EB-2011-0371
EB-2011-0376

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

BOOK OF AUTHORITIES
OF THE
SCHOOL ENERGY COALITION

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TAB 1

Indexed as:

Bell Canada v. Canadian Telephone Employees Assn.

Bell Canada, appellant;
v.
Communications, Energy and Paperworkers Union of Canada, Femmes Action and Canadian Human Rights Commission, respondents, and
Attorney General of Canada, Attorney General of Ontario, Canadian Labour Congress, Public Service Alliance of Canada and Canada Post Corporation, interveners.

[2003] 1 S.C.R. 884

[2003] S.C.J. No. 36

2003 SCC 36

File No.: 28743.

Supreme Court of Canada

Heard: January 23, 2003;
Judgment: June 26, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

(55 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Administrative law -- Procedural fairness -- Institutional independence -- Impartiality -- Canadian Human Rights Tribunal -- Canadian Human Rights Commission -- Canadian Human Rights Act authorizing Commission to issue guidelines binding on Tribunal concerning "a class of cases" --

Act also authorizing Tribunal Chairperson to extend terms of Tribunal members in ongoing inquiries -- Whether Commission's guideline-making power compromises Tribunal's independence and impartiality -- Whether Chairperson's power to extend appointments compromises Tribunal's independence and impartiality -- Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 11, 27(2), 48.2(2) -- Canadian Bill of Rights, S.C. 1960, c. 44, s. 2(e).

[page885]

Summary:

Bell brought a motion before a panel of the Canadian Human Rights Tribunal, which had been convened to hear complaints filed against Bell by female employees. Bell alleged that the Tribunal's independence and impartiality were compromised by two powers: first, the power of the Canadian Human Rights Commission to issue guidelines that are binding on the Tribunal concerning "a class of cases", and second, the power of the Tribunal Chairperson to extend Tribunal members' terms in ongoing inquiries.

The Tribunal rejected Bell's position and directed that the hearings should proceed. The Federal Court, Trial Division, allowed Bell's application for judicial review, holding that even the narrowed guideline power of the Commission unduly fettered the Tribunal, and that the Chairperson's discretionary power to extend appointments did not leave Tribunal members with a sufficient guarantee of tenure. The Federal Court of Appeal reversed that judgment.

Held: The appeal should be dismissed.

Neither of the two powers challenged by Bell compromises the procedural fairness of the Tribunal. Nor does either power contravene any applicable quasi-constitutional or constitutional principle.

The Tribunal should be held to a high standard of independence, both at common law and under s. 2(*e*) of the *Canadian Bill of Rights*. Its main function is adjudicative and it is not involved in crafting policy. However, as part of a legislative scheme for rectifying discrimination, the Tribunal serves the larger purpose of ensuring that government policy is implemented. The standard of independence applicable to it is therefore lower than that of a court. The Tribunal's function in implementing government policy must be kept in mind when assessing whether it is impartial.

The guideline power does not undermine the independence of the Tribunal. The requirement of independence pertains to the structure of tribunals and the relationship between their members and members of other branches of government. It does not have to do with independence of thought. Nor does the guideline power undermine the Tribunal's impartiality. The guidelines are a form of law. Being fettered by law does not render a tribunal partial, because impartiality does not consist in

the absence of all constraints. The guideline [page886] power is limited; and the statute and administrative law contain checks to ensure that it is not misused.

The power to extend members' appointments does not undermine the independence of Tribunal members. This question is settled by *Valente*. Nor does the power undermine the Tribunal's impartiality. A reasonable person informed of the facts would not conclude that members whose appointments were extended were likely to be pressured to adopt the Chairperson's views.

Cases Cited

Referred to: Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369; Valente v. The Queen, [1985] 2 S.C.R. 673; 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 S.C.R. 919; IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282; Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623; Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781, 2001 SCC 52; Russell v. Duke of Norfolk, [1949] 1 All E.R. 109; R. v. Lippé, [1991] 2 S.C.R. 114; Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177; Canada (Attorney General) v. Central Cartage Co., [1990] 2 F.C. 641; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; Canada (Attorney General) v. Public Service Alliance of Canada, [2000] 1 F.C. 146; Liteky v. United States, 510 U.S. 540 (1994); R. v. S. (R.D.), [1997] 3 S.C.R. 484; Brosseau v. Alberta Securities Commission, [1989] 1 S.C.R. 301; Katz v. Vancouver Stock Exchange, [1996] 3 S.C.R. 405; R. v. Greenbaum, [1993] 1 S.C.R. 674; Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854.

Statutes and Regulations Cited

Canadian Bill of Rights, S.C. 1960, c. 44 [reproduced in R.S.C. 1985, App. III], s. 2(e).

Canadian Charter of Rights and Freedoms.

Canadian Human Rights Act, R.S.C. 1985, c. H-6 [am. 1998, c. 9], ss. 11(1), (4), 27(1), (2), (3), 48.1(3), 48.2(1), (2), 48.3, 48.6(1), 50(2).

Constitution Act, 1867, s. 96.

Equal Wages Guidelines, 1986, SOR/86-1082.

Statutory Instruments Act, R.S.C. 1985, c. S-22.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal, [2001] 3 F.C. 481, 272 N.R. 50, 199 D.L.R. (4th) 664, 32 Admin. L.R. (3d) 1, 9 C.C.E.L. (3d) 228, [2001] F.C.J. No. 776 (QL), 2001 FCA 161, allowing the respondents' appeal from a judgment of the Trial Division, [2001] 2 F.C. 392, 190 F.T.R. 42, 194 D.L.R. (4th) 499, 26 Admin. L.R. (3d) 253, 5 C.C.E.L. (3d) 123, 39 C.H.R.R. D/213, 2000 C.L.L.C. para. 230-043, [2000] F.C.J. No. 1747 (QL), quashing the decision of the Canadian Human Rights Tribunal. Appeal dismissed.

Counsel:

Roy L. Heenan, John Murray, Thomas Brady and David Stratas, for the appellant.

Peter C. Engelmann, Jula Hughes and Fiona Campbell, for the respondent the Communications, Energy and Paperworkers Union of Canada.

No one appeared for the respondent Femmes Action.

Ian Fine and Philippe Dufresne, for the respondent the Canadian Human Rights Commission.

Donald J. Rennie and Alain Préfontaine, for the intervener the Attorney General of Canada.

Sara Blake and Karin Rasmussen, for the intervener the Attorney General of Ontario.

Mary F. Cornish and Fay C. Faraday, for the intervener the Canadian Labour Congress.

Andrew Raven and David Yazbeck, for the intervener the Public Service Alliance of Canada.

Brian A. Crane, Q.C., and David Olsen, for the intervener the Canada Post Corporation.

The judgment of the Court was delivered by

McLACHLIN C.J. and BASTARACHE J.:--

I. Introduction

1 This appeal raises the issue of whether the Canadian Human Rights Tribunal (the "Tribunal") lacks independence and impartiality because of the [page888] power of the Canadian Human Rights Commission (the "Commission") to issue guidelines binding on the Tribunal concerning "a class of cases", and the power of the Tribunal Chairperson to extend Tribunal members' terms in ongoing inquiries.

2 The appeal marks the latest proceeding in a lengthy dispute between Bell Canada ("Bell") and the respondents, dating back to the early 1990's, when two unions, Canadian Telephone Employees Association ("CTEA") and Communications, Energy and Paperworkers Union of Canada ("CEP"), and Femmes Action filed complaints against Bell alleging gender discrimination in the payment of wages, contrary to s. 11 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act "). More than a decade later, the complaints have yet to be heard by the Tribunal. Instead, the parties have been engaged in litigating Bell's challenges to the Tribunal, a process that has taken them to the Federal Court, Trial Division three times, to the Federal Court of Appeal twice, and now to this Court.

3 In our view, Bell's arguments are without merit. Neither of the two powers challenged by Bell compromises the procedural fairness of the Tribunal. Nor does either power contravene any applicable quasi-constitutional or constitutional principle. We would dismiss the appeal and have the complaints, finally, proceed before the Tribunal.

II. Background

4 Between 1990 and 1994, the CTEA, the CEP and Femmes Action, filed complaints with the Commission against Bell, alleging that Bell pays female employees in certain positions lower wages than male employees performing work of equal value, in violation of s. 11 of the Act. In May of 1996, the Commission asked the President of the Tribunal (now "Chairperson") to inquire into the complaints.

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5 The matter quickly became complicated. Bell applied for judicial review of the Commission's decision to refer the complaints to the Tribunal. The Federal Court, Trial Division granted Bell's application and quashed the Commission's decision: *Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (1998), 143 F.T.R. 81. On appeal, the Federal Court of Appeal reversed this judgment and restored the Commission's decision: [1999] 1 F.C. 113. Leave to appeal to this Court was sought by Bell, but was denied: [1999] 2 S.C.R. v.

6 While this was occurring, a panel of Tribunal members was appointed to inquire into the original complaints. Bell brought a motion before the panel urging that the Tribunal was institutionally incapable of providing a fair hearing in accordance with the principles of natural justice. The panel dismissed the motion: *Canadian Telephone Employees Association v. Bell Canada*, Can. H.R. Trib., June 4, 1997.

7 Bell then applied for judicial review of the panel's decision. The Federal Court, Trial Division quashed the panel's decision: *Bell Canada v. Canadian Telephone Employees Assn.*, [1998] 3 F.C. 244, and ordered that there be no further proceedings in the matter until the Act had been

satisfactorily amended by the legislature. At that time, the Act differed from the current legislation in two relevant respects. Firstly, it was the Minister of Justice and not the Tribunal Chairperson to whom the Act gave the discretionary power to extend Tribunal members' appointments beyond their expiry dates. McGillis J. held that, as a result, Tribunal members lacked sufficient security of tenure. Secondly, the Commission's guideline power was broader than it now is, permitting the Commission to make guidelines concerning the application of the Act in a particular case, and not only in "a class of cases". McGillis J. expressed reservations about this power, stating that it would be preferable if the guidelines were non-binding.

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8 The judgment of McGillis J. was appealed to the Federal Court of Appeal, but the appeal was adjourned *sine die* on June 1, 1999, in light of amendments to the Act: (1999), 246 N.R. 368. The amendments transferred the power to extend appointments of Tribunal members to the Tribunal Chairperson, and limited the Commission's guideline power so that it became only a power to issue guidelines respecting the interpretation of the Act "in a class of cases": S.C. 1998, c. 9, s. 20(2).

9 At this time, the Commission, together with CTEA, CEP and Femmes Action, urged the Chairperson of the Tribunal to set formal hearing dates for the panel, so that the original complaints could at last be heard. Bell resisted, and a case-planning meeting before the Tribunal's Vice-chairperson was arranged at which Bell and the respondents put forward their positions. Bell argued that the 1998 amendments did not eliminate the problems of procedural fairness that had been identified by McGillis J. The Vice-chairperson rejected Bell's position, and, in an interim decision of April 26, 1999, directed that the hearings should proceed: Can. H.R. Trib., Decision No. 1 in file T503/2098.

10 Bell then applied for judicial review of this decision. The Federal Court, Trial Division allowed the application: *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392. Tremblay-Lamer J. held that even the narrowed guideline power of the Commission unduly fettered the Tribunal, and that the Chairperson's discretionary power to extend appointments did not leave Tribunal members with a sufficient guarantee of tenure.

11 The Commission, CTEA, CEP and Femmes Action appealed. Before the Federal Court of Appeal, Bell argued that the Tribunal violated not only the requirements of procedural fairness, but also Bell's right to a fair hearing under s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III) . The Federal Court of Appeal rejected Bell's view that the Tribunal [page891] violated the requirements of procedural fairness, and held it unnecessary to consider the arguments based on the *Canadian Bill of Rights*: [2001] 3 F.C. 481, 2001 FCA 161.

12 It is on appeal from this decision of the Federal Court of Appeal that the parties now appear before this Court -- thirteen years after the filing of the respondents' original complaints, which still

have yet to be heard.

III. Relevant Statutory Provisions

13 *Canadian Human Rights Act*, R.S.C. 1985, c. H-6

> **11.** (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.
>
> ...
>
> (4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.
>
> ...
>
> **27.** ...
>
> (2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.
>
> (3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.
>
> **48.2** (1) The Chairperson and Vice-chairperson are to be appointed to hold office during good behaviour for terms of not more than seven years, and the other members are to be appointed to hold office during good behaviour for terms of not more than five years, but the Chairperson may be removed from office by the Governor in Council for cause and the Vice-chairperson and the other members may be subject to remedial or disciplinary measures in accordance with section 48.3.

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(2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58.

50. ...

(2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

Canadian Bill of Rights, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III)

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

...

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

IV. Issues

14 By order of the Chief Justice dated July 10, 2002, the following constitutional questions were stated for the Court's consideration:

(1) Are ss. 27(2) and (3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable or inapplicable?

(2) Are ss. 48.1 and 48.2 of the *Canadian Human Rights Act*, R.S.C. 1985, c.

> H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable and inapplicable?

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V. Analysis

15 Bell argues that the power of the Commission to issue guidelines binding on the Tribunal, under ss. 27(2) and 27(3), compromises the Tribunal's independence because it places limits upon how the Tribunal can interpret the Act, and undermines the Tribunal's impartiality because the Commission is itself a party before the Tribunal. Similarly, Bell argues that the discretionary power of the Tribunal Chairperson to extend members' terms for ongoing inquiries, under ss. 48.2(1) and 48.2(2), compromises the Tribunal's independence because it threatens their security of tenure, and undermines the Tribunal's impartiality because the Chairperson may pressure such members to reach outcomes that he or she favours.

16 Since Bell's arguments draw upon both independence and impartiality, it will be useful to begin by discussing the distinction between these two requirements of procedural fairness.

A. *The Distinction Between Independence and Impartiality*

17 The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, *nemo debet esse judex in propria sua causa*. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? (See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J., dissenting.)

18 The requirements of independence and impartiality are not, however, identical. As Le Dain J. wrote in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at [page894] p. 685 (cited by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 41):

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the

> issues and the parties in a particular case. The word "impartial" ... connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

19 As noted above, Bell challenges both the Tribunal's independence and its impartiality. However, the above discussion of the difference between the two requirements suggests that one of Bell's challenges involves a category mistake. Bell's claim that the guideline power undermines the Tribunal's independence is based upon the contention that it threatens members' independence of thought. But the requirement of independence pertains to the structure of tribunals, and to the relationship between their members and others, including members of other branches of government, such as the executive. The test does not have to do with independence of thought. A tribunal must certainly exercise independence of thought, in the sense that it must not be unduly influenced by improper considerations. But this is just another way of saying that it must be impartial. Bell's only real objection to the guideline power, then, is that it leaves the Tribunal insufficiently impartial.

20 We will look first at this objection to the guideline power, and will then turn to Bell's two objections to the power of the Chairperson to extend appointments. Before doing so, however, we must determine the precise content of the requirements [page895] of impartiality and independence that apply to the Tribunal. How high a degree of independence is required? And what constitutes impartiality in this particular context?

B.

Content of the Requirements of Procedural Fairness Applicable to the Tribunal

21 The requirements of procedural fairness -- which include requirements of independence and impartiality -- vary for different tribunals. As Gonthier J. wrote in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24: "the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces". Rather, their content varies. As Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636, the procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" (see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 82, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-22, *per* L'Heureux-Dubé J.). As this Court noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 , 2001 SCC 52, administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" (para. 24). Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to

develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence (see *Newfoundland Telephone*, at p. 638, [page896] *per* Cory J., and *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.)).

22 To say that tribunals span the divide between the executive and the judicial branches of government is not to imply that there are only two types of tribunals -- those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as "quasi-judicial" on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal -- such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law -- as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.

23 The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make [page897] submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

24 The fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence from the executive branch. A high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal -- such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices. There is no indication in the Act that the legislature intended anything less than a high degree of independence of Tribunal members. Members' remuneration is fixed by the Governor in Council, and is not subject to their performance on the Tribunal: s. 48.6(1). Members

hold office for a fixed term of up to five years (or up to seven years, in the case of the Chairperson and Vice-chairperson) (s. 48.2(1)); and their terms may only be extended to enable them to finish a hearing that they have already commenced. Further, the Chairperson is removable only for cause; and before a member is disciplined or removed, the Chairperson may request the Minister of Justice to look into the situation, who in turn may request the Governor in Council to appoint a judge to conduct a full inquiry (s. 48.3). All of these features of the statutory scheme suggest that the legislature intended the Tribunal to exhibit a high degree of independence from the executive branch.

25 We turn now to impartiality. The same test applies to the issue of impartiality as applies to independence (*R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143, *per* Lamer C.J., citing *Valente, supra*, at pp. 684 and 689). Whether the Tribunal is impartial depends upon whether it meets the test set out by [page898] de Grandpré J. in *Committee for Justice and Liberty, supra*, at p. 394: would a well-informed person, viewing the matter realistically and practically, have a reasonable apprehension of bias in a substantial number of cases? As Lamer C.J. stated in *Lippé*, allegations of institutional bias can be brought only where the impugned factor will give a fully informed person a reasonable apprehension of bias in a substantial number of cases (p. 144).

26 In answering this question, we must attend not only to the adjudicative function of the Tribunal, but also to the larger context within which the Tribunal operates. The Tribunal is part of a legislative scheme for identifying and remedying discrimination. As such, the larger purpose behind its adjudication is to ensure that governmental policy on discrimination is implemented. It is crucial, for this larger purpose, that any ambiguities in the Act be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the Act's objectives. For instance, as the intervener Canadian Labour Congress argued before this Court, it would be counterproductive if the Tribunal were, in pay equity disputes, to compare the value of different forms of work using a method that itself rests on discriminatory attitudes. This would perpetuate discrimination, rather than helping to eradicate it. In endowing the Commission with the power to issue interpretive guidelines, and in binding the Tribunal to observe these guidelines, the legislature has attempted to guard against this possibility. The Act therefore evinces a legislative intent, not simply to establish a Tribunal that functions by means of a quasi-judicial process, but also to limit the interpretive powers of the Tribunal in order to ensure that the legislation is interpreted in a non-discriminatory way. The fact that the legislature regarded such limits as necessary for the fulfilment of the ultimate purpose of the Act must be borne in mind in determining precisely which sorts of fetters on the Tribunal's decision-making power adversely affect its impartiality, and which do not.

[page899]

27 Our analysis has, thus far, looked to the statute and its overall purpose in determining the appropriate content for the requirements of independence and impartiality that apply to the

Tribunal. However, the content of the requirements of procedural fairness applicable to a given tribunal depends not only upon the enabling statute but also upon applicable quasi-constitutional and constitutional principles.

28 Here, the *Canadian Bill of Rights*, quasi-constitutional legislation, applies. Section 2(*e*) of the *Canadian Bill of Rights* requires that parties be given a "fair hearing in accordance with the principles of fundamental justice". Canadian courts have held that the content of s. 2(*e*) is established by reference to common law principles of natural justice (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 229-30; *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641 (C.A.), at pp. 663-64). As the parties in the case at bar did not suggest that the guarantees of independence and impartiality under s. 2(*e*) would in this case differ from the common law requirements of procedural fairness, it is unnecessary for us here to devote separate discussion to the *Canadian Bill of Rights*.

29 Bell also argues that the Tribunal is bound by a constitutional principle -- the "unwritten principle of judicial independence" -- which confers on it the same degree of independence as a court established under s. 96 of the *Constitution Act, 1867*: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. Bell presents no authority for this argument. As an administrative tribunal subject to the supervisory powers of s. 96 courts, the Tribunal does not have to replicate all features of a court. As discussed above, the legislature has conferred a high degree of independence on the Tribunal, stopping short of constituting it as a court, but nevertheless supporting it by safeguards adequate to its function.

30 Bell suggests, in the alternative, that the constitutional principle applies and holds the Tribunal to the [page900] standard of common law procedural fairness. Since, as discussed below (at para. 53), the common law standard is met, this submission does not advance Bell's argument.

31 This discussion shows that the Tribunal, though not bound to the highest standard of independence by the unwritten constitutional principle of adjudicative independence, must act impartially and meet a relatively high standard of independence, both at common law and under s. 2(*e*) of the *Canadian Bill of Rights*.

32 We turn now to Bell's challenges to the Tribunal.

C. *The Guideline Power*

33 Bell alleges that the Commission's power to issue binding guidelines regarding the proper interpretation of the Act undermines the Tribunal's impartiality. In Bell's words, this provision "usurps the power of the Tribunal to make its own decisions concerning the interpretation and application of the Act". Moreover, Bell argues, it is problematic that the Commission, the body that directs the Tribunal in its interpretation of the Act, also appears before the Tribunal as a party.

34 It is unclear exactly what objection Bell is making here. On one reading, Bell's objection lies

simply with the fact that the Tribunal is "fettered" -- that is, that it does not have full freedom to interpret the Act in whatever manner that it wishes, unconstrained by any other body. On a second reading, the objection is rather that the fact that the Commission has the power to issue binding guidelines may make the Tribunal more likely to favour the Commission in the proceedings before it. On a third reading, the objection is simply to the fact that Parliament has placed in one and the same body the functions of investigating complaints, formulating guidelines, and acting as prosecutor in hearings before the Tribunal. The objection is that this overlap of functions itself gives rise to a reasonable apprehension of bias. Finally, on a fourth reading, Bell is objecting [page901] that the Commission may use its guideline power to manipulate the outcome of a particular case, to ensure that it succeeds as prosecutor. We shall consider each of these versions of the objection, in turn.

35 In oral argument, counsel for Bell stated repeatedly that the guideline power "fetters" the Tribunal in its application of the Act. This assumes that the sole mandate of the Tribunal is to apply the Act, and not also to apply any other forms of law that the legislature has deemed relevant -- such as guidelines. This assumption is mistaken. If the guidelines issued by the Commission are a form of law, then the Tribunal is bound to apply them, and it is no more accurate to say that they "fetter" the Tribunal than it is to suggest that the common law "fetters" ordinary courts because it prevents them from deciding the cases before them in any way they please.

36 It might be contended that ss. 27(2) and 27(3) of the Act do not adequately empower the Commission to issue valid subordinate legislation, and that consequently, the guidelines are not "law". In our view, this view is incorrect. The guidelines issued by the Commission under the Act are indistinguishable from regulations issued by other administrative bodies (see *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.), at paras. 136-41, *per* Evans J., as he then was). They are, like regulations, of general application: indeed, under the amended s. 27(2), they must pertain always to "a class of cases". Like regulations, the Commission's guidelines are subject to the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and must be published in the *Canada Gazette*. Moreover, the process that is followed in formulating particular guidelines resembles the legislative process, involving formal consultations with interested parties and revision of the draft guidelines in light of these consultations. The *Equal Wages Guidelines, 1986*, SOR/86-1082, for instance, were the result of [page902] consultation with some 70 organizations, including Bell. The Commission met with all organizations who requested a meeting; and, as a direct result of the consultation process, Commission staff made changes to the draft guidelines prior to their submission to the Commission for approval.

37 While it may have been more felicitous for Parliament to have called the Commission's power a power to make "regulations" rather than a power to make "guidelines", the legislative intent is clear. A functional and purposive approach to the nature of these guidelines reveals that they are a form of law, akin to regulations. It is also worth noting that the word used in the French version of the Act is *ordonnance* -- which leaves no doubt that the guidelines are a form of law.

38 The objection that the guideline power unduly fetters the Tribunal overlooks the fact that guidelines are a form of law. It also mistakenly conflates impartiality with complete freedom to decide a case in any manner that one wishes. Being fettered by law does not render a tribunal partial, because impartiality does not consist in the absence of all constraints or influences. Rather, it consists in being influenced only by relevant considerations, such as the evidence before the Tribunal and the applicable laws. As Scalia J. pointed out in *Liteky v. United States*, 510 U.S. 540 (1994), at p. 550, the words "bias" and "partiality" "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess" (emphasis in the original). Similarly, as Cory J. emphasized in *R. v. [page903] S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 119, not all predispositions amount to "bias". Predispositions that simply reflect applicable law do not undermine impartiality. On the contrary, they help to preserve it. Hence, the fact that the Tribunal must apply all relevant law, including guidelines formulated by the Commission, does not on its own raise a reasonable apprehension of bias.

39 The second version of Bell's objection is that the Tribunal is more likely to favour the Commission during a hearing because the Commission has the power to issue guidelines that bind it. It is not evident to us why this would be so. When the Commission appears before the Tribunal, it is in no different a position from any representative of the government who appears before an administrative board or court. The public does not, in other contexts, assume that a decision-maker will favour submissions by government representatives simply because the decision-maker must apply laws that the government has made. The Tribunal seems no more likely to be biased in favour of the Commission because the Commission provides the Tribunal's guidelines than it is likely to be biased in favour of Bell because Bell provides the Tribunal's phone service.

40 On a third interpretation, Bell objects that Parliament has placed in one and the same body the function of formulating guidelines, investigating complaints, and acting as prosecutor before the Tribunal. Bell is correct in suggesting that the Commission shares these functions. However, this overlapping of different functions in a single administrative agency is not unusual, and does not on its own give rise to a reasonable apprehension of bias (see *Régie des permis d'alcool, supra*, at paras. 46-48, *per* Gonthier J.; *Newfoundland Telephone, supra*, at p. 635, *per* Cory J.; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301). As McLachlin C.J. observed in *Ocean Port, supra*, at para. 41, "[t]he overlapping of investigative, prosecutorial [page904] and adjudicative functions in a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role".

41 Indeed, it may be that the overlapping of functions in the Commission is the legislature's way of ensuring that both the Commission and the Tribunal are able to perform their intended roles. In *Public Service Alliance, supra*, Evans J. noted that although it was unusual for Parliament to have conferred the power to make subordinate legislation on the Commission and not the Governor in Council, Parliament must have contemplated that "the expertise that the Commission will have acquired in the discharge of its statutory responsibilities for human rights research and public

education, and for processing complaints up to the point of adjudication" (para. 140) was necessary in the formulation of the guidelines, and was more important than certain other goals. In our view, Evans J.'s conjecture regarding Parliamentary intent is correct. The Commission is responsible, among other things, for maintaining close liaisons with similar bodies in the provinces, for considering recommendations from public interest groups and any other bodies, and for developing programs of public education (s. 27(1)). These collaborative and educational responsibilities afford it extensive awareness of the needs of the public, and extensive knowledge of developments in anti-discrimination law at the federal and provincial levels. Placing the guideline power in the hands of the Commission may therefore have been Parliament's way of ensuring that the Act would be interpreted in a manner that was sensitive to the needs of the public and to developments across the country, and hence, that it would be interpreted by the Tribunal in the manner that best furthered the aims of the Act as a whole.

42 This point is related to our earlier discussion of the importance of considering the aims of the Act as a whole, in assessing whether the requirement [page905] of impartiality has been met. We noted there that the Act's ultimate aim of identifying and rectifying instances of discrimination would only be furthered if ambiguities in the Act were interpreted in a manner that furthered, rather than frustrated, the identification of discriminatory practices. If, as the Act suggests, this can best be accomplished by giving the Commission the power to make interpretive guidelines that bind the Tribunal, then the overlapping of functions in the Commission plays an important role . It does not result in a lack of impartiality, but rather helps to ensure that the Tribunal applies the Act in the manner that is most likely to fulfill the Act's ultimate purpose.

43 We note in passing that, given the relatively small volume of s. 11 equal pay cases adjudicated by the Tribunal, the promulgation of guidelines by the Commission has likely provided parties with a sense of their rights and obligations under the Act in a more efficient and clearer way than would an incremental development of informal guidelines by the Tribunal itself, through its decisions in particular cases.

44 Bell's real objection may be that placing the guideline power and the prosecutorial function in a single agency allows the Commission to manipulate the outcome of a hearing in its favour.

45 This version of Bell's objection might have been stronger had Bell provided some evidence that, in practice, the Commission had attempted to use the guidelines to influence the Tribunal's views toward it (see *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, and *Matsqui Indian Band, supra*, at paras. 117-24, *per* Sopinka J.). No such evidence was provided in this case. Indeed, since the only guidelines that apply to the complaints brought against Bell are the *Equal Wages Guidelines, 1986*, which were introduced several years before the complaints against Bell were brought, it is difficult to see how these guidelines could have been [page906] formulated with the aim of unduly influencing the Tribunal against Bell.

46 In suggesting that the Commission could misuse its guideline power in this way, and that the

misuse could remain undetected, Bell seems to be overestimating the breadth of the guideline power. Indeed, counsel for Bell suggested in oral argument that the guideline power would permit the Commission effectively to repeal provisions of the Act. Counsel also argued that the guideline power might be used to strip away any procedural protections guaranteed in the Act, and that the Tribunal has no power to "escape the fetters of any guidelines imposed on it by declaring them *ultra vires* the Commission".

47 As the Commission has readily acknowledged, the guideline power is constrained. The Commission, like other bodies to whom the power to make subordinate legislation has been delegated, cannot exceed the power that has been given to it and is subject to strict judicial review: *R. v. Greenbaum*, [1993] 1 S.C.R. 674. The Tribunal can, and indeed must, refuse to apply guidelines that it finds to be *ultra vires* the Commission as contrary to the Commission's enabling legislation, the Act, the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. The Tribunal's power to "decide all questions of law or fact necessary to determining the matter" under s. 50(2) of the Act is clearly a general power to consider questions of law, including questions pertaining to the *Charter* and the *Canadian Bill of Rights*: see *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854. No invalid law binds the Tribunal. Moreover, the Commission's guidelines, like all subordinate legislation, are subject to the presumption against retroactivity. Since the Act does not contain explicit language indicating an intent to dispense with this presumption, no guideline can apply retroactively. This is a significant bar to attempting to influence a case that is currently being prosecuted before the Tribunal by promulgating a new guideline. Finally, [page907] any party before the Tribunal could challenge a guideline on the basis that it was issued by the Commission in bad faith or for an improper purpose; and no guideline can purport to override the requirements of procedural fairness that govern the Tribunal.

48 In addition to these factors, there are specific indications in the Act that the legislature intended the scope of the guideline power to be limited. In determining the reach of this power, both language versions of s. 27(2) must be read harmoniously. The English version, which empowers the Commission to "issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases", must be read in such a way as to be coherent with the French version. The French version states that the Commission can, in a category of given cases, "*décider de préciser, par ordonnance, les limites et les modalités de l'application de la présente loi*". This power to "make precise the limits and the modes of application of the law" certainly falls short of the power to repeal portions of the Act which Bell fears. An apt example of what is involved in merely "making precise" the limits of the Act is provided by s. 11(4), which envisions that guidelines will be promulgated to list the factors (*facteur reconnu*) which would justify what might otherwise amount to discrimination under s. 11(1). This provision clearly contemplates guidelines adding precision to the Act, without in any way trumping or overriding the Act itself.

49 It is of course true that by "making precise" various provisions of the Act, the guidelines will affect the outcome of cases. However, they will only risk undermining the impartiality of the

Tribunal if they do so in a manner that is unjust or improper. Given the many constraints on the Commission's guideline power, and the many ways in which the Tribunal is empowered to question or set aside guidelines that [page908] are in violation of the law, it does not seem likely that the Commission's guidelines could improperly influence the Tribunal.

50 Parliament's choice was obviously that the Commission should exercise a delegated legislative function. Like all powers to make subordinate legislation, the Commission's guideline power under ss. 27(2) and 27(3) is strictly constrained. We fail to see, then, that the guideline power under the Act would lead an informed person, viewing the matter realistically and practically and having thought the matter through, to apprehend a "real likelihood of bias": *S. (R.D.), supra*, at para. 112, *per* Cory J.; *Committee for Justice and Liberty, supra*, at p. 395, *per* de Grandpré J.

D. *The Chairperson's Power to Extend Appointments*

51 Bell challenges the Chairperson's power to extend appointments of Tribunal members in ongoing inquiries. Bell argues that this power robs members of the Tribunal of sufficient security of tenure. In addition, Bell contends that it threatens members' impartiality.

52 There is an obvious need for flexibility in allowing members of the Tribunal to continue beyond the expiry of their tenure, in light of the potential length of hearings and the difficulty of enlisting a new member of a panel in the middle of a lengthy hearing. It would not, for this reason, be practicable to suggest that members simply retire from a panel upon the expiry of their appointment, with no official having the power to extend their appointments. And of the officials who could exercise this power, the Tribunal Chairperson seems most likely both to be in a good position to know how urgent the need to extend an appointment is and also to be somewhat distant from the Commission.

