energy Professionals : Cavalluzzo Shilton McIntyre Cornish, Toronto.

Procureurs de l'intervenante : Jay Shepherd Professional Corporation, Toronto.

2005 CarswellOnt 1419
Ontario Court of Appeal

Children's Lawyer for Ontario v. Goodis

2005 CarswellOnt 1419, [2005] O.J. No. 1426, 138 A.C.W.S. (3d) 778, 17 R.F.L. (6th) 32, 196 O.A.C. 350, 253 D.L.R. (4th) 489, 29 Admin. L.R. (4th) 86, 75 O.R. (3d) 309

CHILDREN'S LAWYER FOR ONTARIO (Applicant / Appellant) and DAVID GOODIS, Senior Adjudicator, Information and Privacy Commissioner and JANE DOE, Requester (Respondents)

McMurtry C.J.O., Goudge, Blair JJ.A.

Heard: December 6-7, 2004
Judgment: April 18, 2005
Docket: CA C41313

Proceedings: affirming *Children's Lawyer for Ontario v. Goodis* (2003), 231 D.L.R. (4th) 727, 177 O.A.C. 1, *(*sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 66 O.R. (3d) 692, 45 R.F.L. (5th) 285, 2003 CarswellOnt 3426, 8 Admin. L.R. (4th) 251 (Ont. Div. Ct.)

Counsel: Leslie M. McIntosh, Elaine Atkinson for Appellant
Freya Kristjanson, Christopher D. Bredt for Respondent
Mary M. Thomson, Christine Lonsdale, amicus curiae

Subject: Civil Practice and Procedure; Public; Family

Headnote

Administrative law --- Practice and procedure — On application for certiorari — Standing

Adult former client represented by Office of Children's Lawyer sought disclosure of her files in child protection case and two motor vehicle accident cases — Children's Lawyer treated request as request under Ontario Freedom of Information and Protection of Privacy Act and disclosed all but 933 of 3,700 pages, relying on s. 19 solicitor-client and Crown counsel exemptions — Client appealed to Information and Privacy Commissioner, who ordered Children's Lawyer to disclose most of outstanding records — Children's Lawyer applied unsuccessfully for judicial review of commissioner's decision — On judicial review application, applications judge dismissed Children's Lawyer's motion to refuse or limit standing of commissioner — Children's Lawyer appealed on issue of commissioner's role in Divisional Court — Appeal dismissed — Ordinary meaning of s. 9(2) of Judicial Review Procedure Act gave administrative tribunal right to be party to proceeding if it chose to do so — Scope of standing was left to judicial discretion — Context-specific approach to scope of tribunal standing was preferable to precise a priori rules depending on grounds being pursued in application or on applicable standard of review — Scope of tribunal's standing was to be considered in light of factors including importance of fully informed adjudication of issues before it and importance of maintaining tribunal impartiality — No error was made in decision to dismiss attempts of Children's Lawyer to deny or limit commissioner's standing in judicial review proceedings — In present case, full tribunal participation was significant factor in judicial review to ensure fully informed adjudication of issues — Children's Lawyer would be only party if tribunal were denied standing — With full standing, commissioner's expert familiarity with statute provided important assurance of fully informed adjudication — Circumstances of case were such that commissioner's impartiality would not be significantly compromised and integrity of decision-making process would not be undermined on allowing commissioner full standing in judicial review proceedings.

APPEAL by Children's Lawyer from judgment reported at *Children's Lawyer for Ontario v. Goodis* (2003), 231 D.L.R. (4th) 727, 177 O.A.C. 1, *(*sub nom. *Ontario (Children's Lawyer) v. Ontario (Information & Privacy Commissioner))* 66 O.R. (3d)

692, 45 R.F.L. (5th) 285, 2003 CarswellOnt 3426, 8 Admin. L.R. (4th) 251 (Ont. Div. Ct.), dismissing motion for declaration that Information and Privacy Commissioner lacked standing in context of judicial review proceedings.

***Goudge J.A.*:**

1 In the proceedings resulting in this appeal, the Children's Lawyer for Ontario sought judicial review of the decision of the Information and Privacy Commissioner who ordered the Children's Lawyer to disclose certain documents in her possession. Disclosure had been requested under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*") by a requester who has been given the pseudonym of Jane Doe in these proceedings.

2 The Divisional Court dismissed the application for judicial review. In the course of doing so, it dismissed the Children's Lawyer's request to refuse or limit the standing of the Commissioner. The Children's Lawyer now appeals, challenging the role that the Commissioner was permitted to play in the Divisional Court. We must therefore grapple with the vexing question of the scope of standing to be accorded by the court to an administrative tribunal whose decision is attacked by way of judicial review.

3 For the reasons that follow, I agree with the conclusion of the Divisional Court and would therefore dismiss the appeal.

Background

4 When Jane Doe was a child, the Children's Lawyer acted for her in three different legal proceedings. The Children's Lawyer represented her in a child protection case and acted as her litigation guardian in two motor vehicle accident cases.

5 Upon reaching majority and apparently dissatisfied with her representation, Jane Doe requested a copy of her "complete files". The Children's Lawyer, whose office operates as a branch of the Ministry of the Attorney General, treated this as a request for information under *FIPPA* rather than as a request from a client for her file. However reasonable it might be to analyze the interests at stake in this framework, this was not raised as an issue before us, and I will say nothing more about it.

6 The Children's Lawyer responded to the request by deciding that some 2,800 pages of records had to be disclosed, but that she had the right to deny access to 933 pages. She based this decision on s. 13 and s. 19 of *FIPPA*.

7 Section 13 creates an exemption from disclosure for records that reveal the advice and recommendations of a public servant. Section 19 is more important for these proceedings. It has two branches and provides that the head of the government agency may refuse to disclose a record either if it is subject to solicitor-client privilege or if it was prepared by or for Crown counsel to assist in giving legal advice or in contemplation of or for use in litigation. Section 19 reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

8 As *FIPPA* permits, the requester appealed the decision to deny access to 933 pages to the Commissioner. Except for a handful of these pages, the Commissioner allowed the appeal and ordered disclosure of these pages. The Commissioner found that s. 13 did not apply because the records were prepared by the Children's Lawyer for the purpose of representing the requester in legal proceedings rather than for the benefit of the government or the public at large. The first branch of s. 19 did not apply because solicitor-client privilege could not be asserted by the Children's Lawyer against a party she represented in litigation. The Commissioner found that the second branch of s. 19 did not apply because it does not protect the Children's Lawyer from a request from an individual she has represented.

9 The Children's Lawyer subsequently applied under *FIPPA* to have the Commissioner reconsider her decision. The result was that although the Commissioner permitted several additional documents to be withheld, she confirmed the essence of her prior decision.

10 The Children's Lawyer then applied for judicial review of the decision and the reconsideration on the grounds that the Commissioner erred in finding that neither s. 13 nor the second branch of s. 19 entitled the Children's Lawyer to withhold these records. She no longer asserted that she could deny disclosure based on the first branch of s. 19.

11 The Commissioner opposed the application for judicial review. In her factum, the Commissioner put the argument that the second branch of s. 19 was not available to the Children's Lawyer because the Children's Lawyer was not acting as Crown counsel when she represented the requester in the various pieces of litigation. This reason was not expressly set out in the Commissioner's original decision.

12 The Children's Lawyer responded to the Commissioner's factum by moving for an order that the Commissioner be denied standing, or at least be prohibited from arguing that her decision was correct on a basis that was not given in her original decision. The Children's Lawyer filed an affidavit saying that in her exchanges with the Commissioner prior to the decision, the Commissioner had not raised the "Crown counsel" issue and that, had she done so, the Children's Lawyer would have provided evidence and submissions on the question.

13 The requester did not respond to the judicial review application or to the preliminary motion and has played no part in the court proceedings. Because of the Children's Lawyer's objection to the Commissioner's standing, and the absence of the requester, the Divisional Court appointed *amicus curiae* to assist the court by making those submissions it deemed appropriate on all issues. Through the facilities of the Advocates' Society, Ms. Thomson and Ms. Lonsdale filled that role there and again in this court with great skill. That they have acted *pro bono* throughout reflects the best traditions of the bar.

14 The Divisional Court dismissed the preliminary motion, finding that s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 gives the Commissioner the right to be a party to the judicial review application and that the court ought not exercise its discretion to limit the Commissioner's participation because the court would thereby deny itself legitimate and helpful submissions.

15 The court then dismissed the application for judicial review in its entirety. The court found that the Commissioner was correct in denying the protection of the second branch of s. 19 of *FIPPA* because in representing the requester in litigation the Children's Lawyer could not be considered to be Crown counsel when it represented the requester. The court also found that, while this issue may not have been front and centre before the Commissioner, it was raised in the record and was open to be argued by both the Commissioner and the *amicus* on judicial review. Finally, the court found that the Commissioner's decision that s. 13 of *FIPPA* did not permit the Children's Lawyer to withhold disclosure of these records was not unreasonable.

16 In this court, the Children's Lawyer did not pursue the s. 13 argument but focused on the role that the Commissioner was permitted to play in the judicial review application. The Children's Lawyer raised two issues on this appeal:

> (a) Whether the Divisional Court erred in affording standing to the Commissioner, and
>
> (b) Whether the Divisional Court erred in permitting the Commissioner to raise the issue of whether lawyers employed or retained by the Children's Lawyer are "Crown counsel" for the purposes of s. 19 of *FIPPA* and then proceeding to decide the case on that basis.

17 The Children's Lawyer did not ask this court to decide the merits of the judicial review application or even to determine the Crown counsel issue but rather sought an order remitting the latter question back to the Commissioner for determination. The focus of argument in this court was almost entirely on the law applicable to determining the scope of standing of an administrative tribunal in a judicial review application.

Analysis

18 The last half-century has seen an explosion in the number and variety of administrative tribunals that are part of the broader justice system. One consequence has been the increasingly sophisticated law governing the courts' supervision of tribunals. However an aspect of that law that has lacked consistency concerns the extent of an administrative tribunal's role in an application for judicial review of its decision. The eminent administrative law scholar Professor David Mullan has described it as "a domain fraught with uncertainty". See David J. Mullan, *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) at 457.

19 Despite this uncertainty, a brief review of several cases that highlight the jurisprudential history of the issue is useful in clarifying the fundamental values at play.

20 The starting point is *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.). The decision under scrutiny was that of the Public Utilities Board for Alberta. Although the attack was commenced by way of statutory appeal, the principles enumerated by the Supreme Court have been applied without distinction to judicial review.

21 Writing for the court, Estey J. made it clear that, although the governing legislation would be determinative if it defined the role of the tribunal, if it did not do so, the tribunal could not go beyond explaining the record and making representations supporting its jurisdiction to make the order in question. He relied squarely on the importance of maintaining tribunal impartiality. He put it this way at 709:

> This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

22 Ten years after this decision, the Supreme Court again addressed the issue in *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) [*Paccar* hereafter]. In that case, judicial review was sought of a British Columbia Labour Relations Board decision. LaForest J., writing for himself and Dickson C.J.C., accepted as beyond question a tribunal's standing to explain the record before the court and to advance its view of the appropriate standard of review. He also approved the tribunal's standing to explain why its decision was a reasonable approach to adopt and could not be said to be patently unreasonable. To this extent, the Board was free to argue the merits of its approach although not to the point of defending the decision as correct. The scope of the Board's standing was thus expanded considerably beyond the strict question of jurisdiction. L'Heureux-Dubé J., who was the only other member of the court to address the issue, essentially agreed with this approach.

23 LaForest J. was clearly moved to these conclusions by the importance of having a fully informed adjudication of the issues before the court. At 1016, he placed at the centre of his reasoning a passage from Taggart J.A. in *B.C.G.E.U. v. British Columbia (Industrial Relations Council)* (1988), 26 B.C.L.R. (2d) 145 (B.C. C.A.), at 153 that he adopted without reservation. It makes the point graphically:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

24 Since *Paccar*, the fundamental values of maintaining tribunal impartiality and facilitating a fully informed adjudication have been employed in a number of cases — separately or together — to underpin decisions on this issue. Some have followed *Northwestern Utilities*. Some have followed *Paccar*. In other cases, the courts have simply given full standing as a matter of course to tribunals to defend their decisions without even broaching, let alone discussing, the limits of their standing. In a thoughtful article on the subject, Laverne Jacobs and Thomas Kuttner cite as two examples of this method *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.) and *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R.

221 (S.C.C.). See Laverne A. Jacobs and Thomas S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing before the Courts" (2002) 8 Can. Bar. Rev. 616.

25 Against this rather clouded jurisprudential backdrop, I think the analysis of the scope of standing to be accorded to the Commissioner in this case must begin with the relevant legislation. Section 9(2) of the *Judicial Review Procedure Act* reads:

> For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

26 The ordinary meaning of this provision gives the administrative tribunal the right to be a party to the proceeding if it chooses to do so. It leaves to the tribunal rather than the court the decision of whether to become a party to the application for judicial review.

27 However, once a party, the scope of a tribunal's standing is a subject not addressed by the legislation. Although the legislature could have pre-empted the debate by spelling out precise limits to a tribunal's participation, it has chosen not to do so. The legislation's silence necessarily leaves this issue to the court's discretion, as part of its task of ensuring that its procedures serve the interests of justice. Where the issue arises, the court must exercise this discretion to determine the scope of standing to be accorded to a tribunal that is a party to a judicial review proceeding.

28 This approach to s. 9(2) was well described by the Divisional Court in *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.* (1985), 51 O.R. (2d) 481 (Ont. Div. Ct.). In that case, judicial review was sought of a decision of the Ontario Labour Relations Board on the basis that the draft decision by the hearing panel was presented to the full Board for discussion of policy, thereby violating the principle of natural justice.

29 The applicant objected to counsel for the Board making submissions about its own procedure. However, the Divisional Court unanimously rejected this argument. It found that s. 9(2) entitled the Board to be a party to the proceedings and it then exercised its discretion to permit Board counsel full latitude to answer the submissions of the applicant.

30 When the case was appealed to the Court of Appeal for Ontario and then to the Supreme Court of Canada, Board counsel was again permitted to argue fully. In neither court was the scope of standing raised, let alone commented upon.

31 In the decision under appeal here, the Divisional Court adopted the approach used in *Consolidated Bathurst*, *supra*. It held that the scope of standing accorded to the Commissioner is best left to judicial discretion. In exercising that discretion to permit the Commissioner to respond fully to the applicant, the court appeared to be most moved by the desire to avoid denying itself legitimate, helpful submissions. On this basis, the Children's Lawyer's motion to deny or limit the Commissioner's standing was dismissed.

32 In this court, all parties took similar positions, at least at the broadest level of generality. They all argued that the court should approach the scope of standing issue contextually and should avoid the formalism of fixed rules that turn on whether the question before the court is one of jurisdiction, natural justice, or the applicable standard of review. They all urged the same "pragmatic and functional" label for this approach but disagreed on the considerations that should inform the court's decision.

33 As I have said, s. 9(2) of the *Judicial Review Procedure Act* entitles the administrative tribunal to be a party to the proceedings but leaves to the court's discretion the scope of its standing. Given the wide variety of administrative tribunals and types of decisions that are today subjected to judicial review, I agree that the court should exercise this discretion paying attention to the context presented in the particular application. However, I think it is both unnecessary and confusing to use the "pragmatic and functional" label. This phrase has developed a strong association with the quite different task of determining the proper standard of review and with the well-known factors embodied in that approach, which will not automatically be useful in determining the scope of standing.

34 However, I agree with the parties that a context-specific solution to the scope of tribunal standing is preferable to precise *a priori* rules that depend either on the grounds being pursued in the application or on the applicable standard of review. For

example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *Bransen Construction Ltd. v. C.J.A., Local 1386* (2002), 249 N.B.R. (2d) 93 (N.B. C.A.) at para. 32.

35 Nor do I think cases like *Northwestern* and *Paccar*, *supra*, dictate the use of precise rules of this sort. Particularly in light of the recent evolution of administrative law away from formalism and towards the more flexible practical approach exemplified by *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), I think these cases are best viewed as sources of the fundamental considerations that should inform the court's discretion in the context of a particular case. Resolving the scope of standing on this basis rather than by means of a set of fixed rules is likely to produce the most effective interplay between the array of different administrative decision makers and the courts.

36 If this is so, what are the important considerations that should guide the court in the exercise of its discretion? In my view, the two most important considerations are those reflected in the two seminal cases on this issue: *Paccar* and *Northwestern Utilities*, *supra*.

37 In *Paccar*, LaForest J. articulated the importance of having a fully informed adjudication of the issues before the court. Because of its specialized expertise, or for want of an alternative knowledgeable advocate, submissions from the tribunal may be essential to achieve this objective. In these circumstances, a broader standing adds value to the court proceedings. Because sound decision making is most likely to come from a fully informed court, this consideration will frequently be of most importance. Professor Mullan put it this way at Mullan, *supra*, at 459:

> Under a discretionary approach, the principal question should probably be whether the participation of the tribunal is needed to enable a proper defence or justification of the decision under attack. If that decision will almost certainly be presented adequately by the losing party at first instance or by some other party or intervenor such as the attorney general, there may be no need for tribunal representation irrespective of the ground of judicial review or appeal. On the other hand, where no one is appearing to defend the tribunal's decision, where the matter in issue involves factors or considerations peculiarly within the decision maker's knowledge or expertise, or where the tribunal wishes to provide dimensions or explanations that are not necessarily going to be put by a party respondent, then there should clearly be room for that kind of representation to be allowed within the discretion of the reviewing or appellate court. Indeed, in at least some instances, a true commitment to deference and restraint in intervention would seem to necessitate it.

38 In *Northwestern Utilities*, *supra*, Estey J. articulated the other significant consideration, namely the importance of maintaining tribunal impartiality. This obviously matters to the parties to the decision, particularly if the application results in the matter being referred back to the tribunal. More broadly however, in future cases before the tribunal where similar interests arise, or where the tribunal serves a defined and specialized community, there may be a risk that full-fledged participation by a tribunal as an adversary in a judicial review proceeding will undermine future confidence in its objectivity.

39 This risk may be enhanced where the tribunal's role is not to evaluate the interests of an applicant against a legislative standard but is to resolve private disputes between two litigants where the perception of favouring one side over the other may be felt more acutely.

40 I also agree with Jacobs and Kuttner, *supra*, that the nature of the issue under review may affect the apprehension of partiality arising from the unconstrained participation of the tribunal before the court. For example, if the question is whether the tribunal has treated a particular litigant fairly, impartiality may suggest a more limited standing than if the allegation is that the structure of the tribunal itself compromises natural justice.

41 Although these two considerations are primary and will have to be weighed and balanced in almost every case where the scope of a tribunal's standing is in issue, there will undoubtedly be other considerations that will be relevant in particular cases.

42 In this case the Children's Lawyer raises such a consideration. She says that the tribunal's standing should not extend to defending its decision on a ground that it did not rely on in the decision under review. The argument is that this "bootstrapping" undermines the integrity of the tribunal's decision-making process. It is akin to the impartiality concern in that a tribunal seeking to justify its decision in court on an entirely different basis than that offered in its reasons may well cause those adversely affected to feel unfairly dealt with. However, it goes beyond impartiality. The importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to support its decision. Where a tribunal takes such a course, this will become an important consideration in determining the extent of the tribunal's standing.

43 Ultimately, if the legislation does not clearly articulate the tribunal's role, the scope of standing accorded to a tribunal whose decision is under review must be a matter for the court's discretion. The court must have regard in each case, to the importance of a fully informed adjudication of the issues before it and to the importance of maintaining tribunal impartiality. The nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to knowledgeably respond to the attack on the tribunal's decision, may all be relevant in assessing the seriousness of the impartiality concern and the need for full argument.

44 The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of fully informed adjudication may well be the governing consideration.

45 In addition to fully informed adjudication and tribunal impartiality, there may be other considerations that arise in particular cases, as the appellant argues here. In the end however, the court must balance the various considerations in determining the scope of standing that best serves the interests of justice.

46 It remains to apply these considerations to this case to assess whether the Divisional Court erred in exercising its discretion to dismiss the appellant's attempt to deny or limit the standing of the Commissioner in these judicial review proceedings.

47 Several aspects of this case clearly demonstrate the importance of full tribunal participation in the judicial review to ensure a fully informed adjudication of the issues.

48 From the beginning, the requester has played no part in the proceedings. As the Divisional Court noted, it would be left with only one party, the Children's Lawyer, if the tribunal were denied standing. There would be nobody charged with defending the decision under review, a problem not solved by the appointment of the *amicus*, whose appointment was for the purpose of making the submissions it deemed appropriate. Traditionally, an *amicus* does not act on behalf of any party nor is it meant to defend the position of the tribunal.

49 As well, the specialized nature of the statutory scheme administered by the Commissioner has long been recognized by this court. See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (Ont. C.A.), at 472 -73. The issues raised in the judicial review require the court to understand two specific provisions in that scheme (s. 13 relating to the advice of a public servant and s. 19 relating to Crown litigation privilege). With full standing, the Commissioner's expert familiarity with the statute provides an important assurance of a fully informed adjudication. This is not a role that an *amicus* could be expected to fill.

50 On the other hand, both the nature of the tribunal here and the nature of the issues suggest that the impartiality consideration is not a significant brake on full standing for the Commissioner.

51 Under *FIPPA*, the Commissioner sits on the appeal from a decision of the head of a government institution about whether the legislation requires disclosure of records to the public at the behest of a requester. On appeal, the head is not defending his or her private interest, or that of the institution, but his or her decision interpreting the legislation and applying it to the circumstances. Nor is the requester seeking private access but access for the public. *FIPPA* provides that the process used by the Commissioner to decide the appeal is inquisitorial not simply adversarial. All of this shifts the nature of the tribunal somewhat away from a court-like model and mutes the impartiality concern.

52 Similarly the issues raised by this judicial review application are fundamentally ones of statutory interpretation. Although they arise in a particular factual context, they are not applicable only to the Children's Lawyer and the requester. If the Commissioner were to address the court on these issues, its ability to act impartially in future cases, even ones involving this government head and this requester, would not be adversely affected any more than its original decision on the same issues could be said to carry that consequence.

53 The final consideration in this case is the importance of preserving the integrity of the administrative tribunal's decision making. The appellant argues that this is undermined if the Commissioner is given standing to defend her decision in court on an entirely different basis than that offered in her reasons for decision. There is no doubt that this is a valid consideration. The only question is whether in this case it warrants curtailing the scope of the Commissioner's standing.

54 In my view it does not. There is no doubt that the Commissioner's original decision that the second branch of s. 19 of *FIPPA* did not provide the Children's Lawyer with a basis to refuse to disclosure rested on her conclusion that this provision offered the Children's Lawyer no protection from the individual she represents. It did not rest on an express finding that the Children's Lawyer was not "Crown counsel" in the circumstances. In the Divisional Court that is the argument the Commissioner sought to put in defence of its decision.

55 Clearly an administrative tribunal must strive to provide fully reasoned decisions. However I do not think the absence of the "Crown counsel" argument in the decision should prevent the Commissioner from advancing it to the court on judicial review. It is not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it. If the Children's Lawyer was the legal representative of the requester in the proceedings for which records are sought (the reason relied upon by the Commissioner in her original decision) it could not have been Crown counsel in those proceedings.

56 Moreover, the Children's Lawyer was required by this section of *FIPPA* to positively establish that it was Crown counsel in order to take advantage of the protection offered by the second branch of s. 19. It appears that the Children's Lawyer did not seek to do so before the Commissioner either by evidence or argument. The result was that the decision under review was simply silent on the question.

57 Finally, if the Commissioner's standing were to preclude her from making this argument there would be no guarantee that the Divisional Court would hear it from anyone else with a resulting risk to a fully informed adjudication.

58 It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis.

59 In summary, I conclude that allowing the Commissioner full standing in the judicial review proceedings assures a fully informed adjudication of the issues without significantly compromising her impartiality or undermining the integrity of her decision-making process. The Divisional Court did not err in exercising its discretion to refuse the appellant's attempt to preclude or limit the Commissioner's standing.

60 Before leaving this appeal, I would add a word about procedure. Where a party to a judicial review application seeks to limit the standing of the administrative tribunal, it should do as the appellant did here. It should serve a notice of motion saying why, so that the issue can be properly joined. Although this may require additional factums and perhaps additional material, it ought not normally require a separate preliminary hearing. Submissions on this issue can be made at the hearing on the merits of the application. If the decision on the scope of standing is reserved, the written and oral submissions of the tribunal on the

merits that go beyond the scope of standing ultimately permitted will, of course, be disregarded. With this approach, the scope of standing issue ought not to unduly complicate judicial review proceedings.

61 Finally, I think it important that if an administrative tribunal seeks to make submissions on a judicial review of its decision, it pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary.

62 I hasten to add that before us all counsel were exemplary. We are grateful for their able submissions.

63 The appeal is dismissed. No party sought costs, and none are ordered.

***McMurtry C.J.O.*:**

I agree.

***Blair J.A.*:**

I agree.

Appeal dismissed.

2019 BCCA 406
British Columbia Court of Appeal

C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)

2019 CarswellBC 3397, 2019 BCCA 406, 313 A.C.W.S. (3d) 290,
31 B.C.L.R. (6th) 1, 59 C.C.E.L. (4th) 1, 64 Admin. L.R. (6th) 163

C.S. (Appellant / Petitioner) And WCAT, WCB, C.K., L.K. and the Attorney General of British Columbia (Respondents / Respondents)

Bennett, MacKenzie, Dickson JJ.A.

Heard: March 14, 2019
Judgment: November 19, 2019
Docket: Vancouver CA45345

Proceedings: affirming *Stein v. British Columbia (Workers' Compensation Appeal Tribunal)* (2018), 2018 CarswellBC 1190, 2018 BCSC 778, A. Saunders J. (B.C. S.C.)

Counsel: C.S., Appellant, for herself
M. Bennett, for Respondent, Worker's Compensation Appeal Tribunal
B. Parkin, J. Mehat, for Respondent, Workers' Compensation Board
C.K., for himself
L.K., Respondent, for herself
K.A. Wolfe, for Respondent, Attorney General of British Columbia

Subject: Civil Practice and Procedure; Constitutional; Public; Employment; Labour; Human Rights; Occupational Health and Safety

Headnote

Constitutional law --- Procedure in constitutional challenges — Miscellaneous

Applicant cardiology technologist, suffering from bi-polar disorder and finding work stressful, reached written accommodation agreement with employer doctor that she would not be required to perform more than eight stress tests per day — Applicant also alleged that employer verbally agreed that she would not be required to perform five stress tests in row — Applicant did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits, based on claimed workplace mental health injury arising from breach of alleged further accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review, including claim under s. 15 of Canadian Charter of Rights and Freedoms, was dismissed — Applicant appealed — Appeal dismissed — Application judge made no reviewable error in finding that applicant raised constitutional challenge for first time on judicial review — Application judge's finding that applicant's references to discriminatory treatment of mental disorder injuries before Tribunal did not amount to formal constitutional challenge was available on record and unassailable on appeal — Application judge acted on correct principles and gave sufficient weight to all relevant considerations in exercising discretion not to hear constitutional challenge raised for first time on judicial review — Application judge carefully explained why highly contextual nature of weighty constitutional claim should be decided on properly developed record by Board in first instance — Applicant's claim that she could not, as self-represented litigant, be expected to bring explicit Charter challenge in Board proceedings could not be accepted given publicly available information about such procedures.

Labour and employment law --- Workers' compensation legislation — Judicial review — Miscellaneous

Applicant cardiology technologist, suffering from bi-polar disorder and finding work stressful, reached written accommodation agreement with employer doctor that she would not be required to perform more than eight stress tests per day — Applicant

also alleged that employer verbally agreed that she would not be required to perform five stress tests in row — Applicant did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits based on claimed workplace mental health injury, arising from breach of alleged further accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review, including claim under s. 15 of Canadian Charter of Rights and Freedoms, was dismissed — Applicant appealed — Appeal dismissed — Application judge made no reviewable error in finding that, before Tribunal, applicant did not argue that employer repeatedly and intentionally breached accommodation agreement and so he did not err in exercising discretion not to engage with this new issue — As applicant was now attempting to raise, for first time, applicability of Human Rights Code, it was inappropriate to consider issue — Application judge identified correct standard of review and applied it correctly to Tribunal decision, in which factual findings were amply supported by evidence and entitled to deference — Tribunal found that alleged agreement did not exist and so was not breached, that doctor's wife spoke to applicant encouragingly rather than abusively on last day, and that co-worker did not behave in intimidating, humiliating or degrading way — Accepting such factual underpinnings, Tribunal's conclusions were not patently unreasonable — Applicant did not demonstrate any breach of procedural fairness.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Applicant cardiology technologist, suffering from bi-polar disorder, was accommodated by employer doctor but did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits based on claimed workplace mental health injury, arising from breach of alleged accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review was dismissed — Applicant appealed — Appeal dismissed — Given negative impact of personal identification for applicant, doctor, and his wife, and minimal impairment of open process of judicial proceedings by replacing names with initials, salutary effects of initialization order outweighed its deleterious effects — Sealing order sought by applicant would be granted only over her medical orders, as they related to her mental health and their publication posed serious risk to important public interest in confidentiality of such records — Such limited sealing order would not unduly limit public interest in open and accessible court proceedings.

Administrative law --- Practice and procedure — Judicial review — Evidence

Applicant cardiology technologist, suffering from bi-polar disorder, was accommodated by employer doctor with written agreement limiting number of stress tests she would be required to perform in day to eight with alleged verbal agreement for even fewer — Applicant did not return to work after day in which she performed five stress tests in morning and another in afternoon — Applicant's application to Workers' Compensation Board for benefits based on claimed workplace mental health injury, arising from breach of alleged further accommodation agreement and bullying by doctor's office manager wife and by co-worker, was denied — Applicant's appeals, ultimately to Workers' Compensation Appeal Tribunal, were dismissed — Applicant's application for judicial review, challenging factual findings and raising claim under s. 15 of Canadian Charter of Rights and Freedoms, was dismissed — Applicant appealed — Appeal dismissed — Applicant applied to adduce fresh evidence, consisting of various contemporaneous emails between her and her mother alluding to doctor's failure to abide by accommodation agreement and calendars reflecting her workload at time — Proposed fresh evidence did not satisfy requirements for admission as, even if it could be considered credible and relevant, it was previously available and was not adduced before Tribunal or application judge — Applicant's other material inserted in appeal book that was not before judge would also not be admitted as fresh evidence.

APPEAL by applicant from judgment reported at *Stein v. British Columbia (Workers' Compensation Appeal Tribunal)* (2018), 2018 BCSC 778, 2018 CarswellBC 1190 (B.C. S.C.), dismissing her application for judicial review from denial of workers' compensation benefits arising from alleged workplace mental health injury.

***Dickson J.A.*:**

1 The self-represented appellant, C.S., appeals from an order dismissing her petition for judicial review. The underlying proceedings concerned her claim for statutory benefits under s. 5.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 [*Act*], which provides for compensation for a mental disorder where certain conditions are met. C.S.'s claim was based on

allegations that she was bullied and harassed at work and had a mental breakdown precipitated by her employer's breach of an accommodation agreement. The Workers' Compensation Board ("WCB") denied the claim and the WCB Review Division ("WCBRD") and Workers' Compensation Appeal Tribunal ("WCAT") dismissed C.S.'s appeals, with the latter finding that the claim did not meet the requirements of the *Act* or Policy item C3-13.00.

2 C.S. brought a petition for judicial review of the WCAT decision, together with an application for a declaration that s. 5.1 of the *Act* and Policy item C3-13.00 contravened her s. 15 equality rights under the *Charter*. Justice Saunders refused to hear the *Charter* challenge because, he found, C.S. raised it for the first time in the judicial review rather than in the administrative proceedings, as intended by the Legislature. He went on to dismiss the petition on the basis that the WCAT decision was not patently unreasonable or procedurally unfair.

3 On appeal, C.S. contends that the judge should have heard her *Charter* challenge and that he erred in dismissing her petition. Among other things, she asks this Court to determine the *Charter* challenge and find that she suffered a compensable mental health injury within the meaning of the *Act*. For the reasons that follow, I would dismiss the appeal.

Background

4 C.S. is a cardiology technologist. The respondent, Dr. C.K., is a retired cardiologist. His wife, the respondent L.K., was the office manager of Dr. C.K.'s private practice.

5 In January 2012, C.S. began working part-time as a cardiology technologist in Dr. C.K.'s office. Her duties included performing stress tests and electrocardiograms on patients. A stress test is a cardiologic test that measures the heart's ability to respond to external stress in a controlled, clinical environment.

6 C.S. suffers from bi-polar disorder. She found her job stressful and obtained an accommodation from her employer, confirmed in writing, that she would not be required to perform more than eight stress tests per day (the "Accommodation Agreement"). Throughout the various proceedings C.S. maintained that her employer also agreed verbally that she would not be required to perform five stress tests in a row (the "No-Five-in-a-Row Alleged Agreement"), but Dr. C.K. and L.K. denied granting any such accommodation. From C.S.'s perspective, the existence of the No-Five-in-a-Row Alleged Agreement remains a point of contention which has never been satisfactorily resolved.

7 On March 13, 2013, C.S. was scheduled to perform five stress tests in the morning and required to report the results of the tests to the patients. She asked that one of the morning appointments be rescheduled to the afternoon, but L.K. did not agree to the request. C.S. performed the five morning stress tests and another in the afternoon, but when she went home she had what she described as a breakdown. Thereafter, she stopped working at Dr. C.K.'s office.

8 On March 18, 2013, C.S. applied to the WCB for statutory benefits based on a mental disorder under s. 5.1 of the *Act*. In her application, C.S. claimed that she developed a workplace mental health injury on March 13, 2013 as a result of the stress of having to conduct the five stress tests in breach of the No-Five-in-a-Row Alleged Agreement and having to report the results to patients, as well as the cumulative stress of bullying by L.K. and a co-worker, D.

Statutory Scheme

9 The *Act* provides for a comprehensive no-fault insurance scheme under which the WCB pays compensation for personal injury or death arising out of and in the course of a worker's employment. The WCB is an expert administrative body which is responsible for adjudicating and administering benefits to workers and their surviving dependents. The *Act* defines eligibility for compensation and its interpretation is aided by policies set by the board of directors and published in the *Rehabilitation Services and Claims Manual I and II*. Section 96(1) of the *Act* grants to the WCB "exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law" arising under Part 1 of the *Act*. Section 99(2) provides that the WCB must make its decision based upon the merits and justice of a case, but that, in doing so, it must apply a policy that is applicable to that case.

Internal Appeal Process

10 The statutory scheme includes an internal appeal process in relation to claims for compensation. The first level of appeal is to the WCBRD under sections 96.2 to 96.5 of the *Act*. As Justice Harris explained in *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 (B.C. C.A.); leave to appeal ref'd [2018] S.C.C.A. No. 12 (S.C.C.), the WCBRD has jurisdiction to decide *Charter* issues and it will not apply a legislative provision or policy that it finds to be in breach of the *Charter*. He also noted that the WCBRD's procedures for addressing issues under the *Charter* and the *Human Rights Code*, R.S.B.C. 1996, c. 120 [*HRC*] are posted on the WorkSafeBC website.

11 WCAT is a separate and independent administrative body established by s. 232 of the *Act*. As the final level of appeal within the statutory scheme, WCAT adjudicates appeals from many of the decisions made by the WCBRD. However, WCAT has a limited jurisdiction and, unlike the WCBRD, it is precluded by ss. 45 and 46.3 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] from considering questions relating to the *Charter* or the *HRC*. As Justice Harris observed in *Denton*, this results in a cumbersome process by which *Charter* challenges can be brought before the WCBRD and then judicially reviewed, with the petition for judicial review being heard, if necessary, in conjunction with a separate judicial review of a WCAT decision.

12 Pursuant to s. 250(1) of the *Act*, WCAT may consider all questions of fact and law that arise in an appeal, but it is not bound by legal precedent. Pursuant to s. 251(1), WCAT may refuse to apply a policy if it is so patently unreasonable that it cannot be supported by the *Act* and its regulations, in which case a process of suspension and referral is to be applied.

Compensation for Mental Disorder

13 Section 5.1 of the *Act* sets out the conditions that must be met for a mental disorder to be compensated. Pursuant to ss. 5.1(1)(a)(i) and (ii), a worker is entitled to compensation for a mental disorder arising out of and in the course of their employment where the mental disorder is either a reaction to a traumatic event or predominantly caused by a significant workplace stressor. Pursuant to s. 5.1(1)(b), the mental disorder must be diagnosed by a psychologist or psychiatrist as a mental or physical condition described in the most recent version of the Diagnostic and Statistical Manual of Mental Disorders. Pursuant to s. 5.1(1)(c), a mental disorder arising out of and in the course of employment is not compensable if it is caused by a decision of the employer relating to the worker's employment. Section 5.1(1)(c) is commonly referred to as the "Labour Relations Exclusion".

14 Section 5.1(1) of the *Act* provides:

> 5.1 (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
>
> (a) either
>
> (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
>
> (ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,
>
> (b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

15 Policy item C3-13.00 includes five points for adjudicators to consider in determining whether a worker's mental health disorder is compensable under s. 5.1 of the *Act*:

> i. Does the worker have a diagnosed mental disorder?
>
> ii. Was there an identifiable event(s) or work-related stressor(s)?
>
> iii. Was the event(s) "traumatic" or work-related stressor(s) "significant"?
>
> iv. Was the mental disorder caused by the event(s) or work-related stressor(s) in that it was a reaction to a traumatic event(s) arising out of and in the course of the employment or predominantly caused by a significant work-related stressor(s) arising out of and in the course of the worker's employment?
>
> v. Was the mental disorder caused by a decision of the employer relating to the worker's employment?

16 Policy item C3-13.00 also deals with the meaning of "traumatic", "significant" and "predominant cause":

> ... a "traumatic" event is an emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment...
>
> A work-related stressor is considered "significant" when it is excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment.
>
> Interpersonal conflicts between the worker and his or her supervisors, coworkers or customers are not generally considered significant unless the conflict results in behaviour that is considered threatening or abusive.
>
> . . .
>
> Predominant cause means that the significant work-related stressor, or cumulative series of significant work-related stressors, was the primary or main cause of the mental disorder.

Procedural History

WCB Decision

17 By decision letter dated April 26, 2013, a WCB case manager denied C.S.'s claim for statutory benefits. He accepted she was distressed that her employer decided not to adjust her work schedule on March 13, 2013, but found there was no violation of the Accommodation Agreement and the decision fell within the Labour Relations Exclusion under s. 5.1(1)(c) of the *Act*. He also found that the workplace conflict in question was not a "traumatic event" or a "significant workplace stressor" under Policy item C3-13.00. In particular, he stated, he could not conclude that the interpersonal conflict of which C.S. complained resulted in behaviour that was threatening or abusive.

WCBRD Decision

18 C.S. appealed the WCB decision to the WCBRD. She requested an oral hearing, but the WCBRD refused her request and conducted the review based on written submissions. Among other things, C.S. submitted that the employer failed to follow the No-Five-In-A-Row Alleged Agreement and she asked that the claim be adjudicated under Policy item C3-16.00, not Policy item C3-13.00, contending that the WCB decision was based on the wrong policy. Policy item C3-16.00 refers generally to personal injury claims and provides that pre-existing conditions may be compensable if aggravated by an employment-related incident or trauma.

19 On November 15, 2013 C.S. wrote a letter to the WCBRD. In the letter, among other things she stated:

> ... no distinction between physical and mental is made (both equal treatment-non constitutional otherwise).

20 On January 28, 2014, the WCBRD upheld the WCB decision. The review officer held that claims for mental disorders are to be adjudicated under Policy item C3-13.00 whether or not there is a pre-existing mental disorder, that C.S.'s claims were covered by the Labour Relations Exclusion and that the evidence failed to establish C.S. was exposed to a traumatic event, a significant work-related stressor or a cumulative series of such stressors. He also held that C.S.'s pre-existing condition did not fall within other categories of compensable claims.

WCAT Decision

21 Next, C.S. appealed the WCBRD decision to WCAT. On July 25, 2014, she and several others testified at an oral hearing conducted in the WCAT proceeding. C.S. argued that mental disorders should be treated "just as physical injury" and that "[i]t is wrong how the laws stand rights now and quite discriminatory towards mental disorders and the seriousness of them". She also asserted that she could prove the employer was misleading about the "real" No-Five-In-A-Row Alleged Agreement and failed to address the ongoing conflict with D appropriately.

22 On September 22, 2014, Vice Chair Murray dismissed C.S.'s appeal and confirmed the WCBRD decision. In summary, she concluded that C.S. suffered an aggravation of her pre-existing mental disorder and that the incidents of interpersonal conflict in question fell into three categories of work-related stressors: stressors associated with the events of March 13, 2013, stressors related to C.S.'s belief that the employer failed to handle D's behaviour appropriately and stressors arising from the conflict with D.

23 With respect to the events of March 13, 2013, the Vice Chair accepted Dr. C.K. and L.K.'s evidence that the No-Five-In-A-Row Alleged Agreement did not exist and L.K.'s evidence that she intended to be encouraging when she said "you can do it" to C.S. in denying her request to reschedule one of the morning stress test appointments. She reasoned that the March 13, 2013 scheduling decision fell within the Labour Relations Exclusion and held that L.K.'s conduct did not amount to employer misconduct which removed the events from its scope. She held further that any stressors associated with C.S.'s belief that the employer failed to handle D's behaviour appropriately would also fall within the Labour Relations Exclusion.

24 As to stressors arising from the conflict with D, the Vice Chair noted that interpersonal conflict is considered a "significant" stressor only when there is an element of abuse or threat involved in the impugned behaviour. She reviewed the evidence and concluded that D's behaviour, while rude and thoughtless, did not constitute a "series of significant workplace stressors":

> [136] While the worker interpreted Ms. D's comments and behaviour as bullying and harassment, I am unable to reach the same conclusion. Before August 24, 2012, I have no hesitation in characterizing Ms. D's behaviour as likely "bossy" and overbearing at time, and she was sarcastic and/or thoughtless in some of her comments. Nonetheless, even if Ms. D's conduct can be labeled as "bossy", being "bossy" is not, in my view, equivalent to her being a bully. She clearly was trying to get a message across that she had little time for the worker and she thought the worker was wasting her and the employer's time. However, I do not find that her comments, tone and gestures were of an abusive or threatening nature, as those terms were earlier defined, and they were not deliberately intended to or reasonably ought to be known would intimidate, humiliate or degrade the worker.

25 After the WCAT decision was issued, C.S. filed two applications for reconsideration. The first was put on hold when she failed to respond to correspondence from WCAT. The second was put on hold pending resolution of her petition for judicial review.

Judicial Review - [Stein v. British Columbia (Workers' Compensation Appeal Tribunal)] 2018 BCSC 778 (B.C. S.C.)

26 In the Court below, C.S. sought a declaration that s. 5.1 of the *Act* and Policy item C3-13.00 contravened her s. 15 *Charter* rights by subjecting those who suffer from work-related mental disorders to a more stringent test for compensation than the test applied to those who suffer from physical injuries. In support of her *Charter* challenge, C.S. quoted extensively from

Plesner v. British Columbia Hydro & Power Authority, 2009 BCCA 188 (B.C. C.A.), in which a majority of this Court held that the predecessor to s. 5.1 of the *Act* read together with then Policy item 13.30 contravened s. 15 of the *Charter*. She also contended that the WCAT decision was patently unreasonable and procedurally unfair and sought various remedies, including an order setting the decision aside, a change to WCB legislation and a finding that L.K. was not wholly truthful in her testimony before WCAT.

27 After summarizing the history of the case, the statutory framework and the applicable standard of review, the judge identified the s. 15 *Charter* challenge as the primary issue from C.S.'s perspective. He acknowledged that C.S. referred to allegedly discriminatory treatment of mental disorder injuries in her November 15, 2013 letter and in her submissions before the WCBRD and WCAT, but found she was raising the constitutionality of s. 5.1 of the *Act* and Policy item C3-13.00 for the first time on judicial review:

> [47] The constitutionality of these provisions was introduced into these proceedings for the first time on this Petition. [C.S.] had previously referred to discriminatory and unequal treatment of mental disorder injuries, as compared to physical injuries, and to the relative ease with which physical injury claims are adjudicated, in written materials and submissions before the Review Division and WCAT and in her testimony at the WCAT hearing; but there was no explicit challenge brought under the *Charter*, at any level. For that reason, the issue of constitutionality was not addressed by either the Review Division, or WCAT.
>
> [48] As I have noted, [C.S.]'s November 15, 2013 letter to the Review Division did make specific reference to the fact the Board's Policy item #C3-16.00 made "no distinction between physical and mental ... non constitutional otherwise". But this comment was presented as justification for her argument that her claim ought to be considered under #C3-16.00 instead of Policy 13.00, not as a *Charter* challenge to the latter policy or to s. 5.1 of the *Act*.

28 The judge noted that courts have a discretion to consider new matters raised for the first time on judicial review. He also noted that the Attorney General provided some evidence relating to the legislative history of the *Act*. However, he stated that he had "no assurance that the record before me is complete" and that, as a general rule, the discretion to consider new issues on judicial review should not be exercised, particularly in connection with alleged *Charter* breaches in WCB compensation claims.

29 The judge went on to distinguish this case from *Plesner* and declined to exercise his discretion to engage with C.S.'s *Charter* challenge. In explaining his decision, he cited the broad scope of the private clause under s. 96 of the *Act* and the absence of a clear evidentiary record or the WCB's views in respect of the *Charter* issues. He also cited this Court's analysis in *Denton* and the tangential relationship of C.S.'s *Charter* concerns to the Vice Chair's reasoning in the WCAT decision.

30 After declining to deal with the *Charter* challenge, the judge turned to whether the WCAT decision was patently unreasonable. He concluded that it was not. In doing so, he found that C.S. did not advance her claim before the WCB or WCAT on the basis of cumulative breaches of the Accommodation Agreement, that consideration of the Accommodation Agreement would not have changed the result of the WCAT decision in any event and that WCAT's factual findings were supported by the evidence:

> [64] First, [C.S.] submits that WCAT failed to consider the cumulative effect of the employer's breaches of her "no more than eight stress tests a day" accommodation. That is an entirely new issue; it is simply not how [C.S.]'s compensation claim was advanced before the Review Division or WCAT. Furthermore, given the Vice Chair's application of the Labour Relations Exclusion in the WCAT Decision, and given her findings as to the employer's credibility, it seem plainly apparent that any explicit consideration of that accommodation could have made no difference to the result.
>
> [65] Second, [C.S.] attacks a number of the WCAT Decision's findings of fact, including in particular: the credibility findings, the issue of whether there had been a "no five in a row" accommodation agreed to, the issue of whether the co-worker had knowledge of [C.S.]'s bipolar disorder, and the characterizations of the employer's and the co-worker's conduct. These findings were all supported by evidence, and accordingly must be given deference.

31 The judge also found that many of C.S.'s other arguments were merely attempts to reargue her case and that her submission that the WCAT decision was based on no medical or psychiatric opinion evidence was simply wrong (paras. 66-68). He found further that there was no procedural unfairness. In making this finding, he rejected C.S.'s complaint that the WCB did not interview her, noted the existence of the typed summary and commented that C.S. testified orally at the WCAT hearing (para. 69). He went on to comment that C.S.'s plea for changes to the WCB legislation was a matter for the Legislature, not a matter for the courts (para. 70).

32 Based on all of the foregoing, the judge dismissed C.S.'s petition for judicial review.

On Appeal

33 On appeal, C.S. advances many arguments regarding errors that she contends the WCB, WCAT and the judge committed. Her arguments reduce to the following issues:

a) What is the extent of WCAT's standing on the appeal?

b) Did the judge err in refusing to consider C.S.'s s. 15 *Charter* challenge regarding the validity of s. 5.1 of the Act and Policy item C3-13.00? If so, how did he err and should this Court consider the *Charter* challenge on appeal?

c) Did the judge err in refusing to consider C.S.'s arguments regarding the cumulative effect of breaches of the Accommodation Agreement and in concluding that consideration of the issue would have made no difference to the result of the WCAT decision?

d) Did the judge err in failing to recognize that the WCB and WCAT overlooked and failed to apply the *HRC*?

e) Did the judge err in finding the WCAT decision was not patently unreasonable because WCAT failed to recognize that C.S.'s injury arose from a "cumulative series of significant work-related stressors" and erroneously held that breaches of the Accommodation Agreement did not warrant compensation by virtue of the Labour Relations Exclusion?

f) Did the judge err in finding that the WCAT decision was not procedurally unfair because C.S. was not granted an oral interview by the WCB?

Preliminary Applications

Applications for Initialization and Sealing Orders

34 Shortly before the hearing of the appeal, C.S. filed a motion seeking an initialization order and a sealing order, together with affidavit materials. She submits that an initialization order is necessary to protect her health and relies on two letters from medical practitioners in support of the application. She also submits the same considerations justify a sealing order over the entire court file. In supplementary submissions, she describes anonymity as "imperative" and relies on additional medical information in support.

35 Dr. C.K. and L.K. also sought an initialization order. They submit that such an order is warranted because it would prevent further unwanted and unfair publicity. In response to C.S.'s supplementary submissions, they oppose her request for anonymity and draw our attention to two recent related decisions on the point in the court below.

36 Initialization orders provide anonymity by preventing litigants and others from being personally identified in reasons for judgment. Sealing orders prohibit access to all or part of the court record or other information. The framework developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), *R. v. Mentuck*, 2001 SCC 76 (S.C.C.) and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), guides applications for non-statutory confidentiality orders, such as initialization orders and sealing orders. In *Sahlin v. Nature Trust of British Columbia Inc.*, 2010 BCCA 516 (B.C. C.A. [In Chambers]), Justice Tysoe summarized the applicable framework:

[6] The Supreme Court of Canada dealt with an application for a confidentiality order in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522. Mr. Justice Iacobucci expressed the test for a confidentiality order as follows at para. 53

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

It is to be noted the *Sierra Club* case did involve a public institution.

[7] In *Blue Line Hockey Acquisition Co v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 1483 (CanLII), 78 B.C.L.R. (4th) 100, Madam Justice Wedge considered an application by the media for access to an exhibit in litigation between private parties in relation to private interests. She noted that the balancing of competing interests is somewhat different in such litigation as a result of reasonable expectations of privacy. Madam Justice Wedge discussed how the balancing of those interests should be determined in terms of the opening words of the reasons in *Toronto Star*:

> [49] I return then to the words of Fish J. in *Toronto Star*. Will a balancing of the competing interests in this case create a "cloud of secrecy" under which justice will wither? The answer must be "no".

I agree with the way in which Madam Justice Wedge has framed the issue.

37 Bearing in mind the foregoing, in my view this is an appropriate case for an initialization order in respect of C.S., Dr. C.K. and L.K. Replacing names with initials in reasons for judgment minimally impairs the openness of judicial proceedings because such an order relates only to a "sliver" of information: *G. (B.) v. British Columbia*, 2004 BCCA 345 (B.C. C.A.) at para. 26. Given the negative impact of personal identification for all three individuals and the minimal nature of the impairment, as well as the fact that C.S. has not been declared a vexatious litigant in this Court, the salutary effects of an initialization order outweigh its deleterious effects.

38 However, I would not grant a sealing order over the entire court file. In my view, a limited sealing order over C.S.'s medical records alone would accord with the governing principles and the usual practice of this Court: *N.E.T. v. British Columbia*, 2018 BCCA 22 (B.C. C.A.) at para. 44 (Fitch J.A. in Chambers); *Sierra Club* at para. 53. The medical records relate to C.S.'s mental health, their publication poses a serious risk to an important public interest in the confidentiality of such records and there are no reasonable alternative measures available: see *Osif v. College of Physicians & Surgeons (Nova Scotia)*, 2008 NSCA 113 (N.S. C.A.) at para. 22. A limited sealing order would restrict access to C.S.'s sensitive medical records, but without unduly limiting the public interest in open and accessible court proceedings.

Application to Adduce Fresh Evidence

39 C.S. also applied to adduce fresh evidence on appeal. The proposed fresh evidence consists of various emails exchanged by C.S. and her mother between September 2012 and March 2013 and exhibited to C.S.'s affidavits. In the emails, C.S. refers to the failure of Dr. C.K. and L.K. to abide by the Accommodation Agreement. Also exhibited to an affidavit are calendars that C.S. deposes reflect her workload for the months of September 2012 and March 2013. In her submission, this fresh evidence proves that the breaches of the Accommodation Agreement she alleges actually occurred.

40 In *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), Justice McIntyre set out the criteria to be considered on an application to adduce fresh evidence on appeal (at 775):

> a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: [citation omitted].
>
> b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> c) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> d) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

41 I would not grant C.S.'s application. The proposed fresh evidence does not satisfy the requirements of the *Palmer* test. Even if it could be considered credible and relevant, it was previously available, it was not part of the record before WCAT and the judge did not consider it. This Court's role is not to conduct a hearing *de novo* on appeal based on evidence that was not before the tribunal or the reviewing judge: *Albu v. University of British Columbia*, 2015 BCCA 41 (B.C. C.A.) at para. 36. Further, the judge found C.S.'s submissions regarding the Accommodation Agreement raised a new issue on judicial review which would, in any event, have made no difference to the result of the WCAT decision:

> [64] First, [C.S.] submits that WCAT failed to consider the cumulative effect of the employer's breaches of her "no more than eight stress tests a day" accommodation. That is an entirely new issue; it is simply not how [C.S.'s] compensation claim was advanced before the Review Division or WCAT. Furthermore, given the Vice Chair's application of the Labour Relations Exclusion in the WCAT Decision, and given her findings as to the employer's credibility, it seems plainly apparent that any explicit consideration of that accommodation could have made no difference to the result.

42 C.S. also inserted material in her Appeal Book that was not before the judge, such as letters which are not fully produced in the record, handwritten notes on several documents and an email between the parties. To the extent that she seeks to have this material admitted as fresh evidence on appeal, I would not admit it for the same reasons I would not admit the fresh evidence C.S. submitted in affidavit form.

Analysis

Standard of Review

43 This Court's role on appeal is to determine whether the judge identified the correct standard of review and applied it correctly to the WCAT decision. These are questions of law concerning which no appellate deference is owed. In addressing them, this Court is in the same position as the reviewing judge: *Decision No. WCAT-2004-04388-AD*, *(*sub nom. *Vandale v. Workers' Compensation Appeal Tribunal (B.C.))* 2013 BCCA 391 (B.C. C.A.) [hereinafter *Vandale*] at para. 43; *Northern Thunderbird Air Inc. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 60 (B.C. C.A.) at para. 14.

44 However, the correctness standard does not apply where a reviewing judge makes findings of fact or undertakes an original exercise of discretion: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 (B.C. C.A.) at para. 79; *Chen v. Surrey (City)*, 2015 BCCA 57 (B.C. C.A.) at para. 16. The judge's findings that C.S. did not raise her *Charter* challenge or her arguments regarding breaches of the Accommodation Agreement before the WCB were factual and this Court will not interfere with them unless he made a palpable (obvious) and overriding (material) error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para. 10. In addition, the judge's decisions not to hear the *Charter* challenge or the Accommodation Agreement arguments were exercises of judicial discretion. Accordingly, this Court will not interfere with them unless he acted on a wrong principle or failed to give sufficient weight to all relevant considerations: *Lafontaine v. University of British Columbia*, 2018 BCCA 307 (B.C. C.A.) at para. 45.

45 As to the underlying WCAT decision, the applicable standard of review is patent unreasonableness: s. 58(2)(a), *ATA*; *Vandale* at para. 43; s. 245.1, *Act*. This is a highly deferential standard which is met when an administrative decision "is so flawed that no amount of curial deference can justify letting it stand": *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 (S.C.C.) at para. 52. The question for determination regarding the rules of natural justice and procedural fairness, is whether, in

the circumstances, WCAT acted fairly: s. 58(2)(b), *ATA*. Accordingly, this Court will not set aside the WCAT decision unless it is patently unreasonable or procedurally unfair.

What is the extent of WCAT's standing on the appeal?

46 Dr. C.K. and L.K. appeared at the hearing of the appeal, but limited their participation to seeking an initialization order. They were not represented by counsel, they did not file a factum and they did not present any argument on the merits of the appeal, including the merits of the WCAT decision. However, WCAT filed a factum addressing whether the judge erred in refusing to hear C.S.'s new arguments on judicial review (as distinct from her *Charter* challenge) or in finding that the WCAT decision was not patently unreasonable or procedurally unfair, as well as the standard of review that applies to the WCAT decision. Counsel for WCAT also made oral submissions on these issues at the hearing of the appeal.

47 WCAT may be a party to a judicial review proceeding, although the common law circumscribes the extent of its participation. Whether a tribunal has standing to defend the merits of its own decision is a matter for the discretion of the reviewing court. In exercising this discretion, the court must strike a balance between the two fundamental values which are implicated, namely, the need to maintain tribunal impartiality, on the one hand, and the need to facilitate fully informed adjudication on review, on the other: *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 15; *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 (B.C. C.A.), paras. 38-54.

48 Where there is no other respondent able and willing to defend the merits of an administrative decision, the need to facilitate fully informed adjudication is the more important of the two competing values. In such circumstances, as a general rule, it is appropriate to permit a tribunal to argue the merits of its own decision: *18320* at paras. 51-53. That is the situation on this appeal with respect to the WCAT decision. For this reason, I would grant WCAT standing to argue the merits of its decision on the issues addressed in its factum and in the oral submissions of its counsel.

Did the judge err in refusing to consider C.S.'s s. 15 Charter challenge regarding the validity of s. 5.1 of the Act and Policy item C3-13.00? If so, how did he err and should this Court consider the Charter challenge on appeal?

49 In oral submissions, C.S. focused primarily on her contention that the judge erred in refusing to consider her s. 15 *Charter* challenge. She submits this Court should do so on appeal because neither the WCB nor WCAT made it clearly known that she could bring a *Charter* challenge in the administrative proceedings. According to C.S. her case is unlike *Denton*, in which this Court upheld a judge's refusal to consider a *Charter* challenge for the first time on judicial review, because she was entirely self-represented whereas Ms. Denton was assisted by an experienced union labour relations officer. In addition, she says, unlike Ms. Denton she did not miss filing deadlines and she repeatedly referred to the constitutional issue throughout.

50 C.S. concedes that she did not bring a formal *Charter* challenge in the administrative proceedings. However, she argues, she drew the constitutional issue to the attention of the WCB and WCAT at least 17 times and it would be unreasonable to expect a self-represented party to do more to raise a *Charter* issue. In other words, C.S. challenges the judge's finding that she introduced the issue of the constitutionality of s. 5.1 of the *Act* and Policy item C3-13.00 for the first time on judicial review. She also suggests that the WCB wilfully keeps applicants in the dark regarding the need to bring a formal *Charter* challenge in that forum.

51 According to C.S., the judge decided not to hear her *Charter* argument on judicial review simply because "he did not want to tackle it". As a result, she contends, he disregarded *Plesner*, which confirmed that a *Charter* challenge such as hers can be determined by the Court even if it was not previously raised before the WCB. She contends further that, through no fault of hers, the judge made his decision in an "evidentiary vacuum" because the WCB failed to provide the "necessary record". Given that alleged failure, she asks this Court to order the WCB to produce the "necessary record" now.

52 C.S. goes on to submit that, as it did in *Plesner*, this Court should determine her *Charter* challenge despite the fact that it was not addressed by the WCBRD or the reviewing judge. In support of this submission, she emphasizes the importance of s. 15 *Charter* rights to individuals who struggle with mental disorders and seek equal treatment from the WCB relative to

those who suffer from physical injuries. She also emphasizes the important role this Court plays in guiding the legislature on constitutional matters, as illustrated, she says, by amendments made to the *Act* after *Plesner* was handed down.

53 As to the merits of her *Charter* challenge, C.S. repeats her submissions in the court below, namely, that the burden of proof imposed on those who suffer from mental health injuries is higher than that imposed on those who suffer from physical injuries, which she characterizes as starkly discriminatory. In particular, she submits, the requirement in s. 5.1(1)(a)(ii) of the *Act* that a "significant" work-related stressor be a "predominant" cause of the injury, combined with Policy item C3-13.00, subjects those who suffer from work-related mental health disorders to a more stringent standard for compensation, which renders their benefit from the statutory scheme less valuable.

54 I do not accept these submissions.

55 I see no palpable and overriding error in the judge's finding that C.S. introduced the constitutionality of s. 5.1 of the *Act* and Policy item C3-13.00 for the first time in the judicial review proceedings. He recognised that she referred to discriminatory treatment of mental disorder injuries before the WCBRD and WCAT, but concluded that she did not bring an explicit *Charter* challenge and that her statements in the November 15, 2013 letter related to her argument regarding Policy item C3-16.00, not to challenging the constitutionality of s. 5.1 and Policy item C3-13.00. In reaching this conclusion, the judge noted that C.S. did not appeal the WCBRD decision to WCAT on the basis that the WCBRD failed to address the constitutional issue and reasoned she would have done so had she actually intended to raise the issue in the administrative proceedings. In my view, his finding that C.S. raised the constitutional issue for the first time on judicial review was available on the record and it is unassailable on appeal.

56 Given his finding that C.S. raised the constitutional issue for the first time on judicial review, the judge acted on correct principles and gave sufficient weight to all relevant considerations in exercising his discretion not to hear her s. 15 *Charter* challenge. It is well established that issues should generally be thrashed out at first instance to ensure that all relevant evidence is part of the record, that the expertise of the tribunal is brought to bear on the issues and that the legislative choice of the tribunal as the first instance decision-maker is respected: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 (B.C. C.A.) at para. 48; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paras. 22-25. As the judge appreciated, these considerations are particularly weighty where, as here, the issue raised for the first time on judicial review is constitutional in nature: *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 (F.C.A.) at para. 46.

57 In *Denton*, WCAT denied compensation for Ms. Denton's claim of work-related mental disorder. Her petition for judicial review was dismissed in part because, like C.S., she sought to challenge the constitutional validity of s. 5.1 of the *Act* and Policy item C3-13.00 pursuant to s. 15 of the *Charter* for the first time on judicial review. On appeal, this Court upheld the reviewing judge's decision not to hear the constitutional challenge, emphasizing the deference owed to exercises of judicial discretion, the WCBRD's expertise in factual and policy matters relevant to a *Charter* analysis and the importance of respecting the intention of the Legislature:

> [48] ... It is, in my view, indisputable that the grant of jurisdiction by the Legislature to the Review Division to decide constitutional issues evidences a legislative intent to have such issues decided in the first instance by the specialized tribunal charged with administering the scheme and expert in its purposes, application and the context in which it operates. Courts should be reluctant to ignore this intent, especially where the legislative and administrative scheme provide reasonable access to individuals to have their claims adjudicated.
>
> [49] This approach coheres with the preferred approach to a court's review of constitutional claims calling for a complete factual context and a developed record. The point here is both that such claims should be considered in the context of a developed record, and that the views of the administrative tribunal on those matters in respect of which it is expert are invaluable to a reviewing court.

58 Nor do I accept C.S.'s submission that the judge simply avoided tackling her *Charter* challenge. He carefully explained why he considered it inappropriate to deal with the constitutional validity of s. 5.1 and Policy item C3-13.00 for the first time on judicial review. For example, the judge considered the legislative intention that the WCB should determine *Charter* issues in the first instance, the highly contextual nature of *Charter* claims and the importance of deciding such claims based on a properly developed record. As is clear from *Denton*, he did not err taking these factors into account.