[page909]

53 In any case, the question of whether this power compromises the independence of Tribunal members is settled by *Valente, supra*. That case concerned legislation that conferred a discretionary power upon the Chief Justice of the provincial court to permit judges who had attained retirement age to hold office until the age of 70, and that conferred a discretionary power upon the Judicial Council for Provincial Judges to further approve the extension of a judge's term of office from age 70 to 75. Prior to amendments in the legislation, these powers had rested with the executive. At p. 704, Le Dain J. wrote of the amendments that:

> This change in the law, while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to the provision ... since it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who

> may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.

In our view, this passage resolves the question. If the discretionary power of the Chief Justice and Judicial Council of the provincial courts to extend the tenure of judges does not compromise their independence in a manner that contravenes the requirements of judicial independence, then neither does the discretionary power of the Tribunal Chairperson compromise the independence of Tribunal members in a manner that contravenes common law procedural fairness.

54 It remains to consider Bell's claim that this power undermines the Tribunal's impartiality. Bell's argument here seems to be that members might feel pressure to adopt the views of the Chairperson in order to remain on a panel beyond the expiry of their appointment, and that because of this, a reasonable person might doubt whether members were guided only by legitimate considerations in the disposition of their final case. However, given that members whose appointments have expired will not sit on another panel again, it is difficult to see what power the Chairperson could ultimately have over them, once their appointments have been [page910] extended and it is time for them to decide the case. Moreover, there are ample provisions in the Act to suggest that the Tribunal Chairperson can reasonably be regarded as disinterested in the outcome of cases. The Chairperson must have been a member in good standing in the bar of a province for at least ten years (s. 48.1(3)). He or she can be removed from the position for cause (s. 48.2(1)) by the Governor in Council. A reasonable person informed of these facts would not conclude that members were likely to be illegitimately pressured to adopt the Chairperson's views.

VI. Conclusion

55 We would therefore uphold the conclusions of the Federal Court of Appeal, and dismiss the appeal with costs. The constitutional questions should be answered as follows:

(1) Are ss. 27(2) and (3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable or inapplicable?

Answer: No.

(2) Are ss. 48.1 and 48.2 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable and inapplicable?

Answer: No.

Solicitors:

Solicitors for the appellant: Heenan Blaikie, Montréal.

Solicitors for the respondent the Communications, Energy and Paperworkers Union of Canada: Engelmann Gottheil, Ottawa.

[page911]

Solicitors for the respondent the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitors for the intervener the Public Service Alliance of Canada: Raven, Allen, Cameron & Ballantyne, Ottawa.

Solicitors for the intervener the Canada Post Corporation: Gowling Lafleur Henderson, Ottawa.

cp/e/qw/qllls

TAB 2

Case Name:

Snopko v. Union Gas Ltd.

Between
Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight,
Plaintiffs (Appellants), and
Union Gas Ltd. and Ram Petroleums Ltd., Defendants
(Respondents)

[2010] O.J. No. 1335

2010 ONCA 248

317 D.L.R. (4th) 719

261 O.A.C. 1

100 O.R. (3d) 161

187 A.C.W.S. (3d) 110

100 L.C.R. 137

Docket: C49977

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, J.L. MacFarland and D. Watt JJ.A.

Heard: January 22, 2010.
Judgment: April 7, 2010.

(32 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Lack of jurisdiction -- Judgments and orders -- Summary judgments -- Availability -- To dismiss action -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell

outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Natural resources law -- Oil and gas -- Royalties and rents -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Appeal by Snopko and others from the summary judgment dismissal of their action against Union. The motion judge concluded that section 38 of the Ontario Energy Board Act conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation run by the respondent Union, and that the various claims by the appellants fell within that exclusive jurisdiction. On appeal, the appellants contended that as their claim attacked the validity of agreements relied upon by the respondent and alleged breach of contract, negligence, unjust enrichment and nuisance, it fell outside the ambit of section 38 or, at the very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

HELD: Appeal dismissed. In substance, all of the claims raised by the appellants fell within the language of section 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order". The position advanced by the appellants that the Board's jurisdiction could have been avoided by virtue of the legal characterization of the cause of action asserted would have defeated the intention of the legislature. As the issue of jurisdiction was an issue of pure law, the motion judge was correct in dealing with it by way of summary judgment.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, S.O. 1998, c. 15, Sched. B, s. 19(1), s. 36.1(1), s. 36.1(2), s. 37, s. 38(1), s. 38(2), s. 38(3), s. 38(4)

Appeal From:

On appeal from the judgment of Justice John A. Desotti of the Superior Court of Justice, dated

January 6, 2009.

Counsel:

Donald R. Good, for the appellants.

Crawford Smith, for the respondents.

The judgment of the Court was delivered by

1 **R.J. SHARPE J.A.**:-- This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

2 The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd. ("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

3 In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

4 In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

5 In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement,

Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

6 On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

7 Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

8 The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

9 Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

10 Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

11 Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the Compensation Order. Each of the appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

12 On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

13 The appellants advance the following claims against Union:

* *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);
* *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28(b));
* *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);
* *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and
* *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

14 The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

15 In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

16 Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

17 The Act provides as follows with respect to the regulation of gas storage areas:

Gas storage areas

36.1(1) The Board may by order,

(a) designate an area as a gas storage area for the purposes of this Act; or

(b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2(2).

Transition

(2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1)(a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2(2).

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2(3).

Authority to store

38.(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38(1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38(2).

> **Determination of amount of compensation**
>
> (3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38(3).
>
> **Appeal**
>
> (4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply.

18 In addition, s. 19 of the Act provides as follows:

> **Power to determine law and fact**
>
> 19.(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

19 The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Re Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177 (H.C.J.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> ...
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

20 The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide

all issues pertaining to compensation from the operation of the gas storage operation and that the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

21 While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

22 Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

23 The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

24 I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board."

25 The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

26 In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

27 Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

28 In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Re Wellington and Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

29 By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38(2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

30 In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

31 As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

32 For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

R.J. SHARPE J.A.
J.L. MacFARLAND J.A.:-- I agree.
D. WATT J.A.:-- I agree.

cp/e/qllxr/qljxr/qljyw/qlhcs/qlced/qlhcs

TAB 3

Case Name:

Watt v. Classic Leisure Wear Inc.

Re: Dr. Peggy Vivian Watt and Adam Crothall, Appellants, and Classic Leisure Wear Inc., Petromac Holdings Inc., Peggy Shalapoutis, and Thomas Jeffrey Lewis, Respondents

[2008] O.J. No. 2676

49 M.P.L.R. (4th) 143

238 O.A.C. 213

2008 CarswellOnt 3958

168 A.C.W.S. (3d) 421

59 O.M.B.R. 280

Court File No. 347/07

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

J.R.R. Jennings, A.M. Molloy and K.E. Swinton JJ.

Heard: June 27, 2008.
Judgment: July 7, 2008.

(27 paras.)

Municipal law -- Municipal boards and tribunals -- Jurisdiction -- Planning and development -- Appeal by neighbours to proposed development from denial of request for reconsideration of Board decision, allowing development which included driveway access along right of way shared with neighbouring lands dismissed -- Board did not exceed jurisdiction as it limited ruling to whether or not development and its proposed driveway were acceptable from planning perspective -- Use of right of way by neighbours would not be affected by development -- Municipal Board Act, ss. 35,

43, 96.

Real property law -- Interests in land -- Easements -- Particular easements -- Positive easements -- Rights of way -- Appeal by neighbours to proposed development from denial of request for reconsideration of Board decision, allowing development which included driveway access along right of way shared with neighbouring lands dismissed -- Board did not exceed jurisdiction as it limited ruling to whether or not development and its proposed driveway were acceptable from planning perspective -- Use of right of way by neighbours would not be affected by development.

Appeal by Watt and Crowthall from the Municipal Board's denial of their request for a review of an earlier Board decision. In the original decision, the Board granted an appeal by Classic Leisure Wear, Petromac, Shalapoutis and Lewis from a decision by the Toronto Committee of Adjustment, the consequence of which was to allow the development of three detached houses in the rear yard of a residential property in the vicinity of Lee Avenue and Kingston Road. Lewis owned the property for which the development was proposed. The new houses would have access to Lee Avenue via a driveway, to be part of the common elements of a condominium, running along the north side of another lot owned by Lewis. There was an existing right of way on part of the land that would form the common elements driveway, for the benefit of other landowners including Watt and Crowthall. It was not paved but was being used for foot traffic. The Board held the proposed driveway provided adequate access to the proposed development, and found no irresolvable technical issues pertaining to the site. Watt and Crowthall sought reconsideration of this decision, arguing the Board exceeded its jurisdiction when it approved access via the right of way. The review Board held the original Board acted within its jurisdiction. Watt and Crowthall were granted leave to appeal on the jurisdictional question.

HELD: Appeal dismissed. As it did not rule on the rights of the neighbouring landowners, but limited its ruling to the determination of whether the use of the proposed driveway was acceptable from a planning perspective, the original Board did not exceed its jurisdiction. The proposed development had no effect on the use of the right of way enjoyed by Watt and Crowthall.

Statutes, Regulations and Rules Cited:

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 35, s. 43, s. 96(1)

Ontario Municipal Board Rules, Rule 115

Ontario Rules of Civil Procedure, Rule 14.05(3)(d)

Planning Act, R.S.O. 1990, c. P.13, s. 45(12), s. 51(24), s. 51(24)(e), s. 51(24)(g), s. 53(19)

Planning Regulations, O. Reg. 197/96,

Counsel:

Sonia T. Kociper and Ali M. Amini for the Appellants.

Signe B. Leisk and Nicole Auty for the Respondents.

ENDORSEMENT

The judgment of the Court was delivered by

1 K.E. SWINTON J.:-- The appellants appeal from a decision of the Ontario Municipal Board (the "Board") dated July 3, 2007, in which the Chair of the Board denied the appellants' request to review an earlier decision of the Board dated April 10, 2007 (the "Original Decision"). In the Original Decision, the Board had granted the respondents' appeal from a decision of the Toronto Committee of Adjustment pursuant to ss. 45(12) and 53(19) of the *Planning Act*, R.S.O. 1990, c. P.13. The result of the Original Decision was to allow a development of three detached houses in the rear yard of a residential property in the vicinity of Lee Avenue and Kingston Road.

2 The respondent Thomas Jeffrey Lewis is the owner of 342 Lee Avenue and 332R Lee Avenue. 332R Lee Avenue is a vacant parcel of land located behind 342 Lee Avenue and extending behind 334, 336, 338 and 340 Lee Avenue, upon which Mr. Lewis proposes to build three detached homes. The new houses would have access to Lee Avenue via a driveway that is to be part of the common elements of a condominium. The proposed driveway would run along the north side of 342 Lee Avenue, across the back of that property and then into and around 332R Lee Avenue.

3 There is an existing right of way ("ROW") on part of the land that would form the condominium common elements driveway. The ROW runs east and west behind Kingston Road and north and south behind the Lee Avenue properties. The ROW is for the benefit of the landowners of 330 to 342 Lee Avenue and 525 to 541 Kingston Road, giving them an unrestricted right of way "over, along and upon" a way that provides access to and egress from the rear of their properties. The ROW was conferred by express grant in land deeds in the early 1900's. At the present time, part of the ROW near Lee Avenue is paved, but the ROW behind the Lee Avenue properties is not paved and is used for foot traffic.

4 Mr. Lewis has purchased the real property over which the ROW runs behind two of the properties on Kingston Road. The remaining access for the new houses would be across land formerly attached to 342 Lee Avenue, but to be severed from it, and from the site under development.

5 The planning applications before the Original Board concern Parts 1 to 9 of a Draft Reference Plan, which the respondents own in fee simple. According to the planning applications, Parts 5, 8

and 9 of the condominium common elements will continue to be subject to the right of way in favour of the neighbouring landowners entitled thereto and will remain open and unobstructed. Part of the land subject to the existing ROW will be paved and lit as a result of the development.

6 The Committee of Adjustment turned down the application for approval of minor variances to the zoning by-law and consents to sever land, expressing concern that the adequacy of access to the proposed site had not been demonstrated.

7 The Original Board considered the appropriateness of site access in accordance with s. 51(24) of the *Planning Act* and held that the proposed driveway provided adequate access to the proposed development. At p. 6 of its Reasons, the Board stated,

> With respect to this issue, the Board finds that potential new owners of the subject site by virtue of the location of their properties would have to use the laneway to gain access to those properties and would, therefore, also have a *de facto* share in the *tenement.*

8 It went on to find that there were no irresolvable technical issues pertaining to the site, including with respect to access and traffic circulation (p. 9). On the issue of access, the Board held that driveway access could be safely provided onto Lee Avenue through the existing ROW, which would remain in place (p. 16).

9 The appellants requested a reconsideration of this decision on a number of grounds, including the argument that the Original Board acted outside its jurisdiction when approving access via the ROW. In their submission, the Board had no jurisdiction to decide the ROW/easement issue as it did. The access by the owners of the new houses was not contemplated under the original grant and would create an overburden and enlargement of the ROW that would interfere with the property rights of the neighbouring landowners.

10 The Board, pursuant to s. 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 ("*OMB Act*"), has the power to review any Board decision. Pursuant to Rule 115 of its rules, the Board will review a decision only if there is an arguable case that the Board has acted outside its jurisdiction, violated the rules of natural justice, made an error of law or fact such that the Board would likely have reached a different result, or heard false or misleading evidence from a party or witness that was discovered after the hearing and that could have affected the result.

11 The Review Board held that the Original Board acted within its jurisdiction. It specifically stated,

> The Board, in my opinion, heard evidence regarding its ability to decide the easement issue and made a proper decision based on the evidence presented. The Board did not act outside its jurisdiction when deciding on the easement issue. (Reasons, p. 3)

12 Leave to appeal to this Court was granted pursuant to s. 96(1) of the *OMB Act* on one issue: whether or not the Review Board erred in law by holding that the Original Board "did not act outside its jurisdiction when deciding on the easement issue."

13 The appropriate standard of review on a narrow question of jurisdiction like the one before us is correctness *(Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 at para. 59).

14 The task of the Original Board, in the appeal before it, was to determine if approval should be given for minor variances to the zoning by-law and whether consents to sever should be granted. In determining the severance issue, the Board was required to have regard to the criteria for plan of subdivision approvals in s. 51(24) of the *Planning Act*, including the adequacy of road access and restrictions on the land proposed to be subdivided (see s. 51(24)(e) and (g)).

15 O. Reg. 197/96 of the *Planning Act* requires that consent applications, such as the one submitted by the respondents in this case, include information and material for the municipality's (and ultimately for the Board's) review respecting whether there are easements or restrictive covenants affecting the subject lands.

16 Section 35 of the *OMB Act* provides:

> The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact.

Thus, the Board has jurisdiction to determine legal issues which are incidental to its administrative functions (*Toronto (City) v. Goldlist Properties Inc.*, [2003] O.J. No. 3931 (C.A.) at paras. 35-41).

17 The Review Board was correct in holding that the Original Board's decision was within its jurisdiction. The Original Board made a decision to grant the variances and the consents based on the criteria in the *Planning Act* and the evidence before it. As part of its decision-making process, it had to determine whether the use of the proposed driveway on the condominium common elements provided access to the site that was acceptable from a planning perspective. In making such a determination, it had the jurisdiction to determine questions related to the ownership of the lands affected and the easement issue, as this was necessary for the Board to carry out its responsibility to decide whether the respondents' applications met the applicable tests under the *Planning Act.*

18 It is undisputed that the respondents are the owners in fee simple of the entirety of the subject lands, including the proposed driveway. Neither the Review Board nor the Original Board made any legal determination as to the use of or the ownership of the parts of the ROW that were not the subject of the planning application. Nor have they ruled on the scope of the rights of the neighbouring landowners, who will continue to enjoy a ROW on the parts of the condominium common elements driveway that are subject to their easement.

19 Thus, the Review Board was correct in holding that the Original Board acted within its

jurisdiction, as the consideration of the easement issue was incidental to its function of approving variances and granting consents to sever.

20 The fact that a judge of the Superior Court of Justice has jurisdiction to determine rights dependent on the interpretation of a deed pursuant to Rule 14.05(3)(d) of the *Rules of Civil Procedure* does not curtail the jurisdiction of the Board to make legal determinations with respect to matters such as ownership and easements when exercising its planning jurisdiction (see, for example, *Inderwick v. Bathurst, Burgess and Sherbrooke (Township)*, [2001] O.M.B.D. No. 413 at para. 2).

21 Moreover, the case law on easements relied upon by the appellants is not relevant to the issue of the Board's jurisdiction. In *Re Gordon and Regan* (1985), 49 O.R. (2d) 521 (H.C.J.), the owner of a dominant tenement held a ROW over lands adjoining his property. Subsequently, he acquired further lands contiguous to his property that he planned to develop. The Court held that the adjoining lands had no right to use the existing ROW, as they were not covered by the original grant.

22 That is not the situation here. The respondents seek to provide access to the new houses over lands owned by them in fee simple that are subject to the neighbouring properties' ROW.

23 Even the affidavit from Robert Aaron, which the appellants submitted in support of the request for review of the Original Decision, does not support their position that the Original Board improperly extended the ROW to the new houses. His affidavit indicates that "as long as the servient tenement [342 Lee Avenue and the new development] does not interfere with the use and enjoyment of the right of way by the owners of the dominant tenement [the neighbours with a ROW], then the owner of the servient tenement can make such alterations to the surface of the land as he or she wishes". In this case, the servient tenement is the land forming the common elements of the condominium that is subject to the ROW. The dominant tenement is the lands along Lee Avenue and Kingston Road that hold a grant of the ROW, and which will continue to have access to the ROW on the servient tenement.

24 Each of the neighbouring properties has the benefit of the right to use the ROW over the lands of others and the burden of having a ROW through their own property for the benefit of others. The proposed development does not increase the burden or change the nature of the ROW over any of the neighbouring properties. Those changes occur only on the property owned by Mr. Lewis. The neighbours therefore can have no complaint about the burden the new development places on the ROW over their own lands.

25 The neighbours' only other right with respect to the ROW is the right of access over the lands of others. Mr. Lewis is entitled to make any changes to his own property that do not interfere with the ROW. The neighbours have no entitlement to require that the ROW be maintained in its current condition, provided that any changes do not adversely affect their ability to use the ROW as a ROW. The proposed development may interfere with the neighbours' enjoyment of their own

properties, and perhaps even the value of those properties, but it does not interfere with their ability to travel "over, along and upon" the ROW, which is the only issue before this Court.

26 There has been no effort by the appellants to seek leave to appeal from the Original Decision. Therefore, matters raised by the appellants such as the insufficient width of the proposed driveway or the likelihood that there will be a need to use part of the ROW that is not owned by the respondents are not properly before this Court. It is understandable why the neighbours are concerned about the merits of the proposed development, given issues such as increased traffic, difficulty of access, added lighting and loss of privacy in their backyards. However, those are issues to be raised before the Board. This Court has no jurisdiction over such issues, as an appeal lies to this Court only on a question of law and with leave.

27 For these reasons, I would dismiss the appeal. If the parties cannot agree on costs, the respondents may make brief written submissions within 21 days of the release of this decision and the appellants may reply within 14 days thereafter. All submissions should be sent to the Registrar of the Divisional Court.

K.E. SWINTON J.
J.R.R. JENNINGS J.
A.M. MOLLOY J.

cp/e/qlbxr/qllkb/qlhcs/qlcas/qlaxr/qlaxw/qlhcs

TAB 4

Case Name:

Toronto (City) v. Goldlist Properties Inc.

Between
City of Toronto, applicant (respondent in appeal), and
Goldlist Properties Inc., Kenneth-Sheppard Limited, Fair Rental Policy Organization, Greater Toronto Apartment Association, Gloucester Gate Inc., 335 Lonsdale Apartments Co-ownership Ltd., John Bentley, Wendy Chiles-Bentley, 720 Spadina Co-ownership, Brunswick Court Inc., Heathwood Manor (Raglan) Inc., 580 Christie Street Co-ownership Inc., 2 Ridelle Avenue Co-ownership Inc., Bathurst-Hillview South Co-operative Housing Inc., 499968 Ontario Limited, Burton-Lesbury Holdings Limited and City of Hamilton, respondents (appellants), and
Regional Municipality of Ottawa-Carleton and Corporation of the City of Ottawa, intervenors (respondents)
And between
City of Hamilton, applicant (respondent in appeal), and
Goldlist Properties Inc., Kenneth-Sheppard Limited, Fair Rental Policy Organization, Greater Toronto Apartment Association, Gloucester Gate Inc., 335 Lonsdale Apartments Co-ownership Ltd., John Bentley, Wendy Chiles-Bentley, 720 Spadina Co-ownership, Brunswick Court Inc., Heathwood Manor (Raglan) Inc., 580 Christie Street Co-ownership Inc., 2 Ridelle Avenue Co-ownership Inc., Bathurst-Hillview South Co-operative Housing Inc., 499968 Ontario Limited, Burton-Lesbury Holdings Limited and City of Toronto, respondents (appellants), and
Regional Municipality of Ottawa-Carleton and Corporation of the City of Ottawa, intervenors (respondents)

[2003] O.J. No. 3931

67 O.R. (3d) 441

232 D.L.R. (4th) 298

178 O.A.C. 11

44 M.P.L.R. (3d) 1

126 A.C.W.S. (3d) 147

Docket No. C38589

Ontario Court of Appeal
Toronto, Ontario

O'Connor A.C.J.O., Morden and Sharpe JJ.A.

Heard: June 19-20, 2003.
Judgment: October 14, 2003.

(71 paras.)

Land use control, official or development plans Amendment of Approval of, by minister or board Land use control appeals to the courts Jurisdiction.

Appeal by Goldlist Properties and others from a judicial review decision finding that the Ontario Municipal Board lacked jurisdiction to consider the validity of an amendment to the Official Plan of the City of Toronto. Official Plan Amendment No. 2 (OPA2), aimed at preserving rental housing, restricted the conversion of rental units to condominiums or freehold. Goldlist Properties and other property owners and developers of rental residential property appealed the adoption of OPA2 to the Ontario Municipal Board. The Board accepted jurisdiction and ruled that the OPA2 was illegal and invalid because it fell outside the powers conferred on the City by the Planning Act and because it conflicted with the Tenant Protection Act. The Ontario Divisional Court allowed the City's appeal and found the Board did not have jurisdiction and that OPA2 was legal and valid. Goldlist and the others appealed to the Court of Appeal.

HELD: Appeal dismissed. The Board had jurisdiction and the appropriate standard of review was correctness. In view of the framework of the Planning Act, the purpose of official plans and the legislative directive that stated a need to plan for a full range of housing, the City had the authority to enact OPA2. The City was entitled to include goals, objectives and policies related to ensuring an adequate supply of rental housing in making its planning decisions. The restrictions imposed on owners of rental properties in OPA2 did not conflict with the legal protection afforded tenants under the Tenant Protection Act. As long as it was within its municipal competence, the City was free to establish policies and standards more restrictive than those established by provincial legislation.

Statutes, Regulations and Rules Cited:

Condominium Act, 1998, S.O. 1998, c. 19, s. 9.

Municipal Act, R.S.O. 1990, c. M.35, s. 136, 136(1).
Ontario Energy Board Act, S.O. 1998, c. 15, s. 32.Èh)0*0*0* Èî Ontario Municipal Board Act, R.S.O. 1990, c. O.28, ss. 17(45), 34, 35, 36, 37(a), 57, 94, 94(1).
Planning Act, 1955.
Planning Act, R.S.O. 1990, c. P.13, ss. 1.1, 2, 2(j), 3, 16(1)(a),16(1)(b), 17, 17(24), 17(36), 17(50), 33, 38(4), 51(24).
Rental Housing Protection Act, 1986, S.O. 1986, c. 26.
Tenant Protection Act, 1997, S.O. 1997, c. 24

Appeal From:

On appeal from the order of the Divisional Court dated February 20, 2002. Regional Senior Justice Robert A. Blair, Justices Gerald F. Day and Claire Marchand.

Counsel:

Robert G. Doumani, for the appellants, Kenneth-Sheppard Limited, Fair Rental Policy Organization and Greater Toronto Apartment Association.
Andrew Weretelnyk and Roberto Zuech, for the respondent, City of Toronto.
James M. Canapini, for the intervenor, City of Ottawa.
Art Zuidema, for the intervenor, City of Hamilton.
Leslie McIntosh, for the respondent, Ontario Municipal Board.

[Editor's note: A corrigendum was released by the Court March 16, 2004; the correction has been made to the text and the corrigendum is appended to this document.]

Reasons for judgment were delivered by Morden J.A. and Sharpe J.A.

1 MORDEN and SHARPE JJ.A.:-- This appeal involves the jurisdiction of the Ontario Municipal Board ("OMB") to rule on the legality or validity of a municipal by-law and the authority of a municipality to include in its official plan policies designed to ensure an adequate supply of rental housing by limiting the demolition of residential rental properties and the loss of rental units through conversion to condominium ownership.

FACTS

2 The City of Toronto's Official Plan Amendment No. 2 ("OPA 2"), approved in April 1999, established a series of policies aimed at preserving, maintaining, and replenishing the supply of rental housing throughout the newly amalgamated City. OPA 2 restricts "the demolition of residential property and the conversion of rental units to condominium, and/or freehold, by discouraging the conversion of rental units to equity cooperative, and by encouraging new rental

housing production." Among the policies included in OPA 2 are restrictions on conversion unless the vacancy rate for rental accommodation exceeds a specified limit and requirements for the replacement of demolished rental units when considering redevelopment applications involving demolition of existing rental properties.

3 Under the Planning Act, R.S.O. 1990, c. P.13, these official plan policies become relevant when a proposed development does not conform with the existing zoning restrictions or official plan, and a zoning change or official plan amendment is required. The policies of OPA 2 also apply when an owner seeks to convert rental residential property to condominium ownership. The combined effect of the Condominium Act, 1998, S.O. 1998, c. 19, s. 9 and the Planning Act, s. 51(24), is to require the municipality, when considering a proposed conversion, to have regard to whether the conversion conforms to the official plan.

4 The City adopted OPA 2 because of its concern about the adequacy of the rental housing supply. When OPA 2 was adopted, over 50% of the City's residents depended upon rental housing. The vacancy rate was under 1% and virtually no affordable rental housing was being constructed. OPA 2 continued policies found in the official plans of the former Cities of Toronto, East York, Etobicoke, North York, and York that dealt with the conversion of rental units to condominiums, and of the former Municipality of Metropolitan Toronto's official plan policy that encouraged new rental housing and the preservation and maintenance of existing rental housing.

5 The City of Hamilton intervened before the OMB and the City of Ottawa intervened before the Divisional Court to support the validity of OPA 2. Both intervenors have official plan policies similar to OPA 2 motivated by like concerns for the preservation and enhancement of an adequate supply of rental housing for their residents.

6 The adoption of OPA 2 followed an important change in provincial legislation governing the conversion of rental properties to condominium ownership. In 1986, the province enacted the Rental Housing Protection Act, 1986, S.O. 1986, c. 26 ("RHPA"), which required approval for the demolition, conversion, renovation, or severance of rental properties by municipal councils on the basis of certain specified criteria. The municipal approval required by the RHPA was in addition to any approvals that might be required under the Planning Act. Both before and after the enactment of the RHPA, several municipalities, including Toronto, North York, and Scarborough, had official plan policies dealing with the conversion of rental properties to condominiums. The RHPA was repealed and replaced by the new scheme established by the Tenant Protection Act, 1997, S.O. 1997, c. 24 ("TPA"), proclaimed in force in June 1998. The TPA introduced a package of protections to individual tenants in the event of demolition, conversion, or repair requiring vacant possession. These protections generally consist of notice, compensation, security of tenure, and rights of first refusal.

7 In June 1999, several property owners, developers, and associations of owners of rental residential property appealed the adoption of OPA 2 to the OMB. On a preliminary motion, decided before it engaged in any review of the planning issues, the OMB ruled that it had jurisdiction to rule on the legality of OPA 2. The OMB found that OPA 2 was illegal and invalid on the two grounds:

(1) that it falls outside the powers conferred upon the municipality by the Planning Act, and (2) that it conflicts with the Tenant Protection Act.

8 The City of Toronto appealed the OMB's decision to the Divisional Court. The Divisional Court held that the OMB lacked jurisdiction to rule on the legal validity of OPA 2 and that OPA 2 was a valid exercise of the City's authority to enact an official plan. The Divisional Court rejected the argument that OPA 2 conflicts with the Tenant Protection Act and accordingly upheld the legality and validity of OPA 2.

9 The appellants urge this court to reverse the judgment of the Divisional Court and restore the decision of the OMB ruling that it had jurisdiction to rule on the legal validity of OPA 2 and that OPA 2 is illegal and invalid. The appellants also seek leave to appeal the Divisional Court's award of costs in favour of the respondents.

ISSUES

1. Does the OMB have jurisdiction to rule on the legal validity of OPA 2?
2. If the OMB does have jurisdiction, what is the appropriate standard of review on appeal from its decision to the Divisional Court?
3. Does the City of Toronto have the authority to enact OPA 2?
4. Does OPA 2 conflict with the Tenant Protection Act?
5. There is also before us a motion by the appellants for leave to appeal the Divisional Court's award of costs against them in favour of the City of Toronto and the City of Hamilton and the amounts of costs fixed and, if leave be granted, an appeal from the award and, alternatively, from the amounts fixed.

ANALYSIS

Issue 1: Does the OMB have jurisdiction to rule on the legal validity of OPA 2?

10 The facts relating to how this issue came before the OMB are set forth briefly in paragraph 7 above. The notices of appeal to the OMB raised several issues. It is sufficient to say that two of them raised planning policy objections to OPA 2. One of them was based on the objection that OPA 2, wrongly, had retroactive application to existing applications for condominium conversions or rental housing demolitions. The remaining objection was based on the ground that:

> The policies are in direct contravention of the thrust, direction, spirit and intent of the Tenant Protection Act (TPA), are beyond the City's jurisdiction and are inappropriate, improper and illegal.

11 Goldlist Properties Inc., Kenneth-Sheppard Limited, and A.J. Green Ltd. brought a preliminary motion to the OMB. The notice of motion contains the following:

> The Motion deals with the validity of Official Plan Amendment No. 2 of the

> former Municipality of Metropolitan Toronto and related amendments to the local Official Plans (collectively "OPA 2"). The Motion also addresses the applicability of OPA 2 to certain classes of applications. The Motion will not deal with the merits of OPA 2.
>
> Specifically the Motion is for:
>
> 1. An order that OPA 2 is illegal and beyond the competence of the City to adopt and that consequently the Board has no jurisdiction to approve it regardless of its merits ...

12 The OMB held that it had jurisdiction to entertain the motion and concluded its reasons on the merits of the motion as follows:

> In conclusion, the Board orders:
>
> 1. that OPA 2 is illegal and invalid and is therefore not approved; ...

13 The most relevant provisions in the Planning Act bearing on the right of appeal to the OMB and its basic powers on an appeal are ss. 17(24) and 17(50) respectively, which read as follows:

> 17(24) If the plan is exempt from approval, any person or public body may, not later than 20 days after the day that the giving of written notice under subsection (23) is completed, appeal all or part of the decision of council to adopt all or part of the plan to the Municipal Board by filing with the clerk of the municipality a notice of appeal.
>
> 17(50) On an appeal or a transfer, the Municipal Board may approve all or part of the plan as all or part of an official plan, make modifications to all or part of the plan and approve all or part of the plan as modified as an official plan or refuse to approve all or part of the plan.

14 The following is a brief summary of the reasons of the Divisional Court for concluding that the OMB did not have jurisdiction to decide the motion:

(1) While the OMB recognized that it did not have a general power to determine the legal validity of by-laws it erred in making exactly such a determination, separately and discretely from a consideration of the planning merits of OPA 2.
(2) The OMB "erred in concluding that it was 'necessary and incidental' to its

determination of whether the by-law should be approved on Planning Act principles, for it to determine the validity of the by-law."

(3) Related to (2) the OMB erred in reasoning from the Supreme Court of Canada decisions in Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5 and Douglas Kwantlen Faculty Association v. Douglas College, [1990] 3 S.C.R. 570, that it had the power to order that OPA 2 is illegal and invalid.

(4) [58] The City's competence to adopt Official Plan policies by by-law is not a matter within the OMB's jurisdiction. Its jurisdiction is to approve, modify and approve, or refuse to approve the Official Plan amendment based upon the planning principles underlying the Planning Act. Put another way, neither the Planning Act nor the Ontario Municipal Board Act, nor the Municipal Act, give the OMB a supervisory jurisdiction over the legislative competency of municipalities. The Board is given supervisory jurisdiction, in this context, over their municipal planning competence [emphasis in original].

(5) There are legal avenues for challenging the validity of a by-law adopting an official plan:

(a) An application under s. 136 of the Municipal Act, R.S.O. 1990, c. M.35 which enables the court to "quash the by-law in whole or in part for illegality";

(b) Section 94(1) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 gives the OMB the authority to state a case in writing to the Divisional Court upon any question of law.

(6) [63] Significantly, however, that Act goes on to specify that the Board's approval *is to be withheld where litigation is pending regarding the validity of the by-law in question.* Section 57 of the Ontario Municipal Board Act stipulates that:

> The Board shall not grant or issue any approval or certificate under this or any other general or special Act in respect of any municipal affair or matter, while the same or the validity thereof is called in question in any pending action or proceeding or by which it is sought to quash any by-law of a municipality relating thereto.

15 In our respectful view, the Divisional Court erred in holding that the OMB lacked jurisdiction to consider whether the by-law adopting OPA 2 was authorized by the Planning Act. Put shortly, we think that the Board necessarily had the jurisdiction to consider whether OPA 2 was an "official plan" within the meaning of the term in the Planning Act before it could consider the document on its planning merits. The OMB, acting under s. 17 of the Planning Act, particularly s. 17(50), had no

jurisdiction to approve a document that was not an official plan. We stress that the Board does not have a free-standing jurisdiction, as a court does, to determine that a by-law is invalid. Its power is confined to making decisions necessarily incidental to carrying out its responsibilities under s. 17 of the Planning Act.

16 Before elaborating upon the foregoing we should deal with a particular attack on the OMB's decision on jurisdiction made by some of the respondents. It is based on the fact that the decision was made on a motion to it and not as part of the appeal under s. 17(24). This argument is supported by the submission that s. 17(45) of the Planning Act establishes the only mechanism relating to summary disposition of a planning issue by way of a motion and that, accordingly, it may be inferred that the Legislature deliberately excluded the power to allow an appeal on a motion. Section 17(45) reads:

> 17(45) Despite the Statutory Powers Procedure Act and subsection (44), the Municipal Board may dismiss all or part of an appeal without holding a hearing on its own motion or on the motion of any party if
>
> (a) it is of the opinion that,
>
> (i) the reasons set out in the notice of appeal do not disclose any apparent land use planning ground upon which the plan or part of the plan that is the subject of the appeal could be approved or refused by the Board,
> (ii) the appeal is not made in good faith or is frivolous or vexatious, or
> (iii) the appeal is made only for the purpose of delay;
>
> (b) the appellant did not make oral submissions at a public meeting or did not make written submissions to the council before the plan was adopted and, in the opinion of the Board, the appellant does not provide a reasonable explanation for having failed to make a submission;
> (c) the appellant has not provided written reasons with respect to an appeal under subsection (24) or (36);
> (d) the appellant has not paid the fee prescribed under the Ontario Municipal Board Act; or
> (e) the appellant has not responded to a request by the Municipal Board for further information within the time specified by the Board. 1996, c. 4, s. 9.

17 We think that these arguments are based on an overly technical view of what the Board, in substance, did. As we have said, one of the issues raised on the appeals to the OMB was the question whether OPA 2 was authorized by the Planning Act. It was open to the Board to hold a

hearing on this issue first, as part of the appeal, before considering other issues raised. This is in substance what it did. Its decision on this question made it unnecessary for it to go forward with hearing the balance of the appeal. This is a practice that is followed, in appropriate circumstances, in courts in cases where a decision one way on a particular issue is dispositive of the whole proceeding.

18 The Divisional Court held, in effect, that only the courts have jurisdiction to deal with the validity of by-laws and, as is indicated above, referred to an application to quash under s. 136(1) of the Municipal Act and the stating of a case by the OMB under s. 94 of the Ontario Municipal Board Act. These provisions read, respectively:

> 136.(1) The Superior Court of Justice upon application of a resident of the municipality or of a person interested in a by-law of its council may quash the by-law in whole or in part for illegality.
>
> 94.(1) The Board may, at the request of the Lieutenant Governor in Council, or of its own motion, or upon the application of any party, and upon such security being given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the Board, is a question of law.
>
> (2) The Divisional Court shall hear and determine the stated case and remit it to the Board with the opinion of the court thereon.

19 We accept, of course, that these provisions confer jurisdiction on the courts to decide the validity of by-laws. This does not, however, mean that the courts necessarily have the exclusive jurisdiction to consider issues of this nature in the circumstances of a case such as the present one. We shall, shortly, consider this further.

20 As we indicated in paragraph 14(6) above, the Divisional Court also relied upon s. 57 of the Ontario Municipal Board Act to indicate that the Ontario Municipal Board had no jurisdiction to consider whether OPA 2 was an official plan. Section 57 is set forth in paragraph 14(6).

21 Section 57 goes no further than providing that in the circumstances mentioned in that section, the Board's approval is to be withheld where litigation is pending regarding the validity of the by-law in question. It does not speak to the case where there is no such litigation.

22 The Divisional Court made no reference to the powers conferred on the Board by the Ontario Municipal Board Act with respect to questions of law. These powers are conferred by s. 35, which we set forth in the context of ss. 34 to 37(a):

> 34. The Board for all purposes of this Act has all the powers of a court of record and

shall have an official seal which shall be judicially noticed.

35. The Board, as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact.

36. The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act.

37. The Board has jurisdiction and power,

> (a) to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act; ...

23 With respect to s. 35, we think it is implicit that one matter within the Board's jurisdiction to decide in a proceeding, for the purpose of carrying out its mandate, is the scope of its jurisdiction in that proceeding. We have indicated that its power in this regard is not exclusive. Nor is it final. We shall, in the next part of these reasons, address the question of the standard of appellate review of the Board's decisions on its own jurisdiction.

24 There are practical reasons supporting this view of the Board's power. One is based on expedition. Waiting for the decision of the Divisional Court on a stated case, or of a court on an application, may involve delay. Also, in cases like the present, the Board has had considerable experience in dealing with official plans and what they typically include or do not include. This would, undoubtedly, be of some assistance in ruling on the outer legal boundaries of what may be included in an official plan.

25 The recent judgment of this court in Ottawa (City) v. Ontario (Attorney General) (2002), 64 O.R. (3d) 703 is particularly apposite on the question of the OMB's jurisdiction. In Ottawa, the Ontario Energy Board had stated a case for the opinion of the Divisional Court under s. 32 of the Ontario Energy Board Act, S.O. 1998, c. 15, Schedule B, which is substantially the same as s. 94 of the Ontario Municipal Board Act. It is not necessary to relate all of the facts in Ottawa. It is sufficient to note that the Divisional Court, on the motion of the Attorney General, quashed the stated case and that one of the reasons for the court's decision was that "the Board stated a case which, in effect, asked if a regulation is valid and has no jurisdiction to do so".

26 The Divisional Court's full reasons on this issue were as follows:

> Thirdly, further, the board has no jurisdiction to state a case asking if a regulation is valid. It has attempted to justify its approach by analogising with respect to two Charter cases: Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),

> [1991] 2 S.C.R. 5 and Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854 that it is not questioning the validity of the regulation, but rather only whether it has to apply it. The case before us is not a Charter case. In any event this seems to be a distinction without a functional difference. The board's jurisdiction under section 96 of the Ontario Energy Board Act is restricted to determining whether the proposed transmission line is in the public interest. When the board asks this court to determine the "applicability", but in substance the validity of the regulation, it is exceeding its jurisdiction as a creature of statute. Therefore, the court has no jurisdiction to decide the validity of the regulation within the context of this stated case.

27 Goudge J.A., for the court, dealt with this issue as follows:

> [37] The third issue is whether the Divisional Court was correct to quash the stated case on the basis that the Board was really asking if O. Reg. 365/00 was valid and had no jurisdiction to state such a case.
>
> [38] With respect, I think that the Divisional Court erred in characterizing the question posed in the stated case as a request that the Court determine the validity of the regulation. The stated case poses the more limited question of whether the regulation is to be applied by the Board in hearing applications under s. 92 of the Act or whether, as asserted by the appellant, it is inconsistent with the Act and therefore not to be applied.
>
> [39] *The stated case does not seek a determination of whether the regulation is valid for all purposes. It simply asks whether the regulation is effective to determine the boundary of the Board's jurisdiction.* In stating the case the Board seeks the assistance of the Divisional Court in defining the Board's jurisdiction in s. 92 applications, following the making of O. Reg. 365/00. *The question posed is one which the Board could put to itself and equally one it could put to the Divisional Court by way of stated case.* As Lamer C.J. said in Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3 at pp. 25-6:
>
> > [23] It is now settled that while the decisions of administrative tribunals lack the force of res judicata, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.

> [40] In short, I think the question posed did not seek to determine the validity of O. Reg. 365/00, but was a question which the Board could state and the Divisional Court had the jurisdiction to answer [emphasis added].

28 This clearly states that the Ontario Energy Board had jurisdiction to decide the boundaries of its own jurisdiction and, also, could seek the assistance of the Divisional Court on this question.

29 Also, the stated case did not seek a determination of whether the regulation was "valid for all purposes". Neither, in the present case, should the OMB's decision be regarded as determining the validity of the by-law that adopted the official plan "for all purposes" but, rather, only for the purpose of deciding the Board's jurisdiction.

30 We further note, as emphasized in paragraph 27 above, that the court said:

> The question posed is one which the Board could put to itself and equally one it could put to the Divisional Court by way of stated case.

31 In the present case, the respondents submit that, although the OMB could have, indeed, should have, stated a case to the Divisional Court on the question of its jurisdiction, it could not itself decide the question. This is contradicted by the reasons in Ottawa.

32 We think that the foregoing is sufficient to determine the question of the OMB's jurisdiction but, before concluding, we think that we should deal, briefly, with certain earlier decisions of this court that are submitted to be germane to the issue.

33 The first, in time, is Village of Forest Hill v. The Municipality of Metropolitan Toronto, [1958] O.R. 254. We do not think that it resolves the question in favour of the respondents. The court held that a provincial statute that vested judicial power in the Ontario Municipal Board to decide the question of the validity of a by-law, a power that the court found not to be incidental to its administrative function, was unconstitutional. In the present case, the power to decide the question of law is incidental to its power to determine the limits of its jurisdiction in the case before it.

34 The next decision, in time, is Re North York Twp., [1960] O.R. 374. The court in this case, as one of several issues decided, held that the OMB had erred in its interpretation of a provision in the Planning Act, 1955. The decision is much-cited for a statement in the reasons at p. 384 that "the Board has no power to deal with the validity or otherwise of a by-law". Soon after this, however, the court said at p. 384:

> As no by-law passed under the Act became effective until it had received the board's approval it is obvious that quite a wide field was left to the board as to matters which it was entitled to review. *Among these, of necessity, must have been a consideration of the intent and purpose of the Act and, so far as this might*

> *be a consideration of law, it was nevertheless one which the board was entitled to exercise as incidental to its administrative functions.* It is my opinion that the board, notwithstanding its words, sought to do no more than that on this occasion and was acting within its powers [emphasis added].

35 This appears to draw the distinction between the Board dealing with the validity of a by-law as a free-standing issue, which it cannot do, and making a decision on a question of law as incidental to its administrative functions, which it can do.

36 The other two decisions are Equity Waste Management of Canada v. Halton Hills (Town) (1997), 35 O.R. (3d) 321 and Country Pork Ltd. v. Ashfield (Township) (2002), 60 O.R. (3d) 529. We do not think that either of them is determinative of the issue of the OMB's jurisdiction in the present case.

37 The appellants submit that the Divisional Court erred in not considering Equity Waste Management, which, they submit, stands for the proposition that, in exercising its jurisdiction to review an interim control by-law, the OMB could decide the question of the legality of the by-law. The main issue before the court was a contest relating to which tribunal, the OMB under s. 38(4) of the Planning Act, or the Superior Court in an application under s. 136(1) of the Municipal Act, had jurisdiction to review the interim control by-law. Laskin J.A., for the court, held that both tribunals had jurisdiction and that, in the circumstances of the case at hand, the judge who heard the application did not err in exercising jurisdiction to deal with the by-law under s. 136(1) of the Municipal Act.

38 The respondents submit that Laskin J.A.'s decision goes no further than holding that the kind of legality of the by-law over which the OMB had jurisdiction was illegality in the form of bad faith related to the planning principles relevant to the case at hand. The appellants submit that the decision stands for the proposition that the Board could consider questions of legality, generally, in exercising its power under s. 38(4) of the Planning Act. To decide the issue before the court, whether the OMB had exclusive jurisdiction to review the interim control by-law, it was not necessary for Laskin J.A. to deal generally with the scope of the Board's jurisdiction and we do not think that Equity Waste Management should be read as dealing with all aspects of this question.

39 The same reasoning applies to the bearing of the judgment in Country Pork. In this case, Borins J.A., for the court, interpreted Equity Waste Management for the purpose of resolving, once again, an issue relating to whether the review of an interim control by-law should be before the OMB under s. 38(4) of the Planning Act or before a judge under s. 136(1) of the Municipal Act. He held that a person attacking an interim control by-law did not have an unfettered choice between an appeal to the OMB and an application to quash the by-law.

40 What makes Country Pork relevant for consideration in the present case is Borins J.A.'s reference, at paragraphs 29 to 31 in his reasons, to the reasons of the Divisional Court in the case before us as part of his delineation of the respective spheres of the OMB and the court. He quoted

from the Divisional Court's reasons that are set forth in paragraph 14(4) of our reasons respecting the lack of the Board's "supervisory jurisdiction over the *legislative competence of municipalities*" [emphasis added]. We do not think that his reasons dispose of the issue before this court, which is whether the OMB had jurisdiction, for the purpose of determining its jurisdiction to deal with the appeal under s. 17 of the Planning Act, to decide whether or not the document before it was an official plan.

41 We conclude this part of our reasons with a reference to a passage in the reasons for judgment of the Supreme Court of Canada in Bell Canada v. Canadian Telephone Employees Assn., [2003] S.C.J. No. 36, which was released after the appeal before us had been heard. It relates to the power of the Canadian Human Rights Tribunal under the Canadian Human Rights Act, R.S.C. 1985, c. H-6 to determine the validity of guidelines (which were held by the court to be "a form of law, akin to regulations" (paragraph 37)) made by the Canadian Human Rights Commission. In paragraph 47 McLachlin C.J. and Bastarache J. said for the court:

> The Tribunal can, and indeed must, refuse to apply guidelines that it finds to be ultra vires the Commission as contrary to the Commission's enabling legislation, the Act, the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights. The Tribunal's power to "decide all questions of law or fact necessary to determining the matter" under s. 50(2) of the Act is clearly a general power to consider questions of law, including questions pertaining to the Charter and the Canadian Bill of Rights: see Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854. No invalid law binds the Tribunal.

Issue 2: If the OMB does have jurisdiction, what is the appropriate standard of review on appeal from its decision to the Divisional Court?

42 We have little difficulty in concluding that, even if it could be said that s. 16(1) of the Planning Act (which, as we shall discuss in the next part of these reasons, loosely defines an official plan) is a provision with respect to which the Board could be said to have expertise from the standpoint of planning principles (which would lead to a deferential standard of review), on the matter of the Board interpreting this provision for the purpose of determining the scope of its jurisdiction, the relevant standard of review is correctness. In this regard, we refer to paragraph 27 above, which contains as part of Goudge J.A.'s reasons in Ottawa (City) v. Ontario (Attorney General), a portion of the judgment of the Supreme Court of Canada in Canadian Pacific Limited v. Matsqui Indian Band, [1995] 1 S.C.R. 3 at 25-26.

43 It is even clearer with respect to the Board's decision on the question of whether OPA 2 was in conflict with the Tenant Protection Act, which is issue 4 in this appeal, that the standard is correctness. The Board's expertise is not engaged in interpreting a statute of general application.

Issue 3: Does the City of Toronto have the authority to enact OPA 2?

44 The Planning Act, s. 16(1)(a) provides that an official plan "*shall* contain goals, objectives and policies established *primarily* to manage and direct physical change and the effects on the social, economic and natural environment of the municipality or part of it ..." [emphasis added]. Apart from certain procedural matters dealt with in s. 16(1)(b), the Planning Act contains no other statements relating to the contents of an official plan, nor does it contain any other specific provisions defining or limiting what can or must be contained in an official plan.

45 The appellants' central argument is that the conversion of a rental property is not a "physical change" within the meaning of s. 16(1)(a). They submit that OPA 2 focuses on changes in nature of tenure rather than on "physical change" and, because the permitted land use remains the same after conversion, there is no change capable of being reached by an official plan. The municipality, say the appellants, cannot address the social issue of a perceived shortage of affordable rental housing through its official plan absent some actual physical change to which the official plan can attach. While the demolition of a rental building amounts to physical change, the appellants contend that demolition control is dealt with explicitly and exhaustively by s. 33 of the Planning Act.

46 The OMB found that the City lacked the authority to enact OPA 2 as the power to do so was not expressly conferred by the Planning Act and that "any broad power conferred by the province on a municipality that may on the face appear to be general and vague should not be construed to mean unrestrained and wide power for a municipal council to legislate." The OMB was strongly influenced by its opinion that OPA 2 essentially reclaimed the same approval powers formerly available to municipalities under the RHPA that had been repealed by the TPA, a point we address as the next issue.

47 The Divisional Court found that the OMB had erred in law in finding that the City lacked the legal authority to adopt OPA 2. Day J., writing for the court on this issue, held that "the enabling provisions of s. 16(1) of the Planning Act, in the spectrum of their broadness, would clearly include the impugned by-law, particularly in light of s. 2(j) of the Planning Act."

48 For the following reasons, we do not accept the appellants' arguments and affirm the decision of the Divisional Court on this issue.

49 We turn first to the specific wording of s. 16(1)(a) of the Planning Act. By the terms of s. 16(1)(a), an official plan shall deal primarily with physical change. Section 16(1)(a) does not say that the official plan shall only deal with physical change. A second and related point is that s. 16(1)(a) is framed in mandatory terms and specifies what an official plan "shall contain". Section 16(1)(a) is cast in terms of the minimum requirements for an official plan, not the outside limits. It does not list heads of power or the subjects that may be addressed by the official plan. There are unquestionably limits to what a municipality may include within its official plan, but the wording and scope of s. 16(1)(a) indicate that those limits cannot be determined solely by a literal application of its terms. To determine what may be included in an official plan, as distinct from what must be included by virtue of s. 16(1)(a), reference must be had to the Planning Act as a

whole. In this regard, it is important to bear in mind that the purpose of an official plan is to set out a framework of "goals, objectives and policies" to shape and discipline specific operative planning decisions. An official plan rises above the level of detailed regulation and establishes the broad principles that are to govern the municipality's land use planning generally. As explained by Saunders J. in Bele Himmel Investments Ltd. v. City of Mississauga et al. (1982), 13 O.M.B.R. 17 at 27:

> Official plans are not statutes and should not be construed as such. In growing municipalities such as Mississauga, official plans set out the present policy of the community concerning its future physical, social and economic development.

In our view, it is essential to bear in mind this legislative purpose when interpreting scope of authority to adopt an official plan. The permissible scope for an official plan must be sufficient to embrace all matters that the legislature deems relevant for planning purposes.

50 Another significant feature of s. 16(1)(a) is that, contrary to the submission of the appellants, management of "the social, economic and natural environment of the municipality" are explicitly mentioned as necessary elements of the official plan. While this phrase must be read in light of the requirement that the official plan be primarily concerned with the management and direction of physical change, it hardly supports the appellants' contention that the power to enact an official plan must be strictly limited to the purely physical aspects of land use planning.

51 As the Supreme Court of Canada recently reaffirmed, in Bell Express Vu Limited Partnership v. Rex, [2002] 2 S.C.R. 559 at paragraph 26, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at p. 87 the words of any statute "are to 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". When one moves from the confines of s. 16(1)(a) to the broader context of the Planning Act as a whole, one finds considerable added support for the argument advanced by Toronto and the intervenors for the authority of a municipality to include in its official plan provisions designed to limit or control the conversion or demolition of rental housing.

52 In this regard, s. 1.1 defining the purposes of the Planning Act, s. 2 specifying the matters to which municipalities are to have regard when carrying out their duties, and s. 3 dealing with ministerial policy statements are significant. Among the purposes of the Act specified in s. 1.1 are:

> (b) to provide for a land use planning system led by provincial policy;
> (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
> (f) to recognize the decision-making authority and accountability of municipal councils in planning.

53 This statement of legislative purpose makes it clear that the Act is concerned with the broad

policies to govern land use planning and the integration and implementation of provincial interests at the local level through the municipal councils exercising their local authority. In s. 2, the legislature specifies some of the "matters of provincial interest" to which municipalities "shall have regard" and among these are "(j) the adequate provision of a full range of housing." Section 2 is closely linked to s. 3 which allows the Minister, with the approval of the Lieutenant Governor in Council, to issue policy statements "on matters relating to municipal planning that in the opinion of the Minister are of provincial interest." The current Provincial Policy Statement (1997) issued under the authority of s. 3 of the Planning Act makes specific reference to the need to plan for a full range of housing:

> 1.2.1(c) Provision will be made in all planning jurisdictions for a full range of housing types and densities to meet projected demographic and market requirements of current and future residents of the housing market area by:
>
> c. encouraging housing forms and densities designed to be affordable to moderate and lower income households; ...

Under the heading "Implementation/Interpretation", the Policy states:

> Nothing in this policy statement is intended to prevent planning authorities from going beyond the minimum standards established in specific policies, in developing official plan policies and when making decisions on planning matters, unless so doing would conflict with any other policy.

54 A ministerial policy statement cannot, of course, confer powers that the legislature has withheld. But here, the legislature has explicitly directed municipalities to pay heed to ministerial policy statements on a broad range of subjects, including the "the adequate provision of a full range of housing", in the exercise their statutory powers.

55 In our view, given the overall framework of the Act and the purpose of official plans, this specific legislative directive that the municipality should address the adequate provision of a full range of housing provides strong statutory support for the City's authority to adopt OPA 2. The legislature and the Minister have both made it clear that attending to the housing needs of its residents is a matter requiring the attention of the municipality in the exercise of its statutory powers related to land use planning. It follows, in our view, that when defining the planning "goals, objectives and policies" that are to govern its planning decisions, a municipality is entitled to include "goals, objectives and policies" related to ensuring an adequate supply of rental housing.

56 We see no merit in the appellants' submission that the city has no capacity to adopt policies concerning the demolition of buildings beyond those spelled out in s. 33 of the Planning Act dealing with demolition control area by-laws and demolition permits. We see nothing in s. 33 to suggest that it is intended as an exhaustive statement of permissible regulation by the municipality. OPA 2

does not create a regulatory regime that competes or conflicts with the specific provisions of s. 33. To the extent OPA 2 deals with the demolition of buildings, it does so from a perspective quite different and distinct from s. 33.

57 We are fortified in our reading of the scope of the City's authority with respect to OPA 2 by recent jurisprudence that has emphasized the importance of enhancing local decision-making and avoiding narrow and technical readings of municipal powers. In 114957 Canada Ltee (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241 at paragraph 21, the Supreme Court of Canada stated that the courts should accord municipal powers a liberal and benevolent interpretation, and that only in the clearest of cases should a municipal by-law be held to be ultra vires, and approved the dictum of McLachlin J. in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231 at paragraph 19, "barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold."

58 We would resolve this issue in favour of the respondent.

Issue 4: Does OPA 2 conflict with the Tenant Protection Act?

59 The OMB found that OPA 2 was also invalid on the ground that it conflicts with the TPA. In the OMB's view, OPA 2 is inconsistent with the significant change in provincial policy brought about by the repeal of the RHPA and the enactment of the TPA. The OMB found that "the province has been occupying the legislative field involving residential tenants and tenancy" and that as provincial policy had shifted from the protection of rental units and municipal controls under the RHPA to the protection of the rights of tenants under the TPA, municipalities were precluded from reverting to policies akin to those that formerly existed under the RHPA. The OMB found that OPA 2 "was at cross purpose or in conflict with" the TPA and that "in both timing and content" the impugned policies of OPA 2 "are but a reclaim by the city of the municipal powers that have been otherwise repealed by the Ontario Legislature."

60 The Divisional Court disagreed and held that the OMB had erred in concluding that there was an invalidating conflict between OPA 2 and the TPA. Writing for the court on this issue, Day J. relied on statements made by the Minister of Municipal Affairs and Housing upon the introduction of the TPA that municipalities would retain authority to have official plan policies restricting the conversion of rental buildings to condominiums. Day J. followed Spraytech, at paragraphs 36 to 39, and applied the "impossibility of dual compliance" test and held that "as a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter."

61 For the reasons that follow, we agree with the conclusion reached by the Divisional Court.

62 By repealing the RHPA and introducing the TPA, the legislature removed the RHPA restrictions on conversion of rental buildings and introduced the TPA scheme of rights for individual tenants. The purpose of the TPA is, as its title suggests, the protection of the rights of

tenants, not the enhancement of the rights of property owners or developers. The TPA confers no positive rights on property owners or developers with respect to the conversion or demolition of rental buildings. The TPA is silent on the subject of whether a municipality may, through its planning process, introduce its own regulations or controls in this area. Accordingly, as a simple matter of statutory interpretation, we see nothing in the TPA that precludes the city from including in its official plan policies aimed at restricting the conversion or demolition of rental buildings.

63 To the extent that there is any ambiguity on the point, we agree with Day J. that the legislative history was admissible to resolve the issue: see E.A. Driedger & R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at 497-500; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at paragraph 31 per Iacobucci J.:

> ... in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., R. v. Vasil, [1981] 1 S.C.R. 469, at p. 487; Paul v. The Queen, [1982] 1 S.C.R. 621 at pp. 635, 653 and 660).

64 The legislative history is clear that by repealing the RHPA scheme providing for controls at the municipal level and introducing the tenants rights package under the TPA, the government did not intend to limit the capacity of municipalities to adopt official plan policies aimed at protecting the rental properties from conversion. Indeed, the government made it clear that the TPA would not eliminate or limit the authority of municipalities to control conversions of rental properties. On the first reading of the TPA in the legislature, the government's summary stated: "Municipalities maintain the ability to have official plan policies restricting the conversion of a rental building to a condominium." During the legislative debate (Hansard, 12 May 1997) the Minister of Municipal Affairs and Housing, Al Leach, explicitly stated that the intent of the TPA was not to remove the authority municipalities have with respect to adopting official plan policies restricting the conversion of rental units to condominiums:

> ... [W]hile we are changing the Rental Housing Protection Act, we have made no changes whatsoever to the authority of municipalities to adopt official plan policies restricting condominium conversions. Municipalities can still discourage condominium conversions through their official plan policies that exist in the present city of Toronto if they feel a conversion is not in the best interests of their community.

65 More recently (Hansard, 6 April 2000), Brian Coburn, Parliamentary Assistant to the Minister of Municipal Affairs and Housing, reiterated this policy on behalf of the Ministry:

> Bill 96 [the TPA] allows municipalities to use their official plan policies to manage conversions and demolitions in the best interests of their constituents. Through that planning exercise, they have the ability to forecast and protect their communities and design for future growth.

66 In our view, the appellant's argument that the repeal of the RHPA and the enactment of the TPA reflected a legislative intention to eliminate regulatory authority at the municipal level is flatly contradicted by the legislative history.

67 We also agree with the Divisional Court that the OMB erred by applying the wrong test for determining whether there is a conflict between OPA 2 and the TPA. The OMB rendered its decision prior to the release of the Supreme Court of Canada's judgment in Spraytech. That decision makes it clear that, assuming the matter falls within municipal competence, a municipality is free to establish policies and standards more restrictive that those established by provincial legislation. This means that, contrary to the OMB's decision, by enacting legislation dealing with one aspect of a matter, the legislature does not necessarily pre-empt an otherwise valid municipal by-law dealing with the same matter. Spraytech establishes a strict "impossibility of dual compliance" test, derived from Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, to determine whether there is a conflict between a municipal by-law and provincial legislation. A conflict rendering a by-law invalid arises only when one enactment compels what the other forbids. On this test it is clear that restrictions on conversion or demolition imposed on the owners of rental properties as a result of OPA 2 do not conflict with the legal protections afforded tenants under the TPA.

68 Accordingly, we would resolve this issue in favour of the respondent.

The Motion for Leave to Appeal Costs

69 The appellants move for leave to appeal the Divisional Court's award of costs against them in favour of the City of Toronto and the City of Hamilton and the amounts of costs fixed and, if leave be granted, appeal from the award and, alternatively, from the amounts fixed. The court fixed the City of Toronto's costs in the amount of $75,000 and the City of Hamilton's costs in the amount of $12,000. In our view, it was appropriate for the Divisional Court to award these costs against the appellants. Further, we do not think that there is a principled basis upon which we can properly interfere with the amounts of the awards. Accordingly, we would not grant leave to appeal.

The Costs of this Appeal

70 We think that it is appropriate that the Cities of Toronto, Hamilton and Ottawa should have their costs of this appeal payable by the appellants. We fix the amounts of these costs as follows: $40,000 (Toronto), $12,000 (Hamilton) and $12,000 (Ottawa).

DISPOSITION

71 For the reasons we have given, we would dismiss these appeals with costs as set forth above.

MORDEN J.A.
SHARPE J.A.
O'CONNOR A.C.J.O. -- I agree.

* * * * *

Corrigendum
Released: March 16, 2004

The Ontario Municipal Board Act in paragraph 16 line 4 has been amended to read: Planning Act.

cp/e/nc/ln/qw/qlgkw/qlkjg/qlmjb/qlsxs

TAB 5

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

SUPREME COURT OF CANADA

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

DATE: 20111214
DOCKET: 33620

BETWEEN:

Information and Privacy Commissioner
Appellant
and
Alberta Teachers' Association
Respondent
- and -
Attorney General of British Columbia,
Information and Privacy Commissioner of British Columbia and
B.C. Freedom of Information and Privacy Association
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 77) Rothstein J. (McLachlin C.J. and LeBel, Fish, Abella and Charron JJ. concurring)

CONCURRING REASONS: (paras. 78 to 89) Binnie J. (Deschamps J. concurring)

CONCURRING REASONS: Cromwell J.
(paras. 90 to 104)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

INFORMATION AND PRIVACY COMM. *v.* ATA

Information and Privacy Commissioner *Appellant*

v.

Alberta Teachers' Association *Respondent*

and

Attorney General of British Columbia, Information and Privacy Commissioner of British Columbia and B.C. Freedom of Information and Privacy Association *Interveners*

Indexed as: Alberta (Information and Privacy Commissioner) *v.* Alberta Teachers' Association

2011 SCC 61

File No.: 33620.

2011: February 16; 2011: December 14.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative Law — Judicial Review — Implied Decision — Decision of adjudicator quashed on judicial review on basis of the Information and Privacy Commissioner's failure to comply with statutory time limits — Issue of time limits not raised with the Commissioner or adjudicator — Adjudicator consequently not specifically addressing issue and not issuing reasons in this regard — Whether a matter that was not raised at tribunal may be judicially reviewed — Whether reasons given by tribunal in other decisions may assist in determination of reasonableness of implied decision — Personal Information Protection Act, S.A. 2003, c. P-6.5, s. 50(5).

Administrative Law — Standard of Review — Whether a tribunal's decision relating to the interpretation of its home statute or statutes closely connected to its functions is reviewable on standard of correctness or reasonableness — Whether category of true questions of jurisdiction or vires should be maintained when tribunal is interpreting its home statute or statutes closely connected to its functions.

The Information and Privacy Commissioner received complaints that the ATA disclosed private information in contravention of the Alberta *Personal Information Protection Act*. At the time, s. 50(5) of *PIPA* provided that an inquiry must be completed within 90 days of the complaint being received unless the Commissioner notified the parties that he was extending the time period and he provided an anticipated date for completing the inquiry. The Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. Seven months later, an adjudicator delegated by the Commissioner issued an order, finding that the ATA had contravened the Act. The ATA applied for judicial review of the adjudicator's order. In argument, it claimed for the first time that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days of the complaint being received. The chambers judge quashed the adjudicator's decision on that basis. A majority of the Court of Appeal upheld the chambers judge's decision.

Held: The appeal should be allowed.

Per McLachlin C.J. and LeBel, Fish, Abella, Charron and **Rothstein** JJ.: Although the timelines issue was not raised before the Commissioner or the adjudicator, the adjudicator implicitly decided that providing an extension after 90 days did not automatically terminate the inquiry. The adjudicator's decision was subject to judicial review on a reasonableness standard and her decision was reasonable. The adjudicator's order should be reinstated and the matter should be remitted to the chambers judge to consider issues not dealt with and resolved in the judicial review.