59 Moreover, the judge did not disregard *Plesner*. On the contrary, he expressly recognized that this Court decided a constitutional issue in *Plesner* which was not addressed first by the WCB and that the issue was similar, though not identical, to the constitutional issue C.S. sought to raise in this case. However, he also discerned significant differences between *Plesner* and this case. As a result, he distinguished *Plesner* and reached a different decision on whether to entertain the constitutional issue in question in the first instance.

60 In *Plesner*, a majority of this Court decided that an earlier version of s. 5.1 of the *Act*, read together with aspects of then Policy item 13.30, was discriminatory based on mental disability because the threshold for compensation for those suffering from work-related mental stress injuries was significantly higher than the threshold for those suffering from work-related physical injuries. In particular, when *Plesner* was decided workers with mental stress claims were required to show that they suffered a work injury that was caused by a "traumatic event", which Policy item 13.30 provided was akin to a "horrifying" event, but workers who suffered from physical injuries were required only to show that they suffered a work injury. In addition to finding that this gave rise to substantive discrimination, the majority concluded the offending aspects of Policy item 13.30 were not saved by s. 1 of the *Charter*. After *Plesner* was released, the Legislature amended s. 5.1 of the *Act* in an effort to address the Court's concerns.

61 In *Plesner*, the *Charter* challenge was the only live issue between the parties. The judge inferred that this Court exercised its discretion to hear that challenge even though it was not addressed below because the discriminatory effect of the existing legislation was readily apparent. However, he concluded that a *Charter* analysis of the legislation in its current form would require a more nuanced approach and thus a more well-developed evidentiary record. In my view, this conclusion was wellfounded, particularly given subsequent developments in the jurisprudence regarding s. 15 of the *Charter*: see, for example, *Withler v. Canada (Attorney General)*, 2011 SCC 12 (S.C.C.) and *Droit de la famille - 091768*, 2013 SCC 5 (S.C.C.).

62 As to C.S.'s application for an order directing the WCB to produce the "necessary record", its basis is unclear to me. WCAT provided the Court below with the certified record in the usual way. As discussed, C.S. did not bring a *Charter* challenge in the WCB proceedings and, therefore, no record with respect to the *Charter* issue was created in that forum. Accordingly, there is no "necessary record" in existence for the WCB to produce. To the extent she suggests that the WCB had an independent duty to produce evidence relevant to her *Charter* challenge or "make its views known" on the matter, C.S. is mistaken.

63 Further, I do not accept that, as she claims, C.S. should not have been expected to bring an explicit *Charter* challenge in the WCB proceedings because she was self-represented. This is particularly so given the existence of publicly available information on the WorkSafeBC website regarding the applicable procedures when *Charter* issues arise. Again, the comments of Justice Harris in *Denton* are apposite:

> [59] In this case, Ms. Denton had available to her an administrative structure capable of adjudicating her claim as mandated by the Legislature. The record does not support the argument that the system is impossible to navigate, is relatively too expensive, inefficient, incompetent, or slow. Indeed, to the contrary. The scheme provides a relatively accessible forum in which to seek timely and relatively cheap and efficient vindication of rights to compensation, including arguments that the *Act* or the Board policies are constitutionally invalid. Nothing supports an argument that somehow the court system is more accessible, cheaper, more efficient or quicker than the administrative scheme. Furthermore, it seems to me that the issue of the adequacy of a forum must turn on its institutional characteristics, not contingent facts about such matters as the capacity of a claimant or the choice of representative.

64 Finally, the importance of the s. 15 *Charter* rights of individuals who struggle with mental disorders cannot be doubted. As C.S. submits, they should be assiduously protected by all concerned. In my view, this underscores the importance of a full record properly developed in the forum of first instance designated for this purpose by the Legislature when a s. 15 *Charter* issue arises, as explained in *Denton* and by the reviewing judge.

65 For all of these reasons, I would not accede to this ground of appeal and I would decline to consider C.S.'s s. 15 *Charter* challenge on appeal.

Did the judge err in refusing to consider C.S.'s arguments regarding the cumulative effect of breaches of the Accommodation Agreement and in concluding that consideration of the issue would have made no difference to the result of the WCAT decision?

66 C.S. also submits the judge erred in finding that she did not raise the issue of whether she repeatedly performed over eight stress tests a day and whether the cumulative effect of these breaches of the Accommodation Agreement was causally related to her mental disorder in the WCB and WCAT proceedings. In consequence, she says, he erred in exercising his discretion not to consider the issue on judicial review. He erred further, she says, in concluding that, even if it was not a new issue, consideration of the breaches of the Accommodation Agreement would have made no difference to the result of the WCAT decision. According to C.S., this conclusion was absurd because repeatedly and intentionally breaking a work-related accommodation plainly amounts to "egregious behaviour", a "cumulative series of stressors" and "bullying and harassment". Therefore, she says, her injury was plainly compensable.

67 In support of her submission, C.S. points to several instances in the WCB and WCAT proceedings where she stated that she performed more than eight stress tests in a day during the course of her employment. She also relies on a decision of the Human Rights Tribunal ("HRT") reported at [*Stein v. Keebler*] 2015 BCHRT 79 (B.C. Human Rights Trib.), which dealt with her discrimination claim against Dr. C.K. and L.K. She contends the HRT found that she did perform more than eight stress tests a day, which she submits shows WCAT erred in failing to recognize that the employer breached the Accommodation Agreement. She also submits the HRT decision shows that the judge failed to recognize WCAT's error with respect to the repeated breaches of the Accommodation Agreement issue.

68 In my view, these submissions lack merit.

69 Again, I see no palpable and overriding error in the finding in question, namely, that C.S. did not advance her claim before WCAT on the basis that the employer repeatedly and intentionally breached the Accommodation Agreement and that the cumulative effect of the breaches was causally related to her mental disorder. The evidence was that C.S. occasionally performed nine stress tests per day after the Accommodation Agreement was reached and that she did not complain about the additional tests. The record amply supports the judge's conclusion that C.S. did not argue before WCAT that the employer intentionally breached the Accommodation Agreement or that such breaches amounted to egregious or harassing conduct and aggravated her mental disorder. Rather, she argued that the employer failed to accommodate her disability and recklessly breached the No-Five-in-a-Row Alleged Agreement, failed to appropriately address her concerns regarding D and disclosed her disability to D.

70 Nor does the HRT decision assist C.S. It was merely a preliminary determination on whether to dismiss C.S.'s complaint based on the doctrine of issue estoppel in relation to the WCAT decision. Contrary to C.S.'s submission, the HRT did not make findings on how many stress tests C.S. performed daily in the course of her employment or the impact of alleged breaches on her mental disorder. Rather, the HRT was unable to discern any analysis in the WCAT decision regarding breaches of the Accommodation Agreement, which led it to conclude that, as to that issue, issue estoppel did not apply.

71 C.S. points to no irrelevant considerations or wrong principles the judge applied in exercising his discretion not to engage with the issue of whether the employer repeatedly breached the Accommodation Agreement because it was a new issue. Seeing none, I conclude that he did not err. That being so, it is unnecessary to analyse his conclusion that, in any event, consideration of the issue would have made no difference to the result of the WCAT decision.

Did the judge err in failing to recognize that the WCB and WCAT overlooked and failed to apply the HRC?

72 Next, C.S. submits that the WCB, WCAT and the judge overlooked and failed to apply the *HRC*. Unfortunately, the precise nature of her submission on this issue is unclear. At some points she appears to argue that the WCB and WCAT were obliged to apply the *HRC* in determining her claim for compensation but failed to do so, which failure the judge erroneously failed to recognize. At others, she appears to argue that the WCB and WCAT discriminated against her on the basis of disability, perhaps by applying the Labour Relations Exclusion in her case, and thus they denied her a service contrary to the *HRC*.

73 On either view of the submission, I would decline to consider the *HRC* issue.

74 C.S. did not raise the applicability of the *HRC* to her claim for compensation as an issue in the WCB, WCAT or judicial review proceedings. Accordingly, she is attempting to raise this issue for the first time on appeal. As I have already explained, for the reasons expressed in *Alberta Teachers'* and *Denton* this Court is generally disinclined to entertain a new issue on appeal in the absence of a proper record on the issue developed in the designated forum of first instance. As I have also explained, the WCBRD has jurisdiction to determine human rights issues. That is the forum of first instance in which C.S. should have raised the *HRC* issue.

75 As previously noted, WCAT has no jurisdiction to hear matters arising under the *HRC*: s. 46.3, *ATA*; s. 245.1(r) of the *Act*. To the extent that C.S. contends the WCB and WCAT discriminated against her, I see nothing in the record to support such an allegation. In any event, if that is the nature of her complaint it should be made to the HRT.

Did the judge err in finding the WCAT decision was not patently unreasonable because WCAT failed to recognize that C.S.'s injury arose from a "cumulative series of significant work-related stressors" and erroneously held that breaches of the Accommodation Agreement did not warrant compensation by virtue of the Labour Relations Exclusion?

76 C.S. goes on to submit that the judge erred in finding the WCAT decision was not patently unreasonable. This is so, she says, because the employer's intentional and egregious breaches of her accommodations amounted to targeted harassment that aggravated her mental disorder. As such, she says, the breaches met the definition of a "cumulative series of significant work-related stressors", they were not subject to the Labour Relations Exclusion and her mental disorder injury was compensable. In her submission, it was absurd for WCAT to conclude otherwise and the judge erred in failing to recognise that absurdity.

77 In *Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73 (B.C. C.A.), this Court explained the meaning of patent unreasonableness:

> [37] The meaning of this highly deferential standard in relation to nondiscretionary decisions was discussed in *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 (S.C.C.) at para. 52:
>
> > ... a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, per Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, per Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> [38] This meaning continues to apply to the patent unreasonableness standard under the *Administrative Tribunals Act* post *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.): *Preast* at para. 28, citing *Pacific Newspaper Group Inc. v. CEP, Local 2000*, 2014 BCCA 496 (B.C. C.A.) at para. 48.
>
> [39] With respect to factual matters, it is not for a court on judicial review or on appeal to second guess the conclusions drawn from the evidence considered by WCAT and substitute different findings of fact or inferences drawn from those facts. As this Court held in *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 (B.C. C.A.) at para. 37:

> A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable.

78 I am not persuaded by this submission.

79 In my view, the judge identified the correct standard of review and applied it correctly to the WCAT decision. It was not his role to second guess WCAT's conclusions drawn from the evidence, nor is it the role of this Court. As the judge recognised, Vice Chair Murray made factual findings that were amply supported by the evidence. As such, they are entitled to deference.

80 Based on the witness testimony and documents presented at the hearing, Vice Chair Murray found that the No-Five-in-a-Row Alleged Agreement did not exist and thus the employer did not breach it. She also found that L.K. spoke to C.S. encouragingly, not abusively, on March 13, 2013. She found further that D did not behave toward C.S. in a subjectively or objectively intimidating, humiliating or degrading way. As previously discussed, C.S. did not argue that the employer intentionally breached the Accommodation Agreement by requiring her to perform more than eight stress tests a day, so, unsurprisingly, she made no findings on the point.

81 Unless it is clearly irrational, Vice Chair Murray's conclusion that the events of March 13, 2013 were subject to the Labour Relations Exclusion is also entitled to deference. The same is true of her conclusion that the cumulative series of stressors associated with C.S.'s conflict with D were not "significant" within the meaning of Policy item C3-13.00. C.S. submission that these conclusions were "absurd" is based on an unjustifiable rejection of their factual underpinnings. When those factual underpinnings are accepted, as they must be, given the terms of s. 5.1 of the *Act* and Policy item C3-13.00, in my view there is nothing clearly irrational about either conclusion.

Did the judge err in finding the WCAT decision was not procedurally unfair because C.S. was not granted an oral interview by the WCB?

82 Finally, C.S. repeats her assertion that she was not granted an oral interview by the WCB and argues that this was a breach of procedural fairness. In her submission, the judge erred in finding otherwise. However, C.S. does not explain how the judge's finding that she *was* interviewed by a WCB case manager, as evidenced by the typed summary, is open to challenge on appeal. Nor does she explain how the WCB's alleged procedural unfairness in connection with a failure to interview her tainted the WCAT proceedings in which she testified. In other words, C.S. makes no submission on how *WCAT* allegedly acted unfairly in adjudicating her appeal.

83 In my view, C.S. has failed to demonstrate a breach of procedural fairness. The judge's finding that she was interviewed by a WCB case manager is supported on the record and is unassailable. In addition, C.S. was provided with a full opportunity to be heard at the WCAT hearing when she testified. I would not accede to this ground of appeal.

Conclusion

84 I would grant an initialization order in respect of C.S., Dr. C.K. and L.K., grant a sealing order over C.S.'s medical records, decline to admit the fresh evidence and dismiss the appeal.

***Bennett J.A.*:**

I agree.

***MacKenzie J.A.*:**

I agree.

Appeal dismissed.

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In the Court of Appeal of Alberta

Citation: Sandhu v College of Physicians and Surgeons of Alberta, 2023 ABCA 61

Date: 20230223
Docket: 2101-0211AC
Registry: Calgary

Between:

Manjeet Sandhu

Appellant

- and -

College of Physicians and Surgeons of Alberta

Respondent

The Court:

The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Elizabeth Hughes
The Honourable Justice Bernette Ho

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.M. Jones
Dated the 28th day of June, 2021
Filed on the 17th day of August, 2021
(2021 ABQB 494, Docket: 2001 15663)

Memorandum of Judgment

The Court:

[1] The appellant appeals an order dismissing his application for judicial review of a decision of the Council Review Panel (the Panel) of the College of Physicians and Surgeons of Alberta (the College or CPSA).

[2] The appellant is an internationally trained family physician and surgeon who applied to practice as a family physician in rural Alberta. As part of the application process to become a regulated member, the appellant was required to complete a three-month clinical assessment. The appellant's assessment was terminated after two weeks. Two months later, the Assistant Registrar of the College informed the appellant that his application for registration as a regulated member was refused and that he would be required to complete further education before applying again. The appellant appealed the Assistant Registrar's decision to the Panel and it was upheld. On judicial review of the Panel's decision, the chambers judge upheld the Panel's decision: *Sandhu v College of Physicians and Surgeons of Alberta*, 2021 ABQB 494 (*Chambers Reasons*). The appellant now appeals to this court on the basis that he was denied procedural fairness and the Panel's decision was unreasonable.

[3] For the reasons that follow, the appeal is dismissed.

Background

Legislative Scheme

[4] Under the *Health Professions Act*, RSA 2000, c H-7 the College is responsible for establishing, maintaining, and enforcing standards for registration for those who practice medicine in Alberta. The *Physicians, Surgeons and Osteopaths Profession Regulation*, Alta Reg 350/2009 (the regulation in force at the relevant time) establishes several registers for regulated members. The appellant applied for registration on the "provisional register" for independent practice as a regulated member. The application for registration as a regulated member process is outlined in sections 28 to 30 of the *Health Professions Act*. The requirements for registration on the provisional register are outlined in section 6 of the *Regulation*.

The College's Registration Process

[5] An applicant must complete a Practice Readiness Assessment (PRA) satisfactory to the College to be registered on the provisional register for independent practice. The Practice Readiness Assessment is used to ensure that the applicant's "training and clinical skills are substantively equivalent to those of a Canadian trained physician entering independent practice in

Alberta." The Practice Readiness Assessment is made up of two components: a three-month Preliminary Clinical Assessment (PCA) (which the College may elect to waive) and a three-month Supervised Practice Assessment. The appellant was required to complete both components.

[6] The *Health Professions Act* and the *Regulation* provide no details about the Practice Readiness Assessment, indeed the Practice Readiness Assessment is not mentioned at all in the statute or the regulation. The College previously published a Practice Readiness Assessments Information Manual on its website (the "PRA Manual"), but it was removed in 2019 and has not been replaced.

The Appellant

[7] The appellant obtained his medical degree from India in 1986 and his Masters of Surgery and Specialty in General Surgery from India in 2003. He has been registered for independent practice in India since 1987 and practiced as a Family and Emergency Physician in India for about 20 years in the period between 1988 and 2012. From 2013 to 2014, the appellant completed a Practical Nursing Program in Ontario. From 2014 to 2016 he completed a two-year fellowship in Cardiovascular Surgery in Texas, and from 2017 to 2019 he completed two years of Postgraduate Training in Family Medicine in India.

[8] In 2018, the appellant completed the English Language Testing System academic module and while in Ontario and Texas he communicated with patients, classmates, and staff in English.

[9] In 2019, the College confirmed that the appellant was eligible to apply for the "Provisional Register Conditional Practice". The appellant obtained sponsorship from Alberta Health Services (AHS) North Zone to work as a general practitioner at a clinic in Mayerthorpe, starting December 1, 2019.

The Letter of Understanding

[10] On December 17, 2019, the appellant signed a Letter of Understanding with the College. The Letter of Understanding outlined the details of the Practice Readiness Assessment stating that it was not a "training experience" but rather a "high stakes assessment" (para 1). The Letter of Understanding listed several orientations an applicant was required to complete (para 5). To pass the Preliminary Clinical Assessment, a final rating of 'satisfactory' was required on all assessed competencies and the final decision regarding pass/fail was made by the Assistant Registrar and not the assessor (para 13). The Letter of Understanding further explained that an applicant has "a maximum of two attempts in any jurisdiction" to successfully complete a Practice Readiness Assessment - the College would consider a prior failed assessment in another jurisdiction in Canada as a failed attempt to apply for registration on the provisional register (para 14). In the case of an unsuccessful applicant, they are eligible to re-apply for a second Practice Readiness Assessment in Alberta if the following conditions are met:

> …the applicant must apply for registration and meet the current eligibility criteria for the provisional register, including Alberta Health sponsorship, the second attempt must take place within a five-year period of the end of the first failed assessment, and evidence of remediation or professional development acceptable to CPSA must be provided at the time of application for the second attempt and must be verifiable by the Assistant Registrar Registration or his/her designate.

[11] As for the length of the Preliminary Clinical Assessment, the Letter of Understanding provided that it will "typically be scheduled" for three months but can be "terminated at any point by the Assistant Registrar Registration or his/her designate if s/he feels there is sufficient evidence to support a practice readiness decision, be it a pass or a fail determination" (para 17). In addition, an applicant can be immediately removed from a Practice Readiness Assessment "in the event that concerns are identified about patient safety or inappropriate conduct by the Applicant" (para 16).

[12] Finally, the Letter of Understanding provided that during the course of the Preliminary Clinical Assessment, the applicant would be provided access to the "online assessment system" and the applicant is expected to view the online entries and raise any concerns with the assessor (para 20).

The January 6 Letter

[13] On January 6, 2020, the appellant received a letter from the College advising him that the Preliminary Clinical Assessment would begin 10 days later in Bonnyville (the "January 6 Letter"). The Preliminary Clinical Assessment was scheduled to run from January 16, 2020 to April 9, 2020 and a doctor had been contracted by the College to be the assessor. The letter indicated that two tools would be used to evaluate the appellant's performance during the Preliminary Clinical Assessment: the GroveWare online assessment system and the Direct Observation of Procedural Skills (DOPS) – Family Medicine.

[14] Appended to the letter was information about the GroveWare online assessment system and a list of "8 Sentinel Habits (Competencies)" that describe the "skills and habits that are important in a good physician". The letter and appendices also contained a number of links to other documents. The court record does not establish what information or documents were available at those links.

Registration Understanding and Acknowledgement

[15] On January 9, 2020, the appellant signed a "Registration Understanding and Acknowledgement" that he would be registered on the "Provisional Register Physician Undergoing Practice Assessment", and that this registration was only valid for the duration of the Preliminary Clinical Assessment. This document also contained a list of eight "Responsibilities of Physicians Undergoing Practice Readiness Assessment" that the appellant agreed to comply with.

The Preliminary Clinical Assessment

[16] Upon receipt of the January 6 Letter, the appellant relocated to Bonnyville.

[17] Prior to starting the Preliminary Clinical Assessment the appellant was required to, and did, complete the University of Calgary Practice Readiness Assessment Orientation for International Medical Graduate Candidates, the purpose of which is "to provide strategies to challenges faced when undergoing a PRA assessment and to help integrate applicants into the Alberta health care system."

[18] On the first day of the Preliminary Clinical Assessment, January 16, 2020, the appellant received less than a half hour introduction to patient charts.

[19] A total of 36 assessment notes were entered in GroveWare between January 18 and January 29, with almost half of the entries dated January 29. Each assessment note contained entries under the following headings: date, clinical presentation, sentinel habit, chart review, observation, feedback, clinical domain, assessment level (unsatisfactory, needs improvement or satisfactory), and event follow-up. Of the 36 assessment notes, 24 showed an assessment level of "unsatisfactory" and 7 showed "needs improvement".

[20] The College call-log shows that the assessor had concerns about the appellant's competence from the outset, raising concerns with the College on January 20.

[21] On January 30, 2020, the assessor advised the College that the appellant had "the medical knowledge" but was "unable to appropriately apply this knowledge" and "know how to prioritize medical concerns." The assessor advised the College that he was unable to continue the Preliminary Clinical Assessment as the appellant's assessor. That day, the College contacted the appellant and advised him that the Preliminary Clinical Assessment was being "placed on hold" [EKE(A) 182].

Assistant Registrar's Decision

[22] By letter dated February 5, 2020, the Assistant Registrar informed the appellant that the assessor had raised concerns. The Assistant Registrar advised that they were going to make a decision regarding the outcome of the Preliminary Clinical Assessment. The Assistant Registrar enclosed the Letter of Understanding, the Registration Understanding and Agreement, the GroveWare assessment notes, and the call-log summarizing discussions between the assessor and the College between January 15 and 30. The appellant was invited to review the information and respond in writing.

[23] On February 28, 2020, the appellant provided a written response to the Assistant Registrar responding to the concerns raised by the assessor. The appellant wrote, in part:

> I would humbly like to submit that the lack of provision of adequate orientation, introduction to [Electronic Medical Records], paper charts, and support staff has significantly contributed in creating a subpar impression about me in my assessor's mind. Further, introduction to a high volume work and unfamiliar environment from the get go of my assessment may have contributed to some of the negative observations regarding my skills. I greatly appreciate your favorable consideration to allow me to continue my PCA so that I can contribute in the rural Alberta.

[24] On April 9, 2020, the Assistant Registrar issued their decision concluding that the appellant's Preliminary Clinical Assessment was unsuccessful and refusing the appellant's application for independent practice registration. The Assistant Registrar also issued the following direction:

> In order for you to be eligible to apply again for licensure in Alberta, you will be required to have the successfully completed the following training [sic in original]:
>
> - Two years of an accredited postgraduate training program in Family Medicine that meets with the approval of the CPSA.

The Council Review Panel's Decision

[25] The appellant unsuccessfully appealed to the Panel under section 31 of the *Health Professions Act*. The appellant argued that the Preliminary Clinical Assessment was procedurally unfair, and that the reasoning and outcome of the Assistant Registrar's April 9, 2020 decision was unreasonable. The appellant's procedural fairness argument centred on a lack of orientation and the assessor's failure to review with the appellant how the assessment would be conducted. The appellant also argued that the assessor did not use the DOPS tool as described in the January 6 Letter, the assessor did not provide feedback and an opportunity for the appellant to incorporate that feedback, the assessor's notes were inaccurate and incomplete, and the assessor was biased and had pre-determined the outcome.

[26] Before the Panel, the appellant relied on two documents that he said demonstrated the College had failed to discharge its duty of procedural fairness. First, the PRA Manual (that had been removed from the College's website in 2019 and not replaced) that described the Practice Readiness Assessment process and the responsibilities of the applicant and the assessor. The appellant argued that without the PRA Manual there were no objective standards for the process that would be followed, and the PRA Manual was evidence of what the College understood to be a fair process. Second, the appellant pointed to the National Assessment Collaboration Family Medicine PRA Standards (the NAC Standards), a pan-Canadian model with a set of common standards, tools, and materials for Practice Readiness Assessment programs. Ultimately, however, the appellant argued that with or without these documents there was a basic expectation of fairness that the College was required to meet and failed to do so.

[27] The College submitted to the Panel that the PRA Manual had been removed from its website because it "had some inconsistencies about the process" that were noted in *Mohamed v College of Physicians and Surgeons of Alberta*, 2019 ABQB 657. The College further submitted that the PRA Manual may lead an applicant to think the Practice Readiness Assessment was a training process rather than a high stakes pass/fail assessment process, and that is why the document was no longer used.

[28] The Panel accepted the additional documents but placed little weight on them. The Panel held that the NAC document had not been adopted by the College and therefore it could not be used to determine the procedural safeguards or expectations the appellant had about the process. As for the PRA Manual, the Panel held that since the College no longer used it, applicants should not rely on it.

[29] The Panel concluded that the appellant was afforded the relatively high level of procedural fairness he was owed during the assessment process. The Panel found that the appellant received adequate information regarding how the assessment would be conducted and noted that the appellant had not requested further orientation. The Panel also found that there was sufficient feedback via the entries in GroveWare, and the fact that the DOPS tool was not used was not sufficient to constitute a breach of procedural fairness. The Panel found no evidence to substantiate the claims of bias or that the assessor made inaccurate or incomplete notes.

[30] As for the reasonableness of the outcome, the Panel held that the Assistant Registrar reached a reasonable decision and provided adequate justification. The Panel noted that the decision whether to terminate an assessment before the three-month timeline is at the discretion of the Assistant Registrar. The Assistant Registrar concluded that the appellant's competence posed a potential risk of serious harm to patients, and that the appellant's complaints about a lack of orientation did not explain the deficiencies observed by the assessor. The Panel also upheld the Assistant Registrar's decision to require the appellant complete two years of an accredited postgraduate training program in Family Medicine before applying again for licensure.

Chambers Reasons

[31] The appellant brought an application for judicial review of the Panel's decision, advancing the same two grounds of appeal: procedural unfairness and unreasonableness of the Panel's decision. The chambers judge dismissed the application.

[32] On procedural fairness, the chambers judge held that it was necessary to consider the statutory and social context as the College has a duty under the *Health Professions Act* to protect and serve the public interest. The chambers judge held that it was for the College to determine its own procedures and there was no merit to any of the appellant's specific complaints regarding lack of orientation, failure to use the DOPS tool, lack of feedback, early termination, or bias.

[33] As for the decision itself, the chambers judge held that the Assistant Registrar and the Panel's decisions bore the hallmarks of reasonableness as described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 and there was no basis to interfere with the College's decision to terminate the Preliminary Clinical Assessment, refuse the appellant's registration, and require that he take further education before being able to apply for licensure again.

Grounds of Appeal

[34] The appellant advances three grounds of appeal. The appellant argues that the chambers judge erred by:

a) allowing the College to exceed the proper role of a tribunal during the course of the judicial review;

b) finding that the College's Practice Readiness Assessment process was procedurally fair; and

c) finding that the decision to terminate the Preliminary Clinical Assessment, refuse the applicant's registration, and impose a further education requirement was reasonable.

Standard of Review

[35] The court's role on an appeal from a judicial review of an administrative decision is to determine whether the reviewing judge identified and applied the correct standard of review and, if not, to assess the administrator's decision in light of the correct standard: *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 45. No deference is owed to the reviewing judge's application of the standard of review, rather, the appellate court performs a *de novo* review of the administrative decision: *Agraira* at para 46; *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at para 10.

[36] Questions of procedural fairness are reviewed to determine if the party received the degree of procedural fairness to which they are entitled by law: *Baron Real Estate Investments Ltd v Edmonton (City)*, 2021 ABCA 64 at para 17. The parties agree that the appellant was owed a high degree of procedural fairness.

[37] On the question of the substance of the Panel's decision, the parties agree that decision is reviewed for reasonableness.

Analysis

Role of the College During the Judicial Review Process

[38] The appellant argues that the scope of the College's submissions raise concerns about the impartiality of the College if the matter is sent back for another assessment. The appellant argues that the College's tone crossed the line from helpful elucidation to aggressive partisanship, contrary to the direction from this court in *JK v Gowrishankar*, 2019 ABCA 316 at para 53. The appellant seeks further direction from this court on the proper scope of the College's participation because the College introduced new evidence to the chambers judge on judicial review that was not before the Panel and that did not form part of the Certified Record of Proceedings. The College relied on this evidence to undermine the appellant's credibility as it related to alleged inaccuracies in the training and work experience information provided by the appellant to the College. The appellant argued that this evidence was inadmissible, relying on *Alberta College of Pharmacists v Sobeys West Inc*, 2017 ABCA 306 at para 67, leave to appeal to SCC refused, 37864 (9 August, 2018) and the general rule that evidence that was not before the decision maker and relates to the merits of the decision is not permitted on judicial review.

[39] The chambers judge held that this new evidence was irrelevant, and he would disregard it: *Chambers Reasons* at para 70. However, the appellant submits it is apparent from the chambers judge's reasons that this new evidence was a factor in the chambers judge's assessment of the appellant's credibility because the chambers judge expressed doubt about the accuracy of the appellant's work and training experience: *Chambers Reasons* at paras 2-3.

[40] We do not view the chambers judge's statements at paragraphs 2-3 as factoring into his ultimate conclusions, and he was correct to disregard this new evidence - it was not on the record before the decision maker: *Alberta College of Pharmacists* at paras 67-70.

[41] As for the scope of the College's participation in an appeal or judicial review, the court must balance concerns about the need for the reviewing court to be fully informed against the importance of maintaining tribunal impartiality: *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 57. We agree with the College that impartiality concerns are lessened here because the College was the only named respondent in the initial review of its decision and it is, amongst other things, tasked with regulating physicians in Alberta. Unlike this court's finding in *Gowrishankar*, the chambers judge did not find the College to be acting improperly during the judicial review process. Rather, the chambers judge wrote at para 71:

> I did not find the CPSA's submissions, either orally or in writing, to be unduly aggressive or partisan. Those submissions sought to outline the practices and procedures underlying Dr. Sandhu's PRA and to explain the basis for the CPSA Decision and the Appeal Panel Decision. As they outline what the CPSA considered relevant in declining Dr. Sandhu's application for registration, they are,

> understandably, somewhat pejorative in nature, but that, in my view, does not render the CPSA partisan.

[42] We do not find that the College's submissions on appeal to be improper. As a result, it is not necessary for us to provide a direction as requested by the appellant. Prior appellate jurisprudence, including the Supreme Court's decision in *Ontario (Energy Board)* at paragraphs 59 to 72, already provides guidance on this issue.

Procedural Fairness

[43] The appellant submits that the College breached the "relatively high" duty of procedural fairness owed to him during preparation for and the conduct of his Practice Readiness Assessment.

[44] Specifically, he asserts that he was provided with insufficient information relating to: (i) how he would be evaluated and what standards and guidelines would be used; (ii) an orientation to the practice setting in which he would be working; (iii) how he would receive feedback on his performance during the Preliminary Clinical Assessment. Further, he argues that the lack of procedural fairness was exacerbated by the fact that the Preliminary Clinical Assessment was terminated when the assessor refused to continue after only two weeks.

[45] For the reasons set out below, we conclude that the chambers judge did not err in finding that the appellant received the degree of procedural fairness to which he was entitled.

The PRA Manual and NAC Document

[46] The appellant refers throughout his submissions to the PRA Manual that the College removed from its website in March 2019. He argues that the College cannot escape the duty of procedural fairness by simply removing the PRA Manual and refusing to refer to the NAC Document, because without these materials, the appellant is in a "vacuum" not knowing what to expect in terms of the Practice Readiness Assessment process.

[47] The chambers judge found that the Letter of Understanding and January 6 Letter set out what the Practice Readiness Assessment would and would not involve, and there was no need to have recourse to the PRA Manual or NAC Document. We agree that the College is permitted to determine its own procedures and, in this case, the College relied on the Letter of Understanding and January 6 Letter to provide information to, and outline expectations for, the appellant. Neither the PRA Manual nor the NAC Document were referred to by the College in its dealings with the appellant, and there was no basis for the appellant to rely upon the PRA Manual or NAC Document.

Evaluation Standards and Guidelines

[48] The appellant asserts that his assessment was procedurally unfair because he was not given information about how he would be evaluated and what standards or guidelines would be used.

[49] The January 6 Letter addressed evaluation tools and standards. It states:

> Your Assessor(s) has been asked to use the following tools to evaluate your performance during the assessment, please review this information **carefully** prior to your assessment:
>
> 1. **GroveWare online assessment system**: See pages 3-6 for instructions.
>
> 2. **Direct Observation of Procedural Skills (DOPS) - Family Medicine**: Click here for the information on this tool. This form will be completed on GroveWare.
>
> [emphasis in original]

[50] On pages 3 to 6, more information was provided about the GroveWare tool, which would be used to document assessment observations and findings. The appellant was provided with access to GroveWare to view assessment notes and reports and was advised that "the College will not notify the applicant about the status of current or recently added notes and it is left to the applicant to review GroveWare entries on a regular basis throughout the assessment."

[51] The following paragraph was included under the heading "Purpose of GroveWare":

> To help you better understand the expected level of care for a family physician practicing in Canada prior to beginning the practice readiness assessment, it is suggested that you familiarizes [sic in original] yourself with the College of Family Physicians of Canada 99 Priority Topics and Evaluation Objectives.
>
> [underlining indicates a link to a website]

[52] The 8 Sentinel Habits, identifying the skills and habits important in a good physician, were then listed. On the last page, the appellant was advised:

> Throughout your assessment, your Assessor will enter observations which will include a brief description, sentinel habit, clinical domain, feedback given about your performance and rating of level of competence. The findings for an assessment note can be a) satisfactory, b) needs improvement, or c) unsatisfactory.

[53] The January 6 Letter emphasized that the Sentinel Habits would be used as a baseline for evaluation and the assessor's notes in GroveWare would refer to the relevant Sentinel Habit observed. The January 6 Letter also provided links to the materials prepared by the College of

Family Physicians of Canada, though the information accessed through such links was not included in the record.

[54] We agree with the chambers judge that given the contents of the Letter of Understanding and the January 6 Letter, the appellant was provided with sufficient information respecting evaluation standards and guidelines. This ground of appeal is dismissed.

Orientation to Practice Setting

[55] The appellant submits that he was not provided with an orientation to the practice setting in which he would be doing his Preliminary Clinical Assessment. Although he completed the mandatory one-day orientation provided at the University of Calgary, he argues that did not provide him with an understanding of what to expect in the smaller clinical setting in Bonnyville. Further, although he was directed in the Letter of Understanding to contact his sponsor (AHS) for more orientation, he could not practically do so because he only received two-weeks' notice of the start of his Preliminary Clinical Assessment.

[56] Paragraph 5 of the Letter of Understanding addressed orientation and provided that the appellant was required to complete the following:

> a. The mandatory online PRA Orientation for International Medical Graduate (IMG) Candidates course hosted by the University of Calgary Office of Continuing Medical Education and Professional Development.
>
> b. The University of Calgary Office of Continuing Medical Education and Professional Development's one-day PRA IMG Orientation Workshop, which purpose is to provide strategies to challenges faced when undergoing a PRA assessment and to help integrate applicants into the Alberta health care system.
>
> c. The Applicant is responsible for engaging with his/her Sponsor to obtain an orientation to the Canadian healthcare system and to medical practice within the context of Alberta prior to starting a practice-readiness assessment.
>
> d. The online orientation program *Communication and Cultural Competence* hosted on physicansapply.ca prior to his/her practice-readiness assessment to start date and submit this Attestation Form. Neither CPSA, nor an assessor, has an obligation to provide the Applicant with an orientation to the Canadian healthcare system or medical practice within the context of Alberta.

[57] The appellant completed the one-day orientation workshop at the University of Calgary. The appellant also acknowledges that the assessor spent about thirty minutes reviewing charting practices with him. There is no evidence that the appellant asked for a more in-depth orientation from his assessor or his sponsor, AHS.

[58] While we appreciate that the appellant was provided with a short period of time to commence his Preliminary Clinical Assessment, we agree with the chambers judge and see no merit to this ground of appeal. The Letter of Understanding and January 6 Letter both referred to orientation that was required and the Letter of Understanding further made it clear that the onus was on the appellant to ask for more orientation from his sponsor if he wished. The Letter of Understanding also made it clear that neither the College nor the assessor were responsible for providing greater orientation. Therefore, we dismiss this ground of appeal.

Feedback Issues

[59] The appellant submits that his assessor did not provide feedback to him, and because the appellant's access to GroveWare was delayed, he did not have an opportunity to meaningfully consider it and respond, particularly given the early termination of his Preliminary Clinical Assessment. He further asserts that he was never provided feedback through the DOPS tool as indicated in the January 6 Letter and ought to have received feedback from multiple sources rather than just from the assessor.

[60] As already noted, the January 6 Letter provided information to the appellant regarding the GroveWare assessment tool and evaluation standards. The Letter of Understanding further provided:

> All Family Medicine Applicants undergoing a Preliminary Clinical Assessment will be provided confidential access to online assessment system to view the assessment notes and reports submitted by the assessor to [the] CPSA. The applicant understands that CPSA will not notify the applicant about the status of current or recently added notes and it is left to the Family Medicine Applicants to review online entries on a regular basis throughout the assessment. The applicant is expected to view all online entries and to treat access responsibly and professionally. The applicant is not permitted to request the assessor to make any modifications to the assessment notes or reports. Any concerns by the applicant should be first discussed with the assessor, and if the concern is not resolved, then the applicant may bring the matter to the attention of the Assistant Registrar Registration or his/her designate.

[61] While the assessor needed to be prompted to use the GroveWare tool, and the appellant initially did not have access to the system, the assessor's notes and reports were available to the appellant through GroveWare within 4 or 5 days of starting the Preliminary Clinical Assessment.

[62] With respect to use of the DOPS tool, the appellant completed two procedures for which the DOPS tool within GroveWare could have been used. Instead, the assessor completed the regular GroveWare form and marked the appellant as "satisfactory" for both procedures. Notably, there is little difference between the information already provided in GroveWare and the information that would have specifically been required on the DOPS tool.

[63] Finally, while it is true that most of the appellant's feedback was provided by the assessor, some of what the assessor reported in GroveWare is reflective of comments received from third parties. For example, a consultant reported that the appellant conveyed information in a disorganized and hard to understand fashion, and the assessor then reviewed with the appellant "the importance of structuring consults outlining the most pertinent and important features": [EKE(A) 142]. In addition, nursing staff reported having to seek clarification regarding charting instructions and the assessor repeatedly reviewed with the appellant "the importance of putting date and time with medical orders and to sign off after each order" [EKE(A) 150].

[64] Therefore, this ground of appeal is dismissed.

[65] To conclude, we see no basis for appellate intervention on grounds of procedural unfairness.

Reasonableness of the Decision

[66] The appellant argues that the chambers judge appeared to identify reasonableness as the proper standard but failed to apply it correctly.

[67] In *Vavilov*, the Supreme Court indicated that a principled approach to a reasonableness review puts the decision maker's reasons first, and noted at paragraph 85 that:

> …a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[68] Further, any shortcomings or flaws relied upon by the party challenging the decision must be "sufficiently central or significant to render the decision unreasonable": *Vavilov* at para 100.

Termination of the Preliminary Clinical Assessment

[69] The appellant submits that the College's decision to terminate the Preliminary Clinical Assessment after two weeks and refuse his application for registration was unreasonable having regard for the circumstances of this case and the governing statutory framework. Specifically, he asserts there was no reasonable basis for the College to conclude there was a substantive risk to the public and for the College to cite patient safety as the basis for terminating the Preliminary Clinical Assessment. He argues that there was only one instance of a minor injury being inflicted on a patient and other concerns related to charting and communication issues, and that the outcome was determined by the assessor's unwillingness to continue after two weeks.

[70] The Assistant Registrar's decision refers to the evidence relied on to conclude that the appellant had posed potential risk of serious harm to patients. For example, the Assistant Registrar

relied on a January 30, 2020 conversation between the assessor and a representative of the College and noted the following:

> [The assessor] stated that there had been a number of incidences where your performance was deficient or had caused harm to a patient. [The assessor] provided the following examples:
>
> - Trauma to the external canal as a result of examining a 6 year old patient with an otoscope and not accurately reporting it in the patient record
> - Inability to do a complete well baby exam or to do Pap tests
> - Inaccurate diagnoses for common general practice conditions such as mononucleosis, viral exanthema
> - Not making a referral to an oncologist for a patient with prostate cancer and lymphadenopathy who was suspected to have metastatic disease
> - Incomplete charting and lack of familiarity with SOAP format
> - [The assessor] reported that you were functioning at the level of a second year medical student
> - For a patient with a potential diagnosis of alcohol withdrawal seizures, you didn't perform an examination of the patient and you told [the assessor] that an acetaminophen level had been done and that it was fine. This test had not been done. …

[71] In the Analysis portion of the Assistant Registrar's decision, it was noted that the assessor was an experienced rural family physician and assessor. The Assistant Registrar found the assessor's documentation was objective and balanced in that the assessor reported on the appellant's clinical strengths and deficiencies. The Assistant Registrar wrote:

> It is significant that **31/36 (86%)** of your assessment notes were rated as **unsatisfactory or needs improvement**. The deficiencies noted occurred in 7 of the 8 sentinel habits and in both the hospital and community practice settings. [emphasis in original]

[72] The Assistant Registrar again reviewed several examples of concerns that were identified in both the rural hospital and community practice setting including one interaction between the appellant and assessor that led to the assessor feeling that he could not rely upon the appellant's assessments or trust what the appellant was telling him.

[73] The Assistant Registrar also reviewed the responses provided by the appellant and provided reasons as to why the appellant's deficiencies could not have been accounted for based on the absence of an orientation to the hospital or clinic. Ultimately, regarding the termination of the Preliminary Clinical Assessment, the Assistant Registrar wrote:

> I made the decision to discontinue your PCA after two weeks because of the overwhelming evidence that you did not demonstrate competence in either the hospital or community practice setting and that there was substantive risk to the public. Your assessor was no longer willing to continue the assessment because of the potential risk to his patients and that you were functioning at the level of a medical student and required training rather than an assessment.

[74] We do not accept the appellant's characterization of the record and consider the Assistant Registrar's identified concern for patient safety to be supported by several GroveWare notations. In one notation, the assessor expressed a concern about the appellant not having reassessed the need to administer IV fluids to a patient and wrote, "[t]his patient became unstable and required transfer to tertiary hospital, it is possible that the continuous IV fluids contributed to his deterioration" [EKE(A) 159]. In another, the assessor described the appellant's suggested approach to diagnoses and treatment of a patient as "a very dangerous and inappropriate therapeutic option…" [EKE(A) 169].

[75] Given the record, we see no basis to interfere with the chambers judge's conclusion that the Panel's decision upholding the Assistant Registrar's decision to terminate the Preliminary Clinical Assessment early and refuse registration based on patient safety concerns was reasonable.

Imposition of a Further Education Requirement

[76] The appellant argues that the imposition of a further training requirement is unreasonable because the Assistant Registrar failed to consider the evidence from the call-logs that the assessor found that the appellant had the necessary medical knowledge.

[77] The Assistant Registrar's decision reviewed several examples of concerns arising in both the hospital and community practice setting. As already noted, she concluded there was overwhelming evidence that the appellant posed a substantive risk to the public and pointed to the assessor's conclusion that the appellant was functioning at the level of a medical student and needed further training. The Assistant Registrar also noted that observerships are not equivalent to accredited postgraduate training and would not be an acceptable option to address the deficiencies noted in the Preliminary Clinical Assessment. It was within that context that she determined that for the appellant to apply again for licensure in Alberta, he would first be required to successfully complete two years of an accredited postgraduate training program in Family Medicine that meets the approval of the College.

[78] Given the patient safety concerns outlined in the record, we decline to interfere with the Assistant Registrar's exercise of discretion in imposing the two-year educational requirement in this case.

[79] It is important to note that in response to a question from the Court, near the conclusion of the oral hearing of this matter, counsel to the respondent stated, " ... and I will acknowledge, the *Regulations* and the statute do not provide that authority—do not say that the College can say 'you have to meet this additional criteria before a second attempt at a PRA'." The jurisdiction and authority of the Assistant Registrar to impose the two-year educational requirement was not raised as a ground of appeal before the Panel or the chambers judge. Although we requested supplemental submissions from the parties regarding this issue, we are not satisfied that we have an adequate record to address this issue and decline to do so in this appeal.

Conclusion

[80] The appeal is dismissed.

Appeal heard on December 6, 2022

Memorandum filed at Calgary, Alberta
this 23rd day of February, 2023

Strekaf J.A.

Hughes J.A.

Ho J.A.

Appearances:

S.M. Shawa, K.C.
R.M. Phillips
for the Appellant

C.D. Boyer
for the Respondent

2022 BCSC 717
British Columbia Supreme Court

Aghili v. British Columbia (Workers' Compensation Appeal Tribunal)

2022 CarswellBC 1155, 2022 BCSC 717, 2022 A.C.W.S. 3200

Mohammad Seyed Aghili (Petitioner) and Workers' Compensation Appeal Tribunal (Respondent)

D. MacDonald J.

Heard: April 4, 2022
Judgment: May 4, 2022
Docket: Vancouver S218431

Counsel: M. Aghili, Petitioner, for himself
D. Morrison, for Respondent

Subject: Public; Employment; Occupational Health and Safety

Headnote

Labour and employment law --- Workers' compensation legislation — Judicial review — Denial of natural justice

In June 2020, applicant filed claim for compensation for injury allegedly suffered in workplace accident in May 2019 — Workers' Compensation Board denied claim on basis it had not been filed within one year as required by s. 151(3) of Workers Compensation Act — When Board offered applicant opportunity to demonstrate special circumstances warranting exercise of discretion afforded by s. 151(4) to accept claim filed within three years, applicant claimed he had been unfamiliar with claims process, unaware of one-year limitation period and believed he required diagnosis before making claim — Board declined to exercise discretion on basis applicant had made previous claims, demonstrating awareness of claims process, and had received diagnosis, torn tendon requiring surgery, following MRI in March 2020, well before expiration of one year — Decision was confirmed by Board's Review Division — On appeal to Workers' Compensation Appeal Tribunal, panel consisting of single vice-chair agreed there had been no special circumstances precluding applicant from filing claim within one year — Applicant brought application for judicial review — Although his affidavit was treated as written submission, exhibits included in certified record were treated as new evidence and not admissible — Application dismissed — There was no merit to applicant's contention use of word "panel" in s. 285 of Act created legitimate expectation appeal would be determined by multi-person panel — There was also no merit to allegation of bias — Allegation vice-chair had been influenced by "Jewish money" was serious and discriminatory — Claims there had been interference in assignment of workers' advisors, appeal had been denied as cost-cutting measure and decision reflected prejudice, discrimination and racism were without foundation — Although vice-chair had been entitled to retain independent health professional, such as psychologist, to assist with decision, suggestion raised by applicant for first time on appeal, there was nothing patently unreasonable, no evidence of arbitrariness, bad faith or improper purpose, in discretionary decision not to do so — There was, in any event, no evidence vice-chair had failed to take personal challenges faced by applicant into consideration .

APPLICATION for judicial review of Workers' Compensation Appeal Tribunal's decision, dated July 28, 2021 (Decision Number: A2100291), upholding denial applicant's claim.

***D. MacDonald J.*:**

Introduction

1 This is an application by Mr. Aghili, the petitioner, for judicial review of a decision of the respondent, the Workers' Compensation Appeal Tribunal ("WCAT"). The Decision number is A2100291 and it is dated July 28, 2021 (the "WCAT Decision").

Background

2 On May 1, 2019, Mr. Aghili, who was working as a computer numerical control (CNC) machinist for Wesgar Inc., was allegedly injured while lifting heavy metal tubing at work. He felt a crack in his left elbow accompanied by sharp pain. Mr. Aghili was laid off from the company the following day for unrelated reasons.

3 Section 151(3) of the Workers Compensation Act, R.S.B.C. 2019, c. 1 [“WCA“], requires an application for compensation to be made within one year after the date of injury. However, s. 151(4) gives the Workers' Compensation Board (the "Board") discretion to accept an application filed up to three years after the date of injury if special circumstances precluded the worker from filing within one year.

4 Mr. Aghili filed a claim application with the Board on June 25, 2020, more than one year after his injury. On July 16, 2020, the Board issued a letter to the petitioner explaining that his application was late. The letter requested that Mr. Aghili provide a detailed explanation of any special circumstances that precluded him from filing within the one-year limitation period.

5 The petitioner provided a written explanation on July 28, 2020. Mr. Aghili advised the Board that he did not file a claim earlier because he thought the root cause of the problem had to be known or pinpointed first. He also claimed that he did not have any experience with the application process and was unaware of the one-year time limit.

6 On August 7, 2020 the Board issued a decision to the petitioner. The Board denied his application on the ground that his explanation did not establish that special circumstances had precluded him from applying within the one-year limitation period.

7 The Board's reasoning was as follows:

> • You did not apply within the one year time limit as set out under Section 151 of the Workers' Compensation Act.
>
> • You have two prior claims with WorkSafeBC that both have Teleclaim Applications. The claim prior to this was for an injury April 17, 2019 and you submitted a Teleclaim Application April 23, 2019. This was only two weeks prior to your May 1, 2019 injury indicating you are aware of the reporting process and how to submit a claim.
>
> • Your injury occurred on May 1, 2019, meaning you had until May 1, 2020 to apply for compensation. In that time you saw multiple practitioners, including an Orthopedic Surgeon. You had an X-ray, Ultrasound and MRI. You also received seven trigger point injections. You indicated you did not apply in the one year time frame because you thought a diagnosis was needed. Your MRI on March 10, 2020 diagnosed you with a torn tendon in your elbow, at which point you had just under two months to apply for compensation. I understand your surgery was delayed due to the COVID-19 pandemic, however the date of the surgery did not preclude you from applying. You were aware in March that you had a torn tendon in your elbow and were aware surgery was necessary in May.

8 The Board also found the injury was not reported to Mr. Aghili's employer at the time of the injury.

9 Mr. Aghili asked for a review of the decision by the Board's Review Division. His former employer did not participate in the review despite being invited to do so. The petitioner was represented by a workers' adviser from the Workers' Advisers Office. [1] Both the workers' adviser and the petitioner made submissions to the Review Division. On January 21, 2021, the Review Division confirmed the Board's decision.

10 Mr. Aghili appealed the Review Division's decision to WCAT. He noted on his form that he was now self-represented. At Mr. Aghili's request, the appeal proceeded by way of written submissions rather than an oral hearing.

11 Mr. Aghili's appeal was considered and determined by a panel consisting of a single vice chair, pursuant to s. 285(4) of the WCA. Pursuant to s. 295(3) of the WCA, the Board provided Mr. Aghili and WCAT with the Board's records respecting the matter under appeal. This consisted of the Board's claim file and its review file, which included the submissions made by Mr. Aghili and his adviser on the review.

12 Mr. Aghili was to provide his submissions to WCAT by April 19, 2021. At his request, this deadline was extended until June.

13 On July 28, 2021, the vice chair issued her decision dismissing Mr. Aghili's appeal. She held there were no special circumstances that precluded him from filing an application for compensation within one year of his injury as required under the *WCA*. She confirmed the Review Division's decision.

14 Mr. Aghili now seeks judicial review before this Court.

Standing

15 Pursuant to s. 15 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, WCAT is entitled to be a party to an application for judicial review. The extent to which a tribunal may participate in a judicial review proceeding is a matter to be determined by the court in accordance with a principled exercise of its discretion. A court seeks to balance the competing interests of impartiality and of fully informed adjudication: Ontario (Energy Board) v. Ontario Power Generation Inc.,2015 SCC 44, at paras. 41–62.

16 When the employer appears to respond to the petition for judicial review, a tribunal does not normally wade into the merits of the dispute. However, where a tribunal is the only respondent to a petition it is generally appropriate for the tribunal to argue the merits of its own decision: C.S. v. British Columbia (Workers' Compensation Appeal Tribunal),2019 BCCA 406 at paras. 47–48. This is because the need to facilitate fully informed adjudication on review is more important than maintaining tribunal impartiality. It ensures the court has heard both sides of a dispute: *Ontario (Energy Board)* at para. 54.

17 As WCAT is the only respondent to the petition, I find it is appropriate for WCAT to argue the merits of the appeal. It has standing to do so.

Legislative and Procedural Framework

18 The Board is the first-level decision-maker on matters arising under the *WCA*. Pursuant to s. 268 of the WCA, most Board decisions are reviewable by the Review Division of the Board. Pursuant to s. 288, most Review Division decisions are appealable to WCAT. WCAT is an independent appellate body whose primary responsibility is to decide appeals from the Review Division. It is comprised of the chair and vice chairs. WCAT is not part of the Board and does not answer to the Board.

19 Section 303 of the WCA provides that WCAT may consider all questions of fact and law arising in an appeal, but it is not bound by legal precedent. WCAT must make its decision based on the merits and justice of the case. In doing so it must apply any applicable policy of the board of directors of the Board. The standard of proof is on a balance of probabilities. If the evidence in an appeal is evenly weighted between the worker and the Board, the issue must be resolved in the worker's favour.

20 WCAT may confirm, vary, or cancel the decision under appeal: s. 306(1). WCAT does not consider matters which were not raised in the decision under appeal.

21 Pursuant to s. 280 of the WCA and s. 11 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [“ATA”], WCAT has created rules of procedure, called the *Manual of Rules of Practice and Procedure* (the "MRPP"). WCAT's routine correspondence advises parties to an appeal of the MRPP, its significance, and the fact that it is published on WCAT's public website.

22 Section 319 of the WCA requires the board of directors to set and revise policies. These policies are binding on the Board and WCAT: ss. 339(2) and 303(2). The key policy applied in the present case is Policy Item #93.22, "Application Made Out of Time", in the *Rehabilitation Services and Claims Manual* Volume II ("RSCM II") located on the WorkSafe BC website.

New Evidence on Judicial Review

23 The petitioner filed an affidavit dated September 27, 2021. The petitioner attached a document in the nature of a written argument. Despite being unsworn, there are exhibits interspersed and appended to this argument. Most of the exhibits to the document are included in the Certified Record. However there are some exhibits containing evidence that was not before the WCAT panel.

24 New evidence is generally not accepted on a judicial review. Judicial reviews take place on the basis of the record that was before the tribunal: Goulding v. Workers' Compensation Appeal Tribunal,2015 BCCA 223 at paras. 6–7; Corcoran v. Workers' Compensation Appeal Tribunal,2014 BCSC 1087 at paras. 9–10. A reviewing court wrongly usurps the role of the tribunal when it receives new evidence and embarks upon a *de novo* hearing: Actton Transport Ltd. v. British Columbia (Employment Standards),2010 BCCA 272 at paras. 21–23.

25 I have treated the document from the petitioner as his written submissions. I have not considered the attached exhibits which contain new evidence.

Standard of Review

26 WCAT has exclusive jurisdiction to determine all questions of law, fact, and discretion on an appeal: WCA s. 308. WCAT's decisions are final and conclusive: WCA s. 309. These provisions together constitute a privative clause: Ahluwalia v. Workers' Compensation Appeal Tribunal,2020 BCSC 1717 at para. 21; Singla v. Workers' Compensation Appeal Tribunal,2020 BCSC 1227 at paras. 8–9. Accordingly, s. 58 of the ATA applies. It provides:

> **Standard of review with privative clause**
>
> **58** (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion:
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

27 A finding of fact, law, or an exercise of discretion is reviewed using the standard of patent unreasonableness. The patently unreasonable standard is highly deferential to the original tribunal. The decision must be "clearly irrational or evidently not in accordance with reason" before it will be disturbed: Shamji v. Workers' Compensation Appeal Tribunal,2018 BCCA 73 at para. 37. In West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal),2018 SCC 22, the Court articulated the standard as follows:

> [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *\/oice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers' compensation context in British Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).
>
> [29] By stipulating the standard of patent unreasonableness, the Legislature has indicated that courts should accord the utmost deference to the Tribunal's interpretation of the legislation and its decision.

28 The standard of patent unreasonableness in the *ATA* clearly differs from the common law standard of reasonableness. Under the patently unreasonable standard, I must accept WCAT's reasoning and its interpretation of the governing legislation unless it "almost borders on the absurd": *West Fraser Mills Ltd.*

29 Section 58(2)(b) of the ATA provides that the standard of review for procedural fairness is whether, in all of the circumstances, the tribunal acted fairly. Where a reviewing court concludes the procedures meet the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures: Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.,2013 BCCA 55 at para. 52.

30 The object of procedural fairness is not to achieve "procedural perfection". It is to achieve a balance between the need for fairness, efficiency, and predictability of outcome: Knight v. Indian Head School Division No. 19,[1990] 1 S.C.R. 653 at 685, 69 D.L.R. (4th) 489.

Petitioner's Position

31 The petitioner has a number of grounds for review. First, he accuses WCAT of replacing the workers' adviser who represented him at the Review Division with another adviser who declined to represent him on the appeal.

32 Second, the petitioner states he inferred from WCAT's use of the word "panel" that his appeal would be determined by a group of three or more decision-makers. He alleges he had a legitimate expectation of a multi-person panel.

33 Third, the petitioner accuses WCAT and the vice chair of several types of bias. Mr. Aghili alleges that WCAT and the vice chair were influenced by "Jewish money" and WCAT denied his appeal as a cost-saving measure. Mr. Aghili also accuses the vice chair of prejudice, discrimination, and racism, implying that it is reflected in the vice chair's handling of evidentiary issues.

34 Fourth, the petitioner argues that the vice chair should have retained an independent health professional for advice on the effects of systemic discrimination and to assist in reaching the decision.

35 Lastly, Mr. Aghili argues his injury is significant, he required surgery, and in a country like Canada he should be compensated.

Respondent's Position

36 The respondent argues that Mr. Aghili's claims with respect to bias are baseless. The respondent submits that Mr. Aghili has offered no support for his allegations that WCAT has engaged in prejudice, discrimination, and racism. In particular, the respondent contends that Mr. Aghili's claim that WCAT was influenced by "Jewish money" is a reprehensible anti-Semitic smear that has no foundation in truth.

37 The respondent argues that Mr. Aghili's claim that WCAT interfered with his representation by his workers' adviser is unfounded since the Board and WCAT are independent from the Workers' Advisers Office.

38 The respondent further argues that there is insufficient evidence to establish that Mr. Aghili had a legitimate expectation that the WCAT panel would be made up of three or more decision-makers.

39 Finally, the respondent argues that Mr. Aghili did not ask the panel to engage an independent health professional to assist in reaching a decision. He has raised this issue for the first time on review.

Analysis

General

40 Canada (Minister of Citizenship and Immigration) v. Vavilov,2019 SCC 65 [, is the leading case from the Supreme Court of Canada with respect to judicial review. Because the *ATA* governs the judicial review of tribunal decisions, *Vavilov* is of limited value in the case before me. Nevertheless, *Vavilov* emphasizes that respect for the "institutional design choices" of legislatures requires a reviewing court to adopt a posture of restraint: at paras. 24, 36. Here, as set out by the *ATA*, the legislature has determined that the standard of patent unreasonableness applies. The Court in *Vavilov* directs me to adopt a principled approach by beginning my inquiry into the reasonableness of the WCAT Decision by examining the reasons provided with "respectful attention". I must seek to understand the reasoning process the decision-maker followed to arrive at its conclusion: at para. 84.

Was the Decision Procedurally Unfair?

41 Mr. Aghili alleges two grounds of procedural unfairness: (i) that he had a legitimate expectation of a multi-person panel and (ii) that WCAT and the vice chair were biased.

42 In regard to the first ground of procedural unfairness, the petitioner understood the word "panel" to mean there would be a group of three or more vice chairs hearing his review. He argues that he had a legitimate expectation of a multi-person panel.

43 If a government official makes representations within the scope of their authority to an individual about an administrative process that the government will follow, the government may be held to its word so long as the representations are clear, unambiguous, and unqualified. Further, the representations must be procedural in nature and not conflict with the decision maker's statutory duty: Canada (Attorney General) v. Mavi,2011 SCC 30 at para. 68.

44 Section 285 of the WCA provides that "panels must consist of the chair sitting alone or a vice chair sitting alone" unless the chair determines that a panel of three or more members is required. If the matter is of special interest or significance to the workers' compensation system as a whole, the chair may appoint a panel of up to seven members. Chapter 2.7.1 of the MRPP, a non-binding guideline, also states that the chair may appoint a multi-person panel depending on the complexity and significance of the issues raised in an appeal. The respondent advises that in practice multi-person panels are infrequent.

45 According to para. 17 of the *Decision of the Chair, Workers' Compensation Appeal Tribunal #30*, only three WCAT officers have the authority to appoint multi-person panels: tribunal counsel, the registrar, and the vice chair responsible for quality assurance. None of the communications between the petitioner and WCAT involved any of these officers.

46 Although Mr. Aghili appeared to be unaware of the legislation, procedures, and decisions, I do not find that the use of the word "panel", alone, was a clear and unambiguous representation to him. Accordingly, the doctrine of legitimate expectations does not arise in this case. In any event, I am not persuaded that having more vice chairs on the panel would have changed the panel's decision or that Mr. Aghili suffered any prejudice as a result of his appeal being heard by one vice chair. I do not accept that the underlying proceeding was procedurally unfair on this ground.

47 In regard to the second ground of procedural unfairness, Mr. Aghili alleges bias. A person alleging bias must support the allegation with evidence. The petitioner's argument regarding interference with the Workers' Advisers Office is not supported by any evidence. The Workers' Advisers Office is independent of the Board and WCAT. According to the respondent, WCAT plays no part in, and exerts no influence on, the selection or assignment of workers' advisers. Moreover, there is no evidence

before me suggesting WCAT replaced Mr. Aghili's original workers' adviser with another representative. The petitioner has not persuaded me that there is any procedural unfairness under this ground.

48 In terms of Mr. Aghili's claim that the vice chair was influenced by "Jewish money", he offered no evidence to support this serious and discriminatory allegation. He simply implied that prejudice, discrimination, and racism are reflected in the vice chair's handling of the evidentiary issues. His allegation has no foundation.

49 In terms of Mr. Aghili's claim that WCAT denied his appeal as a cost-cutting measure, I note that claims benefits are the responsibility of the Board. As such, there is no gain for WCAT in denying a worker's appeal just as there is no loss in allowing an appeal. There is no evidence before me that WCAT denied the petitioner's appeal as a cost-cutting measure.

50 I understand the petitioner is disappointed with the outcome of the WCAT Decision. A ruling on an issue will generally favour one party over the other. While the petitioner's disappointment with the outcome is understandable, it cannot serve as a sound basis for an allegation of reasonable apprehension of bias.

51 The petitioner has not established procedural unfairness on the basis of bias.

Was the Decision Patently Unreasonable?

52 The petitioner did not request that the vice chair retain an independent health professional, specifically a psychologist. He is raising this issue for the first time in this judicial review proceeding.