A court has discretion not to undertake judicial review of an issue and generally will not review an issue that could have been, but was not, raised before the tribunal. However, in this case, the rationales for the general rule have limited application. The Commissioner has consistently expressed his views in other cases, so we have the benefit of his expertise. No evidence was required to consider the timelines issue and no prejudice was alleged.

In the present appeal, the letter notifying the parties of the extension was sent after the expiration of 90 days. An inquiry was conducted and the adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review could only be decided in one of two ways — either the consequence of an extension was that the inquiry was terminated or not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated.

In this case, a reasonableness standard applied on judicial review. The Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply. The timelines question does not fall into such a category: it is not a constitutional

question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, nor a true question of jurisdiction or *vires*. Experience has shown that the category of true questions of jurisdiction is narrow and it may be that the time has come to reconsider whether this category exists and is necessary to identify the appropriate standard of review. Uncertainty has plagued standard of review analysis for many years. The "true questions of jurisdiction" category has caused confusion to counsel and judges alike and without a clear definition or content to the category, courts will continue to be in doubt on this question. For now, it is sufficient to say that, unless the situation is exceptional, the interpretation by a tribunal of its home statute or statutes closely connected to its function should be presumed to be a question of statutory interpretation subject to deference on judicial review. As long as the "true question of jurisdiction" category remains, a party seeking to invoke it should be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the standard of reasonableness.

The deference due to a tribunal does not disappear because its decision was implicit. Parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons. When the decision under review concerns an issue that was not raised before the decision-maker, the reviewing court can consider reasons which could have been offered in support of the decision. When a reasonable basis for an implied decision is apparent, a reviewing court should uphold the decision as reasonable. In some cases, it may be that the reviewing court cannot adequately show deference without first providing the decision-maker the opportunity to give its own reasons for the decision. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one.

Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists. Other decisions by the Commissioner and the adjudicator have provided consistent analyses of the similarly-worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act* ("*FOIPA*"). The Commissioner has held that a similar 90-day time limit in s. 69(6) applies only to his duty to complete an inquiry and not to extending time to complete an inquiry. His interpretation of s. 69(6) systematically addresses the text of that provision, its purposes, and the practical realities of conducting inquiries. His interpretation of s. 69(6) satisfies the values of justification, transparency and intelligibility in administrative decision-making.

It is reasonable to assume that the Commissioner's interpretations of s. 69(6) of *FOIPA* are the reasons of the adjudicator in this case. Both s. 50(5) of *PIPA* and s. 69(6) of *FOIPA* govern inquiries conducted by the Commissioner. They are identically structured and use almost identical language. It was reasonable for the adjudicator to apply the Commissioner's interpretation of s. 69(6) of *FOIPA* to s. 50(5) of *PIPA*. The interpretation does not render statutory requirements of notice meaningless. No principle of statutory interpretation requires a presumption that an extension must be granted before the expiry of the 90-day time limit simply because s. 50(5) is silent as to when an extension of time can be granted. The distinction between mandatory and directory provisions does not arise in this case because this is not a case of failure by a tribunal to comply with a legislative direction. Therefore, there exists a reasonable basis for the adjudicator's implied decision in this case.

Per **Binnie** and Deschamps JJ.: There is agreement with Cromwell J. that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and to the rule of law. Administrative tribunals operate within a legal framework dictated by the Constitution and limited by their respective statutory mandates and it is the courts that determine the outer limits of those mandates. On the other hand, the notion of a "true question of jurisdiction or *vires*" is not helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision.

The middle ground lies in the more nuanced approach adopted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), 2011 SCC 53, that if the issue relates to the

interpretation and application of a tribunal's own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply. The expression "issues of general legal importance" means issues whose resolution has significance outside the operation of the statutory scheme under consideration. "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense. The calibration will be challenging enough for reviewing judges without super-adding an elusive search for something that can be labelled a true question of *vires* or jurisdiction.

On the other hand, Rothstein J.'s creation of a "presumption" based on insufficient criteria simply adds a further step to what should be a straightforward analysis. A simplified approach would be that if the issue before the reviewing court relates to the interpretation or application of a tribunal's "home statute" and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness. Otherwise, the last word on questions of law should be left with the courts.

Per Cromwell J.: In this case the applicable standard of review is reasonableness. The Commissioner's power to extend time is granted in broad terms in the context of a detailed and highly specialized statutory scheme which it is the Commissioner's duty to administer and under which he is required to exercise many broadly granted discretions. The adjudicator's decision on the timeliness issue should be reinstated and the matter should be remitted to the chambers judge to consider the issues not dealt with and resolved in the judicial review proceedings. Courts have a constitutional responsibility to ensure that administrative action does not exceed its jurisdiction, but they must also give effect to legislative intent when determining the applicable standard of judicial review. The standard of review analysis identifies the limits of the legality of a tribunal's actions and defines the limits of the role of the reviewing court. When existing jurisprudence has not already satisfactorily determined the standard of review applicable to the case at hand, the courts apply several relevant factors. These factors allow the courts to identify questions that are reviewable on a standard of correctness. Elevating to a virtually irrefutable presumption the general guideline that a tribunal's interpretation of its home statute will not often raise a jurisdictional question goes well beyond saying that deference will usually result where a tribunal's interpretation of its home statute is in issue. The terms "jurisdictional" and "*vires*" are unhelpful to the standard of review analysis but true questions of jurisdiction and *vires* do exist. There are legal questions in "home" statutes whose resolution legislatures do not intend to leave to the tribunal. As this Court's recent jurisprudence confirms, as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues. The fact that s. 50(5) of *PIPA* is in the Commissioner's home statute did not relieve the reviewing court of its duty to consider the argument that the provision was one whose interpretation the legislator intended to be reviewed for correctness, by examining the provision and other relevant factors.

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By Rothstein J.

Discussed: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190; **distinguished:** *Kellogg Brown and Root Canada v. Information and Privacy Commissioner*, 2007 ABQB 499 (CanLII), 2007 ABQB 499, 434 A.R. 311; **referred to:** *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396; *Poirier v. Canada (Minister of Veterans Affairs)*, reflex, [1989] 3 F.C. 233; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, 1997 CanLII 6370 (FC), [1998] 2 F.C. 198; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160 (CanLII), 2001 ABCA 160, 303 A.R. 8; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246 (CanLII), 2002 ABCA 246, 317 A.R. 385; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), 2007 SCC 15, [2007] 1 S.C.R. 650;

Waters v. British Columbia (Director of Employment Standards), 2004 BCSC 1570 (CanLII), 2004 BCSC 1570, 40 C.L.R. (3d) 84; *Alberta v. Nilsson*, 2002 ABCA 283 (CanLII), 2002 ABCA 283, 320 A.R. 88; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292 (CanLII), 2009 ONCA 292, 306 D.L.R. (4th) 251; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), 2011 SCC 7, [2011] 1 S.C.R. 160, rev'g 2009 FCA 110 (CanLII), 2009 FCA 110, 389 N.R. 363, rev'g 2008 FC 12 (CanLII), 2008 FC 12, 34 C.E.L.R. (3d) 138; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), 2011 SCC 53; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionnel de Lévis-Lauzon*, 1985 CanLII 609 (SCC), [1985] 1 S.C.R. 596; *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (CanLII), 2011 SCC 1, [2011] 1 S.C.R. 3, aff'g 2009 FCA 378 (CanLII), 2009 FCA 378, 315 D.L.R. (4th) 270, rev'g 2009 FC 271 (CanLII), 2009 FC 271, 344 F.T.R. 45; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), 2009 SCC 39, [2009] 2 S.C.R. 678, aff'g *sub nom. Kerry Canada Inc. v. DCA Employees Pension Committee*, 2007 ONCA 416 (CanLII), 2007 ONCA 416, 86 O.R. (3d) 1, rev'g *sub nom. Nolan v. Superintendent of Financial Services* reflex, (2006), 209 O.A.C. 21; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (CanLII), 2009 SCC 50, [2009] 3 S.C.R. 309; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), 2011 SCC 59; *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 (CanLII), 2009 BCCA 396, 276 B.C.A.C. 135; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12, [2009] 1 S.C.R. 339; *Canada (Attorney General) v. Mavi*, 2011 SCC 30 (CanLII), 2011 SCC 30, [2011] 2 S.C.R. 504; *Order P2008-005; College of Alberta Psychologists*, December 17, 2008, O.I.P.C.; *Order F2006-031; Edmonton Police Service*, September 22, 2008, O.I.P.C.; *Order F2008-013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); *Order F2007-014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); *Order F2008-003; Edmonton Police Service*, December 12, 2008, O.I.P.C.; *Order F2008-016; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 82 (QL); *Order F2008-017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 79 (QL); *Order F2008-005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); *Order F2008-018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); *Order F2008-027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); *Order F2007-031; Grande Yellowhead Regional Division No. 35*, November 27, 2008, O.I.P.C.; *British Columbia (Attorney General) v. Canada (Attorney General)*, 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41.

By Binnie J.

Discussed: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), 2011 SCC 53, [2011] S.C.R. x; **referred to:** *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, 1970 CanLII 7 (SCC), [1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, 1971 CanLII 1 (SCC), [1971] S.C.R. 756; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12, [2009] 1 S.C.R. 339.

By Cromwell J.

Discussed: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), 2009 SCC 39, [2009] 2 S.C.R. 678; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, 1970 CanLII 7 (SCC),

[1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, 1971 CanLII 1 (SCC), [1971] S.C.R. 756; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), 2004 SCC 19, [2004] 1 S.C.R. 485; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (CanLII), 2009 SCC 50, [2009] 3 S.C.R. 309.

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Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, ss. 2(b), 69(6).

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APPEAL from a judgment of the Alberta Court of Appeal (Berger, Watson and Slatter JJ.A.), 2010 ABCA 26 (CanLII), 2010 ABCA 26, 21 Alta. L.R. (5th) 30, 474 A.R. 169, 479 W.A.C. 169, 316 D.L.R. (4th) 117, [2010] 8 W.W.R. 457, 1 Admin. L.R. (5th) 60, [2010] A.J. No. 51 (QL), 2010 CarswellAlta 94, affirming a decision of Marshall J. (2008), 21 Alta. L.R. (5th) 24, 1 Admin. L.R. (5th) 85, [2008] A.J. No. 1592 (QL), 2008 CarswellAlta 2300. Appeal allowed.

Glenn Solomon, Q.C., and *Rob W. Armstrong*, for the appellant.

Sandra M. Anderson and *Anne L. G. Côté*, for the respondent.

Written submissions only by David Loukidelis, Q.C., Veronica Jackson and Deanna Billo, for the intervener the Attorney General of British Columbia.

Written submissions only by Murray Rankin, Q.C., and *Nitya Iyer*, for the intervener the Information and Privacy Commissioner of British Columbia.

Brent B. Olthuis and *Tam C. Boyar*, for the intervener the B.C. Freedom of Information and Privacy Association.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Charron and Rothstein JJ. was delivered by

ROTHSTEIN J. —

[1] Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals. This appeal provides an opportunity for this Court to address the question of how a court may give adequate deference to a tribunal when a party raises an issue before the court on judicial review, which was never raised before the tribunal and where, as a consequence, the tribunal provided no express reasons with respect to the disposition of that issue.

[2] The context in which this issue arises is the judicial review of a decision of an adjudicator delegated by the appellant, the Information and Privacy Commissioner (the "Commissioner"), finding that the respondent, the Alberta Teachers' Association (the "ATA"), had disclosed certain private information in contravention of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("*PIPA*"). In response to a number of complaints about an ATA publication of private information, the Commissioner started an investigation. At the time, the Commissioner's enabling statue provided that an inquiry "must" be completed within 90 days of the complaint being received by the Commissioner, unless the Commissioner notifies the parties concerned that he is extending the period and provides an anticipated date for completing the inquiry (s. 50(5) *PIPA*). In dealing with the complaints against the ATA, the Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. The adjudicator delegated by the Commissioner subsequently issued an order against the ATA before the anticipated date for completion and 29 months after the initial complaint was made.

[3] The issue of compliance with statutory timelines was not raised before the Commissioner or the adjudicator. The ATA applied for judicial review of the adjudicator's order, arguing *inter alia* that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days. The chambers judge granted the ATA's application on this basis, quashing the adjudicator's decision ((2008), 21 Alta. L.R. (5th) 24). This decision was upheld by a majority of the Court of Appeal 2010 ABCA 26 (CanLII), (2010 ABCA 26, 21 Alta. L.R. (5th) 30).

[4] The Commissioner now appeals to this Court. There are three questions at issue: First, should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator? Second, if the timelines issue should be considered, what is the applicable standard of review? Third, on the applicable standard of review, does the adjudicator's continuation and conclusion of the inquiry, despite the Commissioner having provided an extension after 90 days, survive judicial review?

[5] For the reasons that follow, I would find that the timelines issue was subject to judicial review. Although the issue was not raised before the Commissioner or the adjudicator, it was implicitly decided by both the Commissioner and the adjudicator, and there was no evidentiary inadequacy or prejudice to the parties in this case. The implied decision of the Commissioner to extend the time after 90 days as implicitly adopted by the delegated adjudicator was reviewable on a reasonableness standard and I conclude that the adjudicator's decision was reasonable. Accordingly, the Commissioner's appeal should be allowed and the adjudicator's order against the ATA reinstated.

I. Facts

[6] Between October 13 and December 2, 2005, ten individuals complained to the Office of the Information and Privacy Commissioner that the ATA disclosed their personal information, in contravention of *PIPA*. They alleged that the ATA did so by publishing their names together with a statement that they were no longer required to adhere to the ATA's Code of Professional Conduct in a publication called the "ATA News". The Commissioner's office informed the ATA on October 27, 2005 that it was conducting an investigation. On July 25, 2006, the investigation was concluded and a report was given to the complainants. Although the record is not clear, from their subsequent action, it would appear that the report was not satisfactory to the complainants.

[7] In September 2006, the complainants requested that an inquiry under *PIPA* be conducted. On February 7, 2007, the complainants were notified that their request was being processed. On May 17, 2007, the Commissioner issued a Notice of Inquiry setting out a deadline of June 11, 2007 for written submissions (subsequently extended to July 25, 2007), and of August 8, 2007 for rebuttals. Although the timing is not disclosed in the record, the Commissioner did delegate an adjudicator to conduct the inquiry and issue a decision.

[8] On *August 1, 2007*, the Commissioner wrote to the parties informing them that he was *extending the 90-day period* set out in s. 50(5) *PIPA* and provided an anticipated date for completion of February 1, 2009. On March 13, 2008, an order was issued by the Commissioner's delegated adjudicator. The adjudicator found that the ATA had disclosed the complainants' personal information contrary to ss. 7 and 19 *PIPA*. The issue of compliance with the timelines set out in s. 50(5) *PIPA* was not raised before the adjudicator and the adjudicator's reasons did not expressly address this issue.

[9] On April 25, 2008, the ATA filed an originating notice for judicial review of the adjudicator's order. On judicial review, the adjudicator's decision was quashed on the basis that the Commissioner lost jurisdiction for failing to comply with the timelines set out in s. 50(5) *PIPA*. By majority, the Court of Appeal upheld that decision.

II. Relevant Statutory Provisions

[10] The relevant statutory provisions, as they were worded at the relevant time, are:

Personal Information Protection Act, S.A. 2003, c. P-6.5

> **3** The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

43(1) The Commissioner may delegate to any person any duty, power or function of the Commissioner under this Act except the power to delegate.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the Commissioner considers appropriate.

47(1) To ask for a review or to initiate a complaint under this Part, an individual must, as soon as reasonable, deliver a written request to the Commissioner.

(2) A written request to the Commissioner for a review of a decision of an organization must be delivered within

(a) 30 days from the day that the individual asking for the review is notified of the decision, or

(b) a longer period allowed by the Commissioner.

(3) A written request to the Commissioner initiating a complaint must be delivered within a reasonable time.

(4) The time limit in subsection (2)(a) does not apply to delivering a written request for a review concerning an organization's failure to respond within a required time period.

50 . . .
(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

III. Judicial History

A. *Court of Queen's Bench of Alberta ((2008), 21 Alta. L.R. (5th) 24)*

[11] In reasons delivered orally, Marshall J. noted that a preliminary question raised by the ATA was whether the Commissioner had lost jurisdiction over the inquiry as a result of his failure to complete the inquiry within the timelines set out in s. 50(5) *PIPA*. Relying on *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190, for the principle that "the standard of correctness still applies to matters of jurisdiction and some other matters of law" (at para. 10), he held that this question was reviewable on a standard of correctness.

[12] According to Marshall J., the reasons of Belzil J. in *Kellogg Brown and Root Canada v. Information Privacy Commissioner*, 2007 ABQB 499 (CanLII), 2007 ABQB 499, 434 A.R. 311, were compelling and entirely applicable in this case. Following that decision, he held that the timelines for completing a review set out in s. 50(5) are mandatory, employing the word "must" (at para. 7) and not directory. He also held that it was not necessary for him "to

determine whether an extension of time must be given within the 90-day period. The time period is substantially breached in any event" (para. 12).

[13] Marshall J. then addressed the issue of unfairness raised by the Commissioner. He noted that various authorities had held that the court should not consider an issue which was not raised before a tribunal. He rejected as speculation the Commissioner's submission that, since the individual complainants were not before the court, the court would not have the benefit of additional facts available from them. He further held that "[t]he legislature has clearly stated that timely disposition of complaints is essential in a proceeding under the Act" (at para. 11) and that the "matter was not conducted in a manner required by the legislature, so it can be said that the proceedings must be found to be invalid" (para. 11).

[14] Marshall J. granted the ATA's application and quashed the Commissioner's decision. However, he declined to order costs against the Commission, partly because a tribunal is rarely required to pay costs and partly because the timelines issue could have been raised before the Commissioner (para. 22).

B. *Alberta Court of Appeal, 2010 ABCA 26 (CanLII), 2010 ABCA 26, 21 Alta. L.R. (5th) 30 (Watson J.A. (Slatter J.A. Concurring) and Berger J.A. Dissenting)*

(1) The Majority — Watson J.A.

[15] Watson J.A. was of the view that since the adjudicator never got a chance to say anything on the question being considered on judicial review, it was not necessary to determine the appropriate standard of review. Rather, he appears to have determined the issue of timeliness *de novo*.

[16] Watson J.A. affirmed that the timelines issue ought to have been raised before the Commissioner. Objections to a tribunal's ability to make a lawful decision should be made first to the challenged tribunal. The failure to raise the issue before the adjudicator was a defect in process that should not be encouraged and should not generally occur. He nonetheless did not reverse the judicial review decision on this ground and was of the opinion that the Court of Appeal was in a position to consider the matter.

[17] Watson J.A. found that the language of the section spoke to "extending that period" in a manner that connoted doing the "extending" while the 90 days was still running. Since the Commissioner had not extended the period within 90 days, the adjudicator's decision was not rendered within the statutory timelines. He held that the time rules specified in s. 50(5) *PIPA* were mandatory and that the consequence of breaching them was the presumptive termination of the inquiry process. Contrary to the decision of the chambers judge that the consequence of non-compliance with s. 50(5) was the automatic and incurable termination of the proceedings, the reasons of the Commissioner might justify the breach and overcome the presumption of termination. However, the chambers judge had concluded that "[t]he time period is substantially breached in any event" (para. 12). Under those circumstances, the presumption of termination was not overcome. Watson J.A. therefore upheld the trial judge's decision to quash the adjudicator's decision.

(2) The Dissent — Berger J.A.

[18] In dissent, Berger J.A. concluded that *PIPA* authorized the Commissioner to extend the 90-day period either before or after the expiry of that period. When a provision is silent as to when an extension of time can be granted, there is no presumption that the extension must be granted before expiry. An interpretation of s. 50(5) that allows the Commissioner to extend the 90-day period after it expires is consistent with legislative intent because it maintains the protection of the individuals' rights to privacy which *PIPA* strives to ensure. In the present case, by the time the 90-day period had expired, the inquiry process was engaged and had progressed with the parties' participation. Because they were involved, the parties were aware that the process would continue beyond 90 days. The goals of timely resolution and keeping parties informed would not have been enhanced by requiring the Commissioner to formally communicate with the parties within 90 days.

[19] Berger J.A. found that quashing the adjudicator's order without the benefit of reasons compromised judicial review. The court generally will not decide on judicial review a question which was not put to the administrative tribunal. Without the benefit of the Commissioner's expertise and analysis relative to the questions of mixed law and fact in this case, the curial deference normally accorded to the Commissioner was rendered nugatory, thereby fettering a thorough and meaningful judicial review.

[20] Berger J.A. would have allowed the appeal and restored the adjudicator's order.

IV. Analysis

[21] This appeal raises three issues, which I shall consider in turn. First, should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator? Second, if the timelines issue should be considered, what is the applicable standard of review? Third, on the applicable standard of review, does the continuation and conclusion of the inquiry, despite providing an extension after 90 days, survive judicial review?

A. *Judicial Review of an Issue that Was Not Raised Before the Tribunal*

[22] The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, for example, *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies" (para. 30).

[23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of Veterans Affairs)*, reflex, [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, 1997 CanLII 6370 (FC), [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160 (CanLII), 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246 (CanLII), 2002 ABCA 246, 317 A.R. 385, at para. 4).

[24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has

entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts ... must be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.

[25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)

[26] Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue *(Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570 (CanLII), 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283 (CanLII), 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-67; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292 (CanLII), 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).

[27] Watson J.A., for the majority of the Court of Appeal, acknowledged that "[t]he judicial review was adversely affected by the fact that the adjudicator did not hear and consider the objection", under s. 50(5) *PIPA*, to the Commissioner's authority to proceed. It was a "defect in the process" that should "not ... be encouraged and should not generally occur" (para. 18). He nevertheless did not interfere with the chambers judge's judicial review on this ground. He observed that no additional evidence or submissions were available beyond the statements of law and policy contained in the Commissioner's prior decisions. Moreover, the Commissioner conceded that the adjudicator would have said the same as the Commissioner, had the issue been raised (para. 18). For its part, the ATA stressed in its factum before this Court that the Commissioner has consistently decided the timelines issue in other decisions and that there was nothing further for the Commissioner to decide (paras. 6, 42, 49 and 51).

[28] In these circumstances, I do not think the Court of Appeal erred in refusing to disturb the exercise of the reviewing judge's discretion to consider the timeliness issue. In this case, the rationales for the general rule have limited application. Both parties agreed that the Commissioner has expressed his views in several other decisions. Therefore, the Commissioner has had the opportunity to decide the issue at first instance and we have the benefit of his expertise, albeit without reasons in this case. No evidence was required to consider the timelines issue and no prejudice was alleged. Rather, it involved a straightforward determination of law, the basis of which was able to be addressed on judicial review, irrespective of what is the appropriate standard of review.

[29] In the present appeal, a decision on the timelines issue is necessarily implied. By his letter of August 1, 2007, the Commissioner notified the parties that he was extending the 90-day period for completion of an inquiry and provided them with an anticipated date for completion of February 1, 2009. This was done after the expiry of the 90-day period. An inquiry was conducted and the Commissioner's delegated adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review, but not before the Commissioner or the adjudicator, was whether the result of the Commissioner not extending the completion date of the inquiry before the 90-day period expired resulted in the automatic termination of the inquiry. This issue could only be decided in one of two ways: either the consequence of an extension after 90 days was that the inquiry was automatically terminated or that it was not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated. The Commissioner's decision was implicit in his giving notice of an extension and an anticipated date for

completion after 90 days. The adjudicator's decision was implicit in her proceeding with the inquiry and rendering an order. In this appeal, this Court is reviewing the adjudicator's implied decision because hers is the decision under judicial review.

B. *What Is the Applicable Standard of Review and How Is it Applied to Implicit Decisions on Issues Not Raised Before the Administrative Tribunal?*

[30] The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA*, a provision of the Commissioner's home statute. There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... questions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), 2011 SCC 53, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

[31] The timelines question is not a constitutional question; nor is it a question regarding the jurisdictional lines between two or more competing specialized tribunals.

[32] And it is not a question of central importance to the legal system as a whole, but is one that is specific to the administrative regime for the protection of personal information. The timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner's specialized expertise. The question deals with the Commissioner's procedures when conducting an inquiry, a matter with which the Commissioner has significant familiarity and which is specific to *PIPA*. Also, in terms of interpreting s. 50(5) *PIPA* consistently with the purposes of the Act, the relevant considerations include the interests of all parties in the timely completion of inquiries, the importance of keeping the parties informed of the progression of the process and the effect of automatic termination of an inquiry on individual privacy interests. These considerations fall within the Commissioner's expertise, which centres upon balancing the rights of individuals to have their personal information protected against the need of organizations to collect, use or disclose personal information for purposes that are reasonable (s. 3 *PIPA*).

[33] Finally, the timelines question does not fall within the category of a "true question of jurisdiction or *vires*". I reiterate Dickson J.'s oft-cited warning in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, 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 *Dunsmuir*, at para. 35). See also *Syndicat des professeurs du collège de Lévis-Lauzon v. Collège d'enseignement général et professionnel de Lévis-Lauzon*, 1985 CanLII 609 (SCC), [1985] 1 S.C.R. 596, at p. 606, *per* Beetz J., adopting the reasons of Owen J.A. in *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394. As this Court explained in *Canada (Canadian Human Rights Commission)*, "*Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (CanLII), 2011 SCC 1, [2011] 1 S.C.R. 3, at paras 33-34; *Smith v. Alliance Pipeline Ltd.*, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (CanLII), 2009 SCC 50, [2009] 3 S.C.R. 309, that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a

correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).

[34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[35] Justice Cromwell takes issue with my querying whether the category of true question of jurisdiction exists and is necessary. He says that this proposition "undermine[s] the foundation of judicial review of administrative action" (para. 92).

[36] Judges and administrative law counsel well know of the uncertainty and confusion that has plagued standard of review analysis for many years. That was the animating reason for this Court's decision in *Dunsmuir*. At paragraph 32 of *Dunsmuir*, Bastarache and LeBel JJ. wrote:

> Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

At paragraph 158, Deschamps J. wrote:

> The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes.

At paragraph 145, Binnie J. wrote:

> The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere preparation for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [Emphasis deleted.]

Although these passages in *Dunsmuir* pertain to the approach to standard of review prior to *Dunsmuir*, I believe they are relevant in response to Justice Cromwell's expressed opinion.

[37] The continuing uncertainty about standard of review when the issue is the tribunal's interpretation of its home statute is well exemplified in the cases that have come before this Court subsequent to *Dunsmuir*. In *Nolan v. Superintendent of Financial Services* reflex, (2006), 209 O.A.C. 21, the Ontario Divisional Court thought the appropriate standard of review was correctness. The Court of Appeal applied a reasonableness standard (*sub nom. Kerry Canada Inc. v. DCA Employees Pension Committee*, 2007 ONCA 416 (CanLII), 2007 ONCA 416, 86 O.R. (3d) 1), as did this Court (*sub nom. Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), 2009 SCC 39, [2009] 2 S.C.R. 678). In *Alliance Pipeline Ltd. v. Smith*, 2008 FC 12 (CanLII), 2008 FC 12, 34 C.E.L.R. (3d) 138, the judicial review judge applied a reasonableness standard, but the Court of Appeal 2009 FCA 110 (CanLII), (2009 FCA 110, 389 N.R. 363) found it unnecessary to decide whether reasonableness or correctness was the appropriate standard of review. This Court applied a reasonableness standard 2011 SCC 7 (CanLII), (2011 SCC 7, [2011] 1 S.C.R. 160). In *Celgene Corp. v. Canada (Attorney General)*, 2009 FC 271 (CanLII), 2009 FC 271, 344 F.T.R. 45, the judicial review judge applied a correctness standard. The Federal Court of Appeal 2009 FCA 378 (CanLII), (2009 FCA 378, 315 D.L.R. (4th) 270) and this Court 2011 SCC 1 (CanLII), (2011 SCC 1, [2011] 1 S.C.R. 3) doubted that this was the proper standard. Without engaging in a standard of review analysis and for reasons of practicality, in *Northrop Grumman*, this Court applied a standard of correctness based on precedent. In the present appeal, both the judicial review court and the Court of Appeal applied a correctness standard of review.

[38] These examples demonstrate that the "true questions of jurisdiction" category has caused confusion to counsel and judges alike and has unnecessarily increased costs to clients before getting to the actual substance of the case. Avoiding using the label "jurisdictional" only to engage in a search for the legislators' intent, as my colleague suggests at paras. 96-97, simply leads to the same debate about what constitutes a jurisdictional question. As Binnie J. directly put it in *Dunsmuir*, our objective should be to get the parties away from arguing about standard of review to arguing about the substantive merits of the case.

[39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[40] In Justice Cromwell's view, saying that jurisdictional questions are exceptional is not an answer to a plausible argument that a particular provision falls outside the presumption of reasonableness review and into the exceptional category of correctness review. Nor does it assist, he says, in determining by what means the presumption may be rebutted.

[41] Both Binnie J. and Cromwell J. object to the *creation of a presumption* of reasonableness review of the home statute of the tribunal. With respect, I find the objection perplexing in view of judicial and academic opinion that the presumption was implicitly already established in *Dunsmuir*. Professor D. J. Mullan writes in "The McLachlin Court and the Public Law Standard of Review: A Major Irritant Soothed or a Significant Ongoing Problem?", in D. A. Wright and A. M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade*, (2011), 79 at p. 108.

> Justice John Evans of the Federal Court of Appeal has argued in his 2009 10th Heald Lecture delivered at the College of Law at the University of Saskatchewan that in *Dunsmuir* (reinforced by *Khosa*), the Court has now established (re-established?) a very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive, statute, or any other frequently encountered statute, or even common or civil law principle. I too accept that ....

Both Justice Evans and Professor Mullan are recognized as leading scholars in the field of administrative law in Canada.

[42] As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary.

[43] With respect, Justice Cromwell's reasons fail to appreciate that an invitation to consider whether a true question of jurisdiction or *vires* exists in a future case does not raise the specter of the constitutional guarantee of judicial review being an "empty shell" (para. 103). All decisions of tribunals are subject to judicial review, including decisions dealing with the scope of their statutory mandate, even if this Court were to eliminate true questions of jurisdiction as a separate category attracting a correctness review. This change would simply end the need for debate around whether the issue in any given case can be properly characterized as jurisdictional. It would not preclude judicial review on a reasonableness standard when interpretation of the home statute of the tribunal is at issue. Nor would it eliminate correctness review of decisions of tribunals interpreting their home statute where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator's expertise, or a question regarding the jurisdictional lines between competing specialized tribunals. See *Alliance*, at para. 26 citing *Dunsmuir*, at paras 58-61, and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), 2011 SCC 59, at para. 35, *per* Fish J.

[44] *Dunsmuir* provided guidance as to how a standard of review might be determined summarily without requiring a full standard of review analysis. One method was to identify the nature of the question at issue, which would normally or, I say, presumptively determine the standard of review. Contrary to the view of my colleague in para. 97, I would not wish to retreat to the application of a full standard of review analysis where it can be determined summarily.

[45] At paragraph 89, Binnie J. suggests that "[i]f the issue before the reviewing court relates to the interpretation and application of a tribunal's 'home statute' and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness." With respect, I think Binnie J.'s isolating matters of general legal importance as a stand-alone basis for correctness review is not consistent with what this Court has said in *Dunsmuir*, *Alliance*, *Canada (Canadian Human Rights Commission)* and *Nor-Man*.

[46] At paragraph 22 of *Canada (Canadian Human Rights Commission)*, LeBel and Cromwell JJ. state:

> On the other hand, our Court has reaffirmed that general questions of law that are <u>both</u> of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. [Emphasis added.]

In other words, since *Dunsmuir*, for the correctness standard to apply, the question has to not only be one of central *importance to the legal system* but also outside the *adjudicator's specialized area* of expertise.

[47] At paragraphs 85-87, Binnie J. reintroduces from his concurring reasons in *Dunsmuir* the concept of variable degrees of deference. The majority reasons in *Dunsmuir* do not recognize variable degrees of deference within the reasonableness standard of review and with respect neither do the reasons in *Canada (Canadian Human Rights Commission)*. Once it is determined that a review is to be conducted on a reasonableness standard, there is no second assessment of how intensely the review is to be conducted. The judicial review is simply concerned with the question at issue. A review of a question of statutory interpretation is different from a review of the exercise of discretion. Each will be governed by the context. But there is no determination of the intensity of the review with some reviews closer to a correctness review and others not.

[48] The Commissioner's interpretation of s. 50(5) *PIPA* relates to the interpretation of his own statute, is within his expertise and does not raise issues of general legal importance or true jurisdiction. His decision that an inquiry does not automatically terminate as a result of his extending the 90-day period only after the expiry of that period is therefore reviewable on the reasonableness standard.

[49] The oral reasons given by the chambers judge did not involve an extended discussion of the appropriate standard of review. Marshall J. assumed that *Dunsmuir* stood for the principle that "the standard of correctness still applies to matters of jurisdiction and some other matters of law" (at para. 10), and then held that the timelines question was reviewable on a standard of correctness. As I have explained, the timelines question is neither a true jurisdictional question nor any other type of question of law that attracts a correctness standard.

[50] For its part, the majority of the Alberta Court of Appeal appears to have held that, since the adjudicator provided no reasons for the decision, it was not necessary to determine the appropriate standard of review in the administrative law sense. The reasons of the majority suggest that, in these circumstances, the Court of Appeal could simply apply the standard of appellate review for questions of law, i.e., correctness. With respect, this approach cannot be maintained. Had the issue been raised before the adjudicator, it would have been subject to review on a reasonableness standard. Where the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear because the issue was not raised before the tribunal.

[51] In the present case, the adjudicator, by completing the inquiry, implicitly decided that extending the 90-day period for completion of an inquiry after the expiry of that period did not result in the automatic termination of the inquiry. However, as the issue was never raised and the decision was merely implicit, the adjudicator provided no reasons for her decision. It is therefore necessary to address how a reviewing court is to apply the reasonableness standard in such circumstances.

[52] In *Dunsmuir*, the majority explained (at paras. 47-78):

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ... We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

Obviously, where the tribunal's decision is implicit, the reviewing court cannot refer to the tribunal's process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal's decision-making process. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons.

[53] However, the direction that a reviewing court should give respectful attention to the reasons "which could be offered in support of a decision" is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.

[54] I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 (CanLII), 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place. When there is no duty to give reasons (e.g. *Canada (Attorney General) v. Mavi*, 2011 SCC 30 (CanLII), 2011 SCC 30, [2011] 2 S.C.R. 504) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.

[55] In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. However, remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place. Accordingly, remitting the issue to the tribunal is not necessarily the appropriate option available to a court when it is asked to review a tribunal's implied decision on an issue that was not raised before the tribunal. Indeed, when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable. On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one. This, of course, assumes that the Court has thought it appropriate in the particular circumstances to allow the issue to be raised for the first time on judicial review. Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.

C. *Application of the Reasonableness Standard in This Case*

[56] In the present case, the Court need not look far to discover a reasonable basis for the adjudicator's decision. The Commissioner and his delegated adjudicators have considered the issue, as it relates to s. 50(5) *PIPA* and to the similarly worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("*FOIPA*"), on numerous occasions and have provided a consistent analysis. The existence of other decisions of a tribunal

on the same issue can be of assistance to a reviewing court in determining whether a reasonable basis for the tribunal's decision exists. In this case, a review of the reasons of the Commissioner and the adjudicators in other cases allows this Court to determine without difficulty that a reasonable basis exists for the adjudicator's implied decision in this case. Indeed, in the circumstances here, it is safe to assume that the numerous and consistent reasons in these decisions would have been the reasons of the adjudicator in this case.

[57] In *Order P2008-005; College of Alberta Psychologists*, December 17, 2008, O.I.P.C., the Commissioner's delegated adjudicator considered the issue of whether there could be an extension after the expiry of the 90-day period under s. 50(5) *PIPA*. Adopting the Commissioner's analysis of s. 69(6) *FOIPA* in *Order F2006-031; Edmonton Police Service*, September 22, 2008, O.I.P.C. as applicable to s. 50(5) *PIPA*, she decided that "time extensions under section 50(5) can be done after expiry of the 90-day period" (para. 27). She looked at the text of s. 50(5) *PIPA* and reasoned that "[t]he placing of the phrase 'within 90 days' is such that this modifier refers only to the time within which the inquiry must be completed, rather than to a time within which the extension must be done" (para. 27). She went on to explain that, if "there is ambiguity, a purposive interpretation of section 50, in the context of the entire Act, leads to the conclusion that the purpose of the Act would be best served if the provision were interpreted as permitting an extension after 90 days" (para. 27).

[58] Finally, her interpretation of s. 50(5) was informed by practical realities of procedures under *PIPA*, which could make it impossible for adequate notice, including an anticipated date of completion, to be provided before the expiry of 90 days. In the case before her,

> ... at the time the 90 days expired, the interviews with the parties had not yet been completed. Indeed, because the mediator was not appointed until after further information had been sought and obtained from the Applicant, the mediation process was only commencing. At that time, it was impossible to know whether there would be a need for an inquiry. It makes no sense to speak of anticipating a date for completion of an inquiry until the inquiry itself can be anticipated in the sense of being expected. ... It was only after it became clear that the mediation had failed and the matter would go to inquiry that it became necessary to undertake the next phase. [para. 36]

[59] In my view, it was reasonable to interpret s. 50(5) *PIPA* in a manner consistent with s. 69(6) *FOIPA*. Both provisions govern inquiries conducted by the Commissioner. The two provisions are identically structured and use almost identical language. For ease of reference, I repeat that s. 50(5) *PIPA* then provided:

> An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner
>
> (a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and
>
> (b) provides an anticipated date for the completion of the review.

[60] Section 69(6) *FOIPA* provides:

> An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner

(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

[61] Given that the reasons in *Order P2008-005* adopted the Commissioner's reasoning in *Order F2006-031*, the analysis in *Order F2006-031* can provide further assistance in determining the existence of a reasonable basis for the adjudicator's implied decision in this case. Indeed, the Commissioner and his delegated adjudicators have repeatedly relied upon the detailed reasoning in *Order F2006-031* when deciding whether there can be an extension after 90 days under s. 69(6) *FOIPA* (see *Order F2008-013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); *Order F2007-014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); *Order F2008-003; Edmonton Police Service*, December 12, 2008, O.I.P.C.; *Order F2008-016; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 82 (QL); *Order F2008-017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 79 (QL); *Order F2008-005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); *Order F2008-018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); *Order F2008-027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); *Order F2007-031; Grande Yellowhead Regional Division No. 35*, November 27, 2008, O.I.P.C.).

[62] In *Order F2006-031*, the Commissioner considered the text of the provision, finding that

> Section 69(6) does not expressly state whether I must notify the parties that I am extending the 90 days and provide an anticipated date for completion of the review before the 90-day period expires. Placing the phrase "within 90 days" at the beginning of the provision makes it unclear whether the phrase is meant to refer to (i) the duty to complete the inquiry, as set out in the beginning of the provision, or (ii) the power in section 69(6)(a) and section 69(6)(b) to extend the 90-day period.
>
> In my view, the placement of the phrase "within 90 days" indicates that the 90 days refers only to my duty to complete the inquiry, and does not refer to my power to extend the 90-day period in section 69(6)(a) and section 69(6)(b). [paras. 53-54]

[63] In my view, this is a reasonable interpretation of the text of s. 69(6) *FOIPA* and of s. 50(5) *PIPA*. The placement of "within 90 days" suggests that it may refer to the completion of the inquiry and not to providing an extension.

[64] The ATA submits that interpreting s. 50(5) *PIPA* to allow an extension after the expiry of 90 days would render the requirements of notice nugatory (Factum, at para. 75). I do not agree. The mere fact that an extension and an anticipated date for completion is given after the expiry of 90 days does not eliminate its value in keeping the parties informed of the progression of the process. As the Commissioner noted, in most cases that progress to an inquiry, the parties will be involved in the process and will know that it will not be completed within 90 days (*Order F2006-031*, at para. 58). Even if provided after 90 days, the notice of extension, which includes an anticipated date for completion, still provides information to the parties about how the matter is progressing and when the parties can expect it to be completed.

[65] The ATA argues that the principle of statutory interpretation, *expressio unius est exclusio alterius*, leads to the conclusion that an extension must be made before the expiry of 90 days: when the legislature intended to allow an extension to be made either before or after the expiry of a time period; it said so expressly. The now repealed s. 54(5)

PIPA authorized a court to "on application made either before or after the expiry of the period referred to in subsection (3) [i.e., 45 days], extend that period if the court considers it appropriate to do so". According to the ATA, absence of such language in s. 50(5) *PIPA* necessarily implies that the legislature did not intend for the Commissioner to be able to extend the period for completion of an inquiry "before or after" the 90-day period has expired (Factum, at para. 76).

[66] This argument, while having some merit, is far from determinative. As Justice Berger pointed out, there are also many statutory provisions in Alberta that expressly restrict extensions to those granted before expiry of a time period (at para. 57), citing *Credit Union Act*, R.S.A. 2000, c. C-32, s. 13; *Expropriation Act*, R.S.A. 2000, c. E-13, s. 23, *Garage Keepers' Lien Act*, R.S.A. 2000, c. G-2, s. 6(3); *Insurance Act*, R.S.A. 2000, c. I-3, s. 796; *Land Titles Act*, R.S.A. 2000, c. L-4, s. 140; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80(3); and *Loan and Trust Corporations Act*, R.S.A. 2000, c. L-20, s. 257). I agree with Justice Berger that, "when ... the provision is silent as to when an extension of time can be granted, there is no presumption that silence means that the extension must be granted before expiry" (para. 58). I am therefore unable to conclude that the *expressio unius* principle renders the adjudicator's interpretation unreasonable.

[67] The Commissioner developed his analysis by relying on established principles of statutory interpretation to resolve any potential ambiguity through a purposive interpretation of the provision. He explained:

> To the extent that there is any ambiguity, by interpreting section 69(6) purposively as I will do below, the provision allows me to extend the time after the 90-day period expires.
>
> In Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes,* 4th Edition, (Markham, Ontario: Butterworths Canada Ltd., 2002), the author quotes Duff C.J. in *McBratney* v. *McBratney* (1919), 59 S.C.R. 550. Duff, C.J. set out the principles that govern judicial reliance on purpose in interpretation, in order to resolve ambiguity. The first of these principles set out by Ruth Sullivan at page 219 is:
>
> > If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted. [paras. 54-55]

[68] Referring to s. 2(b) *FOIPA*, the Commissioner affirmed that the purpose of *FOIPA* was "to provide a mechanism for controlling the collection, use and disclosure of personal information by public bodies", which *FOIPA* achieves "by giving [the Commissioner] the power to review the collection, use and disclosure of personal information" (para. 57). In his view, the specific purpose of s. 69(6) *FOIPA* was "to ensure that such reviews are conducted in a timely way, and also that parties are kept aware of the timing of the process so they may participate and plan their affairs accordingly" (para. 57). The purpose of *FOIPA* is uncontroversial, as it is expressly articulated at s. 2(b). I consider the Commissioner's view of the purpose of s. 69(6) *FOIPA* to be reasonable. It is similarly reasonable to determine that the purpose of s. 50(5) *PIPA* is to ensure timely completion of reviews and to keep the parties informed about the process.

[69] According to the Commissioner, "[i]n most cases that advance to inquiry ... at the time the 90-day period expires, the inquiry process has been fully engaged and is progressing with the participation of the parties. Because they are involved, the parties are fully aware that the process will continue beyond 90 days" (para. 58). For this reason, the Commissioner did "not believe that the goal of a timely resolution of issues, and of keeping the parties informed, would be advanced by requiring [him] to formally communicate to the parties within 90 days something they already know: that the matter will not be completed within 90 days" (para. 58).

[70] The Commissioner then addressed the practical difficulty of satisfying the s. 69(6)(b) *FOIPA* requirement to

provide an anticipated date of completion with the extension if the extension must necessarily be made within 90 days. He pointed out that s. 68 *FOIPA* empowers him to authorize a mediation upon receipt of a request for review. The mediation itself could take up some or all of the 90 days. If the mediation is unsuccessful or mediation is not authorized, the matter would move to inquiry. An inquiry must accord the parties procedural fairness, which can mean accommodating requests for adjournments, to adduce further evidence and to adjourn to review and make submissions on the new evidence. In short, the Commissioner explained that "the parties, as much as [he], have carriage of the matter" and that "[t]he time within which the matter will be completed is largely determined by their actions, schedules and the issues they raise" (para. 62). For this reason, it may not be feasible for the Commissioner to provide an anticipated date for completion within 90 days and the parties are well aware of how the matter is progressing in any event (paras. 59-62).

[71] The Commissioner therefore concluded that

> ... neither the purpose of the [*FOIPA*] in general nor section 69(6) in particular is advanced by interpreting the provision as creating an absolute "deadline", beyond which a proceeding that is underway cannot continue unless I have, before the 90 days expires, expressly stated that the matter will continue beyond 90 days, and projected a new final date for completion. [para. 63]

[72] In my view, the Commissioner's reasoning in support of his conclusion that extending the period for completion of an inquiry after the expiry of 90 days does not result in the automatic termination of the inquiry under s. 69(6) *FOIPA* satisfies the values of justification, transparency and intelligibility in administrative decision making. The decision is carefully reasoned, systematically addressing: (i) the text of the provision, (ii) the purposes of *FOIPA* in general and of s. 69(6), in particular, and (iii) the practical realities of conducting inquiries drawn from the Commissioner's experience administering *FOIPA*. It was reasonable for the Commissioner's delegated adjudicator, in *Order P2008-005*, to adopt this detailed reasoning and apply it to s. 50(5) *PIPA*. I therefore have no difficulty concluding that there exists a reasonable basis for the adjudicator's implied decision in this case that extending the 90-day period after the expiry of that period did not terminate the process.

D. *The Mandatory/Directory Distinction Does Not Arise in This Case*

[73] The parties, the trial judge and the Court of Appeal all approached the timelines issue as though it engaged the distinction between mandatory and directory legislative provisions. R. W. Macaulay and J. L. H. Sprague succinctly explain the mandatory/directory distinction as follows:

> Where a provision is imperative it must be complied with. The consequence of failing to comply with an imperative provision will vary depending on whether the imperative direction is mandatory or directory. Failing to comply with a mandatory direction will render any subsequent proceedings void while failing to comply with [a] directory command will not result in such invalidation (although the person to whom the command was directed will not be relieved from the duty of complying with it.
>
> (*Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, pp. 22-126 to 22-126.1)

[74] This Court has previously expressed doubt as to the usefulness of the mandatory/directory distinction. In *British Columbia (Attorney General) v. Canada (Attorney General)*, 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41, Iacobucci J. affirmed that

> [T]he "mandatory" and "directory" labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result-oriented. ... Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from *Reference re Manitoba Language Rights*, [1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721], the principle is "vague and expedient" (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. [p. 123]

[75] In any event, the mandatory/directory distinction does not arise in this case. This distinction is concerned with the consequences of *failing to comply* with a legislative direction. Here, we are not dealing with the consequences of the Commissioner's failure to comply with s. 50(5) *PIPA*. Instead, we are concerned with interpreting the statute to determine when s. 50(5) *PIPA* requires the Commissioner to extend the period for completion of an inquiry. The issue was not "what is the consequence of non-compliance with the provision?", but "did the adjudicator comply with the provision?".

[76] Therefore, I do not agree with Marshall J. that the finding in *Kellogg Brown and Root Canada* that the requirements of s. 50(5) *PIPA* are mandatory is "entirely applicable here" (para. 12). Rather, I would adopt the adjudicator's analysis in *Order P2008-005* in which she explains that *Kellogg Brown and Root Canada* has no application to a case such as this one where the Commissioner provides an extension after 90 days. The decision in that case was premised on the fact that *no time extension was ever* issued (at para. 27, citing para. 14 of *Kellogg Brown and Root Canada*). For that reason, the consequences of non-compliance with s. 50(5) *PIPA* arose in *Kellogg Brown and Root Canada*, but they do not arise here. As the matter is not before this Court, it is not necessary to comment on the conclusion in *Kellogg Brown and Root Canada* that s. 50(5) *PIPA* imposes a mandatory direction.

V. Conclusion

[77] I would allow the appeal with costs in this Court and in the Court of Appeal and reinstate the adjudicator's decision on the timelines issue. In accordance with the recommendation of the Commissioner, the matter is remitted to the chambers judge to consider the issues not previously dealt with and resolved in the judicial review.

The reasons of Binnie and Deschamps JJ. were delivered by

BINNIE J. —

[78] My colleagues Rothstein J. and Cromwell J. have staked out compelling positions on both sides of the argument about the role, function and even the existence of "true questions of jurisdiction or *vires*". While I agree with much that is said by both colleagues, I find myself occupying a middle ground which, given the importance of the issue, I believe is worth defending. I therefore append these brief reasons concurring in the result.

[79] I agree with Cromwell J. that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and, more generally, to the rule of law. Administrative tribunals operate within a legal framework which is both dictated by s. 96 of the *Constitution Act, 1867*, and limited by their respective statutory mandates. The courts, not the tribunals, determine the outer limits of those mandates. Cromwell J. puts the point succinctly, at para. 98, when he writes

that within the limits imposed by the Constitution,

> [t]he fact that a provision is in the tribunal's own statute or statutes closely connected to its function with which it will have particular familiarity thus may well be an important indicator that the legislature intended to leave its interpretation to the tribunal. But there are legal questions in "home" statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal's delegated power are more likely to be set out.

[80] On the other hand, just because the notion of a "true question of jurisdiction or *vires*" works well at the conceptual level does not mean that it is helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision. On this point, Cromwell J. adopts, at para. 95, the deeply problematic statement by the *Dunsmuir* majority that jurisdiction should be understood in the "narrow sense of whether or not the tribunal had the authority to . . . decide a particular matter" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59). As Professor D. Mullan pointed out in "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at pp. 126-30, this formulation was not narrow but so broad as to risk bringing back from the dead the preliminary question jurisprudence from which Cromwell J. endeavours to dissociate himself, which reached its unfortunate zenith in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, 1970 CanLII 7 (SCC), [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, 1971 CanLII 1 (SCC), [1971] S.C.R. 756.

[81] In response to this controversy about *vires* and jurisdiction, Rothstein J. lays down the sweeping proposition that "it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal 'of its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review" (para. 34). Cromwell J. says, disapprovingly, that in the absence of further guidance, such a presumption is unlikely to be of "any assistance to reviewing courts" (para. 92). His solution, on the other hand, would be to return us to a "more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly" (para. 99). This "thorough examination" is to be based on a variation of the pragmatic and functional test associated with *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, as repositioned in *Dunsmuir*. I do not think, with respect, that generalities about "legislative intent" are any more likely to provide quick and straightforward "assistance to reviewing courts" than Rothstein J.'s offer of a presumption.

[82] It may be recalled that the willingness of the courts to defer to administrative tribunals on questions of the interpretation of their "home statutes" originated in the context of elaborate statutory schemes such as labour relations legislation. In such cases, the tribunal members were not only better versed in the practicalities of how the scheme could and did operate, but in many cases, the legislature tried to curb the enthusiasm of the courts to intervene by inserting explicit privative clauses. Over the years, acceptance of judicial deference grew even on questions of law (see e.g. *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557), but never to the point of presuming, as Rothstein J. does, that whenever the tribunal is interpreting its "home statute" or statutes, it is entitled to deference. It is not enough, it seems to me, to say that the tribunal has selected one from a number of interpretations of a particular provision that the provisions can reasonably bear, no matter how fundamentally the tribunal's legal opinion affects the rights of the parties who appear before it. On issues of procedural fairness or natural justice, for example, the courts should not defer to a tribunal's view of the extent to which its "home statute" permits it to proceed in what the courts conclude is an unfair manner.

[83] The middle ground between Cromwell J. and Rothstein J., it seems to me, lies in the more nuanced approach

recently adopted by the Court in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), 2011 SCC 53 ("*CHRC*"), where it was said that "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference" (para. 24 (emphasis added)). Rothstein J. puts aside the limiting qualifications in this passage when he comes to formulating his presumption, which is triggered entirely by the location of the controversy in the "home statute".

[84] *CHRC* is also helpful in emphasizing the expression "issues of general legal importance" and downplaying (while citing) the *Dunsmuir* majority's more extravagant requirement of a question of law "of central importance to the legal system as a whole" (para. 60). While judicial self-citation is generally to be avoided, I feel encouraged by *CHRC* to resuscitate what I said on this point in my concurring reasons in *Dunsmuir*:

> It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges. [para. 128]

I would interpret the reference in *CHRC* to "issues of general legal importance" as being to issues whose resolution has significance outside the operation of the statutory scheme under consideration. After all, some administrative decision makers have considerable legal expertise and resources. Others have little or none.

[85] What then is involved in a "reasonableness" review of a tribunal's interpretation of its home statute? The *Dunsmuir* majority said that "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions" (para. 47). It is clear that "the range of acceptable and rational solutions" is context specific and varies with the circumstances including the nature of the issue under review. In *CHRC*, the reviewing court was called on to judicially review a tribunal's decision that its home statute gave it the statutory power to award costs. On appeal, the Court applied a "reasonableness" standard (referring at several points to the issue being within the "core function and expertise of the Tribunal", e.g., at para. 25). The reasonableness analysis nevertheless followed the well-worn path of *Driedger*'s golden rule and *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983)). In other words, the intensity of scrutiny was not far removed from a correctness analysis, in my respectful opinion, just as was the case in *Dunsmuir* itself.

[86] In matters of general policy or broad discretion, on the other hand, the courts also apply "reasonableness" but with a much less aggressive attitude. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12, [2009] 1 S.C.R. 339, for example, the question was pure policy, namely whether Mr. Khosa had shown "sufficient humanitarian and compassionate considerations" to warrant, in the opinion of the immigration appeal board, discretionary relief from a removal order whose validity Mr. Khosa did not contest.

[87] In this case, the reasons of both Rothstein J. and Cromwell J. show a much more intense level of scrutiny of the issue before the Information and Privacy Commissioner than was the case in *Khosa*, and for good reason. "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense (or, as the *Dunsmuir* majority put it, assessing the "degree of deference" (para. 62)). Predictability is important to litigants and those who try to advise them on whether or not to initiate proceedings. It remains to be seen in future cases how the discretion of reviewing judges will be supervised at the

appellate level to achieve such predictability. The *Dunsmuir* majority noted that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the [administrative] decision-making process" (para. 47). Such values are no less important in the process of judicial review.

[88] All of this is challenging enough for the reviewing judge without superadding to the debate at the working level Cromwell J.'s search for the elusive "true" question of *vires* or jurisdiction. Accordingly, I support Rothstein J.'s effort to euthanize the issue (apart from legislative provisions which guarantee its survival, as in s. 18.1(4)(*a*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7). I would nevertheless respectfully part company with Rothstein J. in his effort to dilute the significance of expertise and general legal importance as conditions precedent to any deference to an administrative tribunal on matters of law, including the interpretation of its "home statute".

[89] The creation of a "presumption" based on insufficient criteria simply adds a further step to what should be a straightforward analysis. If the issue before the reviewing court relates to the interpretation and application of a tribunal's "home statute" and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness. Otherwise, in my respectful opinion, the last word on questions of law should be left with the courts.

The following are the reasons delivered by

CROMWELL J. —

I. Introduction

[90] I agree with the disposition of this appeal proposed by my colleague Rothstein J. and, for the most part, with his lucid and persuasive reasons. I respectfully do not agree, however, with some of my colleague's views set out, either expressly or by implication, in paras. 33-46.

[91] My colleague suggests that true questions of jurisdiction or *vires* arise so rarely when a tribunal is interpreting its home statute that it may be asked whether "the category of true questions of jurisdiction exists" and further that "the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review": para. 34. There is no indication of how, if at all, this *presumption* could be rebutted. I have two difficulties with this position.

[92] The first difficulty concerns elevating to a virtually irrefutable presumption the general guideline that a tribunal's interpretation of its "home" statute will not often raise a jurisdictional question. This goes well beyond saying that "[d]eference will usually result" with respect to such questions (as in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54) or that "courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority" (as in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 34). In my view this is no "natural extension" of the approach set out by the majority of the Court in *Dunsmuir*, as is made plain by the fact that my colleague does not cite a word from the majority judgment which supports his position. Creating a presumption without providing guidance on how one could tell whether it has been rebutted does not, in my respectful view, provide any assistance to reviewing courts. The second difficulty concerns the suggestion that jurisdictional questions may not in fact exist at all. Respectfully, these propositions undermine the foundation of judicial

review of administrative action.

[93] *Dunsmuir* was clear that at the heart of judicial review of administrative action is a balance between legality and legislative supremacy. On one hand, the principle of legality requires the courts to ensure that administrative tribunals and agencies exercise their delegated powers lawfully. This includes the requirement that "[a]dministrative bodies ... be correct in their determinations of true questions of jurisdiction or *vires*": *Dunsmuir*, at para. 59. In other words, there are some questions with respect to which the courts are obliged to substitute their understanding of the correct answer for the tribunal's understanding of the correct answer. On the other hand, the principle of legislative supremacy means that, in carrying out their functions, courts must be respectful of legislative intent that these bodies should be largely undisturbed by the courts in exercising those powers: para. 27. While courts have the constitutional responsibility "to review administrative action and ensure that it does not exceed its jurisdiction", they also must give effect to legislative supremacy by determining the applicable standard of judicial review by "establishing legislative intent": paras. 29–31.

[94] I agree that the use of the terms "jurisdiction" and "*vires*" have often proved unhelpful to the standard of review analysis. This, however, should not distract us from the fundamental principles: as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is "correct". These core principles of judicial review of administrative action were laid down by the Court as recently as the 2008 decision in *Dunsmuir*. I therefore can neither agree with my colleague that the fact that a legislative provision is in a "home statute" has become a virtually unchallengeable proxy for legislative intent nor join him in speculating about whether jurisdictional review even exists. The standard of review analysis not only identifies the limits of the legality of the tribunal's actions, but also defines the limits of the role of the reviewing court. The reviewing court cannot consider the "substantive merits" of a judicial review application or statutory appeal unless it identifies and applies the appropriate standard of review. That is what defines those "substantive merits".

II. Legislative Intent

[95] I begin with the significance of the terms "jurisdiction" and "*vires*". I remain of the view that true questions of jurisdiction or *vires* exist. As I will explain later in these reasons, the jurisprudence affirms that they do. However, for the purposes of the standard of review analysis, I attach little weight to these terms. They add little to the analysis, and can cause problems. Undue emphasis on the concepts they embody bedevilled administrative law with preliminary jurisdictional questions that allowed for undue interference with administrative decisions. This Court's jurisprudence has long eschewed an expansive approach to "jurisdiction" that animated early cases such as *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, 1970 CanLII 7 (SCC), [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, 1971 CanLII 1 (SCC), [1971] S.C.R. 756. As was wisely said in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, at p. 233, courts "should not be alert to brand as jurisdictional ... that which may be doubtfully so". In *Dunsmuir*, the Court repeated this sentiment and noted that such questions will be "narrow" and that jurisdiction should be understood in the "narrow sense of whether or not the tribunal had the authority to make the inquiry ... whether its statutory grant of power gives it the authority to decide a particular matter": para. 59.

[96] The touchstone of judicial review is legislative intent: *Dunsmuir*, at para. 30. (I put aside situations in which there is clear legislative intent to prevent judicial review of jurisdiction as such preclusion is not permitted as a matter of constitutional law: see, for example, *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220.) This focus means that whether a question falls into the category of "jurisdictional" is largely beside the point. What matters is whether the legislature intended that a particular question be left to the tribunal or to the courts.

[97] Where the existing jurisprudence has not already determined in a satisfactory manner the degree of deference

to be accorded to an administrative decision-maker operating in a particular statutory scheme, the courts are to apply a number of relevant factors to the case at hand, factors which include the presence or absence of a privative clause, the purpose of the tribunal as determined by interpretation of its enabling legislation, the nature of the question at issue and the expertise of the tribunal. These are the concrete criteria, clearly established by the Court's jurisprudence, which are used to identify questions that are reviewable for correctness because the legislature intended the courts to have the last word on what constitutes a "correct" answer. These questions may be called "jurisdictional": see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, at para. 28. However, labelling them as such does nothing to assist the analysis. I therefore agree with Rothstein J. to the extent that he considers that, as analytical tools, the labels of "jurisdiction" and "*vires*" need play no part in the courts' everyday work of reviewing administrative action.

[98] As the Court noted in *Dunsmuir*, "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54 (citations omitted)). The fact that a provision is in the tribunal's own statute or statutes closely connected to its function with which it will have particular familiarity thus may well be an important indicator that the legislature intended to leave its interpretation to the tribunal. But there are legal questions in "home" statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal's delegated power are more likely to be set out. The majority of the Court in *Dunsmuir* (at para. 59) identified an example of such a question by referring to *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), 2004 SCC 19, [2004] 1 S.C.R. 485. Writing for the Court, Rothstein J. identified another in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50 (CanLII), 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10, stating that "[t]he issue on this appeal is jurisdictional in that it goes to whether the [Canadian International Trade Tribunal] can hear a complaint initiated by a non-Canadian supplier". In reaching this conclusion, the Court noted that this standard of review had been determined *in a satisfactory manner* by the existing jurisprudence: para. 10. Recast to side-step the language of "jurisdiction" or "*vires*", these two cases demonstrate that there are provisions in home statutes that tribunals must interpret correctly.

[99] The point is this. The proposition that provisions of a "home statute" are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in "home" statutes are "exceptional" is not an answer to a plausible argument that a particular provision falls outside the "presumption" of reasonableness review and into the "exceptional" category of correctness review. Nor does it assist in determining by what means the "presumption" may be rebutted.

[100] The respondent's position in this case is that s. 50(5) of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, is a provision the Commissioner was obliged to interpret correctly. While the fact that this provision is in the Commissioner's "home" statute suggests caution in accepting that characterization of the provision, this alone does not relieve the reviewing court of examining the provision and the other relevant factors to determine the legislature's intent in relation to it.

[101] When this is done, my view is that the legislature did not intend to authorize judicial review for correctness of the Commissioner's interpretation of s. 50(5). The power to extend time is granted in broad terms in the context of a detailed and highly specialized statutory scheme which it is the Commissioner's duty to administer and under which he is required to exercise many broadly granted discretions. The respondent's contention that s. 50(5) is a provision whose interpretation is reviewable on a correctness standard should be rejected because, having regard to the nature of the statutory scheme, the nature of the Commissioner's broadly conferred duties to administer that highly specialized scheme, and the nature of the provision in issue, it was the legislature's intent to leave to the Commissioner the question of whether s. 50(5) allowed him to extend the time limit after the 90 days had expired. I therefore agree with my colleague's conclusion

that the applicable standard of review is reasonableness.

III. Jurisdictional Review

[102] I do not join my colleague in asking whether the category of true questions of jurisdiction exists. I have signalled above that the language of "jurisdiction" or "*vires*" might be unhelpful in the standard of review analysis. But I remain of the view that correctness review exists, both as a matter of constitutional law and statutory interpretation. This will be true, on occasion, with respect to a tribunal's interpretation of its "home" statute. As the Court affirmed in *Dunsmuir*, "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits": para. 31.

[103] In the face of such a clear and recent statement by the Court, I am not ready to suggest, as my colleague does, at para. 34, that this constitutional guarantee may in fact be an empty shell. To be clear, this constitutional guarantee does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard. *Dunsmuir* was clear and unequivocal on this point as the passage I have just cited demonstrates. I think it unfortunate that the Court should be seen to be engaging in casual questioning of the ongoing authority of what it said so clearly and so recently. Parliament and the legislatures, as a matter of constitutional law, cannot oust judicial review for correctness of a tribunal's interpretation of jurisdiction limiting provisions. Of course, there is no suggestion that this principle is engaged in this case.

IV. Conclusion

[104] I agree with Rothstein J. that the appeal should be allowed with costs in this Court and in the Court of Appeal; that the adjudicator's decision on the timeliness issue should be reinstated; and that the matter should be remitted to the chambers judge to consider the issues not dealt with and resolved in the judicial review proceedings.

Appeal allowed with costs.

Solicitors for the appellant: Jensen Shawa Solomon Duguid Hawkes, Calgary.

Solicitors for the respondent: Field, Edmonton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Information and Privacy Commissioner of British Columbia: Heenan Blaikie, Vancouver.

Solicitors for the intervener the B.C. Freedom of Information and Privacy Association: Hunter Litigation Chambers Law Corporation, Vancouver.

TAB 6

Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, 2011 SCC 59 (CanLII)

SUPREME COURT OF CANADA

CITATION: Nor-Man Regional Health Authority Inc. *v.* Manitoba Association of Health Care Professionals, 2011 SCC 59

DATE: 20111202
DOCKET: 33795

BETWEEN:

Nor-Man Regional Health Authority Inc.
Appellant
and
Manitoba Association of Health Care Professionals
Respondent
- and -
Attorney General of British Columbia
Intervener

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 62) Fish J. (McLachlin C.J. and LeBel, Deschamps, Abella, Rothstein and Cromwell JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

NOR-MAN REGIONAL HEALTH *v.* MAHCP

Nor-Man Regional Health Authority Inc. *Appellant*

v.