53 I accept that s. 302 of the WCA provides that a panel may retain an independent health professional if it determines that assistance or advice from such a health professional would assist in reaching a decision. However, this Court will generally not review an issue that could have been, but was not, raised before the tribunal: Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61 at para. 22. In Yadav v. British Columbia (Superintendent of Motor Vehicles),2019 BCSC 350, Justice Baird explained this as follows:

> [19] Generally speaking on a review such as this a judge should not find an anterior administrative decision to be unreasonable based on a submission that the statutory decision-maker never heard: *Gorenshtein v. British Columbia*, 2016 BCCA 457at para. 47. The reasons for this are set out in *Vandale v. British Columbia*, 2013 BCCA 391at para. 54, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61at para. 24, as follows:
>
> > To allow a party a new hearing before an administrative tribunal because it overlooked raising an issue or making an argument at the original hearing would unduly interfere with the role entrusted to such tribunals . . . In effect, the tribunal's decision would be set aside not because it failed to pass scrutiny under the applicable standard of review, but because it did not address a point it was not asked to address.

54 I am not prepared to depart from the general rule that I should not address issues arising for the first time on the judicial review.

55 Moreover, the decision of the vice chair regarding whether to retain an independent health professional was discretionary. Discretionary decisions of a tribunal are owed deference by a reviewing court. A discretionary decision is patently unreasonable only if the discretion is exercised arbitrarily or in bad faith, is exercised for an improper purpose, is based entirely or predominantly on irrelevant factors, or fails to take statutory requirements into account: ATA s. 58(3). None of these factors are present here.

56 I find it was not patently unreasonable for the vice chair, on her own motion, not to exercise her discretion to retain an independent health professional.

57 The petitioner argues that there were special circumstances that precluded him from filing his claim within one year because he was under a tremendous amount of stress and psychological pressure during the years 2019 and 2020. He was unable to think straight and he was not mindful of the passage of time. Further, he was unaware of the one-year time limit to

file his claim. The petitioner asserts that the vice chair grossly downplayed his circumstances and the amount of stress he was experiencing during the relevant time period.

58 The vice chair acknowledged that Mr. Aghili faced several hardships and challenges over the past few years. These hardships included his daughter being bullied at school, difficulties with his landlord (including limited access to the Internet and having to look for a new home), and being laid off or dismissed from employment on several occasions (which caused him to have difficulties earning an income during this time).

59 The vice chair made the following observations regarding the impact the petitioner's circumstances may have had on his ability to file his claim:

> While I appreciate that these posed challenges to the worker and created a great deal of stress in his life, there is no evidence to suggest that he was suffering from a psychological impairment as a result of these challenges or was unable to face these challenges . . .

60 The vice chair was aware of Mr. Aghili's challenges and she considered his psychological state when she made her ruling.

61 The vice chair emphasized that a worker must file a claim within one year of the date of the worker's injury: WCA s. 151(3). She relied on the applicable Board policies. She correctly noted that before the Board can consider an application outside the one-year timeframe, two requirements must be satisfied: (i) there must have existed special circumstances which precluded the application from being filed within one year and (ii) the Board must exercise its discretion to pay compensation despite the delay: ATA s. 151; RSCM II Policy Item #93.22.

62 In determining whether special circumstances were present, the vice chair found it was irrelevant whether the claim itself is valid. She relied on previous decisions for the principle that the appropriate approach is to consider whether unusual and extraordinary circumstances existed and, if so, whether such circumstances made it difficult or hindered the worker from pursuing their claim. She noted a worker does not have to establish it was impossible to undertake their claim.

63 The vice chair further noted that special circumstances could include language difficulties, a worker relying on the advice of others (such as a physician or employer), limited education, or a lack of knowledge that their injury might be work-related. She noted the list is not exhaustive. Judgment is made in the circumstances of the particular case.

64 The vice chair emphasized the fact that Mr. Aghili had two prior claims with the Board and was therefore not completely unfamiliar with the claims process. Further, the vice chair noted that during the material time period Mr. Aghili was able to pursue a complaint against his landlord with the Residential Tenancy Branch in a timely way, he was able to apply for employment insurance to assist with the gaps in his income, and he made an application for workers' compensation for another injury. The application for workers' compensation was made just weeks before the injury upon which his current claim is based.

65 The vice chair concluded that "the worker had the knowledge and skill to seek benefits from different governmental bodies and could have done so with the Board in relation to his left elbow injury given his prior experience with the Board and his knowledge of the extent of his left elbow injury": at para. 46. Based on the other applications, the vice chair concluded that Mr. Aghili could have made an application to the Board for wage loss benefits.

66 At the outset the employer took the position that Mr. Aghili never advised it about this workplace injury at the relevant time. The vice chair found it important that the petitioner took no steps, reasonable or otherwise, to contact the Board and advise it of his injury even when his injury became more severe than he initially believed. Mr. Aghili was aware that his injury was significant by March 10, 2020 when an MRI report revealed that he had torn a tendon in his left elbow. His surgery was on June 16, 2020 and he would have known in advance of that date of the seriousness of his injury. Finally, the vice chair noted that Mr. Aghili did not inform any of his treating physicians that he had suffered a workplace injury, even after he was no longer working for the employer where he was allegedly injured.

67 The vice chair concluded that despite Mr. Aghili's relative inexperience with the Board system, he provided no reasonable explanation as to why he could not file his claim earlier. The evidence did not support the finding that special circumstances precluded Mr. Aghili from filing his application within the one-year time limit. As a result, the vice chair denied Mr. Aghili's appeal and confirmed the Review Decision.

68 In Speckling v. British Columbia (Workers' Compensation Board),2005 BCCA 80 at para. 37, the court held: "A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is 'openly, clearly, evidently unreasonable', can it be said to be patently unreasonable."

69 The petitioner asserts that the vice chair ignored the submission of his original workers' adviser. This submission forms part of WCAT's appeal record. While the vice chair's decision does not specifically refer to the submission, it is not required that an adjudicator refer to all the parties' evidence and arguments. As stated in Byelkova v. Fraser Health Authority,2021 BCSC 1312 at para. 20, "the court should presume that the tribunal considered all of the evidence and argument, even if not all are recited in the reasons . . . ".

70 The standard of review is patent unreasonableness within the meaning of s. 58(2)(a) of the ATA. I must give respectful attention to the reasons provided by the vice chair. As emphasized in *West Fraser Mills Ltd.* , WCAT is entitled to the highest degree of deference when this Court is reviewing a decision to deny a late-filed complaint.

71 There was evidence before the vice chair to support her conclusions. It was not patently unreasonable for the vice chair to find that the petitioner did not have special circumstances which precluded him from filing an application for workers' compensation within one year of his injury. I find that the vice chair addressed the relevant points raised in Mr. Aghili's submissions and she appropriately considered his reasons for delay. Her decision certainly does not "almost border on the absurd".

72 The vice chair's Decision is not patently unreasonable, nor is it procedurally unfair.

Costs

73 Based on Laursen v. Director of Crime Victim Assistance,2017 BCCA 8 at para. 95, WCAT does not seek its costs against the petitioner.

Disposition

74 I dismiss the petition.

75 No costs are awarded to either party.

Application dismissed.

Footnotes

1 The Workers' Advisers Office and workers' advisers are established under ss. 350 to 353 of the WCA as a resource for workers with claims under the *WCA*.

CITATION: Del Grande v. Toronto Catholic District School Board, 2023 ONSC 349
DIVISIONAL COURT FILE NO.: 139/21
DATE: 20230113

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

R. Smith, Stewart and Nishikawa JJ.

B E T W E E N:	
Michael Del Grande Applicant	*Charles Lugosi*, for the Applicant
- and –	*Christine Muir and Adrian Pel,* for the Respondent
Toronto Catholic District School Board Respondent	*David Tortell and Waleed Malik*, for the Intervener, the Attorney General of Ontario
	HEARD: in Toronto by videoconference on October 19, 2022

REASONS FOR DECISION

NISHIKAWA J.

Overview

[1] The Applicant, Michael Del Grande, a Trustee of the Toronto Catholic District School Board ("TCDSB"), seeks judicial review of four decisions of the Board of Trustees (the "Board") finding that he breached the code of conduct for trustees, imposing certain sanctions on him and confirming those decisions.

[2] The Applicant was found to have breached the code of conduct for trustees when he made certain comments, as further detailed in these reasons, during a Board meeting to discuss an amendment to the TCDSB's code of conduct to include gender identity, gender expression, family status, and marital status as additional protected grounds.

[3] The Applicant's main argument is that the Board lacked authority and was precluded from reconsidering an initial decision, which had failed to obtain the two-thirds majority required for a finding that he breached the code of conduct. The Applicant submits that the initial decision ought to be reinstated. The Applicant further submits that because his comments were constitutionally protected, the subsequent decisions contravene *Charter* values and principles of fairness.

[4] For the reasons set out below, the application is dismissed.

Background

The Parties

[5] The Applicant has been an elected Trustee of the TCDSB since 2014. The Applicant originally served as a trustee from 1994 to 2003, and as Chair in 2000. From 2003 to 2014, the Applicant served as an elected councillor of the City of Toronto.

[6] The TCDSB is a school board constituted as a corporate body under the *Education Act*. The TCDSB serves approximately 90,000 students in 196 elementary and secondary schools. The Board consists of 12 trustees, who must be Catholic and are elected to the Board during each municipal election. The Board makes decisions through resolutions at formal meetings, which are recorded in written minutes.

Codes of Conduct for Trustees Under the *Education Act*

[7] In 2009, after several reports calling for a review of school board governance in Ontario, the legislature enacted amendments to the *Education Act* to strengthen school board governance: *Student Achievement and School Board Governance Act, 2009*, S.O. 2009, c. 25. The following provisions were added to the *Education Act* and are relevant to this application: ss. 169.1, 218.1, 218.2 and 218.3.

[8] Section 169.1 imposes statutory duties on school boards to: (i) "promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any… sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability"; (ii) promote the prevention of bullying; (iii) promote student achievement and well-being; and (iv) "develop and maintain policies and organizational structures that promote" these goals.

[9] Since 2018, it has been mandatory for school boards to have a code of conduct for their trustees: *Education Act*, s. 218.2(2)(a), O. Reg. 246/18, s. 1(1). Section 218.1 imposes certain statutory duties on school board trustees, including duties to "maintain focus on student achievement and well-being" and to comply with a school board's code of conduct for trustees.

The TCDSB Code of Conduct for Trustees

[10] The TCDSB adopted a Code of Conduct for Trustees in September 2010 (the "Code of Conduct").[1] The Code of Conduct recognizes that Trustees "represent all citizens in the Catholic community in the City of Toronto" and that the public "is entitled to expect the highest standard

[1] The Code of Conduct was amended in April 2012 and February 2016.

from the school trustees that it elects." Trustees are expected to "respect differences in people, their ideas, and their opinions", and to "respect and treat others fairly, regardless of, for example, race, ancestry, place of origin, colour, ethnic origin, citizenship, religion, gender, sexual orientation, age, or disability."

[11] The Code of Conduct requires trustees to "ensure the affairs of the board are conducted with openness, justice and compassion" and "share in the responsibility for creating a positive environment that is safe, harmonious, comfortable, inclusive and respectful.[]" The Code of Conduct further requires that "when performing their duties as trustees and in… meetings with staff, parents and other stakeholders, appropriate language and professionalism are expected[.]"

[12] The Code of Conduct sets out a range of sanctions and remedial measures, which supplement the sanctions enumerated in s. 218.3(3) of the *Education Act*. The Code of Conduct stipulates that a vote "on any resolutions of determination or sanctions will be made by a 2/3 majority of all Trustees on the board not including the accused Trustee."

The Applicant's Comments

[13] On August 29, 2019, the Minister of Education issued Policy/Program Memorandum 128 ("Memorandum 128") which communicated that the Minister had revised the provincial code of conduct, an instrument with which all school board codes of conduct must conform. Among other changes, the Memorandum specifies gender identity, gender expression, family status, and marital status (the "Additional Grounds") as enumerated grounds that "all members of the school community" must respect and not discriminate based upon.

[14] In response to the Memorandum, the TCDSB Trustees considered whether to add gender identity, gender expression, family status and marital status as enumerated grounds under the TCDSB Code of Conduct. On October 30, 2019, the Board's Catholic Education and Living Our Catholic Values Subcommittee voted 4-1 against a proposal to add the Additional Grounds to the TCDSB Code of Conduct. The Applicant voted with the majority.

[15] On November 7, 2019, at a public meeting of the Student Achievement and Well Being, Catholic Education and Human Resources Committee, the Trustees considered a motion to direct the Governance and Policy Committee to approve the addition of gender identity, gender expression, family status and marital status as enumerated grounds under the TCDSB Code of Conduct. Two days before the meeting, the Archdiocese of Toronto had advised the Board that it accepted the addition of the Additional Grounds to the TCDSB Code of Conduct.

[16] At the meeting, several delegations made submissions regarding the motion to add the Additional Grounds to the TCDSB Code of Conduct. A former student trustee of the Board who identifies as a member of the LGBTQ+ community spoke about his personal experience at a Board-operated high school, including the suicide of a friend who did not feel accepted because he was gay.

[17] During the debate, the Applicant proposed an amendment to the motion. The Applicant moved to add to the Additional Grounds numerous fetishistic behaviours including pedophilia, gerontophilia, bestiality and vampirism, among others. The Applicant spoke at length describing more than 20 types of such behaviours, some of which are offences under the *Criminal Code*. The

Applicant characterized his proposal as showing the "slippery slope" of adding the Additional Grounds.

[18] The Director of Education for the TCDSB, Rory McGuckin, advised the Board that the Applicant's remarks could result in a contravention of the *Education Act* or policy guidelines and that some of the terms were contrary to the *Criminal Code*. The Chair, Garry Tanuan, then ruled the Applicant's proposed amendment out of order on the basis that it would be contrary to the *Human Rights Code*, the *Education Act*, the Memorandum and, in some cases, the *Criminal Code*.

[19] As the meeting continued, the Applicant continued to inquire about opinions provided by the Catholic Archdiocese on the matter. The Board ultimately voted to direct the Governance and Policy Committee to approve the addition of the Additional Grounds into the TCDSB Code of Conduct.

The Investigation

[20] After the meeting, the TCDSB received over a dozen formal complaints about the Applicant's comments. The Ontario Catholic School Trustees' Association repudiated the Applicant's remarks.

[21] On February 24, 2020, the Board sought an independent review of the matter. At the Applicant's request, the initial investigator was replaced by an investigator with knowledge of Catholic teachings. The investigator reviewed the written complaints, interviewed the Applicant and three complainants, reviewed documents provided by the parties, and reviewed relevant portions of a recording of the meeting.

[22] On May 29, 2020, the investigator issued her report which found that the Applicant had violated the Trustees' Code of Conduct by creating an "unwelcoming and harmful environment for certain members of the Catholic school board community." The investigator found that while debating the motion was within the Applicant's role, he "crossed the line" through the "inflammatory language" of his proposed amendment and the "flippant (to use his own word) manner in which he addressed concerns about that language[.]"

The First Decision

[23] On August 20, 2020, at held a regularly scheduled meeting, the full Board of Trustees considered, among other things, the Applicant's Code of Conduct matter. At the start of the meeting, the Applicant requested that it be recorded and argued that the agenda item relating to the Code of Conduct proceeding was unlawful and abusive. The Chair ruled that the item was in order. The Applicant appealed and the Board voted to uphold the ruling. The Applicant alleges that the Chair did not allow the Applicant's counsel to respond to submissions made by the Board's external counsel and that the Applicant's counsel's Zoom connection was terminated and not restored.

[24] During an *in camera* session, the Trustees considered the investigation report and discussed whether the Applicant had violated the Code of Conduct. The Applicant recused himself from the discussion and vote. The Trustees then returned to the public session and voted on a resolution finding that the Applicant was in breach of the Code of Conduct. The Board voted 7-4 in favour

of the resolution (the "First Decision"). This was one vote short of the two-thirds majority required under the Board's By-law 175 (the "By-law") to find that a Trustee has breached the Code of Conduct.

[25] On September 8, 2020, the Board's legal counsel advised an investigator for the Ontario College of Teachers that the Board determined that the Applicant did not breach the "Code of Conduct.

Reconsideration and Subsequent Decisions

[26] The First Decision was followed by a strong negative response from the community. The Board decided to convene a special meeting on November 11, 2020 to debate whether it should reconsider the First Decision, pursuant to Article 10.11 of the By-law (the "Reconsideration Provision.") Counsel for the TCDSB and counsel for the Applicant attended. The Applicant had sent a 46-page legal submission to the Trustees in advance of the meeting. During an *in camera* session, his counsel was invited to respond to questions. In the public part of the session several delegations made submissions. The meeting lasted for over eight hours.

[27] At 12:30 a.m. on November 12, 2020, the Board voted 8-1 in favour of a motion to use the Reconsideration Provision to reconsider the First Decision (the "Reconsideration Decision").

[28] The Board then voted 8-1 in favour of finding that the Applicant, by his comments and proposed amendment at the November 7, 2019 Board meeting, had engaged in misconduct and breached the Code of Conduct by making comments that were offensive and inappropriate (the "Merits Decision").

[29] The Board proceeded to debate the appropriate sanctions to apply to the Applicant. After a couple of amendments, the Board voted 8-1 to sanction the Applicant, under s. 10(a) of Policy T.04 (Trustees Code of Conduct) and s. 218.3 of the *Education Act* (the "Sanctions Decision"), as follows:

(1) That the Board censure Trustee Del Grande for behavior which was disrespectful to the LGBTQ community as a whole, as well as the TCDSB community;

(2) That the Board request that Trustee Del Grande present a public apology;

(3) That Trustee Del Grande be barred from sitting on a number of committees of the Board for a three-month period;

(4) That the Board refrain from appointing Trustee Del Grande to any representative position or role on behalf of the Board for a period of three months; and

(5) That Trustee Del Grande immediately undertake and complete within a month an Equity Training program, to be recommended by the Board's Human Rights and Equity Advisor.

The Decisions Are Confirmed

[30] On December 3, 2020, the Applicant sought to appeal the Merits and Sanction Decisions and delivered a 440-page affidavit and 36-page legal submission. The Board's external legal counsel provided a summary to the Director of Education on December 11, 2020. On December 14, 2020, the Applicant then delivered a purported "reply" submission (the "Reply"). The Respondent takes the position that the Reply is not a proper reply but that it simply rehashes arguments made in the Applicant's initial submission.

[31] On December 16, 2020, as required under s. 218.3(6) of the *Education Act*, a special meeting of the Board was held to confirm, vary or revoke the determination that the Applicant had breached the Code of Conduct. In a private session, the Board considered a report and a legal opinion from the Board's external counsel which concluded that the determination that the Applicant breached the Code of Conduct was legally sound. The Board considered the Applicant's initial submission but did not consider the Reply. In a public session, the Board confirmed the prior determination by a vote of 8-1 (the "Confirmation Decision"). On December 17, 2020, the Chair of the Board sent the Applicant a letter confirming the Merits and Sanctions Decisions.

[32] The Applicant seeks to quash the Reconsideration Decision, the Merits Decision, the Sanctions Decision and the Confirmation Decision (collectively, the "Decisions") and to have the First Decision reinstated.

Issues

[33] This application for judicial review raises the following issues:

(a) What is the applicable standard of review?

(b) Was the Reconsideration Decision reasonable?

(c) Were the Merits, Sanctions and Confirmation Decisions reasonable?

(d) Was the Applicant denied procedural fairness because of the Board's failure to consider his Reply?

Analysis

Standard of Review

[34] The Applicant submits that the standard of correctness applies to the Decisions because the application raises issues of the Board's jurisdiction to reconsider the First Decision, as well as the application of the principles of *res judicata*, issue estoppel, abuse of process and *functus officio*. He submits that those issues are of central importance to the legal system as a whole.

[35] I disagree. Pursuant to *Canada (Minister of Immigration and Citizenship) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 16-17, the presumptive standard of review is reasonableness. The issues raised in this application do not displace that presumption. First, the issue of whether the Board had authority to reconsider the First Decision did not require that the

Board resolve an issue of conflicting jurisdiction between two administrative decision-makers. The issue was simply whether the Board had authority under the *Education Act* and its By-law, to reconsider its decision. To the extent that this issue can be characterized as a jurisdictional question, it is one that the Supreme Court of Canada clarified in *Vavilov* would attract a reasonableness review: *Vavilov*, at paras. 65-68.

[36] Second, the application raises no issue of central importance to the legal system as a whole or pertaining to the rule of law. In this case, the Board applied the well-established principles of *res judicata*, issue estoppel, abuse of process and *functus officio* within a particular factual context and in light of the Reconsideration Provision. The Board was not required to articulate a general doctrine or resolve a complex legal issue of broader application. See: *Vavilov*, at paras. 60-62; *Victoria University (Board of Regents) v. GE Canada Real*, 2016 ONCA 646, at paras. 88-93. As a result, the standard of reasonableness applies.

[37] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, at para. 85. The reasonableness standard requires that a reviewing court defer to such a decision.

[38] The parties agreed that no standard of review analysis is required on matters of procedural fairness, which are determined with reference to the non-exhaustive list of considerations set out in *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817, at para. 23. More recently, the Supreme Court of Canada has clarified in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 DLR (4th) 328, at para. 30, that the standard of review applicable to matters of procedural fairness is correctness.

Was the Reconsideration Decision Reasonable?

Was the Board's Application of the Reconsideration Provision Reasonable?

[39] The Applicant submits that the Decisions must be quashed because any reconsideration must be authorized by statute and the *Education Act* contains no such authority. The Applicant submits that the Reconsideration Provision, Article 10.11 of the By-law, is inferior to the statutory scheme set out in s. 218.3 of the *Education Act* and is not intended for use in Code of Conduct proceedings. The Applicant's position is that the Board was not entitled to use the Reconsideration provision to hold a fresh vote to get the result that it was seeking, a process that he characterizes as "reverse engineering." In support of his position, the Applicant relies on the following paragraph from *Vavilov*, at para. 121:

> The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior – albeit plausible – merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[40] The Respondent submits that the Reconsideration Decision was reasonable. The *Education Act* gives the Board broad authority to control and determine its own processes. Because the *Education Act* does not prohibit reconsideration, the Board was entitled to use the Reconsideration Provision to reconsider the First Decision. The Respondent relies on the following contextual factors to support its position: (i) the board was interpreting its home statute and its own codes of procedure and conduct; (ii) the legislative scheme favours deference to the Board; (iii) the Trustees have a unique perspective on the Applicant's comments; and (iv) the Trustees are elected representatives and the Board is democratically accountable to the community.

The Reconsideration Provision

[41] Article 10.11of the By-law reads as follows:

> 10.11 Reconsideration by the Board of Trustees
>
> > Any matter which has been decided upon by the Board of Trustees, for a period of three months thereafter, may be reconsidered by the Board of Trustees only on an affirmative vote of two-thirds of all Trustees of the Board of Trustees entitled to vote, thereafter only on an affirmative vote of a majority of all Trustees of the Board of Trustees entitled to vote thereon. Thereafter a matter may be reconsidered only on a vote of a majority of all Trustees of the Board of Trustees entitled to vote thereon.

[42] The Applicant accepts that under s. 169.1(d) of the *Education Act*, the Board had authority to enact the By-law and consequently Article 10.11. He submits, however, that the Board was not entitled to circumvent or read-in new procedure to s. 218.3 of the *Act*. The Applicant further submits that the Reconsideration Provision is only intended to be used on appeal when a Trustee has been found "guilty" of misconduct and not when a Trustee has been "acquitted."

Section 218.3 of the *Education Act*

[43] The procedure for enforcing a school board's code of conduct for trustees is set out in s. 218.3 of the *Education Act*. In brief, where a potential breach of a code of conduct has come to the board's attention, the board is required to make inquiries and determine whether the code of conduct has been breached (s. 218.3(2)); to take certain actions if the board determines that a trustee has breached the code of conduct (s. 218.3(3)); and to give the trustee notice and provide an opportunity to make written submissions regarding the finding of misconduct or sanction (s. 218.3(6)). The board is required to make a determination as to whether misconduct has occurred, the sanctions to be imposed, and the confirmation/revocation of the decisions by resolution at a public meeting of the board (s. 218.3(11)).

[44] Subsection 218.3(3) specifies the sanctions that may be imposed in the event of a breach of the code of conduct. The sanctions include censure of the member and barring the member from attending meetings and/or sitting on committees of the board for a specified period of time.

[45] A trustee's opportunity to make submissions takes place after a finding of breach and the imposition of a sanction under s. 218.3(6), which states as follows:

(6) If a board determines that a member has breached the board's code of conduct under subsection (2),

(a) the board shall give the member written notice of the determination and of any sanction imposed by the board;

(b) the notice shall inform the member that he or she may make written submissions to the board in respect of the determination or sanction by a date specified in the notice that is at least 14 days after the notice is received by the member; and

(c) the board shall consider any submissions made by the member in accordance with clause (b) and shall confirm or revoke the determination within 14 days after the submissions are received.

Findings

[46] The modern principle of statutory interpretation requires that the words of an Act be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature: *Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27.

[47] In my view, the Board's application of the Reconsideration Provision to reconsider the Applicant's Code of Conduct matter was reasonable because it is supported by the text, context and purpose of the *Education Act*. I reject the Applicant's submission that because the Board was not entitled to reconsider the First Decision, the Reconsideration Decision was "illegal."

[48] Beginning with the text of the provision, nothing in the language of s. 218.3, or the *Education Act*, precludes reconsideration of a code of conduct matter by a board. There is no provision in the *Act* stating that a determination under s. 218.3(6) is final. Section 218.3 prescribes a process for determining whether a trustee has breached a code of conduct. As noted above, under s. 218.3(6), the trustee does not have an express right to make submissions before a finding of a breach is made. The trustee has an opportunity to make written submissions before the meeting at which the determination will be confirmed, revoked or varied. Moreover, s. 218.3 does not require that a board provide a trustee with a full hearing or participatory rights; it provides only for written submissions. Subsection 218.3(14) reinforces this by specifically stating that the *Statutory Powers Procedures Act* does not apply.

[49] Similarly, the Reconsideration Provision itself contains no limits as to the subject matter to which it applies. In fact, the wording of the provision is broad, and states that "[a]ny matter which has been decided upon by the Board of Trustees… may be reconsidered by the Board of Trustees…[.]" The Reconsideration Provision does not exclude its application to Code of Conduct matters. There is no basis on which to read-in such a limit where none exists. The provision stipulates that a two-thirds majority vote is required to reconsider a decision of the Board within three months but that after that, a simple majority is sufficient. This requirement is logical to ensure that policy matters are not constantly revisited once they have been decided. The fact that the Reconsideration Provision has not previously been used in relation to a Code of Conduct matter does not mean that it cannot be.

[50] As is evident from the process provided under s. 218.3, the process for determining whether a trustee has breached a code of conduct is not akin to a criminal process. The potential sanctions under the *Education Act*, including censure and the inability to participate in committees, are correspondingly weak. An individual facing a criminal prosecution has, for good reason, stronger, constitutionally protected participatory and procedural rights than a trustee facing a code of conduct proceeding under the *Education Act*. It follows that the Applicant's use of criminal law concepts, such as a "finding of guilt," "acquittal" and "double jeopardy" have no place in a code of conduct proceeding under s. 218.3. The process under s. 218.3 leads to a determination as to whether a trustee has breached the code of conduct and an appropriate sanction, and nothing more.

[51] The statutory scheme provides further support for the Board's interpretation of the Reconsideration Provision and s. 218.3. Under s. 58.5(1) of the *Education Act*, a school board is permitted to function as a corporation and "has all the powers and shall preform all the duties that are conferred or imposed on it under this or any other Act." That provision reflects a legislative intent that school boards not be limited in conducting their affairs to those functions that are specified in the *Education Act.* Moreover, the *Act* does not dictate to the Board how it must conduct its affairs, rather, the Board is the primary determinant of its own processes.

[52] This court has previously held that school boards should be free to act as modern, democratic, dynamic legal personalities. Provided there is some statutory foundation for the process in question and no express statutory prohibition against it, they have the freedom to control their own internal processes: *In the Matter of s. 10 of the Education Act*, 2016 ONSC 2361, at para. 56. The *Education Act* vests a virtually unrestricted statutory authority to act, provided only that there be some basis for the board's actions in a valid statute. While school boards may only exercise the powers expressly or impliedly conferred on them by statute, included in this authority are any general powers conferred by the legislation: *In the Matter of s. 10 of the Education Act*, at para 55.

[53] In addition, while the *Education Act* requires that a board enact a code of conduct, it does not prescribe the standards or content. This demonstrates that the legislature intended for conduct issues to fall within the Board's authority, which enables the Board to act in a flexible and dynamic manner, responsive to the community it serves.

[54] The purpose of the *Education Act* is to foster a strong public education system, which is the foundation of a "prosperous, caring and civil society." *Education Act*, s. 0.1(1). Subsection 0.1(2) further states that the "purpose of education is to provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to their society." The Board, as a "partner[] in the education sector" has "a role to play in enhancing student achievement and well-being, closing gaps in student achievement and maintaining confidence in the province's publicly funded education systems." *Education Act*, s. 0.1(3).

[55] The focus of the *Education Act* is thus the public education system and the well-being and achievement of the students who participate in it, with the goal of ensuring they develop into caring, contributing citizens. It is the Board, and therefore its Trustees, who are in service to these objectives and not the public education system that serves a trustee's objectives. This is made clear by the responsibilities of the Board under s. 169.1(1) of the *Education Act*, which includes, among

others, promoting student achievement and well-being; the prevention of bullying; and "a positive school climate that is inclusive and accepting of all pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability[.]" The responsibilities under s. 169.1(1) of the *Act* are reinforced under s. 218.1, which requires that board members carry out their responsibilities in a manner that assists the board in fulfilling its duties, including under s. 169.1 of the *Act*, to maintain focus on student achievement and well-being, and to comply with the board's code of conduct.

[56] The Board's role in enhancing student well-being and maintaining public confidence under s. 0.1(3) of the *Act* is best served by ensuring good governance and adherence to the Code of Conduct. The preamble to the Code of Conduct recognizes that TCDSB Trustees have been entrusted with the education of all students in the community they serve and that the public is "entitled to expect the highest standard from the school trustees that it elects." The Board should be responsive to the community and students it serves. In view of the legislative objectives, the Board and Trustees' duties and the need for public confidence in the public education system, it was reasonable for the Board to apply the Reconsideration Provision to the Applicant's Code of Conduct matter and to consider whether it might have got it wrong the first time.

[57] The Applicant's submission, that the Board could apply the Reconsideration Provision to a finding of a breach but not a finding of no breach of the Code of Conduct has no basis in the statutory language of s. 218.3 or the Reconsideration Provision.

[58] Moreover, the Applicant's submission that once a motion fails to obtain the requisite two-thirds majority to find a Code of Conduct breach, it can only be challenged by an application for judicial review, is impractical and cumbersome. Such a process would make it more difficult to ensure compliance with the Code of Conduct and would be contrary to the objectives of the legislation.

[59] Further, I would note that if the *Education Act* provided, as the Applicant suggests, a complete procedural code for Code of Conduct matters, the Board would not have had the authority to require a two-thirds majority to find a breach of the Code of Conduct under the By-law. The requirement of a two-thirds majority is also an aspect of the Board's ability to govern its own processes. Had a simple majority been sufficient, the First Decision would have resulted in a determination that the Applicant breached the Code of Conduct.

[60] Accordingly, the Board's application of the Reconsideration Provision to reconsider the First Decision was reasonable in view of the text, context and purpose of s. 218.3 of the *Education Act* and was not an exercise in reverse-engineering to obtain the desired result.

Was the Reconsideration Decision Reasonable in Light of the Doctrines of* Res Judicata, *Issue Estoppel, Abuse of Process and* Functus Officio*?

[61] The Applicant further submits that it was improper and contrary to the principles of *res judicata*, issue estoppel, abuse of process, *functus officio* and double jeopardy for the Board to reconsider the First Decision, which was, in his words, an "acquittal."

[62] The Respondent submits that the principles of *res judicata*, issue estoppel, abuse of process, *functus officio* and double jeopardy have no application because the Board had authority to reconsider the First Decision. The Respondent further submits that even if those principles applied, the Board's decision to reconsider was a reasonable exercise of its discretion.

Res Judicata and Issue Estoppel

[63] In my view, the Board's conclusion that it was not precluded from reconsidering the First Decision by the principles of *res judicata* or issue estoppel was reasonable. As discussed above, the Reconsideration Provision authorizes the Board to reconsider its decisions, including in relation to Code of Conduct matters. Where such reconsideration is authorized, "[t]here is no finality to a tribunal's decision for the purpose of issue estoppel": D.J. Lange, *The Doctrine of Res Judicata in Canada*, 5th Ed., Ch. 2.6.

[64] Moreover, the Board's decision not to apply the doctrine of issue estoppel is an exercise of discretion to achieve fairness in the circumstances: *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, 293 O.A.C. 248 at para. 81. As a result, the Board's decision not to apply the doctrine or *res judicata* is entitled to deference.

Abuse of Process

[65] The Applicant submits that it was an abuse of process for the Board to reconsider the First Decision and that the Board was "corrupted by political influences" to substitute its initial decision with a finding that he breached the Code of Conduct.

[66] Like the issue of *res judicata*, given that the Reconsideration Provision authorized the Board to reconsider the First Decision, its finding that reconsideration was not an abuse of process was reasonable. Contrary to the Applicant's submission, it was not improper for the Board to reconsider.

[67] Moreover, in my view, the nature of the decision-maker and process are relevant to this issue. Given the nature of the Board as a body of democratically elected Trustees responsible to their constituencies, teachers, students and staff, the Board is different from a court or an adjudicative tribunal. When the Board considers a Code of Conduct matter, it is acting in a more adjudicative role than it does when ordinarily considering matters of policy. However, pursuant to s. 218.3, such a decision is nonetheless made at a public meeting by resolution of the Board and not at an adversarial hearing with processes akin to courts or adjudicative tribunals. As a result, it is not unreasonable for the Board to be responsive to the community as opposed to entirely insulated from it.

[68] The evidence is that there was a public outcry in response to the First Decision. As a responsive body, the Board called a special meeting to address the issue. At that meeting, over the course of eight hours, numerous delegations including former students spoke to the impact of the First Decision on them. The Applicant's counsel made both written and oral submissions. The Board took all of those submissions into consideration when it deliberated on the motion to reconsider the First Decision. The Board did not simply bend to public pressure and reverse the First Decision upon receiving a negative response.

[69] As a result, the Board's decision that it was not an abuse of process to reconsider the First Decision was a reasonable one.

Functus Officio

[70] The general common law rule is that a decision-maker is *functus officio* when they make a final decision in respect of the matter before it": *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 861. In *Chandler*, the Supreme Court held that:

> As a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within [certain] exceptions…."

[71] The Supreme Court went on to say that the principle should not operate strictly in the administrative law context "where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation": *Chandler*, at p. 862. See also: *Canadian Union of Public Employees, Air Canada Component v. Air Canada*, 2014 ONSC 2552, at para. 6.

[72] Where the administrative decision-maker has authority to reconsider, it would not be *functus officio*: *Stanley v. Office of the Independent Police Review Director*, 2020 ONCA 252, at paras. 62, 67-68. In that case, the Court of Appeal found that the express statutory authority to reconsider unsubstantiated complaints implied that there was no authority to reconsider substantiated complaints.

[73] Moreover, in *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2002), O.R. (3d) 245 (Div. Ct.) at paras. 26-27, this court found that the Building Materials Evaluation Commission had an implied legislative authority to reconsider decisions where public health and safety issues warranted. In doing so, the court cited the following paragraph from David Mullan:

> [T]he prohibition on reconsiderations or rehearings was in the past explained as *functus officio*, *res judicata*, or estoppel by record. However, the rule applicable to administrative authorities is much more flexible than the doctrine of *functus officio* in regular court proceedings. Rather, it is more a general operating principle or rebuttable presumption. Finality in administrative proceedings is in general desirable but that may have to give way to other indicators either in statutory language, the nature of the process, or derived from the considerations of justice.

[74] In this case, the doctrine of *functus officio* did not apply to preclude reconsideration because the Reconsideration Provision provided the Board with the authority to reconsider. Based on the analysis above regarding the Reconsideration Provision, s. 218.3 and the duties of the Board under

the *Education Act*, it was reasonable for the Board to find that it was not prohibited by the doctrine of *functus officio* from reconsidering the First Decision.

[75] Accordingly, for all the foregoing reasons, the Reconsideration Decision was reasonable.

Were the Decisions Reasonable?

The Parties' Positions

[76] The Applicant's main argument regarding the Merits, Sanctions and Confirmation Decisions is that they are "illegal" because the Board had no authority to reconsider the First Decision. The Applicant further submits that the Decisions "run afoul of *Charter* values, including the values underlying ss. 2(a), 2(b), 7, 11(a), 11(d), 11(h), 12 and 26 of the *Charter*."[2] The Applicant submits that the Board contravened the *Charter* by, among other things, punishing him for exercising his freedom of conscience, religion, thought, belief, opinion and expression and by imposing a mandatory penalty to "re-educate him to conform to politically correct speech that will not offend the sensitivities of those in opposition to Catholic teachings."

[77] The Applicant takes the position that his comments constituted "rhetorical hyperbole" which does not violate the Code of Conduct. The Applicant relies on American case law to argue that such statements are constitutionally protected. The Applicant further submits that the purpose for which he used the statements was to fulfil his obligation as a Catholic Trustee to uphold and defend the s. 93 constitutional rights of his constituents.

[78] The Respondent's position is that the Merits, Sanctions and Confirmation Decisions were reasonable in that pursuant to the applicable *Doré/Loyola*[3] analysis, they reflect an appropriate balancing between the statutory objectives of the Board under the *Education Act* and the *Charter* values at play.

Findings

[79] In *Doré v. Barreau du Québec*, 2012 SCC 12, the Supreme Court of Canada clarified the approach to be used when administrative decision-maker applies *Charter* values in the exercise of statutory discretion. The decision-maker must balance the *Charter* values with the statutory objectives, first by identifying the statutory objectives and then asking how the *Charter* values at stake will best be protected in view of the statutory objectives. The question for this court on judicial review is whether, when assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balance of the *Charter* protections at play. If the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[2] For the reasons given above, the Code of Conduct proceeding was not a criminal proceeding and ss. 7, 11(a), 11(d), 11(g) and 12 have no application.
[3] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.

[80] In my view, the Applicant, who did not address the applicable analysis under *Doré/Loyola*, has failed to demonstrate that the Board did not properly balance the *Charter* values at issue with its statutory objectives.

[81] As noted above, the Board has a statutory obligation to promote student well-being and a positive and inclusive school climate. The Board also has an obligation to enforce a minimum standard of conduct expected of its Trustees. All Trustees have an obligation to comply with the Code of Conduct and to assist the Board in fulfilling its duties. Sanctioning the Applicant for making disrespectful comments was not contrary to the *Education Act*, but consistent with the *Act*'s statutory objectives.

[82] Before making the Decisions, the Board had ample opportunity to consider the findings of the investigation report, the submissions from delegations who attended the meeting, and the Applicant's lengthy written submissions as well as his counsel's oral submissions. The Applicant's submissions detailed his rationale for proposing the amendment and the legal arguments against reconsidering the First Decision. Those submissions included the *Charter* grounds upon which the Applicant relies. The Board was thus alert to the need to balance the statutory objectives, including its own obligations, against the Applicant's Charter-protected interests.

[83] The investigation report was also alert to the *Charter* values at stake. The investigator accepted the Applicant's submission that he was using rhetorical hyperbole to advance an argument. She found, however, that the Applicant's inflammatory language crossed the line because it was disrespectful, not inclusive and lacking in compassion. The investigator specifically noted that the Applicant made his remarks knowing that members of the LGBTQ+ community were present at the meeting and that others who were not present would be able to access his remarks. In that context, the investigator found that by his remarks, the Applicant suggested that including criminal activity such as cannibalism and rape in the TCDSB Code of Conduct was somehow similar to including the Additional Grounds. In choosing the words that he did, the Applicant created an unwelcoming and harmful environment for certain members of the Catholic school board community. The investigator found that there was ample room for the Applicant to hold and act on his religious beliefs without using language that was distressing and demeaning to others, including students and the community he was entrusted with serving.

[84] The Applicant submits that he made the comments in order to fulfil his fiduciary duty as a Trustee of the TCDSB to ensure that the constitutionally protected denominational rights of Catholic electors are not infringed. However, the Applicant's submissions disregard that the Decisions do not sanction him for holding certain religious beliefs or for debating the issue of extending the protected grounds under the TCDSB Code of Conduct. Rather, the Applicant was sanctioned for using extreme and derogatory rhetoric that fell below the standard of conduct required of a Trustee. In his factum, the Applicant characterizes the grounds that he proposed as "rare, deviant, illegal, immoral, repulsive, unusual behaviours[.]" The Applicant's remarks did not reflect any sincerely held religious beliefs, as demonstrated by his own admission that he was using a rhetorical device, absurdity to try to demonstrate, in his view, absurdity. The Decisions thus did not interfere with the Applicant's ability to hold or manifest a religious belief or to act in accordance with, practice or believe in a more than trivial manner. *See: Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386.

[85] The Merits Decision reflects an appropriate balance between the statutory objectives and the *Charter* values at stake. The Applicant made his comments in his capacity as a Trustee, in a public meeting that included at least one delegate from the LGBTQ+ community who expressed vulnerability and alienation in the Catholic school system. The Applicant had a duty to "represent all the citizens in the Catholic community" in Toronto and to create a "positive environment that is safe, harmonious, comfortable, inclusive and respectful." The Board's determination that the Applicant breached the Code of Conduct by engaging in extreme, disrespectful and demeaning language was reasonable.

[86] Moreover, the Trustees who voted in favour of the Decisions are also Catholic trustees who are well-acquainted with their obligations, including to ensure that the mission of Catholic education is fulfilled. The Board is presumed to have expertise as to its processes and standards of behaviour: *Dupont v. Port Coquitlam (City)*, 2021 BCSC 728, at para. 42 (regarding a city council). The Decisions are entitled to deference.

[87] I further note that the Applicant's reliance on the concurring reasons of Kerans J.A. in *Achtem v. Law Society of Alberta*, 1981 ABCA 145, is misplaced. In that case, a majority of the Alberta Court of Appeal held that a provision authorizing the disbarment of a lawyer convicted of an offence, after a previous discipline proceeding, did not run afoul of the principle of double jeopardy.

[88] In respect of the Sanctions Decision in particular, this court has held that to overturn a penalty imposed by a regulatory tribunal, "it must be shown that the tribunal made an error in principle or that the penalty was clearly unfit, which is to say that it manifestly is deficient or excessive and is a substantial and marked departure from penalties in similar cases." *Khan v. Law Society of Ontario*, 2022 ONSC 1951, at para. 77.

[89] In a pre-*Doré* case, *Kempling v. College of Teachers (British Columbia)*, 2005 BCCA 327, 255 DLR (4th) 169, the British Columbia Court of Appeal upheld the suspension of a teacher who, while off-duty, published a newspaper article and several letters to the editor associating homosexuality with "immorality, abnormality, perversion and promiscuity[.]" The Court of Appeal, conducting a s. 1 analysis, found that the suspension infringed on the teacher's *Charter* rights but that the "deleterious effects of the infringement are, nonetheless, relatively limited when compared to the salutary effects, namely, restoring the integrity of the school system and removing any obstacles preventing access for students to a tolerant school environment":*Kempling.*, at para. 82.

[90] In my view, the Applicant has not met the high burden of establishing that the sanctions determined by the Board were manifestly excessive. The majority of the sanctions are provided for in s. 218.3(3) of the *Education Act.* The remainder are authorized by Article 10 of the Code of Conduct, which provides for a progressive approach to sanctions including "personal contact, clarification, redirection, request for an apology, reprimand, censure and or other sanctions as per board motion[.]"

[91] The Merits Decision, Sanctions Decision and Confirmation Decision reflect an appropriate balancing of the statutory objectives under the *Education Act* and the *Charter* values at issue. Accordingly, the Decisions are reasonable.

Was the Applicant Denied Procedural Fairness?

[92] The Applicant submits that he was denied procedural fairness because the Board did not accept or consider the December 14, 2020 Reply delivered by his counsel before making the Confirmation Decision. The Applicant submits that pursuant to s. 218.3(6)(c) of the *Education Act* and Article 2.10.6.3 of the By-Law, the Board was required to consider the Reply.

[93] Section 218.3(6)(c) of the *Education Act* states that "the board shall consider any submissions made by the member in accordance with clause (b) and shall confirm or revoke the determination within 14 days after the submissions are received." Under s. 218.3(6)(b), the notice must "inform the member that he or she may make written submissions to the board in respect of the determination or sanction by a date specified in the notice…[.]" As a result, the Board was only required to consider written submissions submitted by the date specified in the notice. It was not required to consider submissions made after that date.

[94] In addition, Article 2.10.6.3 of the By-law requires that, if the Board determines that a member has breached the Code of Conduct, the Board consider "any submissions made by the member in accordance with Article 2.10.6.2…" That provision allows the member to make written submissions within a period of at least 14 days after they receive notice.

[95] Neither the *Act* nor the By-law provide for reply submissions. In addition, the timelines under s. 218.3(6) do not contemplate an extended exchange of material. The Board was required under s. 218.3(6)(c) to confirm or revoke the determination within 14 days after it received the Applicant's written submission on December 3, 2020.

[96] At the December 16, 2020 meeting of the Board, the Applicant did not object to his Code of Conduct matter proceeding. In fact, he voted to approve the agenda for the meeting and did not object to the motion regarding the Code of Conduct matter being put forward, even though he knew that the Reply was not before the Trustees. Had the Applicant believed that he would be prejudiced by the Board's inability to consider his Reply, he could have objected to the matter proceeding or brought a motion to postpone the matter to a future meeting. That he did not do so indicates that he was content for the motion to proceed.

[97] In any event, the Applicant raised no new substantive points in the Reply. The Reply repeated arguments made in his earlier written submissions, including *res judicata*, double jeopardy, abuse of process, the application of the *Charter* to school boards, and the lack of statutory authority to reconsider the First Decision. The Reply quoted excerpts from *Vavilov* to support an argument that a correctness standard of review would apply to the issue of whether the decision was *res judicata*. The applicable standard of review was unlikely to have an impact on the Board's consideration of the motion.

[98] The Applicant was given a full opportunity to present his arguments to the Board. He was represented by counsel and filed a 440-page affidavit and 30-page legal submission. The Board's failure to consider his Reply did not result in a denial of procedural fairness to him.

Conclusion

[99] Accordingly, the application for judicial review is dismissed.

[100] Given the outcome, I need not address the Applicant's request for full indemnity costs. As the successful party, the Respondent would normally be entitled to costs. However, no cost outlines were uploaded to CaseLines or forwarded to the panel despite the parties having been given ten days after the hearing to do so. As a result, there will be no costs of the application.

"Nishikawa J."

I agree: "R. Smith J."

I agree: "Stewart J."

Released: January 13, 2023

CITATION: Del Grande v. Toronto Catholic District School Board, 2022 ONSC 349
DIVISIONAL COURT FILE NO.: 139/21
DATE: 20221213

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Smith, Stewart and Nishikawa JJ.

B E T W E E N:

Michael Del Grande

Applicant

- and -

Toronto Catholic District School Board

Respondent

REASONS FOR DECISION

Nishikawa J.

Released: January 13, 2022

CITATION: Ramsay v. Waterloo Region District School Board, 2023 ONSC 6508
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-141-JR
DATE: 20231207

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E. Stewart, Lococo and Williams JJ.

BETWEEN:	
MICHAEL RAMSAY Applicant	*Hatim Kheir*, Counsel for the Applicant
- and -	
WATERLOO REGION DISTRICT SCHOOL BOARD Respondent	*Kevin McGivney and Natalie D. Kolos*, Counsel for the Respondent
	Heard at Hamilton by videoconference on June 6, 2023

REASONS FOR DECISION

E. STEWART J.

Nature of the Application

[1] Michael Ramsay has brought this application for judicial review of the decision of the Waterloo Region District School Board (the "WRDSB") on June 6, 2022 which found that he had breached its Code of Conduct for Trustees ("Code of Conduct") and imposed sanctions upon him as a result.

[2] On June 27, 2022, following receipt of a reconsideration request from Ramsay, the WRDSB confirmed its decision and the sanctions that had been imposed.

[3] Ramsay seeks an order quashing the decision. He also asks for a declaration that the decision infringed his right to freedom of expression under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter").

[4] Ramsay also takes the position that the complete and unredacted versions of the Record of Proceedings in this matter should be included in the court file and made available to the public.

[5] The Respondent WRDSB asks that the application be dismissed.

Background Facts

[6] The WRDSB is a public school board that exercises statutory authority under the *Education Act*, R.S.O. 1990, c. E.2 (the "*Act*"). The WRDSB is composed of 11 trustees who are responsible for serving the interests and needs of the general public, and for advocating for a strong public education system that benefits the learners and communities served within the local community.

[7] Ramsay has served as a WRDSB trustee since 1989. Indeed, he was a member of the WRDSB committee that drafted the current version of the Code of Conduct.

[8] On January 17, 2022 the WRDSB held a public meeting called a Committee of the Whole Meeting. One of the topics on the agenda was a proposed "Library Review". During an oral delegation that digressed from the topic at hand, the Chair warned the delegate that she risked being in violation of human rights legislation. When she nevertheless continued with her presentation and refused to adhere to the scope of the agenda item, the Chair stopped her presentation because of concerns that its content was potentially harmful to the school and the LGBTQ+ community.

[9] Ramsay was one of the trustees presiding at the public meeting who felt that the presenter ought to have been permitted to proceed. However, by a majority, the WRDSB voted to support the Chair's ruling.

[10] The delegate whose presentation had been terminated then brought an application for judicial review of the decision of the WRDSB which was dismissed by this Court on November 29, 2023 (see: *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506). She also has brought a civil action claiming damages against the WRDSB and its Chair.

[11] On January 24, 2022 at the next meeting of the WRDSB, Ramsay repeatedly interrupted the discussion of the Board's business and was ruled out of order by the Chair. Ramsay accused the Chair of having incited "moral panic" in the community by his handling of the delegation issue at the January 17, 2022 public meeting and he demanded that an apology be issued to the entire community.

[12] On February 14, 2022 at a further WRDSB meeting, Ramsay again strongly criticized the WRDSB and the Chair, saying that they had unfairly forced staff to abandon any balanced approach to these issues and had ordered them to disregard directives from the Ministry of Education as well as the law on human rights applicable to these issues and to vaccination and masking mandates.

[13] As these events were unfolding, Ramsay also used social media to communicate his views about this controversy. In his online activity, Ramsay amplified, agreed with and "re-tweeted" commentary that (among other things) described the WRDSB as a "farce," and made strong

criticisms of the Chair's handling of the delegation issue at the January 17, 2022 meeting. He also appeared to downplay the threats of bodily harm that had been made against the Chair after the public meeting.

[14] On February 24, 2022 the WRDSB received a formal complaint from a another WRDSB trustee (not the Chair) about Ramsay's conduct regarding this delegation issue. Specifically, the complaint alleged that Ramsay had failed to uphold the dignity and integrity of his office, had failed to act in a manner that would inspire public confidence in the abilities and integrity of the WRDSB, and had engaged in unprofessional behaviour, among other alleged breaches of the Code of Conduct.

[15] In order to handle and deal with the complaint, the WRDSB retained Barry Bresner of ADR Chambers as Integrity Commissioner to investigate the allegations made against Ramsay contained in it and to provide a report, as provided by the Code of Conduct.

[16] The Integrity Commissioner summarized the breaches of the Code of Conduct alleged in the complaint as follows:

(a) The refusal of Ramsay to accept and respect the decisions of the Chair and the WRDSB;

(b) Accusations by Ramsay of unlawful conduct by fellow trustees; and

(c) Disclosure of confidential information by Ramsay.

[17] The Integrity Commissioner invited any trustees who wished to speak to him to provide their comments. Among the information provided to the Integrity Commissioner were comments in writing from the Chair. This was considered to be a "written statement of witness" under section 48 of the Code of Conduct. A copy of this written statement was provided to Ramsay but was not shared with any of the other trustees.

[18] Ramsay was invited to provide, and did provide, his detailed response to the complaint to the Integrity Commissioner in the following way:

(a) The Integrity Commissioner received a call from Ramsay on March 29, 2022 for a preliminary discussion;

(b) On April 22, 2022 Ramsay submitted his written response to the complaint;

(c) A private meeting between the Integrity Commissioner and Ramsay took place via telephone on April 27, 2022; and

(d) On April 28, 2022 Ramsay delivered a "Response to Request for Clarification and Summary of Telephone Visit of April 27, 2022" by email to the Integrity Commissioner.

[19] On May 31, 2022 the Integrity Commissioner submitted a report. Pursuant to the WRDSB's Code of Conduct, the Integrity Commissioner's report did not make any specific

recommendation as to consequence, but simply presented his findings of fact to the WRDSB. It was up to the WRDSB to decide whether Ramsay had breached its Code of Conduct and, if so, to determine whether any of the sanctions applicable to trustees should be imposed upon him.

[20] The Integrity Commissioner confirmed that Ramsay's conduct that had formed the basis for the making of the complaint had arisen because of the delegation issue. The complaint against Ramsay was based on his strong negative reaction to the WRDSB decision to stop the delegate's presentation, and his alleged ongoing failure to respect that decision despite his disagreement with it.

[21] Among several other findings contained in his report, the Integrity Commissioner found that Ramsay had "retweeted" an online posting by a journalist following the meeting on January 17, 2022 that was misleading in that it did not "accurately portray what occurred at the meeting, unfairly insinuated that the Chair is misogynist and racist, and failed to note that the majority of the other trustees, all of whom are female, supported that decision." The Integrity Commissioner also noted that at the time Ramsay's Twitter "handle" was @Trustee_Ramsay, which he considered could give the impression to members of the public that he was communicating in his official capacity as a trustee.

[22] The Integrity Commissioner noted that Ramsay acknowledged that the basic facts forming the foundation of the conduct alleged in the complaint occurred and are reflected in the recordings of the meetings and in his tweets and emails. There seems to be little dispute that Ramsay said and did what was alleged in the complaint against him, with the exception of the allegation of disclosure of confidential information, which had not been substantiated by the investigation.

[23] Ramsay's basic response to the complaint was that he felt strongly that his right to freedom of expression as guaranteed by the *Charter* trumps any obligation he may have under the Code of Conduct to fetter or restrain that freedom, including any requirement to fulfil conduct expectations arising from his position as a school board trustee.

[24] On June 6, 2022 the trustees deliberated *in camera* the issues of whether to find Ramsay in breach of the Code of Conduct based on the findings of the Integrity Commissioner's report, and to determine whether any resulting sanctions should be imposed.

[25] Following that meeting, a public meeting was held at which the trustees voted 6-3 that Ramsay had breached the Code of Conduct. The WRDSB voted, by the same 6-3 margin, to impose sanctions on Ramsay. These sanctions included a formal censure, and the suspension of his entitlement to attend WRDSB meetings or to receive *in camera* materials until September 30, 2022. The Chair cast a vote in these determinations.

[26] On June 8, 2022, Ramsay was provided with written notice of the decision. He was informed that he could provide written submissions to request the WRDSB to reconsider its decision. On June 24, 2022 Ramsay submitted his request for reconsideration.

[27] On June 27, 2022 the WRDSB deliberated *in camera* whether to confirm or revoke its decision that Ramsay breached the Code of Conduct. At the public meeting immediately following, the trustees voted 6-3 to confirm its finding of a breach, and to confirm the sanctions imposed.

Jurisdiction

[28] The Divisional Court has jurisdiction to hear and determine this application for judicial review under sections 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990 c. J.1.

Standard of Review

[29] The standard of review applicable to this subject matter for judicial review is that of reasonableness (see: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653). For an issue of procedural fairness, the standard is that of correctness (see: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at paras. 26-20).

Discussion

[30] Ramsay raises the following principal issues on this application:

A. Denial of Procedural Fairness

B. Unreasonableness of the Decision

Was Ramsay Denied Procedural Fairness?

[31] Ramsay argues that the procedural fairness he was owed was breached because he had not been fully apprised of the specific allegations against him. He also claims that the deliberations concerning whether he had breached the Code of Conduct as well as what sanctions should be ordered were held *in camera*, contrary to the legislation governing meetings of the WRDSB. He further submits that the participation of the Chair in the process was unfair and tainted the result.

[32] The undisputed evidence of the course of the investigation conducted by the Integrity Commissioner reveals that Ramsay was given all pertinent details of the complaint against him and was provided with a full opportunity to respond. As already noted, there was little or no dispute but that all of the events alleged had occurred and that the statements attributed to Ramsay had been uttered or otherwise communicated by him.

[33] The description of the investigation carried out by the Integrity Commissioner and the process leading up to the decision made by the WRDSB provide an ample basis to conclude that Ramsay was given a fair and full opportunity to refute or explain the allegations contained in the complaint against him.

[34] With respect to his concern with the use of *in camera* proceedings, Ramsay submits that a key factor in determining the scope of the content of the duty of fairness is the nature of the statutory scheme and the terms of the statute pursuant to which the body operates. In this case, s. 207 of the *Act* requires that meetings of the WRDSB be open to the public, subject only to specific statutory exceptions that permit the use of *in camera* proceedings. These are:

(a) the security of the property of the board;

(b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;

(c) the acquisition or disposal of a school site;

(d) decisions in respect of negotiations with employees of the board; or

(e) litigation affecting the board.

[35] Ramsay argues that none of these exceptions applied to the complaint against him or were otherwise engaged. Hence, the principle of openness was not followed and his right to procedural fairness was breached.

[36] The WRDSB maintains that Ramsay was afforded adequate procedural fairness throughout. As articulated by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration),* [1999] 2 S.C.R. 817, at para. 27, considerable weight must be given to the choice of procedures made by the agency itself and its institutional constraints when assessing the requirements of procedural fairness.

[37] The WRDSB submits that decisions of a purely administrative nature, where a board is not acting as a tribunal which must deliberate and decide upon the rights of others, minimal procedural fairness is required. Decisions related to the enforcement of the Code of Conduct with respect to members of a school board, such as this decision of the WRDSB dealing with the conduct of one of its trustees, are predominantly administrative in nature.

[38] The WRDSB argues that, assuming that procedural fairness was owed to Ramsay, the factors set out in *Baker* would suggest that such fairness is on the lower end of the spectrum in these circumstances. The impact of the decision on Ramsay is nominal, and the sanctions imposed on him were minimal. The decision was not quasi-judicial in nature so as to require a very high level of procedural fairness. As the WRDSB points out, the Code of Conduct is explicit in stating that no formal trial-type hearing is to be conducted in enforcing the Code of Conduct. Rather, this process was designed to be an administrative one carried out by an elected WRDSB of Trustees empowered by statute to govern its own internal affairs.

[39] The WRDSB further submits that the use of *in camera* proceedings for deliberations was permissible under the applicable legislation. Section 207(2) of the *Education Act* allows for meetings to be closed to the public when, among other exceptions, the subject matter under consideration involves litigation affecting the school board. Since the delegate who was prevented from finishing her presentation commenced an application for judicial review as well as a civil action for damages against the WRDSB and its Chair, the facts involved with the complaint about the Ramsay were involved in litigation affecting the WRDSB. Further, the heart of the decision-making took place in the public sessions, where trustees publicly voted to find a breach of the Code of Conduct and to sanction Ramsay.

[40] The reasons for the decision in *Del Grande v Toronto Catholic District School Board*, 2023 ONSC 349 (Div. Ct.) illustrates the degree of procedural fairness a school board owes one of its trustees when enforcing its code of conduct in the context of alleged inappropriate trustee conduct. The Court stated (at paras 50-51):

> As is evident from the process provided under s. 218.3, the process for determining whether a trustee has breached a code of conduct is not akin to a criminal process. The potential sanctions under the *Education Act*, including censure and the inability to participate in committees, are correspondingly weak…The process under s. 218.3 leads to a determination as to whether a trustee has breached the code of conduct and an appropriate sanction, and nothing more…
>
> Under s. 58.5(1) of the *Education Act*, a school board is permitted to function as a corporation and "has all the powers and shall preform all the duties that are conferred or imposed on it under this or any other Act." That provision reflects a legislative intent that school boards not be limited in conducting their affairs to those functions that are specified in the *Education Act*. Moreover, the *Act* does not dictate to the Board how it must conduct its affairs, rather, the Board is the primary determinant of its own processes.

[41] In my view, the June 6, 2022 meeting was permitted to be held *in camera* as the subject matter under consideration involved litigation affecting the WRDSB that stemmed from the delegation incident and its aftermath. This formed a significant part of the subject matter under consideration at the *in camera* meeting. It was "the triggering event [which gave] rise to the conduct which forms the primary basis for the Complaint" as found by the Integrity Commissioner to be the case.

[42] For this same reason, the WRDSB has filed a redacted Record of Proceeding with which Ramsay takes issue. The report of the Integrity Commissioner directly acknowledges that its contents arise from the delegation event which forms the subject matter of the related court application for judicial review and the civil action for damages against the WRDSB and the Chair. Similarly, the minutes of the *in camera* meetings were removed from the materials filed with the Court. There is no unfairness to Ramsay that results from this approach, nor any impediment to his raising of any argument on his own application for judicial review of the WRDSB decision in his case.

[43] Ramsay further submits that the Chair's involvement in the investigation process and his participation in casting votes tainted the decision with bias, or a reasonable apprehension of bias.

[44] Ramsay argues that by making submissions to the Integrity Commissioner the Chair was acting as both investigator and advocate which are roles that are incompatible with his ultimate role as a decision-maker. Ramsay argues that where a decision is made by multiple decision makers and one is disqualified on the basis of bias, the question becomes whether the entire panel is tainted. The Court must therefore evaluate the role of the decision-makers and whether the biased decision-maker had case the deciding vote (see: *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 31, [2019] 8 W.W.R. 67).

[45] In this case, the Chair was the deciding vote since a majority of two-thirds is required to confirm any finding that the Ramsay breached the Code of Conduct. But for the casting of the Chair's vote, the finding could not have been confirmed and the decision would not have been made. Ramsay argues that the Chair's role as author of the reasons and the necessity of his vote to the decision mean that his reasonable apprehension of bias taints the whole decision.

[46] The WRDSB points out that the Integrity Commissioner invited all of the trustees to make written submissions and that is why the Chair did so. The WRDSB submits that there was nothing wrong with the Chair's providing of his submission to the Integrity Commissioner after having been invited to do so.

[47] The WRDSB argues that it cannot be said that the Chair's submissions constituted bias that tainted the entire group of trustees when making the decision. It is evident from the Integrity Commissioner's report that the Chair's submissions were not shared with the other WRDSB trustees. The decision-maker in this case was the panel of the WRDSB as a whole, made up of nine voting trustees. There is no evidence that five other trustees who comprised the majority were biased or tainted by the alleged apprehension of bias of the Chair, nor does the Chair's submission in response to the invitation from the Integrity Commissioner raise any reasonable apprehension that they were biased (see: *R. v. Roberts*, 2005 SCC 3, [2005] 1 S.C.R. 22).

[48] I agree with the approach taken by the WRDSB to this issue in its argument. Ramsay's concerns of bias must be evaluated against the particular structure of the board of trustees and its processes for the handling of complaints against any individual trustee. Indeed, it is only a trustee who is able to bring a formal complaint against another trustees. The Code of Conduct prohibits the trustee who filed the complaint from voting on the disciplinary resolution, but does not otherwise prohibit other trustees from being witnesses, providing such information as they may have to the Integrity Commissioner, and participating in the decision-making process. The very nature of many of the requirements of expected conduct of trustees as contained in the Code of Conduct makes it likely that other trustees may often be 'witnesses" to such conduct. This does not raise any spectre of bias in such a setting.