Manitoba Association of Health Care Professionals *Respondent*

and

Attorney General of British Columbia *Intervener*

Indexed as: Nor-Man Regional Health Authority Inc. *v.* Manitoba Association of Health Care Professionals

2011 SCC 59

File No.: 33795.

2011: October 20; 2011: December 2

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Labour Relations — Grievances — Arbitral award — Standard of review — Arbitrator imposing estoppel on union's claim for redress under collective agreement — Whether arbitral award applying common law or equitable remedy is reviewable on standard of reasonableness or correctness.

P contended that she was entitled, upon 20 years of employment, to a bonus week of vacation pursuant to the terms of the collective agreement between Nor-Man and P's Union. Her request was denied by Nor-Man. The arbitrator decided that the employer's practice of excluding casual service in calculating vacation benefits breached the terms of the collective agreement. However, the Union was barred by its long-standing acquiescence from grieving the employer's application of the disputed provisions of the collective agreement. The arbitrator held that the Union was estopped from asserting its strict rights under the disputed provisions of the collective agreement until the expiry of the agreement. The Union's application for judicial review was dismissed on the basis that the arbitrator's award was reasonable. The Court of Appeal held that correctness was the governing standard of review and it set aside the estoppel imposed by the arbitrator.

Held: The appeal should be allowed.

Broadly stated, the issue is whether arbitral awards that apply common law or equitable remedies are for that reason subject to judicial review for correctness. It is well established that, as a general rule, reasonableness is the standard of review governing arbitral awards under a collective agreement. The equitable remedy of estoppel imposed here by the arbitrator does not involve a question of central importance to the legal system as a whole that was beyond the expertise of the arbitrator. It therefore cannot be said to fall within that established category of question — nor any other — subject to review for correctness. Furthermore, a contextual analysis confirms that reasonableness, not correctness, is the appropriate standard of review. Deference is appropriate in this case.

Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord. Labour arbitrators require the flexibility to craft appropriate remedial doctrines when the need arises. Labour arbitrators are not legally bound to apply equitable and common law principles — including estoppel — in the same manner as courts of law. Labour arbitrators may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized. The broad mandate of arbitrators flows from the broad grant of authority vested in arbitrators by collective agreements, statutes such as *The Labour Relations Act* (*LRA*), and from their distinctive role in fostering peace in industrial relations. They are well equipped by their expertise to adapt the legal and equitable doctrines they find relevant within the sphere of arbitral creativity. The domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.

Here, the labour arbitrator's award can hardly be considered unreasonable. His reasons are not just transparent and intelligible, but coherent as well. The arbitrator adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the *LRA*, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of P's grievance. The arbitrator's reasons are amply sufficient to explain why he imposed the remedy of estoppel in this case.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), 2011 SCC 7, [2011] 1 S.C.R. 160; **referred to:** *Agassiz School Division No. 13 (Re)*, [1997] M.G.A.D. No. 61 (QL); *Manitoba (Department of Family Services and Housing) and C.U.P.E., Loc. 2153 (Murdock) (Re)* (2005), 142 L.A.C. (4th) 173; *Ryan v. Moore*, 2005 SCC 38 (CanLII), 2005 SCC 38, [2005] 2 S.C.R. 53; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), 2003 SCC 63, [2003] 3 S.C.R. 77; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC), [1997] 1 S.C.R. 487; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII),

2003 SCC 42, [2003] 2 S.C.R. 157; *Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 (CanLII), 2010 SCC 14, [2010] 1 S.C.R. 427; *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50.

Statutes and Regulations Cited

Labour Relations Act, R.S.M. 1987, c. L10, ss. 121, 128(2).

APPEAL from a judgment of the Manitoba Court of Appeal (Monnin, Steel and Freedman JJ.A.), 2010 MBCA 55 (CanLII), 2010 MBCA 55, 255 Man. R. (2d) 93, 486 W.A.C. 93, 319 D.L.R. (4th) 193, 194 L.A.C. (4th) 193, 5 Admin. L.R. (5th) 291, 85 C.C.E.L. (3d) 163, [2010] 7 W.W.R. 1, [2010] CLLC ¶ 220-034, [2010] M.J. No. 166 (QL), 2010 CarswellMan 217, reversing a decision of Bryk J., 2009 MBQB 213 (CanLII), 2009 MBQB 213, 243 Man. R. (2d) 281, 98 Admin. L.R. (4th) 266, [2009] CLLC ¶ 220-048, [2009] M.J. No. 289 (QL), 2009 CarswellMan 386. Appeal allowed.

Bryan P. Schwartz, William S. Gardner and Todd C. Andres, for the appellant.

Jacob Giesbrecht, for the respondent.

Jonathan Eades and Meghan Butler, for the intervener.

The judgment of the Court was delivered by

FISH J. —

I

[1] An experienced labour arbitrator endorsed in this case the union's interpretation of vacation benefit clauses in its collective agreement with the employer — but imposed an estoppel on the union's claim for redress.

[2] Essentially, the arbitrator held that the union was barred by its long- standing acquiescence from grieving the employer's application of the disputed provisions. Given the employer's consistent and open practice of calculating vacation entitlements as it did, and the employer's detrimental reliance on the union's acquiescence, it would be unfair, the arbitrator found, for the union to now hold the employer to the strict terms of the collective agreement in that regard.

[3] The union's application for judicial review was dismissed in the Manitoba Court of Queen's Bench on the ground that the arbitrator's award was reasonable 2009 MBQB 213 (CanLII), (2009 MBQB 213, 243 Man. R. (2d) 281). The Manitoba Court of Appeal held that *correctness* — not reasonableness — was the governing standard of review 2010 MBCA 55 (CanLII), (2010 MBCA 55, 255 Man. R. (2d) 93). Applying that standard here, the Court of Appeal set aside the estoppel imposed by the arbitrator.

[4] In my respectful view, the Court of Appeal erred in reviewing the arbitrator's decision for correctness: reasonableness is the applicable standard.

[5] Labour arbitrators are not legally bound to apply equitable and common law principles — including estoppel — in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.

[6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.

[7] The arbitrator's decision in this case falls well within those bounds. I would allow the appeal and restore his award.

II

[8] At the time of her grievance in July 2008, Jacqueline Plaisier had been employed continuously for 20 years — though at times only on a casual basis — by Nor-Man Regional Health Authority Inc. ("Nor-Man").

[9] Ms. Plaisier contended that she was entitled upon 20 years of employment to a "bonus" week of vacation pursuant to arts. 1104 and 1105 of the collective agreement between Nor-Man and Ms. Plaisier's union, the Manitoba Association of Health Care Professionals (the "Union"). Nor-Man denied her request on the ground that, in its view, Ms. Plaisier's time as a casual employee did not count for the purposes of art. 1105.

[10] Articles 1104 and 1105 of the collective agreement provided during the relevant period as follows:

> 1104 Employees shall be entitled to paid vacation, calculated on the basis of vacation earned at the following rates:
>
> | Length of Employment | Rate at which vacation earned |
> |---|---|
> | In the first (1st) to third (3rd) year inclusive | Twenty (20) working days per year* |
> | In the fourth (4th) to (10th) year inclusive | Twenty-five (25) working days per year |
> | In the eleventh (11th) to twentieth (20th) year inclusive | Thirty (30) working days per year |
> | In the twenty-first (21st) and subsequent years | Thirty-five working days per year |
>
> *for employees hired prior to August 31, 1989, the rate shall be "twenty-one" (21) days instead of

"twenty" (20).

. . .

1105 An additional week of paid vacation shall be granted to an employee in the year of her twentieth (20th) anniversary of employment, and at five (5) year intervals thereafter. Such additional vacation shall be taken in the vacation year during which the anniversary will occur. This provision shall apply to all employees employed on August 31, 1989. It ceases to apply to employees hired after August 31, 1989.

[11] In denying her request, Nor-Man advised Ms. Plaisier that her "anniversary of employment" under art. 1105 was, at the earliest, May 30, 1999 — the date she began to accrue seniority. Under the collective agreement, her casual employment did not count toward seniority. It therefore had no bearing, according to Nor-Man, on Ms. Plaisier's eligibility for a bonus week of vacation.

[12] Since 1988, Nor-Man had consistently applied arts. 1104 and 1105 according to the "seniority date" of its employees. And the Union had never challenged this practice until Ms. Plaisier's grievance — some twenty years and at least five collective agreements later.

III

[13] Ms. Plaisier's grievance went to arbitration under *The Labour Relations Act*, R.S.M. 1987, c. L10 (the "*LRA*"), before a sole arbitrator, R.A. Simpson. Two main issues were dealt with at the grievance arbitration: (1) What is the correct interpretation of arts. 1104 and 1105 of the collective agreement? and (2) Is the Union estopped from asserting its rights accordingly? ([2008] M.G.A.D. No. 30 (QL)).

[14] On the first issue, the arbitrator endorsed the Union's interpretation of arts. 1104 and 1105. He explained his conclusion this way:

> Length of employment is not necessarily synonymous with seniority, but is the period of time during which the employee has been continuously employed by the employer. . . . There are employment settings where each casual engagement may reflect a new employment relationship. There are employment settings where a change in status to or from casual and permanent will cause a break in the employment relationship. Here, no such break occurs. . . . Although there have been many changes in [Ms. Plaisier's] status throughout her career, she has been employed by the Employer since July 12, 1988. That would be her employment date for determining length of employment and anniversary of employment under Articles 1104 and 1105 of the Collective Agreement. [para. 89]

[15] After concluding that the Union's interpretation of arts. 1104 and 1105 was correct, the arbitrator declined to enforce them accordingly.

[16] On this branch of the grievance, the arbitrator reasoned as follows:

> Having regard to the Statement of Agreed Facts, the accompanying exhibits, and the viva voce testimony, the Employer's practice has been long standing, consistent, and open. All employees were made aware of the practice through the annual Employees Confirmation of Vacation Sheets, and all employees and the Union were made aware of the practice through the annual Seniority Reports, both provided and posted. Questions pertaining to the practice have been asked and answered. If the Union was not aware, it certainly ought to have been aware of the Employer's application of Articles 1104 and 1105. It would be unfair to permit the Union to enforce its interpretation of Articles 1104 and 1105. The Employer was entitled to assume that the Union had accepted its practice, and to rely on that acceptance in not seeking to negotiate a change or to exercise a right to effect a service break with a change in employment status. [para. 96]

[17] The arbitrator cited with approval two arbitral precedents in which the doctrine of estoppel was similarly applied in a labour relations context (*Agassiz School Division No. 13 (Re)*, [1997] M.G.A.D. No. 61 (QL) (Arbitrator Graham) ("*Agassiz*"), and *Manitoba (Department of Family Services and Housing) and C.U.P.E., Loc. 2153 (Murdock) (Re)* (2005), 142 L.A.C. (4th) 173 (Arbitrator Peltz) ("*Murdock*")).

[18] In both instances, the employer was found by the arbitrator to have applied the relevant clauses of its collective agreement incorrectly — in *Agassiz*, for at least 25 years; in *Murdock*, for at least three. And in both instances, estoppel was imposed against the union for reasons that in essence mirror the arbitral award in this case.

[19] Both arbitrators were alive to the foundational principles of estoppel. Essentially, they both found that the union was fixed with knowledge — constructive, if not actual — of the employer's mistaken application of the disputed clauses throughout the relevant time; that the union's silence amounted to acquiescence in the employer's practice; that this sufficiently fulfilled the intention requirement of estoppel; that the employer could reasonably rely on the union's acquiescence; that the employer's reliance was to its detriment; and that all of this had the effect of altering the legal relations between the parties.

[20] Thus, in *Murdock*, the arbitrator first reviewed in detail the essential elements of an estoppel, its effects, and the arbitral award in *Agassiz*. He then concluded as follows:

> ... there was a representation by silence in this case, sufficient to meet the test for an equitable estoppel and barring the Union from asserting its strict legal rights under Article 15.03(a) of the collective agreement. While the Union did not know about the practice, it had constructive or imputed notice. Under all the circumstances, it would be inequitable to allow the Union to enforce its rights against the Employer after a period of acquiescence which extended into collective bargaining. [p. 192]

[21] The arbitrator in this case applied *Agassiz* and *Murdock* to the facts as he found them and, as I have already mentioned, imposed an estoppel against the Union. This estoppel was to terminate upon the expiry of the collective agreement, on March 31, 2010.

[22] The Union's application for judicial review was dismissed in the Manitoba Court of Queen's Bench, where Bryk J. held that the appropriate standard of review was reasonableness. In his view, this followed from the existence of a privative clause in the *LRA* and the nature of the disputed issue — a mixed question of fact and law that was neither of central importance to the legal system as a whole nor beyond the expertise of the arbitrator.

[23] Bryk J. then concluded that the arbitrator's decision was not unreasonable. He found that it was intelligible, justifiable and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

[24] The Manitoba Court of Appeal held that Bryk J. had erred in applying the reasonableness standard of review to the arbitrator's finding of estoppel. In the court's view, correctness was the applicable standard since the arbitrator's finding of estoppel raised a question of law that was of central importance to the legal system as a whole and did not fall within the expertise of labour arbitrators (*Dunsmuir*, at paras. 55 and 60).

[25] The Court of Appeal then concluded that the arbitrator had misconstrued the doctrine of promissory estoppel. It held that promissory estoppel, as a matter of law, requires a finding that the promisor intended to affect its legal relations with the promisee. Yet here, the arbitrator had found only that the promisor (the Union) ought to have known how the promisee (Nor-Man) was calculating employees' vacation entitlements, and had made no finding as to the Union's intent.

[26] On this ground alone, the Court of Appeal set aside the arbitrator's finding of estoppel.

[27] For the sake of clarity, I pause here to mention that the arbitrator never mentioned "promissory estoppel". Nor did he purport to apply the doctrine of promissory estoppel as a matter of law. Rather, like the precedents on which he relied, the arbitrator simply referred to the remedy he awarded as an "estoppel".

[28] In fairness to the Court of Appeal, I acknowledge that the estoppel applied by the arbitrator resembles promissory estoppel more closely than any of the other estoppels identified by this Court in *Ryan v. Moore*, 2005 SCC 38 (CanLII), 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 52. It nonetheless remains *an arbitral remedy* and not a strict application by the arbitrator of the doctrine of promissory estoppel applicable in courts of law.

IV

[29] The standard of review applicable in this case is governed by *Dunsmuir*.

[30] *Dunsmuir* makes clear that "[a]n exhaustive review is not required in every case to determine the proper standard of review" (para. 57). A reviewing court should therefore first inquire "whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (*Dunsmuir*, at para. 62; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 24). Only where this "first inquiry proves unfruitful, [must courts] proceed to an analysis of the factors making it possible to identify the proper standard of review" (*Dunsmuir*, *ibid.*).

[31] Prevailing case law clearly establishes that arbitral awards under a collective agreement are subject, as a general rule, to the reasonableness standard of review.

[32] Stated narrowly, the issue on this appeal is whether the arbitrator's imposition of an estoppel brings his award within an exception to that general rule. Stated more broadly, the issue is whether arbitral awards that apply common law or equitable remedies are for that reason subject to judicial review for correctness.

[33] Stated either way, the issue comes before us squarely for the first time in this case. And, as we have seen, the

courts below reached opposing conclusions as to the governing standard of review.

[34] In this light, I think it best to adhere, in substance if not in form, to the analytical template set out in *Dunsmuir* and adopted in *Smith*. This will serve to explain why reasonableness — not correctness — is the appropriate standard in cases such as this. And it will help to determine whether the award conforms to that standard.

V

[35] An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'", or a "true question of jurisdiction or *vires*". It will be reviewable for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, at paras 58-61; *Smith*, at para. 26; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, *per* LeBel J.).

[36] The standard of reasonableness, on the other hand, normally prevails where the tribunal's decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at paras. 51 and 53-54; *Smith*, at para. 26).

[37] In this case, the Court of Appeal held, as mentioned earlier, that correctness was the governing standard because, in its view, the issue involved a question of central importance to the legal system as a whole that was beyond the expertise of the arbitrator.

[38] With respect, I see the matter differently. Our concern here is with an estoppel imposed as a remedy by an arbitrator seized of a grievance in virtue of a collective agreement. No aspect of this remedy transforms it into a question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" within the meaning of *Dunsmuir* (para. 60). It therefore cannot be said to fall within that established category of question — nor any other — subject to review for correctness pursuant to *Dunsmuir*.

[39] Moreover, the second step of the standard of review inquiry mandated by *Dunsmuir* — a contextual analysis — confirms that reasonableness, not correctness, is the appropriate standard of review.

[40] In proceeding to a contextual analysis, reviewing courts must remain sensitive to the tension between the rule of law and respect for legislatively endowed administrative bodies (*Dunsmuir*, at para. 27). Four non-exhaustive contextual factors have been identified in the jurisprudence to guide courts through this exercise: (1) the presence or absence of a privative clause; (2) the purposes of the tribunal; (3) the nature of the question at issue; and (4) the expertise of the tribunal (*Dunsmuir*, at para. 64).

[41] These contextual guideposts confirm that deference is appropriate in this case. As I noted earlier, they are of assistance as well in assessing the reasonableness of a contested arbitral remedy.

[42] As a starting point, it is well established that, as a general rule, reasonableness is the standard of review governing arbitral awards under a collective agreement: "This Court has often recognized the relative expertise of labour

arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference" (*Dunsmuir*, at para. 68).

[43] In this case, as we have seen, the Court of Appeal found that the arbitrator's imposition of an estoppel was an aspect of the award that fell outside the protected zone of deference. With respect, I disagree.

[44] Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.

[45] On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates — and well equipped by their expertise — to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

[46] This flows from the broad grant of authority vested in labour arbitrators by collective agreements and by statutes such as the *LRA*, which governs here. Pursuant to s. 121 of the *LRA*, for example, arbitrators and arbitration boards must consider not only the collective agreement but also "the real substance of the matter in dispute between the parties". They are "*not bound by a strict legal interpretation of the matter in dispute*". And their awards "provide a final and conclusive settlement of the matter submitted to arbitration".

[47] The broad mandate of arbitrators flows as well from their distinctive role in fostering peace in industrial relations (*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC), [1997] 1 S.C.R. 487, at para. 36; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 17).

[48] Collective agreements govern the ongoing relationship between employers and their employees, as represented by their unions. When disputes arise — and they inevitably will — the collective agreement is expected to survive, at least until the next round of negotiations. The peaceful continuity of the relationship depends on a system of grievance arbitration that is sensitive to the immediate and long-term interests of both the employees and the employer.

[49] Labour arbitrators are uniquely placed to respond to the exigencies of the employer-employee relationship. But they require the flexibility to craft appropriate remedial doctrines when the need arises: Rigidity in the dispute resolution process risks not only the disintegration of the relationship, but also industrial discord.

[50] These are the governing principles of labour arbitration in Canada. Their purpose and underlying rationale have long been well understood by arbitrators and academics alike. More than 30 years ago, Paul C. Weiler, then Chairman of the British Columbia Labour Relations Board and now Professor Emeritus at Harvard University, underlined their importance in a dispute of particular relevance here. He explained in the following terms why the doctrine of estoppel must be applied differently in a grievance arbitration than in a court of law:

> ... a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of

> problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in [*Corporation of the District of Burnaby and CUPE, Local 23,* [1978] 2 C.L.R.B.R. 99 at page 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship — all contrary to the objectives of the Labour Code"....
>
> (*Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.), at p. 320)

[51] Reviewing courts must remain alive to these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft labour specific remedial doctrines. Within this domain, arbitral awards command judicial deference.

[52] But the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.

[53] Other contextual factors favour judicial deference to labour arbitrators as they adopt and apply common law and equitable principles within their distinctive sphere: Section 128(2) of the *LRA* contains a privative clause in respect of labour arbitrators and boards of arbitration. They benefit from *institutional expertise* in resolving disputes arising under a collective agreement (*O.S.S.T.F., District 15*, at para. 37), even if they lack *personal expertise* in matters of law. *Dunsmuir* makes clear that, "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" (para. 68 (emphasis added)).

VI

[54] The respondent argues that the flexible application of estoppel in the field of labour relations is a matter best left to the legislature. I would reject that submission. The requisite legislative authority already exists: It is *inherent* in the statutory scheme of the *LRA* and similar statutes across the country that labour arbitrators are already authorized — subject to the constraints I mentioned earlier (at para. 6) — to apply general legal principles flexibly in resolving disputes arising under collective agreements. More particularly, arbitrators have a "statutory mandate … to fit the principle of estoppel into the special setting and policy objectives of the world of industrial relations" (*Re Corporation of the City of Penticton*, at pp. 319-20).

[55] The respondent also argues that *Toronto (City)* stands for the proposition that a labour arbitrator's application of common law doctrines must be correct. In my view, it does not. As we have seen, the application of general rules or

principles of law will not automatically be reviewed for correctness unless they raise legal issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" *(Toronto (City)*, at para. 62, *per* LeBel J.; *Dunsmuir*, at para. 60; *Smith*, at para. 26).

VII

[56] The labour arbitrator's imposition of estoppel in this case can hardly be considered unreasonable.

[57] As LeBel J. stated in *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 (CanLII), 2010 SCC 14, [2010] 1 S.C.R. 427, at para. 38, "[t]he concept of 'reasonableness' relates primarily to the transparency and intelligibility of the reasons given for a decision. But it also encompasses a quality requirement that applies to those reasons and to the outcome of the decision-making process". Similar guidance can be found in *Dunsmuir*, at para. 47.

[58] In my view, the labour arbitrator's reasons are not just transparent and intelligible, but coherent as well. They set out in detail the evidence, the submissions of the parties, and the arbitrator's own analysis. The arbitrator reviewed the decisions relied on by the parties, and he identified and applied the precedents he found relevant and persuasive. They are consistent with his decision, and his reasons are amply sufficient to explain why he imposed the remedy of estoppel in this case.

[59] With respect to substance, the respondent submits that the labour arbitrator did not make a factual finding that the Union intended to affect its legal relationship with Nor-Man, as required by the test for promissory estoppel laid down by this Court in *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50, at p. 57.

[60] I would reject that submission as well. The question is not whether the labour arbitrator failed to apply *Maracle* to the letter, but whether he adapted and applied the equitable doctrine of estoppel in a manner reasonably consistent with the objectives and purposes of the *LRA*, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of Ms. Plaisier's grievance.

[61] I am satisfied that he did.

VIII

[62] For all of these reasons, I would allow the appeal with costs and restore the labour arbitrator's award in its entirety.

Appeal allowed with costs.

Solicitors for the appellant: Pitblado, Winnipeg.

Solicitors for the respondent: Inkster, Christie, Hughes, Winnipeg.

Solicitor for the intervener: Attorney General of British Columbia, Victoria.

TAB 7

Indexed as:

Smith v. Alliance Pipeline Ltd.

Vernon Joseph Smith, Appellant;
v.
Alliance Pipeline Ltd., Respondent, and
Arbitration Committee, appointed pursuant to the National Energy Board Act R.S.C. 1985, c. N-7, Part V, Intervener.

[2011] 1 S.C.R. 160

[2011] 1 R.C.S. 160

[2011] S.C.J. No. 7

[2011] A.C.S. no 7

2011 SCC 7

File No.: 33203.

Supreme Court of Canada

Heard: October 5, 2010;
Judgment: February 11, 2011.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(111 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Administrative law -- Judicial review -- Standard of review -- Land expropriated by pipeline company pursuant to agreement -- Expropriated party not fully compensated and Pipeline

Arbitration Committee appointed pursuant to National Energy Board Act -- Queen's Bench action commenced by company and then discontinued -- First committee aborted and a second committee appointed -- Second committee awarding costs for proceedings before both committees and for court action -- Whether standard of reasonableness applicable to second committee's decision on costs -- National Energy Board Act, R.S.C. 1985, c. N-7, ss. 75, 99(1).

Administrative law -- Boards and Tribunals -- Jurisdiction -- Costs -- Land expropriated by pipeline company pursuant to agreement -- Expropriated party not fully compensated and Pipeline Arbitration Committee appointed pursuant to National Energy Board Act -- Queen's Bench action commenced by company and then discontinued -- First committee aborted and a second committee appointed -- Second committee awarding costs for proceedings before both committees and for [page161] court action -- Whether tribunal having jurisdiction to order such costs -- National Energy Board Act, R.S.C. 1985, c. N-7, ss. 75, 99(1).

Summary:

In 1998, the respondent, A, obtained approval from the National Energy Board to build a pipeline that would cross the farmland of S. A completed the pipeline in 1999, but failed to perform the agreed-upon reclamation work on the easement the following spring. S proceeded to do so on his own. A offered to pay only part of the invoice submitted by S. S filed a Notice of Arbitration, and a hearing took place before the first Pipeline Arbitration Committee. Before a decision was rendered, A decided to perform maintenance work on its easement and asked S for permission to use a portion of his private property that lay outside the company's right-of-way. S asked for prior compensation before giving his approval, and in response, A instituted proceedings before the Alberta Court of Queen's Bench seeking, among other things, unhindered access to S's land and an order that the first committee not render its decision until the Queen's Bench action was resolved. A eventually discontinued its action and ultimately paid less than one quarter of the fees and disbursements S had by then incurred in defending the action. Meanwhile, the arbitration proceedings failed to get resolved because one of the members of the first Arbitration Committee was elevated to the bench. A second Arbitration Committee was appointed and in his amended Notice of Arbitration, S sought compensation for his reclamation work as well as his costs before the first Arbitration Committee and for $16,222.57 in solicitor-client costs which was the balance of his legal expenses resulting from the discontinued Queen's Bench action. The second Arbitration Committee awarded him a portion of his costs from the first Arbitration Committee proceedings and the balance of his solicitor-client costs on the action and motion before the Court of Queen's Bench. On appeal by A, the Federal Court concluded that this decision was reasonable but on further appeal, the Federal Court of Appeal concluded that the second Arbitration Committee had erred.

Held: The appeal is allowed and the decision of the second Arbitration Committee is restored with costs to S throughout, on a solicitor-client basis.

[page162]

Per McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ.: Applying the analytical framework of *Dunsmuir*, it is clear that the governing standard of review is reasonableness. The second committee was interpreting its home statute which usually attracts a reasonableness standard of review. Moreover, the committee was interpreting s. 99(1) of the *National Energy Board Act* ("*NEBA*"), a provision of its home statute regarding awards for costs. Awards for costs are invariably fact-sensitive and generally discretionary. The statutory language involved reflects a legislative intention to vest in arbitration committees sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve. In discharging that responsibility, committees must interpret s. 99(1) in order to apply it in accordance with their statutory mandate. These considerations all fall within categories which according to *Dunsmuir* generally attract the standard of reasonableness. Cumulatively considered, they point unmistakably to that standard.

The impugned decision of the second committee satisfies that standard. The second committee reasonably found that it was entitled under s. 99(1) of the *NEBA* to make the impugned awards on costs. The committee's reasoning in interpreting and applying this provision is coherent. It acknowledged that it had awarded S compensation exceeding eighty-five percent of the amount offered by A, thereby triggering the application of s. 99(1). The reasonableness of the second committee's conclusion that s. 99(1) of the *NEBA* merits a broad reading accords with the plain words of the provision, its legislative history, its evident purpose, and its statutory context. Moreover, it rests comfortably on the foundational principle of full compensation that animates both the *NEBA* and expropriation law generally.

It is not open to dispute that S, as a matter of fact, incurred all of the costs he was awarded by the committee. The committee found those costs to have been reasonably incurred. The committee concluded, again reasonably, that S's costs before both arbitration committees and in the Queen's Bench all related to a single claim for compensation in respect of a single expropriation by a single expropriating party.

[page163]

In allowing the appeal and restoring the second committee's decision, S is also awarded his costs throughout, on a solicitor-client basis. In the context of modern expropriation law, where statutes authorize awards of "all legal, appraisal and other costs", Canadian jurisprudence and doctrine demonstrate that costs on a solicitor-and-client basis should generally be given. Awarding costs on a solicitor-client basis accords well with the object and purpose of the *NEBA*. Only this type of award can indemnify S as best one can for the inordinate amount of money -- to say nothing of time -- he has had to invest in what should have been an expeditious process. Lastly, S should not be made to bear the costs of what is clearly a test case for A.

Per Deschamps J.: While it is agreed that the proper standard of review in this case is reasonableness and that the decision of the second committee in making the costs award to S satisfied that standard, the same cannot be said for the proposition that an administrative decision-maker's interpretation of its home statute, absent indicia of its particular familiarity with the statute, attracts deference unless the question raised is constitutional, of central importance to the legal system or concerned with demarcating one tribunal's authority from another. On the contrary, principles of administrative law, jurisprudence and commentary support the position that according deference to an administrative decision-maker's interpretation of its home statute is anchored in the need to respect legislative intent to leave these interpretative issues to certain decision-makers when there is good reason to do so. Most of the time, the reason is that the decision-maker possesses expertise or experience that puts it in a better position to interpret its home statute relative to a court. There is no presumption of expertise or experience flowing from the mere fact that an administrative decision-maker is interpreting its enabling statute.

In *Dunsmuir*, various categories of question were articulated based on pre-existing jurisprudence in order to assist in resolving the standard of review. *Dunsmuir* does not, however, recognize a broad home statute category, but rather a category grounded in the relative expertise or experience of the decision-maker. According deference to an administrative decision-maker merely for the reason that it is interpreting its home statute and no constitutional question, centrally important legal question, or question about the limits [page164] of its authority *vis-à-vis* another tribunal is incomplete. Such a position is purely formalistic and loses sight of the rationale for according deference to an interpretation of the home statute that has developed in the jurisprudence: namely, that the legislature has manifested an intent to draw on the relative expertise or experience of the administrative body to resolve the interpretative issues before it. Such intent cannot simply be presumed from the creation of an administrative body by the legislature. Provided that no other category of question for resolving the standard of review is engaged and absent indicia of the decision-maker's familiarity with its home statute, courts should move to the second step of *Dunsmuir* and consider the contextual factors.

In the case at bar, there is no indication that Parliament intended the arbitration committee to have particular familiarity with its home statute, the *NEBA*. Arbitration committees are appointed *ad hoc* under the *NEBA* and while they may include practising lawyers, there is nothing to suggest -- in the legislative scheme or otherwise -- that they hold any sort of expertise or experience relative to a court when it comes to interpreting the *NEBA*. Though decisions of arbitration committees are subject to review on questions of law or jurisdiction, it is notable that Parliament grants a right of appeal from a committee decision to the Federal Court. In this appeal, deference should be accorded to the second committee, not because it interpreted its home statute, but because it exercised its statutorily conferred discretion to make an award of costs. *Dunsmuir* recognized that for matters of discretion, "deference will usually apply automatically". This, and not the mere fact that the second committee was interpreting its home statute, militates in favour of according deference.

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By Fish J.

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Canadian Union of Public [page165] Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Re Conger Lehigh Coal Co. and City of Toronto*, [1934] O.R. 35; *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712; *Irving Oil Co. v. The King*, [1946] S.C.R. 551; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; *Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc.* (1987), 14 B.C.L.R. (2d) 273; *Christian & Missionary Alliance v. Municipality of Metropolitan Toronto* (1973), 3 O.R. (2d) 655; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Campbell River Woodworkers' & Builders' Supply (1966) Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2004 BCCA 27, 22 B.C.L.R. (4) 210; *Thoreson v. Alberta (Minister of Infrastructure)*, 2007 ABCA 272, 79 Alta. L.R. (4) 75; *Town of Mahone Bay v. Lohnes* (1983), 59 N.S.R. (2d) 68, aff'd (1983), 59 N.S.R. (2d) 65; *Lohnes v. Town of Mahone Bay* (1983), 28 L.C.R. 338; *McKean v. Ontario (Ministry of Transportation)* (2008), 94 L.C.R. 185; *Bayview Builder's Supply (1972) Ltd. v. British Columbia (Minister of Transportation & Highways)*, 1999 BCCA 320, 67 B.C.L.R. (3d) 312; *Holdom v. British Columbia Transit*, 2006 BCCA 488, 58 B.C.L.R. (4) 207; *Hill v. Nova Scotia (Attorney General) (No. 2)* (1997), 155 D.L.R. (4) 767 (S.C.C.); *Foulis v. Robinson* (1978), 92 D.L.R. (3d) 134.

By Deschamps J.