[49] Accordingly, given the nature of the complaint, the observation that the basic facts underlying it were not disputed, and the context of the decision itself, I conclude that there is no basis for a finding of bias here nor any denial of procedural fairness to Ramsay.

Was the Decision Unreasonable?

[50] Ramsay submits that the reasons for the decision fail to meet the requisite standard of justification, transparency and intelligibility required by *Vavilov*. Because of that failure, Ramsay submits that the decision was unreasonable.

[51] This standard of reasonableness requires that the reasons for the decision must reveal an internally coherent and rational chain of analysis. Reasons that are transparent and intelligible draw a line of analysis that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived (see: *Vavilov*, para 102).

[52] Ramsay argues that the reasons for the decision do not stand up to scrutiny and do not make it possible to understand how the WRDSB arrived at its finding. Ramsay argues that the decision simply repeats statutory and Code of Conduct language but does not reveal any sort of chain of logic.

[53] Alternatively, Ramsay argues that the decision was unreasonable because the WRDSB failed to balance his *Charter* right to free expression against other relevant considerations, as required by the framework set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, insofar as the decision held Ramsay in breach of the Code of Conduct for comments made by him in meetings and online.

[54] The WRDSB argues that the reasons provided were sufficient. The Supreme Court has held that there is no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process. It submits that a school board's reasoning may be deduced from the debate, deliberations and the statements of policy (see: *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5). The *Act* does not require the provision of reasons in writing for a decision. The only statutory requirement it imposes is to provide written notice of the result and applicable sanctions. This was done.

[55] The context within which the decision was made was an administrative one, where the WRDSB was enforcing its Code of Conduct as part of the discretion granted to it by statute to manage its own affairs. The trustees had ample opportunity to review and consider the factual findings contained in the Integrity Commissioner's report, as well as the submissions made by Ramsay. They were well positioned to balance statutory and policy objectives in coming to a decision. The notice of the decision references the findings of the Integrity Commissioner's report which implicitly accepts the findings of fact made by the Integrity Commissioner.

[56] The WRDSB argues that the decision reflects an appropriate balancing between the statutory objectives under the *Education Act* and the *Charter* values at play. Given the context within which the decision was made, specific reference to the *Doré* framework was not required.

[57] Pursuant to the *Act*, the WRDSB is permitted to adopt its own Code of Conduct that applies to its board members, and to carry out procedures to enforce its Code. Trustees are required to comply with the Code of Conduct. The Code of Conduct outlines expectations of trustees with respect to their behaviour to maintain the integrity and dignity of their office, civil behaviour, compliance with legislation and upholding of decisions of the board.

[58] In making its decision, the WRDSB properly considered its own governing Bylaws, its Code of Conduct and the statutory objectives of the *Act*, as well as Ramsay's *Charter* rights. In particular, the WRDSB was alive to Ramsay's right to free expression pursuant to the *Charter* which had been addressed at length by the Integrity Commissioner in his report as well as in Ramsay's own comprehensive submissions. In reaching its decision with respect to finding that Ramsay breached the Code of Conduct, and by imposing fairly minimal sanctions, the WRDSB effectively attempted to achieve a reasonable balance between Ramsay's *Charter* rights and the WRDSB's responsibilities of both the WRDSB and Ramsay under its Code of Conduct, its Bylaws and the requirements of the *Act*.

[59] I am therefore of the view that the decision is reasonable and the reasons for it are adequate. When viewed against the backdrop of the sequence of events giving rise to the complaint, the contents of the report of the Integrity Commissioner, and Ramsay's own acknowledgment of his conduct, the issue before the WRDSB was clear. Its finding that Ramsay breached its Code of Conduct is rational and wholly reasonable.

[60] As pointed out by the Integrity Commissioner in his report, the right to freedom of expression is neither absolute nor unqualified. Although the WRDSB decision was debated and was not unanimous, it is one which on the facts before it was available to the required majority of the WRDSB to make. I see no basis upon which interference with that decision by this Court would be justified.

Conclusion

[61] For these reasons, the application for review of the decision of the WRDSB is dismissed.

[62] In the circumstances, and given the result on the main aspect of the application, I see no compelling reason to disturb the decision of the WRDSB to maintain confidentiality of those portions of the report of the Integrity Commissioner or those parts of the record of its *in camera* proceedings that, in its discretion, have been redacted. Similarly, the arguments of mootness and available remedies if Ramsay had been successful raised on behalf of the WRDSB need not be addressed.

Costs

[63] The WRDSB has been successful in responding to this application and seeks its costs as a result.

[64] Although the issues dealt with on this application may be of some public interest, I do not consider the magnitude of same to be great enough to affect the usual determination of costs in an application of this nature. The decision under review primarily affects an interest that is specific to Ramsay, being the negative finding that he breached the WRDSB's Code of Conduct. I consider that the public interest is better served by directing that Ramsay, as the unsuccessful party, pay to the WRDSB, the publicly-supported successful party, a contribution toward its costs of responding to this application.

[65] Accordingly, costs of the application, fixed in the amount of $7,500 inclusive of all disbursements and applicable taxes, shall be paid to WRDSB by Ramsay, if demanded.

E. Stewart J.

I agree:

Lococo J.

I agree:

Williams J.

Released: December 7, 2023

CITATION: Ramsay v. Waterloo Region District School Board, 2023 ONSC 6506
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-141-JR1
DATE: 20231207

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E. Stewart, Lococo and Williams, JJ.

B E T W E E N :

MICHAEL RAMSAY
Applicant

- and –

WATERLOO REGION DISTRICT
SCHOOL BOARD
Respondent

REASONS FOR DECISION

Released: December 7, 2023

CITATION: *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-126-JR
DATE: 20231129

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E. STEWART, LOCOCO AND WILLIAMS JJ.

BETWEEN:	
Carolyn Burjoski Appellant	*Jorge Pineda* and *Rob Kittredge*, counsel for the Appellant
– and –	
Waterloo Region District School Board Respondent	*Kevin McGivney* and *Natalie D. Kolos*, counsel for the Respondent
	Heard at Hamilton via videoconference: June 5, 2023

REASONS FOR DECISION

STEWART J.

Nature of the Proceeding

1. Carolyn Burjoski ("Burjoski") applies for judicial review of the decision of the Waterloo Region District School Board (the "WRDSB") to uphold the Chair's decision to stop Burjoski's presentation to a Committee of the Whole Meeting on January 17, 2022.

2. Burjoski seeks an order quashing the decision, a declaration that the decision was unreasonable and a breach of the duty of fairness and in violation of the principles of natural justice, and an order requiring the WRDSB to allow her to make her presentation in full at a future meeting to be scheduled.

3. Burjoski also seeks a declaration pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11 (the "*Charter*"), on the basis that the decision unreasonably breached her right to freedom of expression under s. 2(b) of the *Charter*.

4. The WRDSB asks that this application be dismissed.

Background Facts

5. Burjoski is a resident of the Waterloo Region. She is an elementary school teacher who taught English as a second language with the WRDSB until she retired about two years ago.

6. The WRDSB is a public school board that exercises statutory authority under the *Education Act*, R.S.O. 1990, c. E.2., composed of 11 trustees. The WRDSB is responsible for serving the interests and needs of the general public and for advocating for a strong public education system that benefits the Waterloo Region.

7. On January 17, 2022, the WRDSB held a Committee of the Whole Meeting to which members of the public were invited. One of the topics for consideration at the meeting was a proposal for a "Library Review".

8. Burjoski sought registration as a delegate to speak at the meeting. In her request form, Burjoski indicated that she wished to speak on the topic of transparency in the library review process and to offer recommendations in that regard. Specifically, Burjoski in her request form stated the following:

> I would like to address the Board on issues of transparency regarding the library and classroom teacher's collections culling project. I would also like to express my concern regarding Board Policy 1235 Section 4 which states that we teachers must not disclose a student's transgender status to their parents.

9. Bujoski's proposed recommendations included the following:

> Be more transparent in general. The Board should have been ready to answer the reporter's questions about criteria for the library cull for the National Post's October 8, 2021 article.
>
> From the subsequent November 8 memo "Reviewing Our Library Collections", the Board listed the CREW method and the MUSTIE criteria for reviewing collections. Be transparent about the criteria for titles that will be considered "Misleading, Superseded, Trivial or Irrelevant" when using the CREW method, or keep lists of titles that are being removed from the library.
>
> Do not cull teacher collections.
>
> Create committees which include diverse thinkers when making decisions. Be ready to share how the Board arrived at decisions and explain why the people who were on the committee were chosen. Include people from both within and outside of the LGBT banner when you create committees and include diversity of thought in your criteria.
>
> Strike a committee that properly represents parents and teachers to discuss the intersection of biology and gender and clarify which direction teachers should follow. For example, the Living Things strand of the Science curriculum teaches children to classify living things based on physical characteristics of their bodies. This differs from the Gender Lessons which teach children that they can choose if they are a boy or a girl or something in between.

> Demonstrate more respect for the role of parents when making policy decisions. Change policy 1235 to state that schools must inform parents if their child asks to be called a different name, pronoun, etc. It is their right to know this information.

10. Burjoski did not include in her request form any indication that she would be advocating for the removal of any specific books.

11. On December 20, 2021, Burjoski was advised that, while her delegation request was for two separate topics, only her request for a delegation regarding the need for transparency in the library review was approved. Accordingly, Burjoski was permitted to appear at the meeting solely to address her first issue, which she had described as addressing the WRDSB "on issues of transparency regarding the library and classroom teacher's collections culling project".

12. At the beginning of the meeting, the Chair made a statement that indicated that each delegation would have up to ten minutes to make their submissions and that all presentations were to be confined to the issue that the delegate was registered to address. Any discourteous language or statements that might contravene human rights legislation would not be tolerated.

13. It is not difficult to understand why the Chair considered it necessary and advisable to deliver this early warning to all persons in attendance at the meeting. It is the Chair's responsibility to maintain decorum and order at meetings and to ensure that the available time is used effectively for the purposes at hand.

14. Soon after Burjoski began her delegation, she digressed from the scope of the issue that had been approved. She embarked instead upon an outline of her views about what she perceived to be books that discuss gender identity, shifting rapidly toward a critique of specific books that were available in school libraries. This went well beyond the "transparency" concerns that had been represented and approved in her request form as being the core subject of her presentation.

15. Burjoski stated that some books in the school libraries were inappropriate for young children and further argued that certain books make it "seem simple or even cool take puberty blocks or opposite sex hormones." At this stage, the Chair expressed his concern that the contents of Burjoski's delegation may be problematic and cautioned her to make sure that she would not say anything that would violate human rights legislation.

16. Burjoski was allowed to continue her delegation. Despite the Chair's admonition, she continued to persist in commenting on the appropriateness for students of specific books about gender identity issues. She described these books as misleading and stated that at least one of them "makes very serious medical interventions seem like an easy cure for emotional and social distress".

17. The Chair again interrupted Burjoski's presentation and required its conclusion because he considered that it could violate human rights legislation and WRDSB policies for delegations, as he noted that gender identity and gender expression are protected grounds under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Human Rights Code*").

18. One of the trustees challenged the Chair's decision to stop Burjoski's presentation. The Chair again explained his reasons for stopping her presentation. The WRDSB took a vote on the issue and, by a majority, voted to sustain the Chair's decision to end Burjoski's delegation.

19. Burjoski now asks this Court, among other things, to quash the WRDSB's decision.

Jurisdiction

20. The Divisional Court has jurisdiction to hear this application for judicial review under ss. 2 and 6 of the *Judicial Review Procedure Act*, R.S.O. 1990 c. J.1.

Standard of Review

21. The standard of review applicable to this subject matter for judicial review is that of reasonableness (see: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653). For an issue of procedural fairness, the standard is that of correctness (see: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at paras. 26-20).

Discussion

22. This judicial review application raises three issues:

A. Was the decision unreasonable?

B. Was there a breach of procedural fairness?

C. Was there a reasonable apprehension of bias in the decision?

Was the decision unreasonable?

23. Burjoski submits that the WRDSB's decision was unreasonable because the WRDSB failed to consider her *Charter* right to freedom of expression and failed to engage in a "robust balancing exercise". She also claims that the WRDSB did not have the authority to find that Burjoski engaged in improper conduct, and the WRDSB did not have the authority to find that she breached the *Human Rights Code*.

24. Burjoski argues that the contents of her delegation were protected under s. 2(b) of the *Charter* and submits that the decision of the WRDSB required a robust explanation as a prerequisite. The decision cannot be fair or reasonable if the WRDSB did not engage in the balancing exercise as set out in the prevailing legal authorities (see: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395).

25. Burjoski submits that the WRDSB does not have the authority to end a presentation, or censor a presenter, that it deems or perceives to be a violation of the *Human Rights Code*. She submits that the only option available to the WRDSB, pursuant to the *Education Act*, is the removal of the presenter from a meeting. She argues that the *Education Act* does not provide the WRDSB with the authority to curtail speech on the basis that such speech is misconduct. She submits that the improper conduct contemplated by the *Act* must be something that interferes with the WRDSB's ability to conduct a proper meeting and carry out its functions. She submits that, as such meetings are supposed to be open to the public, the decision to stop her delegation was unreasonable.

26. Burjoski also argues that the WRDSB did not provide adequate reasons to indicate how Burjoski breached the *Human Rights Code*, and therefore the decision was unreasonable.

27. I agree with the submission of the WRDSB that the decision was not unreasonable. The WRDSB has codified certain operational matters in its Bylaws that include procedures for delegations, for its committees and committee members, for public meetings, and for WRDSB meetings. The Bylaws

identify duties of the Chair to maintain order in WRDSB meetings and, in particular, to preserve order and decorum and decide upon all questions of order, subject to an appeal to the WRDSB. The Bylaws also set out procedures for delegations to make submissions at meetings which include the requirement to make written submissions ahead of time that provide a summary of the points being presented.

28. The WRDSB has multiple policies that commit to providing working and learning environments free of discrimination and harassment as well as ensuring that individuals are treated with respect and dignity. The WRDSB policy on Equity and Inclusion identifies the WRDSB's mandate to "identify and remove systemic and attitudinal barriers and biases to learning and employment opportunities that have a discriminatory effect on any individual" as well as the WRDSB's duty "provide a safe, inclusive environment free from inequity, discrimination and harassment…." including by incorporating "the principles of equity and inclusive education into all aspects of its operations…" The Policy further acknowledges that all "partners in education" "have a critical role to play in leading the identification and removal of bias [and] discrimination." The Policy commits to "the principle that every person within the school community is entitled to a respectful, positive school climate… free from all forms of discrimination and harassment."

29. In the context of decisions made by elected decision-makers like the WRDSB, a high degree of deference must be given. The WRDSB trustees are accountable to their community and are well-versed in the goals of the education system and the boundaries of proper debate at meetings. School boards should be free to act as modern, democratic, dynamic legal personalities, provided only that there be some statutory foundation for, and no express statutory prohibition of, their conduct (see: *Radio CHUM 1050 Ltd. v. Toronto (City) Board of Education*, [1964] 2 O.R. 207 (C.A.)).

30. The WRDSB made no finding that Burjoski breached the *Human Rights Code*. The Chair merely referenced that statute and expressed concerns that Burjoski's comments were becoming problematic. It was reasonable for him to do so.

31. There is no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process. A school board's reasoning may be deduced from the debate, deliberations and the statements of policy that give rise to the decision in question (see: *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293). Accordingly, given that the decision was reached through a democratic process by elected trustees, it was not necessary for the WRDSB to give detailed formal reasons for the decision. In any event, the Chair made known to Burjoski the reasons for his ruling. In my view, the explanation when taken in context was adequate.

32. The written materials Burjoski submitted expressed her concerns about the WRDSB being transparent in how the "library cull" was to be conducted. Her written materials did not indicate she intended to address the WRDSB about specific books within the WRDSB collection. Burjoski was permitted to continue with her presentation after receiving a warning that she refused to abide. There is nothing preventing Burjoski from voicing her opinion on these library books in another forum. The decision was ultimately about Burjoski's choice of words, which were, in the opinion of the WRDSB, derogatory and contrary to its Bylaws, the objectives of the *Education Act*, and potentially the *Human Rights Code*, as gender identity and expression are both explicitly listed as protected grounds under both the *Education Act* and the *Human Rights Code*.

33. In making its decision, the WRDSB sought to achieve, and did achieve, a reasonable balance between Burjoski's *Charter* right to free expression and the objectives of its Bylaws, its Equity and Inclusion Policy, the *Education Act*. It prioritized the maintenance of a safe and inclusive school environment for its community members and was in accordance with the requirements of reasonableness as set out in *Vavilov*.

34. Accordingly, I consider the decision of the WRDSB to be reasonable and would not give effect to this ground of review.

Was there a breach of procedural fairness?

35. Burjoski also argues that there is no doubt that the WRDSB owed her a duty of procedural fairness because it made a decision that "affects the rights, privileges, or interests" of individuals is enough to trigger the duty of fairness. She maintains that she was denied such procedural fairness (see: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817).

36. If any procedural fairness was owed to Burjoski, it was on the low end of the spectrum and it was not breached. The impact of the decision on Burjoski was relatively minimal. She was given an opportunity to speak about the library review process itself, as she requested to do in her request for delegation. It was only when she began to speak of topics irrelevant to those outlined in her request for a delegation that her presentation was interrupted with a warning. When she continued expressing her opinion about the content of books, and not the library review process, she was stopped by the Chair. In these circumstances and in this context, I consider that the restriction on her freedom of expression was minimal.

37. Like every administrative body, a school board such as WRDSB is "the master of its own procedure and need not assume the trappings of a court." Important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.

38. The WRDSB followed its own procedures in coming to a resolution to end Burjoski's presentation. Although the Bylaws do not specify how the board may stop a delegation, even where a mode of procedure is not prescribed by statute, any reasonable mode not expressly forbidden by law may be adopted (see: *Knight v. Indian Head School Division No 19*, [1990] 1 S.C.R. 653). The Chair did provide brief reasons when he referenced the delegation procedure and his concern that Burjoski's comments may have violated the *Human Rights Code*.

39. I consider that the process that was afforded to Burjowski was not unfair. She was given more than one opportunity to deliver her delegation on the topic approved in advance, but declined to do so even after she was reminded of its scope. I therefore would not give effect to this ground of review.

Was there a reasonable apprehension of bias in the decision?

40. Burjoski submits that the statements made by the Chair subsequent to the meeting can leave no doubt that the decision was motivated by bias. She submits that the Chair disparaged her comments as "transphobic"; inexplicably stated that she "questioned the right to exist of trans people"; claimed she had not been "respectful and courteous"; that she engaged in "hate" and "derogatory speech"; and that she had in fact caused "harm."

41. She argues that these comments are not reflective of a sober and impartial decision maker. She argues that a reasonable person would perceive that the decision maker in this case formed a biased opinion against Burjoski based on his own personal perspective on the issue. Because of this bias, Burjoski submits that the decision should be quashed.

42. The test for bias is objective. In this case, the question that must be answered is whether a reasonable, informed and right-minded person viewing all the facts would believe that the WRDSB had a "closed mind" before making the decision because they were not amenable to persuasion (see: *Citizens for Accountable and Responsible Education Niagara Inc v. Niagara District School Board*, 2015 ONSC 2058, 335 O.A.C. 101 (Div. Ct.)).

43. The only evidence of bias raised by Burjoski are statements that were made after the meeting. The WRDSB submits that the comments that Burjoski takes issue with merely support the decision that was made after the fact and do not in any way leave a reasonable person to believe that the Chair had a closed mind before he voted in support of the decision. In addition, the decision was made by five members of the elected WRDSB. The Chair also specifically passed the chair position to the Vice-Chair to preside over the vote. Having formed a reason for voting a certain way is not the same as being biased before the vote is cast.

44. I see no basis established upon which any finding of a reasonable apprehension of bias, or any actual bias, on the part of the WRDSB could be justified.

Conclusion

45. For these reasons, this application is dismissed.

Costs

46. The WRSDB has been successful in its response to this application and seeks its costs as a result.

47. Burjoski submits that the WRDSB should not receive any award of costs. Instead, she submits that the issue she has raised is of such public interest that no costs should be ordered.

48. I see no compelling reason why the usual approach as to awarding costs to the successful party should be departed from in this case. Although Burjoski's perspective on what students should and should not read may be shared by others, it is not of such a nature as to operate to insulate her from an order that she contribute to the costs of the opposing party when she initiates a court proceeding.

49. Costs fixed at $5000, inclusive of disbursements and applicable taxes, shall be paid by Burjoski to the WRDSB if demanded.

E.Stewart J.

I agree:
Lococo J.

I agree:
Williams J.

Released: November 29, 2023

CITATION: *Carolyn Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6506
DIVISIONAL COURT FILE NO.: Hamilton, DC-22-126-JR1
DATE: 20231129

ONTARIO SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

E.Stewart, Lococo and William, JJ.

B E T W E E N :

Carolyn Burjoski

Appellant

- and –

Waterloo Region District School Board

Respondent

REASONS FOR DECISION

Released: November 29, 2023

Province of Alberta

EDUCATION ACT

Statutes of Alberta, 2012
Chapter E-0.3

Current as of December 7, 2023

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
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Preamble

WHEREAS the following visions, principles and values are the foundation of the education system in Alberta;

WHEREAS education is the foundation of a democratic and civil society;

WHEREAS education inspires students to discover and pursue their aspirations and interests and cultivates a love of learning and the desire to be lifelong learners;

WHEREAS the role of education is to develop engaged thinkers who think critically and creatively and ethical citizens who demonstrate respect, teamwork and democratic ideals and who work with an entrepreneurial spirit to face challenges with resiliency, adaptability, risk-taking and bold decision-making;

WHEREAS students are entitled to welcoming, caring, respectful and safe learning environments that respect diversity and nurture a sense of belonging and a positive sense of self;

WHEREAS education is a shared responsibility and requires collaboration, engagement and empowerment of all partners in the education system to ensure that all students achieve their potential;

WHEREAS the educational best interest of the child is the paramount consideration in making decisions about a child's education;

WHEREAS parents have the right and the responsibility to make informed decisions respecting the education of their children;

WHEREAS parents have a prior right to choose the kind of education that may be provided to their children;

WHEREAS the Government of Alberta recognizes the importance of an inclusive education system that provides each student with the relevant learning opportunities and supports necessary to achieve success;

WHEREAS the Government of Alberta recognizes the importance of teaching essential knowledge to help students develop foundational competencies;

WHEREAS the Government of Alberta recognizes the need to smooth the transition for students between secondary education and post-secondary education or entry into the workforce;

WHEREAS the Government of Alberta recognizes the importance of enabling high quality and socially engaging learning

Limitations

2 The exercise of any right or the receipt of any benefit under this Act is subject to the limitations that are reasonable in the circumstances under which the right is being exercised or the benefit is being received.

Part 1
Access to Education

Right of access to education

3(1) Every person

(a) who at September 1 in a year is 6 years of age or older and younger than 19 years of age,

(b) who is a resident of Alberta, and

(c) who has a parent who is a resident of Canada,

is entitled to have access in that school year to an education program in accordance with this Act.

(2) A board may permit an individual

(a) who at September 1 in a year is younger than 6 years of age or older than 18 years of age, and

(b) who complies with subsection (1)(b) and (c),

to have access in that year to an education program in accordance with this Act.

2012 cE-0.3 s3;2019 c7 s4

Resident student

4(1) Subject to this section, a student is a resident student of the board of the school division in which the student's parent resides.

(2) For the purposes of this section and section 59,

(a) a student who is in the care of a foster parent under the *Child, Youth and Family Enhancement Act* is deemed to be a resident student of the board of the school division in which the foster parent resides, unless subsection (5) applies, and

(b) a student who has a disability and is the subject of an agreement under the *Family Support for Children with Disabilities Act* is deemed to be a resident student of the board of the school division in which the student resides.

(a) act as the primary guide and decision-maker with respect to the child's education,

(b) take an active role in the child's educational success, including assisting the child in complying with section 31,

(c) ensure that the child attends school regularly,

(d) ensure that the parent's conduct contributes to a welcoming, caring, respectful and safe learning environment,

(e) co-operate and collaborate with school staff to support the delivery of supports and services to the child,

(f) encourage, foster and advance collaborative, positive and respectful relationships with teachers, principals, other school staff and professionals providing supports and services in the school, and

(g) engage in the child's school community.

2012 cE-0.3 s32;2019 c7 s9

Board responsibilities

33(1) A board, as a partner in education, has the responsibility to

(a) deliver appropriate education programming to meet the needs of all students enrolled in a school operated by the board and to enable their success,

(b) be accountable and provide assurances to students, parents, the community and the Minister for student achievement of learning outcomes,

(c) provide, where appropriate, for the engagement of parents, students, staff and the community, including municipalities and the local business community, in board matters, including the board's plans and the achievement of goals and targets within those plans,

(d) ensure that each student enrolled in a school operated by the board and each staff member employed by the board is provided with a welcoming, caring, respectful and safe learning environment that respects diversity and fosters a sense of belonging,

(e) provide a continuum of supports and services to students that is consistent with the principles of inclusive education,

(f) collaborate with municipalities, other boards and community-based service agencies in order to effectively

address the needs of all students and manage the use of public resources,

(g) collaborate with post-secondary institutions and the community to enable smooth transitions for students from secondary to post-secondary education,

(h) establish and maintain governance and organizational structures that promote student well-being and success, and monitor and evaluate their effectiveness,

(i) ensure effective stewardship of the board's resources,

(j) recruit the superintendent and entrust the day-to-day management of the school division to the staff through the superintendent,

(k) develop and implement a code of conduct that applies to trustees of the board, including definitions of breaches and sanctions, in accordance with principles set out by the Minister by order,

(l) comply with all applicable Acts and regulations,

(m) establish appropriate dispute resolution processes, and

(n) carry out any other matters that the Minister prescribes.

(2) A board shall establish, implement and maintain a policy respecting the board's obligation under subsection (1)(d) to provide a welcoming, caring, respectful and safe learning environment that includes the establishment of a code of conduct for students that addresses bullying behaviour.

(3) A code of conduct established under subsection (2) must

(a) be made publicly available,

(b) be reviewed every year,

(c) be provided to all staff of the board, students of the board and parents of students of the board,

(d) contain the following elements:

(i) a statement of purpose that provides a rationale for the code of conduct, with a focus on welcoming, caring, respectful and safe learning environments;

(ii) one or more statements that address the prohibited grounds of discrimination set out in the *Alberta Human Rights Act*;

(iii) one or more statements about what is acceptable behaviour and what is unacceptable behaviour, whether or not it occurs within the school building, during the school day or by electronic means;

(iv) one or more statements about the consequences of unacceptable behaviour, which must take account of the student's age, maturity and individual circumstances, and which must ensure that support is provided for students who are impacted by inappropriate behaviour, as well as for students who engage in inappropriate behaviour,

and

(e) be in accordance with any further requirements established by the Minister by order.

(4) An order of the Minister under subsection (1)(k) or (3)(e) must be made publicly available.

2012 cE-0.3 s33;2019 c7 s10;2023 c9 s7

Exemption from section 33

33.1 The Lieutenant Governor in Council may, by order, exempt an accredited private school or a class of accredited private schools from the operation of all or part of section 33.

2019 c7 s11

Trustee responsibilities

34 A trustee of a board, as a partner in education, has the responsibility to

(a) fulfil the responsibilities of the board as set out in section 33,

(b) be present and participate in meetings of the board and committees of the board,

(c) comply with the board's code of conduct, and

(d) engage parents, students and the community in matters related to education.

Most Negative Treatment: Distinguished
Most Recent Distinguished: James v. Canada (Citizenship and Immigration) | 2023 FC 1425, 2023 CarswellNat 4212, 99 Imm. L.R. (4th) 164, 2023 A.C.W.S. 5294 | (F.C., Oct 26, 2023)

2019 SCC 65, 2019 CSC 65
Supreme Court of Canada

Canada (Minister of Citizenship and Immigration) v. Vavilov

2019 CarswellNat 7883, 2019 CarswellNat 7884, 2019 SCC 65, 2019 CSC 65, [2019] 4 S.C.R. 653, [2019] 4 R.C.S. 653, [2019] S.C.J. No. 65, 312 A.C.W.S. (3d) 460, 441 D.L.R. (4th) 1, 59 Admin. L.R. (6th) 1, 69 Imm. L.R. (4th) 1, EYB 2019-335761

Minister of Citizenship and Immigration (Appellant) and Alexander Vavilov (Respondent) and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: December 4-6, 2018
Judgment: December 19, 2019
Docket: 37748

Proceedings: affirming *Vavilov v. Canada (Citizenship and Immigration)* (2017), 2017 CAF 132, 2017 CarswellNat 9490, 2017 CarswellNat 2791, 2017 FCA 132, [2018] 3 F.C.R. 75, 30 Admin. L.R. (6th) 1, [2017] F.C.J. No. 638, 52 Imm. L.R. (4th) 1, David Stratas J.A., Mary J.L. Gleason J.A., Wyman W. Webb J.A. (F.C.A.); reversing *Vavilov v. Canada (Minister of Citizenship and Immigration)* (2015), [2016] F.C.R. 39, 38 Imm. L.R. (4th) 110, 2015 FC 960, 2015 CarswellNat 3740, 2015 CarswellNat 4747, 2015 CF 960, B. Richard Bell J. (F.C.)

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Terrence J. O'Sullivan, Paul Michell, for Intervener, Council of Canadian Administrative Tribunals
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Guy Régimbald, for Intervener, Canadian Bar Association
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David Cote (written), Subodh Bharati (written), for Intervener, Community & Legal Aid Services Programme
Guillaume Cliche-Rivard, Peter Shams, for Intervener, Association québécoise des avocats et avocates en droit de l'immigration
Nicholas McHaffie, for Intervener, First Nations Child & Family Caring Society of Canada
Daniel Jutras, Audrey Boctor, Olga Redko, Edward Béchard Torres — amicus curiae

Subject: Civil Practice and Procedure; Constitutional; Immigration; Public
Related Abridgment Classifications
Administrative law
III Standard of review
III.2 Reasonableness
III.2.c Miscellaneous
Immigration and citizenship
VII Citizenship
VII.2 Citizenship by birth
VII.2.a General principles
Headnote
Administrative law --- Standard of review — Reasonableness — Miscellaneous
Applicant's parents were foreign agents who entered Canada and assumed identities of deceased Canadians — Parents returned to Russia from United States (US), and applicant's passport and US citizenship were revoked — Applicant amended birth certificate to parents' true identities to obtain Certificate of Canadian Citizenship — Registrar cancelled certificate as parents were not lawfully Canadian citizens or permanent residents and were employees/representatives of foreign government under s. 3(2)(a) of Citizenship Act — Applicant's application for judicial review was dismissed on basis that anyone who moved to Canada with goal of establishing life to further foreign intelligence operation was in service of, or employee/representative of, foreign government — Applicant's appeal to Federal Court was dismissed and appeal to Federal Court of Appeal was allowed — Minister of Citizenship and Immigration appealed — Appeal dismissed — New course was established for reviewing merits

of administrative determinations — Reasonableness is presumptive standard for review and can be rebutted where legislature intends different standard to apply, or where rule of law requires it — Rationales including specialized expertise may be reasons for legislature to delegate decision-making authority, but very fact that legislature opted to delegate authority was basis for default position of reasonableness review, and expertise was no longer relevant factor, as it had been using contextual review approach — Where legislature has provided for appeal from administrative decision to court, there is departure from reasonableness standard and court hearing appeal should apply appellate standards of review — Rule of law requires correctness standard for constitutional questions, general questions of law of central importance to legal system as whole, and questions regarding jurisdictional boundaries between administrative bodies — "Matters of true jurisdiction" is not distinct category attracting correctness review — Focus of reasonableness review must be on decision made, including both reasoning process and outcome — Reasonable decision is justified, transparent and intelligible, and is justified in relation to relevant legal and factual constraints.

Immigration and citizenship --- Citizenship — Citizenship by birth — General principles

Applicant's parents were foreign agents who entered Canada and assumed identities of deceased Canadians — Parents returned to Russia from United States (US) and applicant's passport and US citizenship were revoked — Applicant amended birth certificate to parents' true identities to obtain Certificate of Canadian Citizenship — Registrar cancelled certificate as parents were not lawfully Canadian citizens or permanent residents and were employees/representatives of foreign government under s. 3(2)(a) of Citizenship Act — Applicant's application for judicial review was dismissed on basis that anyone who moved to Canada with goal of establishing life to further foreign intelligence operation was in service of, or employee/representative of, foreign government — Applicant's appeal to Federal Court was dismissed and appeal to Federal Court of Appeal was allowed — Minister of Citizenship and Immigration appealed — Appeal dismissed — Standard of review was reasonableness — Registrar's determination was not reasonable in finding that applicant's parents had been other representatives or employees in Canada of foreign government within meaning of s. 3(2)(a) of Act — Registrar failed to justify her interpretation in light of constraints imposed by s. 3 of Act considered as whole, and by other legislation and international treaties that inform purpose of s. 3, by jurisprudence on interpretation of s. 3(2)(a), and by potential consequences of her interpretation — Section 3(2)(a) of Act was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities — Officials responsible for files were aware that s. 3(2)(a) of Act was informed by principle that individuals subject to exception were not obliged to law of Canada, and were also aware that interpretation they had adopted was novel one — Registrar's determination failed to provide rationale for expanded interpretation of Act — Registrar's determination had same effect as revocation of citizenship Citizenship Act, R.S.C. 1985, c. C-29, s 3(2)(a).

Droit administratif --- Norme de contrôle — Caractère raisonnable — Divers

Parents du requérant étaient des agents étrangers qui sont entrés au Canada et ont usurpé l'identité de deux Canadiens décédés — Parents sont retournés en Russie à partir des États-Unis et le passeport ainsi que la citoyenneté américaine du requérant ont été révoqués — Requérant a modifié son certificat de naissance et utilisé la véritable identité de ses parents dans le but d'obtenir un certificat de citoyenneté canadienne — Greffière a annulé le certificat au motif que les parents n'étaient pas légalement citoyens canadiens ou résidents permanents, mais étaient des représentants ou employés au service d'un gouvernement étranger pour les besoins de l'art. 3(2)a) de la Loi sur la citoyenneté — Demande du requérant en contrôle judiciaire a été rejetée au motif que quiconque déménage au Canada avec l'objectif explicite de s'établir afin de poursuivre une opération de renseignements étrangère le faisait au service d'un gouvernement étranger ou en tant que représentant ou employé au service d'un tel gouvernement — Appel du requérant à la Cour fédérale a été rejeté et l'appel à la Cour d'appel fédérale a été accueilli — Ministre de la Citoyenneté et de l'Immigration a formé un pourvoi — Pourvoi rejeté — Nouvelle voie a été tracée pour contrôler une décision administrative au fond — Norme de la décision raisonnable est la norme de contrôle présumée et cette présomption peut être réfutée si l'intention du législateur est qu'une autre norme de contrôle s'applique ou dans les cas où la primauté du droit l'exige — Si l'expertise spécialisée et d'autres considérations peuvent justifier qu'une législature prévoit la délégation du pouvoir décisionnel, le simple fait que la législature ait choisi de prévoir une délégation de pouvoir constituait la base d'une approche par défaut justifiant l'application de la norme de la décision raisonnable et l'expertise n'était plus un facteur pertinent, en ce qu'elle avait retenu l'approche consistant à procéder à un contrôle contextuel — Lorsque la législature a prévu que l'appel à l'encontre d'une décision rendue en matière administrative doit être interjeté devant un tribunal en particulier, on s'écarte de la norme de la décision raisonnable et le tribunal saisi de l'appel devrait appliquer les normes de contrôle applicables en appel — Primauté du droit requiert que la norme de la décision correcte s'applique aux questions

constitutionnelles, aux questions de droit générales d'importance capitale pour le système juridique dans son ensemble et aux questions liées aux délimitations des compétences respectives d'organismes administratifs — [TRADUCTION] « Véritables questions de compétence » ne constituent pas une catégorie à part justifiant l'application de la norme de la décision correcte — Contrôle d'une décision en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision — Décision raisonnable est justifiée, intelligible et transparente et est justifiée par rapport aux contraintes juridiques et factuelles.

Immigration et citoyenneté --- Citoyenneté — Citoyenneté à la naissance — Principes généraux

Parents du requérant étaient des agents étrangers qui sont entrés au Canada et ont usurpé l'identité de deux Canadiens décédés — Parents sont retournés en Russie à partir des États-Unis et le passeport ainsi que la citoyenneté américaine du requérant ont été révoqués — Requérant a modifié son certificat de naissance et utilisé la véritable identité de ses parents dans le but d'obtenir un certificat de citoyenneté canadienne — Greffière a annulé le certificat au motif que les parents n'étaient pas légalement citoyens canadiens ou résidents permanents, mais étaient des représentants ou employés au service d'un gouvernement étranger pour les besoins de l'art. 3(2)a) de la Loi sur la citoyenneté — Demande du requérant en contrôle judiciaire a été rejetée au motif que quiconque déménage au Canada avec l'objectif explicite de s'établir afin de poursuivre une opération de renseignements étrangère le faisait au service d'un gouvernement étranger ou en tant que représentant ou employé au service d'un tel gouvernement — Appel du requérant à la Cour fédérale a été rejeté et l'appel à la Cour d'appel fédérale a été accueilli — Ministre de la Citoyenneté et de l'Immigration a formé un pourvoi — Pourvoi rejeté — Norme de contrôle applicable était celle de la décision raisonnable — Décision de la greffière n'était pas raisonnable en ce qu'elle a conclu que les parents du requérant avaient été les représentants ou employés au service au Canada d'un gouvernement étranger au sens de l'art. 3(2) de la Loi — Greffière n'a pas justifié son interprétation à la lumière des contraintes qu'imposent l'art. 3 de la Loi pris dans son ensemble, d'autres lois et traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence relative à l'interprétation de l'art. 3(2)a), et les conséquences possibles de son interprétation — Article 3(2)a) de la Loi n'était pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques — Fonctionnaires chargées des dossiers savaient que l'art. 3(2)a) de la Loi reposait sur le principe que les personnes faisant l'objet de l'exception n'étaient pas assujetties aux lois canadiennes et étaient également au fait du caractère inédit de l'interprétation adoptée — Décision de la greffière ne comprenait pas les motifs justifiant une interprétation élargie de la Loi — Décision de la greffière a eu le même effet qu'une révocation de la citoyenneté.

The applicant was born in Canada after his parents entered Canada from Russia and assumed the identities of two deceased Canadians. The parents were issued passports, moved to France and then to the United States, where they obtained American citizenship. The parents were exposed as unregistered agents of a foreign government engaged in the paid collection of intelligence. In 2010, the applicant's parents were returned to Russia via a spy swap and the applicant's passport and American citizenship were revoked. The applicant moved to Russia and was issued a new identity. The applicant subsequently attempted to obtain a Canadian passport after amending his birth certificate to his parents' true identities. The applicant obtained a Certificate of Canadian Citizenship, but the registrar cancelled the certificate on the ground that the applicant's parents were not lawfully Canadian citizens or permanent residents, but were employees or representatives of a foreign government for the purposes of s. 3(2)(a) of the Citizenship Act. The applicant's application for judicial review was dismissed on the basis that anyone who moved to Canada with the explicit goal of establishing life to further foreign intelligence operation, in Canada or another country, was doing so in the service of, or as an employee or representative of, a foreign government.

The applicant's appeal to the Federal Court was dismissed.

The applicant's appeal to the Federal Court of Appeal was allowed. The appellate court found the registrar's decision to revoke the applicant's citizenship was not supportable, defensible or acceptable, so it was unreasonable. The applicant's parents were not "employee[s] in Canada of a foreign government" under s. 3(2)(a) of the Act, which meant that this paragraph did not apply. The purpose of the paragraph was to prohibit the Canadian-born children of employees of foreign governments from obtaining Canadian citizenship. The intent of the amendment of the paragraph was to ensure it applied only to those employees who benefit from diplomatic privileges and immunities from civil and/or criminal law. As such, "employee[s] in Canada of a foreign government" included only those who enjoyed diplomatic privileges and immunities under the Vienna Convention on Diplomatic Relations. The appellate court found the types of privileges accorded to diplomats and their families were not consistent with the obligations of citizenship, which was why they could not acquire citizenship. People subject to Canadian

laws have duties and responsibilities to Canada and a person born to such a person becomes a Canadian citizen upon birth. Diplomatic immunity is required to trigger s. 3(2)(a). At no time did the applicant's parents enjoy any immunity.

The appellate court found the registrar's approach was inadequate and unacceptable. There was a failure to consider the context and purpose of the section. The registrar adopted the reasoning of an analyst, which had only a very short paragraph on legislative history and failed to have any consideration of other parts of s. 3(2). On the facts, s. 3(1)(a) was the governing provision. As a person born in Canada in 1994, the applicant was entitled to citizenship.

The Minister of Citizenship and Immigration appealed.

Held: The appeal was dismissed.

Per Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.: A new course was established for reviewing the merits of an administrative determination. Reasonableness is the presumptive standard for review. This standard can be rebutted where the legislature intends a different standard to apply, or where the rule of law requires it.

Rationales including specialized expertise may be reasons for a legislature to delegate decision-making authority, but the very fact that the legislature opted to delegate authority was the basis for a default position of reasonableness review, and expertise was no longer a relevant factor, as it had been using a contextual review approach.

Where the legislature has provided for an appeal from an administrative decision to a court, there is a departure from the reasonableness standard and the court hearing the appeal should apply appellate standards of review.

The rule of law requires a correctness standard for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between administrative bodies. Merely being of wider public concern, or touching on an important issue, is insufficient to meet the test of a general question of law of central importance. "Matters of true jurisdiction" is not a distinct category attracting a correctness review. Other categories might arise in future cases, but new categories of correctness review should not be routinely established.

The focus of a reasonableness review must be on the decision made, including both the reasoning process and the outcome. Reasonableness is a single standard, and contextual elements of a decision do not modulate the standard. Reasons should be read in light of the record and recognize that administrative decision-makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge. A reasonable decision is justified, transparent and intelligible, and is justified in relation to relevant legal and factual constraints. Where no reasons have been provided, the determination will still be examined in the light of relevant constraints, although it is more likely that the analysis will focus on the outcome rather than the reasoning process.

In the case at bar, the standard of review was reasonableness. The registrar's determination was not reasonable in finding that the applicant's parents had been other representatives or employees in Canada of a foreign government within the meaning of s. 3(2)(a) of the Act. The registrar failed to justify her interpretation in the light of the constraints imposed by s. 3 of the Act considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Section 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. What matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. The applicant raised many of these considerations but the registrar failed to address them in her reasons and did not perform more than a cursory review of legislative history.

The officials responsible for the files were aware that s. 3(2)(a) of the Act was informed by the principle that individuals subject to the exception were not obliged to the law of Canada, and they were also aware that the interpretation they had adopted was a novel one. The registrar knew this but failed to provide a rationale for this expanded interpretation. Rules concerning citizenship require a high degree of interpretive consistency. The registrar's determination had the same effect as a revocation of citizenship.

Per Abella, Karakatsanis JJ. (concurring): The majority decision fundamentally reoriented the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. The majority's framework rested on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignored the specialized expertise of administrative decision-makers. Correctness review was permitted only for questions "of central importance to the legal system and outside the specialized expertise of the adjudicator". Broadening this category from its original characterization unduly expanded the issues available for judicial substitution. The majority's reliance on the

"presumption of consistent expression" in relation to the single word "appeal" was misplaced and disregarded long-accepted institutional distinctions between how courts and administrative decision-makers function. If an applicant were to challenge multiple aspects of an administrative determination, some falling within an appeal clause and others not, complexity and barriers to access to justice could arise. The judgment disregarded precedent and stare decisis and disregarded the high threshold necessary to overturn previous decisions.

A more modest approach was justified. A standard of review framework with a meaningful rule of deference, based on both the legislative choice to delegate decision-making authority to an administrative actor and on the specialized expertise that these decision-makers possess and develop in applying their mandates, was required. Outside of the correctness categories from earlier caselaw, and absent clear and explicit legislative direction on the standard of review, administrative decisions should be reviewed for reasonableness. The category of "true questions of jurisdiction" should be eliminated. The approach to reasonableness should focus on deference. Deference informs the attitude a reviewing court must adopt towards an administrative decision-maker, affects how a court frames the question it must answer, and affects how a reviewing court evaluates challenges to an administrative decision.

In the case at bar, the standard of review was reasonableness. The registrar's reasons failed to respond to the applicant's extensive and compelling submissions about the objectives of s. 3(2)(a) of the Act. The analyst misunderstood arguments on this point. The text of s. 3(2)(c) could be seen as undermining the registrar's interpretation, as the language suggests that s. 3(2)(a) covers only those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

Le requérant est né au Canada après que ses parents soient arrivés au Canada en provenance de la Russie et aient usurpé l'identité de deux Canadiens décédés. Les parents ont obtenu des passeports, ont déménagé en France puis aux États-Unis, où ils ont obtenu la citoyenneté américaine. Les parents ont été démasqués en tant qu'agents non accrédités d'un gouvernement étranger se livrant à la collecte rémunérée de renseignements. En 2010, les parents du requérant sont retournés en Russie à la suite d'un échange d'espions et le passeport du requérant ainsi que sa citoyenneté américaine ont été révoqués. Le requérant s'est installé en Russie et a obtenu une nouvelle identité. Par la suite, le requérant a tenté d'obtenir un passeport canadien après avoir modifié son certificat de naissance et utilisé la véritable identité de ses parents. Le requérant a obtenu un certificat de citoyenneté canadienne, mais la greffière a annulé le certificat au motif que les parents du requérant n'étaient pas légalement citoyens canadiens ou résidents permanents, mais étaient des représentants ou employés au service d'un gouvernement étranger pour les besoins de l'art. 3(2)a) de la Loi sur la citoyenneté. La demande du requérant en contrôle judiciaire a été rejetée au motif que quiconque déménage au Canada avec l'objectif explicite de s'établir afin de poursuivre une opération de renseignements étrangère, au Canada ou dans un autre pays, le faisait au service d'un gouvernement étranger ou en tant que représentant ou employé au service d'un tel gouvernement.

L'appel du requérant à la Cour fédérale a été rejeté.

L'appel du requérant à la Cour d'appel fédérale a été accueilli. La Cour d'appel a estimé que la décision de la greffière de révoquer la citoyenneté du requérant n'appartenait pas aux décisions acceptables ou justifiables et n'était donc pas raisonnable. Les parents du requérant n'étaient pas « au service au Canada d'un gouvernement étranger » en vertu de l'art. 3(2)a) de la Loi, ce qui signifiait que ce paragraphe ne s'appliquait pas. L'objectif de ce paragraphe était d'interdire que les enfants nés au Canada de parents au service d'un gouvernement étranger n'obtiennent la citoyenneté canadienne. L'intention de la modification à ce paragraphe était de s'assurer qu'il s'appliquât seulement aux employés qui bénéficiaient de privilèges diplomatiques et d'immunités de juridiction civile et/ou pénale. Comme telles, les personnes « au service au Canada d'un gouvernement étranger » comprenaient seulement celles qui jouissaient de privilèges et immunités diplomatiques conférés par la Convention de Vienne sur les relations diplomatiques. La Cour d'appel a conclu que les types de privilèges conférés aux diplomates et à leur famille n'étaient pas compatibles avec les obligations de la citoyenneté, ce qui expliquait pourquoi ils ne pouvaient acquérir la citoyenneté. Les personnes assujetties aux lois canadiennes ont des obligations envers le Canada et une personne née d'une telle personne devient citoyen canadien au moment de sa naissance. L'immunité diplomatique est nécessaire pour l'application de ce paragraphe. Or, les parents du requérant n'ont bénéficié de quelque immunité que ce soit à aucun moment.

La Cour d'appel a conclu que l'approche de la greffière était inadéquate et inacceptable. Le contexte et l'objet de cet article n'ont pas été pris en compte. La greffière a fait sien le raisonnement de l'analyste, dont le rapport ne contenait qu'un très court paragraphe concernant l'origine législative et ne faisait aucun renvoi aux autres alinéas de l'art. 3(2). Sur la base des faits, l'art. 3(1) était la disposition principale. En tant que personne née au Canada en 1994, le requérant se qualifiait pour l'obtention de la citoyenneté.

Le ministre de la Citoyenneté et de l'Immigration a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Wagner, J.C.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin, JJ. : Une nouvelle voie a été tracée pour contrôler une décision administrative au fond. La norme de la décision raisonnable est la norme de contrôle présumée. Cette présomption peut être réfutée si l'intention du législateur est qu'une autre norme de contrôle s'applique ou dans les cas où la primauté du droit l'exige. Si l'expertise spécialisée et d'autres considérations peuvent toutes justifier qu'une législature prévoit la délégation du pouvoir décisionnel, le simple fait que la législature ait choisi de prévoir une délégation de pouvoir constituait la base d'une approche par défaut justifiant l'application de la norme de la décision raisonnable et l'expertise n'était plus un facteur pertinent, en ce qu'elle avait retenu l'approche consistant à procéder à un contrôle contextuel.

Lorsque la législature a prévu que l'appel à l'encontre d'une décision rendue en matière administrative doit être interjeté devant un tribunal en particulier, on s'écarte de la norme de la décision raisonnable et le tribunal saisi de l'appel devrait appliquer les normes de contrôle applicables en appel.

La primauté du droit requiert que la norme de la décision correcte s'applique aux questions constitutionnelles, aux questions de droit générales d'importance capitale pour le système juridique dans son ensemble et aux questions liées aux délimitations des compétences respectives d'organismes administratifs. Il n'est suffisant qu'une question soit simplement d'un plus grand intérêt public ou qu'elle soulève un sujet important pour satisfaire au critère de la question de droit d'importance capitale. Les [TRADUCTION] « véritables questions de compétence » ne constituent pas une catégorie à part justifiant l'application de la norme de la décision correcte. D'autres catégories sont susceptibles d'apparaître dans les décisions qui seront rendues plus tard, mais de nouvelles catégories justifiant l'application de la norme de la décision correcte ne devraient pas être établies avec légèreté.

Le contrôle d'une décision en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision. La norme de la décision raisonnable est une norme unique et les éléments contextuels d'une décision n'altèrent pas cette norme. Les motifs devraient être interprétés eu égard au dossier et reconnaître que l'on ne peut pas toujours s'attendre à ce que les décideurs administratifs déploient toute la gamme de techniques juridiques auxquelles on peut s'attendre de la part d'un avocat ou d'un juge. Une décision raisonnable est justifiée, intelligible et transparente et est justifiée par rapport aux contraintes juridiques et factuelles. Lorsqu'aucun motif n'a été fourni, la décision doit tout de même être examinée à la lumière des contraintes pertinentes, bien qu'il soit davantage probable que l'analyse se concentre sur le résultat plutôt que sur le raisonnement.

Dans le présent dossier, la norme de contrôle applicable était celle de la décision raisonnable. La décision de la greffière n'était pas raisonnable en ce qu'elle a conclu que les parents du requérant avaient été les représentants ou employés au service au Canada d'un gouvernement étranger au sens de l'art. 3(2) de la Loi. La greffière n'a pas justifié son interprétation à la lumière des contraintes qu'imposent l'art. 3 de la Loi pris dans son ensemble, d'autres lois et traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence relative à l'interprétation de l'art. 3(2)a), et les conséquences possibles de son interprétation. L'article 3(2)a) n'était pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques. Ce qui importe, pour les besoins de l'art. 3(2)a), n'est pas de savoir si une personne se livre à des activités au service d'un État étranger alors qu'elle se trouve au Canada, mais plutôt si la personne s'était vu accorder, à l'époque pertinente, des privilèges et immunités diplomatiques. Le requérant a soulevé plusieurs de ces considérations, mais la greffière n'en a pas traité dans ses motifs et n'a pas fait davantage que se livrer à un examen superficiel de l'historique législatif.

Les fonctionnaires chargées des dossiers savaient que l'art. 3(2)a) de la Loi reposait sur le principe que les personnes faisant l'objet de l'exception n'étaient pas assujetties aux lois canadiennes et étaient également au fait du caractère inédit de l'interprétation adoptée. La greffière avait connaissance des éléments susmentionnés, mais elle n'a pas motivé cette interprétation élargie. Les règles concernant la citoyenneté commandent une grande uniformité en matière d'interprétation. La décision de la greffière dans la présente affaire a eu le même effet qu'une révocation de la citoyenneté.

Abella, Karakatsanis, JJ. (souscrivant à l'opinion des juges majoritaires) : Les juges majoritaires réorientent complètement le rapport qui existait depuis des décennies entre les acteurs administratifs et la magistrature, en élargissant considérablement les circonstances dans lesquelles les juges généralistes pourront substituer leur propre opinion à celle des décideurs spécialisés qui exercent leur mandat au quotidien. Le cadre établi par les juges majoritaires reposait sur une conception du contrôle judiciaire qui était à la fois erronée et incomplète et qui négligeait sans raison valable l'expertise spécialisée des décideurs administratifs.

La norme de la décision correcte n'était applicable qu'à l'égard de questions qui sont « d'importance capitale pour le système juridique et qui échappent au domaine d'expertise de l'arbitre ». Étendre cette catégorie par rapport à son acception initiale avait pour conséquence d'étendre indûment les questions pour lesquelles les cours peuvent substituer leur propre opinion à celle des décideurs administratifs. Le fait que les juges majoritaires invoquent la « présomption d'uniformité d'expression » en se fondant uniquement sur le mot « appel » était malavisé et négligeait les distinctions institutionnelles qui sont reconnues depuis longtemps en ce qui concerne le mode de fonctionnement des cours et des décideurs administratifs. Si un requérant conteste plusieurs aspects de la décision administrative dont certains relèvent d'une disposition créant un droit d'appel et d'autres non, cela pourrait donner lieu à une incitation à la complexité et un obstacle à l'accès à la justice. Les motifs de la majorité ne tiennent pas compte des précédents et de la règle du stare decisis et du critère rigoureux auquel il faut satisfaire pour pouvoir écarter l'une des décisions de la Cour.

Une approche plus modeste était justifiée. Un cadre d'analyse de la norme de contrôle qui repose sur une règle de déférence significative et fondée à la fois sur le choix du législateur de déléguer des pouvoirs décisionnels à des acteurs administratifs et sur l'expertise spécialisée que ces décideurs possèdent et acquièrent au fur et à mesure qu'ils s'acquittent de leur mandat était nécessaire. Exception faite des catégories assujetties à la norme de la décision correcte établies dans une décision précédente, et à défaut de directives claires et explicites du législateur sur la norme de contrôle applicable, c'est la norme de la décision raisonnable qui s'applique au contrôle judiciaire des décisions administratives. La catégorie des « questions touchant véritablement à la compétence » devrait être éliminée. La conception du contrôle judiciaire selon la norme de la décision raisonnable devrait être centrée sur le principe de la déférence. La déférence influence l'attitude que la cour de révision doit adopter à l'égard du décideur administratif, influence la façon dont la cour formule la question à laquelle elle doit répondre et influe sur la façon dont elle évalue la contestation dont fait l'objet la décision administrative.

Dans le présent dossier, la norme de contrôle applicable était celle de la décision raisonnable. Dans ses motifs, la greffière n'a pas répondu aux arguments abondants et convaincants que le requérant a invoqués au sujet des objectifs de l'art. 3(2)a) de la Loi. L'analyste a mal compris les arguments sur ce point. Le libellé de l'art. 3(2)c) pouvait être perçu comme sapant l'interprétation de la greffière, car ce texte laisse croire que l'art. 3(2)a) ne vise que les personnes « au service au Canada d'un gouvernement étranger » qui jouissent de privilèges et immunités diplomatiques.

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Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade) (2007), 2007 FC 559, 2007 CarswellNat 1452, 2007 CF 559, 2007 CarswellNat 2819, 64 Imm. L.R. (3d) 67, 315 F.T.R. 1 (Eng.) (F.C.) — considered

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Canada (Minister of Citizenship & Immigration) v. Tobiass (1997), 1997 CarswellNat 1385, 1997 CarswellNat 1386, 118 C.C.C. (3d) 443, 151 D.L.R. (4th) 119, 10 C.R. (5th) 163, 131 F.T.R. 230 (note), [1997] 3 S.C.R. 391, 40 Imm. L.R. (2d) 23, 14 C.P.C. (4th) 1, 1 Admin. L.R. (3d) 1, 218 N.R. 81 (S.C.C.) — considered

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Crevier v. Quebec (Attorney General) (1981), [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1, 38 N.R. 541, 1981 CarswellQue 109, 1981 CarswellQue 109F (S.C.C.) — referred to

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Doré c. Québec (Tribunal des professions) (2012), 2012 SCC 12, 2012 CarswellQue 2048, 2012 CarswellQue 2049, (sub nom. *Doré v. Barreau du Québec)* 343 D.L.R. (4th) 193, 34 Admin. L.R. (5th) 1, (sub nom. *Doré v. Barreau du Québec)* 428 N.R. 146, [2012] 1 S.C.R. 395, (sub nom. *Doré v. Barreau du Québec)* 255 C.R.R. (2d) 289 (S.C.C.) — considered

Dunsmuir v. New Brunswick (2008), 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, D.T.E. 2008T-223, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, 329 N.B.R. (2d) 1, 844 A.P.R. 1, 2008 CSC 9, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 170 L.A.C. (4th) 1, 95 L.C.R. 65, [2008] 1 S.C.R. 190 (S.C.C.) — followed

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Generally — referred to

s. 3 — considered

s. 3(1) — considered

s. 3(1)(a) — considered

s. 3(1)(b) — referred to

s. 3(2) — considered

s. 3(2)(a) — considered

s. 3(2)(c) — considered

s. 10 — referred to

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s. 3 — referred to

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s. 4 — referred to

Sched. II — referred to

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Sched. II, Article 43 — referred to

Sched. II, Article 49 — referred to

Sched. II, Article 53 — referred to
Human Rights Code, R.S.B.C. 1996, c. 210
s. 32 — referred to
Immigration and Refugee Protection Act, S.C. 2001, c. 27
Generally — referred to

ss. 35-37 — referred to
Interpretation Act, R.S.C. 1985, c. I-21
Generally — referred to

s. 35(1) "diplomatic or consular officer" — considered
Municipal Government Act, R.S.A. 2000, c. M-26
s. 470 — referred to

s. 470(1) — referred to
Statutes considered by *Abella J., Karakatsanis J.*:
Administrative Tribunals Act, S.B.C. 2004, c. 45
Generally — referred to
Canadian Citizenship Act, R.S.C. 1970, c. C-19
s. 5(3)(b)(i) — considered

s. 5(3)(b)(ii) — considered
Citizenship Act, R.S.C. 1985, c. C-29
Generally — referred to

s. 3(1)(a) — considered

s. 3(2) — considered

s. 3(2)(a) — considered

s. 3(2)(c) — considered
Customs Tariff, S.C. 1997, c. 36
Generally — referred to
Foreign Missions and International Organizations Act, S.C. 1991, c. 41
Generally — referred to
Interpretation Act, R.S.C. 1985, c. I-21
s. 35(1) "diplomatic or consular officer" — considered
Ontario Human Rights Code, 1961-62, S.O. 1961-62, c. 93
s. 3 — considered
Securities Act, R.S.B.C. 1996, c. 418
s. 159 — referred to
Treaties considered by *Wagner C.J.C., Moldaver J., Gascon J., Côté J., Brown J., Rowe J., Martin J.*:
Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, 500 U.N.T.S. 223
Article II — considered
Vienna Convention on Consular Relations, 1963, C.T.S. 1974/25; 596 U.N.T.S. 261
Generally — referred to

Vienna Convention on Diplomatic Relations, 1961, C.T.S. 1966/29; 500 U.N.T.S. 95
Generally — referred to
Treaties considered by *Abella J., Karakatsanis J.*:
Vienna Convention on Consular Relations, 1963, C.T.S. 1974/25; 596 U.N.T.S. 261
Generally — referred to
Vienna Convention on Diplomatic Relations, 1961, C.T.S. 1966/29; 500 U.N.T.S. 95
Generally — referred to
Regulations considered by *Wagner C.J.C., Moldaver J., Gascon J., Côté J., Brown J., Rowe J., Martin J.*:
Citizenship Act, R.S.C. 1985, c. C-29
Citizenship Regulations, SOR/93-246

s. 26 — referred to

s. 26(3) — considered
Words and phrases considered:

diplomatic or consular officer or other representative or employee in Canada of a foreign government

Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a) of *Citizenship Act*, R.S.C. , 1985, c. C-29] applies to individuals who have not been granted diplomatic privileges and immunities in Canada.
Termes et locutions cités:

agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger

Notre examen de la décision de la greffière mène à la conclusion qu'il était déraisonnable de sa part de décider que les mots « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » [que l'on retrouve à l'art. 3(2)a) de la *Loi sur la citoyenneté*, L.R.C. 1985, c. C-29] visent les individus à qui on n'a pas accordé de privilèges et d'immunités diplomatiques au Canada.

APPEAL by Minister of Citizenship and Immigration from judgment reported at *Vavilov v. Canada (Citizenship and Immigration)* (2017), 2017 FCA 132, 2017 CarswellNat 2791, [2017] F.C.J. No. 638, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, 2017 CAF 132, 2017 CarswellNat 9490, [2018] 3 F.C.R. 75 (F.C.A.), granting application for judicial review of determination regarding citizenship.

POURVOI formé par le ministre de la Citoyenneté et de l'Immigration à l'encontre d'un jugement publié à *Vavilov v. Canada (Citizenship and Immigration)* (2017), 2017 FCA 132, 2017 CarswellNat 2791, [2017] F.C.J. No. 638, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, 2017 CAF 132, 2017 CarswellNat 9490, [2018] 3 F.C.R. 75 (F.C.A.), ayant accordé une demande en contrôle judiciaire d'une décision rendue en matière de citoyenneté.

***Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.*:**

1 This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 (S.C.C.)), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

2 In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) : that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

3 We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the Citizenship Act, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the Citizenship Regulations, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

I. Need for Clarification and Simplification of the Law of Judicial Review

4 Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

5 Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

6 In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir* , some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

7 The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir* 's promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir* , a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir* , the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) ; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (S.C.C.) , at para. 46; *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.) , at para. 55; *Canadian Artists' Representation / Le Front des artistes canadiens v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 (S.C.C.) , at para. 13; *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.) , at paras. 26 and 28; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) , at para. 25; *Dunsmuir* , at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.) , at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean* , at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.) , at para. 32; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 (S.C.C.) ("*CHRC*"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made

the analysis unwieldy: see, e.g., P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. 527.

8 In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see Dunsmuir , at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

9 The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770(S.C.C.) , at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

10 This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

11 The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.

12 These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir* 's promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

14 On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 C.J.A.L.P. 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 U.T.L.J. 458, at pp. 467-70.

15 In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

II. Determining the Applicable Standard of Review

16 In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

17 The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir* , at paras. 62-64; *McLean* , at para. 22) in order to identify the appropriate standard.

18 Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101(S.C.C.) , at para. 47; *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489(S.C.C.) , at paras. 24-27; *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.) , at paras. 56-57 and 129-31, 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.) , at paras. 43-44; *R. v. Bernard*, [1988] 2 S.C.R. 833 (S.C.C.) , at pp. 849-50.

19 On this point, we recall the observation of Gibbs J. in Queensland v. Commonwealth1977139 C.L.R. 585(Australia H.C.), which this Court endorsed in Craig , at para. 26:

> No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

20 Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig* , at paras. 28-30; *Henry* , at paras. 45-47; *Fraser* , at para. 135 (per Rothstein J., concurring in the result); Bernard , at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Canada (Minister of Indian Affairs & Northern Development) v. Ranville*, [1982] 2 S.C.R. 518(S.C.C.) , at p. 528; Bernard , at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740(S.C.C.) , at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary

to the underlying value behind that doctrine, namely, clarity and certainty in the law": Bernard , at p. 858. These considerations apply here.

21 Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in Dunsmuir , at para. 133, are still apt:

> [J]udicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied .... If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis] .... A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome ....

Regrettably, we find ourselves in a similar position following *Dunsmuir* . As Karakatsanis J. observed in Edmonton East, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review." While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson* , at para. 25, per Abella J.

22 As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing Dunsmuir , at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. Presumption That Reasonableness Is the Applicable Standard

23 Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

24 Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir* , at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the Constitution Act, 1867, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir* , at para. 31; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220(S.C.C.) , at pp. 236-37; *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048(S.C.C.) , at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

25 For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to

hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

26 Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227(S.C.C.) , the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.* , at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

27 In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.* , at p. 236; *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982(S.C.C.) , at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) , at pp. 591-92; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748(S.C.C.) , at paras. 50-53; *Dunsmuir* , at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93; see also Dunsmuir , at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa* , at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach, which was first set out in *Bibeault* , a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., Pezim , at pp. 591-92; *Southam*, at paras. 50-53; *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226(S.C.C.) , at paras. 28-29; *Deputy Minister of National Revenue v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100 (S.C.C.) , at paras. 28-32; *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, [2002] 1 S.C.R. 249 (S.C.C.) , at para. 50.

28 Unfortunately, this contextual analysis proved to be unwieldly and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

29 Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

30 While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa* , for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate

where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir* , at para. 27.

31 We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

32 That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

B. Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent

33 This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.) , at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

(1) Legislated Standards of Review

34 Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 (S.C.C.) , at paras. 31-32; *Khosa* , at paras. 18-19; *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.) , at para. 20; *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 (S.C.C.) , at para. 55; *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108 (S.C.C.) , at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587 (S.C.C.) , at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795 (S.C.C.) , at para. 28.

35 It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the Administrative Tribunals Act, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); Human Rights Code, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

(2) Statutory Appeal Mechanisms

36 We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Bhadauria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181 (S.C.C.) , at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

37 It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235(S.C.C.) , at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen* , at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

38 We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig* , at para. 27. Our conclusion is based on the following considerations.

39 First, there has been significant judicial and academic criticism of this Court's recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, "What is a 'reasonable decision'?" (2018), 31 C.J.A.L.P. 225, at p. 244; the Hon. J.T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 27, at p. 33; Daly, at pp. 541-42; Québec (Procureure générale) c. Montréal (Ville)2016 QCCA 210817 Admin. L.R. (6th) 328(C.A. Que.), at paras. 36-46; *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311(F.C.A.), at paras. 190-92, per Nadon J.A., concurring, and at 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1(Alta. C.A.), at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22(N.S. C.A.) , at paras. 250, 255-64 and 274-302, per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14(N.S. C.A.) , at paras. 9-14. These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

40 This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig* , at para. 29; *R. v. Robinson*, [1996] 1 S.C.R. 683 (S.C.C.) , at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory

rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa* , at para. 87, per Rothstein J., concurring in the result.

41 Second, there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.) , at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former "pragmatic and functional" approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., Pezim , at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739(S.C.C.) , at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan* , at paras. 30-31; *Dr. Q* , at para. 27; *Mattel*, at paras. 26-27; *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.) , at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476 (S.C.C.) , at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.) , at para. 7.

42 The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim* . In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities* , at paras. 9-19; *Monsanto* , at paras. 6-16.

43 Yet as, in *Dunsmuir* , *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

44 More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., Federal Courts Act, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.

45 That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.) , at p. 838.

46 Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative expertise — what it called the "specialization of duties" principle in Pezim , at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

47 The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

48 Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada's judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied "sparingly" (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was "all but complete": reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita* , at para. 35; *McLean* , at para. 22; *Edmonton East*, at para. 32; *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283(S.C.C.) , at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir* . A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

49 In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

50 We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

51 Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give

courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the Federal Courts Act, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see Khosa , at para. 34. Another example is the current version of s. 470 of Alberta's Municipal Government Act, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

52 Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

C. The Applicable Standard Is Correctness Where Required by the Rule of Law

53 In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir* , at para. 58.

54 When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir* , at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

55 Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the Constitution Act, 1982, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir* , para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.) .

56 The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

57 Although the *amici* questioned the approach to the standard of review set out in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) , a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the Charter (see,

e.g., *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.) , at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

(2) General Questions of Law of Central Importance to the Legal System as a Whole

58 In *Dunsmuir* , a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) , at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

59 As the majority of the Court recognized in *Dunsmuir* , the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir* , para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see Toronto (City) , at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.) , at para. 20; *Canadian National Railway* , at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (S.C.C.) , at para. 17; *Saguenay*, at para. 51; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.) ("*Mowat*"), at para. 22; *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29 (S.C.C.) , at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary* , at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

60 This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)* , at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary* , at para. 20); and the scope of parliamentary privilege (*Chagnon* , at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

61 We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458 (S.C.C.) , at para. 66; *McLean* , at para. 28; *Barreau du Québec c. Québec (Procureure générale)*, 2017 SCC 56, [2017] 2 S.C.R. 488 (S.C.C.) , at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, [2011] 3 S.C.R. 616 (S.C.C.) , at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean* , at paras. 28-31); whether a party to a confidential contract could bring

a complaint under a particular regulatory regime (*Canadian National Railway* , at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec* , at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

62 In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies

63 Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir* , para. 61. One such question arose in *Regina Police Assn. v. Regina (City) Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360 (S.C.C.) , in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, 2004 SCC 39, [2004] 2 S.C.R. 185 (S.C.C.) , the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

64 Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see British Columbia Telephone Co. , at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

D. A Note Regarding Jurisdictional Questions

65 We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see Dunsmuir , at para. 59; *Québec (Procureure générale) c. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3 (S.C.C.) , at para. 32. Since *Dunsmuir* , however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean* , at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin* , at paras. 32-36; *CHRC*, at paras. 31-41.

66 As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly City of Arlington v. Federal Communications Commission569 U.S. 290(U.S. Sup. Ct. 2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter

to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360(S.C.C.) ; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635 (S.C.C.) .

67 In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

68 Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in Arlington, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" ....

E. Other Circumstances Requiring a Derogation from the Presumption of Reasonableness Review

69 In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting Dunsmuir , at para. 145, per Binnie J., concurring.

70 However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from

the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

71 The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level — such that a statute comes to mean, simultaneously, both "yes" and "no" — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

72 We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756(S.C.C.) , this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, [2001] 1 S.C.R. 221 (S.C.C.) , at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see Domtar , at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and require a court to step in is not obvious. Given these practical difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

III. Performing Reasonableness Review

73 This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

74 In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": *amici curiae* factum, at para. 12.

75 We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.

A. Procedural Fairness and Substantive Review

76 Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review.

77 It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) , at p. 682; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817(S.C.C.) , at paras. 22-23; *Moreau-Bérubé* , at paras. 74-75; *Dunsmuir* , at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker* , at para. 21. In *Baker* , this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker* , at paras. 23-27; see also *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)*, 2004 SCC 48, [2004] 2 S.C.R. 650 (S.C.C.) , at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker* , at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

78 In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

79 Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869(S.C.C.) , at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine* , at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker* , "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

80 The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker* , at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment*: *Making Judicial Decisions* (2018), at p. 134; see also Sheppard , at para. 23.

81 Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker* , at para. 39. In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708(S.C.C.) , the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting Dunsmuir , at para. 47; see also *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3(S.C.C.) , at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

B. Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes

82 Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir* , at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.) , at para. 10; *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) , at para. 10.

83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) , that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan* , at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

84 As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see Dunsmuir , at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

86 Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir* , at paras. 47-49. In *Dunsmuir* , this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir* , "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

87 This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 (S.C.C.) , at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

C. Reasonableness Is a Single Standard That Accounts for Context

88 In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

89 Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa* , at para. 59; *Catalyst* , at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 (S.C.C.), at para. 44; *Wilson* , at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 (S.C.C.) , at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 (S.C.C.), at para. 53.

90 The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

D. Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given

91 A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

92 Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

93 An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see Dunsmuir , at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime

and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

94 The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

95 That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

96 Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines* , at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

97 Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267 (F.C.), at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn ....

98 As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the

decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135 (B.C. C.A.) , at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

E. A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision

99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir* , at paras. 47 and 74; *Catalyst* , at para. 13.

100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

101 What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

102 To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan* , at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139; see also *Mora Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151(F.C.), at paras. 57-59.

103 While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see Wright v. Nova Scotia (Human Rights Commission)2017 NSSC 1123 Admin. L.R. (6th) 110(N.S. S.C.); *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada*

(Minister of Citizenship and Immigration), 2016 FC 17 (F.C.), at para. 21) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Gamez Blas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92 (F.C.), at paras. 54-66; *Reid v. Ontario (Criminal Injuries Compensation Board)*, 2015 ONSC 6578 (Ont. Div. Ct.) ; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051 (F.C.A.) ; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520 (F.C.A.) , at para. 47).

104 Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

105 In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir* , at para. 47; *Catalyst* , at para. 13; *Nor-Man Regional Health Authority* , at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

106 It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

107 A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) Governing Statutory Scheme

108 Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst* , at paras. 15 and 25-28; see also Green , at para. 44. As Rand J. noted in *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.) , at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine , at para. 7; *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 SCC 14, [2010] 1 S.C.R. 427(S.C.C.) , at paras. 32-33; *Nor-Man Regional Health Authority* , at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)* , at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.) , at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see Delta Air Lines , at para. 18.

109 As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

110 Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) Other Statutory or Common Law

111 It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir* , at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (S.C.C.) , at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)* , at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir* , at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 (F.C.A.) , at paras. 93-98.

112 Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 Alta. L.R. 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

113 That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority* , at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines* , at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

114 We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with ... the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292(S.C.C.) , at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754 (S.C.C.) , at para. 40. Since *Baker* , it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker* , at paras. 69-71.

(c) Principles of Statutory Interpretation

115 Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

116 Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan* , at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

117 A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) , at para. 21, and *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) , at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., Interpretation Act, R.S.C. 1985, c. I-21.

118 This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

119 Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may

sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

120 But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601(S.C.C.) , at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

121 The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

122 It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405 (S.C.C.) , at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

123 There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

124 Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir* , at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52 (F.C.A.) ., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) Evidence Before the Decision Maker

125 It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker":*CHRC*, at para. 55; see also Khosa , at para. 64; *Dr. Q* , at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous

position of the first instance decision maker, apply equally in the context of judicial review: see *Housen* , at paras. 15-18; *Dr. Q* , at para. 38; *Dunsmuir* , at para. 53.

126 That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir* , para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see Southam, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker* , for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

(e) Submissions of the Parties

127 The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker* , at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

128 Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker* , at para. 39.

(f) Past Practices and Past Decisions

129 Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar* , "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

130 Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid ... conflicting results": *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.) , at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

131 Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker* , at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

132 As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) Impact of the Decision on the Affected Individual

133 It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker* , at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

134 Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84(S.C.C.) .

135 Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. Review in the Absence of Reasons

136 Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine , at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker* , at para. 43.

137 Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or

a law society renders a decision by holding a vote: see, e.g., *Catalyst* ; *Green* ; *Trinity Western University* . However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker* , at para. 44. For example, as McLachlin C.J. noted in *Catalyst* , "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw ... clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli* .

138 There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. A Note on Remedial Discretion

139 Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

140 Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see Delta Air Lines , at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

141 Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines* , at paras. 30-31.

142 However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (F.C.A.) , at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 S.C.R. 202 (S.C.C.) , at pp. 228-30; *Renaud c. Québec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855(S.C.C.) ; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772 (S.C.C.) , at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 (F.C.A.), at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.), at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 (Ont. C.A.) , at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may

also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.) , at paras. 45-51; *Alberta Teachers*, at para. 55.

IV. Role of Prior Jurisprudence

143 Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases — including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

144 This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

145 Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

V. Mr. Vavilov's Application for Judicial Review

146 The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of the Citizenship Act and cancelled his certificate of citizenship under s. 26(3) of the Citizenship Regulations. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

A. Facts

147 Mr. Vavilov was born in Toronto as Alexander Foley on [date omitted]. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

148 Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born,

the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

149 Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

150 Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

151 However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the Citizenship Act, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the Citizenship Regulations.

B. Procedural History

(1) Registrar's Decision

152 In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the Citizenship Regulations on the basis that he was not entitled to it. The Registrar summarized her position as follows:

> a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.
>
> b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.
>
> c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".
>
> d) Accordingly, pursuant to s. 3(2)(a) of the Citizenship Act, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the Citizenship Act (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully

> admitted to Canada for permanent residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

153 For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the Citizenship Act. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

154 In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the Citizenship Act": A.R., Vol. I, at p. 3. The report was dated June 24, 2014.

155 In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the Citizenship Act, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the Citizenship Act, which reads as follows:

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

156 The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the Interpretation Act and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase "other representative or employee in Canada of a foreign government."

157 The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the Canadian Citizenship Act, R.S.C. 1970, c. C-19, excluded from citizenship children whose "responsible parent" at the time of birth was:

> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

158 The analyst reasoned that because s. 3(2)(a) "makes reference to 'representatives or employees of a foreign government,' but does not link the representatives or employees to 'attached to or in the service of a foreign diplomatic mission or consulate in Canada' (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff'": A.R., vol. I, at p. 7.

159 Although the analyst acknowledged that "Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions", she concluded that they were nonetheless "unofficial employees or representatives" of Russia at the time of Mr. Vavilov's birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the Citizenship Act, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian Registrar of Citizenship "recall" Mr. Vavilov's certificate on the basis that he was not, and had never been, entitled to citizenship.

(2) Federal Court (Bell J.), 2015 FC 960, [2016] F.C.R. 39 (F.C.)

160 Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar's decision in the Federal Court pursuant to s. 22.1 of the Citizenship Act. His application was dismissed.

161 The Federal Court rejected Mr. Vavilov's argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court's view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

162 The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the Citizenship Act. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

163 Finally, the Federal Court was satisfied, given the evidence, that the Registrar's conclusion that Mr. Vavilov's parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

(3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75 (F.C.A.)

164 A majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal from the Federal Court's judgment and quashed the Registrar's decision.

165 The Court of Appeal unanimously rejected Mr. Vavilov's argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal's view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

166 The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the Citizenship Act was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

167 The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in Canada of a foreign government" in s.

3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

168 The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

C. Analysis

(1) Standard of Review

169 Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

170 When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the Citizenship Act lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

(2) Review for Reasonableness

171 The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the Citizenship Act.

172 In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the Citizenship Act in light of the constraints imposed by the text of s. 3 of the Citizenship Act considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

173 Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

(a) Section 3(2) of the Citizenship Act

174 The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the Citizenship Act. Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14, 1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

175 The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

176 As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

(b) The Foreign Missions and International Organizations Act and the Treaties It Implements

177 Before the Registrar, Mr. Vavilov argued that s. 3(2) of the Citizenship Act must be read in conjunction with both the Foreign Missions and International Organizations Act, S.C. 1991, c. 41 ("FMIOA"), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 ("*VCDR*"). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the FMIOA.

178 To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: Citizenship Act, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the Citizenship Act as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the Citizenship

Act to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that "[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State". Mr. Vavilov made the following submission to the Registrar:

> The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.
>
> Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.
>
> (A.R., vol. IV, at pp. 449-50)

179 In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67 (F.C.), a case which was referred to in the analyst's report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

> Of particular interest are the special rules relating to the jus soli, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reasons of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'
>
> In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'. Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Emphasis deleted.]
>
> (Brownlie, at pp. 392-93).

180 Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the Citizenship Act was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as "conform[ing] to international custom" and as having been drafted with the intention of "exclud[ing] children born in Canada to diplomats from becoming Canadian citizens": Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, "a number of other people would be affected such as those working for large

foreign corporations": ibid Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

181 In attempting to distinguish the meaning of the phrase "other representative or employee in Canada of a foreign government" from that of the term "diplomatic or consular officer", the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov's submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

182 It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa* , at para. 40; see also Pushpanathan , at para. 51; *Baker* , at para. 70; *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401 (S.C.C.) , at para. 39; *Hape* , at paras. 53-54; *B010 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (S.C.C.) , at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127 (S.C.C.) , at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398 (S.C.C.) , at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

(c) Jurisprudence Interpreting Section 3(2) of the Citizenship Act

183 Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the Citizenship Act in a footnote, she dismissed them as being irrelevant on the basis that they related only to "individuals whose parents maintained diplomatic status in Canada at the time of their birth". But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov's case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi* ; *Lee v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204 (F.C.); and *Hitti c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2007 FC 294, 310 F.T.R. 168 (Eng.) (F.C.) — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

184 In *Al-Ghamdi* , the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the Citizenship Act in reviewing a decision in which Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

> The only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats ....

185 The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the Citizenship Act and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi* , at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi* , at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the Charter, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an "extraordinary array of privileges under the *Foreign Missions and International Organizations*

Act": *Al-Ghamdi* , at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of the Charter, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi* , at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi* , at paras. 3, 9, 27, 28, 56 and 59.

186 In *Lee* , another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that "[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the Citizenship Act are children of individuals with diplomatic status": *Lee* , at para. 77. The court found in *Lee* that the "functional duties of the applicant's father" were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the Citizenship Act: para. 58. Rather, what mattered was only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

187 *Hitti* , the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the Citizenship Act, their holders had never been entitled to them. In that case, the applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti* , at paras. 6 and 9; see also Interpretation Act, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

188 What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi* , the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

(d) Possible Consequences of the Registrar's Interpretation

189 When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

> Well, usually the way we use section 3(2)(a) is for — you're right, for diplomats and that they don't — because they are not — they are not obliged ... to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status. But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that.
>
> (R.R. transcript, at pp. 87-88)

190 In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged ... to the law of Canada". They were also aware that the interpretation

they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

191 Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.) , in which Iacobucci J., writing for this Court, stated: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship": para. 68. This was reiterated in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.) , in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

192 It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 (S.C.C.) , at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

193 Moreover, we would note that despite following a different legal process, the Registrar's decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as "a kind of 'political death'" — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014), 40 Queen's L.J. 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada's position with respect to Mr. Vavilov's citizenship and recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the Citizenship Regulations and the revocation of an individual's citizenship (as set out in s. 10 of the Citizenship Act) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

D. Conclusion

194 Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the Citizenship Act considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

195 As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there

is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the Citizenship Act to apply to children of individuals who have not been granted diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

196 Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the Citizenship Act. He is a Canadian citizen.

E. Disposition

197 The appeal is dismissed with costs throughout to Mr. Vavilov.

***Abella, Karakatsanis JJ.*:**

198 Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227(S.C.C.) , this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

199 Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation's evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

200 We support the majority's decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of "true questions of jurisdiction". These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190(S.C.C.) .

201 But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court's jurisprudence for the last four decades. The majority's reasons are an encomium for correctness and a eulogy for deference.

The Evolution of Canadian Administrative Law

202 The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

203 In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

204 The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts — but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 Can. Bar Rev. 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour/Le Travail* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

205 Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around "reasonableness" and "correctness", and determining when each standard applies. On the one hand, "reasonableness" review expects courts to defer to decisions by specialized decision-makers that "are defensible in respect of the facts and law"; on the other, "correctness" review allows courts to substitute their own opinions for those of the initial decision-maker (*Dunsmuir* , at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

206 The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute "law" (Kevin M. Stack, "Overcoming Dicey in Administrative Law" (2018), 68 U.T.L.J. 293, at p. 294).

207 The canonical example of Dicey's approach at work is the House of Lords' decision in *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147(U.K. H.L.) , the judicial progenitor of "jurisdictional error". *Anisminic*

entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors" capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive*. [Emphasis added; p. 171.]

208 The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*, [1970] S.C.R. 425(S.C.C.) , and *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756 (S.C.C.) . These cases "took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal", and in each case, "th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal" (*Canada (Attorney General) v. P.S.A.C.*, [1991] 1 S.C.R. 614 (S.C.C.) , at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life* , for example, this Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell* , this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the Ontario Human Rights Code, 1961-62, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

209 As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service* Alliance, at p. 650; *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324(S.C.C.) , at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 C.J.A.L.P. 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R.A. MacDonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

210 In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the "jurisdictional error" model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir* , at para. 35; *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339(S.C.C.) , at para. 45; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, [2011] 3 S.C.R. 654(S.C.C.) , at para. 33; *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230(S.C.C.) , at para. 31). The Court instead endorsed an approach that respected the legislature's decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could "bristl[e] with ambiguities" and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.* , the decision was protected by a privative clause (pp. 230 and 234-36).

211 By championing "curial deference" to administrative bodies, *C.U.P.E.* embraced "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" (National Corn Growers , at p. 1336, per Wilson J., concurring;

Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles), [1993] 2 S.C.R. 756 (S.C.C.) , at p. 800). As one scholar has observed:

> ... legislatures and courts in ... Canada have come to settle on the idea that the functional capacities of administrative agencies — their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change — justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state*. [Emphasis added.]
>
> (Stack, at p. 310)

212 In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada's approach to administrative law — one based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

213 A new institutional relationship between the courts and administrative actors was thus being forged, based on "an understanding of the role of expertise in the modern administrative state" which "acknowledge[d] that judges are not always in the best position to interpret the law" (The Hon. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 Queen's L.J. 859, at p. 866).

214 In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048(S.C.C.) , the Court introduced the "pragmatic and functional" approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal's existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator "intend[ed] the question to be within the jurisdiction conferred on the tribunal" (p. 1087; see also p. 1088). If so, the tribunal's decision could only be set aside if it was "patently unreasonable" (p. 1086).

215 Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers* , Wilson J. noted that part of the process of moving away from Dicey's framework and towards a more sophisticated understanding of the role of administrative tribunals:

> ... has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

216 By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision ... [e]ven where the tribunal's enabling statute provides explicitly for appellate review" (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316(S.C.C.) , at p. 335). Of the factors relevant to setting the standard of

review, expertise was held to be "the most important" (*Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748(S.C.C.) , at para. 50).

217 Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise" (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) , at p. 591; see also *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722(S.C.C.) , at pp. 1745-46). Critically, the Court's willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

218 In *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982(S.C.C.) , the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault* , namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

219 Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.) , at paras. 21 and 29-34; *Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672 (S.C.C.) , at para. 45; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.) , at paras. 88-92 and 100).

220 Next came *Dunsmuir* , which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court's administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its "home" statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

221 Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para. 49). They noted that "in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (para. 49, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93).

222 Post-*Dunsmuir* , this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see Khosa , at para. 25; *R. v. Conway*, [2010] 1 S.C.R. 765(S.C.C.) , at para. 53; *British Columbia (Securities Commission) v. McLean*, [2013] 3 S.C.R.

895 (S.C.C.) , at paras. 30-33). Drawing on the concept of specialized expertise, the Court's post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker's interpretation of its home or closely-related statutes (see *Alberta Teachers' Association* , at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3 (S.C.C.) , at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise ... (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

223 And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293 (S.C.C.) , the majority recognized:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer .... [E]xpertise is something that inheres in a tribunal itself as an institution: "... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions". [Citation omitted; para. 33.]

224 The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

225 As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [2009] 2 S.C.R. 764 (S.C.C.) , *Alliance Pipeline Ltd. v. Smith*, [2011] 1 S.C.R. 160 (S.C.C.) , *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219 (S.C.C.) , and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80 (S.C.C.) , the Court applied the reasonableness standard without even *referring* to the presence of an appeal clause. When appeal clauses *were* discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

226 In *Khosa* , Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language ... a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 (S.C.C.) ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean* , decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque* , Gascon J. affirmed that

> [w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal .... [para. 38]

227 In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence

from this Court" (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that "a statutory right of appeal is not a new 'category' of correctness review" (para. 70).

228 By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir* 's promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

> *This contextual approach should be applied sparingly*. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" .... After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano* [*Edmonton East*], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano* [*Edmonton East*], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

229 In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir* , the meaning of "true questions of jurisdiction" and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

The Majority's Reasons

230 The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a "presumption of reasonableness review", this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as "expertise ... institutional experience ... proximity and responsiveness to stakeholders ... prompt[ness], flexib[ility], and efficien[cy]; and ... access to justice", the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

231 In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir* , at para. 49). As Iacobucci J. observed in *Southam*:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

232 Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.) , at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District)*

Welfare Administration Board v. O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157(S.C.C.) , at para. 53). Specialization and expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan* , at para. 36; *Dr. Q* at paras. 29-30; Pezim , at pp. 591-92 and 596).

233 All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.* , at p. 236; *McLean* , at para. 37). As Professor H.W. Arthurs said:

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.
>
> ("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

234 Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (National Corn Growers , at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.* , Dickson J. fused expertise and legislative intent by explaining that an administrative body's specialized expertise can be essential to achieving the purposes of a statutory scheme:

> The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

235 Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (Bradco Construction, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir* , the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean* , at para. 40; see also Conway , at para. 53; *Mowat*, at para. 30; *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, [2011] 3 S.C.R. 708(S.C.C.) , at para. 13; *Doré c. Québec (Tribunal des professions)*, [2012] 1 S.C.R. 395 (S.C.C.) , at para. 35; *Mouvement laïque* , at para. 46; *Khosa* , at para. 25; *Edmonton East*, at para. 33).

236 Although the majority's approach extolls respect for the legislature's "institutional design choices", it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

237 Nor are we persuaded by the majority's claim that "if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not". Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

238 We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on "the reality that ... those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Khosa* , at para. 25; see also *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, [2011] 3 S.C.R. 616 (S.C.C.) , at para. 53; *Edmonton East*, at para. 33).

239 The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates to expanded correctness review. The majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

240 In the majority's framework, deference gives way whenever the "rule of law" demands it. The majority's approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey's 19th century philosophy.

241 The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law" had to be "reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (para. 30). As discussed in *Dunsmuir* , the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 C.J.A.L.P. 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770(S.C.C.) , at para. 31, per Abella J.).

242 Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.) , at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

> ... the aims of administrative law ... generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.
>
> (Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

243 These goals are compromised when a narrow conception of the "rule of law" is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

244 The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room ... for both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 U.B.C. L. Rev. 443, at p. 483). We would leave *Dunsmuir* 's description of this category undisturbed. [1]

245 We also disagree with the majority's reformulation of "legislative intent" to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

246 In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

247 The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235(S.C.C.) , must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

248 In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect. [2]

249 In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (Pezim , at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

250 Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done. [3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66(S.C.C.) , that, absent exceptional

circumstances, the existence of a statutory right of appeal does not displace the presumption that the standard of reasonableness applies.[4] The majority, however, has inexplicably chosen the template proposed by the *amici*,[5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

251 The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

252 Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque* , at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. 527, at pp. 542-43; The Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 U.N.B.L.J. 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

253 The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa* , at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir* , which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

254 But the aspect of the majority's decision with the greatest potential to undermine both the integrity of this Court's decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

255 *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Craig v. R.*, [2012] 2 S.C.R. 489(S.C.C.) , the case about horizontal *stare decisis* on which the majority relies:

> The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J.,

> in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).
>
> Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled ....*
>
> Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585(H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:
>
> > No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

256 Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a "special justification", which must be over and above the belief that a prior case was wrongly decided (Kimble v. Marvel Entertainment, LLC135 S.Ct. 2401(U.S. Sup. Ct. 2015), at p. 2409; see also Halliburton Co. v. Erica P. John Fund, Inc.573 U.S. 258(U.S. Sup. Ct. 2014), at p. 266; Kisor v. Wilkie139 S.Ct. 2400(U.S. Sup. Ct. 2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

257 Similarly, the House of Lords "require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it" (*Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)* (1977), 51 T.C. 708(U.K. H.L.) , at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor (Jack)*, [2016] UKSC 5, [2016] 4 All E.R. 617(U.K. S.C.), at para. 19; *Willers v. Joyce*, [2016] UKSC 44, [2017] 2 All E.R. 383(U.K. S.C.), at para. 7; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897(U.K. S.C.), at paras. 22-23).

258 New Zealand's Supreme Court views "caution, often considerable caution" as the "touchstone" of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent "merely because, if the matter were being decided afresh, the Court might take a different view" (Couch v. Attorney-General (No. 2) [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

259 Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (Lee v. New South Wales Crime Commission [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *South Africa (Republic) v. Grootboom*[2010] ZACC 19 , 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.* [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

260 The virtues of horizontal *stare decisis* are widely recognized. The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (Kimble , at p. 2409, citing Payne v. Tennessee501 U.S. 808(U.S. Tenn. S.C. 1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Bedford v. Canada (Attorney General)*, [2013] 3 S.C.R. 1101(S.C.C.) , at para. 38; *R. v. Bernard*, [1988] 2 S.C.R. 833(S.C.C.) , at p. 849; *Canada (Minister of Indian Affairs & Northern Development) v. Ranville*, [1982] 2 S.C.R. 518(S.C.C.) , at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (Michigan v. Bay Mills Indian Community572 U.S. 782(U.S. Sup. Ct. 2014), at p. 798; Kimble , at p. 2409; Kisor , at p. 2422; see also *Camps Bay* , at pp. 55-56; Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012), 111 Mich. L. Rev. 1, at p. 28; Lewis F. Powell, Jr., "Stare Decisis and Judicial Restraint" (1990), 47 Wash. & Lee L. Rev. 281, at p. 288).

261 Respect for precedent also safeguards this Court's institutional legitimacy. The precedential value of a judgment of this Court does not "expire with the tenure of the particular panel of judges that decided it" (*Plourde c. Québec (Commission des relations du travail)*, [2009] 3 S.C.R. 465(S.C.C.) , at para. 13). American cases have stressed similar themes:

> There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.
>
> (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833(U.S. Sup. Ct. 1992), at p. 866; see also *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assoc.*, 450 U.S. 147(U.S. Sup. Ct. 1981), at p. 153, per Stevens J., concurring.)

262 Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

> overruling precedent damages the public's conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble a ticket valid only for the day of purchase.
>
> ("Overruling Precedent" (1986), 21 *Is.L.R.* 269, at p. 275)

263 The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

264 The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

265 The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa* , at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque* , at para. 38; *Edmonton East*, at paras. 27-31; see also McLean , at para. 21).

266 Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer* , at para. 22; *Casey* , at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance" (Knick v. Township of Scott, Pennsylvania139 S.Ct. 2162(U.S. Sup. Ct. 2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble* :

> ... an argument that we got something wrong — even a good argument to that effect — cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then.

> To reverse course, we require as well what we have termed a "special justification" — over and above the belief "that the precedent was wrongly decided." [Citation omitted; p. 2409.]

267 But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim* ; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132(S.C.C.) ; *Dr. Q* ; *Ryan* ; *Cartaway*; *VIA Rail*; *Proprio Direct inc. c. Pigeon*, [2008] 2 S.C.R. 195(S.C.C.) ; *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, [2009] 2 S.C.R. 678(S.C.C.) ; *McLean* ; *Bell Canada (2009)*; *ATCO Gas* ; *Mouvement laïque* ; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis and to "home statute" deference (*C.U.P.E.* ; *National Corn Growers* ; *Domtar Inc.* ; *Bradco Construction*; *Southam*; *Pushpanathan* ; *Alberta Teachers' Association* ; *Canadian Human Rights Commission*, among many others).

268 Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court's strong reluctance to overturn precedents that "represen[t] the considered views of firm majorities" (*Craig* , at para. 24; *Fraser v. Ontario (Attorney General)*, [2011] 2 S.C.R. 3(S.C.C.) , at para. 57; see also *Rascal Trucking Ltd. v. Nishi*, [2013] 2 S.C.R. 438(S.C.C.) , at paras. 23-24), or to overrule decisions of a "recent vintage" (*Fraser* , at para. 57; see also Nishi , at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a 34-year-old precedent; *R. v. Henry*, [2005] 3 S.C.R. 609(S.C.C.) , overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

269 The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean* , for example, this Court acknowledged that a limitations period in British Columbia's Securities Act [6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

270 The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; Kimble , at pp. 2410-11). By changing the entire status quo, the majority's approach will undermine legal certainty — "the foundational principle upon which the common law relies" (*Bedford* , at para. 38; see also Cromwell, at p. 315).

271 Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our past decisions is even less compelling (*R. v. Binus*, [1967] S.C.R. 594(S.C.C.) , at p. 601; see also Kimble , at p. 2409; Kisor , at pp. 2422-23; Bilski v. Kappos561 U.S. 59(U.S. Sup. Ct. 2010), at pp. 601-2).

272 Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor* . There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (Bowles v. Seminole Rock & Sand Co.325 U.S. 410(U.S. Sup. Ct. 1945); Auer v. Robbins519 U.S. 452(U.S. Sup. Ct. 1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained

at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by lower courts thousands of times (p. 2422). She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

> ... even if we are wrong about *Auer*, "Congress remains free to alter what we have done." In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history — and Congress's continuing ability to take up Kisor's arguments — we would need a particularly "special justification" to now reverse *Auer*. [Citations omitted; pp. 2422-23]

273 In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 U.N.B.L.J. 87; The Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 C.J.A.L.P. 67, at p. 79; The Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 C.J.A.L.P. 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 C.J.A.L.P. 67).

274 A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court*. As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.
>
> Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]
>
> (paras. 65-66, citing *Baker v. Campbell*, [1983] HCA 39, (1983), 153 C.L.R. 52(Australia H.C.), at pp. 102-3)

275 This Court, in fact, has been clear that "criticism of a judgment is not sufficient to justify overruling it" (*Fraser* , at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, [2016] 1 S.C.R. 631(S.C.C.) , or even *Housen* , which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401(S.C.C.) , at para. 76; see also Paul M. Perell, "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 Can. Bus. L.J. 434, at p. 436).

276 To justify circumventing this Court's jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect, is wrong. Ever since *Bell Canada (1989)* and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Deputy Minister of National Revenue v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100(S.C.C.) , at paras. 27-33; *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84(S.C.C.) , at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45(S.C.C.) , at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

277 For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

278 This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court's existing jurisprudence.

Going Forward

279 In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. "[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine" (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

> Judicial modesty is .... a disposition to respect precedents (as embodying the opinions of others), to learn from their and others' experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

280 Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The* Rule of Law (2010):

> ... it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]

(See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, [1991] 3 S.C.R. 654(S.C.C.), at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842(S.C.C.), at para. 42; *R. v. Brown*, [2008] 1 S.C.R. 456(S.C.C.), at paras. 14-16, per Lebel J., and 73-74, per Binnie J., concurring.)

281 Lord Bingham's comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

282 So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir* . These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures' court to modify the standards of review if they wish.

283 To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

284 We also acknowledge that this Court should offer additional direction on conducting reasonableness review. [7] We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Irving Pulp & Paper Ltd. v. CEP, Local 30*, [2013] 2 S.C.R. 458(S.C.C.) , at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

285 Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority's warning that administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

286 We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer" [8] to an administrative decision (see Dunsmuir , at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

287 In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

288 First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir* , at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77(S.C.C.) , at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir* , at paras. 48-49). Reviewing courts must pay "respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

289 Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa* , at paras. 59 and 61-62; *Dunsmuir* , at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

290 This Court has often endorsed this approach to conducting reasonableness review. In *Ryan* , for example, Iacobucci J. explained:

> ... When deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been .... The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness .... Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]
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> (See also *U.A.W., Local 720 v. Volvo Canada Ltd.* (1979), [1980] 1 S.C.R. 178(S.C.C.), at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Canada (Citizenship and Immigration)*, 2019 FC 1251(F.C.), at para. 22, per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in Administrative Law" (2017), 68 *U.N.B.L.J.* 68, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

291 Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83(S.C.C.) , at para. 108; *Khela v. Mission Institution*, [2014] 1 S.C.R. 502(S.C.C.) , at para. 64; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809(S.C.C.) , at para. 71; *Ryan* , at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada* (1979), [1980] 1 S.C.R. 115(S.C.C.) , at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

292 Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir* , at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5(S.C.C.) , at para. 18). Administrative law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained

in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) , at para. 158 (dissenting in part, but not on this point):

> ... not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate ....

293 Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association* , at para. 47; *Wilson* , at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.) , at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive — but it does not alter the deferential posture of the reviewing court (*Suresh* , at para. 40).

294 Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail. [295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required. [9]

296 The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake* , at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

297 Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean* , at para. 40).

298 Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

299 Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-

maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration ... than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (National Corn Growers , at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

300 When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir* , at para. 47; *Khosa* , at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

301 Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, [2012] 3 S.C.R. 405 (S.C.C.) , at para. 3; *Newfoundland Nurses*, at para. 16, citing *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.) , at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake* , at para. 37; *Delta Air Lines Inc. v. Lukács*, [2018] 1 S.C.R. 6(S.C.C.) , at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association* , at paras. 53 and 56).

302 The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan, at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker* , at para. 44), which may not be conducive to the production of "archival" reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123).

303 Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 U.N.B.L.J. 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker* , at para. 44; see also Williams Lake , at para. 37; *Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71(Ont. C.A.) , at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history (*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3(S.C.C.) , at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are "consistent with the process of reasoning" applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" (*Lukács* , at para. 24).

304 The "adequacy" of reasons, in other words, is not "a stand-alone basis for quashing a decision" (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead "be read together with the outcome and serve the purpose

of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works & Government Services)*, [2012] 2 S.C.R. 108 (S.C.C.) , at para. 44; *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559 (S.C.C.) , at para. 52; *Williams Lake* , at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

305 In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

306 We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

307 We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason* , at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 Mod. L. Rev. 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

308 Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

309 Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (National Corn Growers , at p. 1336, per Wilson J., concurring; *Domtar Inc.* , at p. 800). Further, not only are statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 Colum. L. Rev. 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

310 Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

311 Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

312 We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association* , at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293(S.C.C.) , at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.* , at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

313 In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

Application to Mr. Vavilov

314 Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the Citizenship Act, R.S.C. 1985, c. C-29.

315 The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

316 The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

317 Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports.

After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

318 In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

319 From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

320 On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

321 The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

322 The Federal Court ((2015), [2016] F.C.R. 39(F.C.)) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

323 The Federal Court of Appeal (2017[2018] 3 F.C.R. 75(F.C.A.)) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

324 As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's interpretation of the Act in this case. As such, the standard of review is reasonableness.

325 The following provisions of the *Citizenship Act* are relevant to this appeal:

> **Persons who are citizens**
>
> **3 (1)** Subject to this Act, a person is a citizen if
>
> (a) the person was born in Canada after February 14, 1977;
>
> . . . . .
>
> **Not applicable to children of foreign diplomats, etc.**

> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

326 The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

327 In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

328 The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

329 The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the Canadian Citizenship Act, R.S.C. 1970, c. C-19:

> **Not applicable to children of foreign diplomats, etc.**
>
> (3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent
>
> (a) is an alien who has not been lawfully admitted to Canada for permanent residence; and
>
> (b) is
>
> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

330 The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the Interpretation Act, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic

mission, the analyst determined "it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

331 Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

332 In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

333 In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

334 First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the Foreign Missions and International Organizations Act, S.C. 1991, c. 41 ("FMIOA"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. (1983), 1966 No. 29 (Australia H.C.) , Sched. I to the FMIOA, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the FMIOA, which deal with diplomatic privileges and immunities. He submitted that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

335 Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

336 Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 (S.C.C.) , at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 539(S.C.C.) , at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (Ont. S.C.J.) ; *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. Prov. Div.) ; Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)200764 Imm. L.R. (3d) 67(F.C.)).

337 The Federal Court's decision in *Al-Ghamdi* , a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

338 The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did

not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

339 The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

340 In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

341 By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2) that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

342 Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

343 We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 Other than one of the two *amici*, no one asked us to modify this category.

2 The "constitutional concerns" cited by the majority are no answer to this dilemma — nothing in *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220(S.C.C.) , prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 Rev. Const. Stud. 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

3 See Administrative Tribunals Act, S.B.C. 2004, c. 45. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, An Act *mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

4 The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

5 Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

6 R.S.B.C. 1996, c. 418, s. 159

7 Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

8 Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

9 Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817(S.C.C.) , at para. 43.

Old St. Boniface Residents Association Inc. *Appellant*

v.

The City of Winnipeg and the St. Boniface-St. Vital Community Committee *Respondents*

INDEXED AS: OLD ST. BONIFACE RESIDENTS ASSN. INC. v. WINNIPEG (CITY)

File No. 21428.

1990: May 1; 1990: December 20.

Present: Dickson C.J.* and Lamer C.J.** and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal law — Municipal corporations — Applications for zoning by-laws — Bias or apprehended bias — Municipal councillor supporting rezoning application in private and subsequently voting in favour of it without revealing prior involvement — Whether councillor's conduct raised a reasonable apprehension of bias.

Municipal law — Planning — Official plan — Effect — City and district plans providing for residential development and park — Rezoning permitting condominium development — Whether proposed development conflicted with plans — City of Winnipeg Act, S.M. 1971, c. 105, ss. 599, 609.

Municipal law — Zoning — Amendment — Procedure — Applicant for rezoning negotiating with municipality to purchase municipal lands and streets to be closed — Municipality approving sale to applicant before rezoning passed — Whether rezoning proper — City of Winnipeg Act, S.M. 1971, c. 105, s. 609(1).

Municipal law — Zoning by-laws — Validity — Rezoning application brought by intended purchaser of municipal land's without city's authorization — Whether rezoning by-law invalid for failure to comply with statute and procedure — City of Winnipeg Act, S.M. 1971, c. 105, s. 609(1).

* Chief Justice at the time of hearing.
** Chief Justice at the time of judgment.

L'Association des résidents du Vieux St-Boniface Inc. *Appelante*

c.

La ville de Winnipeg et le comité municipal de St-Boniface-St-Vital *Intimés*

RÉPERTORIÉ: ASSOC. DES RÉSIDENTS DU VIEUX ST-BONIFACE INC. *c.* WINNIPEG (VILLE)

N° du greffe: 21428.

1990: 1er mai; 1990: 20 décembre.

Présents: Le juge en chef Dickson*, le juge en chef Lamer** et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Droit municipal — Municipalités — Demandes de règlements de zonage — Partialité ou crainte de partialité — Un conseiller municipal a appuyé en privé une demande de modification de zonage et a subséquemment voté en faveur de la demande sans révéler sa participation antérieure — La conduite du conseiller soulève-t-elle une crainte raisonnable de partialité?

Droit municipal — Urbanisme — Plan officiel — Effet — Aménagement résidentiel et parc prévus dans les plans de la ville et du district — Nouveau zonage permettant l'aménagement de condominiums — L'aménagement proposé contrevient-il aux plans? — City of Winnipeg Act, S.M. 1971, ch. 105, art. 599, 609.

Droit municipal — Zonage — Modification — Procédure — L'auteur d'une demande de modification de zonage négocie avec la municipalité l'acquisition de biens-fonds municipaux et de rues destinées à être fermées — Vente au requérant approuvée par la municipalité avant l'adoption du nouveau zonage — Régularité du nouveau zonage — City of Winnipeg Act, S.M. 1971, ch. 105, art. 609(1).

Droit municipal — Règlements de zonage — Validité — Demande de modification de zonage présentée par l'acquéreur prévu de biens-fonds municipaux sans autorisation de la ville — Le règlement portant modification de zonage est-il invalide pour cause de non-respect de la loi et de la procédure? — City of Winnipeg Act, S.M. 1971, ch. 105, art. 609(1).

* Juge en chef à la date de l'audition.
** Juge en chef à la date du jugement.

Winnipeg approved a proposed land development in Old St. Boniface, and adopted the recommendations of the Finance Committee, the Community Committee, the Planning and Community Services Committee and, ultimately, City Council that the land in question be rezoned to permit the erection of two condominium towers, that certain streets be closed and that the streets, together with other city-owned land, be sold to the developer. Prior to public hearings before the Community Committee on the application for rezoning submitted by the intended purchaser of the lands, a municipal councillor had been personally involved in the planning of the proposed development and had appeared as advocate in support of the application at in camera private meetings of the Finance Committee. An election intervened during the period between public meetings in which the councillor took part, and he was re-elected. At the public meetings, he did not disclose his earlier involvement with the application.

Before the re-zoning by-law was passed, the appellant attacked the process by way of originating motion filed in the Court of Queen's Bench. The motions judge quashed the Committee's decision, prohibited the passing of the rezoning by-law, and adjourned the appellant's application to quash the street-closing by-law. The City was further prohibited from implementing or acting upon the street-closing by-law until further ordered by the court. The respondents' appeal to the Court of Appeal for Manitoba was allowed and the appellant's cross-appeal concerning the street-closing by-law was dismissed.

The issues raised in this appeal are: (1) whether the municipal councillor was disqualified by reason of bias from participating in the proceedings of the Community Committee; (2) whether the application for rezoning, which was made by someone other than the owner of the subject land, complied with s. 609(1) of the *City of Winnipeg Act*; (3) whether the zoning by-law failed to comply with the Greater Winnipeg development plan ("Plan Winnipeg"); and (4) whether the Community Committee acted in bad faith or in violation of a reasonable expectation of consultation.

Held (La Forest, L'Heureux-Dubé and Cory JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson, Sopinka, Gonthier and McLachlin JJ.: *Wiswell v. Metropolitan Corporation of Greater Winnipeg* was distinguished. A flexible approach based on the context is now taken with respect to the test to be applied for disqualifying bias. Here, it

Winnipeg a approuvé un projet d'aménagement immobilier dans le Vieux St-Boniface et a adopté les recommandations du comité des finances, du comité municipal, du comité de l'urbanisme et des services communautaires et, finalement, du conseil municipal que les biens-fonds en question fassent l'objet d'un nouveau zonage de façon à permettre la construction de deux tours de condominiums, que certaines rues soient fermées et que les rues ainsi que d'autres biens-fonds appartenant à la ville soient vendus au promoteur. Avant que des audiences publiques soient tenues devant le comité municipal relativement à la demande de modification de zonage présentée par l'acquéreur prévu des biens-fonds, un conseiller municipal avait participé personnellement à la planification du projet d'aménagement et avait appuyé la demande dans des réunions à huis clos et privées du comité des finances. Durant la période comprise entre les réunions publiques, il y a eu une élection à laquelle le conseiller a participé et où il a été réélu. Lors des réunions publiques, il n'a pas révélé sa participation antérieure relativement à la demande.

Avant l'adoption du nouveau règlement de zonage, l'appelante a attaqué cette façon de procéder par voie d'avis de requête introductive d'instance déposé auprès de la Cour du Banc de la Reine. Le juge des requêtes a annulé la décision du comité, interdit l'adoption du règlement portant modification de zonage et ajourné l'audition de la demande de l'appelante visant l'annulation du règlement portant fermeture de rues. De plus, il a interdit à la ville d'appliquer ou d'utiliser le règlement de fermeture de rues jusqu'à nouvel ordre de la cour. La Cour d'appel du Manitoba a accueilli l'appel des intimés et rejeté l'appel incident de l'appelante relativement au règlement portant fermeture de rues.

Les questions soulevées dans ce pourvoi sont de savoir (1) si le conseiller municipal était, pour cause de partialité, inhabile à participer aux procédures du comité municipal, (2) si la demande de modification de zonage, présentée par une autre personne que le propriétaire du bien-fonds visé, est conforme au par. 609(1) de la *City of Winnipeg Act*, (3) si le règlement de zonage est conforme au plan directeur de la ville de Winnipeg (le «plan de la ville de Winnipeg»), et (4) si le comité municipal a agi de mauvaise foi ou sans respecter une expectative raisonnable de consultation.

Arrêt (les juges La Forest, L'Heureux-Dubé et Cory sont dissidents): Le pourvoi est rejeté.

Le juge en chef Dickson et les juges Wilson, Sopinka, Gonthier et McLachlin: Une distinction est faite d'avec l'arrêt *Wiswell v. Metropolitan Corporation of Greater Winnipeg*. Il convient d'adopter une approche souple fondée sur le contexte en ce qui concerne le critère à

would not be appropriate to apply the test of a reasonable apprehension of pre-judgment with full vigour simply because of the councillor's appearance as advocate for the development proposal before the Finance Committee. The Legislature could not have intended that the rule requiring a tribunal to be free of an appearance of bias apply to members of Council with the same force as in the case of other tribunals whose character and functions more closely resemble those of a court. Some degree of prejudgment is inherent in the role of a municipal councillor. Nor, however, could the Legislature have intended that there be a hearing before a body which has already made an irreversible decision.

The applicable test is that objectors or supporters be heard by members of Council who are capable of persuasion. This test is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor. The party alleging disqualifying prejudgment must establish that any representations at variance with the adopted view would be futile. Statements by individual members of Council, while they may give rise to an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter.

On the other hand, there is nothing inherent in the councillors' hybrid functions that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have either a personal or other interest. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that it might influence the exercise of that duty. The motions judge erred in applying the reasonable apprehension of bias test once he had found that the councillor whose impartiality was in question had no personal interest in the development, either pecuniary or by reason of a relationship with the developer.

Per Lamer C.J.: The reasons of La Forest J. in *Save Richmond Farmland Society v. Richmond (Township)* were agreed with. Applying his test to the facts of this case, the appeal should be dismissed.

On the issue of conformity with Plan Winnipeg, the reasons of Sopinka J. were agreed with.

appliquer pour conclure à l'inhabilité pour cause de partialité. Il ne serait pas approprié en l'espèce d'appliquer le critère d'une crainte raisonnable de préjugé dans toute sa rigueur simplement parce que le conseiller a défendu le projet d'aménagement devant le comité des finances. Le législateur ne peut pas avoir voulu que la règle qui exige qu'un tribunal soit exempt de toute apparence de partialité s'applique aux membres d'un conseil municipal avec la même rigueur qu'à d'autres tribunaux administratifs dont le caractère et les fonctions ressemblent davantage à ceux d'une cour de justice. Un certain degré de préjugé est inhérent au rôle de conseiller municipal. Le législateur ne pouvait cependant pas non plus avoir voulu d'une audience devant un organisme qui a déjà pris une décision irrévocable.

Le critère applicable est que les tenants de l'un ou l'autre point de vue doivent être entendus par des membres du conseil qu'il est possible de convaincre. Ce critère est compatible avec les fonctions d'un conseiller municipal et lui permet de remplir ses fonctions politiques et législatives. La partie qui allègue l'existence d'un préjugé qui rend inhabile doit établir qu'il ne servirait à rien de présenter des arguments contredisant le point de vue adopté. Bien qu'elles puissent créer une apparence de partialité, les déclarations de conseillers individuels ne satisfont au critère que si la cour conclut qu'elles sont l'expression d'une opinion finale sur la question.

Par contre, il n'y a rien d'inhérent aux fonctions hybrides des conseillers qui rendrait obligatoire ou souhaitable de les soustraire à l'obligation de ne pas intervenir dans des affaires dans lesquelles ils ont un intérêt personnel ou autre. Quant on conclut à l'existence d'un tel intérêt, tant en vertu de la common law que de la loi, un conseiller devient inhabile si l'intérêt est à ce point lié à l'exercice d'une fonction publique qu'une personne raisonnablement bien informée conclurait que cet intérêt risquerait d'influer sur l'exercice de la fonction en question. Le juge des requêtes a commis une erreur en appliquant le critère de la crainte raisonnable de partialité après qu'il eut conclu que le conseiller dont l'impartialité était mise en doute n'avait aucun intérêt personnel dans le projet d'aménagement, que ce soit sur le plan pécuniaire ou sur celui de ses rapports avec le promoteur.

Le juge en chef Lamer: Le juge en chef souscrit aux motifs du juge La Forest dans l'affaire *Save Richmond Farmland Society c. Richmond (Canton)*. En appliquant son critère aux faits de l'espèce, on conclut au rejet du pourvoi.

Quand à la question du respect du plan de la ville de Winnipeg, le juge en chef Lamer souscrit aux motifs du juge Sopinka.

Per La Forest, L'Heureux-Dubé and Cory JJ. (dissenting): The City was precluded from adopting the zoning by-law in question without first amending Plan Winnipeg. The zoning power of Council is constrained by the community plan, the amendment of which involves consultation with community committees and requires the entire council, rather than simply the executive policy committee, to deliberate on the plan by-law. In adopting a by-law which does not conform to the plan, Council oversteps its statutory authority.

The proposed condominium represented a derogation from Plan Winnipeg. If the City wished to permit development that conflicted with the policy of the Plan, it was first required to seek amendment to the Plan. The procedures for amendment provide for public participation at all stages of policy development and it was not open to Council to circumvent the public process by the simple passage of a zoning by-law.

Judicial review is not inappropriate in this case. The designated commissioner, who determines whether a by-law conforms to the Plan, is not independent of Council but, rather, is appointed by and may be dismissed by Council. Furthermore, there is no privative clause. It is therefore open to the courts to overturn a decision which is legally incorrect. The land in question was clearly designated as parkland on the Plan policy map and the condominium development could not be said to conform to the Plan.

Cases Cited

By Sopinka J.

Distinguished: *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512; **referred to:** *R. ex rel Ellerby v. Winnipeg*, [1930] 1 W.W.R. 914; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Oley and Moffatt v. Fredericton* (1984), 57 N.B.R. (2d) 361; *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20; *Re Blustein and Borough of North York*, [1967] 1 O.R. 604; *Re Moll and Fisher* (1979), 23 O.R. (2d) 609; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E.R. 935; *Attorney General of Hong Kong v. Ng Yuen Shiu*, [1983] 2 All E.R. 346; *R. v. Hull Prison Board of Visitors, ex parte St. Germain*, [1979] 1 All E.R. 701; *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d)

Les juges La Forest, L'Heureux-Dubé et Cory (dissidents): La ville ne pouvait pas adopter le règlement de zonage en cause sans d'abord modifier le plan de la ville de Winnipeg. Le pouvoir de zonage du conseil est limité par le plan d'urbanisme dont la modification nécessite la consultation de comités municipaux et exige que le conseil au complet, et non simplement le comité exécutif, délibère sur le règlement relatif au plan. En adoptant un règlement non conforme au plan, le conseil outrepasse le pouvoir que lui confère la Loi.

Le projet de condominiums constitue une dérogation au plan de la ville de Winnipeg. Si la ville désirait autoriser un aménagement qui ne respectait pas la politique du plan, elle devait d'abord demander la modification du plan lui-même. Les procédures de modification prévoient la participation du public à toutes les étapes de la conception d'une politique et il n'était pas loisible au conseil de se soustraire au processus public par la simple adoption d'un règlement de zonage.

Le contrôle judiciaire n'est pas inopportun en l'espèce. Le commissaire désigné, qui détermine si un règlement est conforme au plan, n'est pas indépendant du conseil; au contraire, il est nommé et peut être démis de ses fonctions par le conseil. En outre, il n'y a aucune clause privative. Les tribunaux peuvent donc infirmer une décision qui est mauvaise du point de vue légal. Le bien-fonds en cause était clairement désigné comme parc sur la carte établie conformémement à la politique du plan et on ne pouvait dire que l'aménagement de condominiums était conforme au plan.

Jurisprudence

Citée par le juge Sopinka

Distinction d'avec l'arrêt: *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] R.C.S. 512; **arrêts mentionnés:** *R. ex rel Ellerby v. Winnipeg*, [1930] 1 W.W.R. 914; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; *Oley and Moffatt v. Fredericton* (1984), 57 R.N.-B. (2e) 361; *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20; *Re Blustein and Borough of North York*, [1967] 1 O.R. 604; *Re Moll and Fisher* (1979), 23 O.R. (2d) 609; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E.R. 935; *Attorney General of Hong Kong v. Ng Yuen Shiu*, [1983] 2 All E.R. 346; *R. v. Hull Prison Board of Visitors, ex parte St. Germain*, [1979] 1 All E.R. 701; *Re Multi-Malls Inc. and Minister of Transportation*

49; *Re Canadian Occidental Petroleum Ltd. and District of North Vancouver* (1983), 148 D.L.R. (3d) 255; *Gaw v. Commissioner of Corrections* (1986), 2 F.T.R. 122; *Re Bruhn-Mou and College of Dental Surgeons of British Columbia* (1975), 59 D.L.R. (3d) 152; *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213.

By Lamer C.J.

Save Richmond Farmland Society v. Richmond (Township), [1990] 3 S.C.R. 1213.

By La Forest J.

Christie v. City of Winnipeg (1981), 16 M.P.L.R. 128.

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Community Planning Act, R.S.N.B. 1973, c. C-12, s. 68.

Municipal Council Conflict of Interest Act, R.S.M. 1987, c. 255, ss. 4, 5, 8.

National Energy Board Act, R.S.C. 1970, c. N-6, s. 44.

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APPEAL from a judgment of the Manitoba Court of Appeal (1989), 58 Man. R. (2d) 255, [1989] 4 W.W.R. 708, 43 M.P.L.R. 101, 58 D.L.R. (4th) 138, allowing the respondents' appeal from a judgment of Schwartz J. (1988), 54 Man.

and Communications (1976), 14 O.R. (2d) 49; *Re Canadian Occidental Petroleum Ltd. and District of North Vancouver* (1983), 148 D.L.R. (3d) 255; *Gaw v. Commissioner of Corrections* (1986), 2 F.T.R. 122; *Re Bruhn-Mou and College of Dental Surgeons of British Columbia* (1975), 59 D.L.R. (3d) 152; *Save Richmond Farmland Society c. Richmond (Canton)*, [1990] 3 R.C.S. 1213.

Citée par le juge en chef Lamer

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POURVOI contre un arrêt de la Cour d'appel du Manitoba (1989), 58 Man. R. (2d) 255, [1989] 4 W.W.R. 708, 43 M.P.L.R. 101, 58 D.L.R. (4th) 138, qui a accueilli l'appel interjeté par les intimés contre un jugement du juge Schwartz (1988), 54

R. (2d) 252, 39 M.P.L.R. 271, quashing the decision of the respondent, the St. Boniface-St. Vital Community Committee, and granting *certiorari* and prohibition. Appeal dismissed, La Forest, L'Heureux-Dubé and Cory JJ. dissenting.

Arne Peltz and *M. B. Nepon*, for the appellant.

C. Gillespie and *D. McCaffrey*, *Q.C.*, for the respondents.

The judgment of Dickson C.J. and Wilson, Sopinka, Gonthier and McLachlin JJ. was delivered by

SOPINKA J.—This appeal was heard together with *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, and reasons for judgment are being released concurrently. They both raise the question of the application of the rules of natural justice or fairness to municipal councillors when they are called upon to make a decision after hearing representations from interested parties. In particular, these appeals raise the issue of the application to municipal councillors of the rule which requires a member of a tribunal to recuse himself or herself when there exists a reasonable apprehension of bias or prejudgment.

In this appeal the appellant, in addition to the issue of bias, raises the following issues: Did the City have jurisdiction to proceed with the rezoning in the absence of express written authority from all freehold owners of the proposed site? Is the zoning by-law void for non-conformity with Plan Winnipeg? Did breach of an alleged undertaking to involve the Residents Association in a redevelopment plan constitute bad faith or create a right of consultation?

Facts

The appellant is a Residents Association for the area known as Old St. Boniface. It has existed since 1977. It was incorporated in 1979 pursuant to the Neighbourhood Improvement Program, which was a federal, provincial and municipal

Man. R. (2d) 252, 39 M.P.L.R. 271, qui avait annulé une décision de l'intimé, le comité municipal de St-Boniface-St-Vital, et accordé un bref de *certiorari* et de prohibition. Pourvoi rejeté, les juges La Forest, L'Heureux-Dubé et Cory sont dissidents.

Arne Peltz et *M. B. Nepon*, pour l'appelante.

C. Gillespie et *D. McCaffrey*, *c.r.*, pour les intimés.

Version française du jugement du juge en chef Dickson et des juges Wilson, Sopinka, Gonthier et McLachlin rendu par

LE JUGE SOPINKA—Le présent pourvoi et le pourvoi *Save Richmond Farmland Society c. Richmond (Canton)*, [1990] 3 R.C.S. 1213, ont été entendus ensemble et les motifs de jugement sont rendus simultanément. Ils soulèvent l'un et l'autre la question de l'application des règles de justice naturelle ou de l'équité aux conseillers municipaux appelés à prendre une décision après avoir entendu les observations des parties intéressées. Se pose en particulier dans ces pourvois la question de l'application aux conseillers municipaux de la règle imposant à un membre d'un tribunal administratif l'obligation de se récuser lorsqu'il existe une crainte raisonnable de partialité ou de préjugé.

Outre la partialité, l'appelante soulève en l'espèce les questions suivantes: la ville avait-elle compétence pour procéder à la modification du zonage sans en avoir reçu par écrit l'autorisation expresse de tous les propriétaires fonciers du site proposé? Le règlement de zonage est-il entaché de nullité pour cause de non-conformité avec le plan de la ville de Winnipeg? L'engagement qui aurait été pris de faire participer l'association des résidents à la conception d'un plan de réaménagement conférait-il à celle-ci le droit d'être consultée et la violation de cet engagement constituait-elle de la mauvaise foi?

Les faits

L'appelante est une association des résidents du secteur connu sous le nom de Vieux St-Boniface. Elle existe depuis 1977. En 1979, elle a été constituée en personne morale dans le cadre du programme d'amélioration de quartier qui était une

initiative. Since the completion of that program, the appellant has continued its involvement in area planning through consultation with the Community Committee and others.

It helps to note from the outset the distinction between planning and zoning by-laws. The *City of Winnipeg Act*, S.M. 1971, c. 105, as amended, calls for various plans of different levels of specificity. The Greater Winnipeg development plan ("Plan Winnipeg") is the most general plan, encompassing the whole City. The Act creates six "communities" within the City, and each is to have a corresponding Community Plan. The most specific plan is called an Action Area Plan. These plans are created or amended by by-law. Planning by-laws do not affect zoning, which for any given parcel of land must be established by a zoning by-law. Under the Act the various plans are to be consistent with one another, and zoning is to be consistent with the plans.

The lands at issue in this case are located across the Red River from downtown Winnipeg, in Old St. Boniface. The Red River borders the area to the north and the west. To the east is an open area called Whittier Park. To the south is the CN mainline, known as the Highline. Prior to 1976, lands immediately adjacent to the Highline were designated as a proposed rapid transit corridor. The area is somewhat isolated from the rest of St. Boniface by the Highline. In 1976 the North St. Boniface District Plan was enacted (By-law 965/75), which designated the lands north of the Highline as "proposed park area". This plan was and continues to be the Action Area Plan for North St. Boniface. Pursuant to this plan the City commenced acquiring land in the area north of the Highline.

In December 1979, the appellant initiated a review of the Action Area Plan for the purpose of having the area north of the Highline, except for the riverbank property, redesignated for residential

initiative conjointe des gouvernements fédéral, provincial et municipal. Depuis la fin de ce programme, l'appelante continue, par la consultation avec le comité municipal notamment, à participer aux projets d'urbanisme pour le secteur en question.

Il est utile de souligner au départ la différence entre les règlements d'urbanisme et les règlements de zonage. La *City of Winnipeg Act*, S.M. 1971, ch. 105, et ses modifications, prévoit divers plans présentant différents degrés de précision. Le plus général de ces plans est le plan directeur de la ville de Winnipeg (le «plan de la ville de Winnipeg»), qui vise l'ensemble de la ville. La Loi crée dans les limites de la ville six «secteurs» devant avoir chacun son propre plan de secteur. Ce sont les plans d'action de secteur, établis ou modifiés par voie de règlement, qui sont les plus précis. Or, les règlements d'urbanisme ne touchent pas le zonage, qui, pour chaque parcelle de terrain, doit être établi par un règlement de zonage. Aux termes de la Loi, les différents plans doivent être compatibles les uns avec les autres et le zonage doit être conforme à ces plans.

Les biens-fonds en cause sont situés dans le Vieux St-Boniface, en face du centre-ville de Winnipeg, de l'autre côté de la rivière Rouge. Ce secteur est bordé au nord et à l'ouest par la rivière Rouge. À l'est, il y a un secteur inoccupé appelé Whittier Park. Au sud, s'étend la voie principale du CN, que l'on appelle la Highline. Antérieurement à 1976, des terres attenantes à la Highline ont été affectées à un projet de couloir de transport rapide. Le secteur en question se trouve quelque peu isolé du reste de St-Boniface par la Highline. En 1976, on a adopté le plan du district de St-Boniface nord (règlement 965/75), qui affectait à un [TRADUCTION] «projet de parc» les terres situées au nord de la Highline. Ce plan constituait alors et constitue encore le plan d'action de secteur de St-Boniface nord. En exécution de ce plan, la ville a commencé à faire l'acquisition de bien-fonds dans le secteur situé au nord de la Highline.

En décembre 1979, l'appelante a amorcé une révision du plan d'action de secteur en vue de faire changer l'affectation des terres se trouvant au nord de la Highline, à l'exception de celles longeant la

land use. Since 1979, it appears to have been a generally recognized goal to encourage people to live in the area north of the Highline. The conversion of then existing residential property by the City to parkland was reducing the population and number of families to a level required for a stable community base in North St. Boniface. Councillor Guy Savoie, the Municipal Councillor for the area, was involved in this review.

City By-laws 3336/82 and 3829/84 changed the planning designation to future residential use. By-law 3829/84 reclassified an area, including that at issue in this case, as residential. However, the scope and density of the residential use were not determined in that by-law. The appellant was apparently aware that a single-family designation might not provide sufficient population to justify servicing costs of a residential subdivision and that a multiple use might be necessary to meet its objectives. The appellant, however, was opposed to highrise development.

On April 9, 1986, the City passed By-law No. 2960/81, known as Plan Winnipeg, concluding a process that had been begun years earlier. It shows a portion of the disputed lands as carrying a designation of "regional park", while the balance is designated as "older residential neighbourhood".

As noted above, planning by-laws do not affect zoning. In the spring of 1986, the area north of the Highline was in a variety of parcels with various zoning designations, including M2, light industrial.

We now come to the development giving rise to these proceedings. By the summer of 1986, Tyrone Enterprises Ltd. (Tyrone) had acquired several

rivière, de manière à ce qu'elles soient destinées à l'habitation. Il semble être généralement reconnu depuis 1979 qu'il faut encourager les gens à s'installer dans le secteur situé au nord de la Highline. La conversion en parcs, effectuée par la ville, de terres affectées alors à l'habitation a eu pour effet de réduire la population et le nombre de familles au niveau requis pour assurer à St-Boniface nord une solide base démographique. Guy Savoie, conseiller municipal du secteur en question, a participé à cette révision.

Par suite des règlements municipaux 3336/82 et 3829/84, qui sont venus en changer l'affectation urbaniste, les terres visées devaient constituer un futur quartier résidentiel. En particulier, le règlement 3829/84 affectait à l'habitation un territoire englobant les biens-fonds en cause en l'espèce. Ce règlement ne précisait toutefois pas l'étendue ni la densité de l'aménagement aux fins d'habitation. À ce qu'il paraît, l'appelante savait que l'affectation à la construction d'habitations unifamiliales ne permettrait peut-être pas d'obtenir une population suffisante pour justifier les coûts de viabilisation d'un lotissement à usage d'habitation et que l'affectation à des usages multiples pourrait s'imposer pour assurer la réalisation de ses objectifs. L'appelante s'opposait cependant à la construction de tours.

Le 9 avril 1986, la ville a adopté le règlement n° 2960/81, connu sous le nom de plan de la ville de Winnipeg. C'était là l'aboutissement d'un processus entamé plusieurs années auparavant. Sur le plan, une partie des biens-fonds faisant l'objet du litige figurent comme [TRADUCTION] «parc régional», tandis que le reste de ces terres sont désignées comme [TRADUCTION] «vieux quartier résidentiel».

Comme je l'ai déjà indiqué, les règlements d'urbanisme n'ont aucune incidence sur le zonage. Au printemps de 1986, le secteur situé au nord de la Highline se composait de plusieurs terrains ayant différentes affectations de zonage, dont l'affectation M2 (industrie légère).

Voilà qui nous amène au projet immobilier à l'origine de la présente instance. Dès l'été de 1986, Tyrone Enterprises Ltd. (Tyrone) s'était portée

adjacent parcels of land on rue Messager, in Old St. Boniface north of the Highline. The street is a block in length, running east to west. Tyrone owned most of the south side of the block. The north side is vacant, city-owned land which extends to the Red River. Tyrone intended to build two seven-storey condominiums. Its plan required consolidating its land with land it would purchase from the City, purchasing and closing certain streets, and changing existing zoning.

In May 1986, Tyrone approached the City about purchasing the city-owned properties plus the land comprising intended street closures. Some time prior to August 1986, discussions took place between representatives of Tyrone and representatives of the City, including Councillor Guy Savoie, at which the proposal was presented and reviewed. On August 6, Tyrone's solicitor wrote to the City, indicating his client's intention to proceed with a rezoning application for the consolidated parcel of land. He asked for a letter from the City authorizing Tyrone to proceed with the zoning application.

On August 7, 1986, Tyrone filed the application. There was as yet no written authorization from the City to apply for rezoning of City-owned lands.

On August 8, 1986, the Land Surveys and Real Estate Department of the City filed a report with the Finance Committee which summarized the discussions that had been held with representatives of Tyrone. It recommended that Tyrone be given an option with respect to the City-owned lands. The report came before an in camera meeting of the Finance Committee held on August 12, 1986. Although in camera, full minutes of the meeting were kept and were available to the public. Councillor Savoie, although not a member of the Finance Committee, attended and spoke in favour of granting Tyrone an option to buy the necessary lands. The Finance Committee put the matter over to its next meeting, on September 9. At that

acquéreur de plusieurs terrains contigus situés rue Messager dans le Vieux St-Boniface au nord de la Highline. D'une longueur équivalant à la distance entre deux rues parallèles, cette rue a une orientation est-ouest. Tyrone était propriétaire de la majeure partie du côté sud du quadrilatère. La partie nord se compose de terrains vagues appartenant à la ville, qui s'étendent jusqu'à la rivière Rouge. Tyrone projetait la construction de deux tours de condominiums de sept étages. Son plan nécessitait le regroupement de ses terrains avec des terrains qu'elle achèterait à la ville, l'acquisition et la fermeture de certaines rues et la modification du zonage existant.

En mai 1986, Tyrone a pressenti la ville relativement à l'achat des biens-fonds appartenant à cette dernière et des terrains occupés par les rues dont Tyrone envisageait la fermeture. Quelque temps avant le mois d'août 1986, des discussions ont eu lieu entre des représentants de Tyrone et des représentants de la ville, dont le conseiller Guy Savoie, au cours desquelles la proposition a été soumise et examinée. Le 6 août, l'avocat de Tyrone a écrit à la ville, lui signalant l'intention de sa cliente de présenter une demande de modification du zonage des biens-fonds regroupés. Il a demandé à la ville une lettre autorisant Tyrone à aller de l'avant avec sa demande de modification de zonage.

Le 7 août 1986, Tyrone a présenté la demande. À ce moment-là, la ville n'avait pas encore accordé l'autorisation écrite de demander la modification du zonage des biens-fonds lui appartenant.

Le 8 août 1986, le service des levés de terrain et des biens immobiliers de la ville a déposé auprès du comité des finances un rapport résumant les discussions qui avaient eu lieu avec les représentants de Tyrone. Il était recommandé dans ce rapport que l'on accorde à Tyrone une option sur les biens-fonds appartenant à la ville. Le rapport a été examiné au cours d'une réunion à huis clos du comité des finances tenue le 12 août 1986. En dépit du huis clos, un procès-verbal complet de la réunion a été dressé et mis à la disposition du public. Le conseiller Savoie, bien qu'il ne fût pas membre du comité des finances, a assisté à la réunion où il s'est prononcé en faveur de l'idée d'accorder à Tyrone une option d'acheter les biens-

meeting, Councillor Savoie again spoke in favour of granting the option to Tyrone. The Finance Committee approved of the option as recommended.

By letter dated September 17, 1986, the Director of the Land Surveys and Real Estate Department authorized Tyrone to proceed with the rezoning application in respect of City-owned lands, in the following terms:

> Inasmuch as your client now has an interest in those City-owned properties contained within the proposed development area your client may now proceed to make application for rezoning and subdivision.

As noted above, the Act divides Winnipeg into six "communities". Rezoning applications are initially referred to the Community Committee in which the land is located. The Community Committee hears representations from interested persons, and makes a recommendation on the application. The Community Committee is composed of members of City Council who represent a ward within the community. These included Councillors Savoie, Reese and Ducharme. Councillors Reese and Ducharme were also members of the Finance Committee and had voted against the Tyrone development.

The hearing of the zoning application commenced on October 7, 1986. Councillor Savoie was one of three members of City Council present at the meeting. Tyrone's solicitor made a presentation in favour of rezoning. A representative of the appellant opposed rezoning. The application was deferred. In the meantime, on Councillor Savoie's motion, the Community Committee sought further information from the City administration on the impact of the potential development.

The next meeting was November 18, and Councillor Savoie acted as chairman. During the period

fonds nécessaires. Le comité des finances a reporté l'étude de cette question à sa réunion suivante, prévue pour le 9 septembre. Lors de cette réunion, le conseiller Savoie s'est de nouveau prononcé en faveur de l'attribution d'une option à Tyrone. Le comité des finances a approuvé l'option telle qu'elle lui avait été recommandée.

Dans une lettre en date du 17 septembre 1986, le directeur du service des levés de terrain et des biens immobiliers a autorisé Tyrone à aller de l'avant avec la demande de modification de zonage relativement aux biens-fonds appartenant à la ville. L'autorisation est ainsi formulée:

> [TRADUCTION] En autant qu'elle possède maintenant un intérêt dans les biens-fonds appartenant à la ville situés dans le secteur destiné à l'aménagement envisagé, votre cliente peut maintenant présenter une demande de modification de zonage et de lotissement.

Ainsi que je l'ai déjà fait remarquer, la Loi divise Winnipeg en six «secteurs». Les demandes de modification de zonage sont acheminées d'abord au comité municipal du secteur où se trouvent les biens-fonds en question. Le comité municipal entend les observations des intéressés et fait ensuite une recommandation concernant la demande. Il se compose des conseillers municipaux représentant un quartier compris dans le secteur. En l'occurrence, il s'agissait notamment des conseillers Savoie, Reese et Ducharme. Les conseillers Reese et Ducharme étaient également membres du comité des finances et avaient voté contre le projet immobilier de Tyrone.

L'audition de la demande de modification de zonage a débuté le 7 octobre 1986. Le conseiller Savoie était l'un des trois membres du conseil municipal présents à la réunion. L'avocat de Tyrone a exposé des arguments en faveur de la modification du zonage tandis qu'un représentant de l'appelante s'y est opposé. L'audition de la demande a été ajournée. Entre-temps, à la suite d'une requête du conseiller Savoie, le comité municipal a demandé à l'administration de la ville de plus amples renseignements sur les effets de l'aménagement éventuel.

La réunion suivante a été tenue le 18 novembre et présidée par le conseiller Savoie. Pendant la

of the adjournment, a municipal election intervened. Councillors Reese and Ducharme, who had opposed the development, were not re-elected, while Councillor Savoie, who supported it, was. There was lengthy discussion of the application and again the matter was deferred. Before the next meeting, the appellant learned that Councillor Savoie had earlier supported Tyrone's application before the Finance Committee. On December 5, 1986, the appellant wrote to Councillor Savoie, suggesting that he had committed himself in support of the project, and that he therefore should not participate in the decision with respect to zoning at the Community Committee meeting. On December 9, 1986, the Community Committee, including Councillor Savoie, approved Tyrone's application subject to the City's usual requirements, and at the same meeting approved the street-closing by-law.

The report of the Community Committee recommending the rezoning was then referred to the Committee on Planning and Community Services (the designated committee). On January 5, 1987, with the addition of further conditions, it expressed its agreement to the suggested rezoning. The Executive Policy Committee considered the proposed rezoning at a meeting held on January 14, 1987.

On January 21, 1987, the report of the Committee on Planning and Community Services, recommending the rezoning subject to conditions, came before the plenary session of City Council. After a full debate, Council gave its approval to the intended rezoning, subject to conditions, and directed the city solicitor to prepare the necessary rezoning by-law and forward it to Council "for all three readings" when the various conditions had been met.

The Committee on Finance and Administration received a report on the negotiations concerning the sale of the land, including city streets, on July 14, 1987. The Committee recommended the sale of all of the lands to Tyrone for $152,530. This

période d'ajournement, une élection municipale a eu lieu. Les conseillers Reese et Ducharme, qui s'étaient opposés au projet, n'ont pas été réélus, tandis que le conseiller Savoie, qui l'appuyait, l'a été. La demande a été longuement discutée et l'affaire a de nouveau été ajournée. Avant la réunion suivante, l'appelante a appris que le conseiller Savoie avait auparavant appuyé la demande de Tyrone devant le comité des finances. Le 5 décembre 1986, l'appelante a écrit au conseiller Savoie pour lui dire que, comme il s'était engagé à appuyer le projet d'aménagement, il ne devrait pas participer à la prise de la décision relative au zonage lors de la réunion du comité municipal. Le 9 décembre 1986, le comité municipal, y compris le conseiller Savoie, a fait droit à la demande de Tyrone sous réserve des conditions d'usage imposées par la ville et, au cours de la même réunion, a approuvé le règlement prévoyant la fermeture de rues.

Ensuite, le rapport du comité municipal recommandant la modification du zonage a été soumis au comité de l'urbanisme et des services communautaires (le comité désigné). Le 5 janvier 1987, ce comité, après avoir ajouté des conditions, a exprimé son approbation du nouveau zonage proposé. Cette proposition de modification de zonage a alors été examinée par le comité exécutif lors d'une réunion tenue le 14 janvier 1987.

Le 21 janvier 1987, le rapport du comité de l'urbanisme et des services communautaires, qui recommandait la modification du zonage, sous réserve de certaines conditions, a été déposé lors d'une séance plénière du conseil municipal. À l'issue d'un débat exhaustif, le conseil a approuvé, sous réserve de certaines conditions, le projet de modification de zonage, et a ordonné au procureur de la ville de rédiger le règlement de modification de zonage nécessaire et de le faire tenir au conseil [TRADUCTION] «pour qu'il soit procédé aux trois lectures», une fois remplies les différentes conditions prescrites.

Le comité des finances et de l'administration a reçu le 14 juillet 1987 un rapport sur les négociations relatives à la vente des biens-fonds en question, qui comprenaient certaines rues de la ville. Le comité a recommandé que tous ces biens-fonds

recommendation went to City Council on August 19, 1987, and was approved. On August 19, 1987, the City Council also adopted the recommendation of the Committee on Works and Operations to close the streets and on October 1, 1987, the Council passed a by-law closing the streets.

This was the state of affairs when the appellant commenced these proceedings. To summarize:

1. The rezoning had been approved by the Community Committee and by the Planning and Community Services Committee, and then ultimately by City Council itself, but the rezoning by-law had not yet been passed.

2. The necessary street closings had been completed.

3. Sale of the property, both the land comprised in the closed streets and further City-owned lands, was approved, but the conveyance of these lands to Tyrone had not yet taken place.

The appellant attacked the process by way of originating notice of motion filed in the Court of Queen's Bench. It sought an order quashing the decision of the Community Committee, an order prohibiting the City from giving third reading to the proposed zoning by-law, and an order quashing the street-closing by-law. The motions judge quashed the Committee's decision, prohibited the passing of the rezoning by-law and adjourned the application to quash the street-closing by-law: (1988), 54 Man. R. (2d) 252. Further, the City was prohibited from implementing or acting upon the street-closing by-law until further order by the court. The respondents' appeal to the Court of Appeal for Manitoba was allowed and the appellant's cross-appeal concerning the street-closing by-law dismissed: (1989), 58 Man. R. (2d) 255.

Decisions Below

Court of Queen's Bench of Manitoba

soient vendus à Tyrone au prix de 152 530 $. Cette recommandation a été examinée et approuvée par le conseil municipal le 19 août 1987. Le même jour, le conseil municipal a également adopté la recommandation du comité des travaux publics de fermer les rues et, le 1er octobre 1987, le conseil a adopté un règlement en ce sens.

Voilà où en étaient les choses lorsque l'appelante a introduit la présente instance. En résumé:

1. Le nouveau zonage avait été approuvé par le comité municipal et par le comité de l'urbanisme et des services communautaires et, finalement, par le conseil municipal lui-même, mais le règlement portant modification du zonage n'avait pas encore été adopté.

2. Les fermetures de rues qui s'imposaient avaient été effectuées.

3. La vente des biens-fonds, composés des terrains occupés par les rues fermées ainsi que d'autres terrains appartenant à la ville, a été approuvée, mais la cession de ces biens-fonds à Tyrone n'avait pas encore eu lieu.

L'appelante a attaqué le processus par voie d'avis de requête introductive d'instance déposé auprès de la Cour du Banc de la Reine. Elle sollicitait une ordonnance annulant la décision du comité municipal, une ordonnance interdisant à la ville de procéder à la troisième lecture du projet de règlement de zonage ainsi qu'une ordonnance annulant le règlement prévoyant la fermeture des rues. Le juge des requêtes a annulé la décision du comité, interdit l'adoption du règlement portant modification du zonage et suspendu la demande d'annulation du règlement prévoyant la fermeture des rues: (1988), 54 Man. R. (2d) 252. En outre, la ville s'est vu interdire d'appliquer ou d'utiliser le règlement de fermeture des rues jusqu'à nouvel ordre de la cour. L'appel interjeté par les intimés devant la Cour d'appel du Manitoba a été accueilli et l'appel incident de l'appelante relativement au règlement prévoyant la fermeture des rues a été rejeté: (1989), 58 Man. R. (2d) 255.

Les décisions des tribunaux d'instance inférieure

Cour du Banc de la Reine du Manitoba

Schwartz J. dealt with only two of the grounds argued by the appellant.

Jurisdiction to Proceed Under s. 609(1)

Section 609(1) provides that an application for rezoning shall be made by the owner of the land or a person authorized in writing by the owner. When Tyrone made its application on August 7, 1986, it did not own all of the land for which rezoning was requested.

Schwartz J. did not consider the option granted by the Finance Committee to purchase City-owned land to be legally enforceable. He rejected the City's contention that the option constituted the required authority to comply with s. 609(1). The City could have given the required written authority or could have had the Commissioner for the Environment bring a rezoning application. As to the streets, s. 495(3) of the Act confirms that title to the land on which a street is situated is vested in Her Majesty in right of the Province. Schwartz J. invoked the rule that a municipal corporation must meet strictly the statutory provisions of its enacting authority, citing principally Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., vol. 1, at p. 379, and *R. ex rel Ellerby v. Winnipeg*, [1930] 1 W.W.R. 914 (Man. C.A.). He concluded that "Tyrone's failure to provide the written authorization of the owners of the city lands and the portions of the streets to its rezoning application is fatal to the validity of the zoning bylaw"(p. 259).

Bias

Schwartz J. then turned to the allegation of bias. He referred to *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, as authority for the proposition that the "rules of natural justice apply to a rezoning application". He referred to *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369,

Le juge Schwartz n'a examiné que deux des moyens invoqués par l'appelante.

La compétence pour procéder en vertu du par. 609(1)

Le paragraphe 609(1) prévoit qu'une demande de modification de zonage doit être présentée par le propriétaire du bien-fonds visé ou par une personne qui a reçu de ce dernier l'autorisation écrite de le faire. Or, quand Tyrone a fait sa demande le 7 août 1986, elle n'était pas propriétaire de tous les biens-fonds dont elle cherchait à faire modifier le zonage.

Le juge Schwartz a tenu pour légalement non exécutoire l'option d'acheter les biens-fonds appartenant à la ville qu'avait consentie le comité des finances. Il a rejeté l'argument de la ville selon lequel l'option constituait l'autorisation requise pour se conformer au par. 609(1). La ville aurait pu donner l'autorisation écrite requise ou encore faire présenter par le commissaire à l'environnement une demande de modification de zonage. Pour ce qui est des rues, le par. 495(3) de la Loi confirme que c'est Sa Majesté du chef de la province qui détient le titre de propriété des terres occupées par une rue. Citant principalement l'ouvrage de Rogers intitulé *The Law of Canadian Municipal Corporations*, 2e éd., vol. 1, à la p. 379, et la décision *R. ex rel Ellerby v. Winnipeg*, [1930] 1 W.W.R. 914 (C.A. Man.), le juge Schwartz a invoqué la règle selon laquelle une municipalité est tenue de se conformer rigoureusement aux dispositions de sa loi habilitante. Il a conclu que [TRADUCTION] «l'omission de Tyrone de produire l'autorisation écrite des propriétaires de biens-fonds dans la ville et des parties de rue visés par sa demande de modification de zonage entraîne l'invalidité du règlement de zonage» (p. 259).

La partialité

Le juge Schwartz a ensuite examiné l'allégation de partialité. Il a invoqué l'arrêt *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] R.C.S. 512, à l'appui du principe voulant que les [TRADUCTION] «règles de justice naturelle s'appliquent à une demande de modification de zonage». Il a mentionné l'arrêt *Committee for*

for the proposition that "the applicant need not prove bias but that a reasonable apprehension of bias is sufficient whether bias exists or not" (p. 260).

He noted that there "is no suggestion that Councillor Savoie did what he did for any reason other than what he believed to be the best interests of his community" and that there "is no suggestion that he had any personal interest in the success of Tyrone's application other than what he thought was his duty" (p. 260). He concluded (at pp. 260-61):

In these circumstances he ought to have disqualified himself from the role of an impartial arbitrator and declared his interest in the proceedings.

The court does not say that Councillor Savoie did not have the right or duty to assist Tyrone with its application. However, it does say that a councillor may not be both the advocate for and the judge of the application.

Such conduct, if that is what, in the opinion of the Legislature, a councillor should be permitted to do must be specifically authorized by statute.

In the absence of special legislation, the weight of authority is that Councillor Savoie ought not to have been a party to the adjudication.

The community committee recommendation cannot stand and must be quashed.

Court of Appeal for Manitoba

Huband J.A. gave the reasons of the court, O'Sullivan and Lyon JJ.A. concerning.

Bias

Huband J.A. observed that the Councillor's participation in the initial discussions between the developer and the City was to be commended and encouraged as a normal part of his duties. Persons for or against a development proposal should feel free to discuss it with their Municipal Councillor, and the Councillor should be free to express an initial reaction without running the risk of being disqualified from subsequent participation in the decision-making process.

Justice and Liberty c. Office national de l'énergie, [1978] 1 R.C.S. 369, à l'appui de la proposition suivant laquelle [TRADUCTION] «le requérant n'est pas tenu de prouver l'existence de partialité, une crainte raisonnable de partialité étant suffisante, qu'il y ait ou non partialité en fait» (p. 260).

Le juge Schwartz a fait remarquer que [TRADUCTION] «rien n'indique que les gestes du conseiller Savoie aient été motivés par autre chose que sa conviction qu'il agissait au mieux des intérêts de son secteur» et que [TRADUCTION] «rien ne permet de conclure qu'il avait dans le succès de la demande de Tyrone un autre intérêt personnel que l'accomplissement de ce qu'il concevait comme son devoir» (p. 260). Il est arrivé à la conclusion suivante (aux pp. 260 et 261):

[TRADUCTION] Dans ces circonstances, il aurait dû abandonner le rôle d'arbitre impartial et déclarer l'intérêt qu'il avait dans la procédure.

La cour ne prétend pas que le conseiller Savoie n'avait pas le droit ni l'obligation de prêter son concours à la demande de Tyrone. Elle affirme toutefois qu'un conseiller ne saurait être à la fois partisan et juge d'une demande.

Une telle conduite, à supposer que le législateur soit d'avis qu'elle devrait être permise à un conseiller, doit être expressément autorisée par une loi.

Suivant la prépondérance de la jurisprudence, en l'absence d'une disposition législative spéciale en ce sens, le conseiller Savoie n'aurait pas dû participer à la décision.

La recommandation du comité municipal ne saurait donc être retenue et doit être annulée.

Cour d'appel du Manitoba

Le juge Huband, avec l'appui des juges O'Sullivan et Lyon, a exposé les motifs de la cour.

La partialité

Le juge Huband a fait observer que la participation du conseiller aux discussions initiales entre le promoteur et la ville était louable et à encourager à titre d'aspect normal de ses fonctions. Toute personne appuyant une proposition d'aménagement ou s'y opposant devrait se sentir libre d'en discuter avec son conseiller municipal. De même, celui-ci devrait être libre d'exprimer une première réaction sans courir le risque de se rendre inhabile à participer aux étapes subséquentes du processus décisionnel.

Similarly he decided that there was no impropriety in Councillor Savoie appearing at the Finance Committee meeting to urge that the City make lands available so that a viable development might be considered.

In Huband J.A.'s opinion, Councillor Savoie's support for the sale of the property should not have excluded him from participating in the Community Committee. Councillor Savoie had expressed approval of the development by his participation before the Finance Committee, but the same could be said of Councillors Reese and Ducharme, who voted against the intended sale at Finance Committee. Huband J.A. believed that the Councillor was still capable of having an open mind concerning the merits of the development as a whole and as to the kinds of conditions which should be imposed upon the developer as a precondition to rezoning.

Huband J.A. noted that the scheme of the *City of Winnipeg Act*, contemplates that a member of Council will be called upon to consider a matter at various committee stages leading up to an ultimate vote on City Council itself. The participation of a councillor, either as a voting member or as a delegate, in the deliberations of one committee could not constitute bias so as to preclude participation on other committees or in City Council.

Huband J.A. distinguished *Wiswell*, *supra*, on the ground that it was based on a denial of the opportunity to be heard due to failure to comply with statutory notice requirements. He cited with approval the decision of the New Brunswick Court of Appeal in *Oley and Moffatt v. Fredericton* (1984), 57 N.B.R. (2d) 361, which in turn relied on *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405 (Ont. Dist. Ct.). That case held that Council can hold preliminary views, but must be able to hear and consider the objections honestly and fairly. Huband J.A. concluded, at p. 264:

Le juge Huband a décidé en outre qu'il n'y a eu rien d'irrégulier à ce que le conseiller Savoie se présente à la réunion du comité des finances pour inciter la ville à rendre des terres disponibles afin que puisse être examiné un projet d'aménagement viable.

De l'avis du juge Huband, l'appui donné par le conseiller Savoie à la vente des biens-fonds n'aurait pas dû l'empêcher de participer aux délibérations du comité municipal. Le conseiller Savoie avait manifesté devant le comité des finances son approbation du projet d'aménagement, mais son cas n'était pas différent de celui des conseillers Reese et Ducharme qui, eux, avaient voté contre le projet de vente lors de la réunion de ce comité. D'après le juge Huband, le conseiller Savoie pouvait encore faire preuve d'ouverture d'esprit concernant le bien-fondé du projet d'aménagement dans son ensemble et les types de conditions à imposer au promoteur préalablement à la modification du zonage.

Le juge Huband a fait remarquer que la *City of Winnipeg Act*, prévoit qu'un membre du conseil sera appelé à examiner une question donnée dans le cadre des travaux de différents comités avant le vote final du conseil municipal lui-même. La participation d'un conseiller, soit en tant que membre ayant droit de vote soit en qualité de délégué, aux délibérations d'un comité ne pourrait constituer une preuve de partialité le rendant inhabile à prendre part aux délibérations d'autres comités ou du conseil municipal.

Le juge Huband a fait une distinction d'avec l'arrêt *Wiswell*, précité, disant que celui-ci était fondé sur la privation de la possibilité de se faire entendre résultant de l'omission de donner l'avis prévu par la loi. Il a cité, en l'approuvant, l'arrêt *Oley and Moffatt v. Fredericton* (1984), 57 R.N.-B. (2e) 361, dans lequel la Cour d'appel du Nouveau-Brunswick s'est appuyée sur la décision *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405 (C. dist. Ont.), où il a été décidé qu'un conseil peut former des opinions préliminaires, mais qu'il doit être capable d'entendre et de considérer honnêtement et équitablement les objections. Le juge Huband a conclu, à la p. 264:

The learned trial judge specifically found that Councillor Savoie acted in what he believed to be "the best interests of his community". Whether the electors of Old St. Boniface share in his opinion of the public weal is a question that can be answered by them at the next election. But it is not for the courts to prevent Councillor Savoie from taking an open leadership role, for that is his function as an elected representative responsible for the growth and development of the urban area. It is also his duty, of course, to be receptive to persuasion from those who hold contrary views when he subsequently considers and votes upon issues within committees and on Council itself. There is nothing in the record to suggest that Councillor Savoie functioned beyond the parameters of these lawful expectations.

[TRADUCTION] Le juge de première instance a expressément conclu que le conseiller Savoie croyait agir «au mieux des intérêts de son secteur». Quant à savoir si les électeurs du Vieux St-Boniface partagent sa conception du bien public, voilà une question à laquelle ces derniers pourront répondre à la prochaine élection. Il n'appartient toutefois pas aux tribunaux d'empêcher le conseiller Savoie d'assumer ouvertement un rôle de meneur, car c'est là sa fonction en tant que représentant élu, responsable de la croissance et de l'aménagement du secteur urbain. Il lui incombe en outre, évidemment, de prêter une oreille attentive aux arguments des tenants de points de vue contraires au sien lorsque, par la suite, il se penche et vote sur certaines questions en comité ou même en conseil. Rien au dossier n'indique que le conseiller Savoie n'a pas respecté ces attentes légitimes.

Jurisdiction to Proceed Under s. 609(1)

Huband J.A. rejected the submission that the City did not own the title to the streets and therefore could not rezone the land or authorize Tyrone to apply for rezoning. Under the Act, the Province holds title to the streets, but the City has possession and control of the streets, including the right to close, sell or lease streets. The City, therefore, is equitable owner of the streets and the Province is a bare trustee. Huband J.A. concluded that there is no reason to involve the Province in a rezoning application involving City streets and that the City had the necessary authority to zone its lands subject to the requirement to act fairly and to give notice and an opportunity to be heard.

Huband J.A. noted that when Tyrone made the rezoning application, it did not have written authority to do so with respect to the City lands. Such authority was given, in Huband J.A.'s view, with the letter of September 17. This authorization came well before the rezoning application was first considered by the Community Committee. In these circumstances, Huband J.A. held that the recommendations of the Community Committee, and the action of City Council itself in ratifying the recom-

La compétence pour procéder en vertu du par. 609(1)

Le juge Huband a rejeté le moyen selon lequel la ville n'avait pas la propriété des rues en cause et ne pouvait en conséquence modifier le zonage des biens-fonds qu'elles occupaient ni autoriser Tyrone à demander la modification du zonage. Aux termes de la Loi, la province détient le titre de propriété des rues, mais c'est la ville qui en a la possession et le contrôle, ce qui comprend le droit de les fermer, de les vendre ou de les céder à bail. Il s'ensuit donc que la ville est propriétaire en *equity* des rues et que la province n'a à leur égard que la qualité de simple fiduciaire. Le juge Huband a conclu qu'il n'y a aucune raison de mêler la province à une demande de modification de zonage portant sur des rues de la ville et que cette dernière est investie des pouvoirs nécessaires pour procéder au zonage de ses biens-fonds, sous réserve de l'obligation d'agir équitablement, de donner avis et d'accorder aux intéressés la possibilité de se faire entendre.

Le juge Huband a fait observer que, quand Tyrone a présenté la demande de modification de zonage, elle n'avait pas reçu l'autorisation écrite de le faire à l'égard des biens-fonds de la ville. Selon le juge Huband, cette autorisation a été accordée dans la lettre du 17 septembre, soit bien avant que le comité municipal ne se penche pour la première fois sur la demande de modification de zonage. Dans ces circonstances, le juge Huband a décidé que le vice de forme que représentait l'omission

mendations, were not to be set aside on the technicality of non-authorization prior to September 17, 1986. In any event, the provisions of s. 609 were directory and not mandatory.

Plan Winnipeg

Section 599 of the Act provides that in exercising zoning authority the Council shall conform with Plan Winnipeg and the relevant Community Plan and Action Area Plan. Plan Winnipeg shows part of the lands in question as "older residential neighbourhood" and part as "regional park". The Action Area Plan shows the area as "future residential".

Huband J.A. rejected the contention that the rezoning by-law was void because it did not conform to Plan Winnipeg. He noted that Plan Winnipeg is a broad statement of planning policies and objectives. It was some five years between first and final reading. It consists of some 33 pages of text and a City map. It contains policy statements that "the City shall encourage, whenever possible, private sector investment in appropriate development in older residential neighbourhoods" and that the City shall endeavour to develop linear parks along the rivers. While compliance with a document such as Plan Winnipeg is difficult to determine, Huband J.A. was inclined to the view that the zoning application complied.

He added, however, that he did not think that the question was one intended to be answered by a court of law. The Act specifies that the "designated commissioner", together with the appropriate committee of Council, shall adjudicate whether a proposed zoning by-law conforms to the official plan. It was apparent in the case at bar that the

d'accorder l'autorisation antérieurement au 17 septembre 1986 ne devait pas entraîner le rejet des recommandations du comité municipal ni l'annulation de la ratification des recommandations faites par le conseil municipal lui-même. En tout état de cause, les dispositions de l'art. 609 sont de simples directives sans caractère obligatoire.

Le plan de la ville de Winnipeg

Suivant l'art. 599 de la Loi, le conseil doit, en exerçant son pouvoir en matière de zonage, se conformer au plan de la ville de Winnipeg ainsi qu'au plan de secteur et au plan d'action de secteur applicables. Sur le plan de la ville de Winnipeg, une partie des biens-fonds en cause forment un [TRADUCTION] «vieux quartier résidentiel» et une autre partie un [TRADUCTION] «parc régional». Ces mêmes biens-fonds figurent sur le plan d'action de secteur à titre de [TRADUCTION] «futur quartier résidentiel».

Le juge Huband a repoussé l'argument selon lequel le règlement portant modification du zonage était entaché de nullité pour cause de non-conformité avec le plan de la ville de Winnipeg. Il a fait remarquer que le plan de la ville de Winnipeg constitue un énoncé général de politiques et d'objectifs en matière d'urbanisme. Entre son adoption en première et en dernière lecture, environ cinq années se sont écoulées. Ce plan comprend un texte d'environ 33 pages et une carte de la ville. Il énonce comme politique que [TRADUCTION] «la ville doit, autant que possible, encourager le secteur privé à investir dans l'aménagement approprié de vieux quartiers résidentiels» et que la ville doit essayer d'aménager des parcs linéaires le long des rivières. Malgré la difficulté qu'il y a à déterminer si l'on s'est conformé à un document comme le plan de la ville de Winnipeg, le juge Huband était enclin à penser que la demande de modification de zonage y était conforme.

Il a ajouté toutefois qu'il ne croyait pas qu'on ait voulu que pareille question soit tranchée par une cour de justice. La Loi précise que c'est au [TRADUCTION] «commissaire désigné», avec le concours du comité compétent du conseil, de décider si un projet de règlement de zonage est conforme au plan officiel. Il est évident en l'espèce que, de l'avis

commissioner was of the view that the proposed rezoning did comply.

Legislation

City of Winnipeg Act

1 ...

(p. 2) "designated committee" means a committee designated by the council to carry out a specific responsibility but does not apply to a community committee.

. . .

Establishment of communities.

20 (1) The following communities are established in the city, for each of which there shall be a community committee of council, comprising the councillors who represent a ward within the community, and the number of wards are established for each community as follows:

Communities	Number of wards
. . .	
(e) St. Boniface–St. Vital	4 wards
. . .	

Application for zoning by-law.

609 (1) An application for the enactment of a zoning by-law shall be made by the owner of the land, building or structure or by a person authorized in writing by him, and shall be in such form, and accompanied by such supporting material and the payment of such fee as the council deems advisable.

Referral of application or recommendation.

609 (2) When an application in the required form and with the required supporting material is received by the city, or when the designated commissioner has recommended the enactment of a zoning by-law by the city, the designated commissioner shall refer the application or recommendation to the community committee for the community in which the land referred to in the application is located if the land is in the city, and to the council of the municipality if it is located in the additional zone, and public notice shall be given,

(a) that on a day and at a time and place stated in the notice, a meeting will be held to receive representations from any person who wishes to make them in respect of the proposed zoning changes; and

(b) stating that a copy of the application and supporting material and a statement of the proposed zoning changes may be inspected at times and in a place or places specified in the notice.

. . .

du commissaire, le projet de modification du zonage s'y conformait.

Les textes législatifs

City of Winnipeg Act

[TRADUCTION]

(1) ...

(p. 2) «comité désigné» signifie le comité désigné par le conseil pour s'acquitter d'une tâche particulière, mais ne comprend pas un comité municipal.

. . .

Création de secteurs.

20 (1) Sont créés dans les limites de la ville les secteurs énumérés ci-après. Pour chaque secteur, il y a au sein du conseil un comité municipal composé des conseillers représentant un quartier situé à l'intérieur du secteur. Les secteurs comptent le nombre suivant de quartiers:

Secteurs	Nombre de quartiers
. . .	
e) St-Boniface–St-Vital	4 quartiers
. . .	

Demande de règlement de zonage.

609 (1) Une demande d'adoption de règlement de zonage est présentée par le propriétaire du bien-fonds, de l'édifice ou de la structure, ou par une personne qui en a reçu l'autorisation écrite de ce dernier. La demande revêt la forme et est accompagnée des documents justificatifs et du paiement des droits que le conseil juge indiqués.

Renvoi de la demande ou de la recommandation.

609 (2) Sur réception par la ville d'une demande sous la forme prescrite, accompagnée des documents justificatifs requis, ou lorsque le commissaire désigné a recommandé à la ville l'adoption d'un règlement de zonage, ledit commissaire renvoie la demande ou la recommandation au comité municipal du secteur où se trouve le bien-fonds visé dans la demande, si le bien-fonds est situé dans les limites de la ville, et au conseil de la municipalité s'il est situé dans la zone additionnelle. De plus, un avis public est donné

a) fixant la date, l'heure et le lieu d'une réunion lors de laquelle quiconque le désire pourra présenter ses observations sur les modifications de zonage proposées; et

b) indiquant les heures et le lieu où pourront être examinés une copie de la demande et des documents produits à son appui ainsi qu'un énoncé des modifications de zonage proposées.

. . .

Meeting to hear representations.

610 (1) On the day and at the time and place stated in the notice referred to in section 609, a meeting shall be held to receive representations from any person who wishes to make them in respect of the application or the alternative zoning changes.

. . .

Record of meeting to be kept.

611 (1) The community committee shall cause to be made a record of the meeting referred to in section 610 by any means the council considers appropriate.

. . .

Report of community committee to be prepared.

612 (1) A report summarizing the representations and submissions made at the meeting and stating the community committee's recommendations with supporting reasons shall be prepared and forwarded by the committee clerk within thirty days following the completion of the meeting.

Report to be forwarded to designated committee.

612 (2) The community committee's report shall be forwarded within thirty days following the meeting to the designated committee and made available for inspection by any person who appeared at the meeting.

. . .

Forwarding of report.

614 (1) After it receives the report of the community committee, or after the community committee is deemed to have made a report under subsection 612(3), the designated committee shall consider the report of the community committee and shall

(a) forward the report with the designated committee's recommendation thereon to council;

(b) forward a copy of the report with the designated committee's recommendations thereon by mail to all persons who submitted oral or written representations to or at the meeting referred to in subsection 610(1), which recommendations shall include the reasons for recommendations, if any, differing from those of the community committee;

(c) where a written representation was received at the meeting held by the community committee by mail or other means, without the appearance of the person making the written representation, mail a copy of the report to any single address set out thereon for the receipt of the report, if any, or to any single address given upon the filing of the representation, or in the absence of any single

Réunion pour l'audition des observations.

610 (1) À la date, à l'heure et à l'endroit prévus dans l'avis visé à l'article 609 se tient une réunion lors de laquelle quiconque le désire peut présenter ses observations sur la demande ou sur les autres propositions de modification du zonage.

. . .

Procès-verbal de la réunion.

611 (1) Le comité municipal veille à ce que soit dressé, par tout moyen que le conseil juge indiqué, un procès-verbal de la réunion visée à l'article 610.

. . .

Rapport du comité municipal.

612 (1) Dans les trente jours qui suivent la réunion, le secrétaire du comité dresse et envoie un rapport résumant les observations et les arguments présentés lors de la réunion et exposant les recommandations du comité municipal ainsi que les motifs sur lesquels elles sont fondées.

Envoi du rapport au comité désigné.

612 (2) Dans les trente jours qui suivent la réunion, le rapport du comité municipal est envoyé au comité désigné et peut être consulté par toute personne qui a participé à la réunion.

. . .

Diffusion du rapport.

614 (1) Sur réception du rapport du comité municipal, ou dès que ce dernier est réputé avoir fait rapport aux termes du paragraphe 612(3), le comité désigné étudie ce rapport et

a) y ayant joint sa recommandation, le fait tenir au conseil;

b) en fait tenir par la poste, à toutes les personnes qui ont présenté des observations orales ou écrites dans le cadre de la réunion visée au paragraphe 610(1), une copie accompagnée de ses recommandations, les recommandations, s'il en est, qui diffèrent de celles du comité municipal devant être motivées;

c) lorsque des observations écrites reçues à la réunion du comité municipal ont été envoyées par la poste ou de quelque autre manière, sans que leur auteur ne se présente à cette réunion, il envoie une copie du rapport par la poste à l'adresse, s'il en est, indiquée à cette fin dans lesdites observations, ou à l'adresse indiquée lors du dépôt des observations, ou, si plusieurs adresses y figurent, à au moins une

address to any one or more of the addresses set out thereon, and in the absence of any legible address, no report need by forwarded by mail or otherwise under this clause; and

(d) forward with the copies of the report forwarded or mailed under clause (b) or (c), notice of the date, time and place when and where the matter is expected to be considered by council under subsection 615(4).

. . .

Reports and recommendations to executive policy committee.

615 (1.1) Notwithstanding subsection 614(1), council may direct that all reports and recommendations referred to in that subsection be referred to the executive policy committee to be dealt with in accordance with subsections 615(3) and 615(3.1).

. . .

Recommendations to council.

615 (3) Where council has made a direction under subsection 615(1.1), the executive policy committee shall

(a) consider the report of the community committee, or, if the land affected is in the additional zone, the report of the council of the municipality and the designated committee's recommendations or report; and

(b) forward its recommendations thereon to the council.

. . .

Disposition by council.

615 (4) Subject to section 616, the council shall consider the recommendation of the designated committee made under subsection 615(1) or of the executive policy committee made under subsection 615(3) and may

(a) accept, reject or modify the recommendation and may pass one or more zoning by-laws with respect thereto; or

(b) forward the proposed zoning change to The Municipal Board for its report and recommendations; or

(c) refer the recommendation to a committee for a further meeting or consideration upon such terms as the council shall establish.

The Issues

The issues in this appeal are as follows:

de celles-ci et, en l'absence d'une adresse lisible, le présent alinéa n'impose aucune obligation d'envoyer le rapport, que ce soit par la poste ou autrement; et

d) joint aux copies du rapport envoyées conformément aux alinéas b) ou c) avis de la date, de l'heure et du lieu où la question sera vraisemblablement examinée par le conseil en conformité avec le paragraphe 615(4).

. . .

Rapports et recommandations au comité exécutif.

615 (1.1) Par dérogation au paragraphe 614(1), le conseil peut ordonner que tous les rapports et toutes les recommandations y visés soient renvoyés au comité exécutif pour qu'il les examine conformément aux paragraphes 615(3) et 615(3.1).

. . .

Recommandations au conseil.

615 (3) Lorsque le conseil a donné l'ordre visé au paragraphe 615(1.1), le comité exécutif

a) examine le rapport du comité municipal ou, si le bien-fonds en question est situé dans la zone additionnelle, le rapport du conseil de la municipalité ainsi que les recommandations ou le rapport du comité désigné; et

b) fait tenir au conseil ses recommandations y relatives.

. . .

Décision du conseil.

615 (4) Sous réserve de l'article 616, le conseil examine la recommandation faite par le comité désigné en vertu du paragraphe 615(1), ou par le comité exécutif en vertu du paragraphe 615(3), et il peut

a) accepter, rejeter ou modifier la recommandation et y donner suite en adoptant un seul ou plusieurs règlements de zonage; ou

b) soumettre à la Commission municipale le projet de modification de zonage pour qu'elle établisse un rapport et fasse des recommandations; ou

c) renvoyer la recommandation à un comité pour qu'il tienne une nouvelle réunion ou qu'il l'examine à la lumière de critères établis par le conseil.

Les questions en litige

Les questions en litige dans le présent pourvoi sont les suivantes:

1. Bias: Was Councillor Savoie disqualified by bias from participating in the proceedings of the Community Committee?

2. Ownership: Did the application for zoning comply with s. 609(1) of the Act?

3. Plan Winnipeg: Did the zoning by-law fail to conform to Plan Winnipeg?

4. Bad Faith and Expectation of Consultation: Did the Community Committee act in bad faith or in violation of a reasonable expectation of consultation?

1. *Bias*

Natural Justice: Application to Local Government Bodies

The rules which require a tribunal to maintain an open mind and to be free of bias, actual or perceived, are part of the *audi alteram partem* principle which applies to decision-makers. The appellant contends that it applies in its full vigour to members of a municipal council when deciding whether to vote in favour of a by-law which in this case involves zoning. It relies, principally, on *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, *supra*, in support of this proposition.

In that case, Wiswell and the Crescentwood Homeowners Association sought a declaration that an amending zoning by-law passed by Metro Council was invalid. Municipal resolutions prescribing procedures for amendments required notices of hearings to be published in two newspapers and on the premises which were the subject matter of the amendment. No notices were posted on the premises. The Homeowners Association, which consistently opposed attempts to zone the area beyond single family residence density, acquired no knowledge of the hearing and never had the opportunity to make representations. Written notice was sent to the applicants for rezoning, but not to the Homeowners Association,

1. La partialité: Le conseiller Savoie était-il inhabile pour cause de partialité à participer aux délibérations du comité municipal?

2. La propriété: La demande de modification du zonage était-elle conforme au par. 609(1) de la Loi?

3. Le plan de la ville de Winnipeg: Le règlement de zonage dérogeait-il au plan de la ville de Winnipeg?

4. La mauvaise foi et l'expectative de consultation: Le comité municipal a-t-il agi de mauvaise foi ou sans respecter une expectative raisonnable de consultation?

1. *La partialité*

Justice naturelle: application aux organismes gouvernementaux locaux

Les règles exigeant qu'un tribunal administratif fasse preuve d'ouverture d'esprit et qu'il soit, en fait et en apparence, exempt de partialité font partie du principe *audi alteram partem* auquel est assujetti tout décideur. L'appelante soutient que ce principe s'applique dans toute sa rigueur aux membres d'un conseil municipal lorsqu'ils ont à décider s'il y a lieu de voter en faveur d'un règlement, qui, en l'espèce, se rapporte au zonage. Au soutien de cet argument, elle invoque principalement l'arrêt *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, précité.

Dans cette affaire, Wiswell et la Crescentwood Homeowners Association (ci-après «l'association des propriétaires») demandaient un jugement déclarant invalide un règlement portant modification du zonage, adopté par le conseil municipal en cause. Les résolutions municipales établissant la procédure de modification exigeaient que des avis d'audition soit publiés dans deux journaux et affichés dans les lieux visés par la modification. Aucun avis n'a été affiché dans les lieux. L'association des propriétaires, qui s'était systématiquement opposée aux tentatives de faire attribuer au secteur en question un zonage permettant une densité plus élevée que celle d'habitations unifamiliales, n'a pas eu connaissance de la tenue de l'audition et n'a jamais eu la possibilité de faire valoir son point de vue. Un avis écrit a été envoyé

although the latter's opposition was known to Metro Council.

The majority judgment determined that the by-law was invalid by reason of the absence of notice which deprived the appellants of the opportunity to be heard. In coming to this conclusion Hall J., speaking for the majority, characterized the proceeding as quasi-judicial rather than legislative. The consequence was that Metro Council was bound in law to act fairly and impartially, in good faith, listening to both sides. The case did not deal with the issue of bias or pre-judgment which is squarely raised in these appeals. Nevertheless, the appellant argues that the proceedings before the Community Committee were quasi-judicial in nature and that conduct of members of Council must not give rise to a reasonable apprehension of bias. It is therefore necessary to consider whether *Wiswell* supports this conclusion.

Wiswell must be read in light of comparatively recent changes that have occurred in applying the rules of natural justice. The content of the rules of natural justice and procedural fairness were formerly determined according to the classification of the functions of the tribunal or other public body or official. This is no longer the case and the content of these rules is based on a number of factors including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized and the type of decision it is called upon to make. This change in approach was summarized in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879. I stated (at pp. 895-96):

> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with

aux auteurs de la demande de modification de zonage, mais non à l'association des propriétaires, quoique le conseil municipal fût au courant de l'opposition de celle-ci.

La Cour à la majorité a conclu à l'invalidité du règlement en raison de l'omission de donner avis aux appelants, omission qui les avait privés de la possibilité se faire entendre. En arrivant à cette conclusion, le juge Hall, s'exprimant au nom de la majorité, a qualifié la procédure de quasi judiciaire plutôt que de législative. D'où il s'ensuivait que le conseil municipal était juridiquement tenu d'agir de façon équitable et impartiale et de bonne foi, en écoutant les deux points de vue. La question de la partialité ou du préjugé, directement soulevée dans les présents pourvois, n'a pas été abordée dans cet arrêt. L'appelante en l'espèce allègue néanmoins le caractère quasi judiciaire des procédures devant le comité municipal et soutient que la conduite de membres du conseil ne doit faire naître aucune crainte raisonnable de partialité. Il nous faut en conséquence examiner si l'arrêt *Wiswell* justifie cette conclusion.

L'arrêt *Wiswell* doit être interprété à la lumière de changements relativement récents apportés à l'application des règles de justice naturelle. Le contenu des règles de justice naturelle et de l'équité procédurale était autrefois déterminé en fonction de la classification des tâches du tribunal administratif ou d'un autre organisme ou fonctionnaire publics. Ce n'est plus le cas et le contenu de ces règles dépend désormais de plusieurs facteurs, dont les termes de la loi en vertu de laquelle agit l'organisme en question, la nature de la tâche particulière qu'il a à remplir et le type de décision qu'il est appelé à rendre. Ce changement d'approche se trouve résumé dans l'arrêt *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879, où j'affirme (aux pp. 895 et 896):

> Aussi bien les règles de justice naturelle que l'obligation d'agir équitablement sont des normes variables. Leur contenu dépend des circonstances de l'affaire, des dispositions législatives en cause et de la nature de la question à trancher. La distinction entre elles s'estompe donc lorsqu'on approche du bas de l'échelle dans le cas de tribunaux judiciaires ou quasi judiciaires et du haut de

respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates. [Emphasis added.]

It is therefore necessary to examine all the factors under which a committee of Council operates. I start with the most significant fact that the statute provides for a hearing before a committee of members of Council. There is nothing in the legislation to indicate that they are to act in a capacity other than that of municipal councillors. In this regard I must assume that the Legislature was aware that in this capacity the members of Council will have fought an election in which the matter upon which they are called upon to decide may have been debated and on which the would-be councillors may have taken a stand some pro and some con. Indeed, the election of a particular councillor may have depended on the position taken. Furthermore, with respect to the enactment of zoning by-laws and amendments to zoning by-laws, it is well known that numerous committees are involved at which members of Council are expected to vote before being called upon to hear representations and decide the question. Moreover, in the preparation and processing of a development, a municipal councillor is often involved in assisting parties supporting and opposing the development with respect to their presentations. In the course of this process, a councillor can and often does take a stand either for or against the development. This degree of prejudgment would run afoul of the ordinary rule which disqualifies a decision-maker on the basis of a reasonable apprehension of bias. Accordingly, it could not have been intended by the Legislature that this rule apply to members of Council with the same force as in the case of other tribunals whose character and functions more closely resemble those of a court.

l'échelle dans le cas de tribunaux administratifs ou exécutifs. C'est pourquoi on ne détermine plus maintenant le contenu des règles à suivre par un tribunal en essayant de le ranger dans la catégorie de tribunal judiciaire, quasi judiciaire, administratif ou exécutif. Au contraire, on décide du contenu de ces règles en tenant compte de toutes les circonstances dans lesquelles fonctionne le tribunal en question. [Je souligne.]

Il est donc nécessaire d'examiner tous les facteurs qui jouent dans le fonctionnement d'un conseil municipal. Je commence par le fait extrêmement important que la Loi prévoit une audition devant un comité composé de membres du conseil. Il n'y a rien dans la Loi qui indique que ces derniers doivent agir dans une qualité autre que celle de conseillers municipaux. Je dois supposer à cet égard que le législateur savait qu'en cette qualité les membres du conseil auront mené une campagne électorale au cours de laquelle aura pu être débattue la question qu'ils ont à trancher, question sur laquelle les candidats au poste de conseiller auront pris position, certains pour et d'autres contre. En fait, l'élection d'un conseiller donné peut avoir tenu à la position qu'il a adoptée. De plus, en ce qui concerne l'adoption et la modification de règlements de zonage, il est de notoriété que de nombreux comités interviennent dans le processus et que des membres du conseil ont à voter dans le cadre des travaux de ces comités avant d'entendre des présentations et de trancher la question. En outre, aux stades de la préparation et de l'étude d'un projet d'aménagement, il arrive souvent qu'un conseiller municipal fasse bénéficier les personnes qui sont en faveur du projet, et celles qui s'y opposent, de son aide aux fins de la présentation de leur point de vue. Or, il se peut, et cela se produit souvent, qu'au cours de ce processus un conseiller prenne position pour ou contre l'aménagement proposé. Ce serait là préjuger l'affaire d'une manière qui violerait la règle normale prescrivant l'inhabilité d'un décideur en raison d'une crainte raisonnable de partialité. Cela étant, le législateur n'a pas pu vouloir que cette règle s'applique aux membres d'un conseil municipal avec autant de force que dans le cas d'autres tribunaux administratifs qui, de par leur caractère et leurs fonctions, ressemblent davantage à un tribunal judiciaire.

The nature and functions of a municipal body and their influence on the rules of natural justice have been examined in a number of cases which I have found of assistance.

In *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20, the Council was called upon to consider the repeal of a land-use by-law. A majority of Council had already made up their minds and had said so. In dismissing an application to quash the by-law on this ground, Henry J. stated, at p. 43:

> In respect of a *quasi*-judicial tribunal in the fullest sense of that concept required to adhere to principles of natural justice this would amount to an allegation of bias such as might be ground for quashing the decision. But regard must be had to the nature of the body reviewing the matter. A municipal council is an elected body having a legislative function within a limited and delegated jurisdiction. Under the democratic process the elected representatives are expected to form views as to matters of public policy affecting the municipality. Indeed, they will have been elected in order to give effect to public views as to important policies to be effected in the community . . . . They are not Judges, but legislators from whom the ultimate recourse is to the electorate. Once having given notice and fairly heard the objections, the Council is of course free to decide as it sees fit in the public interest.

Henry J. had further occasion to elaborate on the subject in *Re McGill and City of Brantford*, *supra*. It involved a motion to quash a by-law to close certain city streets on the grounds of bias. At the hearing, objectors took the position that the Council had already committed itself to the street closing and that it was therefore unlikely that it could act impartially and in a judicial manner.

After describing the legislative and political nature of a municipal council's function, Henry J. stated, at p. 411:

> On this process, which is simply our concept of democracy in action, is imposed the requirement to hold

La nature et les fonctions d'un corps municipal ainsi que la façon dont elles influent sur les règles de justice naturelle ont fait l'objet d'un examen dans un certain nombre de décisions que j'estime utiles.

Dans l'affaire *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20, le conseil avait à étudier l'opportunité d'abroger un règlement en matière d'utilisation du sol. La majorité des membres du conseil avaient déjà pris parti et l'avaient signalé. En rejetant une demande d'annulation du règlement pour ce motif, le juge Henry a dit, à la p. 43:

> [TRADUCTION] Dans le cas d'un tribunal *quasi* judiciaire tenu, dans toute la force du concept, au respect des principes de justice naturelle, cela constituerait une allégation de partialité pouvant justifier l'annulation de la décision. On doit toutefois tenir compte de la nature de l'organisme chargé d'examiner la question. Un conseil municipal est un corps élu qui exerce une fonction législative à l'intérieur d'un champ de compétence limitée et déléguée. Selon le processus démocratique, on s'attend à ce que les représentants élus forment des opinions sur des questions d'intérêt public touchant la municipalité. En fait, ils auront été élus pour donner suite aux opinions exprimées par le public sur des politiques importantes à mettre en œuvre au sein de la collectivité. [. . .] Ce ne sont pas des juges mais bien des législateurs qui, en dernière analyse, rendent compte aux électeurs. Ayant donné avis et entendu équitablement les objections, le conseil est évidemment libre de prendre la décision qui lui semble indiquée dans l'intérêt public.

L'affaire *Re McGill and City of Brantford*, précitée, a fourni au juge Henry une nouvelle occasion de s'étendre sur ce sujet. Il s'agissait d'une requête en annulation, pour cause de partialité, d'un règlement prévoyant la fermeture de certaines rues de la ville. À l'audition, la position des opposants a été que le conseil s'était déjà engagé à fermer les rues et qu'il était en conséquence peu probable qu'il puisse agir avec impartialité et de façon judiciaire.

Après avoir décrit la nature législative et politique du rôle d'un conseil municipal, le juge Henry a affirmé, à la p. 411:

> [TRADUCTION] Ce processus, qui n'est rien d'autre que la manifestation concrète de notre conception de la

a hearing before roads are closed. What then is the character of such a hearing? Its purpose is to ensure that the Council, before exercising its power to enact a law closing specific roads, must provide a forum in which those whose private rights are adversely affected may assert their objections. It fortifies by law the right every ratepayer has to write to his alderman, organize and address a meeting or conduct a peaceable demonstration. By statute, he is to be *heard*, and that by the whole Council, who must provide the opportunity to do so.

In his view it was only when Council had made an irrevocable decision on the matter that a disqualifying bias was made out. He continued, at p. 416:

So if it could be shown, the onus being on the objectors to do so, that the Council before the hearing had irrevocably decided to pass the by-law to close the roads, that would reflect disabling bias. No hearing in the true sense of that concept was or could be held. As such a hearing is a condition precedent, its absence would be fatal to the exercise of the legislative power.

Oley and Moffatt v. Fredericton, *supra*, a case in the New Brunswick Court of Appeal, applied the test in *Re McGill*, *supra*. The court was concerned with s. 68 of the Community Planning Act, R.S.N.B. 1973, c. C-12, which required City Council to hear and consider the objections to a proposed by-law. The Council passed a by-law amending land use designations to permit the installation of a sewage lagoon. The by-law was attacked on the ground that members of Council had made statements committing themselves to the project and on the further ground that Council had entered into an agreement with the province in respect of financing the project.

Stratton C.J.N.B. summed up as follows, at p. 380:

In such circumstances, I would adopt the statement of Henry, J., in **McGill v. Corporation of the City of Brantford** (1980), 12 M.P.L.R. 24, at p. 35:

démocratie, est assujetti à l'exigence de la tenue d'une audition antérieurement à la fermeture des rues. Quelle est donc la nature de cette audition? Elle vise à empêcher le conseil d'exercer son pouvoir de légiférer pour fermer certaines rues sans qu'il n'ait au préalable donné aux personnes qui en subiront une atteinte à leurs droits privés l'occasion d'exprimer leurs objections. Elle vient renforcer juridiquement le droit de tout contribuable d'écrire à son conseiller municipal, d'organiser une réunion et d'y prendre la parole, ou de procéder à une manifestation pacifique. Aux termes de la loi, le contribuable doit être *entendu*, et ce, par le conseil au complet, auquel il incombe de lui en accorder la possibilité.

Selon lui, il n'y a partialité entraînant l'inhabilité que lorsque le conseil a pris irrévocablement parti sur la question. Il ajoute, à la p. 416:

[TRADUCTION] Donc, s'il était possible de démontrer, et c'est aux opposants qu'il incombe de le faire, qu'antérieurement à l'audition le conseil avait décidé irrévocablement d'adopter le règlement prévoyant la fermeture des rues, cela établirait une partialité entraînant l'inhabilité. Dans ces circonstances, il n'a pu, ni ne pouvait, y avoir d'audition dans le vrai sens du terme. Comme la tenue d'une telle audition est une condition préalable, le défaut de la tenir s'avérerait fatal à l'exercice du pouvoir législatif.

Dans l'affaire *Oley and Moffatt v. Fredericton*, précitée, la Cour d'appel du Nouveau-Brunswick a appliqué le critère énoncé dans la décision *Re McGill*, précitée. La cour avait à se pencher sur l'art. 68 de la *Loi sur l'urbanisme*, L.R.N.-B. 1973, ch. C-12, qui imposait au conseil municipal l'obligation d'entendre et d'examiner les objections soulevées à l'encontre d'un projet de règlement municipal. Le conseil a adopté un règlement portant modification de l'affectation du sol de manière à permettre l'aménagement d'un bassin de stabilisation des eaux usées. On a attaqué ce règlement pour le motif que des membres du conseil avait fait des déclarations dans lesquelles ils s'engageaient à approuver le projet et pour le motif que le conseil avait conclu avec la province une entente relativement au financement du projet.

Le juge en chef Stratton a fait le résumé suivant, à la p. 380:

Dans ces circonstances, je suis porté à suivre la déclaration du juge Henry, dans l'arrêt **McGill v. Corporation of the City of Brantford** (1980), 12 M.P.L.R. 24, à la p. 35:

"It must be assumed that the Legislature knew the functions, and the mode of developing such a project from its inception to the advanced stages, and nonetheless designated the council as the body to hold the hearing. In these circumstances all that can be required of the council is to put aside their tentative views individually and collectively, hear the objections, consider them honestly and fairly, see if they can be accommodated and then make the final decision. No more and no less can be expected of them."

«On doit supposer que le Législateur connaissait les fonctions et le mode de développement d'un projet de ce genre depuis ses débuts jusqu'aux stades avancés, et qu'il a néanmoins choisi le conseil comme organisme chargé de tenir l'audition. Dans ces circonstances, tout ce qu'on peut demander au conseil, c'est qu'il mette de côté ses premières opinions, qu'il écoute les objections, qu'il les étudie honnêtement et impartialement, voie s'il peut les accepter et prenne ensuite la décision finale. On ne peut attendre ni plus ni moins du conseil.»

As I read s. 68 of the **Community Planning Act** it requires a municipal council to honestly and fairly hear and consider any objections to land use change even though individual councillors may previously have expressed opinions on the matter. In the present case, there is no convincing evidence either that the council did not honestly consider the objections of the citizens opposed to the enactment of Bylaw 813 or that it had made an irrevocable decision to approve the Bylaw before hearing the objectors.

Selon mon interprétation, l'art. 68 de la **Loi sur l'urbanisme** exige que le conseil municipal entende et examine honnêtement et impartialement les objections au changement dans les usages permis pour les terrains, même si les conseillers ont déjà exprimé des opinions personnelles sur la question. Dans la présente cause, il n'y a pas de preuve convaincante que le conseil n'a pas examiné honnêtement les objections des citoyens opposés à l'adoption de l'arrêté nº 813, ni qu'il a pris la décision irrévocable d'adopter l'arrêté avant d'entendre les opposants.

The role of a municipal councillor is quite different from that of the Chairman of the National Energy Board which was considered in *Committee for Justice and Liberty v. National Energy Board, supra*. In that case, a majority of our Court concluded that the Chairman of the Board was disqualified from presiding over an application for a certificate of public convenience and necessity in connection with the Mackenzie Valley Pipeline pursuant to s. 44 of the *National Energy Board Act*, R.S.C. 1970, c. N-6, by reason of his participation in the work of a Study Group made up of parties interested in the project. Laskin C.J. on behalf of the majority stressed that the Chairman had participated in discussions material to the s. 44 application with members of the group which included the applicant for the licence. In this capacity he had assisted in the preparation of the s. 44 application. Moreover, the Crown Corporation of which he was the president contributed funds to the Study Group. In short, his relationship with parties to the application had been such that he virtually had a personal interest in the s. 44 application and its outcome which created a reasonable apprehension of bias.

Le rôle d'un conseiller municipal diffère nettement de celui du président de l'Office national de l'énergie, dont il est question dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, précité. Il s'agit d'une affaire dans laquelle notre Cour à la majorité a conclu qu'en raison de sa participation aux travaux d'un groupe d'étude composé de personnes ayant un intérêt dans le projet, le président de l'Office était inhabile à présider l'audition d'une demande de certificat de commodité et nécessité publiques pour le pipeline dans la vallée du Mackenzie, présentée en vertu de l'art. 44 de la *Loi sur l'Office national de l'énergie*, S.R.C. 1970, ch. N-6. Le juge en chef Laskin a souligné au nom de la majorité que le président avait participé à des discussions se rapportant à la demande fondée sur l'art. 44 avec des membres du groupe dont faisait partie l'auteur de la demande de permis. À ce titre, le président avait aidé à préparer la demande fondée sur l'art. 44. De plus, la société d'État dont il était président avait versé des fonds au groupe d'étude. Bref, ses rapports avec des parties à la demande avaient été de nature à lui conférer pratiquement un intérêt personnel dans la demande fondée sur l'art. 44 et dans le sort de celle-ci, ce qui faisait naître une crainte raisonnable de partialité.

The members of the National Energy Board do not have political or legislative duties. Prejudgment of issues is not inherent in the nature of their extra-adjudicative functions. While it was argued that the Chairman was required to deal, in the course of his duties, with matters of supply and the requirements for natural gas and that these matters would have some relevance to the s. 44 application, Laskin C.J. discounted them as merely preparing the Chairman for the main hearing.

I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. See *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board, supra*; and *Valente v. The Queen*, [1985] 2 S.C.R. 673.

Statutory provisions in various provincial Municipal Acts tend to parallel the common law but typically provide a definition of the kind of interest which will give rise to a conflict of interest.

Les tâches des membres de l'Office national de l'énergie ne revêtent aucun caractère politique ou législatif. Préjuger des questions n'est pas inhérent à la nature de leurs fonctions extra-juridictionnelles. Bien qu'on ait fait valoir que la tâche du président consistait notamment à se pencher sur des questions d'approvisionnement et de demande concernant le gaz naturel et que ces questions auraient une certaine pertinence relativement à la demande fondée sur l'art. 44, le juge en chef Laskin n'y a pas attaché d'importance, disant qu'elles servaient simplement à préparer le président à l'audition principale.

Je fais une distinction entre la partialité pour cause de préjugé, d'une part, et la partialité découlant d'un intérêt personnel, d'autre part. Il se dégage nettement des faits de l'espèce, par exemple, qu'un certain niveau de préjugé est inhérent au rôle de conseiller. On ne peut pas en dire autant de l'intérêt personnel. En effet, il n'y a rien d'inhérent aux fonctions hybrides des conseillers municipaux, qu'elles soient politiques, législatives ou autres, qui rendrait obligatoire ou souhaitable de les soustraire à l'obligation de ne pas intervenir dans des affaires dans lesquelles ils ont un intérêt personnel ou autre. Il n'est pas exigé des conseillers municipaux qu'ils aient dans les dossiers qui leur sont soumis un intérêt personnel au-delà de l'intérêt qu'ils partagent avec d'autres citoyens dans la municipalité. Quand on conclut à l'existence d'un tel intérêt personnel, alors, aussi bien en vertu de la common law que de la loi, un conseiller devient inhabile si l'intérêt est à ce point lié à l'exercice d'une fonction publique qu'une personne raisonnablement bien informée conclurait que cet intérêt risquerait d'influer sur l'exercice de la fonction en question. C'est ce qu'on appelle communément un conflit d'intérêts. Voir *Re Blustein and Borough of North York*, [1967] 1 O.R. 604 (H.C.), *Re Moll and Fisher* (1979), 23 O.R. (2d) 609 (C. div.), *Committee for Justice and Liberty c. Office national de l'énergie*, précité, et *Valente c. La Reine*, [1985] 2 R.C.S. 673.

Il existe une tendance au parallélisme entre les dispositions de différentes lois provinciales sur les municipalités et la common law, mais ces dispositions définissent normalement le genre d'intérêt

See *Blustein* and *Moll*, *supra*. In Manitoba, the relevant provisions are found in the *Municipal Council Conflict of Interest Act*, R.S.M. 1987, c. 255, ss. 4, 5 and 8. No reference is made to these sections in this appeal nor is there any suggestion that they have been contravened.

In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

Application to this Appeal

The disqualifying conduct relied on in this case consists of Councillor Savoie appearing before the Finance Committee and speaking on behalf of the developer. This in itself would not necessarily lead to the conclusion that his mind could not be changed. It is, however, suggested that this places him in the role of advocate for the developer thus giving him an interest in the issue which goes beyond the public interest. This submission would have substance if there was something to suggest

qui fait naître un conflit d'intérêts. Voir les décisions *Blustein* et *Moll*, précitées. Au Manitoba, les dispositions pertinentes se trouvent dans la *Loi sur les conflits d'intérêts au sein des conseils municipaux*, L.R.M. 1987, ch. 255, art. 4, 5 et 8. Ces articles n'ont pas été invoqués dans le présent pourvoi et on n'allègue aucune contravention de ceux-ci.

À mon avis, le critère qui se concilie avec les fonctions d'un conseiller municipal et qui permet à ce dernier de remplir ses fonctions politiques et législatives est celui qui exige que les tenants de l'un ou l'autre point de vue soient entendus par des conseillers qu'il est possible de convaincre. Le législateur n'a pu vouloir qu'une audition se tienne devant un organisme qui a déjà pris une décision irrévocable. La partie qui allègue la partialité entraînant l'inhabilité doit établir que l'affaire a en fait été préjugée, de sorte qu'il ne servirait à rien de présenter des arguments contredisant le point de vue adopté. Les déclarations de conseillers individuels, bien qu'elles puissent fort bien créer une apparence de partialité, ne satisfont au critère que si la cour conclut qu'elles sont l'expression d'une opinion finale et irrévocable sur la question. Il importe de se rappeler à ce propos que ni le fait d'appuyer une mesure devant un comité ni le fait de voter en faveur de cette mesure ne constituera, en l'absence d'une indication du caractère définitif de la position prise, une preuve de partialité entraînant l'inhabilité. La conclusion contraire rendrait inhabiles la majorité des conseillers à l'égard de toutes les questions qui sont décidées dans le cadre d'assemblées publiques au cours desquelles les opposants à une mesure ont le droit de se faire entendre.

L'application au présent pourvoi

En l'espèce, c'est la comparution du conseiller Savoie devant le comité des finances pour y prendre la parole au nom du promoteur qui, allègue-t-on, constitue la conduite entraînant l'inhabilité. Cela en soi ne mène pas nécessairement à la conclusion qu'il était impossible de le faire changer d'avis. On prétend toutefois qu'il s'était ainsi fait partisan du promoteur, ce qui a eu pour effet de lui conférer dans le dossier en question un intérêt qui dépasse l'intérêt public. C'est là un argument qui

that the Councillor's support was motivated by some relationship with or interest in the developer rather than in the development. The evidence shows, however, that he had previously supported the development on its merits and there is no evidence that suggests any relationship with the developer. Furthermore, the judge of first instance found as a fact that the Councillor had no such interest. In his reasons Schwartz J. stated, at p. 260:

> There is no suggestion that Councillor Savoie did what he did for any reason other than what he believed to be the best interests of his community.
>
> There is no suggestion that he had any personal interest in the success of Tyrone's application other than what he thought was his duty.

Schwartz J. did refer to the fact that Councillor Savoie acted as an advocate for the development but in light of the above finding this reference must be taken to mean nothing more than that he argued in favour of it. It was error, therefore, for the learned judge to apply the reasonable apprehension of bias test. This test would have been appropriate if it had been found that the Councillor had a personal interest in the development, either pecuniary or by reason of a relationship with the developer. In such circumstances, the test is that which applies to all public officials: Would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty? If that duty is to hear and decide, the test is expressed in terms of a reasonable apprehension of bias. As I have stated above, there is nothing arising from the political and legislative nature of a councillor's duties that requires a relaxation of this test. The situation is quite distinct from a prejudgment case. In this case no personal interest exists or was found and it is purely a prejudgment case. Councillor Savoie had not prejudged the case to the extent that he was disqualified on the basis of the principles outlined above. The Court of Appeal was right, therefore, in reversing the judge of first instance

serait fondé s'il existait une indication que l'appui du conseiller a été motivé par un lien quelconque avec la société de promotion ou par un intérêt dans celle-ci plutôt que par un intérêt dans le projet d'aménagement. La preuve révèle cependant qu'il avait auparavant manifesté pour le projet un appui fondé sur sa valeur intrinsèque et il n'y a aucun élément de preuve établissant l'existence d'un lien quelconque avec le promoteur. De plus, le juge de première instance a constaté que le conseiller n'avait pas de tel intérêt. Le juge Schwartz affirme dans ses motifs, à la p. 260:

> [TRADUCTION] Rien n'indique que les gestes du conseiller Savoie aient été motivés par autre chose que sa conviction qu'il agissait au mieux des intérêts de son secteur.
>
> Rien ne permet de conclure qu'il avait dans le succès de la demande de Tyrone un autre intérêt personnel que l'accomplissement de ce qu'il concevait comme son devoir.

Le juge Schwartz a en fait mentionné que le conseiller Savoie s'était fait partisan du projet d'aménagement mais, compte tenu de la constatation exposée ci-dessus, on doit conclure qu'il a simplement voulu dire par là que le conseiller avait plaidé en faveur du projet. C'est donc à tort que le juge a appliqué le critère de la crainte raisonnable de partialité. L'application de ce critère aurait été indiquée s'il avait conclu que le conseiller avait un intérêt personnel dans le projet d'aménagement, que ce soit sur le plan pécuniaire ou sur celui de ses rapports avec le promoteur. Dans de telles circonstances, le critère est celui qui s'applique à tous les fonctionnaires publics: une personne raisonnablement bien informée estimerait-elle que l'intérêt en question pourrait influer sur l'exercice de la fonction publique du fonctionnaire? Si cette fonction consiste à entendre et à décider certaines questions, la crainte raisonnable de partialité constitue le critère applicable. Comme je l'ai indiqué précédemment, il n'y a rien dans la nature politique et législative des fonctions d'un conseiller qui commande l'assouplissement de ce critère. Cette situation diffère tout à fait du cas où il est question de préjugé. En l'espèce, aucun intérêt personnel n'existe ni n'a été constaté et il s'agit purement et simplement d'un cas de préjugé. Le conseiller

on this point. The appeal on this ground must therefore fail.

2. *Ownership*

An argument advanced by the appellants is that the developer did not have the statutory right to apply for rezoning because part of the lands was owned by the City and another part consisted of streets that were in the process of being closed. Section 609(1) of the Act provides that the application shall be made by the owner or by a person authorized in writing by him. It is submitted by the appellant that when the application was filed on August 7, 1986, at that time the City had not authorized the developer to proceed with the application in respect of its lands. As for the street lands, it is submitted that the owner is the Province and no authorization was received from it.

With respect to the lands owned by the City, I agree with Huband J.A. that any defect in the application as originally filed was remedied before it was processed. It would be unduly technical to require that the application be complete in every respect on the day that it is filed. I adopt the following statement from the reasons of Huband J.A. as determinative of the matter (at p. 265):

> On September 17, 1986, the Director of Lands, Surveys and Real Estate wrote to the solicitor for Tyrone in these terms:
>
> "Inasmuch as your client now has an interest in those city-owned properties contained within the proposed development area your client may now proceed to make application for rezoning and subdivision."
>
> It is obvious that Tyrone had received the necessary authorization to seek a rezoning of city lands and streets, as well as its own lands, well before the rezoning application was first considered by the St. Boniface-St. Vital Community Committee. In my opinion the recommendations of the Community Committee, and the action of City Council itself in ratifying the recommen-

Savoie n'avait pas préjugé l'affaire au point de devenir inhabile en application des principes exposés plus haut. C'est donc à bon droit que la Cour d'appel a infirmé la décision du juge de première instance sur ce point. Le pourvoi doit donc être rejeté en ce qui concerne ce moyen.

2. *La propriété*

Un des arguments avancés par l'appelante est que la Loi ne conférait pas au promoteur le droit de demander la modification du zonage parce qu'une partie des biens-fonds visés appartenaient à la ville et qu'une autre partie se composait de rues en voie de fermeture. Le paragraphe 609(1) de la Loi prévoit que la demande doit être faite par le propriétaire ou par une personne qui a reçu l'autorisation écrite de ce dernier. L'appelante soutient qu'au moment du dépôt de la demande, le 7 août 1986, la ville n'avait pas autorisé le promoteur à présenter une demande relativement aux biens-fonds dont elle était propriétaire. Pour ce qui est des biens-fonds occupés par des rues, on fait valoir que c'est la province qui en est propriétaire et que cette dernière n'a pas accordé d'autorisation.

Quant aux biens-fonds appartenant à la ville, je partage l'avis du juge Huband que tout vice dont pouvait être entachée la demande présentée initialement avait été rectifié avant l'examen de celle-ci. Or, ce serait faire preuve de formalisme excessif que d'exiger que la demande soit complète à tous les égards le jour de son dépôt. La déclaration suivante tirée des motifs du juge Huband est concluante sur cette question et je la fais mienne (à la p. 265):

> [TRADUCTION] Le 17 septembre 1986, le directeur du service des levés de terrain et des biens immobiliers a écrit à l'avocat de Tyrone, lui disant:
>
> «En autant qu'elle possède maintenant un intérêt dans les biens-fonds appartenant à la ville situés dans le secteur destiné à l'aménagement envisagé, votre cliente peut maintenant présenter une demande de modification de zonage et de lotissement.»
>
> De toute évidence, Tyrone avait reçu l'autorisation nécessaire pour demander la modification du zonage des biens-fonds appartenant à la ville et des rues, ainsi que de ses propres biens-fonds, et ce, bien avant que le comité municipal de St-Boniface-St-Vital ne se penche pour la première fois sur la demande de modification de zonage. À mon avis, le vice de forme que représente

dations, are not to be set aside on the technicality of non-authorization prior to September 17th.

With respect to the street lands, I agree with Huband J.A. that the City had a sufficient interest to rezone these lands notwithstanding that the Province technically was the owner. Furthermore, I agree with him that it would make little sense to require the City to apply to itself for rezoning subject always to adequate notice being given to persons affected and an opportunity provided to be heard.

3. *Plan Winnipeg*

Non-conformity

A further argument raised by the Residents Association is that the rezoning by-law is invalid for failure to comply with the development plan for the greater urban area which came into effect on April 9, 1986, Plan Winnipeg. Section 599 of the *City of Winnipeg Act* specifies that in exercising its zoning power "the council shall conform to the Greater Winnipeg development plan, and any relevant provision in a community plan and action area plan". Furthermore, under the Act (s. 597.1(1)):

> ... each action area plan shall conform with the community plan, a component of which the action area plan implements; and each community plan shall conform with the Greater Winnipeg development plan.

It is clear that the Act establishes a complex scheme of nested plans of increasing specificity. That these plans are not intended to alter zoning, but are intended to guide future development and planning, is made clear in the definition of the Greater Winnipeg development plan (Plan Winnipeg) (s. 569(f)):

> ... a statement of the city's policy and general proposals in respect of the development or use of the land in the city and the additional zone, set out in texts, maps or illustrations, and measures for the improvement of the

l'omission d'accorder l'autorisation antérieurement au 17 septembre ne doit pas entraîner le rejet des recommandations du comité municipal ni l'annulation de la ratification des recommandations faite par le conseil municipal lui-même.

En ce qui concerne les biens-fonds occupés par des rues, j'estime, comme le juge Huband, que la ville possédait un intérêt suffisant pour qu'elle puisse en modifier le zonage, même si, en principe, ils appartenaient à la province. Je partage en outre son avis qu'il serait illogique d'exiger que la ville s'adresse à elle-même pour une demande de modification de zonage, toujours en donnant aux personnes touchées un avis suffisant et en leur accordant la possibilité de se faire entendre.

3. *Le plan de la ville de Winnipeg*

La non-conformité

L'association des résidents a fait valoir en outre que le règlement portant modification du zonage est invalide pour cause de non-conformité avec le plan directeur de la région urbaine, le plan de la ville de Winnipeg, entré en vigueur le 9 avril 1986. L'article 599 de la *City of Winnipeg Act* précise que, dans l'exercice de son pouvoir de zonage, [TRADUCTION] «le conseil doit se conformer au plan directeur de la ville de Winnipeg, et à toute disposition pertinente d'un plan de secteur et d'un plan d'action de secteur». De plus, aux termes de la Loi (par. 597.1(1)):

> [TRADUCTION] ... chaque plan d'action de secteur doit être conforme au plan de secteur dont une partie est mise à exécution par le plan d'action de secteur; et chaque plan de secteur doit être conforme au plan directeur de la ville de Winnipeg.

Il est clair que la Loi établit un ensemble complexe de plans superposés présentant un degré croissant de précision. Il se dégage nettement de la définition du plan directeur de la ville de Winnipeg (le plan de la ville de Winnipeg) que ces plans sont destinés non pas à modifier le zonage mais à servir de guide pour l'aménagement et la planification futurs (al. 569f)).

> [TRADUCTION] ... un énoncé de la politique et des propositions générales de la ville concernant l'aménagement ou l'utilisation des biens-fonds situés dans la ville et dans la zone additionnelle, établi dans les textes, les

physical, social and economic environment and transportation;

It is contended by the appellant that the proposed zoning does not conform to Plan Winnipeg. There was no community plan for the area. An earlier district plan had been adopted as the action area plan. In this plan the land was designated "future residential" though zoning heights and densities were left undetermined. In the map accompanying the text of Plan Winnipeg, the land in question was designated partly "regional park" with the balance designated "older residential neighbourhood".

Is there non-conformity with Plan Winnipeg? As in the instant case, it may frequently be difficult to determine if a proposed rezoning does not conform with a general statement of policies and principles. The Act provides (s. 609(2.1)):

> Where the designated commissioner is of the opinion that the zoning by-law applied for would not conform to The Greater Winnipeg Development Plan, a relevant community plan or an action area plan, he shall refer the application to the designated committee and if that committee is of the same opinion the application shall not be referred to the community committee . . . unless and until the council has given 1st reading to a by-law to amend the plan to remove that non-conformity. [Emphasis added.]

The development is residential, though it certainly is not single-family dwellings. This is consistent with the area plan. However, though it conforms in the main with Plan Winnipeg, the part of the project designated parkland in that plan is the source of the alleged non-conformity. As mentioned in Plan Winnipeg, the proposed development would retain a strip, albeit reduced in width, of park beside the river. One street providing access to the river will be closed; it is not clear whether pedestrian access to the river will be prevented. In addition, the development is definitely in conformity with a policy of encouraging

cartes ou les illustrations, ainsi que les mesures visant l'amélioration de l'environnement physique, social et économique et le transport;

L'appelante soutient que le zonage proposé n'est pas conforme au plan de la ville de Winnipeg. Il n'existait pour le secteur en question aucun plan de secteur. Un plan de district antérieur avait été adopté comme plan d'action de secteur. Dans ce plan, les biens-fonds en cause figuraient à titre de [TRADUCTION] «futur quartier résidentiel», quoique la hauteur et la densité des immeubles n'aient pas été précisées. Sur la carte jointe au texte du plan de la ville de Winnipeg, une partie des mêmes biens-fonds figure comme [TRADUCTION] «parc régional», le reste étant désigné comme [TRADUCTION] «vieux quartier résidentiel».

Y a-t-il non-conformité avec le plan de la ville de Winnipeg? Comme c'est le cas en l'espèce, la non-conformité d'un projet de modification de zonage avec un énoncé général de politiques et de principes peut souvent être difficile à déterminer. La Loi prévoit (par. 609(2.1)):

> [TRADUCTION] Lorsque le commissaire désigné estime que le règlement de zonage demandé ne serait pas conforme au plan directeur de la ville de Winnipeg, au plan de secteur applicable ou à un plan d'action de secteur, il renvoie la demande au comité désigné. Si ce comité est du même avis, la demande n'est pas renvoyée au comité municipal [. . .] tant que le conseil n'aura pas examiné en première lecture un règlement visant à modifier le projet de supprimer la non-conformité. [Je souligne.]

Il s'agit en l'occurrence d'un projet de construction résidentielle, quoiqu'il ne soit certainement pas question d'habitations unifamiliales. Cela est conforme au plan de secteur. Toutefois, en dépit de la conformité générale du projet d'aménagement avec le plan de la ville de Winnipeg, on prétend non conforme la partie du projet touchant les biens-fonds désignés comme parc dans ce plan. Conformément au plan de la ville de Winnipeg, le projet d'aménagement comprendrait un parc linéaire, moins large cependant, au bord de la rivière. Une rue donnant accès à la rivière serait fermée, mais il n'est pas certain si l'accès serait en conséquence interdit aux piétons. De surcroît, le projet d'aménagement est certainement conforme à la politique d'encouragement du secteur privé à

private sector investment in older residential neighbourhoods, a goal of Plan Winnipeg.

It is clear from the facts of this case that the designated commissioner was of the opinion that the proposed rezoning did conform to Plan Winnipeg. Huband J.A. came to the same conclusion on the basis that the proposed rezoning complied with the spirit of the text and map "in terms of what our civic elected representatives hope for the future for that particular area".

The question of conformity to an official plan is primarily a planning decision which is based on fact and policy. The opinion of the designated commissioner while not immune from judicial review should not be disturbed by an appellate court simply because it disagrees with the opinion in respect of policy or fact. The commissioner is in a much better position to assess whether a new development conforms to the planning policy of the municipality than is the court. Huband J.A. was not prepared to disagree with the commissioner's opinion. Indeed, he confirmed the opinion. In light of the above, this Court would not be justified in substituting its view of fact and policy except in the most exceptional circumstances.

4. *Bad Faith and Expectation of Consultation*

The appellant contends that in the course of reviewing the area plan which occurred during the period 1979-85, the Community Committee indicated to members of the appellant that they would be involved in the formation of a new area plan prior to any redevelopment. The developer Tyrone was not involved in these discussions.

The appellant relies on the affidavits of two City Councillors, Evelyn Reese and Al Ducharme. The affidavits are textually identical on this point. They read:

8. During my tenure as Councillor, the St. Boniface-St. Vital Community Committee had repeatedly requested that Council develop an overall plan for the North St.

investir dans les vieux quartiers résidentiels, ce qui représente l'un des buts visés par le plan de la ville de Winnipeg.

Les faits de la présente espèce révèlent clairement que le commissaire désigné a estimé conforme au plan de la ville de Winnipeg le projet de modification de zonage. Le juge Huband est arrivé à la même conclusion en affirmant que le projet de modification de zonage était conforme à l'esprit du texte et de la carte [TRADUCTION] «relativement à ce que nos représentants élus envisagent pour l'avenir de ce secteur en particulier».

La conformité avec un plan officiel tient essentiellement à une décision d'urbanisme fondée sur les faits et sur la politique. L'opinion du commissaire désigné n'est certes pas soustraite au contrôle judiciaire, mais il ne convient pas qu'une cour d'appel y touche pour le simple motif qu'elle ne la partage pas sur le plan de la politique ou des faits. Le commissaire se trouve beaucoup mieux placé que la cour pour déterminer si un nouveau projet d'aménagement est conforme à la politique de la municipalité en matière d'urbanisme. Le juge Huband n'était pas disposé à écarter l'opinion du commissaire. En fait, il l'a confirmée. Compte tenu de ce qui précède, notre Cour ne saurait être justifiée à substituer son opinion concernant les faits et la politique en question que dans les circonstances les plus exceptionnelles.

4. *La mauvaise foi et l'expectative de consultation*

L'appelante fait valoir que dans le cadre de l'examen du plan de secteur qui a eu lieu entre 1979 et 1985, le comité municipal avait indiqué aux membres de l'association appelante qu'on les ferait participer à la mise au point d'un nouveau plan de secteur avant que ne s'effectue tout réaménagement. Le promoteur Tyrone n'avait pas participé à ces discussions.

L'appelante s'appuie sur les affidavits de deux conseillers municipaux, Evelyn Reese et Al Ducharme. Ces affidavits, dont la formulation est identique sur ce point, portent notamment:

[TRADUCTION] 8. Lorsque j'ai occupé le poste de conseiller, le comité municipal de St-Boniface-St-Vital avait demandé à plusieurs reprises au conseil de concevoir un

Boniface area. Councillor Savoie was a member of the Community Committee during this time. Furthermore, the Community Committee had indicated to the residents that they would be involved in the formation of a plan for the area.

9. I was, therefore, surprised to hear Councillor Savoie's presentation in support of the development prior to a plan being formulated for the area as a whole. Since it was my understanding, from the conduct of the Community Committee during the preceding years, that no development should be undertaken in the area without an area plan first being approved.

Neither Schwartz J. nor the Court of Appeal dealt with this issue and we do not have the benefit of a finding as to whether this amounted to an undertaking. In these circumstances, I would hesitate to find that the evidence establishes a binding undertaking. But, assuming the evidence amounts to an undertaking, I do not see how it could avail against the statutory right of Tyrone who was not a party to the undertaking to apply for a rezoning pursuant to s. 609 of the Act. Furthermore, members of Council could not enter into a private arrangement imposing a general moratorium on applications for rezoning in an area of the municipality. This kind of land-use freeze would ordinarily require statutory authority or at the very least a resolution of the council of the municipality.

It appears, however, that at bottom the appellant's submission is that the conduct of the Committee created a legitimate expectation of consultation. The appellant cites the decision of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E.R. 935. The principle is also discussed in the leading cases of *Attorney General of Hong Kong v. Ng Yuen Shiu*, [1983] 2 All E.R. 346 (P.C.), and *R. v. Hull Prison Board of Visitors, ex parte St. Germain*, [1979] 1 All E.R. 701 (C.A.). It is also referred to in the following Canadian cases: Re *Multi-Malls Inc. and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49; *Re Canadian Occidental Petroleum Ltd. and District of North Vancouver* (1983), 148 D.L.R. (3d) 255;

plan global pour le secteur de St-Boniface nord. Au cours de la période visée, le conseiller Savoie était membre du comité municipal. De plus, le comité municipal avait indiqué aux résidents qu'on les ferait participer à la mise au point d'un plan pour le secteur en question.

9. C'est donc avec étonnement que j'ai entendu la présentation du conseiller Savoie en faveur du projet d'aménagement avant la conception d'un plan pour l'ensemble du secteur, car j'avais conclu de la conduite du comité municipal au cours des années précédentes qu'aucun aménagement ne devrait être entrepris dans le secteur sans que ne soit approuvé au préalable un plan de secteur.

Ni le juge Schwartz ni la Cour d'appel n'a examiné ce point, de sorte que nous ne bénéficions pas d'une conclusion sur la question de savoir s'il s'agissait là d'un engagement. Dans ces circonstances, j'hésiterais à conclure que la preuve établit l'existence d'un engagement exécutoire. Toutefois, en supposant que l'existence d'un tel engagement ressort de la preuve, je ne vois comment il pourrait être opposé au droit de Tyrone, qui n'a pas été partie à l'engagement, de demander la modification du zonage en vertu de l'art. 609 de la Loi. De plus, les membres du conseil n'étaient pas autorisés à conclure un accord privé imposant la suspension générale des demandes de modification de zonage visant un secteur déterminé de la municipalité. Il faudrait normalement que ce genre de gel de l'affectation du sol soit autorisé par un texte législatif ou, à tout le moins, qu'il se fasse par voie de résolution du conseil municipal.

Il appert toutefois que l'appelante fait valoir au fond que le comité, par sa conduite, a créé une expectative légitime de consultation. L'appelante invoque l'arrêt de la Chambre des lords *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E.R. 935. Le précepte en question fait également l'objet d'un examen dans les arrêts de principe *Attorney General of Hong Kong v. Ng Yuen Shiu*, [1983] 2 All E.R. 346 (P.C.), et *R. v. Hull Prison Board of Visitors, ex parte St. Germain*, [1979] 1 All E.R. 701 (C.A.). Mention en est faite aussi dans les décisions canadiennes suivantes: *Re Multi-Malls and Minister of Transportation and Communications* (1976), 14 O.R. (2d) 49, *Re Canadian Occidental Petroleum Ltd. and District of North Vancouver*

Gaw v. Commissioner of Corrections (1986), 2 F.T.R. 122 and *Re Bruhn-Mou and College of Dental Surgeons of British Columbia* (1975), 59 D.L.R. (3d) 152.

The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

The planning and zoning process is an elaborate structure designed to enable all those affected not only to be consulted but to be heard. The appellant availed itself of this process by making representations before the Community Committee. Even if the conduct of this Committee raised expectations on the part of the appellant, I am of the opinion that this would not justify this Court in mounting onto the elaborate statutory scheme yet another process of consultation.

Disposition

The appeal is dismissed with costs.

The following are the reasons delivered by

LAMER C.J.—I have concurred in the reasons of Justice La Forest in *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213 (released concurrently today). In applying his test to the facts of this case, I am of the view that the appeal should be dismissed.

On the issue of conformity with Plan Winnipeg, I am in agreement with the reasons of Justice Sopinka. Accordingly, I would dispose of this appeal in the manner set out by Sopinka J.

The reasons of La Forest, L'Heureux-Dubé and Cory JJ. were delivered by

LA FOREST J. (dissenting)—Three issues are raised in this appeal:

(1983), 148 D.L.R. (3d) 255, *Gaw v. Commissioner of Corrections* (1986), 2 F.T.R. 122, et *Re Bruhn-Mou and College of Dental Surgeons of British Columbia* (1975), 59 D.L.R. (3d) 152.

Le principe élaboré dans cette jurisprudence n'est que le prolongement des règles de justice naturelle et de l'équité procédurale. Il accorde à une personne touchée par la décision d'un fonctionnaire public la possibilité de présenter des observations dans des circonstances où, autrement, elle n'aurait pas cette possibilité. La cour supplée à l'omission dans un cas où, par sa conduite, un fonctionnaire public a fait croire à quelqu'un qu'on ne toucherait pas à ses droits sans le consulter.

Le processus de planification et de zonage constitue un ensemble complexe destiné à permettre que toutes les personnes concernées soient non seulement consultées mais aussi entendues. L'appelante s'est prévalue de ce processus en faisant des observations devant le comité municipal. Or, même si la conduite de ce comité a suscité certaines attentes chez l'appelante, j'estime que cela ne justifierait pas que notre Cour introduise dans le régime complexe établi par la Loi encore un autre processus de consultation.

Dispositif

Le pourvoi est rejeté avec dépens.

Version française des motifs rendus par

LE JUGE EN CHEF LAMER—J'ai souscrit aux motifs du juge La Forest dans *Save Richmond Farmland Society c. Richmond (Canton)*, [1990] 3 R.C.S. 1213 (rendu simultanément aujourd'hui). Appliquant le critère qu'il propose aux faits de l'espèce, je suis d'avis de rejeter le pourvoi.

Quant à la question de la conformité avec le plan de la ville de Winnipeg, je suis d'accord avec les motifs du juge Sopinka. En conséquence, je trancherais le pourvoi de la manière exposée par le juge Sopinka.

Version française des motifs des juges La Forest, L'Heureux-Dubé et Cory rendus par

LE JUGE LA FOREST (dissident)—Trois questions sont soulevées dans le présent pourvoi:

a) In a contested rezoning under ss. 609-15 of the *City of Winnipeg Act*, S.M. 1971, c. 105, do the rules of natural justice or fairness apply so as to preclude participation by a councillor which would raise a reasonable apprehension of bias?

b) Did the City show bad faith in proceeding as it did?

c) Was the City's proposed rezoning in conformity with Plan Winnipeg, and, if not, was this non-conformity subject to judicial review?

My colleague, Justice Sopinka, has set out the facts, the judicial history and the applicable legislation. In my view, this appeal can be disposed of on the basis of the third issue, and I shall, therefore, confine my remarks to that issue.

Plan Winnipeg

The Residents Association attacks the rezoning by-law on the ground that Council exceeded its zoning power by failing to conform with Plan Winnipeg. It points to s. 599 of the *City of Winnipeg Act*, which delimits the zoning power of Council as follows:

599. In exercising the power delegated by section 598, the council shall conform to the Greater Winnipeg development plan, and any relevant provision in a community plan and action area plan. [Emphasis added.]

Plan Winnipeg designated the area north of the CN Highline as residential and parkland. Part of the site proposed for the Tyrone development is designated for "regional parks" on the Plan's policy area map. By contrast, the developer's site plan indicates one condominium tower situated almost wholly on the designated park area. This, the Association argues, constitutes a violation of s. 599 of the Act, which renders the by-law void for non-compliance with a provision that constitutes a prerequisite to its passing.

a) Dans le cadre d'une contestation de modification de zonage fondée sur les art. 609 à 615 de la *City of Winnipeg Act*, S.M. 1971, ch. 105, les règles de justice naturelle ou d'équité s'appliquent-elles de manière à empêcher la participation d'un conseiller qui pourrait entraîner une crainte raisonnable de partialité?

b) La ville a-t-elle fait preuve de mauvaise foi en agissant comme elle l'a fait?

c) Le projet de modification du zonage de la ville était-il conforme au plan de la ville de Winnipeg, sinon, cette absence de conformité était-elle sujette à un contrôle judiciaire?

Mon collègue le juge Sopinka a exposé les faits, tracé l'historique des procédures judiciaires et énoncé les dispositions législatives applicables. À mon avis, ce pourvoi peut être tranché en fonction de la troisième question et je vais donc limiter mes observations à cette question.

Le plan de la ville de Winnipeg

L'association des résidents conteste le règlement portant modification de zonage pour le motif que le conseil a outrepassé son pouvoir de zonage en omettant de se conformer au plan de la ville de Winnipeg. Elle souligne l'art. 599 de la *City of Winnipeg Act* qui délimite le pouvoir de zonage du conseil de la manière suivante:

[TRADUCTION] **599.** Dans l'exercice du pouvoir délégué par l'article 598, le conseil doit se conformer au plan directeur de la ville de Winnipeg, et à toute disposition pertinente d'un plan de secteur et d'un plan d'action de secteur. [Je souligne.]

Le plan de la ville de Winnipeg affectait le secteur situé au nord de la voie du CN, dite Highline, à la construction résidentielle et à l'aménagement d'un parc. Une partie du site proposé pour le projet immobilier de Tyrone est affectée à l'aménagement de «parcs régionaux» sur la carte établie conformément à la politique du plan pour le secteur. Par contre, le plan du site du promoteur montre une tour de condominiums presque entièrement située dans le secteur désigné comme parc. L'association soutient que cela constitue une violation de l'art. 599 de la Loi, qui a pour effet d'annuler le règlement pour cause de non-conformité avec une disposition constituant une condition préalable à son adoption.

The City, in responding to the argument that a condominium does not conform to a park, rests its submission on the notion that the by-law did indeed conform to the Plan because a strip park was retained for public access. The City also suggests that it is appropriate to interpret the text and map of the Plan in a flexible manner, since the Plan is a policy document containing only general proposals.

The Court of Appeal agreed with the City, holding that the by-law need only conform to the spirit of the text and map. The Court also held that the matter of Council's compliance with Plan Winnipeg in promulgating the by-law is not open to judicial review, given the duty of the designated commissioner to screen for non-compliance.

This issue centres on what is meant by the requirement in s. 599 that the City "conform" to Plan Winnipeg. Does it mean that the City must follow the exact scheme set out in the policy area map, or should "conform" be interpreted in a more flexible manner, to permit Council to enact zoning by-laws which may not represent an exact fit with the map, but comply with the general direction of the articulated policies? In order to resolve this issue, it is necessary to first understand the function of Plan Winnipeg in the planning process.

The Nature of the Plan

Section 569(f) of the Act defines Plan Winnipeg as follows:

569. . . .

(f) "Greater Winnipeg development plan" means a statement of the city's policy and general proposals in respect of the development or use of the land in the city and the additional zone, set out in texts, maps or illustrations, and measures for the improvement of the physical, social and economic environment and transportation;

La ville, dans sa réponse à l'argument selon lequel un immeuble en copropriété ne correspond pas à un parc, fonde son argument sur la notion que le règlement était en fait conforme au plan parce qu'une bande de terrain désignée à titre de parc avait été conservée pour que le public y ait accès. La ville soutient également qu'il convient d'interpréter le texte et la carte du plan d'une manière souple, étant donné que ce plan est un document de principe qui ne contient que des propositions générales.

La Cour d'appel a fait droit aux arguments de la ville en concluant que le règlement ne devait respecter que l'esprit du texte et de la carte. La cour a également conclu que la question de savoir si le conseil avait respecté le plan de la ville de Winnipeg en adoptant le règlement n'est pas sujette à un contrôle judiciaire, compte tenu de l'obligation du commissaire désigné de vérifier s'il y a non-respect.

Cette question porte sur le sens de l'exigence de l'art. 599 que la ville [TRADUCTION] «se conforme [. . .]» au plan de la ville de Winnipeg. Cela signifie-t-il que la ville doit suivre exactement le plan indiqué sur la carte établie conformément à la politique en vigueur pour le secteur, ou l'expression «se conformer» devrait-elle être interprétée d'une manière plus souple, pour permettre au conseil d'adopter des règlements de zonage susceptibles de ne pas concorder exactement avec la carte, mais qui respectent les directives générales des politiques formulées? Pour trancher cette question, il est nécessaire de comprendre d'abord la fonction du plan de la ville de Winnipeg dans le processus de planification.

La nature du plan

L'alinéa 569f) de la Loi définit ainsi le plan de la ville de Winnipeg:

[TRADUCTION] **569** . . .

f) «plan directeur de la ville de Winnipeg» désigne un énoncé de la politique et des propositions générales de la ville concernant l'aménagement ou l'utilisation des biens-fonds situés dans la ville et dans la zone additionnelle, établis dans les textes, les cartes ou les illustrations, ainsi que les mesures visant l'amélioration de l'environnement physique, social et économique et le transport;

Plan Winnipeg was adopted as a by-law of the City in April 1986. The Plan is the instrument by which overall planning for the entire territory of the city is instituted. It is a general, long-term policy document which serves as a framework in which specific policies and zoning by-laws are formulated. It may be viewed as the very foundation of all planning. Indeed, master plans like Plan Winnipeg are characterized by Rogers in *Canadian Law of Planning and Zoning* (1990), at pp. 68-69, as "quasi-constitutional documents":

> In some respects a community plan operates as kind of a constitutional document controlling the future development of the municipality. As a constitution, it embodies limitations on the local authority in both its legislative and administrative spheres and is less subject to change than ordinary laws.

Although the author was speaking in general terms, his insights are applicable to Plan Winnipeg. By section 599 of the Act, the zoning power of council is constrained by the plan, although the extent of the constraint may not be entirely clear. In addition, the procedure for amendment to the plan, found in ss. 574-78 of the Act, is more onerous than the process for the amendment of a zoning by-law, in that it involves consultation with community committees, requires the entire council, rather than simply the executive policy committee, to deliberate on the plan by-law, and contains more stringent public notice provisions. Moreover, council is required to obtain the written approval of the minister before it can finally pass the plan by-law.

There is a temptation to view the plan as a document too policy oriented to command any legal status. Such an approach, however, misapprehends the true nature of the plan. Although the policies are articulated in relatively general terms, this does not detract from the legal force of the plan. The specific legal effect of the plan, pursuant to s. 599 of the Act, is to set the parameters of the zoning power of council. If council adopts a by-law which does not conform with the plan, it has overstepped its statutory authority; see *Christie v.*

Le plan de la ville de Winnipeg a été adopté à titre de règlement municipal en avril 1986. Ce plan constitue l'instrument qui établit la planification générale de l'ensemble du territoire de la ville. Il s'agit d'un document énonçant une politique générale à long terme, en fonction duquel des politiques précises et des règlements de zonage sont formulés. Il peut être considéré comme le fondement même de toute planification. En fait, les plans directeurs comme le plan de la ville de Winnipeg sont qualifiés par Rogers dans *Canadian Law of Planning and Zoning* (1990), aux pp. 68 et 69, de [TRADUCTION] «documents quasi constitutionnels»:

> [TRADUCTION] À certains égards, un plan directeur fonctionne comme un genre de document constitutionnel qui contrôle l'aménagement futur de la municipalité. À titre de constitution, il comprend des restrictions imposées au pouvoir local dans ses champs de compétence législative et administrative et est moins susceptible de subir des modifications que les lois ordinaires.

Bien que l'auteur se soit exprimé en termes généraux, ses opinions s'appliquent au plan de la ville de Winnipeg. Aux termes de l'art. 599 de la Loi, le pouvoir de zonage du conseil est limité par le plan, bien que l'étendue de la limite ne soit pas tout à fait claire. De plus, la procédure de modification du plan, qui se trouve aux art. 574 à 578 de la Loi, est plus lourde que la procédure de modification d'un règlement de zonage parce qu'elle comporte une consultation avec les comités municipaux, exige que le conseil au complet, et non simplement le comité exécutif, délibère sur le règlement relatif au plan, et contient des dispositions plus strictes en matière d'avis public. En outre, le conseil est tenu d'obtenir l'autorisation écrite du ministre avant l'adoption finale du règlement relatif au plan.

On est tenté de considérer le plan comme un document qui est trop axé sur des politiques générales pour avoir un statut juridique. Toutefois, une telle position repose sur une mauvaise compréhension de la véritable nature du plan. Bien que les politiques soient formulées en des termes relativement généraux, cela ne diminue pas le caractère juridique du plan. L'effet juridique précis du plan, selon l'art. 599 de la Loi, est d'établir les paramètres du pouvoir de zonage du conseil. Si le conseil adopte un règlement non conforme au plan, il

City of Winnipeg (1981), 16 M.P.L.R. 128 (Man. Q.B.).

At the same time, I recognize that the Plan does not have the specificity of a zoning by-law, and must be approached accordingly. The distinction between master plans and zoning by-laws is explained by Rogers, supra, at p. 69:

> Because plans are expressed in generalities, it would not be practical to ascribe to them the same effect that a statute or by-law has. Something more is usually needed to translate the policies set out in broad terms in plans into legislative action. One of the essential requisites of a law is that it must be definite and certain and this is lacking in a planning scheme. Courts may be inclined to give a fairly liberal interpretation to statements of policy and prescribed land uses contained in a plan.

It appears then, that as a "quasi-constitutional" document, the Plan should be interpreted with an appropriate measure of flexibility, which reflects a balance between its general, long-term nature, and its statutorily mandated function as the foundation of the planning process.

It remains to apply these general principles to Plan Winnipeg and s. 599 of the Act.

Does the By-law Conform With the Plan?

Huband J.A. adopted the following approach to the issue of whether the by-law is in conformity with Plan Winnipeg, at p. 268:

> It is no easy thing to decide whether a particular zoning "conforms" with a long-term planning document which consists of a mixture of policy statements, long-term objectives, general proposals and land designation map. I think it must be recognized that the new zoning need not fit the designation of that land on the map. What is important is that the zoning conform to the spirit of the text and map in terms of what our civic elected representatives hope for the future for that particular area.

outrepasse le pouvoir que la Loi lui confère; voir *Christie v. City of Winnipeg* (1981), 16 M.P.L.R. 128 (B.R. Man.).

En même temps, je reconnais que le plan n'a pas la précision d'un règlement de zonage et doit être examiné en conséquence. La distinction entre les plans directeurs et les règlements de zonage est expliquée par Rogers, précité, à la p. 69:

> [TRADUCTION] Parce que les plans sont rédigés en termes généraux, il ne serait pas pratique de leur attribuer le même effet qu'une loi ou qu'un règlement. Habituellement, il faut quelque chose de plus pour traduire en action législative les politiques énoncées en termes généraux dans des plans. L'une des conditions essentielles d'une loi est qu'elle doit être précise et certaine, et pareille condition ne se retrouve pas dans un programme de planification. Les tribunaux peuvent être portés à interpréter de façon assez libérale les énoncés de politique et les utilisations de biens-fonds prescrites dans un plan.

Il appert alors que le plan, à titre de document «quasi constitutionnel», devrait être interprété avec une juste mesure de souplesse qui représente un équilibre entre sa nature générale et à long terme, et sa fonction prescrite par la Loi comme le fondement du processus de planification.

Il reste à appliquer ces principes généraux au plan de la ville de Winnipeg et à l'art. 599 de la Loi.

Le règlement est-il conforme au plan?

Le juge Huband a adopté la position suivante à l'égard de la question de savoir si le règlement est conforme au plan de la ville de Winnipeg, à la p. 268:

> [TRADUCTION] Il n'est pas facile de décider si un zonage en particulier est «conforme» à un document de planification à long terme qui comprend un ensemble d'énoncés de politique, d'objectifs à long terme, de propositions générales ainsi qu'une carte sur l'affectation des biens-fonds. Je suis d'avis qu'il faut reconnaître qu'il n'est pas nécessaire que le nouveau zonage soit conforme à l'affectation de ce bien-fonds sur la carte. Ce qui est important c'est que le zonage soit conforme à l'esprit du texte et de la carte relativement à ce que nos représentants élus envisagent pour l'avenir de ce secteur en particulier.

With respect, I find that Huband J.A.'s approach accommodates a more tenuous relationship between the zoning by-law and the Plan than was contemplated by the Legislature.

The development site is designated "regional park" on the Plan Winnipeg policy map. Surely, there is no ambiguity here which requires recourse to the "spirit" of the Plan; if it was intended that the area be open to residential development, the map would have been marked accordingly. I find it difficult to understand what Huband J.A. meant to say when he held that "it must be recognized that the new zoning need not fit the designation of that land on the map". In support of such a proposition, the City submits that the text of the Plan, specifically policy 80(1), a policy of establishing a linear river-bank park system, provides sufficient support for the by-law. There is nothing in s. 569(f) of the Act, however, that confers pre-eminence to the text of the Plan, as opposed to the map. On the contrary, as noted by Wilson J. in *Christie*, *supra*, at p. 135, maps or illustrations are by s. 569(f) of the Act an integral part of the Plan.

Furthermore, I doubt that it was ever intended that the linear park system policy would preclude the establishment of larger parks adjacent to the river. It seems to me that the linear park policy complements rather than contradicts other park policies in the plan, including policy 75(1), which provides that the City shall develop additional parkland in older neighbourhoods, in accordance with specific neighbourhood requirements, and policy 78(1), which provides that the City shall establish a system of regional parks, to offset existing deficiencies and meet projected needs.

I would also note that policy 6(1), relied on by Huband J.A., does not really provide support for the proposed development. That policy is stated in the Plan as follows:

En toute déférence, je suis d'avis que la position du juge Huband correspond à un rapport plus ténu entre le règlement de zonage et le plan qui avait été envisagé par l'assemblée législative.

Le site d'aménagement est affecté à un «parc régional» sur la carte établie conformément à la politique du plan de la ville de Winnipeg. De toute évidence, dans ce cas, aucune ambiguïté n'exige d'avoir recours à l'«esprit» du plan; si on avait voulu que le secteur fasse l'objet d'un aménagement résidentiel, la carte l'aurait indiqué. À mon avis, il est difficile de comprendre ce que le juge Huband a voulu dire quand il a conclu qu'[TRADUCTION] «il faut reconnaître qu'il n'est pas nécessaire que le nouveau zonage soit conforme à l'affectation de ce bien-fonds sur la carte». À l'appui d'un tel argument, la ville soutient que le texte du plan, particulièrement la politique 80(1), une politique qui crée un réseau de parcs linéaires riverains, apporte une justification suffisante du règlement. Toutefois, il n'y a rien dans l'al. 569f) de la Loi qui confère la prééminence au texte du plan, par rapport à la carte. Au contraire, comme l'a souligné le juge Wilson dans l'arrêt *Christie*, précité, à la p. 135, les cartes ou les illustrations sont, aux termes de l'al. 569f) de la Loi, une partie intégrante du plan.

Qui plus est, je doute qu'on ait jamais voulu que la politique du réseau de parcs linéaires empêche la création de parcs plus grands sur le bord de la rivière. Il me semble que la politique des parcs linéaires complète plutôt que contredit d'autres politiques relatives aux parcs dans le plan, y compris la politique 75(1), qui prévoit que la ville doit aménager des parcs supplémentaires dans des vieux quartiers, conformément aux exigences précises du quartier, et la politique 78(1), qui prévoit que la ville doit créer un réseau de parcs régionaux, pour combler les lacunes existantes et répondre aux besoins projetés.

Je tiens également à souligner que la politique 6(1), sur laquelle se fonde le juge Huband, n'appuie pas réellement le projet d'aménagement. Cette politique est énoncée dans le plan de la manière suivante:

The City shall encourage, wherever possible, private sector investment in appropriate development in older residential neighbourhoods. [Emphasis added.]

To my mind, a development that conflicts with policies articulated in both the map and text of the Plan cannot be considered appropriate development within the meaning of policy 6(1).

In determining whether the zoning by-law conforms with the Plan, the purpose of the Plan in the context of the planning process must not be forgotten. The whole point of establishing a master plan is precisely to place constraints on the future character of development in the City, in accordance with long-term objectives. In order to ensure that Council does not exercise its powers in such a way as to inhibit the ultimate implementation of these objectives, the Act mandates that zoning must fit the designation of lands outlined on the Plan. Otherwise, with the effluxion of time, the City could change in a way wholly in conflict with the carefully designed and publicly vetted provisions of the Plan.

As I see it, the regional park designation is clear from the Plan, and the condominium development represents a derogation from that Plan. The state of affairs here can bear no other interpretation. Thus, if the City wishes to permit development that conflicts with the policy of the Plan, it must first seek amendment to the Plan itself. The procedures for amendment to the Plan, including the provision for public participation, are an important component of the system of checks and balances that characterizes the planning process. This system provides for public participation in all stages of policy development and implementation, from the adoption of a master plan to the enactment of zoning by-laws. It is not open to Council to circumvent any part of this public process, a process established by its own Act of incorporation, by the simple passage of a zoning by-law.

The Appropriateness of Judicial Review

A subsidiary issue is raised as a result of the Court of Appeal's decision, which also held that it

[TRADUCTION] La ville doit, autant que possible, encourager le secteur privé à investir dans l'aménagement approprié de vieux quartiers résidentiels. [Je souligne.]

À mon avis, l'aménagement qui ne respecte pas les politiques de la carte et du texte du plan ne peut être considéré comme approprié au sens de la politique 6(1).

Pour déterminer si le règlement de zonage est conforme au plan, il ne faut pas oublier le but du plan dans le contexte du processus de planification. La mise au point d'un plan directeur a précisément pour but de limiter le caractère futur de l'aménagement urbain, conformément à des objectifs à long terme. Afin d'assurer que le conseil n'exerce pas ses pouvoirs de manière à empêcher la réalisation ultime de ces objectifs, la Loi prévoit que le zonage doit être conforme à l'affectation des biens-fonds sur le plan. Autrement, avec le temps, la ville pourrait être modifiée d'une manière complètement contraire aux dispositions du plan soigneusement conçues et vérifiées publiquement.

Selon moi, l'affectation à un parc régional ressort clairement du plan et l'aménagement de condominiums représente une dérogation à ce plan. Les circonstances de l'espèce ne sauraient être interprétées d'une autre façon. Par conséquent, si la ville désire autoriser un aménagement qui ne respecte pas la politique du plan, elle doit d'abord demander la modification du plan lui-même. Les procédures de modification du plan, y compris la participation prévue du public, constituent une composante importante du système de vérification qui caractérise le processus de planification. Ce système prévoit la participation du public à toutes les étapes de la conception et de la mise en application des politiques, de l'adoption d'un plan directeur à l'adoption de règlements de zonage. Il n'est pas loisible au conseil de se soustraire à une partie de ce processus public, qui est créé par sa propre loi constitutive, par la simple adoption d'un règlement de zonage.

L'à-propos du contrôle judiciaire

Une question subsidiaire est soulevée par suite de l'arrêt de la Cour d'appel qui a également conclu qu'on n'a jamais voulu qu'une cour de

was never intended that a court of law consider whether a proposal complies with Plan Winnipeg. In effect the Court of Appeal held that the matter was not open to judicial review.

The Act provides for the "designated commissioner" to determine whether a zoning by-law conforms to the Plan. The proposal is then forwarded to another committee of Council for a consideration of the same issue. While normally I am prepared to accord some deference to those empowered under the Act to consider whether a by-law conforms to the Plan, an issue not lacking in difficulty and where local knowledge is of great assistance, I do not think judicial review is inappropriate in this case.

First, the designated commissioner is not independent of Council, but is appointed and may be dismissed by Council pursuant to s. 2(5) of the Act. It should be noted, as well, that there is no privative clause. Thus, it is open to the courts to overturn a decision which is legally incorrect, rather than patently unreasonable. It is also important to realize that we are not dealing here with a subtle issue which requires great planning expertise and direct knowledge of local land use dynamics. We are faced with the prospect of a seven-storey condominium tower which is to be built on an area clearly designated on the Plan policy map as parkland. With all deference, I am unable to understand how this can be said to conform with the Plan. To so hold would be to set at nought the carefully crafted provisions devised by the Legislature to ensure the participation of citizens in planning decisions affecting the character of the community in which they live.

I conclude that the City was precluded from adopting the zoning by-law in question, and must look to amending the Plan.

conclu qu'on n'a jamais voulu qu'une cour de justice examine si un projet est conforme au plan de la ville de Winnipeg. En effet, la Cour d'appel a conclu que la question n'était pas sujette à un contrôle judiciaire.

La Loi prévoit que le «commissaire désigné» détermine si un règlement de zonage est conforme au plan. Le projet est alors transmis à un autre comité du conseil pour qu'il examine la même question. Bien que normalement je sois prêt à faire preuve de déférence envers ceux que la Loi habilite à examiner la question de savoir si un règlement est conforme au plan, question qui n'est pas facile et à l'égard de laquelle une connaissance locale est très utile, je ne suis pas d'avis que le contrôle judiciaire est inopportun en l'espèce.

D'abord, le commissaire désigné n'est pas indépendant du conseil, mais il est nommé et peut être démis de ses fonctions par le conseil, aux termes du par. 2(5) de la Loi. Il convient également de noter qu'il n'y a pas de clause privative. Les tribunaux peuvent ainsi infirmer une décision qui est erronée du point de vue légal plutôt que manifestement déraisonnable. Il est également important de réaliser que nous ne traitons pas en l'espèce d'une question subtile qui exige une grande expertise en matière de planification ainsi qu'une connaissance directe de la dynamique locale d'affectation des biens-fonds. Nous sommes confrontés à un projet de construction d'une tour de condominiums de sept étages dans un secteur clairement désigné comme parc sur la carte établie conformément à la politique du plan. En toute déférence, je ne puis comprendre comment on peut dire que cela est conforme au plan. Une telle conclusion équivaudrait à ne tenir aucun compte des dispositions soigneusement conçues qui ont été adoptées par l'assemblée législative pour assurer la participation des citoyens aux décisions de planification qui ont un effet sur le caractère de la collectivité dans laquelle ils vivent.

Je conclus que la ville a été empêchée d'adopter le règlement de zonage en question et doit s'occuper de modifier le plan.

Disposition

For these reasons, I would allow the appeal and restore the decision of Schwartz J., with costs throughout.

Appeal dismissed with costs, LA FOREST, L'HEUREUX-DUBÉ and CORY JJ. *dissenting*.

Solicitors for the appellant: Public Interest Law Centre, Winnipeg.

Solicitors for the respondents: Taylor, McCaffrey, Chapman, Winnipeg.

Dispositif

Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de rétablir la décision du juge Schwartz, avec dépens dans toutes les cours.

Pourvoi rejeté avec dépens, les juges LA FOREST, L'HEUREUX-DUBÉ *et* CORY *sont dissidents.*

Procureurs de l'appelante: Public Interest Law Centre, Winnipeg.

Procureurs des intimés: Taylor, McCaffrey, Chapman, Winnipeg.

1990 CarswellBC 282
Supreme Court of Canada

Save Richmond Farmland Society v. Richmond (Township)

1990 CarswellBC 282, 1990 CarswellBC 768, [1990] 3 S.C.R. 1213, [1990] S.C.J. No. 79, [1991] 2 W.W.R. 178, 116 N.R. 68, 24 A.C.W.S. (3d) 436, 2 M.P.L.R. (2d) 288, 46 Admin. L.R. 264, 52 B.C.L.R. (2d) 145, 75 D.L.R. (4th) 425, J.E. 91-74, EYB 1990-67028

SAVE RICHMOND FARMLAND SOCIETY, SMITH and TAYLOR v. TOWNSHIP OF RICHMOND et al.

Dickson C.J.C., * Lamer C.J.C., ** Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

Heard: May 1, 1990
Judgment: August 16, 1990

Subject: Public; Municipal

Headnote

Municipal Law --- Municipal Council — Meetings of Council — Practice and procedure — Disqualification from voting — General

Municipal corporations — Municipal councils — Council members — Disqualification from voting — Bias — Alderman favouring rezoning by-law stating publicly it would take a significant argument to change his mind at the public hearings — Alderman not disqualified from voting by reason of bias — Test for bias being whether alderman had closed mind in fact.

Planning and zoning — Zoning by-laws — Validity — Alderman favouring rezoning by-law stating publicly it would take a significant argument to change his mind at the public hearings — Alderman not disqualified from voting by reason of bias — Test for bias being whether alderman had closed mind in fact.

The township council adopted two zoning by-laws which had the effect of converting the use of land designated as "residential reserve" from agricultural to residential. The alderman who chaired the public hearings voted in favour of the proposed by-laws, and had fought an election supporting residential development of the land. The by-laws were subsequently set aside on technical grounds. When a new comprehensive by-law was introduced that had the same effect, the alderman was reported as having publicly stated that he would not change his mind regardless of what was said at the public hearings required by s. 956 of the Municipal Act. In a subsequent interview he said he would listen to all that was said and that it would take something significant to change his mind. During the hearing, objections were made opposing the alderman's participation in the hearing on the ground that he had predetermined the issue, but he did not reply to the objections. Following the hearing and second reading, the petitioners unsuccessfully sought an order under the Judicial Review Procedure Act prohibiting the alderman from voting or participating in the process. He participated in the vote and the petitioners' appeal was dismissed. They appealed further.

Held:

Appeal dismissed.

Per SOPINKA J. (DICKSON C.J.C., WILSON, GONTHIER, CORY and MCLACHLIN JJ. concurring): A member of a municipal council is not disqualified by reason of bias unless he or she had prejudged the matter to be decided to the extent of being no longer capable of persuasion. The test is whether the alderman had a closed mind in fact. On the evidence, the alderman here did not have a closed mind. He had not reached a final opinion on the matter which could not be dislodged. Therefore he was not disqualified by bias.

Per LA FOREST J. (LAMER and L'HEUREUX-DUBÉ JJ. concurring): The decision-maker is entitled to bring a closed mind to a decision-making process as existed here, provided that the "closed mind" is not the result of corruption but of honest opinions strongly held. Section 956 of the Municipal Act should not be interpreted as meant to apply in exactly the same way to all matters it covers. The section is sufficiently flexible to allow the appropriate standards of fairness to be applied to the particular circumstances. Where a hearing is mandated to consider a rezoning initiated by council and driven by policy, the

emphasis is on the legislative nature of the process so that the standard of fairness required by s. 956 places on council members little more than the obligation of ensuring that due notice is given to those who stand to be affected and of affording them a reasonable opportunity to be heard. A community plan or comprehensive zoning by-law represents a general statement of the broad objectives and policies of the local government respecting the form and character of existing and proposed land use. The adoption of such a measure is less a judicial process than a legislative one. The aldermen who participate in such a process should be viewed accordingly not as judges but as elected representatives who are answerable to the concerns of their constituents.

Appeal from British Columbia Court of Appeal, 36 B.C.L.R. (2d) 49, 36 Admin. L.R. 155, 43 M.P.L.R. 88, 57 D.L.R. (4th) 278, affirming judgment dismissing petition for prohibition.

La Forest J. **(concurring in the result) (*Lamer C.J.C.* and *L'Heureux-Dubé J.* (concurring):**

1 The issue in this appeal [from 36 B.C.L.R. (2d) 49, 36 Admin. L.R. 155, 43 M.P.L.R. 88, 57 D.L.R. (4th) 278] may be stated as follows:

2 Did the Court of Appeal err in law in holding that the municipal council and its members had no obligation, under s. 956 of the Municipal Act, R.S.B.C. 1979, c. 290, to embark upon the hearing with an open mind?

3 This appeal was heard on the same day as *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, issued concurrently [reported [1991] 2 W.W.R. 145]. Both raise issues regarding the application of the rules of natural justice, or the duty to act fairly, to municipal councillors. As my colleague Sopinka J. observes, the present appeal was dismissed earlier with reasons to follow.

4 Though I have reached the same conclusion as my colleague, I approach the issue differently and I have, therefore, prepared my own reasons. My colleague has set forth the facts, judicial history and applicable legislation and I can, therefore, proceed directly to an analysis of the issue.

Analysis

5 I underscore the fact that in this appeal it is clear that the municipality made a policy choice to emphasize the provision of housing rather than the preservation of agricultural land in that portion of the municipality called the Terra Nova lands. This necessitated a zoning change for the lands in question and, as is clear from s. 956 of British Columbia's Municipal Act, a statutory duty is placed on municipal councils to hold a public hearing prior to the adoption of a zoning by-law. The issue raised by this appeal is that of defining what standard of fairness is owed to the participants in this hearing process.

6 This poses the problem of defining in what capacity the council acts when conducting a zoning by-law hearing such as that mandated by the above-noted section. The appellant association relying on *Karamanian v. Richmond*, [1982] 5 W.W.R. 406, 38 B.C.L.R. 106, 19 M.P.L.R. 102, 138 D.L.R. (3d) 760 (S.C.), submitted that the council acts in a quasi-judicial capacity. The respondent municipality, stressing the high policy content of the decision to change the zoning of the lands in question, counters by suggesting that the council acts in its legislative capacity. I consider the implications of both alternatives.

7 If the association is indeed correct and the municipal council in this case was acting in a quasi-judicial capacity, the following passage from *McGill v. Brantford (City)* (1980), 28 O.R. (2d) 721, 12 M.P.L.R. 24, 111 D.L.R. (3d) 405 at 414 (Dist. Ct.), may serve as a succinct statement of the duty of fairness that was owed by the councillors:

> The fact is that the Legislature has required the hearing to be conducted by the very persons who are expected to have formed at least a tentative view, and to have made decisions to carry forward the plan at least to the stage where the formal closing of the roads is to take place. It must be assumed that the Legislature knew the functions, and the mode of developing such a project from its inception to the advanced stages, and nonetheless designated the Council as the body to hold the hearing. In these circumstances all that can be required of the Council is to put aside their tentative views individually and collectively, hear the objections, consider them honestly and fairly, see if they can be accommodated and then make the final decision.

8 On this standard, persons who stand to be affected by the decision will be entitled to object, and the courts to intervene, if council members by their words or actions raise a reasonable apprehension that they are entering the process with a closed mind. The association cites the following excerpt from the decision of the New Zealand Court of Appeal in *Lower Hutt City Council v. Bank*, [1974] 1 N.Z.L.R. 545 at 550, per McCarthy P.:

> We think that the state of impartiality which is required is the capacity in a council to preserve a freedom, notwithstanding earlier investigations and decisions, to approach their duty of inquiring into and disposing of the objections without a closed mind, so that if considerations advanced by objectors bring them to a different frame of mind they can, and will go back on their proposals. As to the necessary appearance of impartiality, we think it must follow that if a public authority exhibits that it has undertaken in advance to exercise the power and duty expressly entrusted to it by the Legislature in a specific way which appears to obstruct the fair consideration and disposal of public rights, prohibition should normally issue.

9 On the respondent's view of the matter, the municipal council in this instance was not acting in a quasi-judicial but rather legislative capacity. It therefore submits that allegations of bias, if by that one understands solely a "form of political predetermination," are entirely misplaced. It points to American authority, citing *Wollen v. Borough of Fort Lee*, 142 A. 2d 881 (N.J.S.C., 1958). In that decision, on facts very similar to those in this appeal, three aldermen had publicly stated that they would vote in favour of a rezoning ordinance. The court held, at pp. 888-89:

> But this is the democratic process; and it would be contrary to the basic principles of a free society to disqualify from service in the popular assembly those who had made pre-election commitments of policy on issues involved in the performance of their sworn legislative duties. Such is not the bias or prejudice upon which the law looks askance ...
>
> There is no showing of an abuse of power — no basis for the conclusion of arbitrary action. The course taken was in pursuit of what was in good faith conceived to be the essential public interest after long and earnest study, aided by experiential advice of unquestionable validity. We are not here concerned with the taint of self-interest in opposition to the public interest and welfare.

10 The Court of Appeal gave its imprimatur to this view of the matter. Southin J.A. (Toy J.A. concurring) held that, in processes such as the one under consideration, it would be unjust to find fault with municipal councillors who maintained a closed mind on the development issue. Councillor Mawby, reasoned Southin J.A., had campaigned in favour of the contested development, had been duly elected and it lay with his constituents to affect his thinking through the political process. Accordingly, short of any suggestions of impropriety that would support allegations of bad faith, reasonable apprehension of bias would have no application.

11 Lambert J.A., in his concurring judgment, took a more conventional view of the matter. He rejected the notion advanced by counsel for the municipality that it would be open to an alderman to state that "my mind is made up; I cannot be influenced by persuasion; but the law requires me to be present and I will be present; and the law requires me to listen attentively and I will do so; but that is all." Lambert J.A. reasoned [at p. 56]:

> There must be a degree of openmindedness; there must be a capacity to be influenced by persuasion. But provided that the alderman is not acting improperly in the sense of having been procured to vote in a certain way (of which there is no suggestion whatsoever in this case), and providing that he retains the capacity to be influenced by a yet unheard and perhaps unexpected argument, he or she will not be disqualified from participation in this particular process of zoning by-law consideration by attitudinal views of the kind that are inherent in the political nature of our form of municipal government ...

12 Lambert J.A. went on to conclude that here, on the facts, it could be said that Councillor Mawby, despite the remarks attributed to him by the media, did indeed maintain this degree of receptivity.

13 On this last point, I think that Lambert J.A. is correct. It must be remembered that the council's initiative to rezone the lands was one that had polarized opinion in the respondent municipality. Aldermen had lined up both for and against the proposal,

and an election was fought on the issue, with the pro-development camp emerging victorious. In short, both sides had strongly felt views and made no secret of them. It is true that Councillor Mawby was quoted in the press as saying that he would not change his mind. But Mawby claimed that his remarks were taken out of context and, during a television interview, he also raised the possibility that arguments presented during the course of the public hearing might lead to a change of mind on his part or on the part of the anti-development forces. Consequently, even if this court were to adopt the "amenable to persuasion" standard as the test for bias (the test proposed by Lambert J.A. and which, in essence, is the same standard as that put forward by the association), it follows that no order should issue that the Alderman Mawby was not entitled to vote on By-law 5300.

"Amenable to Persuasion": A Valid Test?

14 Both judgments of the Court of Appeal are premised on the notion that it is an error, in the context of a rezoning application, to imply bias from the fact that a municipal councillor holds very firm and strongly stated views on the matter. The difference between the two approaches lies in the fact that Lambert J.A. would hold to the notion that having taken a firm position on a given proposal is not a licence to close one's mind entirely to being persuaded otherwise.

15 This sounds good in theory, but breaks down in practice. Southin J.A.'s approach might seem drastic but is the more realistic of the two. There is no way of gauging the "openness" of a person's mind, and indeed it would be pointless to attempt to do so. In the result, it seems to me that if this court is to adopt the "amenable to persuasion" test, this is bound to lead to a lot of posturing. Politicians who have campaigned on a given issue, and owe their election to it, can be expected to make solemn pronouncements to the effect that they remain "amenable to persuasion" if a truly convincing argument is presented to them. There would seem to be little to be gained by enforcing a campaign of "lip-service" to this ideal.

16 In conclusion, I think that Southin J.A. is correct when she holds that a "closed mind" (provided it is not a corrupt mind) should not disentitle an alderman from participating in the electoral process. Woolf L.J. puts the matter well in *R. v. Amber Valley Dist. Council; Ex parte Jackson*, [1985] 1 W.L.R. 298 at 307, [1984] 3 All E.R. 501 (Q.B.D.):

> But does this have the effect of disqualifying the Labour majority from considering the planning application? It would be a surprising result if it did since in the case of a development of this sort, I would have thought that it was almost inevitable, now that party politics play so large a part in local government, that the majority group on a council would decide on the party line in respect of the proposal. If this was to be regarded as disqualifying the district council from dealing with the planning application, then if that disqualification is to be avoided, the members of the planning committee at any rate will have to adopt standards of conduct which I suspect will be almost impossible to achieve in practice.

17 It might be objected that this approach makes the public meeting called for by s. 956 a mere charade. By way of answer, it must be assumed that the legislature will have been well aware of the fact that the very aldermen who are called on by statute to make the final decision on zoning by-laws initiated by municipalities themselves will often have run for office on the strength of their support or opposition to these measures. If this seemingly guarantees that zoning applications of this nature are decided before ever reaching the hearing stage, this inconsistency should be for the legislature to iron out, and not the courts.

18 Secondly, I think that Lambert J.A. is correct in his submission that s. 956 should not be interpreted as meant to apply in exactly the same way to all matters it covers [pp. 55-56]:

> If the bylaw affects a specific solution to a specific problem of a narrow scope that only touches the people it immediately concerns, different obligations of fairness may arise than if the bylaw affects a comprehensive solution to an overall policy problem confronting the whole municipality. *The section is sufficiently flexible to allow the appropriate standards of fairness to be applied to the particular circumstances*. [emphasis added]

19 In the particular circumstances of this appeal, I think that the respondent municipality is correct in its submission that in respect of a rezoning initiated by council itself and driven by policy:

> The emphasis is on the legislative nature of the process and thus on compelling "the elected" to listen to the views of "the electors". It is not, as in an adjudicative process, on compelling the hearing tribunal to find the facts by means of a hearing or inquiry and then to determine the issue on the facts as found.

20 If this is indeed the correct characterization of the purpose served by the meeting in the context of a "policy driven" zoning initiative, it follows that the standard of fairness mandated by s. 956 places on the council members little more than the obligation of ensuring that due notice is given to those who do stand to be affected, and of affording them a reasonable opportunity to express their views.

21 In the final analysis, I think that the association's position is an unrealistic one in the case of a hearing that is mandated in order to consider a rezoning "initiated by Council itself and driven by policy." A community plan or a comprehensive zoning by-law represents a general statement of the broad objectives and policies of the local government respecting the form and character of existing and proposed land use (see s. 945(1) of the Municipal Act), and the adoption of such a measure is less a judicial process than a legislative one. The aldermen who participate in such a process should be viewed accordingly not as judges, but as elected representatives who are answerable to the concerns of their constituents.

22 The above result finds support in the decisions of this court in *Martineau v. Matsqui Inst. Disciplinary Bd.*, [1980] 1 S.C.R. 602, 13 C.R. (3d) 1, 50 C.C.C. (2d)353, 106 D.L.R. (3d) 385, 30 N.R. 119, and *Knight v. Indian Head Sch. Div. 19*, [1990] 1 S.C.R. 653, [1990] 3 W.W.R. 289, 43 Admin. L.R. 157, 30 C.C.E.L. 237, 69 D.L.R. (4th) 489, 90 C.L.L.C. 14,010, 83 Sask. R. 81, 106 N.R. 17, which both stress that the attributes of natural justice that apply in a given context will vary according to the character of the decision made. Dickson J. puts the matter well in *Martineau*, at pp. 628-29:

> A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision. On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards. Between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum.

23 Clearly, in this instance, the decision-making process is to be located at the legislative end of the spectrum. Accordingly the threshold test for establishing bias should be a very high one. In my view, Southin J.A. is correct in her view that a decision-maker is entitled to bring a closed mind to this decision-making process, provided that the "closed mind is the result not of corruption, but of honest opinions strongly held."

***Sopinka J.* (*Dickson C.J.C., Wilson, Gonthier, Cory* and *McLachlin JJ.* concurring):**

24 This appeal raises the issue as to whether a municipal alderman is disqualified by reason of a reasonable apprehension of bias. It was heard along with *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* [reported [1991] 2 W.W.R. 145]. This appeal was dismissed by judgment released 16th August 1990, reasons to follow. These reasons are released concurrently with judgment in *Old St. Boniface Residents Assn.*

Facts

25 The dispute in this case is over the fate of certain lands, known as Terra Nova, within the township of Richmond. The appellants challenge the validity of By-law 5300, which purports to convert part of Terra Nova from agricultural to predominantly residential zoning. As suggested by its name, the appellant Save Richmond Farmland Society, along with the individual appellants, seeks to maintain Terra Nova as farmland, and is opposed to residential development of the land. The acts with which this appeal is most concerned are those of the respondent Alderman Hugh Mawby.

26 It is clear from the evidence that the development of Terra Nova is a contentious and divisive issue in Richmond politics. It has been for many years zoned for agricultural use. In December 1986 the Richmond Official Community Plan, By-law 4700,

was adopted. Pursuant to s. 945(1) of the Municipal Act, R.S.B.C. 1979, c. 290, "A community plan is a general statement of the broad objectives and policies of the local government respecting the form and character of existing and proposed land use and servicing requirements in the area covered by the plan." By-law 4700 designated the Terra Nova as "residential reserve." A community plan does not alter zoning. A plan's legal effect is that, pursuant to s. 949(2), by-laws enacted after the adoption of an official community plan "shall be consistent with the [community] plan." Alderman Mawby was a council member at the time and voted in favour of By-law 4700.

27 The fate of Terra Nova was the main issue in the most recent municipal election in 1987. That election left the composition on the municipal council at a five-to-four split in favour of development. All council votes relevant to this case have followed this division.

28 On 26th September 1988 the municipal council adopted By-laws 5110 and 5115, which had the purported effect of converting approximately 220 acres of Terra Nova from agricultural to predominantly resi dential zoning. Alderman Mawby chaired the public hearings on the by-laws, which occupied some 40 hours over 11 days. He voted in favour of the two proposed by-laws. The by-laws were subsequently set aside by the Supreme Court of British Columbia because of a failure to comply with notice provisions of the Municipal Act.

29 On 22nd November 1988, shortly before By-laws 5110 and 5115 were declared void, the council introduced By-law 5300, which is the focus of this appeal. It is a comprehensive zoning by-law for the entire municipality of Richmond. It was initiated by council on the recommendation of municipal planning staff to consolidate all previous zoning regulations. It repeals all zoning by-laws previously in force. Among other things, By-law 5300 maintains the residential zoning of Terra Nova. Since By-laws 5110 and 5115 were set aside, if it is valid By-law 5300 has the effect of rezoning Terra Nova.

30 Alderman Mawby did not chair the hearing held on By-law 5300. He attended all sessions, which amounted to some 57 hours over 12 days. It is relevant to note that under s. 959(2) a member of council need not be present at the hearing to vote on the by-law, so long as an oral or written report of the hearing is given to the member by an officer or employee of the council. The public hearing on By-law 5300 began on 19th December 1988 after first reading of the by-law. Shortly after, an article appeared in the Richmond News, which read as follows.

> **Mawby Won't Change Mind**
>
> The public hearing on Richmond's proposed new comprehensive zoning bylaw opened Monday night and is expected to extend over many nights into the New Year.
>
> Rezoning of the Terra Nova area in the northwest corner of Lulu Island is expected to dominate proceedings, but one municipal council member, Alderman Hugh Mawby, says he won't change his mind regardless of what is said at the hearing. He was chairman of the public hearing on Terra Nova that stretched over eleven nights earlier this year and eventually resulted in two Terra Nova bylaws that were ruled invalid by B.C. Supreme Court.

31 The article was based on a telephone interview conducted on or close to 16th December 1988. The editor who wrote the article made an affidavit filed in these proceedings which stated that the article truly reports what Alderman Mawby told him. It also includes the following:

> 7. THAT Alderman Mawby further stated to me that although he would not change his mind on the Terra Nova project, he would listen attentively to the public hearing process.

32 On 2nd January 1989 Alderman Mawby participated on the Dave Abbott television show, together with the host, Don Cummings (President of the Save Richmond Farmland Society) and four telephone callers. He advocated the residential rezoning of Terra Nova. He was asked whether the rezoning of Terra Nova was a fait accompli. He made the following response:

> David, I can't make that comment, and I think I made that very clear to you. We are in a public hearing. We are still listening. And I have several things which I think would help. And I made a note of them, because I thought in fairness, because

> we're in public hearings and we don't want in any way to jeopardize those public hearings and if somebody, and I put it down to this, I said the sort of things that would make — help people change their minds, and maybe, maybe there is — one of the other aldermen from the Civic New Democrats might change his mind if the evidence was conclusive enough for them, the same as it may be conclusive enough for me. First of all, I made a decision back in June, and I'm prepared to live with the ramifications of that, to support development on Terra Nova. Now by some small, and I say very small, piece in the advertising, technicality, we have got to review it again. So what is needed, there is already decision made of Council. Five people have said we favour development. Four have said no. So what the four or the five need to change their mind is something significant. And I would suggest that that new evidence would have to come from —

33 On 6th January 1989 an article appeared in another local newspaper, the Richmond Times. It read in part:

> Unlike the first three mights [sic] of the hearing back in December, opposing aldermen did not quarrel among themselves, but Ald. Mawby found himself the target of several attacks by the anti-developers.
>
> Robert Bebluk, quoting a local newspaper, said Mawby had publicly stated his stand on Terra Nova before the conclusion of the hearing.
>
> Saying Mawby had no choice but to disqualify himself from the rest of the hearing, Bedluk said, "any judge in any court of law would disqualify a jurist" under the same circumstances.
>
> Doubts were also raised about Mawby's ability to remain impartial after he appeared on a talk show to discuss Terra Nova January 2.
>
> In an interview with The Times, the alderman said both incidents had been misconstrued. The newspaper, he said, had "misquoted me and taken what I said completely out of context." Mawby explained the newspaper had interviewed him prior to the hearing, before the council members were required to sit as impartial judges.
>
> "At that point, I told him I had heard nothing new that would make me change my mind," Mawby remarked, adding his television appearance did not compromise his position because the discussion was a "philosophical debate".

34 The respondents point out that two aldermen opposed to residential development of Terra Nova wrote a number of articles in local news papers, setting out their views. One of them displayed a sign on the front lawn of his home which said "Save Terra Nova" and bore the telephone number of the Save Richmond Farmland Society.

35 On three occasions during the public hearing, Richmond residents raised the matter of the Richmond News article and objected to Alderman Mawby's continued participation in the hearing on the ground that he had predetermined the issue. Alderman Mawby did not reply to the objections. According to Alderman Mawby's affidavit, the practice of the council at the hearings was to listen to the views of the public and ask questions, but not actively to debate the merits of By-law 5300 with members of the public.

36 Following the hearing and second reading, the appellants launched a petition under the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, to prohibit Alderman Mawby from voting on By-law 5300 or participating in the process of its consideration. The petition was heard and dismissed by Prowse J. on 13th February 1989. The third reading took place shortly thereafter. Alderman Mawby participated in the vote, and the by-law again passed by a five-to-four margin. The appellants appealed to the Court of Appeal. The fourth reading of the by-law, the reconsideration stage, was deferred pending the appeal. The Court of Appeal dismissed the appeal 23rd March 1989 [reported at 36 B.C.L.R. (2d) 49, 36 Admin. L.R. 155, 43 M.P.L.R. 88, 57 D.L.R. (4th) 278].

37 Fourth reading was scheduled for 3rd April 1989. By letter dated 28th March 1989, the appellants requested that this court convene on 3rd April 1989 to consider an application for leave to appeal and interim relief to restrain the council from proceeding with fourth reading. The court declined to convene and no further request for interim relief was made. The council adopted By-law 5300 on 3rd April by a five-to-four margin. Since then, development permits and building permits have been

issued and some construction is in progress. On 1st May 1989 a new petition was filed with the Supreme Court of British Columbia seeking a declaration that By-law 5300 or the parts of it relevant to Terra Nova were without legal effect, on the same facts as the within appeal. These proceedings were dismissed by the Supreme Court and the Court of Appeal. Any appeal to this court is now out of time.

Legislation

38 The council is under a statutory obligation to hold hearings on a proposed zoning by-law, pursuant to the Municipal Act, R.S.B.C. 1979, c. 290, s. 956:

> 956. (1) Subject to subsection (4), a local government shall not adopt a community plan bylaw, rural land use bylaw or zoning bylaw without holding a public hearing on the bylaw for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw.
>
> (2) The public hearing shall be held after the first reading of the bylaw and before the third reading.
>
> (3) At a public hearing all persons who believe that their interest in property is affected by the proposed bylaw shall be afforded a reasonable opportunity to be heard or to present written submissions respecting matters contained in the bylaw that is the subject of the hearing.

Issues

1. Bias

39 Was Alderman Mawby disqualified by bias from participating in the decision with respect to By-law 5300?

2. Remedy

40 In view of the conclusion which I have reached, it will not be necessary to consider this issue.

Decisions Below

Supreme Court of British Columbia, Prowse J.

41 Prowse J. noted that cases have held municipal councils must act in a quasi-judicial manner in some of their functions: *Wiswell v. Metro. Winnipeg*, [1965] S.C.R. 512, 51 W.W.R. 513, 51 D.L.R. (2d) 754. As By-law 5300 was a wide-ranging by-law, initiated by the council, she was satisfied that the council was acting in a legislative capacity in conducting its public hearings on the by-law.

42 In carrying out its function, the council must afford the public "a reasonable opportunity to be heard." In so doing, the council must be free from "disabling" bias. The test for disabling bias is reasonable apprehension of bias, set out in *Ctee. for Justice & Liberty v. Nat. Energy Bd.*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115. Prowse J. stated that the test was whether an informed person viewing the matter realistically and practically and having thought the matter through would conclude that members of council had no intention of considering the submissions put before them.

43 After reviewing the facts, Prowse J. stated her conclusion thus:

> Alderman Mawby has walked as close to the line of reasonable conduct in this situation as one could walk without falling into the abyss. He has jeopardized his role as a member of Council on this important issue and, in so doing, has jeopardized the rights of the constituents who elected him to have him participate in the democratic process. He has been careless in his choice of words and has caused a great uproar which need never have occurred. *But I am unable to conclude, on balance, that in the context of the political process and, in particular, in the context of the protracted dispute over By-law 5300, that he has created a reasonable apprehension of bias from the point of view of an informed observer having thought the matter through*.

> *Precisely what he said, and the context in which it was said, is not as clear as it should be in order for me to conclude that Alderman Mawby had closed his mind against all argument*. The fact that he attended the many nights and long hours of hearings is some indication to any observer that he was involved in the hearing process in a genuine way. [emphasis added]

Court of Appeal, Lambert, Southin and Toy JJ.A.

44 The court received some fresh evidence tendered by both sides, including the transcript of the 2nd January television show. The court unanimously dismissed the appeal, with reasons delivered by Lambert J.A. and Southin J.A. with the concurrence of Toy J.A.

45 Lambert J.A. took the view that s. 956 is sufficiently flexible to allow the appropriate standards of fairness to be applied to the particular circumstances of a hearing. He expressed the view that the appropriate standard required a councillor to retain the capacity to be influenced by persuasion, by an argument that has not been heard and perhaps is unexpected. Applying this test, Lambert J.A. concluded [at p. 56]:

> In this case, Alderman Mawby had been elected. He had spoken out in the political arena about his views of the proper use of land throughout the municipality. He had been chairman of the first public hearing of By-laws 5110 and 5115 over the course of 40 hours. He had thought about the issues extensively. He was, to a large extent, covering the same ground all over again, the same ground on which he had already once been required to make up his mind. *I think that what he was trying to say, or saying, in the course of the interview with the Richmond News was that it would take something very surprising to make him change his mind at that stage and that he did not expect to be surprised at that stage, but that he was going to ... see what happened*. I reach that conclusion about what he was trying to say by taking together the report in the Richmond News, the affidavit of the editor of the Richmond News, Mr. Mawby's two affidavits, and the transcript of the television show. [emphasis added]

46 Southin J.A., Toy J.A. concurring, wrote that a reasonable person would probably conclude that by the second public hearing Alderman Mawby had a closed mind. However, in her opinion, s. 956 does not require an open mind when the issue is a broad public policy issue such as a zoning by-law for the whole municipality. If the closed mind is the result not of corruption but of honest opinions strongly held, then the cases on apprehension of bias are not applicable. Southin J.A. wrote [at p. 61]:

> In my view, the public life of British Columbia would be the poorer if in a matter of this kind a politician must keep an inscrutable face and a silent tongue not disclosing his strongly held opinions lest he be deprived of his vote. There should be no penalty for candour. However distasteful Mr. Mawby's opinions may be to a very large segment of the electors of Richmond, he is entitled to hold them and to express them by his vote at the council table.

Bias

Natural Justice: Application to Local Government Bodies

47 In *Old St. Boniface* I concluded that a member of a municipal council was not disqualified by reason of bias unless he or she had prejudged the matter to be decided to the extent of being no longer capable of persuasion. This test is to be applied to this appeal.

Application

48 The judge of first instance found that Alderman Mawby had not closed his mind against all argument. This finding was supported by Lambert J.A. in the Court of Appeal and by the evidence. Southin and Toy JJ.A. opined that a reasonable person would conclude that he had a closed mind. As explained in *Old St. Boniface*, the relevant test is whether the councillor had a closed mind, in fact. Applying this test, and on the evidence, I conclude that Alderman Mawby had not reached a final opinion on the matter which could not be dislodged. It follows that he was not disqualified by bias. It is not alleged in this appeal that the alderman had any interest or relationship that would disqualify him on the basis of conflict of interest.

Disposition

49 As provided in the judgment of this court released 16th August 1990, the appeal is dismissed with costs.

Appeal dismissed.

Footnotes

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

Red Deer Catholic Regional Schools

Minutes of a Special Meeting of the Board of Trustees of the The Red Deer Catholic Separate School Division, held September 25, 2023.

Present:	S. Heistad M. Hollman M. LaGrange C. Leyson D. Lonsdale K. Pasula A. Watson, Trustees L. Latka, Secretary-Treasurer K. Finnigan, Superintendent of Schools M. St. Pierre, Executive Assistant
Joined via Zoom:	T. Haykowsky, Legal Counsel W. Teed, Law Student J. Kitchen, Legal Counsel Y. Prefontaine, Legal Counsel M. Spelliscy, Legal J. Wells, Legal (JMSLAW)

Board Chair Hollman called the meeting to order at 9:50 a.m.

Trustee Leyson read the opening prayer aloud.

1. APPROVAL OF AGENDA

09/25/23-01-Watson

THAT THE AGENDA BE ACCEPTED AS PRESENTED.

CARRIED.

Board Chair Hollman asked Administration to leave the meeting room as they will not be deliberating in or decision makers in the proceedings. Superintendent Finnigan, Secretary-Treasurer Latka and Executive Assistant St. Pierre left the room at 9:53 a.m.

Executive Assistant St. Pierre was asked to enter the meeting at 9:56 a.m to provide administrative and technical support.

09/25/23-02-Pasula

THAT THE COMMITTEE OF THE WHOLE MOVE INTO CAMERA AT 9:56 A.M.

CARRIED.

09/25/23-03-Pasula

THAT THE BOARD MOVE OUT OF CAMERA AT 7:04 P.M.

CARRIED.

09/25/23-04-Pasula

THAT THE SPECIAL MEETING IS RECESSED AT 7:05 P.M. UNTIL 3:00 PM ON SEPTEMBER 26, 2023.

CARRIED.

Trustee Pasula read a closing prayer aloud.

Board Chair Hollman called the Special Meeting back to order at 3:04 p.m on September 26, 2023 with the following in attendance.

Present:	S. Heistad M. Hollman C. Leyson A. Watson, Trustees M. St. Pierre, Executive Assistant
Joined via Zoom:	Teresa Haykowsky, Legal Counsel
Not in Attendance:	D. Lonsdale M. LaGrange K. Pasula, Trustees

09/25/23-05-Watson

THAT THE BOARD OF TRUSTEES COME OUT OF RECESS AT 3:05 P.M. ON SEPTEMBER 26, 2023.

CARRIED.

09/25/23-06-Heistad

THAT THE COMMITTEE OF THE WHOLE MOVE INTO CAMERA AT 3:05 P.M.

CARRIED.

Trustee Lagrange and Vice-Chair Lonsdale entered the meeting at 4:08 p.m.
Mr. James Kitchen, Legal Counsel and Mary Spelliscy, Legal Counsel joined the meeting via Zoom at 4:08 p.m.

Mr. Teresa Haykowsky left the meeting via Zoom at 4:12 p.m.

23/08/25-08-Watson

THAT THE COMMITTEE OF THE WHOLE MOVE OUT OF CAMERA AT 4:23 P.M.

CARRIED.

Board Chair Hollman stated that Trustee Pasula was unable to attend the meeting due to an emergency situation but stated that Trustee Pasula partook in the deliberations on the matter during the September 25, 2023 portion of the in camera meeting.

Trustee Watson read an opening prayer aloud.

Trustee Heistad read the proposed motion aloud.

Trustee Leyson requested that it be recorded that she opposed the motion, as she felt the decision did not go far enough because of the extremely serious nature of the breach.

09/25/23-09-Heistad

BE IT RESOLVED THAT,

1. further to the, on or about August 27, 2023, posting on Trustee Monique LaGrange's personal Facebook account which took the form of a meme displaying two photographs:

    a) one of a group of children holding Nazi flags with swastikas; and

    b) a contemporary photograph of children holding rainbow Pride flags; and

    c) the meme was captioned "Brainwashing is brainwashing" (collectively, the "Meme"),

the Board of Trustees ("Board") finds Trustee Monique LaGrange ("Trustee") to be in violation of Trustee Code of Conduct and the Education Act.

As a result, as of today's date and up to and including the Trustee's Term of Office ("End Date"), the Trustee

a) is censured from being part of all and any part of Board Committees and is censured from attending and participating in all Board committee meetings, including any part thereof. This also includes all and any ASBA and ACSTA meetings and conferences;
b) shall not represent the Board / School Division in any official capacity, including Board/School Division functions, events, award ceremonies, conferences, assemblies, school masses, graduation events, school council meetings and speaking with news/media outlets;
c) shall cease making any public statements in areas touching upon or relating to,

    i. the 2SLGBTQ+ community; and

    ii. the Holocaust,

    including presenting at meetings and conferences on these topics or related areas and speaking with various news outlets.

d) within 90 days of this motion, the Trustee shall enroll in, at her own expense, and successfully complete:

    i. suitable sensitivity training about the Holocaust;

    ii. suitable sensitivity training relative to the challenges and discrimination faced by members of the 2SLGBTQ+ community; and

    iii. suitable sensitivity training covering professional school trustee boundaries and appropriate use of social media, cultural sensitivity and human rights;

    iv. The Trustee shall inform the Board as to the proposed training, and prior to the Trustee's commencement of said training, the Board shall determine the suitability of the proposed training and approve each course;

    v. the Trustee shall provide the Board with written certificate from the course providers stating that the Trustee has successfully completed said sensitivity training courses; and

    vi. The above training is intended to remind the Trustee of her role and responsibilities as a school board trustee and to assist the Trustee to make better decisions in any further communications, including on social media

e) shall issue, at the first public Board meeting following the completion of the ninety (90) day period set out above at paragraph 1(d), a sincere public letter of apology to School Division students, staff, and the Board in relation to the

Meme; said sincere apology shall recognize the inappropriateness of the Trustee's actions and that the Trustee is deeply sorry for having offended anyone through her actions; and

f) shall refrain from posting any content of a similar nature relating to Meme. (This term and condition shall be ongoing up and including the End Date.)

2. The censure referenced at paragraphs 1(a), (b) and (c) may be removed by the Board prior to the End Date, if the terms and conditions set out at paragraphs 1(d),(e), and (f) are met to the satisfaction of the Board, and if, and as long as, the Trustee acts in accordance with Board Policy and the Trustee Code of Conduct.

3. The Trustee, who may attend regular Board meetings, may bring forward any educational related issues for discussion and debate to the Board through the Board's standard procedures and practices.

To ensure clarity, the Board welcomes open debate of education-related issues in accordance with Board policy and procedures, including sensitive or difficult topics.

4. The Board hereby directs the Superintendent of Schools, Dr. Kathleen Finnigan, to arrange for the following within the next twenty (20) days:

a) a meeting with the Director of Education of the Friends of Simon Wiesenthal Centre to discuss their September 6, 2023, letter and to confirm the date of an educational workshop by the Friends of Simon Wiesenthal Centre for the Board;

b) a meeting with Alberta's Human Rights Commission to confirm an educational workshop for the Board;

c) a follow up meeting further to the January 16, February 13 and March 13, 2023, Board workshops on a pastoral approach to support students in the development and understanding of their sexuality for the purpose of confirming a follow up workshop for the Board.

5. The Board shall provide written reasons in support of this motion to be provided to the Trustee in the next twenty (20) days.

6. The Board Chair and the Superintendent of Schools may take those steps necessary to implement the terms and conditions set out in this motion.

7. Pursuant to paragraphs 4 and 10 of Appendix "A" of Board Policy 4, the Board Chair is hereby authorized to disclose the decision of the Board.

CARRIED.

Recorded Vote requested
by Trustee Leyson:
In favor: Watson, Heistad,
Hollman
Opposed: Leyson
Abstained: Lonsdale,
LaGrange

Trustee Watson read the closing prayer aloud.

09/25/23-09-Leyson

THAT THE SPECIAL MEETING ADJOURN, THE TIME BEING 4:31 P.M.

CARRIED.

(CHAIR)

(SUPERINTENDENT)

Red Deer Catholic Regional Schools

Inspired by Christ. Aspiring to Excellence

Sent via email: education.minister@gov.ab.ca

September 7, 2023

Minister of Education
228 Legislature Building
10800 97 Avenue
Edmonton, AB
T5K 2B6

Dear Honourable Demetrios Nicolaides:

Re: Red Deer Catholic School Board Trustee Matter

I am writing further to a social media post (Post) relating to the 2SLGBTQ+ community which we understand had been reposted, at or around August 30, 2023, by a member of the Board of Trustees of Red Deer Catholic Schools (Board), which included a Nazi-related photograph coupled with a school Pride photograph.

We are writing to assure you and your office that, from an operational perspective, our Superintendent of Schools, Dr. Kathleen Finnigan, has been working with Division System Leaders and School Administrators to continue to ensure our schools are safe, caring and welcoming and to ensure this message is clear; the Division staff and students at our Division schools have been informed that our schools are safe, welcoming and caring, and that if anyone does not feel welcomed, safe or supported, they are to contact Division personnel immediately.

To this end, we are also mindful of your September 1, 2023, Twitter statement which indicated that "No one should have to live in fear of violence, discrimination, or exclusion."

Because student safety, caring and creating a welcoming environment is a priority, last year, as a Board, we received training on January 16, 2023: Sexual Orientation and Gender Identity; February 13, 2023: Transgender Presentation; and March 13, 2023: Presentation of the Professional Development Model on the topic, "A Pastoral Approach to Support Students in the Development and Understanding of Their Sexuality" as part of our ongoing professional development. As we continue to strive to support our Division, staff and students, I will recommend that we seek additional training from the Alberta Human Rights Commission in the areas of 2SLGBTQ+, diversity, equity, and inclusion, as well as social media training.

Red Deer Catholic Regional Schools

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Additionally, on September 5, 2023, our Board passed, by majority vote a motion (Motion) seeking your assistance to have the Trustee dismissed.

Since that time the Board has conferred with legal counsel; ultimately, what we are seeking is all and any support that you or your office can provide to the Division as it continues to support our students and staff at this time.

From a governance perspective, the Board is guided by our enclosed Board Policy 4: Trustee Code of Conduct, including Appendix A – Trustee Code of Conduct Sanctions. As with all Board policy, Board Policy 4 will guide the Board as applicable.

Finally, we wish to assure you and your office that the safety of all Division students and staff remains of the utmost importance. Our Division has worked diligently to create and implement a strategic plan for our school communities that includes fostering love and acceptance to all our students. Student safety, care and support are of the highest priority to the Division.

Thank you again for your attention to this matter. Again, any assistance your office can provide is welcome.

Sincerely,

Murray Hollman
Board Chair

cc. Board of Trustees, The Red Deer Catholic Regional Schools
Dr. Kathleen Finnigan, Superintendent of Schools

Red Deer Catholic Regional Schools

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September 7, 2023

Murray Hollman, Chair
Red Deer Catholic Regional Schools
5210 - 61 Avenue
Red Deer, Alberta
T4N 6N8

Dear Chair Hollman,

RE: Trustee Monique LaGrange Violation of Policy 4: Trustee Code of Conduct

It is with disappointment that I find myself compelled to write this letter of complaint. I request that a formal hearing be held for the review of Policy 4: Trustee Code of Conduct in respect to the recent social media story posted by Trustee Monique LaGrange. I understand to ensure that the complaint has merit to be considered and reviewed, at least one other trustee must provide to the Board Chair, within three (3) days of this notice in writing of the complaint being forwarded to all trustees, a letter indicating support for having the complaint heard at a Code of Conduct hearing.

Specifically, I believe that there is a correlation between RDCRS Policy 4 and the actions taken by Trustee LaGrange when she willingly posted a picture on social media. The sections I believe Trustee LaGrange has violated are as follows:

Policy 4: Trustee Code of Conduct Sections 1, 6, 7, and 22

1. Trustees shall carry out their responsibilities as detailed in Policy 3 - The Role of the Trustee with reasonable diligence. (**NOTE: Policy 3 - Items 6.3, 6.4, 6.7, and 6.20**)

   6.3 The trustee can engage with the public through a variety of communication methods, understanding that all communications and interactions must reflect the principles of the Trustee Code of Conduct.

   6.4 Trustees will be cognizant that they are representing the interests of the Board while posting or commenting on social media, and aware of public perception that their posts, comments and social media engagement, are in accordance with their duties within the school division.

...2

6.7 The trustee will support the decisions of the Board and refrain from making any statements that may give the impression that such a statement reflects the corporate opinion of the Board when it does not.

6.20 The trustee will adhere to the Trustee Code of Conduct.

6. Trustees shall commit themselves to dignified, ethical, professional and lawful conduct.

7. Trustees shall reflect the Board's policies and resolutions when communicating to the public.

22. Represent the Board responsibly in all Board-related matters with proper decorum and respect for others.

Our Board has been working diligently to create and implement a strategic plan for our school communities that includes fostering love and acceptance to all our students. Our students are of the highest priority and any breaches of the code of conduct require a review.

Respectfully,

Dorraine Lonsdale, Vice Chair
Red Deer Catholic Regional Schools

/DML

Red Deer Catholic Regional Schools

POLICY 1: DIVISION FOUNDATIONAL STATEMENTS

Mission

The Red Deer Catholic Separate School Division is committed to supporting inclusive communities that foster care and compassion of students, families and staff with a complete offering of learning opportunities delivered within the context of Catholic teachings and tradition, and within the means of the Division.

Our schools are gospel-centred communities of hope, fostering a Catholic Christian value system within a pluralistic society.

CONTINUING THE MISSION OF JESUS, PROPHET, PRIEST AND SERVANT KING

We make His life, mission and teaching our focal points of belief and conduct within our Catholic schools. Therefore, the education of the whole child -- intellectual, aesthetic, emotional, social, physical, and spiritual -- is our service commitment.

As stewards of Catholic Education nothing in this policy, or any other policy or administrative procedure, is to be interpreted so as to limit or be a waiver of the Red Deer Catholic Regional School Board's rights and powers pursuant the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms to maintain the denominational character of Catholic Schools.

If any of the provisions in this policy conflict with the Red Deer Catholic Separate School Division's rights and powers pursuant to the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms to maintain the denominational character of Catholic schools, the Red Deer Catholic Separate School Division's rights and powers pursuant the Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms to maintain the denominational character of Catholic schools will govern.

Abbreviated Mission Statement

Making Christ known to children.

Beliefs

1. Catholic schools, as stewards of Catholic education, have the responsibility to help all children to develop their unique, individual capabilities to learn and to live, and thereby to experience humanity and the world as created by God and redeemed by Jesus Christ.

2. Catholic schools and Catholic parishes are complementary to the family, which is the primary steward for the child's formation.

3. Education must be based on the Christian concept that each person is a unique and special child of God. The objectives and purpose of education as stated by Alberta Education must be set in this total Christian concept.

4. Students must participate in all Catholic education activities including Religious Studies classes, liturgies, celebrations, and sacramental preparations, at all grade levels.

5. The schools will strive for excellence in education for all students to develop their academic and interpersonal skills. In this way, students will be prepared to use their God-given talents to live and work effectively in society.

6. The schools will assist all students to choose and develop a hierarchy of values consistent with the teachings of the Catholic faith.

7. The schools, in cooperation with parents and parishes, will strive to develop the gift of Catholic faith by assisting all students to:

    7.1 Perceive faith as a personal, free and joyful response to the gift of God himself;

    7.2 Experience the person of Christ in their own lives through relationships with others and with the community of believers;

    7.3 Pray and celebrate their faith as a source of strength in daily life; and

    7.4 Become aware of their religious heritage and acquire a better understanding of the various rites of the Catholic Church.

8. The schools will help all students, families and staff to realize their responsibility to transform the world by practicing the Catholic faith and values in a pluralistic society.

9. The schools will foster the mental and physical well-being of all students through:

    9.1 Selection of appropriate programs which emphasize physical, leisure activities; and

    9.2 A respect for the worth and dignity of the individual.

10. The schools will foster and maintain a safe, secure, caring, respectful and inclusive learning environment for all students, families and staff that is free from physical, emotional and social abuses and models our Catholic faith and values. Schools will be comprehensive and holistic in their approach to inclusion and other potential student issues including bullying, justice, respectful relationships, language and human sexuality.

11. Staff of The Red Deer Catholic Separate School Division will support families in the faith development of students by serving as witnesses to their Catholic beliefs. Catholic social teachings will provide a foundation for the future contributions of our students to society and this connection will be formed by authentic Catholic schools shaped by those employed in the Division.
    Staff also share in the responsibility of helping students see the relevance of our faith in today's world and solving current problems within a Catholic world-view.

Principles of Practice

- We honour our children.
- We provide a safe and secure environment.
- We live and proudly proclaim our Catholic Christian faith.
- We provide quality education in a Catholic environment.
- We pray as an educational community.
- We practice servant-leadership.
- We focus on our mission through clarity of purpose.
- We value our staff.

Motto

Inspired by Christ. Aspiring to Excellence.

Logo

Red Deer Catholic
Regional Schools

Logo Description

- The central feature is a cross which depicts Christ-centered education.
- The four stylized books represent the Gospels, which define our faith and provide the foundation elements for ongoing personal development.
- The circle represents the head of a child, whose arms are open, embracing Christ and knowledge. In full stride, the child exudes youth and potential.
- Green and blue represent creation and beauty, which are eternal gifts from God.

Reviewed: February 2008
Revised: September 2016, April 2018

Red Deer Catholic Regional Schools

POLICY 3: TRUSTEE ROLE DESCRIPTION

The role of the trustee is to contribute to the work of the Board as it carries out its mandate to govern and achieve its vision, mission, beliefs, values and principles. The Board believes that its ability to fulfill its obligations is enhanced when leadership and guidance are forthcoming from within its membership. The oath of office taken by each trustee when she/he assumes office binds that person to work diligently and faithfully in the cause of public education.

Catholic trustees have a unique, dual challenge. They must ensure that students are provided an education which meets or exceeds the goals of Alberta Education and at the same time, ensure that Catholic values and principles are reflected at all times in its policies and practices.

As leaders in the Catholic faith community, Catholic trustees require an understanding, a willingness to grow and a commitment to bearing daily witness to the faith. To meet this challenge, Catholic trustees are entrusted with certain denominational school rights, powers and privileges enshrined in the Canadian Constitution. They exercise these rights with the religious guidance of parish and diocesan authorities.

The Board is a corporation. The decisions of the Board in a properly constituted meeting are those of the corporation. A trustee who is given corporate authority to act on behalf of the Board may carry out duties individually but only as an agent of the Board. In such cases, the actions of the trustee are those of the Board, which is then responsible for them. A trustee acting individually has only the authority and status of any other citizen of the Division.

1. Board Orientation

   As a result of elections, the Board may experience changes in membership. To ensure continuity and facilitate smooth transition from one Board to the next following an election, trustees must be adequately briefed concerning existing Board policy and practice, statutory requirements, initiatives and long-range plans.

   The Board believes an orientation program is necessary for effective trusteeship. All trustees will attend all aspects of the orientation program.

   The Division will offer an orientation program for all newly elected trustees that provides information on:

   1.1 Role of the trustee and the Board;

   1.2 Organizational structures and procedures of the Division;

   1.3 Board policy, agendas and minutes;

   1.4 Existing Division initiatives, annual reports, budgets, financial statements and long-range plans;

1.5 Division programs and services;

1.6 Board's function as an appeal body; and

1.7 Statutory and regulatory requirements, including responsibilities with regard to conflict of interest.

2. The Division will provide financial support for trustees to attend Alberta School Boards Association (ASBA) and Alberta Catholic School Trustees Association (ACSTA) sponsored orientation seminars.

3. The Division will provide financial support for trustees to attend Alberta Education sponsored trustee workshops or information sessions.

4. The Board Chair and Superintendent are responsible for developing and implementing the Division's orientation program for newly elected trustees. The Superintendent shall provide each trustee with access to the Board Policy Handbook and the Administrative Procedures Manual at the organizational meeting following a general election or at the first regular meeting of the Board following a by-election.

5. Incumbent trustees are encouraged to help newly elected trustees become informed about the history, functions, policies, procedures and issues.

6. Specific Responsibilities of Individual Trustees

6.1 The trustee will model involvement in the faith community.

6.2 The trustee will refer queries, or issues and problems, not covered by Board policy, to the Board for corporate discussion and decision.

6.3 The trustee can engage with the public through a variety of communication methods, understanding that all communications and interactions must reflect the principles of the Trustee Code of Conduct.

6.4 Trustees will be cognizant that they are representing the interests of the Board while posting or commenting on social media, and aware of public perception that their posts, comments and social media engagement, are in accordance with their duties within the school division.

6.5 If trustees choose to post pictures of students on their social media sites, permission must be given by the relevant school authority.

6.6 The trustee will participate in, and contribute to, the decisions of the Board in order to provide the best solutions possible for the education of children within the Division.

6.7 The trustee will support the decisions of the Board and refrain from making any statements that may give the impression that such a statement reflects the corporate opinion of the Board when it does not.

6.8 The trustee will participate in training opportunities in order to ensure that the appropriate skills, knowledge and understandings are acquired.

6.9 The trustee will ensure that Catholic values and principles are reflected at all times in the Board's policies and practices.

6.10 The trustee will become familiar with Division policies, meeting agendas and reports in order to participate in Board business.

6.11 The Trustee will keep the Board Chair and/or the Superintendent informed in a timely manner of all matters coming to his/her attention that might affect the Division. Refer administration matters to the Superintendent.

6.12 The trustee will provide the Superintendent with counsel and advice, giving the benefit of the trustee's judgment, experience and familiarity with the community.

6.13 Trustees are encouraged to share Divisional information, key messages, Board priorities, exemplary practices, and student achievement and learning results.

6.14 The trustee will, in alignment with the Board engagement efforts, provide for the engagement of parents, students and the community in matters related to education.

6.14.1 Respectfully bring forward and advocate for local issues and concerns prior to a Board decision;

6.14.2 Interpret the needs of the community to the Board and the Board's action to those we serve; and

6.14.3 Liaise with designated School Council(s).

6.15 Trustees are encouraged to develop individual growth plans on an annual basis.

6.16 The trustee will share the materials and ideas gained from a trustee development activity with fellow trustees at the next available opportunity.

6.17 The trustee will stay current with respect to provincial, national and international education issues and trends.

6.18 The trustee will contribute to a positive and respectful learning and working culture both within the Board and the Division.

6.19 The trustee will attend Division or school functions where possible.

6.20 The trustee will adhere to the Trustee Code of Conduct.

6.21 The trustee will report any violation of the Trustee Code of Conduct to the Board Chair or when applicable, to the Vice-Chair.

Legal Reference: Section 33, 34, 51, 52 53, 64, 67, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96 Education Act, Section 6 Commissioner of Oaths Act

Reviewed: March 2011, January 2018
Revised: November 2019, June 2022

APPENDIX 'A'

SERVICES, MATERIALS AND EQUIPMENT PROVIDED TO TRUSTEES

Trustees shall be provided with the following services, materials and equipment while in office:

1. Reference:
   - Access to *The Education Act*
   - Board Policy Handbook and Administrative Procedures Manual
   - School year and Annual Work Plan
   - Current telephone listings of schools, principals, vice-principals and school secretarial staff
   - List of School Council Chairs
   - These items shall be available online on the RDCRS Board Portal

2. Communications/Public Relations:
   - Access to Superintendent weekly updates on Division News
   - Notification of significant media events, reminders of special meetings
   - Access to school newsletters to trustee liaison
   - Name tags, business cards, lapel pins
   - Speaker's notes
   - Individual and Board photographs

3. Administrative/Secretarial Services:
   - Access to interoffice mail
   - Conference registration, travel and accommodation arrangements
   - E-mail address and Information Technology service support
   - Document management, photocopying and related secretarial services

4. Equipment
   - A computer or stipend, with appropriate software and access. The equipment shall be returned to the Board upon completion of the term in office.
   - Cell phone stipend.

5. Corporate Clothing
   - One piece of corporate clothing

6. Briefcase

7. Professional Development Allowance of $5,000 per year. This includes mileage, hotel, registration and meals.

8. Mileage compensation for all Board business (stipend)

Appendix revised June 2022

Red Deer Catholic Regional Schools

POLICY 4: TRUSTEE CODE OF CONDUCT

The Board commits itself and its members to conduct which meets the highest ethical standards. It is expected that all personal interactions and relationships will be characterized by mutual respect, which acknowledges the dignity and affirms the worth of each person.

- Each trustee, representing all Catholic school supporters of the community and responsible to this electorate through the democratic process, recognizes:

  - That trustees are accountable to the Magisterium of the Church, and that, according to the Code of Canon Law, a Catholic school is an instrument of the Church and is one in which Catholic education is established, directed, recognized or converted to, by the local bishop, who is competent to issue prescriptions dealing with the general regulation of Catholic schools.

  - That legally, the authority of the Board is derived from the province, through the Constitution Act, which ultimately controls the organization and operation of the Division and which determines the degree of discretionary power left with the Board and the people of this community for the exercise of local autonomy.

  - That fellow citizens have entrusted them, through the electoral process, with the educational development of the children and youth of the community.

  - That trustees are the children's advocates and their first and greatest concern is the best interest of each and every one of these children without distinction as to who they are or what their background may be.

  - That trustees are educational leaders who realize that the future welfare of the community, of the province, and of Canada depends in the largest measure upon the quality of education provided in schools to fit the needs of every learner.

Specifically

Whereas the aim of Catholic Education is the development of each student towards personal fulfillment and responsible citizenship motivated by the Spirit of the Gospel and modeled on the example of Jesus Christ, the Catholic School Trustee shall, within the duties prescribed in Acts and Regulations and reflecting a ministry within the Church, adhere to the following Code of Conduct:

1. Trustees shall carry out their responsibilities as detailed in Policy 3 – Role of the

Trustee with reasonable diligence.

2. Provide an example to the Catholic Community by active participation in the communal life of a parish and by a personal lifestyle that reflects the teachings of the Church.

3. Devote time, thought and study to the duties of a trustee so that they may render effective and credible service.

4. Exercise the powers and duties of their office honestly and in good faith. Trustees shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

5. Trustees shall endeavour to work with fellow Board members in a spirit of harmony and cooperation in spite of differences of opinion that may arise during debate.

6. Trustees shall commit themselves to dignified, ethical, professional and lawful conduct.

7. Trustees shall reflect the Board's policies and resolutions when communicating with the public.

8. Consider information received from all sources and base personal decisions upon all available facts in every case; unswayed by partisan bias of any kind, and thereafter, abide by and uphold the final majority decision of the Board.

9. Trustees shall keep confidential any personal, privileged or confidential information obtained in their capacity as a trustee and not disclose the information except when authorized by law or by the Board to do so.

10. While elected from specific wards, trustees shall represent the best interests of the entire Division.

11. Trustees shall honor their fiduciary responsibility to the Board and be loyal to the interests of the Division as a whole in the context of Catholic Education. This loyalty supersedes loyalty to:
    - 11.1 Any advocacy or special interest groups; and
    - 11.2 The personal interest of any trustee.

12. Trustees shall report all conflicts of interest and abstain from voting on or discussing any matter that has been identified as a conflict, in accordance with Appendix 'B' – Conflicts of Interest.

13. In determining whether an actual or perceived conflict of interest exists, the

Trustees shall be guided by the following question:

> *Would a reasonable person, being informed of all of the circumstances, be more likely than not to regard the interest of the trustee as likely to influence that trustee's action and decision on the question?*

14. Maintain the confidentiality of privileged information, including statements made during in-camera sessions of the Board.

15. Work together with fellow trustees to communicate to the electorate.

16. Remember at all times that individual trustees have no legal authority outside the meeting of the Board, and therefore relationships with school staff, the community, and all media of communication is to be conducted on the basis of this fact.

17. Refrain from using the trustee position to benefit either oneself or any other individual or agency apart from the total interest of the Division.

18. Recognize that a key responsibility of the Board is to establish the policies by which the system is to be administered, and that the administration of the educational program and conduct of school business shall be left to the Superintendent and Division staff.

19. Encourage active cooperation by stakeholders with respect to establishing policies.

20. Support provincial and national school board associations for the future of trusteeship in this province and the nation.

21. Provide effective trustee service to the Catholic community in a spirit of teamwork and devotion to education as the greatest instrument for the preservation and perpetuation of our representative democracy.

22. Represent the Board responsibly in all Board-related matters with proper decorum and respect for others.

23. Represent the perceived concerns or needs of the community to the Board or Superintendent as appropriate and accurately communicate the Board's decisions to those who we serve.

24. Abstain from participation in personnel selection when family relatives are involved.

25. Trustees shall disclose any conflict of interest between their personal life and the position of the Board, and abstain and absent themselves from discussion or voting on the matter in question.

26. Trustees shall not use their influence to advance personal, family or friends' interests or the interests of any organization with which the trustee is

associated.

27. Consequences for the failure of individual trustees to adhere to the Trustee Code of Conduct are specified in Policy 4 Appendix A – Trustee Code of Conduct Sanctions.

Legal Reference: Section 33, 34, 51, 52, 53, 64, 67, 85, 86, 87, 88, 89 Education Act

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APPENDIX 'A'

1. Trustees shall conduct themselves in an ethical and prudent manner in compliance with the Trustee Code of Conduct, Policy 4. The failure by trustees to conduct themselves in compliance with this policy may result in the Board instituting sanctions.

2. A trustee who believes that a fellow trustee has violated the Code of Conduct may seek resolution of the matter through appropriate conciliatory measures prior to commencing an official complaint under the Code of Conduct.

3. A trustee who wishes to commence an official complaint under the Code of Conduct shall file a letter of complaint with the Board Chair within ninety (90) days of the alleged event occurring and indicate the nature of the complaint and the section or sections of the Code of Conduct that are alleged to have been violated by the trustee. The trustee who is alleged to have violated the Code of Conduct and all other trustees shall be forwarded a copy of the letter of complaint by the Board Chair, or where otherwise applicable in what follows, by the Vice-Chair, within five (5) days of receipt by the Board Chair of the letter of complaint. If the complaint is with respect to the conduct of the Board Chair, the letter of complaint shall be filed with the Vice-Chair.

4. When a trustee files a letter of complaint and a copy of that letter of complaint is forwarded to all trustees, the filing, notification, content, and nature of the complaint shall be deemed to be strictly confidential, the public disclosure of which shall be deemed to be a violation of the Code of Conduct. Public disclosure of the complaint and any resulting decision taken by the Board may be disclosed by the Board Chair only at the direction of the Board, following the disposition of the complaint by the Board at a Code of Conduct hearing.

5. To ensure that the complaint has merit to be considered and reviewed, at least one other trustee must provide to the Board Chair, within three (3) days of the notice in writing of the complaint being forwarded to all trustees, a letter indicating support for having the complaint heard at a Code of Conduct hearing. Any trustee who forwards such a letter of support shall not be disqualified from attending at and deliberating upon the complaint at a Code of Conduct hearing convened to hear the matter, solely for having issued such a letter.

6. Where no letter supporting a hearing is received by the Board Chair in the three (3) day period referred to in section 5 above, the complaint shall not be heard. The Board Chair shall notify all other trustees in writing that no further action of the Board shall occur.

7. Where a letter supporting a hearing is received by the Board Chair in the three (3) day period referred to in section 5 above, the Board Chair shall convene, as soon as is reasonable, a special meeting of the Board to allow the complaining trustee to present his or her views of the alleged violation of the Code of Conduct.

8. At the special meeting of the Board, the Board Chair shall indicate, at the commencement of the meeting, the nature of the business to be transacted and that the complaint shall be heard in an in-camera session of the special meeting. Without limiting what appears below, the Board Chair shall ensure fairness in dealing with the complaint by adhering to the

following procedures.

8.1 The Code of Conduct complaint shall be conducted at an in-camera session, Code of Conduct hearing, of a special Board meeting convened for that purpose. All preliminary matters, including whether one or more trustees may have a conflict of interest in hearing the presentations regarding the complaint, shall be dealt with prior to the presentation of the complaint on behalf of the complaining trustee.

8.2 The sequence of the Code of Conduct hearing shall be:

8.2.1 The complaining trustee shall provide a presentation which may be written or oral or both;

8.2.2 The respondent trustee shall provide a presentation which may be written or oral or both;

8.2.3 The complaining trustee shall then be given an opportunity to reply to the respondent trustee's presentation;

8.2.4 The respondent trustee shall then be provided a further opportunity to respond to the complaining trustee's presentation and subsequent remarks;

8.2.5 The remaining trustees of the Board shall be given the opportunity to ask questions of both parties;

8.2.6 The complaining trustee shall be given the opportunity to make final comments; and

8.2.7 The respondent trustee shall be given the opportunity to make final comments.

8.3 Following the presentation of the respective positions of the parties, the parties and all persons other than the remaining trustees who do not have a conflict of interest shall be required to leave the room, and the remaining trustees shall deliberate in private, without assistance from administration. The Board may, however, in its discretion, call upon legal advisors to assist them on points of law or the drafting of a possible resolution.

8.4 If the remaining trustees in deliberation require further information or clarification, the parties shall be reconvened and the requests made in the presence of both parties. If the information is not readily available, the presiding Chair may request a recess or, if necessary, an adjournment of the Code of Conduct hearing to a later date.

8.5 In the case of an adjournment, no discussion by trustees whatsoever of the matters heard at the Code of Conduct hearing may take place until the meeting is reconvened.

8.6 The remaining trustees in deliberation may draft a resolution indicating what action,

if any, may be taken regarding the respondent trustee.

8.7 The presiding Chair shall reconvene the parties to the Code of Conduct hearing and request a motion to revert to the open meeting in order to pass the resolution.

8.8 All documentation that is related to the Code of Conduct hearing shall be returned to the Superintendent or designate immediately upon conclusion of the Code of Conduct hearing and shall be retained in accordance with legal requirements.

8.9 The presiding Chair shall declare the special Board meeting adjourned.

9. A violation of the Code of Conduct may result in the Board instituting, without limiting what follows, any or all of the following sanctions:

9.1 Having the Board Chair write a letter of censure marked "personal and confidential" to the offending trustee, on the approval of a majority of those trustees present and allowed to vote at the special meeting of the Board;

9.2 Having a motion of censure passed by a majority of those trustees present and allowed to vote at the special meeting of the Board;

9.3 Having a motion to remove the offending trustee from one, some or all Board committees or other appointments of the Board passed by a majority of those trustees present and allowed to vote at the special meeting of the Board, for a time not to exceed the trustee's term as trustee.

10. The Board may, in its discretion, make public its findings at the special meeting or at a regular meeting of the Board where the Board has not upheld the complaint alleging a violation of the Board's Code of Conduct or where there has been a withdrawal of the complaint or under any other circumstances that the Board deems reasonable and appropriate to indicate publicly its disposition of the complaint.

Legal Reference: Sections 60, 61, 68, 72, 80, 81, 82, 83, 84, 85, 86, 246 *Education Act*

APPENDIX B – CONFLICTS OF INTEREST

Trustees should not gain benefits or monetary rewards because of their position as a trustee except for any allowances, honorarium or remuneration approved by the Board for duties performed. The requirements outlined herein are in addition to Article 16 of Policy 19 – Board Operations.

1. Trustees are expected to avoid both actual potential and perceived conflicts of interest with respect to their fiduciary duties and in all matters considered by the Board. Trustees shall act at all times in the best interests of the Board and the entire Division rather than any personal interests.

2. Trustees shall report any actual, potential or perceived conflict of interest. An actual or potential conflict of interest exists when a trustee is confronted with an issue in which the trustee has a personal or pecuniary interest. A perceived conflict of interest exists when a trustee is confronted with an issue in which the trustee may be seen to have a conflict, such as an issue or question involving or impact a family member of the trustee. For greater clarity,

    a. a “personal interest” includes, but is not limited to, matters in which the trustee has any interest that may reasonably be regarded as likely to have influence on them when carrying out their duties and responsibilities; and

    b. a “pecuniary interest” includes, but is not limited to, where a matter would or could give rise to the expectation of a gain or loss of money and includes “pecuniary interest” as defined in the *Education Act*.

3. In connection with any actual, potential or perceived conflict of interest in any matter being considered by the Board or a committee of the Board, a trustee must disclose the existence of the actual, potential or perceived conflict of interest and be given the opportunity to disclose all material facts to the other trustees and members of committees of the Board. Full disclosure, in itself, does not remove a conflict of interest.

4. Upon disclosing the actual, potential or perceived conflict of interest and all material facts, and after any desired discussion with the Board, the trustee shall leave the Board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining Board or committee members shall decide if a conflict of interest exists.

5. If the Board or committee members determine that a conflict of interest does exist, the trustee shall not vote on the matter and shall not participate in the decision and shall not attempt to influence the decision of other Board or committee members.

6. It is the responsibility of other trustees who are aware of an actual, potential or perceived conflict of interest on the part of a fellow trustee to raise the issue for clarification, first with the trustee and then, if needed, with the Board Chair or committee chair.

7. If the Board or committee has reasonable cause to believe a trustee has failed to disclose actual, potential or perceived conflicts of interest, it shall inform the trustee of the basis for such belief and afford the trustee an opportunity to explain the alleged failure to disclose.

a. If, after hearing the trustee's response and after making any further investigation as deemed necessary by the circumstances, the Board or committee determines that the trustee has failed to disclose an actual, potential or perceived conflict of interest, it shall take appropriate disciplinary and corrective action.

8. The minutes of the Board and all committees of the Board shall contain the names of the persons who disclosed or otherwise were found to have an actual, potential or perceived conflict of interest, the nature of the conflict, any action taken to determine whether the conflict was in fact present, and the Board's or committee's decision as to whether a conflict of interest in fact existed.

9. A trustee shall not also be an employee of the Division, nor shall a trustee receive any compensation for services rendered to the Division in any non-governance capacity. This provision shall not prohibit trustees from receiving authorized compensation for serving as a member of the Board or from receiving reimbursement for authorized expenses incurred during the performance of Board duties, as outlined in Policy 19 – Board Operations.

10. The Board shall not enter into any contract or arrangement with any of its trustees or with a firm, organization, corporation, or partnership in which a trustee has a financial interest unless a more advantageous contract or arrangement is not reasonable possible with another firm, organization, corporation or partnership and the Board or committee of the Board have determined by majority vote of the disinterested trustees whether the contract or arrangement is in the Division's best interests, for its own benefit, and whether it is fair and reasonable.