Referred to: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; [page166] *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Noel, Nadon and Pelletier JJ.A.), 2009 FCA 110, 389 N.R. 363, 42 C.E.L.R. (3d) 1, [2009] F.C.J. No. 407 (QL), 2009 CarswellNat 836, [page167] reversing a decision of O'Keefe J., 2008 FC 12, 34 C.E.L.R. (3d) 138, 318 F.T.R. 100, [2008] F.C.J. No. 28 (QL), 2008 CarswellNat 35, which upheld a decision of the second Pipeline

Arbitration Committee. Appeal allowed.

Counsel:

Richard C. Secord, Meaghan M. Conroy and *Yuk-Sing Cheng*, for the appellant.

Munaf Mohamed and *Jillian Strugnell*, for the respondent.

No one appeared for the intervener the Arbitration Committee, appointed pursuant to the *National Energy Board Act*, R.S.C. 1985, c. N-7, Part V.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

FISH J.:--

I

1 The seeds of this dispute were sown in a thin layer of manure spread by the appellant on a strip of his land that the respondent was obliged to reclaim.

2 Pursuant to an expropriation agreement, the respondent had obtained a right-of-way over the land in question. The respondent failed to reclaim the land in a timely manner, as required by the agreement, and refused to fully compensate the appellant for having done so in its stead. The appellant turned to statutorily mandated arbitration for what was meant to assure an expeditious resolution of the dispute.

3 What ensued was anything but: Two Arbitration Committee hearings, one Court of Queen's Bench action, one judicial review, one appellate review proceeding, and thousands of dollars later, the appellant has only now reached the end of what should have been a short road to full compensation.

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4 Proceedings before the first Arbitration Committee were aborted and a second Committee was appointed. The second Committee awarded the appellant the costs he had incurred in asserting his claim before it. In addition, it awarded the appellant most of his costs on the proceedings before the first Arbitration Committee and the costs he had incurred in defending related proceedings instituted

by the respondent in the Court of Queen's Bench. These awards were upheld by the Federal Court on judicial review, but set aside by the Federal Court of Appeal.

5 In my view, the decision of the second Arbitration Committee should be restored. As we shall see, it was subject to intervention on judicial review only if it was found to be unreasonable.

6 I believe, on the contrary, that the Committee's decision is set out coherently and that its conclusions are entirely consistent with the statutory provisions it was bound to apply, notably ss. 75 and 99(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7 ("*NEBA*"). Section 75 expresses in statutory form the well-established principle that expropriating parties should be made economically whole "for all damage sustained by them by reason of [the expropriation]". In the same vein, s. 99(1) vests in Arbitration Committees a broad discretion in determining the incidental components of full compensation, which include "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred [by the expropriated party] in asserting that person's claim for compensation".

7 I see no basis for interfering with the Committee's application of these and other relevant provisions of the *NEBA* to the facts as it found them.

8 For these reasons, and the reasons that follow, I would therefore allow the appeal and restore the [page169] Arbitration Committee's award, with costs throughout on a solicitor-client basis.

II

9 In 1998, the respondent, Alliance Pipeline Ltd. ("Alliance"), obtained approval from the National Energy Board to build a pipeline that would cross the farmland of the appellant. As directed by the *NEBA*, the parties concluded easement agreements, which provided compensation for the expropriated land. They also signed releases which are not in issue before us.

10 Alliance completed the pipeline in 1999, but failed to perform the agreed-upon reclamation work on the easement the following spring, as Mr. Smith thought necessary. Mr. Smith thus proceeded to do so on his own. He submitted a $9,829 invoice to Alliance. Alliance offered to pay only $2,500.

11 Mr. Smith filed a Notice of Arbitration in August 2001, pursuant to Part V of the *NEBA*. A hearing took place on May 6, 2003, before a three-member Pipeline Arbitration Committee (the "First Committee") appointed by the Minister of Natural Resources ("Minister"), and the Committee reserved judgment.

12 In early June 2003, Alliance decided to perform maintenance work on its easement, pursuant to urgent recommendations of an assessment the company had commissioned a year earlier (but whose conclusions it had previously ignored). In order to access its easement, Alliance asked Mr. Smith for permission to use a 100-foot portion of his private property that lay outside the company's

right-of-way. Frustrated by the respondent's unwillingness to pay his previous claim, Mr. Smith asked for prior compensation before giving his approval. During the ensuing disagreement, Mr. Smith expressed his exasperation with Alliance employees in angry and threatening terms. A company land agent notified [page170] the RCMP, but after speaking with Mr. Smith, the police refused to lay charges.

13 Alliance then instituted proceedings before the Alberta Court of Queen's Bench. In its statement of claim, Alliance sought; (1) unhindered access to Mr. Smith's land; (2) a declaration that Mr. Smith's compensation claim before the First Committee was precluded by the parties' releases; and (3) an order that the First Committee *not* render its decision until the Queen's Bench action was resolved.

14 On August 7, 2003, Alliance filed a notice of motion seeking two interim injunctions: one to stay the First Committee proceedings, and another to compel Mr. Smith to give Alliance access to the easement. Madam Justice Nation dismissed Alliance's motion in October 2003 (2003 ABQB 843 (CanLII)) and awarded Mr. Smith party and party costs, which Alliance paid (A.R., vol. III, at pp. 59-62).

15 Alliance waited a year and a half before discontinuing its Queen's Bench action on March 17, 2005, in respect of which it paid Mr. Smith $4,565.97 in party and party costs, less than one quarter of the $20,788.54 in fees and disbursements he had by then incurred in defending the action.

16 Meanwhile, the arbitration proceedings failed to get resolved. On February 1, 2005, almost two years after the hearing but before any decision was rendered, the parties learned that one of the three members of the First Committee, Mr. John Gill, had been elevated to the bench. The First Committee thereby lost its quorum and the proceedings, in this matter and in 19 companion cases against Alliance, were thereupon aborted.

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17 The Minister appointed a new Arbitration Committee (the "Second Committee") on August 11, 2005. In his amended Notice of Arbitration, Mr. Smith again sought compensation for his reclamation work. However, he added claims for his costs before the First Committee and for $16,222.57 in solicitor-client costs - the balance of his legal expenses following Justice Nation's ruling.

III

18 After a five-day hearing, the Second Committee allowed most of Mr. Smith's claims. It also awarded him a portion of his costs from the First Committee proceedings and the balance of his solicitor-client costs on the action and motion before the Court of Queen's Bench.

19 On an appeal by Alliance to the Federal Court, pursuant to s. 101 of the *NEBA*, Justice O'Keefe concluded that the Second Committee's award of part of the costs incurred by Mr. Smith before the First Committee was *reasonable*. He also found that since Mr. Smith was forced to defend the action in order to preserve his claim before the Committee, his participation in the action was part and parcel of his claim for compensation pursuant to the *NEBA* and it was equally *reasonable* to award him his costs pursuant to s. 99(1) (2008 FC 12, 34 C.E.L.R. (3d) 138).

20 On a further appeal by Alliance to the Federal Court of Appeal, the court concluded that the Second Committee had erred in awarding Mr. Smith his costs before the First Committee and on the Queen's Bench action (2009 FCA 110, 389 N.R. 363). Speaking for the court on this point, Nadon J.A. found it unnecessary to determine whether reasonableness or correctness was the appropriate standard of review, since he would have set aside the Second Committee's [page172] decision no matter which standard of review he applied.

21 In short concurring reasons, Justice Pelletier reprimanded Alliance for its delaying tactics. He explained disapprovingly that it was Alliance who asked the First Committee "to refrain from deciding Mr. Smith's claim until the [action was] completed" (para. 70) and who "effectively stonewall[ed] Mr. Smith by reneging on its earlier position and commencing [an action before the Court of Queen's Bench]" (para. 72). In his opinion, Alliance could and should have left the issue of the releases to be determined by the First Committee.

IV

22 The overarching question before the Second Committee was whether "costs" in s. 99(1) of the *NEBA* refers solely to expenses incurred by an expropriated owner in the proceedings before it. On Alliance's appeal to the Federal Court, the reviewing judge was required to determine, as a threshold question, whether to apply the standard of *correctness* or the less demanding standard of *reasonableness* in scrutinizing the Committee's decision.

23 In this context, I think it important to reiterate here that the extensive and formulaic inquiries of the past have now been replaced by the broader and less cumbersome approach set out by the Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

24 Pursuant to *Dunsmuir*:

> ... the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [para. 62]

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Even when resort to these factors is required, it may not be necessary to consider them all (para. 64).

25 Accordingly, reviewing judges can usefully begin their analysis by determining whether the subject matter of the decision before them for review falls within one of the non-exhaustive categories identified by *Dunsmuir*. Under that approach, the first step will suffice to ascertain the standard of review applicable in this case.

26 Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

27 Applying this analytical framework here, I am satisfied that the governing standard of review is reasonableness.

28 In this case, the Committee was interpreting its home statute. Under *Dunsmuir*, this will usually [page174] attract a reasonableness standard of review (*ibid.* at para. 54). And nothing in these reasons or in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, recently decided, represents a departure from *Dunsmuir*.

29 Any doubt whether reasonableness is the applicable standard here can be comfortably resolved by other considerations.

30 First, the Committee was interpreting s. 99(1) of the *NEBA*, a provision of its home statute regarding awards for costs. Awards for costs are invariably fact-sensitive and generally discretionary.

31 Second, and more specifically, in fixing the costs that must be paid by expropriating parties, the Committee has been expressly endowed by Parliament with a wide "margin of appreciation within the range of acceptable and rational solutions" (*Dunsmuir*, at para. 47): the only costs that must be awarded under s. 99(1) are those "determined by the Committee to have been reasonably incurred". This statutory language reflects a legislative intention to vest in Arbitration Committees

sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve.

32 Third, in discharging that responsibility, Committees must interpret s. 99(1) in order to apply it in accordance with their statutory mandate, a process that will frequently raise "questions where the legal issues cannot be easily separated from the factual issues" (*Dunsmuir*, at para. 51).

33 These considerations all fall within categories which according to *Dunsmuir* generally attract the standard of reasonableness. Cumulatively considered, they point unmistakably to that standard.

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34 Conversely, it is clear that this case does not fall within any of the categories which, under *Dunsmuir*, attract a standard of correctness. The Committee's decision involved no constitutional matter or issue of general law "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (para. 60, citing *Toronto (City) v. C.U.P.E.*, at para. 62), nor did it purport to draw jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, at para. 61).

35 Alliance nonetheless submits that the decision of the Arbitration Committee is subject to review for correctness on two grounds: first, because it involves a true question of jurisdiction; second, because it raises an issue of law to which deference does not apply.

36 The jurisdictional ground is without merit. *NEBA* Arbitration Committees doubtless have "the authority to make the inquiry" whether "costs" under s. 99(1) refer solely to costs incurred in the proceedings before them, a determination that plainly falls within their "statutory grant of power" (*Dunsmuir*, at para. 59). I reiterate in this context the caution that courts should not "brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233, cited in *Dunsmuir*, at para. 35).

37 Characterizing the issue before the reviewing judge as a question of law is of no greater assistance to Alliance, since a tribunal's interpretation of its home statute, the issue here, normally attracts the standard of reasonableness (*Dunsmuir*, at para. 54), except where the question raised is constitutional, of central importance to the legal system, or where it demarcates the tribunal's authority from [page176] that of another specialized tribunal -- which in this instance was clearly not the case.

38 Finally, on this branch of the matter, Alliance argues that adoption of the reasonableness standard would offend the rule of law by insulating from review contradictory decisions by Arbitration Committees as to the proper interpretation of s. 99(1) of the *NEBA*. I am unable to share

the respondent's concern. In *Dunsmuir*, the Court stated that questions of law that are not of central importance to the legal system "may be compatible with a reasonableness standard" (para. 55), and added that "[t]here is nothing unprincipled in the fact that some questions of law will be decided on [this] basis" (para. 56; see also *Toronto (City) v. C.U.P.E.*, at para. 71).

39 Indeed, the standard of reasonableness, even prior to *Dunsmuir*, has always been "based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute" such that "courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41).

40 For the reasons explained, the governing standard in this case was reasonableness, not correctness. And I turn now to consider in this light whether the impugned decision of the Second Committee satisfies that standard.

V

41 As mentioned at the outset, the decisive issue on this appeal is whether the Second Committee could reasonably find that it was entitled under s. 99(1) of the *NEBA* to make the impugned awards on costs.

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42 Section 99(1) reads:

> **99.** (1) [Costs] Where the amount of compensation awarded to a person by an Arbitration Committee exceeds eighty-five per cent of the amount of compensation offered by the company, the company shall pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation.

43 The Committee's reasoning in interpreting and applying this provision is coherent. In granting Mr. Smith the disputed costs, it first acknowledged that it had awarded Mr. Smith compensation exceeding eighty-five percent of the amount offered by Alliance, thereby triggering the application of s. 99(1). Having identified a proper source of authority, it then assessed whether Mr. Smith had "reasonably incurred" the costs "in asserting [his] claim for compensation".

44 The Committee first found that the Court of Queen's Bench action was directly related to Mr. Smith's attempt to obtain compensation from Alliance, concluding that Mr. Smith had therefore incurred these costs reasonably. The Committee's conclusion flows logically from its findings of fact.

45 Second, the Committee decided that the first panel's loss of a quorum resulted in the nullification of some but not all of the original proceedings. On the one hand, it reasoned that the filings and legal work that retained their relevance during the second proceedings, such as the original Notice of Arbitration and reply, were proper bases for an award of costs. On the other hand, the Committee ruled that each party must absorb the costs of actual appearances before and correspondence with the first panel. The Second Committee's logic in awarding Mr. Smith a portion of the costs he incurred during the first arbitral proceedings is consistent with the record. It is not unreasonable.

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46 The reasonableness of the Second Committee's conclusion that s. 99(1) of the *NEBA* merits a broad reading accords, in my view, with the plain words of the provision, its legislative history, its evident purpose, and its statutory context. Moreover, it rests comfortably on the foundational principle of full compensation that animates both the *NEBA* and expropriation law generally.

47 The relevant words of s. 99(1) make it plain that the Committee was thus entitled indeed bound to order Alliance to pay Mr. Smith "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by [Mr. Smith] in asserting [his] claim for compensation".

48 It is not open to dispute that Mr. Smith, as a matter of fact, incurred all of the costs he was awarded by the Committee. The Committee found those costs to have been reasonably incurred. As mentioned earlier, the Committee concluded, again reasonably, that Mr. Smith's costs before both Arbitration Committees and in the Queen's Bench all related to *a single claim for compensation* in respect of *a single expropriation* by *a single expropriating party*. On a plain reading of s. 99(1), it was therefore open to the Committee to find that Mr. Smith was entitled to recover "all [of his] legal, appraisal and other costs" in asserting that claim.

49 The Committee's decision, moreover, is firmly rooted in the legislative evolution and history of the *NEBA*. In modern times, it is generally accepted that this is a relevant consideration in interpreting legislative intent (see R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 280, 577-78, 587-89 and 599-603). A brief overview of the *NEBA*'s statutory antecedents is not only appropriate, but particularly instructive.

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50 The goal of complete indemnification first appeared in the *NEBA* in 1981, when Parliament amended the statute to introduce most of what now constitutes Part V (*An Act to amend the*

National Energy Board Act, S.C. 1980-81-82-83, c. 80). Prior to these amendments, ss. 145 to 184 and 186 of the *Railway Act*, R.S.C. 1970, c. R-2, were imported directly into the *NEBA* (R.S.C. 1970, c. N-6, s. 75). Under those provisions, "[t]he costs of the arbitration" were in the discretion of the arbitrator and could be ordered against either party (*Railway Act*, s. 164(1); see *Re Conger Lehigh Coal Co. and City of Toronto*, [1934] O.R. 35 (H.C.J.), at pp. 43-44).

51 The 1981 amendments to the *NEBA* were inspired by the Law Reform Commission of Canada's review, in 1975, of expropriation in the federal context in its Working Paper 9, *Expropriation*. This was expressly acknowledged by the Minister who introduced the amendments. The proposed legislation, he told Parliament, "substantially incorporates all the major recommendations of the Law Reform Commission of Canada expressed in its 1975 working paper" (*House of Commons Debates*, vol. VII, 1st Sess., 32nd Parl., March 6, 1981, at p. 8006).

52 One of the Commission's recommendations was that owners not be precluded from receiving the compensation to which they were entitled by the financial burden of litigation. Ideally, said the Commission, expropriated owners should receive "full indemnity for all such costs" (p. 73). It also found that the *Railway Act* regime did not provide adequate compensation because "[b]y a quirk in the law, the word 'costs' in the Railway Act, as in many other acts, does not mean exactly what it says[; it] does not mean 'full costs'" (p. 74).

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53 Today, the principle of full indemnification appears explicitly in s. 75 of the *NEBA*, which provides, as I noted earlier, that a company "shall make full compensation ... for all damage sustained" by the expropriated owner. Parliament adopted this more comprehensive approach to indemnification by broadening the language of s. 99(1) from "costs of the arbitration" to "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation".

54 This amendment must be presumed to signify a clear and considered decision by Parliament to allow Arbitration Committees to exercise their full discretion in seeking to make expropriated owners whole (Sullivan, at pp. 579-82), and the historical context validates this presumption.

55 Moreover, the *NEBA* operates within the broader context of expropriation law, both federal and provincial. As early as 1949, this Court acknowledged the vulnerable position of expropriated owners. In *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712, at p. 715, Rand J. (Taschereau J. concurring) stated that no one should be "victimized in loss because of the accident that his land [is] required for public purposes". In the same case, Estey J., citing with approval the earlier reasons of Rand J. in *Irving Oil Co. v. The King*, [1946] S.C.R. 551, affirmed the right of an expropriated person under the relevant clause "to be made economically whole" (p. 717; see K. J. Boyd, *Expropriation in Canada: A Practitioner's Guide* (1988), at pp. 144-45).

56 More recently, in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at paras. 20-22, Cory J. (speaking for six of the seven-member panel) reaffirmed the principle of full compensation. Dealing there with Ontario's *Expropriations Act*, R.S.O. 1990, c. E.26, Justice Cory held that the Act, a remedial statute, [page181] "should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken" (para. 23).

57 Like various provincial expropriation statutes, the *NEBA* is remedial and warrants an equally broad and liberal interpretation. To interpret it narrowly, as the respondent in this case suggests, would in practice transform its purpose of full compensation into an unkept legislative promise.

58 By interpreting s. 99(1) as it did, the Second Committee can hardly be said to have exercised its statutory mandate unreasonably.

VI

59 The respondent challenges the reasonableness of the Committee's decision on four grounds. All four fail.

60 First, relying on *Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc.* (1987), 14 B.C.L.R. (2d) 273 (C.A.), the respondent argues that Mr. Smith is not entitled to costs before the First Committee because at common law a nullified arbitration proceeding cannot form the basis of an award for costs. This submission rests on the mistaken assumption that the principles governing costs on a consensual arbitration likewise apply under the *NEBA*. They do not. Parliament has provided for a comprehensive compensatory scheme. The remedial principles of expropriation law - not the arm's length framework of commercial arbitration - govern the operation of the statute. Accordingly, an expropriating company can reasonably be made to bear the costs of procedural delays even where it is not at fault (see, e.g., *Christian & Missionary Alliance v. Municipality of Metropolitan Toronto* (1973), 3 O.R. (2d) 655 (S.C., Taxing Office), at p. 657).

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61 Second, Alliance submits that its Queen's Bench action was unrelated to Mr. Smith's *assertion* of his "claim for compensation" under the *NEBA* because he was the *defendant* before the Court of Queen's Bench. It was not unreasonable for the Committee to ignore this exercise in semantics, focusing instead on both the substance of the respondent's Queen's Bench action and the purpose of s. 99(1) of the Act.

62 Third, the respondent submits that the Committee's decision is unreasonable because it amounts to "legislative gap filling". In my view, this submission fails as well. The *NEBA* is not underinclusive on the issue of costs. Section 99(1) is broadly framed because provisions of this sort

cannot enumerate exhaustively every cost they are meant to cover. It is therefore sufficient that the costs be found by the Committee, on a justifiable, transparent and intelligible basis (*Dunsmuir*, at para. 47), to have been reasonably incurred in asserting the claims for compensation that it was required to adjudicate. In discharging that duty here, the Second Committee did not "cros[s] the line between judicial interpretation and legislative drafting" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51).

63 Finally, Alliance argues that the Committee should have found that the matter of costs on the action was *res judicata* on a theory of issue estoppel. The company submits that because the Court of Queen's Bench had the power and discretion to award "all or part of the [appellant's] costs ... on a solicitor and client basis" pursuant to r. 601(2)(d)(ii) of the *Alberta Rules of Court*, Alta. Reg. 390/68, but chose not to do so - in part because Mr. Smith did not ask for them - an arbitral committee does not have the authority to revisit the issue.

[page183]

64 The test for issue estoppel was set out this way in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at paras. 25 and 33:

> The preconditions to the operation of issue estoppel [are]:
>
> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and,
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> ...
>
> ... If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied ... [References omitted; emphasis in original.]

65 In essence, the Committee concluded that Alliance's argument founders at the first step. The claim before Justice Nation was for litigation costs. The claim before the Second Committee was for costs in the broader sense contemplated by s. 99(1) of its governing statute.

66 The Second Committee had to assess the reasonableness of costs - legal, appraisal, or other - incurred by Mr. Smith in asserting his claim for compensation. As we have seen, in enacting s. 99(1) of the *NEBA*, Parliament, like provincial legislatures, has expanded the traditional, limited notion of legal costs to encompass "appraisal and other" costs. It is well established that "[a]n owner whose land has been taken involuntarily is entitled to indemnification for the necessary expenses of

pursuing his or her statutory rights to compensation", the only limitation being that "these expenses be reasonable" (*Campbell River Woodworkers' & Builders' Supply (1966) Ltd. v. British Columbia [page184] (Minister of Transportation & Highways)*, 2004 BCCA 27, 22 B.C.L.R. (4th) 210, at para. 11).

67 In *Thoreson v. Alberta (Minister of Infrastructure)*, 2007 ABCA 272, 79 Alta. L.R. (4th) 75, the Alberta Court of Appeal summarized in these terms the special nature of costs in the expropriation law context:

> Thus, a trial judge determining reasonable costs under section 39 [of the *Expropriation Act*, R.S.A. 2000, c. E-13] is not dealing simply with the usual order of civil costs that flow from litigation, nor does the judge have the same discretion with respect to those costs. A statutory right to legal, appraisal and other costs is something quite different from a determination of discretionary litigation costs by a trial judge, and while the judge must address the issue of reasonableness and special circumstances, these issues are addressed within the context of a recognition that the costs are part of the expropriation award. [Emphasis added; para. 23.]

68 Courts and expropriation tribunals in Nova Scotia and Ontario have adopted the same approach. In *Town of Mahone Bay v. Lohnes* (1983), 59 N.S.R. (2d) 68 (S.C.(T.D.)), in rejecting the Town's claim of title to property it otherwise intended to expropriate, Glube C.J.T.D. underlined the distinction between litigation costs in the civil proceedings before her and costs before the expropriation tribunal. Her order for judgment read in part:

> The plaintiff's action is dismissed with costs to the defendants, Philip L. K. Lohnes' Market Limited, to be taxed on a party and party basis, provided, however, that this award of party and party costs shall in no way preclude the defendants, Philip L. K. Lohnes and Lohnes' Market Limited, from seeking compensation before the Expropriation Compensation Board, pursuant to the *ExpropriationAct,1973*, for costs over [page185] and above the party and party costs awarded herein; and further provided that the defendants, Philip L. K. Lohnes and Lohnes' Market Limited, shall have all reasonable disbursements paid with respect to these proceedings. [Cited in *Town of Mahone Bay v. Lohnes* (1983), 59 N.S.R. (2d) 65 (S.C.(A.D.)), at para. 12; emphasis added.]

An appeal of this decision was dismissed with costs.

69 When it later heard Mr. Lohnes' claim, the Nova Scotia Expropriations Compensation Board adopted the Chief Justice's reasoning, concluding that the costs incurred to determine title "were necessary for the determination of compensation payable as envisaged by the *Expropriation Act, 1973*" (*Lohnes v. Town of Mahone Bay* (1983), 28 L.C.R. 338 (N.S.E.C.B.), at p. 343).

70 Similarly, in *McKean v. Ontario (Ministry of Transportation)* (2008), 94 L.C.R. 185 (O.M.B.), the Municipal Board awarded the McKeans the costs they had incurred on a preliminary court action regarding title to land expropriated by the Ministry of Transportation of Ontario. The Board rejected the Ministry's claim of issue estoppel and explained:

> No violence has been done to the principle of finality of litigation by virtue of these proceedings. The MTO has not been twice vexed for the same cause. This is because no Court has previously determined what costs were actually incurred by the owner of lands for the purposes of determining the compensation payable as remediation for land expropriation, as required by s. 32(1) of the *Expropriations Act*. [Emphasis added; p. 190.]

71 Although in that case the Superior Court had not awarded costs to the McKeans, the reasoning remains persuasive. The questions that a superior court answers regarding matters incidental but necessary to expropriation proceedings differ from [page186] those that a board or committee resolves pursuant to the expropriation statutes by which it is governed (see E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at pp. 505-6). Consequently, the doctrine of *res judicata* does not apply, and there is, *a fortiori*, no merit to the respondent's claim that Mr. Smith committed an abuse of process by asking for his costs on the action.

VII

72 For all of these reasons, I would allow the appeal, restore the Second Committee's decision and, in virtue of s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, award the appellant his costs throughout, on a solicitor-client basis.

73 This award is justified for four reasons.

74 First, in the context of modern expropriation law, where statutes authorize awards of "all legal, appraisal and other costs", Canadian jurisprudence and doctrine demonstrate that "costs on a solicitor-and-client basis should generally be given" (*Bayview Builder's Supply (1972) Ltd. v. British Columbia (Minister of Transportation & Highways)*, 1999 BCCA 320, 67 B.C.L.R. (3d) 312, at para. 3, citing Todd, at p. 526; see also *Holdom v. British Columbia Transit*, 2006 BCCA 488, 58 B.C.L.R. (4th) 207, at para. 11, and *Hill v. Nova Scotia (Attorney General) (No. 2)* (1997), 155 D.L.R. (4th) 767 (S.C.C.)).

75 Second, awarding costs on a solicitor-client basis accords well with the object and purpose of the *NEBA*, as reflected in s. 75.

76 Third, this is a case in which "justice can only be done by a complete indemnification for costs" (*Foulis v. Robinson* (1978), 92 D.L.R. (3d) 134 [page187] (Ont. C.A.), at p. 142). Only this type of award can indemnify Mr. Smith as best one can for the inordinate amount of money - to say nothing of time - he has had to invest in what should have been an expeditious process.

77 Lastly, Mr. Smith should not be made to bear the costs of what is clearly a test case for the respondent. Mr. Justice Gill's appointment to the bench ended 19 other arbitration proceedings against Alliance before the First Committee. Mr. Smith, on the other hand, has sought nothing more than to resolve a decade-old disagreement over reclamation work worth a few thousand dollars.

The following are the reasons delivered by

78 DESCHAMPS J.:-- Deference towards administrative bodies raises important issues, both of a political and legal theoretical nature. This Court has not dealt with this topic lightly, sometimes struggling to find a balance between deferring to the expertise or experience of many of these administrative bodies and reviewing the limits to their decision-making authority under the rule of law. A consistent holding of this Court has been, and continues to be, that legislative intent should, within the confines of constitutional principles, ultimately prevail. In the case at bar, the issue of deference is shaped narrowly: Should an administrative decision-maker's interpretation of its "home" statute usually result in a court deferring to that interpretation - through the adoption of a standard of review of reasonableness - based on a presumption that the decision-maker has particular familiarity with its home statute?

79 I have had the benefit of reading the reasons of my colleague Justice Fish. I agree with his conclusion that the proper standard of review in this case is reasonableness. I also agree that the decision [page188] of the second Pipeline Arbitration Committee ("Second Committee") in making the costs award to Mr. Smith pursuant to s. 99(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7 ("*NEBA*"), satisfied that standard, for the reasons he indicates. I part company with my colleague only with respect to his rationale for finding that the standard of reasonableness applies to the Second Committee's decision, particularly as expressed in paras. 28 and 37 of his reasons.

80 Respectfully, I do not accept the proposition advanced by Fish J. under the auspices of applying para. 54 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, namely that an administrative decision-maker's interpretation of its home statute, absent indicia of its particular familiarity with the statute, attracts deference unless the question raised is constitutional, of central importance to the legal system or concerned with demarcating one tribunal's authority from another. On the contrary, principles of administrative law expressed in jurisprudence and commentary support the position that according deference to an administrative decision-maker's interpretation of its home statute is anchored in the need to respect legislative intent to leave these interpretative issues to certain decision-makers when there is good reason to do so. Most of the time, the reason is that the decision-maker possesses expertise or experience that puts it in a better position to interpret its home statute relative to a court. There is no presumption of expertise or experience flowing from the mere fact that an administrative decision-maker is interpreting its enabling statute. It follows that when a decision-maker does not have particular familiarity with its home statute, and no other precedent-based category of question attracting a standard of reasonableness applies, then a standard of review analysis should be undertaken in order to make a contextually sensitive decision on the proper standard (*Dunsmuir*, at paras. 62-64).

[page189]

I. Back to *Dunsmuir*

81 *Dunsmuir* represents this Court's most recent effort to simplify the test for ascertaining the standard of review applicable to administrative decision-making. The test set forth by the majority in that case has two steps:

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [para. 62]

82 As noted in *Dunsmuir*, "[a]n exhaustive review is not required in every case to determine the proper standard of review" (para. 57). Accordingly, various categories of question were articulated based on pre-existing jurisprudence in order to assist in resolving the standard of review at the first step, obviating the need to move to the second step and consider the contextual factors, which are: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of its enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal (*Dunsmuir*, at para. 64).

83 It is important that the Court's elaboration of categories of question should not be turned into a blind and formalistic application of words rather than principles. The parties to any adjudication must be able to understand why deference is given to the decision of the administrative body considering their case.

84 The first-level category of question at issue here relates to an administrative decision-maker's interpretation of its home statute. For ease of reference, I set out the relevant language from para. 54 of *Dunsmuir* more fully:

> Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found [page190] in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39.

85 Textually, this language is capable of differing interpretations. On the one hand, the language

could be read broadly to capture any instance when the administrative decision-maker is interpreting its home statute; however, this interpretation does not sit well with any of the previous grounds that this Court has advanced for according deference.

86 On the other hand, the language could be read to capture those instances where the decision-maker actually has particular familiarity with the statute itself. I accept this latter interpretation. It constitutes one iteration of this Court's long-standing recognition of situations where administrative boards are owed deference because of their specific expertise or experience. It rests on a principled basis for deference instead of formalistic dicta unsupported by any good reason (for an additional argument based on textual interpretation of para. 54 of *Dunsmuir*, see R. W. Macaulay and J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, at p. 28-40.48).

87 Indeed, the two examples cited by the *Dunsmuir* majority following its reference to the home statute category at para. 54 clearly indicate that the administrative decision-maker actually needs to have particular expertise or experience in interpreting its home statute or statutes closely connected to its function. Importantly, both cases referred to, *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)* and *Toronto [page191] (City) Board of Education v. O.S.S.T.F., District 15*, involved labour boards with specialized expertise or experience.

88 In *Canadian Broadcasting Corp.*, the majority noted that "[t]he labour relations tribunal, in its federal and provincial manifestations, is a classic example of an administrative body which is both highly specialized and highly insulated from review" (para. 31). In that case, in addition to noting the existence of a broad privative clause, the majority comments that by virtue of the Canada Labour Relations Board's "specialized expertise, the Board is uniquely suited" (emphasis added) to determine the particular question before it (in that case, whether there had been interference with a trade union) and that this was "a question of law that Parliament intended to be answered by the Board, and not by the courts" (paras. 42-43). As such, the majority's remark in *Dunsmuir* emanates from a context where the administrative decision-maker was recognized as having specialized expertise in interpreting its home statute.

89 *Toronto (City) Board of Education* did not pertain to an administrative decision-maker's interpretation of its home statute - rather, it related to the second segment of the category mentioned in conjunction with the need for particular familiarity in para. 54 of *Dunsmuir*: the interpretation of a statute closely connected to a tribunal's function. At issue was an interpretation by a board of arbitration of a provision of the *Education Act*, R.S.O. 1990, c. E.2, which arose in the context of a labour grievance made by a teacher under a collective agreement. Significantly, the Court noted that it was unnecessary to even consider whether the arbitration board's interpretation of the *Education Act* was correct because the only issue related to the arbitration board's interpretation of "just cause" in the collective agreement (paras. 39-40). Ultimately, the arbitration board's interpretation [page192] was found to be patently unreasonable on the facts.

90 The value of *Toronto (City) Board of Education* stems from its pronouncement that "[t]he findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard" and its reference at para. 39 to *Canadian Broadcasting Corp.* for the proposition that "[a]n exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result." The Court observed that

> [t]here are a great many reasons why curial deference must be observed in such decisions. The field of labour relations is sensitive and volatile. It is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding. [Emphasis added; para. 35.]

In sum, as demonstrated by the two examples, para. 54 of *Dunsmuir* does not recognize a broad home statute category of question, but rather a category grounded in the relative expertise or experience of the decision-maker.

91 But beyond these two examples, neither of which resulted in deference being accorded to the administrative decision-maker for the mere reason that it was interpreting its home statute or a statute closely connected to its function, the result in *Dunsmuir* itself stands against the recognition of a broad "home" statute category of question that the reasons of my colleague would create, one that would not require the relative expertise or experience of the decision-maker. In *Dunsmuir*, the majority noted that the adjudicator, empowered by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25, was called upon to interpret provisions of its home statute and a related statute, the *Civil Service Act*, S.N.B. 1984, c. C-5.1. Reasonableness was not selected by the majority as [page193] the standard of review on the basis of the first-level category of question stemming from the decision-maker's interpretation of its home statute or a statute closely connected to its function; rather, this standard was selected after a contextual standard of review analysis that included a discussion about the significance of the adjudicator's appointment on an *ad hoc* basis by mutual agreement of the parties (paras. 66-71). In the end, the long-standing recognition of "the relative expertise of labour arbitrators" was only one contextual factor that suggested the application of the standard of review of reasonableness (para. 68); deference was not accorded merely because the home statute was being interpreted.

92 Ultimately, the development of any category of question that would tend to eliminate the need for a more fulsome analysis of the standard of review has to be grounded in a defensible rationale. As Professor Dyzenhaus aptly phrased it: "In short, formalism without substance is futile" (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 298). Where the existence of a category is applied as the basis for adopting a standard of review of reasonableness, the rationale for according curial deference to the administrative decision-maker should be evident. For this reason, I find it helpful to briefly review the development of deference in the context of judicial review of administrative

action.

II. Judicial Review and Deference to Administrative Decision-Makers

93 The expansion of the administrative state and the accompanying proliferation of administrative decision-making bodies have challenged courts to reconcile two duties that are often in tension: first, to faithfully apply the laws enacted by Parliament, and second, to ensure that the administrative bodies created by these laws do not overstep their legal boundaries.

[page194]

94 Prior to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*C.U.P.E.*"), courts frequently relied on the broad and somewhat technical notion of jurisdiction to resolve this tension in a manner that gave short shrift to indicators of legislative intent - such as privative clauses - which otherwise would seem to indicate that administrative decision-makers should enjoy some degree of deference (see the Honourable Madam Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at pp. 178-79, and the cases cited at fn. 9).

95 However, Dickson J.'s (as he then was) admonition in *C.U.P.E.* 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), ushered in an era of judicial deference to administrative decision-making. In *C.U.P.E.*, this meant that the Public Service Labour Relations Board was entitled to deference in interpreting its home statute not only because it was protected by a broad privative clause, but because

> [t]he labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area. [Emphasis added; pp. 235-36.]

96 Judicial review of administrative action in the years following *C.U.P.E.* was characterized by the movement away from formalistic notions of jurisdiction and towards a "pragmatic and [page195] functional approach" to the standard of review, which involved consideration of a number of contextual factors (see, e.g., *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048). The goal of this approach was to better focus the concept of deference around legislative intent, namely, "whether the legislator intended the tribunal's decision on these matters to be binding on the parties to the dispute" (*Bibeault*, at p. 1090) or, put another way, to determine which body Parliament

intended to be "best-situated to answer [the] question conclusively - the court or the tribunal?" (McLachlin, at pp. 180-81).

97 During this time, expertise played a key role in the decision to accord deference to administrative decision-makers. Though formally only one of the contextual factors to be considered, the Court held in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, that expertise "is the most important of the factors that a court must consider in settling on a standard of review" (para. 50). In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the majority elaborated on expertise, indicating that it must be understood "as a relative, not an absolute concept" (para. 33), and noted that once the expertise of the administrative decision-maker is established relative to a court, "the Court is sometimes prepared to show considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation" (para. 34).

98 In *Dunsmuir* itself, the Court continued to rely on relative expertise - along with the experience of administrative decision-makers - as a key rationale for according deference. The majority in *Dunsmuir*, drawing from Professor Mullan, explained deference in this way:

> Deference in the context of the reasonableness standard therefore implies that courts will give due [page196] consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime"... . In short, 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. [Emphasis added; citation omitted; para. 49.]

99 *Dunsmuir* retained the multi-pronged standard of review analysis, but it also attempted to simplify the analysis by articulating "categories of question" to resolve the standard of review on the basis of precedent. In my view, the jurisprudence makes clear that with respect to an administrative decision-maker's interpretation of its home statute, relative expertise or experience of the decision-maker is critical and cannot be overlooked if deference is to be categorically accorded. As noted by the majority in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 16, "[d]eference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise" (citing *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 28).

100 According deference to an administrative decision-maker merely for the reason that it is interpreting its home statute and no constitutional question, centrally important legal question, or question about the limits of its authority *vis-à-vis* another tribunal is incomplete. Such a position is purely formalistic and loses sight of the rationale for according deference to an interpretation of the home statute that has developed in the [page197] jurisprudence including *Dunsmuir*, namely, that the legislature has manifested an intent to draw on the relative expertise or experience of the administrative body to resolve the interpretative issues before it. Such intent cannot simply be presumed from the creation of an administrative body by the legislature. Rather, courts should look to the jurisprudence or to the enabling statute to determine whether it is established in a satisfactory manner that the decision-maker actually has a particular familiarity - or put another way, particular expertise or experience relative to a court - with respect to interpreting its home statute. If it is so established, as it typically is with labour boards, then deference should be accorded on the basis of this category of question. But if there is an absence of indicia of a given decision-maker's particular familiarity with its home statute, then, provided that no other category of question for resolving the standard of review is engaged, courts should move to the second step of *Dunsmuir* and consider the contextual factors.

101 There does not appear to be any jurisprudence of this Court post-*Dunsmuir* which supports the proposition advanced by my colleague Fish J. that any administrative decision-maker's interpretation of its home statute, without need for particular familiarity on the part of the decision-maker, attracts deference unless the question is constitutional, of central importance to the legal system or concerned with demarcating one tribunal's authority from another.

102 In *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195, at para. 21, the majority observed that "[w]hat is at issue here is the interpretation by the discipline committee, a body of experts, of its home statute ... . The legislature assigned authority to the Association, through the experience and expertise of its discipline committee, to apply - and necessarily interpret - the statutory mandate" (citations omitted; emphasis [page198] added). Notably, the dissenting reasons in *Proprio Direct* engage the majority on the very question of the discipline committee's relative expertise: "Although the Act the discipline committee had to apply was its constituting statute, the committee's particular expertise is limited to disciplinary matters. It has not been shown to have general expertise in statutory interpretation" (para. 66, *per* Deschamps J., dissenting (emphasis added)).

103 Next, in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 44, the majority notes that "*Dunsmuir* (at para. 54), says that if the interpretation of the home statute or a closely related statute by an expert decision-maker is reasonable, there is no error of law justifying intervention" (emphasis added).

104 In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, the majority of the Court stated that "[t]he inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally

apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority" (para. 34). While there is no express mention of the particular familiarity of the decision-maker (the Financial Services Tribunal) with its home statute in this passage, the presence of such familiarity can be readily inferred from the home statute itself, the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. Subsection 6(4) of that Act indicates that the Lieutenant Governor in Council is to appoint members to be a part of the tribunal "who have experience and expertise in the regulated sectors" and when assigning particular tribunal members to a panel to hear a dispute, s. 7(2) directs that the chair of the tribunal "shall take into consideration the requirements, if any, [page199] for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal". Moreover, the majority reasons in *Nolan* also cite the exact language from para. 54 of *Dunsmuir*, including the portion of that paragraph referring to "particular familiarity" (para. 31).

105 Most recently, in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, the Court commented on an interpretation by the Patented Medicine Prices Review Board of the phrase "sold in any market in Canada" found in its home statute, the *Patent Act*. While noting that the parties did not present any argument on the standard of review and proceeded on the basis of a correctness standard, Abella J. questioned that premise and observed at para. 34 that "[t]his specialized tribunal is interpreting its enabling legislation. Deference will usually be accorded in these circumstances: see *Dunsmuir*, at paras. 54 and 59".

106 Taken together, these cases reflect the imperative that if the standard of review is to be resolved in favour of reasonableness on the basis of a category of question without the need for a contextual standard of review analysis, the category must be firmly grounded in a clear rationale for deference. In the case of an administrative body interpreting its home statute, that rationale must be based upon clear legislative intent revealed by a privative clause (*Dunsmuir*, at para. 55, first factor), or by the discrete regime or question of law in which the decision maker has specialized expertise (*Dunsmuir*, at para. 55, second and third factors). A broad category of question that accords deference solely because the decision-maker is interpreting its home statute, without reference to the particular familiarity of the decision-maker with it pays lip service to legislative intent and creates what Professor Jacobs calls a "detrimental risk of sweeping a wide variety of issues into a single [page200] standard, without analysis of the expertise of the decision-maker" (L. Jacobs, "Developments in Administrative Law: The 2007-2008 Term - The Impact of *Dunsmuir*" (2008), 43 *S.C.L.R.* (2d) 1, at p. 31).

III. Application to This Appeal

107 Here, there is no indication that Parliament intended the Second Committee - or any Arbitration Committee - to have particular familiarity with its home statute, the *NEBA*. Indeed, there is no legislative requirement to that effect. Counsel at the hearing before our Court were questioned regarding the appointment of Arbitration Committees, and conflicting answers were given regarding the existence of a list of appointees and their particular expertise on matters subject to arbitration

under the *NEBA*.

108 At best, what can be said is that Arbitration Committees are appointed *ad hoc* under the *NEBA* by the Minister of Natural Resources and while they may include practising lawyers, there is nothing to suggest - in the legislative scheme or otherwise - that they hold any sort of expertise or experience relative to a court when it comes to interpreting the *NEBA*. This *ad hoc* arrangement is quite unlike that of the National Energy Board, also established under the *NEBA*, which the Act requires to consist of not more than nine permanent members who serve renewable terms of seven years (see *NEBA*, s. 3). Though decisions of Arbitration Committees and the National Energy Board are both subject to review on questions of law or jurisdiction, it is notable that Parliament grants a right of appeal from a Committee decision to the Federal Court, whereas an appeal from a decision of the Board lies to the Federal Court of Appeal, upon leave being granted (see *NEBA*, ss. 101 and 22(1)). Given the broad statutory right to [page201] appeal the decision of an Arbitration Committee, even using the concurring approach advocated by Binnie J. in *Dunsmuir* (at para. 146), there would be no deference presumptively owed to decisions of Arbitration Committees because of the mere fact that the legislature designated them - and not the courts - as the decision-makers of first instance. Moreover, in respect of the Board, s. 23(1) of the *NEBA* states that "[e]xcept as provided in this Act, every decision or order of the Board is final and conclusive." No similar provision exists with respect to Arbitration Committees.

109 The difference in the appointment processes for these two administrative bodies created under the same statute would logically result in the National Energy Board, as an institution, possessing greater expertise and experience under the *NEBA* regarding the matters it is directed to decide, as compared to Arbitration Committees. The different avenues by which the decisions of these two bodies may be reviewed also make it evident that Parliament intended decisions of the National Energy Board be shown greater deference than those of Arbitration Committees. This counsels against creating the broad category of question adopted by Fish J. that would accord deference to any administrative decision-maker's interpretation of its home statute except in a closed category of circumstances. I also reiterate that in *Dunsmuir*, where the adjudicator was selected *ad hoc* by mutual agreement of the parties, the majority did not rely solely on either a presumed or institutional expertise to interpret the home statute as the basis for reasonableness.

110 In this appeal, deference should be accorded to the Second Committee, not because it interpreted its home statute, but because it exercised its statutorily conferred discretion to make an award of costs. This should be considered along with this Court's observation in *Nolan* that costs awards are "quintessentially discretionary" (para. 126) and the [page202] recognition in *Dunsmuir* that for matters involving discretion, "deference will usually apply automatically" (para. 53). Thus, in the context of s. 99(1) of the *NEBA*, which directs an Arbitration Committee to award to an expropriated party "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred ... in asserting that person's claim for compensation", deference should be paid to the Second Committee's finding regarding the costs that it determined were reasonably incurred by Mr. Smith in asserting his claim for compensation. Such deference is warranted because of the

clear and unequivocal language of s. 99(1). In this respect, I agree with my colleague Fish J. when he notes, at para. 31 of his reasons, that this language "reflects a legislative intention to vest in Arbitration Committees sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve". This, and not the mere fact that the Second Committee was interpreting its home statute, militates in favour of according deference.

111 For these reasons, I would allow the appeal, with costs to Mr. Smith throughout on a solicitor-and-client basis.

Appeal allowed with costs.

Solicitors:

Solicitors for the appellant: Ackroyd, Edmonton.

Solicitors for the respondent: Bennett Jones, Calgary.

cp/e/qllls

TAB 8

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for leave to construct new 115kV transmission facilities in the Municipality of Red Lake, and other orders.

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION AND ORDER

The Proceeding

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Company") filed an application, dated April 25, 2011, with the Ontario Energy Board (the "Board") under section 92 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the *"Act"*). Goldcorp sought an order of the Board granting leave to construct the following transmission facilities in the Municipality of Red Lake:

- a new switchyard connecting Hydro One Networks Inc's ("Hydro One's") tap on its E2R 115 kV transmission line approximately 2 km southwest of Harry's Corner with the proposed 115 kV transmission line;
- a new 10.7 km 115 kV single circuit transmission line running from the switchyard to the to-be-constructed Balmer Complex Transformer Station; and
- a 115 kV/44 kV Transformer Station at Goldcorp's Balmer Complex.

The Board issued a Notice of Application and Hearing ("Notice") on April 29, 2011. The Notice was served on potentially affected and interested parties and was published in the Northern Sun News and the Wawatay News.

Following the publication of the Board's Notice, the Independent Electricity System Operator ("IESO"), Lac Seul First Nation ("LSFN") and Hydro One requested intervenor status and were granted such status. The Board also determined that LSFN is eligible to apply for an award of costs under the Board's *Practice Direction on Cost Awards.* The IESO and Hydro One indicated that they did not intend to seek an award of costs.

On May 26, 2011, the Board issued Procedural Order No. 1, which amongst other things, set out the list of approved intervenors and the schedule for interrogatories and submissions.

Pursuant to Procedural Order No 1, Board staff and LSFN filed each of their interrogatories on Goldcorp's evidence on June 9, 2011. Goldcorp filed its responses to all interrogatories on June 17, 2011.

The Board received the final submissions from LSFN and Board staff on June 28, 2011 and a final reply argument from Goldcorp on July 8, 2011.

Motions

Goldcorp Motions

Goldcorp filed two separate Notices of Motion. In the first motion, which was filed on the same date as the application, Goldcorp sought an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the Balmer Complex Transformer Station site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application.

In a Decision and Order dated April 29, 2011, the Board dismissed the motion. In making its determination the Board considered the requirements of section 21(4)(b) of the Act and found as follows:

> The Board cannot determine whether and to what extent any person, other than the applicant in this case, will be adversely affected by the outcome of this proceeding, without having provided notice in the Board's standard form of Notice and communicated in the Board's required methods. Therefore, the Board cannot at this time grant relief of the type sought by the Applicant.

The Board noted that it was issuing the Notice of Application and Letter of Direction in the main leave to construct application simultaneously with its Decision and Order on the Motion.

On May 3, 2011, the Board received a second Notice of Motion. In this second motion, Goldcorp sought an order to carry out the work contemplated in the original motion, however, the second motion was filed following the publication of the Board's Notice in the main leave to construct application. Goldcorp requested that the motion be heard orally and some ten days after the publication and service of the Board's Notice.

The Board convened an oral hearing on June 7, 2011 to hear the second motion. Goldcorp, LSFN and Board staff attended the oral hearing.

The Board issued its decision dismissing the motion on June 20, 2011. Copies of both decisions are attached as Appendix B and Appendix C to this order.

LSFN Motion

On June 27, 2011 LSFN filed a letter with the Board requesting access to Goldcorp's Mine Development Plan (the "Plan") which LSFN had asked for in interrogatory 16(A)(c). Goldcorp had refused to provide the Plan claiming that the Plan was subject to confidential communication privilege. LSFN took the position that Goldcorp had not requested confidentiality with respect to the Plan and further that LSFN had not had the opportunity to object to any such requests for confidentiality. LSFN requested a revision to Procedural Order No. 1 with respect to filing deadlines for submissions while the issue of confidentiality remained outstanding.

As noted above and in adherence to Procedural Order No.1 LSFN filed its final submissions on June 28, 2011.

On June 28, 2011 Goldcorp filed a letter objecting to LSFN's June 27, 2011 request. LSFN filed a further response dated July 4, 2011 and re-asserted the need to file the Plan.

In a letter dated July 5, 2011 the Board provided its response stating that it would not compel Goldcorp to file the Plan. The Board further stated:

> The Board notes that LSFN has filed its submissions in which it argues that need has not been established and that it is necessary to examine the Plan as part of the determination of need. Goldcorp could have chosen to file the Plan and sought confidential treatment. Instead it has indicated that it will not file the Plan voluntarily, even on a confidential basis. The Board will not compel Goldcorp to file the Plan and will address in its decision the issue of the sufficiency of the evidence in support of the application.

On July 8, 2011 the Board received a Notice of Motion from LSFN in relation to the same matter it had raised in its letter of June 27, 2011. In the Notice of Motion, LSFN stated that it had not had an opportunity to formally address the matter and to make complete submissions before the Board rendered its decision not to compel disclosure of the Plan. The motion was for:

- An order directing Goldcorp to provide full and adequate response to interrogatory 16(A)(c) and to file the Plan;
- Alternately, an order that Goldcorp file portions of the Plan that are not considered confidential;
- And, that the Board order Goldcorp to file the Plan on a confidential basis, and that the Plan be provided to parties that have executed the Board's Confidentiality Declaration and Undertaking pending the resolution of this matter.

The Board has addressed the motion under the Project Need section of this Decision and Order.

Decision of the Board

For the reasons that follow the Board grants Goldcorp leave to construct the facilities applied for in its application, subject to conditions.

Positions of Parties and Board Findings

Section 96(2) of the Act provides that for an application under section 92 of the Act, when determining if a proposed work is in the public interest, the Board shall only consider the interests of consumers with respect to prices and reliability and quality of electricity service, and where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. In the context of this application, the Board has considered the following categories of evidence in relation to its mandate under section 96(2):

- Project Need
- System Impact Assessment and Customer Impact Assessment
- Environmental Assessment, Land Matters and Permits
- Project Costs and Impact on Ratepayers

Project Need

Goldcorp submitted that the proposed transmission facilities are needed to meet its increasing electricity demand related to mining activities in the Red Lake area. Goldcorp's evidence is that the current peak demand for all of its complexes in Red Lake is 39.7 MVA and is forecast to increase to 50 MVA by 2015. Goldcorp's evidence further indicates that due to rising demand from other customers in the area and capacity limitations on the E2R line, Hydro One had imposed a limit of 41.7 MVA on Goldcorp's demand. Goldcorp submitted that it expected to exceed the imposed limit by 2012.

Goldcorp's evidence indicates that it had considered a number of alternatives to the proposed facilities, such as, obtaining additional supply from Hydro One, temporary use of diesel generation, on-site Natural Gas fired generators, wind and solar projects and conservation and demand management options. For each of the alternatives considered, Goldcorp explained why the alternatives were not appropriate and indicated that the building of the proposed transmission facilities was the most suitable alternative as it was technically feasible, made use of Goldcorp patented lands and available Crown lands and was supported by other users in the Red Lake area.

Goldcorp stated that the proposed facilities will also benefit other electricity customers in the area by improving the quality of electricity service and by freeing-up capacity at the Red Lake Transformer Station, which could be used to serve new customers. Goldcorp

also noted that the proposed facilities will allow it to avoid adverse operational and environmental effects of diesel generation and to meet the requirements of its Mine Development Plan, thereby creating employment opportunities in the Red Lake area.

LSFN submitted that the Board should not grant the relief sought by Goldcorp at this time.

LSFN argued that Goldcorp had not adequately demonstrated need for the proposed facilities and that Goldcorp's assertions regarding the benefits of the project, should be adopted with caution as they promote Goldcorp's self interest and not the broader public interest. With respect to the alternatives considered, LSFN submitted that Goldcorp's evidence lacked details and that Goldcorp had not fully considered all available conservation and demand management options, including lowering production. LSFN also submitted that the proposed facilities will likely not negate the need for diesel generation, noting that the System Impact Assessment Report had indicated that due to existing grid limitations, Goldcorp may have to arrange for additional supply "through other means, including from generators, not connected to the IESO-controlled grid".[1]

LSFN further submitted that the Board was being asked to approve a project that it knew little about. LSFN noted Goldcorp's refusal to provide the Mine Development Plan and argued that without the Plan, it was not possible to determine need or to test Goldcorp's load forecast.

Board staff submitted that Goldcorp had established need for the project and that the proposed facilities represented the best of the alternatives examined.

Goldcorp submitted that the Board should not accept LSFN's arguments. Goldcorp submitted that the question of need was not a determinative issue because under subsection 96(2) of the Act, the Board may only consider the interest of consumers with respect to prices and the reliability and quality of service. Goldcorp further submitted that there was no reason why Goldcorp, as a public-for-profit company, would invest millions in a project, if the project was not needed. Goldcorp also noted that LSFN had adduced no contrary evidence on the question of need and did not raise the matter at the oral hearing.

[1] Draft System Impact Assessment, p.i.

Goldcorp further submitted that LSFN's submissions did not directly address the question of need and are more emotive than material. In regards to the filing of the Plan, Goldcorp submitted that the Board had already ruled that it will not compel Goldcorp to file the Plan.

In the Board's view, the need for a project is a matter to be determined in the context of the Board's review of the interests of consumers with respect to "price". That is, if there is going to be any impact on "price" (i.e., impact on transmission rates), the Board will review the evidence of the applicant with respect to the costs for the project and any rate impacts against the evidence advanced by the applicant with respect to the need for the project. If the evidence demonstrates that the project is needed, then the Board must determine whether the price and, therefore, the rate impacts, if any, are commensurate with need. In section 92 applications, where the proponent is paying for a facility, the issue of impacts on ratepayers with regard to price does not surface.

However, where a proponent builds and then transfers a facility to a licensed transmitter (as is the case here), the rate impacts are addressed in the context of the Connection and Cost Recovery Agreement ("CCRA"). The Board notes that Goldcorp has provided assurances that the intent is for the CCRA, which will ultimately be entered into by Goldcorp and Hydro One, to hold provincial ratepayers harmless. The Board also notes that the terms of the CCRA are governed by the Transmission System Code and are a condition of Hydro One's licence. Further, parties will have an opportunity to examine the transfer of assets and the associated cost recovery in a future Hydro One rate application.

The issue of "price", (i.e. impacts on ratepayers) therefore does not arise in this case, and as a result the Board need not examine the issue of need in detail because it is not determinative. Certainly, even in the instance where there is no adverse impact on ratepayers, the Board would be unlikely to approve a project for which there was no demonstrable need. That is not the situation here. Goldcorp has provided evidence regarding its energy requirements. The Board finds that the evidence is sufficient.

LSFN's July 7th Motion for an Order compelling Goldcorp to provide the Plan either on a confidential or non-confidential basis is grounded on its assertion that "need' is a determinative factor in this application. The Board has determined that "need" is not a determinative factor in this application and therefore the Motion is hereby dismissed without a hearing.

System Impact Assessment (SIA) and Customer Impact Assessment (CIA)
The Board's filing requirements for leave to construct applications, specify that an applicant is required to file a SIA performed by the IESO and a CIA performed by the relevant licensed transmitter.

Goldcorp filed a draft SIA report and a draft CIA report. The SIA was performed by the IESO and the CIA was carried out by Hydro One. In response to a staff interrogatory, Goldcorp filed the final CIA.

Goldcorp submitted that the SIA confirms the need for the project and that the proposed facilities are adequate and will not adversely affect the IESO controlled grid, provided the conditions imposed by the IESO are met. Goldcorp submitted that the CIA confirms that the proposed transmission line will have a minimal impact on local supply facilities and on the reliability of service.

LSFN argued that the proposed facilities do not meet Goldcorp's long-term electricity requirements and that further upgrades would be needed to achieve the intended purpose. LSFN also submitted that it was unclear as to who would pay for these future upgrades. LSFN further submitted that there was no evidence on the impact on reliability and quality of service and that it was notable that Goldcorp had only received conditional approval in the SIA.

Goldcorp submitted that the proposed facilities are required to relieve the existing bottleneck at the Red Lake Transformer Station and if approved, would meet that intended purpose. With respect to LSFN's concerns regarding future upgrades, Goldcorp submitted that these would be resolved through discussions with Hydro One and others and would be the subject of future applications.

The purpose of the SIA was to study how the supply capability of the circuit E2R can be expanded beyond the existing 57 MVA threshold.[2] In that regard, the SIA concludes that the proposed facilities will not result in "any significant adverse impacts to the IESO controlled grid, provided that the requirements listed in this report are met". Similarly, the CIA concludes that the proposed transmission line will have a minimal impact on local supply facilities, no adverse affect on short circuits and will not materially affect the reliability of Hydro One's E2R line.[3]

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[2] Draft System Impact Report, Ex B/T6/S3, p. i
[3] Final Customer Impact Assessment Report, dated June 10, 2011

The SIA and the CIA demonstrate that the project will have no adverse impact on the reliability and quality of electricity supply as long as Goldcorp fulfills the requirements included in each report. The Board's order will be conditioned accordingly to ensure theses requirements are fulfilled and the final SIA is filed.

LFSN raises concerns about potential future projects. The Board finds that future projects are beyond the scope of this proceeding. In any event, any concerns regarding future projects can be addressed at the appropriate time.

Environmental Assessment ("EA"), Land Matters and Permits

Goldcorp's evidence indicates that it was required to seek project approval under two Class EAs - *Class EA for Minor Transmission Facilities* and *Class EA for Resource Stewardship and Facility Development.* The pre-filed evidence notes that the project received approval from the Ministry of the Environment under the *Class EA for Minor Transmission Facilities* and that approval from the Ministry of Natural Resources (MNR) for the *Class EA for Resource Stewardship and Facility Development* was still pending. In its pre-filed evidence, Goldcorp indicated that approval from the MNR was expected by April 26, 2011. At the hearing of the motion, Goldcorp informed the Board that the MNR's approval and the issuance of permits was delayed until the MNR was satisfied that appropriate consultation with the affected First Nations had occurred.

With respect to land matters, Goldcorp's evidence is that the proposed facilities are to be constructed on land owned either by the province (Crown land held by the Ministry of Natural Resources) or by Goldcorp. Goldcorp stated that the necessary land rights required are confined to easements it expects to receive from the MNR over Crown lands and temporary access rights.

With respect to permits, in undertaking JM1.1, provided at the motion hearing, Goldcorp supplied a list of permits that it requires and the timelines for acquiring these permits. Goldcorp indicated that it would secure the necessary work permits from the MNR over Crown lands.

Board staff submitted that the Board's approval should be conditional on the completion of both Class EAs and on Goldcorp obtaining all necessary approvals.

LSFN submitted that granting leave to construct was premature and potentially adverse to the public interest. LSFN noted the Board should refrain from making a decision on

the application until the MNR had confirmed that duty to consult had been fully discharged. LSFN submitted that granting leave to construct prior to the conclusion of the consultation effectively narrows the range of possibility for adequate accommodation and presents a risk that the project may be cancelled due to lack of appropriate consultation, after it has been approved by the Board. LSFN also noted that Goldcorp had not yet acquired many of the permits that were required to begin construction.

Goldcorp submitted that not having the necessary permits is not a valid reason to deny the application. Goldcorp noted that it was usual Board practice to grant orders that were conditional on the issuance of the relevant permits. Goldcorp also referred to the Board's Decision in Yellow Falls[4] where the Board provided reasons in support of such an approach.

With respect to the duty to consult, Goldcorp again referred to the Yellow Falls Decision, in which the Board made a decision on a question of law, namely that in electricity leave to construct applications, the Board does not have the power to consider whether the degree of consultation with First Nations in relation to the EA process (which is conducted separately) has been adequate. Goldcorp further submitted that the Board's approach has been supported by the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel.*[5]

The Board does not believe it is necessary to refrain from making a decision in this application because of ongoing consultations being undertaken as part of the EA process. In the Board's view, to the extent there are any concerns with respect to the completion of the EA process or the acquisition of permits, these are appropriately dealt with by making the Board's approval conditional on the successful completion of both Class EA's and on Goldcorp obtaining all necessary permits. This has been the Board's practice in leave to construct applications for some time. Further, in its preliminary Decision in the Yellow Falls case the Board stated:

> Board approvals of leave to construct applications invariably include conditions which require the proponent to procure all of the necessary permits and approvals associated with the project. This means that the Board's approval is strictly conditional on the successful completion of the various permitting and assessment processes. Under this architecture there is no danger that the project will somehow begin without all of the necessary

[4] EB-2009-0120, Decision and Procedural Order No. 4 dated November 18, 2009.
[5] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel, [2010] 2 S.C.R.650.

> regulatory steps mandated by various agencies of government being completed. This is as true of the Ministry of Natural Resources permits, as it is of the environmental assessment process itself. [Emphasis Added]

Therefore, the Board's order granting leave to construct is conditional on Goldcorp obtaining all necessary Class EA approvals and all other necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities.

Project Cost and Impact on Ratepayers

Goldcorp's evidence is that the total cost of the proposed transmission facilities is approximately $15 million. Based on the breakdown provided, the cost of the transmission line is $2.6 million, the cost of the work on the switchyard is $0.5 million and the cost of the Balmer Complex Transformer Station is approximately $10 million.

The proposed facilities will be owned and constructed by Goldcorp until commissioned, following which, the switchyard and 115 kV transmission line, but not the Balmer Complex Transformer Station, will be transferred to and operated by Hydro One. The planned in-service date is December 2011.

In Board staff interrogatory no. 2, Goldcorp stated that the CCRA, under which the assets are to be transferred to Hydro One, had not been completed. In LSFN interrogatory no. 13, Goldcorp acknowledged that it had been informed by Hydro One that the terms of the asset transfer must not result in any negative impacts on electricity rates.

LSFN submitted that no evidence was provided with respect to the current project or with respect to possible future upgrades and their impact on electricity rates. As indicated above, the potential impact of other future projects is beyond the scope of this proceeding.

Goldcorp confirmed that it intended to transfer the facilities to Hydro One at no net cost to Hydro One and therefore the transfer will not adversely affect electricity rates. Goldcorp further submitted that it will follow the Transmission System Code Economic Evaluation and the CCRA to achieve the stated objective.

With respect to the matter of impact on ratepayers, as noted earlier in this Decision and Order, due to the fact that the proponent is paying for the facility, there is no ratepayer impact to be assessed. With regard to the intended future transfer of the assets, Hydro One, as a condition of its licence, is required to comply with the terms of the Transmission System Code Economic Evaluation when entering into the CCRA with Goldcorp thereby holding ratepayers harmless. Hydro One has an ongoing requirement to comply with the Transmission System Code and adherence to the Economic Evaluation provisions is a matter to be examined when Hydro One applies to have assets added to its rate base in a cost of service application.

Conclusion

Having considered all of the evidence related to the application, the Board finds the proposed project to be in the public interest in accordance with the criteria established in section 96(2) of the Act.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, Goldcorp is granted leave to construct the proposed transmission facilities, all in the Municipality of Red Lake, subject to the Conditions of Approval attached as Appendix A to this Order.

2. The Board had previously determined that LSFN was eligible to apply for an award of costs. Claims in this regard should conform with the Board's Practice Direction on Cost Awards, and shall be filed with the Board and one copy served on Goldcorp by **August 3, 2011**. Goldcorp should review the cost claims and any objections must be filed with the Board and one copy must be served on the claimant by **August 10, 2011**. LSFN will have until **August 17, 2011** to respond to any objections. All submissions must be filed with the Board and one copy is to be served on Goldcorp. Goldcorp shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

ISSUED at Toronto, July 20, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary