Court File No. CV-21-00669471-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

B E T W E E N:

AUDITOR GENERAL OF ONTARIO

Applicant

and

LAURENTIAN UNIVERSITY OF SUDBURY

Respondent

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**BOOK OF AUTHORITIES OF THE AUDITOR GENERAL OF ONTARIO**

**(Statutory Interpretation of section 10 of the *Auditor General Act*)**

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November 12, 2021

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Alberta (Information and Privacy Commissioner) v. University of Calgary

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# Information and Privacy Commissioner of Alberta (Appellant) and Board of Governors of the University of Calgary Respondent) and Law Society of Alberta, British Columbia Freedom of Information and Privacy Association, Information and Privacy Commissioner of Ontario, Information and Privacy Commissioner for British Columbia, Information and Privacy Commissioner for the Province of Newfoundland and Labrador, Advocates' Society, Federation of Law Societies of Canada, Canadian Bar Association, Information Commissioner of Canada, Privacy Commissioner of Canada, Manitoba Ombudsman, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner [Review Officer], Nunavut Information and Privacy Commissioner, Saskatchewan Information and Privacy Commissioner, Yukon Ombudsman and Information and Privacy Commissioner and Criminal Lawyers' Association (Interveners)

Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: April 1, 2016
Judgment: November 25, 2016
Docket: 36460

Proceedings: affirming *University of Calgary v. R. (J.)* (2015), 647 W.A.C. 35, 602 A.R. 35, [2015] A.J. No. 348, 81 Admin. L.R. (5th) 257, 2015 CarswellAlta 574, 2015 ABCA 118, 12 Alta. L.R. (6th) 272, [2015] 7 W.W.R. 213, 382 D.L.R. (4th) 299, Myra Bielby J.A., Patricia Rowbotham J.A., Russell Brown J.A. (Alta. C.A.); reversing *University of Calgary v. R. (J.)* (2013), 574 A.R. 137, 2013 CarswellAlta 2198, 2013 ABQB 652, 66 Admin. L.R. (5th) 254, 90 Alta. L.R. (5th) 94, [2013] A.J. No. 1233, C.M. Jones J. (Alta. Q.B.); additional reasons at *University of Calgary v. R. (J.)* (2014), 574 A.R. 193, 12 Alta. L.R. (6th) 199, 2014 CarswellAlta 752, 2014 ABQB 263, C.M. Jones J. (Alta. Q.B.)

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Marlys A. Edwardh, Daniel Sheppard, Regan Morris, Diane Therrien, Aditya Ramachandran, for interveners, Information Commissioner of Canada, Privacy Commissioner of Canada, Manitoba Ombudsman, Northwest Territories Information and Privacy Commissioner, Nova Scotia Information and Privacy Commissioner [Review Officer], Nunavut Information and Privacy Commissioner, Saskatchewan Information and Privacy Commissioner and Yukon Ombudsman and Information and Privacy Commissioner
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Subject: Civil Practice and Procedure; Evidence; Public; Municipal
**Related Abridgment Classifications**
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III.1 Correctness
Evidence
XIV Privilege
XIV.1 Solicitor and client privilege
XIV.1.f Miscellaneous
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Administrative law --- Standard of review — Correctness

Vie privée et accès à l'information --- Accès à l'information — Législation provinciale — Procédure

Secret professionnel de l'avocat — Dans le contexte d'une allégation de congédiement déguisé, le délégué de la Commissaire à l'information et à la protection de la vie privée de l'Alberta a ordonné la production de documents à l'égard desquels l'université avait invoqué le secret professionnel de l'avocat — Délégué a donné un avis d'enquête enjoignant à l'université de fournir une copie des documents en cause ou deux copies d'un affidavit ou d'une simple déclaration confirmant que le secret professionnel de l'avocat s'applique aux documents — Université a refusé de fournir une copie des autres documents et a plutôt remis une liste des documents identifiés seulement par le numéro des pages en cause et transmis une lettre indiquant que le secret professionnel de l'avocat avait été invoqué à l'égard des documents — Délégué a donné un avis fondé sur l'art. 56(3) de la Freedom of Information and Protection of Privacy Act (FOIPP) enjoignant à l'université de produire les documents en vue de leur examen — Là encore, l'université ne s'est pas conformée à l'avis et a demandé le contrôle judiciaire de la décision du délégué d'émettre l'avis de produire des documents — Juge saisi de la requête a conclu que l'art. 56(3) de la FOIPP permettait à la commissaire d'exiger la production des documents pour s'assurer de l'application du secret professionnel de l'avocat invoqué à leur égard — Juge saisi de la requête a également conclu que les dispositions de la FOIPP ne pouvaient bien s'appliquer les unes avec les autres que si la commissaire avait le pouvoir d'exiger la production de l'information à l'égard de laquelle le privilège était invoqué puisque la FOIPP ne prévoyait aucune autre procédure pour se prononcer sur pareille allégation — Juge saisi de la requête a conclu que le délégué avait donné l'avis à bon droit et souligné que l'université avait refusé de justifier par ailleurs l'application du secret professionnel de l'avocat — Cour d'appel a accueilli l'appel interjeté par l'université, estimant que la commissaire n'avait pas le pouvoir légal d'exiger la production des documents à l'égard desquels le secret professionnel de l'avocat était invoqué — Commissaire a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — En vertu de la FOIPP, le secret professionnel de l'avocat n'était plus seulement un privilège du droit de la preuve, mais constituait un droit substantiel qui était essentiel au bon fonctionnement de notre système de justice — Communication de documents en application d'un régime d'accès à l'information établi par une loi, indépendamment d'une instance judiciaire, met en jeu le secret professionnel de l'avocat sur le plan du fond plutôt que sur celui de la preuve — Interprétation de l'art. 56(3) dans le contexte global de la loi confirme que le législateur n'a pas voulu écarter le secret professionnel de l'avocat.

Preuve --- Privilège — Secret professionnel de l'avocat — Divers

Lois en matière d'accès à l'information — Dans le contexte d'une allégation de congédiement déguisé, le délégué de la Commissaire à l'information et à la protection de la vie privée de l'Alberta a ordonné la production de documents à l'égard desquels l'université avait invoqué le secret professionnel de l'avocat — Délégué a donné un avis d'enquête enjoignant à l'université de fournir une copie des documents en cause ou deux copies d'un affidavit ou d'une simple déclaration confirmant que le secret professionnel de l'avocat s'applique aux documents — Université a refusé de fournir une copie des autres documents et a plutôt remis une liste des documents identifiés seulement par le numéro des pages en cause et transmis une lettre indiquant que le secret professionnel de l'avocat avait été invoqué à l'égard des documents — Délégué a donné un avis fondé sur l'art. 56(3) de la Freedom of Information and Protection of Privacy Act (FOIPP) enjoignant à l'université de produire les documents en vue

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de leur examen — Là encore, l'université ne s'est pas conformée à l'avis et a demandé le contrôle judiciaire de la décision du délégué d'émettre l'avis de produire des documents — Juge saisi de la requête a conclu que l'art. 56(3) de la FOIPP permettait à la commissaire d'exiger la production des documents pour s'assurer de l'application du secret professionnel de l'avocat invoqué à leur égard — Juge saisi de la requête a également conclu que les dispositions de la FOIPP ne pouvaient bien s'appliquer les unes avec les autres que si la commissaire avait le pouvoir d'exiger la production de l'information à l'égard de laquelle le privilège était invoqué puisque la FOIPP ne prévoyait aucune autre procédure pour se prononcer sur pareille allégation — Juge saisi de la requête a conclu que le délégué avait donné l'avis à bon droit et souligné que l'université avait refusé de justifier par ailleurs l'application du secret professionnel de l'avocat — Cour d'appel a accueilli l'appel interjeté par l'université, estimant que la commissaire n'avait pas le pouvoir légal d'exiger la production des documents à l'égard desquels le secret professionnel de l'avocat était invoqué — Commissaire a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — En vertu de la FOIPP, le secret professionnel de l'avocat n'était plus seulement un privilège du droit de la preuve, mais constituait un droit substantiel qui était essentiel au bon fonctionnement de notre système de justice — Communication de documents en application d'un régime d'accès à l'information établi par une loi, indépendamment d'une instance judiciaire, met en jeu le secret professionnel de l'avocat sur le plan du fond plutôt que sur celui de la preuve — Interprétation de l'art. 56(3) dans le contexte global de la loi confirme que le législateur n'a pas voulu écarter le secret professionnel de l'avocat.

Droit administratif --- Norme de contrôle — Décision correcte

In the context of a constructive dismissal claim, the delegate of Information and Privacy Commissioner of Alberta (Commissioner) ordered the production of records over which a University had claimed solicitor-client privilege. The delegate issued a Notice of Inquiry instructing the University to provide a copy of the records at issue or two copies of an affidavit or unsworn evidence verifying solicitor-client privilege over the records. The University declined to provide a copy of the withheld records, and instead provided a list of documents identified by page numbers only and an affidavit indicating solicitor-client privilege had been asserted over the records. As a result, the delegate issued a Notice to Produce Records under s. 56(3) of Freedom of Information and Protection of Privacy Act (FOIPP), requiring the University to produce the documents for review. The University again did not comply, and sought judicial review of the delegate's decision to issue the Notice to Produce Records. On judicial review, the application judge found that s. 56(3) of FOIPP permits the Commissioner to compel the production of disputed records to verify claims of solicitor-client privilege. The application judge also found that the provisions of FOIPP do not work together effectively unless the Commissioner has the power to compel the production of information over which privilege is alleged since FOIPP provides no other mechanism to review that type of claim. The application judge found that the delegate had correctly issued the notice, noting that the University had refused to substantiate in any other way its claims of solicitor-client privilege. The Court of Appeal allowed the University's appeal, concluding that the Commissioner did not have statutory authority to compel the production of records over which solicitor-client privilege was asserted. The Commissioner appealed with the Supreme Court of Canada.

**Held:** The appeal was dismissed.

Per Côté J. (Moldaver, Karakatsanis, Wagner, Gascon JJ. concurring): The expression "any privilege of the law of evidence" does not require a public body to produce to the Commissioner documents over which solicitor client privilege is claimed. Solicitor client privilege is no longer merely a privilege of the law of evidence, but a substantive right that is fundamental to the proper functioning of our legal system. The disclosure of documents pursuant to a statutorily established access to information regime, separate from a judicial proceeding, engages solicitor client privilege in its substantive, rather than evidentiary, context. To give effect to solicitor client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside, or infringe it must be interpreted restrictively, and must demonstrate a clear and unambiguous legislative intent to do so. Section 56(3) of FOIPP does not meet this standard, and therefore, fails to evince clear and unambiguous legislative intent to set aside solicitor client privilege. Reading s. 56(3) in the context of the statute as a whole supports the conclusion that the legislature did not intend to set aside solicitor client privilege. If the legislature had intended to set aside solicitor client privilege, it would have legislated safeguards to ensure that solicitor client privileged documents are not disclosed in a manner that compromises the substantive right or addressed whether disclosure of solicitor client privileged documents to the Commissioner constitutes a waiver of privilege with respect to any other person.

Per Cromwell J. (concurring in part): The express language and the full context of s. 56(3) of FOIPP demonstrates that the legislature intended to abrogate solicitor client privilege to the extent of permitting the Commissioner to order production of records over which solicitor client privilege is asserted when necessary to adjudicate the validity of that claim. The statutory

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scheme unambiguously supports the view that the legislature intended the Commissioner to have the powers required to decide whether or not records should be produced by a public body. Specifically, FOIPP provides a detailed, self contained process for the disclosure of information to an applicant, and the Commissioner would not be able to fulfill her statutory mandate without the power to review a claim of solicitor client privilege. Section 56(3) expressly provides that the power to order production applies notwithstanding any privilege of the law of evidence. Even though the Commissioner has the authority to compel production for review of records over which solicitor client privilege is asserted, she made a reviewable error to order production in the face of the evidence submitted in relation to the claim of privilege. The University's claim of privilege complied with the requirements of Alberta civil litigation practice at the time, and it was a reviewable error for the Commissioner's delegate to impose a more onerous standard on the University in relation to its assertion of privilege than that applicable in civil litigation before the courts. The evidence filed with the Commissioner clearly asserts that the documents are communications between solicitor and client which entails the seeking or giving of legal advice, and which is intended to be confidential by the parties.

Per Abella J. (concurring in part): The Commissioner's decision to order disclosure was unreasonable. The Commissioner should have exercised her discretion in a manner that interfered with solicitor client privilege only to the extent absolutely necessary to achieve the ends sought by her enabling legislation. In ordering disclosure, she did not sufficiently take into account the fact that the University provided adequate justification for solicitor client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta.

Dans le contexte d'une allégation de congédiement déguisé, le délégué de la Commissaire à l'information et à la protection de la vie privée de l'Alberta a ordonné la production de documents à l'égard desquels l'université avait invoqué le secret professionnel de l'avocat. Le délégué a donné un avis d'enquête enjoignant à l'université de fournir une copie des documents en cause ou deux copies d'un affidavit ou d'une simple déclaration confirmant que le secret professionnel de l'avocat s'applique aux documents. L'université a refusé de fournir une copie des autres documents et a plutôt remis une liste des documents identifiés seulement par le numéro des pages en cause et transmis une lettre indiquant que le secret professionnel de l'avocat avait été invoqué à l'égard des documents. Le délégué a donc donné un avis fondé sur l'art. 56(3) de la Freedom of Information and Protection of Privacy Act (FOIPP) enjoignant à l'université de produire les documents en vue de leur examen. Là encore, l'université ne s'est pas conformée à l'avis et a demandé le contrôle judiciaire de la décision du délégué d'émettre l'avis de produire des documents. Au terme du contrôle judiciaire, le juge saisi de la requête a conclu que l'art. 56(3) de la FOIPP permet à la commissaire d'exiger la production des documents pour s'assurer de l'application du secret professionnel de l'avocat invoqué à leur égard. Le juge saisi de la requête a également conclu que les dispositions de la FOIPP ne peuvent bien s'appliquer les unes avec les autres que si la commissaire a le pouvoir d'exiger la production de l'information à l'égard de laquelle le privilège est invoqué puisque la FOIPP ne prévoit aucune autre procédure pour se prononcer sur pareille allégation. Le juge saisi de la requête a conclu que le délégué a donné l'avis à bon droit et souligné que l'université avait refusé de justifier par ailleurs l'application du secret professionnel de l'avocat. La Cour d'appel a accueilli l'appel interjeté par l'université, estimant que la commissaire n'avait pas le pouvoir légal d'exiger la production des documents à l'égard desquels le secret professionnel de l'avocat était invoqué. La commissaire a formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été rejeté.

Côté, J. (Moldaver, Karakatsanis, Wagner, Gascon, JJ., souscrivant à son opinion) : L'expression « tout privilège que reconnaît le droit de la preuve » n'oblige pas un organisme public à communiquer au commissaire un document à l'égard duquel est invoqué le secret professionnel de l'avocat. Le secret professionnel de l'avocat n'est plus seulement un privilège du droit de la preuve, mais constitue un droit substantiel qui est essentiel au bon fonctionnement de notre système de justice. La communication de documents en application d'un régime d'accès à l'information établi par une loi, indépendamment d'une instance judiciaire, met en jeu le secret professionnel de l'avocat sur le plan du fond plutôt que sur celui de la preuve. Si le secret professionnel de l'avocat constitue un principe fondamental du droit, la disposition législative dont l'objet est de le supprimer, de l'écarter ou d'y porter atteinte doit être interprétée de manière restrictive et l'intention du législateur doit y être claire et non équivoque. L'article 56(3) de la FOIPP ne satisfait pas à cette exigence et ne traduit donc pas l'intention claire et non équivoque du législateur d'écarter le secret professionnel de l'avocat. L'interprétation de l'art. 56(3) dans le contexte global de la loi confirme que le législateur n'a pas voulu écarter le secret professionnel de l'avocat. Si le législateur avait voulu écarter le secret professionnel de l'avocat, il aurait établi certaines conditions pour que la communication de documents protégés par le secret professionnel de l'avocat n'intervienne pas de manière préjudiciable au droit substantiel ou il aurait précisé que la communication au commissaire d'un document protégé par le secret professionnel de l'avocat emporte ou non renonciation au privilège.

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Cromwell, J. (souscrivant en partie à l'opinion des juges majoritaires) : Il appert du libellé exprès de l'art. 56(3) de la FOIPP et de la totalité du contexte dans lequel il s'inscrit que le législateur a voulu supprimer le secret professionnel de l'avocat pour permettre au commissaire d'ordonner la production de documents lorsque cette mesure est nécessaire pour se prononcer sur l'application du secret professionnel de l'avocat invoqué à leur égard. Le régime législatif appuie sans équivoque la thèse selon laquelle le législateur a voulu conférer au commissaire les pouvoirs nécessaires pour décider si des documents doivent ou non être produits par un organisme public. Plus particulièrement, la FOIPP établit une procédure détaillée et autonome de communication de renseignements à une personne et, sans le pouvoir de se prononcer sur l'application du secret professionnel de l'avocat, le commissaire ne serait pas en mesure de s'acquitter de son mandat légal. L'article 56(3) prévoit expressément que le pouvoir d'ordonner la production s'applique malgré tout privilège que reconnaît le droit de la preuve. Même si la commissaire est investie du pouvoir d'ordonner la production en vue de son examen d'un document à l'égard duquel est invoqué le secret professionnel de l'avocat, la commissaire a commis une erreur susceptible de contrôle en ordonnant la production des documents malgré la preuve offerte à l'appui de l'existence du privilège. L'allégation du privilège par l'université respectait les exigences des règles de pratique qui valaient alors en matière civile en Alberta, et le délégué de la commissaire a commis une erreur susceptible de contrôle en soumettant l'université à une norme plus stricte que celle applicable dans un litige civil devant une cour de justice pour établir l'existence du privilège invoqué. La preuve offerte à la commissaire indiquait clairement que les documents constituaient des communications entre un avocat et son client, que celles-ci visaient l'obtention ou la formulation d'un avis juridique et que les parties ont voulu qu'elles demeurent confidentielles.

Abella, J. (souscrivant en partie à l'opinion des juges majoritaires) : La décision de la commissaire d'ordonner la communication était déraisonnable. La commissaire n'aurait dû exercer son pouvoir discrétionnaire de manière attentatoire au secret professionnel de l'avocat que si cela était absolument nécessaire à la réalisation des objectifs de sa loi habilitante. En ordonnant la communication, elle n'a pas tenu suffisamment compte du fait que l'université avait convenablement justifié le respect de ce privilège au vu, tout particulièrement, des règles de droit et de pratique qui avaient cours en matière civile en Alberta.

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*Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (2014), 2014 SCC 36, 2014 CSC 36, 2014 CarswellOnt 5920, 2014 CarswellOnt 5921, (sub nom. *Ontario (Minister of Finance) v. Smith)* 457 N.R. 40, 69 Admin. L.R. (5th) 289, 373 D.L.R. (4th) 601, (sub nom. *Ontario (Minister of Finance) v. Smith)* 320 O.A.C. 135, (sub nom. *John Doe v. Ontario (Finance))* [2014] 2 S.C.R. 3, 131 O.R. (3d) 112 (note) (S.C.C.) — referred to

*Ontario (Ministry of Community Safety & Correctional Services) v. Ontario (Information & Privacy Commissioner)* (2014), 2014 SCC 31, 2014 CSC 31, 2014 CarswellOnt 5105, 2014 CarswellOnt 5106, 10 C.R. (7th) 1, 67 Admin. L.R. (5th) 1, 457

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N.R. 3, 320 O.A.C. 1, 374 D.L.R. (4th) 387, 311 C.C.C. (3d) 553, (sub nom. *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner))* [2014] 1 S.C.R. 674 (S.C.C.) — referred to

*Pritchard v. Ontario (Human Rights Commission)* (2004), 2004 SCC 31, 2004 CarswellOnt 1885, 2004 CarswellOnt 1886, 2004 C.L.L.C. 230-021, 19 C.R. (6th) 203, 33 C.C.E.L. (3d) 1, 12 Admin. L.R. (4th) 171, 47 C.P.C. (5th) 203, [2004] 1 S.C.R. 809, 72 O.R. (3d) 160 (note), 49 C.H.R.R. D/120 (S.C.C.) — referred to

*UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)* (2013), 2013 SCC 62, 2013 CarswellAlta 2210, 2013 CarswellAlta 2211, D.T.E. 2013T-775, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, (sub nom. *Alberta (IPC) v. UFCW, Local 401)* 2014 C.L.L.C. 210-003, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 451 N.R. 253, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401)* [2013] 3 S.C.R. 733, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 561 A.R. 359, (sub nom. *United Food and Commercial Workers, Local 401 v. Privacy Commissioner (Alta.))* 594 W.A.C. 359, 239 L.A.C. (4th) 317, (sub nom. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, local 401)* 297 C.R.R. (2d) 71 (S.C.C.) — referred to

**Statutes considered by *Côté J.*:**

*Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25

Generally — referred to

s. 2(c) — considered

s. 2(e) — considered

s. 7 — referred to

s. 27(1) — considered

s. 53(1)(a) — referred to

s. 56 — considered

s. 56(3) — considered

s. 65(1) — referred to

s. 69(1) — referred to

*Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5

s. 54(3) — referred to

*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165

s. 44 — considered

s. 44(2) — considered

s. 44(2.1) [en. 2003, c. 5, s. 15] — considered

s. 44(3) — considered

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

s. 38(3) — considered

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5

Generally — referred to

s. 12 — considered

s. 12.1 [en. 2010, c. 23, s. 83] — referred to

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*Privacy Act*, R.S.C. 1985, c. P-21
Generally — referred to

s. 34(2) — considered
*Public Inquiries Act*, R.S.A. 2000, c. P-39
Generally — referred to
**Statutes considered by *Cromwell J.*:**
*Access to Information and Protection of Privacy Act*, S.N. 2002, c. A-1.1
s. 52 — referred to
*Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25
Generally — referred to

s. 27 — considered

s. 27(1) — considered

s. 27(1)(a) — considered

s. 56 — considered

s. 56(1) — considered

s. 56(2) — considered

s. 56(3) — considered

s. 58 — considered

s. 59(1) — considered

s. 59(4) — considered

s. 65(1) — considered

s. 69(1) — considered

s. 72(1) — considered

s. 72(2)(a) — considered

s. 73 — considered
*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165
Generally — referred to

s. 44 [rep. & sub. 2007, c. 9, s. 76] — referred to

s. 44(1) — considered

s. 44(1)(b) — considered

s. 44(2)(a) — considered

s. 44(2.1) [en. 2003, c. 5, s. 15] — considered

s. 44(3) — considered

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*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5
Generally — referred to

s. 15 — considered
*Privacy Act*, R.S.C. 1985, c. P-21
Generally — referred to

s. 34(2) — considered
**Statutes considered by *Abella J.*:**
*Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25
Generally — referred to

s. 27(1)(a) — considered

s. 56(3) — considered

APPEAL from judgment reported at *University of Calgary v. R. (J.)* (2015), 2015 ABCA 118, 2015 CarswellAlta 574, 382 D.L.R. (4th) 299, 81 Admin. L.R. (5th) 257, [2015] A.J. No. 348, [2015] 7 W.W.R. 213, 12 Alta. L.R. (6th) 272, 602 A.R. 35, 647 W.A.C. 35 (Alta. C.A.), concluding that Information and Privacy Commissioner of Alberta did not have statutory authority to compel production of records over which solicitor-client privilege was asserted.

POURVOI formé à l'encontre d'un jugement publié à *University of Calgary v. R. (J.)* (2015), 2015 ABCA 118, 2015 CarswellAlta 574, 382 D.L.R. (4th) 299, 81 Admin. L.R. (5th) 257, [2015] A.J. No. 348, [2015] 7 W.W.R. 213, 12 Alta. L.R. (6th) 272, 602 A.R. 35, 647 W.A.C. 35 (Alta. C.A.), ayant conclu que la Commissaire à l'information et à la protection de la vie privée de l'Alberta n'avait pas le pouvoir légal d'exiger la production des documents à l'égard desquels le secret professionnel de l'avocat était invoqué.

***Côté J.* (Moldaver, Karakatsanis, Wagner, and Gascon JJ. concurring):**

**I. Overview**

1 This case involves a judicial review of a decision pursuant to the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 ("FOIPP"). A delegate of the Information and Privacy Commissioner of Alberta ("Commissioner") ordered the production of records over which solicitor-client privilege was claimed in order to verify that the privilege was properly asserted. At the heart of this appeal is whether s. 56(3) of FOIPP, which requires a public body to produce required records to the Commissioner "[d]espite ... any privilege of the law of evidence", allows the Commissioner and her delegates to review documents over which solicitor-client privilege is claimed.

2 I conclude that s. 56(3) does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. As this Court held in *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44, [2008] 2 S.C.R. 574 (S.C.C.), solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal. In the present case, the provision at issue does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. It is well established that solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved into a substantive protection. Therefore, I am of the view that solicitor-client privilege is not captured by the expression "privilege of the law of evidence". Moreover, a reading of s. 56(3) in the context of the statute as a whole also supports the conclusion that the legislature did not intend to set aside solicitor-client privilege. Further, even if s. 56(3) could be construed as authorizing the Commissioner to review documents over which privilege is claimed, this was not an appropriate case in which to order production of the documents for review. Consequently, I would dismiss the appeal.

**II. Facts**

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3 The University of Calgary ("University") was sued by a former employee who brought a claim of constructive dismissal. In October 2008, the former employee made a request for access to information under s. 7 of FOIPP, seeking records about her in the University's possession.

4 The University provided some records in response to the request, but claimed solicitor-client privilege over other records. In March 2009, the former employee brought an application under *FOIPP* seeking production of the withheld records. A delegate of the Commissioner ("delegate") conducted an inquiry on the matter, acting in accordance with the Office of the Commissioner's "Solicitor-Client Privilege Adjudication Protocol" ("Protocol") (online). The Protocol states how, according to the Office of the Commissioner, claims of solicitor-client privilege can be substantiated without revealing the details of the communications. Basing himself on the Protocol, the delegate issued a Notice of Inquiry instructing the University to provide a copy of "the records at issue" or two copies of "an affidavit or unsworn evidence verifying solicitor-client privilege over the records".

5 In August 2010, the University declined to provide a copy of the withheld records, and instead provided a list of documents identified by page numbers only. This way of proceeding complied with the law and the practice regarding identification of solicitor-client privileged documents in civil litigation in Alberta at that time. The University also provided a sworn affidavit from its Access and Privacy Coordinator indicating solicitor-client privilege had been asserted over the records. Later, the University further provided a letter from its Provost and Vice-President (Academic), asserting solicitor-client privilege over the records.

6 In September 2010, the delegate directed the University to substantiate its claim of solicitor-client privilege by either providing him with a copy of the records, or providing additional information regarding the records at issue, including, for example, the date and length of the record, and some information regarding the author and addressee.

7 The University did not comply with either direction. As a result, the delegate issued a Notice to Produce Records under s. 56(3) of FOIPP, requiring the University to produce the documents for review. Section 56(3) reads:

> **(3)** Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

8 The University again did not comply, and in October 2010 sought judicial review of the delegate's decision to issue the Notice to Produce Records. This is the matter on appeal.

9 It is noteworthy that the applicant, the former employee, is not a party to the present appeal. Her litigation against the University concluded in 2012 and she has had no involvement in the matter since then (2012 ABQB 342545 A.R. 110 (Alta. Q.B.)). Therefore, the claim for production is moot at this time.

**III. Decisions Below**

***A. Information and Privacy Commissioner of Alberta***

10 In his decision rendered October 20, 2010, the delegate required the University to produce a copy of the records over which solicitor-client privilege was claimed, to allow the delegate to determine whether solicitor-client privilege had been properly asserted. The delegate concluded that this case was an exceptional one, as the University of Calgary had failed to present adequate evidence of its claim of solicitor-client privilege, and therefore it was necessary to review the records in question to determine whether the University had properly withheld the records.

***B. Alberta Court of Queen's Bench, 2013 ABQB 652574 A.R. 137 (Alta. Q.B.)***

11 On judicial review, Justice Jones first concluded that the appropriate standard of review was correctness. He applied the modern approach to statutory interpretation and found that s. 56(3) of FOIPP permits the Commissioner to compel the production of disputed records to verify claims of solicitor-client privilege. He reviewed the jurisprudence on similar provisions in other statutes, and concluded that the Alberta legislature's intent in enacting *FOIPP* was clear. The application judge also found that

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the provisions of *FOIPP* do not work together effectively unless the Commissioner has the power to compel the production of information over which privilege is alleged since *FOIPP* provides no other mechanism to review that type of claim.

12 The application judge then considered the delegate's exercise of the power to compel the production of the documents. He found that the delegate had correctly issued the notice, noting that the University had refused to substantiate in any other way its claims of solicitor-client privilege. Overall, he concluded the delegate's approach established "a framework that interferes with the confidentiality and privilege only to the extent absolutely necessary" (para. 233).

### *C. Alberta Court of Appeal, 2015 ABCA 118602 A.R. 35 (Alta. C.A.)*

13 The Court of Appeal allowed the University's appeal, concluding that the Commissioner did not have statutory authority to compel the production of records over which solicitor-client privilege was asserted. It agreed with the application judge that the applicable standard of review was correctness. Regarding statutory interpretation, however, the Court of Appeal held that *Blood Tribe* ousts the modern approach to statutory interpretation where solicitor-client privilege is at stake. Instead, the rule of strict construction applies, which requires clear, explicit and specific reference to solicitor-client privilege.

14 Following the rule of strict construction, the Court of Appeal concluded that an inference would need to be drawn to conclude that "any privilege of the law of evidence" refers to solicitor-client privilege. Therefore, the language of s. 56(3) was found to be not sufficiently specific to evince clear legislative intent.

15 The Court of Appeal also observed that a number of contextual factors supported its conclusion. First, neither the Commissioner nor her delegate needed to be a lawyer and could lack the legal training necessary to adjudicate claims of solicitor-client privilege. Second, *FOIPP* authorized the Commissioner to disclose information relating to the commission of an offence to the Minister of Justice and the Attorney General. Third, s. 38(3) of the Personal Information Protection Act, S.A. 2003, c. P-6.5, which applies to law firms, also permits the Commissioner to require the production of records "[n]otwithstanding ... any privilege of the law of evidence". The Court of Appeal noted that allowing solicitor-client privilege to be infringed in that context would be undesirable.

## IV. Issues

16 This appeal raises the following questions:

1. What is the appropriate standard of review applicable to the Commissioner's decision?

2. What approach to statutory interpretation applies to provisions purporting to abrogate, pierce, set aside or infringe solicitor-client privilege?

3. Does s. 56(3) of FOIPP require a public body to produce to the Commissioner records over which solicitor-client privilege is claimed?

## V. Submissions of the Parties

### *A. Information and Privacy Commissioner of Alberta*

17 The Commissioner argues that the appropriate standard of review is reasonableness. Regarding statutory interpretation, she submits a purposive analysis should be applied. In brief, the Commissioner takes the position that s. 56(3) of FOIPP expressly grants her the power to review records over which solicitor-client privilege is claimed. She argues that solicitor-client privilege is a privilege of the law of evidence; thus the words "any privilege of the law of evidence" in s. 56(3) clearly abrogate solicitor-client privilege. The Commissioner submits that the substantive nature of solicitor-client privilege does not preclude this interpretation, and she argues that a contextual analysis supports her position.

### *B. Board of Governors of the University of Calgary*

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18 In contrast, the University's Board of Governors argues that the appropriate standard of review is correctness. Regarding statutory interpretation, it submits that express, clear and precise words are necessary to permit the Commissioner to pierce solicitor-client privilege. The University's Board of Governors' primary argument is that s. 56(3) does not contain express words to that effect since solicitor-client privilege has been elevated from a rule of evidence to a substantive and fundamental rule of law. In the alternative, the University's Board of Governors submits that even if s. 56(3) could be construed as expressly giving the Commissioner the power to pierce solicitor-client privilege, disclosure was not appropriate in this case. The University's Board of Governors also argues that a contextual analysis supports its position.

**VI. Analysis**

***A. Standard of Review***

19 The application judge and the Court of Appeal concluded that the applicable standard of review was correctness. I agree.

20 Whether *FOIPP* allows solicitor-client privilege to be set aside is a question of central importance to the legal system as a whole and outside the Commissioner's specialized area of expertise. As this Court said in *Blood Tribe*, solicitor-client privilege is "fundamental to the proper functioning of our legal system" (para. 9). It is also a privilege that has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy (*R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 (S.C.C.), at para. 41; *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, [2002] 3 S.C.R. 209 (S.C.C.), at para. 46; see also Minister of National Revenue v. Thompson2016 SCC 21S.C.C., [2016] 1 S.C.R. 381, at para. 17). Further, as the Court of Appeal observed, the question of what statutory language is sufficient to authorize administrative tribunals to infringe solicitor-client privilege is a question that has potentially wide implications on other statutes.

21 In *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.), Rothstein J., writing for the Court, discussed how a question of statutory interpretation that does *not* have wide implications on other statutes would *not* be of central importance to the legal system as a whole and would thus attract a reasonableness standard. Paragraph 60 of *National Railway* reads as follows:

> This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the [*Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*")]. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the *CTA* and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under s. 120.1(1). This question does not have precedential value outside of issues arising under this statutory scheme.

Conversely, it follows that where — as in this case — the question *does* have wide implications on other statues, the appropriate standard of review is correctness.

22 In addition, there is nothing to suggest that the Commissioner has particular expertise with respect to solicitor-client privilege, an issue which has traditionally been adjudicated by courts (see *Legal Services Society (British Columbia) v. British Columbia (Information & Privacy Commissioner)*, 2003 BCCA 278, 226 D.L.R. (4th) 20 (B.C. C.A.), at para. 25). Therefore, the applicable standard of review is correctness (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 60), for both (i) the decision that the Commissioner has the authority to require the production of records over which solicitor-client privilege is asserted, and (ii) the decision to issue the Notice to Produce Records.

23 My colleague Justice Abella thinks otherwise. Drawing from six judgments of this Court involving disclosure decisions by Information and Privacy Commissioners, she suggests that there is a "clear lineage" of cases dictating that the standard of review in this appeal should be reasonableness. With respect, I cannot agree.

24 Of the six decisions identified by Abella J., only two mention solicitor-client privilege. One of them is *Blood Tribe*, in which Binnie J. in effect reviewed the impugned decision on the standard of correctness, although he did not expressly state so. The other is *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23, [2010] 1 S.C.R. 815

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(S.C.C.), which addressed, as a secondary issue, whether the Assistant Commissioner properly exercised his discretion under a provision explicitly permitting him to exempt from disclosure documents subject to solicitor-client privilege. That was it. Resolution of that question had few ramifications on the principle of solicitor-client privilege and its application beyond the particular exercise of discretion in that case.

25 The question here is different. It does not just ask whether the Commissioner exercised her discretion appropriately in the instant case. It asks whether the phrase "privilege of the law of evidence" suffices to identify, for the purpose of abrogation, the substantive features of solicitor-client privilege. This necessitates an inquiry into both the substantive and evidentiary qualities of the privilege.

26 The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole. In *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), Chief Justice Lamer described its rationale as follows:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication ....
>
> [Emphasis added; p. 289.]

27 Having determined that the applicable standard of review is correctness, I now proceed to apply this standard to the decision at hand.

***B. Principles of Statutory Interpretation***

28 To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so. The privilege cannot be set aside by inference (*Blood Tribe*, at para. 11; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (S.C.C.), at para. 33; *Lavallee, Rackel & Heintz*, at para. 18). As this Court affirmed in *Thompson*:

> ... it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, although these might provide supporting context where the language of the provision is already sufficiently clear. If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect. [para. 25]

29 I would also add that this requirement is not a renunciation of the modern approach to statutory interpretation. Indeed, on my reading, *Blood Tribe* does not preclude using a full modern approach to interpret words purportedly abrogating privilege. Rather than supporting adoption of a strict construction rule, the analysis conducted in *Blood Tribe* reflects what is essentially the modern approach to statutory interpretation when dealing with solicitor-client privilege, insofar as it recognizes legislative respect for fundamental values. The modern approach was followed by this Court in *Thompson*, and the same approach is followed here. Therefore, in no way is this Court returning to the plain meaning rule or abandoning the modern approach.

***C. Freedom of Information and Protection of Privacy Act***

30 Access to information is an important element of a modern democratic society. As this Court stated in *Criminal Lawyers' Association*:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance. [para. 1]

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31 One of the purposes of *FOIPP* is "to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body" *(s. 2(c))*. As the language of s. 2(c) reveals, the statute does not grant unfettered access to records; requests for access are subject to certain exceptions.

32 *FOIPP* also creates a process for conducting "independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act" *(*s. 2(e)). In this regard, a person making a request for access to a record "may ask the Commissioner to review any decision, act or failure to act" of the head of a public body relating to the request *(s. 65(1))*. The Commissioner's responsibilities include conducting investigations to ensure compliance with *FOIPP (s. 53(1)(a))* and conducting inquiries to deal with requests for a review *(s. 69(1))*.

33 At the heart of this appeal is s. 56(3) of FOIPP. *Section 56* reads as follows:

> **56(1)** In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.
>
> **(2)** The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.
>
> **(3)** Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

The primary issue in this case is whether s. 56(3) of FOIPP requires a public body to produce to the Commissioner records over which solicitor-client privilege is claimed, to review the validity of the claim. This appeal therefore deals with the obligation of the University to disclose solicitor-client privileged documents to the Commissioner for review. This appeal does not raise the issue of whether the Commissioner may order the disclosure of solicitor-client privileged documents to the applicant.

***D. Solicitor-Client Privilege***

34 It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice (*Blood Tribe*, at para. 9). Lawyers have the unique role of providing advice to clients within a complex legal system (*McClure*, at para. 2). Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive (see *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), at para. 46). It is therefore in the public interest to protect solicitor-client privilege. For this reason, "privilege is jealously guarded and should only be set aside in the most unusual circumstances" (*Pritchard*, at para. 17).

35 Further, solicitor-client privilege belongs to the client, not to the lawyer (Canada (Procureur général) c. Chambre des notaires du Québec2016 SCC 20S.C.C., [2016] 1 S.C.R. 336, at para. 48; *Blood Tribe*, at para. 9). Seen through the eyes of the client, compelled disclosure to an administrative officer alone constitutes an infringement of the privilege (*Blood Tribe*, at para. 21). Therefore, compelled disclosure to the Commissioner for the purpose of verifying solicitor-client privilege is itself an infringement of the privilege, regardless of whether or not the Commissioner may disclose the information onward to the applicant.

36 In this regard, it is noteworthy that the Commissioner is not an impartial adjudicator of the same nature as a court. *FOIPP* empowers the Commissioner to exercise both adjudicative and investigatory functions. Unlike a court, the Commissioner can become adverse in interest to a public body. The Commissioner may take a public body to court and become a party in litigation against a public body that refuses to disclose information. These features of the Commissioner's powers further indicate that disclosure to the Commissioner is itself an infringement of solicitor-client privilege.

***E. Application***

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37 The key issue in this case is whether s. 56(3) of FOIPP, which requires a public body to produce to the Commissioner records "[d]espite ... any privilege of the law of evidence", allows the Commissioner to review documents that the University claims are protected by solicitor-client privilege. I conclude that "any privilege of the law of evidence" is not sufficiently clear and precise to set aside or permit an infringement of solicitor-client privilege.

*(1) Solicitor-Client Privilege Is Not Merely a Rule of Evidence*

38 First, it is well established that solicitor-client privilege has evolved from a rule of evidence to a rule of substance (*Blood Tribe*, at para. 10; *Thompson*, at para. 17; *Chambre des notaires*, at para. 28). Further, as indicated above, some even suggest that the Court has granted it a quasi-constitutional status.

39 Formerly, solicitor-client privilege as a rule of evidence meant that a client and his or her lawyer were not required to tender confidential communications into evidence in a judicial proceeding (*Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at p. 876, citing R. Cross, *Cross on Evidence* (5th ed. 1979), at p. 282). As R. D. Manes and M. P. Silver state in *Solicitor-Client Privilege in Canadian Law* (1993), at p. 2:

> The origin of the law of privilege goes back to Tudor times in England, and originated as a respect for the oath and honour of a lawyer who was duty-bound to guard the client's secrets. At first, the duty was restricted to an exemption only from testimonial compulsion, that is, the right of the lawyer or client to refuse to testify in court regarding confidential communications.
>
> [Emphasis added; footnote omitted.]

In its early days, solicitor-client privilege was restricted in operation to an exemption from testimonial compulsion (*Solosky v. R.* (1979), [1980] 1 S.C.R. 821(S.C.C.) at p. 834).

40 As early as *Solosky*, however, this Court recognized that solicitor-client privilege had been placed "on a new plane", and extended beyond the courtroom context (p. 836). Two years later, in *Descôteaux*, this Court elaborated on solicitor-client privilege as a substantive rule and formulated it as follows:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively. [p. 875]

Thus, the substantive rule expanded the circumstances in which solicitor-client privilege applies, and also introduced protections governing when the privilege can be abrogated, set aside or infringed.

41 Following *Descôteaux*, this Court has found solicitor-client privilege to apply in circumstances outside the courtroom, including search and seizure of documents in a lawyer's office (*Lavallee, Rackel & Heintz*; *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67, [2003] 3 S.C.R. 193(S.C.C.); *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2015 SCC 7, [2015] 1 S.C.R. 401(S.C.C.)) and disclosure of documents in the context of access to information legislation (*Blood*

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*Tribe*; *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31, [2006] 2 S.C.R. 32(S.C.C.); *Criminal Lawyers' Association*). In its modern form, solicitor-client privilege is not merely a rule of evidence; it is "a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" (*Lavallee, Rackel & Heintz*, at para. 49).

42 I find that the present case engages solicitor-client privilege in its substantive, rather than evidentiary, context. This case is not occupied with the tendering of privileged materials as evidence in a judicial proceeding. Rather, it deals with disclosure of documents pursuant to a statutorily established access to information regime, separate from a legal proceeding. While it is true that the person who applied for the information was initially seeking the information for use as evidence in separate litigation against the University, her lawsuit has since ended. In addition, the Privacy Commissioner is not seeking to review the solicitor-client privileged information as evidence in order to decide a legal dispute. The disclosure of the information in this context is therefore not related to the "evidentiary privilege". Rather, disclosure in this case is more akin to the review of mail being delivered to prison inmates, which this Court addressed in *Solosky*. In that case, as it was described in *Descôteaux*, the Court "applied a standard that has nothing to do with the rule of evidence ... since there was never any question of testimony before a tribunal or court" (p. 875). Equally, the absence of such a question here highlights the engagement of solicitor-client privilege in its substantive, rather than evidentiary, role.

43 This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary (*Chambre des notaires*, at para. 28, citing *Lavallee, Rackel & Heintz*, at paras. 36-37, *McClure*, at para. 35, *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185 (S.C.C.), at para. 27, and *Goodis*, at para. 15). Within the evidentiary context of criminal proceedings, for example, the substantive nature of solicitor-client privilege has been interpreted as meaning the privilege only yields in "certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis" (*McClure*, at para. 35). These limited categories, which will only be satisfied in rare circumstances, include the accused's right to make full answer and defence (*McClure*; *Brown*) and where public safety is at stake (*Smith*).

44 Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such as spousal communication privilege, religious communication privilege and the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of "privilege of the law of evidence".

45 In this regard, it is noteworthy that s. 56(3) of FOIPP was first enacted in its present form in 1994, in the Freedom of Information and Protection of Privacy Act, S.A. 1994, c. F-18.5, s. 54(3). At that time, the elevation of solicitor-client privilege from a privilege of the law of evidence into a substantive privilege had been well established in the jurisprudence for over a decade.

*(2) Blood Tribe Does Not Stand for the Proposition That Solicitor-Client Privilege Is a "Privilege of the Law of Evidence"*

46 The Commissioner argues that, according to *Blood Tribe*, the phrase "any privilege of the law of evidence" is sufficiently clear and precise to abrogate solicitor-client privilege. In *Blood Tribe*, the provision at issue was s. 12 of the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"), which permitted the Privacy Commissioner of Canada to compel the production of any record "in the same manner and to the same extent as a superior court of record" (now s. 12.1; see S.C. 2010, c. 23, s. 83). This Court concluded that s. 12 of PIPEDA amounted to a general production provision and was not sufficiently express to abrogate solicitor-client privilege (para. 21).

47 In *Blood Tribe*, the Privacy Commissioner of Canada argued that her investigatory powers under *PIPEDA* should be interpreted consistently with her powers under the Privacy Act, R.S.C. 1985, c. P-21, which allowed her to examine information notwithstanding "any privilege under the law of evidence" *(s. 34(2))*. Justice Binnie, writing for the Court, rejected this argument. He observed that the Privacy Commissioner of Canada's powers under *PIPEDA* and the *Privacy Act* were not the same since,

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unlike the general production provision in *PIPEDA*, s. 34(2) of the Privacy Act contained "explicit language granting access to confidences" (para. 28).

48 In this appeal, the Commissioner now argues that s. 34(2) of the Privacy Act, which Justice Binnie observed contained "explicit language granting access to confidences", is very similar to the provision presently at issue. Section 34(2) of the Privacy Act reads as follows:

> **(2)** Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

49 I do not accept the Commissioner's argument that *Blood Tribe* supports her interpretation, for two reasons. First, this Court specifically acknowledged in *Blood Tribe* that the scope of s. 34(2) of the Privacy Act was not at issue, and that "[t]he proper interpretation of s. 34(2) must await a case in which it is squarely raised" (para. 29). In *Blood Tribe*, this Court turned to s. 34(2) merely to demonstrate that the powers of the Privacy Commissioner of Canada were not the same under *PIPEDA* and the *Privacy Act* in response to an argument raised by the Privacy Commissioner (paras. 28-29). The Court in *Blood Tribe* did not lay out definitive criteria with respect to the words contained in s. 34(2) of the Privacy Act.

50 Second, while the terms "privilege under the law of evidence" or "privilege of the law of evidence" contain explicit language granting access to some confidences, as Justice Binnie acknowledged, I am of the view that they do not clearly set aside or permit to infringe solicitor-client privilege. As I have discussed, solicitor-client privilege is not merely a rule of evidence, having been elevated to a rule of substance. Further, a contextual interpretation of s. 56(3) within the scheme of *FOIPP* supports the conclusion that the legislature did not intend to set aside solicitor-client privilege.

*(3) The Statutory Scheme Supports a Finding That Solicitor-Client Privilege Is Not Set Aside*

51 In addition to the lack of clear, explicit and unequivocal language in the provision, a reading of s. 56(3) in the context of the statute as a whole supports the conclusion that the legislature did not intend to set aside solicitor-client privilege.

52 First, s. 27(1) of FOIPP unequivocally establishes that a public body may refuse to disclose solicitor-client privileged documents:

> **27(1)** The head of a public body may refuse to disclose to an applicant
>
> > (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

Section 27(1) recognizes and protects a public body's right to solicitor-client privilege, using the term "solicitor-client privilege". This indicates that the legislature had turned its mind to the specific issue of solicitor-client privilege and was alive to its significance. If the legislature had intended s. 56(3) to compel a public body to produce to the Commissioner documents over which solicitor-client privilege is asserted, it could have used clear, explicit and unequivocal language, as it did in s. 27(1) of the same statute where it granted public bodies a right to assert solicitor-client privilege over information. When setting out the Commissioner's production powers, the legislation did not use equally precise language that would set aside the privilege for the Commissioner, or permit her to infringe it.

53 In addition, the use of the term "privilege of the law of evidence" in s. 56(3) in contrast to "legal privilege" in s. 27(1) is significant, since legislatures are presumed to use expressions consistently within a statute (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §8.36). Therefore, where different terms are used in a single piece of legislation, they must be understood to have different meanings; otherwise the legislature would have employed only one term or the other (*Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at

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para. 81; *R. v. Barnier*, [1980] 1 S.C.R. 1124 (S.C.C.), at pp. 1135-36). If the legislature intended to allow the Commissioner to compel the production of documents over which solicitor-client privilege is asserted under s. 56(3), it could have done so using the words it used in s. 27(1) rather than the phrase "privilege of the law of evidence".

54 Second, this interpretation is a coherent one. In the context of *FOIPP*, the term "legal privilege" is a broader category than "privilege of the law of evidence". As Professor Sullivan states, "[t]he purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included" (§4.39). In the case of s. 27(1), the general language of the phrase "any type of legal privilege" is followed by "including solicitor-client privilege or parliamentary privilege" to ensure that those two sources of privilege, among the most highly protected privileges, are included. This provision clearly demonstrates the legislature's intent to protect a broad range of privileged documents from forced disclosure by a public body to an applicant.

55 "[A]ny privilege of the law of evidence" is a narrower category falling within the scope of "legal privilege". Under s. 56(3), a public body is required to produce to the Commissioner documents over which a "privilege of the law of evidence" is claimed to assess the validity of the privilege.

56 Read together, ss. 27(1) and 56(3) provide that a public body can refuse to disclose documents subject to any "legal privilege". The Commissioner can obtain production of some privileged documents for review, namely those over which a "privilege of the law of evidence" is asserted, and can adjudicate claims of privilege in those cases.

57 Solicitor-client privilege is clearly a "legal privilege" under s. 27(1), but not clearly a "privilege of the law of evidence" under s. 56(3). As discussed, the expression "privilege of the law of evidence" is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege. Therefore, the head of a public body may refuse to disclose such information pursuant to s. 27(1), and the Commissioner cannot compel its disclosure for review under s. 56(3). This simply means that the Commissioner will not be able to review documents over which solicitor-client privilege is claimed. This result is consistent with the nature of solicitor-client privilege as a highly protected privilege.

58 Third, given its fundamental importance, one would expect that if the legislature had intended to set aside solicitor-client privilege, it would have legislated certain safeguards to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right. In addition, there is no provision in *FOIPP* addressing whether disclosure of solicitor-client privileged documents to the Commissioner constitutes a waiver of privilege with respect to any other person. The absence from *FOIPP* of any guidance on when and to what extent solicitor-client privilege may be set aside suggests that the legislature did not intend to pierce the privilege.

59 Overall, this does not mean that an applicant does not have recourse to other means to seek disclosure of documents over which solicitor-client privilege is claimed. It is noteworthy that, in this case, the applicant had the opportunity to do so through the courts in the context of the action she brought against the University. In the course of that action, however, she did not make such a request.

60 I agree with my colleague Justice Cromwell that parallel legislation may assist in the interpretation of statutes. But words and phrases cannot be extricated from their specific statutory context and cross-applied automatically to other legislation. A closer look at British Columbia's Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 44(3), in comparison with the statute at hand, demonstrates significant differences between the operational frameworks of the Alberta and British Columbia statutes, including with respect to the powers of the Commissioner:

> **The Alberta Statute**
>
> ***Powers of Commissioner in conducting investigations or inquiries***
>
> **56(1)** In conducting an investigation under section 53(1)(a) or an inquiry under section 69 or 74.5 or in giving advice and recommendations under section 54, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* and the powers given by subsection (2) of this section.

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**(2)** The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

**(3)** Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

**The British Columbia Statute**

***Powers of commissioner in conducting investigations, audits or inquiries***

**44** (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;

(b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

(2) The commissioner may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

61 Unlike the legislation at hand, s. 44 of the British Columbia Act does not give the Commissioner broad powers to compel the production of records. Significantly, the British Columbia Commissioner does not have all the "powers, privileges and immunities of a commissioner under the *Public Inquiries Act*". Instead, under s. 44(2) of the British Columbia statute, much of that power resides in a court of inherent jurisdiction — the traditional arbiter of solicitor-client privilege. Consequently, it is difficult to conceive a reading of s. 44(3) of the British Columbia Act that would ascribe to the British Columbia Commissioner the type of power the appellant Commissioner here purports to have without rendering s. 44(2) of the British Columbia statute nugatory.

62 Further, nowhere in the British Columbia statute does the legislator reference "legal privilege" or the fact that solicitor-client privilege is a legal privilege. The interpretative conflict that is at the heart of this case therefore does not arise in the context of the British Columbia Act.

63 The modern approach to statutory interpretation requires legislative texts to be read in their entire context. And resort to other texts from different jurisdictions may be helpful in determining what that entire context is. But resort to parallel legislation does not trump other principles of statutory interpretation. Certainly, it would not trump the principle, explained at para. 53 above, that legislatures are presumed to use expressions consistently within an enactment. Indeed, as Professor Sullivan writes, "[o]bviously, the statutes of different jurisdictions cannot be regarded as constituting a single enactment" (§13.42).

64 In my view, that resort must be made to an anterior provision of the British Columbia Act, s. 44(2), to shed light on the meaning of the phrase "privilege of the law evidence" appearing in s. 44(3) of that Act, hurts, rather than helps, the argument that this phrase is sufficiently clear, explicit and unequivocal to capture solicitor-client privilege. Indeed, if it were so clear,

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explicit and unequivocal, then s. 44(2.1) would be rendered largely meaningless. Moreover, that this anterior provision vests much of the production power in a court — as opposed to a commissioner with powers equivalent to those existing under the Public Inquiries Act—in a manner consistent with legislative respect for fundamental values, also militates against the appellant Commissioner's desired interpretation in the case at hand. In fact, the very same contextual considerations operate against the appellant Commissioner in the case before us: an anterior provision, s. 27(1), explicitly permits a public body to refuse to produce documents covered by solicitor-client privilege with reference to the distinct concept of "legal privilege", and the fact that the Commissioner need never ask a court to compel production of privileged documents would be inconsistent with the presumption of legislative respect for fundamental values.

65 Therefore, assuming — without deciding — that, even if the phrase "privilege of the law of evidence" would be understood to include solicitor-client privilege once it is coloured by the relevant contextual considerations arising from the framework of the British Columbia Act, it cannot, so coloured, be imported into the Alberta statute with equivalent effect.

66 I conclude this section in saying a word about the strict construction approach adopted by the Court of Appeal. While its approach bears some similarity with mine, I am not prepared, given the reasons expressed above, to say that *Blood Tribe* ousts the modern approach to statutory interpretation.

*(4) Even if There Was Clear and Unambiguous Legislative Intent, This Was Not an Appropriate Case in Which to Order Disclosure*

67 Lastly, even if the language of s. 56(3) did clearly evince legislative intent to set aside solicitor-client privilege, I would find that this was not an appropriate case in which to order production to the Commissioner.

68 The Commissioner argues she has an adjudicative function akin to that of a superior court, to determine whether a public body has validly claimed solicitor-client privilege. As this Court found in *Blood Tribe*, however, even courts will decline to review solicitor-client documents to ensure the privilege is properly asserted unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue (para. 17, citing Ansell Canada Inc. v. Ions World Corp.199828 C.P.C. (4th) 60(Ont. Gen. Div.), at para. 20).

69 The delegate found that because the University failed to present evidence of its claim of solicitor-client privilege as required by the Protocol, it was necessary for the delegate to review the records. However, the Protocol is not law, and was not enacted by the legislature. Rather, it is a guide established by the Commissioner to assist adjudicators and public bodies.

70 At the time of the Commissioner's request for disclosure, the prevailing authority in Alberta in civil litigation allowed a party to bundle and identify solicitor-client privileged documents by document numbers, as the University had done (see *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81(Alta. C.A.)). No evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue.

**VII. Conclusion**

71 Subject to constitutional limitations, legislatures can pierce solicitor-client privilege by statute. However, the language of the provision must be explicit and evince a clear and unambiguous legislative intent to do so. In the present case, there is no such language. For the above reasons, I would dismiss the appeal and award costs to the Board of Governors of the University of Calgary throughout.

***Cromwell J.*:**

**I. Introduction**

72 I agree with my colleague Justice Côté that the appeal must be dismissed. But I do not agree that, under Alberta's Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 (“FOIPP”), the Information and Privacy Commissioner lacks the authority to compel production for review of records over which solicitor-client privilege is asserted. The Commissioner has

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the authority to order a public body to produce for review any record required by the Commissioner "[d]espite ... any privilege of the law of evidence": *s. 56(3)*. This, in my view, is an explicit legislative grant of power which should be respected, not evaded.

73 Whatever other principles and presumptions of statutory interpretation are engaged, statutory interpretation must be anchored in the words chosen by the legislature read in their full context. In my respectful view, to hold as my colleague Justice Côté would that solicitor-client privilege is a "legal privilege" but not a "privilege of the law of evidence" in *FOIPP* is not justified by the text or context of the legislation or by the principle of interpretation that the legislature must use clear language to authorize any abrogation of solicitor-client privilege. Rather, the words of the enactment, read in context, evince a clear intention to permit the Commissioner, subject to judicial review, to order production for inspection of records over which solicitor-client privilege is claimed. To hold otherwise abandons the modern approach to statutory interpretation repeatedly endorsed by the Court and, under the guise of "restrictive" interpretation, undermines legislative policy choices which, absent constitutional constraint, legislatures are entitled to make.

**II. Issues**

74 There are three questions for decision:

1. What is the appropriate standard of review?

2. Does FOIPP abrogate solicitor-client privilege?

3. Did the Commissioner's delegate make a reviewable error in ordering production?

**III. Analysis**

***A. What Is the Appropriate Standard of Review?***

75 For the purposes of my reasons, I will assume without deciding that the correctness standard of review applies to the question of whether the Commissioner may order production of a record over which solicitor-client privilege is claimed in order to determine whether the claim of privilege is well founded.

***B. Does FOIPP Abrogate Solicitor-Client Privilege?***

*(1) Introduction*

76 In *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44, [2008] 2 S.C.R. 574 (S.C.C.), this Court held that "legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively": para. 11. Solicitor-client privilege cannot be "abrogated by inference" and "[o]pen-textured language governing production of documents will be read *not* to include solicitor-client documents": para. 11 (emphasis in original); see also Minister of National Revenue v. Thompson2016 SCC 21S.C.C., [2016] 1 S.C.R. 381, at paras. 23-25.

77 While this, of course, is an important holding, we must note that what was in issue in *Blood Tribe* has virtually nothing in common with this appeal. The contention in *Blood Tribe* was that the Privacy Commissioner, by virtue of general language authorizing the production of records, had routine access to privileged material even when privilege was properly claimed: paras. 16-17. That is the context in which the Court held that broad language must be read restrictively and that open-textured production powers should not be read as permitting production of privileged material. The Court expressly accepted the submission of the Attorney General of Canada that the ordinary and grammatical meaning of the words, taken in their full and proper context, did not support the Privacy Commissioner's position in that case: para. 26. Moreover, the Court noted that, in contrast to the Privacy Commissioner's powers under the federal Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"), which were in issue in Blood Tribe, the Privacy Act, R.S.C. 1985, c. P-21, used "explicit language granting access to confidences": para. 28. The *Privacy Act* language was, in relevant respects, identical to the language in the Alberta statute before us in this case: the *Privacy Act* authorized the Privacy Commissioner to examine any information "[n]otwithstanding ... any privilege under the law of evidence" *s. 34(2)*.

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78 When applying presumptions of legislative intent, we do not abandon the modern approach to statutory interpretation to which the Court has been for so long and so consistently committed. Consequently, determining whether the legislature has expressed with sufficient clarity the intent to rebut a presumption of legislative intent requires the application of the modern approach to statutory interpretation. By focusing the analysis on the modern approach to statutory interpretation to determine if the legislature intended to displace a presumption, one broadens the inquiry from a focus on the plain meaning of the text to one that considers the entire context in which the words of the statute find themselves. General language in relation to production, as required by *Blood Tribe*, will be read restrictively to exclude abrogation by inference. But the "modern" approach is used to determine whether the statutory text, read in its full context, evinces with the required clarity the intention to abrogate privilege.

79 In my opinion, the legislature expressly provided for the abrogation of solicitor-client privilege in s. 56(3) of FOIPP by authorizing the Commissioner to order production of records over which solicitor-client privilege is asserted in order to determine whether the claim is well founded. This is apparent on the grammatical and ordinary meaning of the words "any privilege of the law of evidence". This interpretation is also supported by the contextual factors that are to be considered in statutory interpretation pursuant to *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.). This conclusion is, in my respectful view, fully consistent with *Blood Tribe*: this interpretation does not abrogate privilege by inference, but with unmistakable clarity by virtue of express legislative direction.

*(2) Grammatical and Ordinary Meaning of "Any Privilege of the Law of Evidence"*

80 Section 56(3) reads:

> (3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

81 The respondent argues that "any privilege of the law of evidence" does not include solicitor-client privilege because solicitor-client privilege is not simply an evidential privilege, but also a substantive rule of law. While I, of course, agree that solicitor-client privilege has become a substantive — indeed, a constitutional — principle, it is also an evidentiary privilege captured by the statutory words in this context. Moreover, as I explain, what is at issue here is the evidentiary component of solicitor-client privilege.

82 This Court has found that solicitor-client privilege is *both* an evidentiary privilege and a substantive principle. In *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, [2002] 3 S.C.R. 209 (S.C.C.), Arbour J. explained that "[s]olicitor-client privilege is a rule of evidence": para. 49. Similarly, in *Société d'énergie Foster Wheeler ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456 (S.C.C.), the Court observed that the case law "establishes the fundamental importance of solicitor-client privilege *as an evidentiary rule*, a civil right of supreme importance and a principle of fundamental justice": para. 34 (emphasis added). In *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), Lamer J. described solicitor-client privilege as a "rule of evidence", which "had also since given rise to a substantive rule": pp. 872 and 875. Solicitor-client privilege is thus both a rule of evidence and a substantive rule.

83 Other appeal courts have arrived at this conclusion with respect to similar language in other statutes.

84 For example, in *Newfoundland & Labrador (Attorney General) v. Newfoundland & Labrador (Information & Privacy Commissioner)*, 2011 NLCA 69, 314 Nfld. & P.E.I.R. 305 (N.L. C.A.), the Newfoundland and Labrador Court of Appeal concluded that the words "a privilege under the law of evidence" in s. 52 of the Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, were "sufficiently clear to abrogate solicitor-client privilege, as this is a privilege recognized under the law of evidence": para. 45. In *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127 (Fed. C.A.), the Federal Court of Appeal concluded that the language "'any privilege under the law of evidence' ... clearly gives the Court authority to interfere with solicitor-client confidentiality": para. 11.

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85 This interpretation of s. 56(3) of FOIPP also finds support in doctrine. Professor A. M. Dodek, for example, describes solicitor-client privilege as being "part of a family of evidentiary privileges": *Solicitor-Client Privilege* (2014), at p. 26. He observes that

> [i]t would be absurd to assert that such language [any privilege under the law of evidence] excludes solicitor-client privilege because it has become more than a privilege under the law of evidence. Consistent with the modern approach to statutory interpretation, "privilege under the law of evidence" should be given a consistent approach throughout the statute book. Unless it indicates otherwise, this phrase should be interpreted to include solicitor-client privilege. [Footnotes omitted; p. 379.]

86 In *The Law of Privilege in Canada* (loose-leaf), R. W. Hubbard, S. Magotiaux and S. M. Duncan note that "solicitor-client privilege has now been *extended* to a substantive legal right": p. 11-4.1 (emphasis added). The authors also note that "privileges such as solicitor-client are more than evidentiary rules that preclude the admissibility of evidence; *they also* bestow substantive rights": pp. 1-3 (emphasis added). Similarly, in *The Law of Evidence in Canada* (4th ed. 2014), S. N. Lederman, A. W. Bryant and M. K. Fuerst explain that "solicitor-client privilege was long considered to be a testimonial privilege in that it could only be asserted at trial": p. 952. However, subsequent decisions "have *extended* the time when privilege may be claimed", which is "part of the trend towards a broader concept of solicitor-client privilege": pp. 952-53 (emphasis added).

87 Moreover — and contrary to the position adopted by my colleague Justice Côté — it is the evidentiary privilege that is in issue here. What is claimed by the respondent is immunity from forced production by virtue of the Commissioner's statutory powers. We are thus concerned with a claim of protection from disclosure required by legal authority, a matter falling squarely within the evidentiary privilege expressly referred to in the statutory language: Dodek, at p. 16; *Lavallee, Rackel & Heintz*, at paras. 13-14.

88 The respondent points out that *s. 27(1)(a)* of the statute specifically includes the words "solicitor-client privilege" and that s. 56(3) does not purport to override that provision but implicitly accepts it. While the words "solicitor-client privilege" are used elsewhere in the statute, this does not detract from the interpretation of s. 56(3) that I would adopt. Section 27(1)(a) provides:

> **27(1)** The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

89 Sections 27(1)(a) and 56(3) of the statute perform different functions. Thus, while s. 27(1)(a) specifically refers to solicitor-client privilege, this does not mean that s. 56(3) is to be interpreted as precluding the Commissioner from ordering production of documents subject to solicitor-client privilege. In any case, *s. 27* expressly includes solicitor-client privilege within the ambit of "any type of legal privilege".

90 Section 27(1)(a) falls under the marginal note "Privileged information" and under the division of the statute entitled "Exceptions to Disclosure". Section 27(1) sets out a number of grounds upon which a public body can refuse to order disclosure. However, it does not provide that the Commissioner is prevented from reviewing a public body's claim that one of these grounds for exception to disclosure properly applies. Rather, s. 27(1) provides explicit guidance to public bodies on what grounds they can assert to resist disclosure.

91 Section 56, on the other hand, falls under the marginal note "Powers of Commissioner in conducting investigations or inquiries" and under the part of the statute entitled "Office and Powers of Information and Privacy Commissioner". Section 56 provides what the Commissioner can and cannot do in the context of conducting an inquiry. There is nothing in this provision, or under s. 27(1), that can be read as saying that the Commissioner is prevented from ordering the production of documents subject to a claim of solicitor-client privilege in the context of answering all questions of law and fact that arise in the course of an inquiry.

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92 I cannot accept that we should read this statute as saying that solicitor-client privilege is a type of legal privilege (as is clear from *s. 27)* but that solicitor-client privilege is not a "privilege of the law of evidence" (the language used in s. 56(3)). As all of the authorities make clear, solicitor-client privilege is a "privilege of the law of evidence" and all such privileges are "legal privileges".

93 In summary, the grammatical and ordinary meaning of "any privilege of the law of evidence" includes solicitor-client privilege. The legislature has, as required by *Blood Tribe*, used appropriate language to clearly show its intention: solicitor-client privilege is abrogated for the purposes of permitting the Commissioner to inspect documents over which privilege is claimed in order to allow the validity of the claim to be assessed.

94 This conclusion is also supported by a number of contextual factors that I will now review.

*(3) Contextual Factors*

**(a) The Statutory Context Under FOIPP**

95 As we shall see, the statutory scheme under *FOIPP* provides a detailed, self-contained process for the disclosure of information to an applicant. This statutory scheme vests the Commissioner with expansive, robust and streamlined review powers to decide whether a public body is required to disclose records. Absent the power to review a claim of solicitor-client privilege, the Commissioner would not be able to fulfill this statutory mandate. Importantly, the Commissioner's decisions are subject to judicial review.

96 *FOIPP*'s aim is to provide a broad right of access to information and it sets up the Commissioner, subject to judicial review, as the authority who decides whether access will be granted.

97 This broad right of access to information is subject to defined limitations in *FOIPP*. Relevant to this appeal, for example, s. 27(1)(a) provides that the head of a public body can refuse to disclose to an applicant "information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege".

98 *FOIPP* also sets out the powers of the Commissioner in conducting investigations or inquiries. *Section 56(1)* provides that the Commissioner has "all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*", R.S.A. 2000, c. P-39, and the powers under *s. 56(2)*. Section 56(2) provides that the Commissioner can require "any record to be produced ... whether or not the record is subject to the provisions of this Act". Section 56(3), as noted above, further provides that a public body "must produce to the Commissioner" any document required under s. 56(1) and (2) "[d]espite any other enactment or any privilege of the law of evidence".

99 *FOIPP* protects privileged information. *Section 58* specifies that "[a]nything said, any information supplied or any record produced by a person during an investigation or inquiry by the Commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court". Further, *s. 59(1)* states that the Commissioner and her delegates "must not disclose any information obtained in performing their duties, powers and functions under this Act" except in limited instances.

100 *FOIPP* also describes the process for reviews and complaints. Section 65(1) provides that a person who requests access from a public body can ask the Commissioner to review "any decision, act or failure to act of the head that relates to the request". *Section 69(1)* provides that, unless the Commissioner refuses to conduct an inquiry under s. 70, "the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry". Under *s. 72(1)*, the Commissioner, on finishing an inquiry, "must dispose of the issues by making an order under this section". *Section 72(2)(a)* provides that the Commissioner can "require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access". Finally, *s. 73* provides that the Commissioner's decision is final, although the decision is subject to judicial review.

101 The respondent raises a contextual argument based on s. 59(4) of FOIPP which provided, at the relevant time:

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> **(4)** The Commissioner may disclose to the Minister of Justice and Attorney General information relating to the commission of an offence against an enactment of Alberta or Canada if the Commissioner considers there is evidence of an offence.

102 The respondent submits that if s. 56(3) empowers the Commissioner to order production of material over which solicitor-client privilege is asserted, then it would follow that s. 59(4) would allow the Commissioner to share that privileged information with the Minister of Justice and Attorney General, if the Commissioner thought that it contained evidence of an offence.

103 This submission must be rejected: it contradicts rather than supports the respondent's position on s. 56(3). The respondent maintains that the statutory language of s. 56(3) is not clear enough to abrogate privilege because it refers only to any privilege of the law of the evidence. But then the respondent claims that s. 59(4), which makes no mention of privilege at all, means that the Commissioner may share privileged information if it discloses evidence of an offence. That interpretation is contrary to the basic and unchallenged principle that clear language is needed to abrogate privilege. There is nothing in the general language of s. 59(4) or the surrounding statutory context that supports an interpretation allowing the abrogation of solicitor-client privilege through disclosure by the Commissioner to the Minister of Justice or the Attorney General. Section 59(4) contributes nothing to the proper interpretation of s. 56(3).

104 The statutory scheme, therefore, unambiguously supports the view that the legislature intended the Commissioner to have the powers required to decide whether or not records should be produced by a public body — including ruling on claims of privilege — subject to judicial review of the exercise of those powers.

**(b) The Statutory Scheme at Issue in Blood Tribe**

105 I have already briefly mentioned how *FOIPP* is markedly different, in relation to the review of claims of solicitor-client privilege, from the legislation that was the subject of the Court's decision in *Blood Tribe*. It will be worthwhile to expand on this point.

106 In *Blood Tribe*, this Court noted a number of concerns with the statutory scheme established under *PIPEDA* in concluding that the statute did not abrogate solicitor-client privilege, namely:

> • A court's power to review disputed claims of privilege derived "from its power to adjudicate disputed claims over legal rights", which the Privacy Commissioner did not have: para. 22.
>
> • The Privacy Commissioner could become "adverse in interest to the party whose documents she wants to access", which is not true of a court. The Privacy Commissioner could take a resisting party to court, and could also decide to share compelled information with prosecutorial authorities: para. 23.
>
> • The language granting the power was expressed in general language and it was the "generality of the language ... which does not advert to issues raised by solicitor-client privilege" that shows the importance of the principle against abrogation of privilege by inference: para. 26 (emphasis deleted).

107 The statutory scheme at issue in this appeal does not give rise to these concerns.

108 First, *FOIPP* gives the Commissioner adjudicative powers. Section 69(1) of the legislation provides that the Commissioner "must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry". If the Commissioner is deprived of the power to order production of documents to review a claim of solicitor-client privilege, the Commissioner is clearly not able to "decide all questions of fact and law". The legislative history of the statute, discussed below, also supports a finding that the legislature vested the Commissioner with adjudicative powers.

109 As Professor Dodek observes, in light of *Blood Tribe*, conferring adjudicative powers on the Privacy Commissioner is a key factor in finding that a statute allows for the abrogation of solicitor-client privilege: p. 368. As he notes, "*Blood Tribe* itself suggests that privacy or information commissioners performing adjudicative functions are empowered to access allegedly privileged documents in order to adjudicate privilege claims": p. 377. Professor Dodek further maintains that "an adjudicative

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body must be taken to have the power to determine privilege claims as part of its adjudicative functions": p. 369. He uses as an example the Federal Court, which is a statutory court yet has no express power to abrogate solicitor-client privilege. He suggests that the power to adjudicate privilege claims "is part of the power of adjudication": p. 369.

110 Second, the Commissioner does not become adverse in interest to a party in the sense described in *Blood Tribe*. Under s. 15 of PIPEDA, the Privacy Commissioner may appear before the Federal Court on behalf of the complainant. There is no similar provision under the statute at issue here. While the Commissioner can be named as a party in the judicial review, the Commissioner is not appearing *on behalf of* the complainant in such a context.

111 Third, the language used in s. 56(3) is not "[o]pen-textured language governing production of documents" as was the provision in issue in *Blood Tribe*: para. 11. On the contrary, s. 56(3) expressly provides that the power to order production applies notwithstanding any privilege of the law of evidence. Further, accepting that solicitor-client privilege is both a legal privilege *and* a substantive principle, the use of the words "solicitor-client privilege" under s. 27(1) does not mean that the language "any privilege of the law of evidence" excludes solicitor-client privilege. On the contrary, the statutory language states that solicitor-client privilege is included in the general term "any type of legal privilege".

112 In conclusion, the statutory context here demonstrates that the legislature intended for the abrogation of solicitor-client privilege. None of the factors listed in *Blood Tribe* as weighing against a finding that the statute abrogated solicitor-client privilege is in play here.

**(c) Legislative History of FOIPP**

113 While the legislative history reveals very little as to the specific intention of the legislature with regards to the issue of whether the Commissioner can order the production of documents subject to solicitor-client privilege under s. 56(3), the debates leading up to the enactment of the first version of the legislation show that the legislature intended the Commissioner to have robust adjudicative powers [1] and that this adjudicative process was to be streamlined to ensure accessibility and reduce delay. [2] This further supports an interpretation of s. 56(3) as abrogating solicitor-client privilege.

1 On April 11, 1994, Mr. Klein, who was the Premier of Alberta at the time, observed that "the commissioner will have absolute authority. If any member or if any department head or official refuses to release information and an appeal is then made to the commissioner and the commissioner says, 'You must release that', then that must be done" (*Alberta Hansard*, 2nd Sess., 23rd Leg., at p. 1052). Mr. Rostad agreed, noting: "The Premier is absolutely correct that *the commissioner does have adjudicative powers*, that he can mandate a ruling, and in fact there is appeal to the Court of Appeal or Queen's Bench only when the commissioner is head of a particular department himself, which happens to be the information and privacy department or section" (p. 1052 (emphasis added)).

2 Dr. Massey, on April 18, 1994, observed that the all-party panel that produced a report of recommendations to the legislature suggested that "there should be no general power of appeal from the decision of the commissioner, only limited power of judicial review if it were alleged that the commissioner had exceeded his or her jurisdiction" (*Alberta Hansard*, 2nd Sess., 23rd Leg., at p. 1239). Dr. Massey was concerned with a provision in the bill creating a right of appeal to the Queen's Bench judge as an adjudicator. He thought this was problematic because "it allows the government to delay compliance with an order to disclose information, as we have seen with the federal Information Commissioner" (p. 1239). Similarly, on that same date, Mr. Kirkland observed that a right to appeal to the Queen's Bench as a judge or adjudicator created two problems: "It allows a delay as far as being forthcoming with the information, which is incorrect as timely submission of the information is extremely important, and that delaying tactic should not be available. The other thing it does is that it has a tendency to drive up the cost of extracting information. If a private citizen has to pay the cost to withstand the appeal of a government that doesn't want to release information, then that private citizen will endure considerable expense, and that in itself is a deterrent" (p. 1240). On May 5, 1994, Mr. Dickson discussed proposed amendments to the bill. He observed that the all-party panel clearly recommended to the government "that there would be no right of appeal from a decision of the commissioner because in places where there is that right of appeal, we've seen abuse, we've seen delay, we've seen costs which become a significant barrier to Albertans getting access" (p. 1752). He notes further on, in response to the proposed amendment which he thinks addresses the concern about a right to appeal, "If there's ever a question of reviewing this at some point and somebody gets into looking at *Hansard*, they will see that this was clearly the intention: that the only right of review is if the

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> complaint or the concern relates to something that the commissioner does within his own small office or department. That's the only time that would apply" (p. 1752).

**(d) Parallel Legislation**

114 Legislation in other jurisdictions dealing with similar subject matters — sometimes referred to as parallel legislation — can be a helpful part of the legislative context: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§13.41 to 13.51; *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at paras. 57-60. For example, it is generally desirable to have a consistent interpretation of similar language used in statutes in different Canadian jurisdictions dealing with the same subject matter: see, e.g., *Merck Frosst Canada Ltée c. Canada (Ministre de la Santé)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (S.C.C.), at para. 195. In this case, the parallel British Columbia legislation sheds some light on the interpretative issue at hand.

115 *The British Columbia statute* provides, in terms nearly identical to s. 56(3) of the Alberta legislation, that "[d]espite ... any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1)": Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 44(3). *Section 44(1)(b)* authorizes the Commissioner to "make an order requiring a person to ... produce for the commissioner a record in the custody or under the control of the person". Section 44(2)(a) permits the Commissioner to apply to the Supreme Court of British Columbia for an order "directing a person to comply with an order made under subsection (1)". Note that the power of the court under s. 44(2)(a) is limited to "directing a person to comply with an order made under subsection (1)", that is *an order of the Commissioner*. Thus, it is the Commissioner's order that the court is permitted to enforce under s. 44(2).

116 The statute was amended in 2003 to provide, at *s. 44(2.1)*, that, where a record subject to solicitor-client privilege is produced to the Commissioner at the Commissioner's request or "under subsection (1)", the solicitor-client privilege of the record is not affected by the disclosure: Freedom of Information and Protection of Privacy Amendment Act, 2003, S.B.C. 2003, c. 5, s. 15; and see Public Inquiry Act, S.B.C. 2007, c. 9, s. 76, amending s. 44 of the Freedom of Information and Protection of Privacy Act, but not in relevant respects. An order under *s. 44(1)* is, as noted, an order of the Commissioner to produce a record. In other words, the amendment provides that production of a record subject to solicitor-client privilege as ordered by the Commissioner does not constitute a waiver of the privilege.

117 The premise of the amendment — and this is the important point — is that records subject to solicitor-client privilege fall within the Commissioner's powers under s. 44(1) and (3) to order production notwithstanding "any privilege of the law of evidence". Otherwise, the amendment dealing with waiver of solicitor-client privilege would be meaningless in relation to records ordered produced by the Commissioner under s. 44(1). The amendment (s. 44(2.1)) refers specifically to solicitor-client privileged records that a person "discloses ... at the request of the commissioner, *or under subsection (1)*". The legislature must have assumed that s. 44(1) permits the Commissioner to require production of solicitor-client privileged records. Otherwise, there could be no record subject to solicitor-client privilege disclosed to the Commissioner under s. 44(1) to which the amendment could refer.

118 This amendment thus makes it clear that the British Columbia legislature, in requiring records to be produced to the Commissioner notwithstanding "any privilege of the law of evidence" in s. 44(3), assumed that phrase to refer to records subject to solicitor-client privilege. This seems to me to answer Justice Côté's contention that the expression "privilege of the law of evidence" is not sufficiently "clear, explicit and unequivocal" to refer to solicitor-client privilege: para. 44.

119 The appellant's position is that the expression "any privilege of the law of evidence" excludes solicitor-client privilege in *FOIPP*. But the fact that the same expression in the parallel British Columbia legislation clearly *includes* solicitor-client privilege adds credence to the view that the phrase includes solicitor-client privilege in *both* statutes. And we should reflect carefully on the implications of holding, as Justice Côté would, that identical words in two pieces of legislation dealing with the same subject matter both do and do not refer to solicitor-client privilege, depending on drafting nuances that reveal no difference in substance.

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*(4) Conclusion*

120 The grammatical and ordinary meaning of the language of s. 56(3) of the legislation, the statutory context and the legislative history all support the conclusion that the legislature expressed a clear intention to allow the Commissioner and his or her delegates to order the production of documents subject to solicitor-client privilege in the course of an inquiry in order to assess the claim of privilege.

***C. Did the Commissioner's Delegate Make a Reviewable Error in Ordering Production?***

121 Having found that s. 56(3) of FOIPP allows the Commissioner to abrogate solicitor-client privilege, we must decide whether the Commissioner's delegate made a reviewable error by ordering production of the documents subject to a claim of solicitor-client privilege in the circumstances. This Court's jurisprudence imposes a requirement that solicitor-client privilege should only be abrogated when it is absolutely necessary to do so in order to achieve the ends sought by the enabling legislation. As Binnie J. noted in *Blood Tribe*, "[e]ven courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue": para. 17.

122 The University submitted a sworn affidavit by the Commissioner in August 2010. In the affidavit, the Commissioner swore that University Legal Services and external legal counsel advised various University officials about the applicant's employment history with the University. She swore that she was advised by the University's General Counsel and believed that solicitor-client privilege had been asserted over the communications given and received by the University lawyers in respect of this matter. Attached as an exhibit to the affidavit was a chart identifying the page numbers over which solicitor-client privilege was being asserted. Nothing other than page numbers described these documents.

123 The following day, the respondent filed written submissions with the Commissioner. The University submitted that it was claiming solicitor-client privilege over records involving the University's General Counsel and the University's external legal counsel. The University reproduced the chart of page numbers subject to solicitor-client privilege, submitting that they were communications involving legal counsel which were being withheld on the basis of solicitor-client privilege.

124 The Commissioner's delegate sent the respondent a letter requesting further information and evidence on the privilege issue in September 2010. The delegate asked the respondent to complete the record form for each record or to provide information requested in the record form in another format. In response, the University's Provost and Vice-President (Academic) filed a letter with the Commissioner. In the letter, he explained that the applicant had started a multi-million dollar lawsuit against the University, which was being vigorously defended. He noted that the "communication between the University of Calgary and its legal advisors" was the "subject matter of solicitor-client privilege as recognized in the common law for centuries, by the Supreme Court of Canada in the Blood Indian Tribe decision ... and also in Section 27 of the FOIP Act". He also affirmed that the University would not waive privilege on the records identified by the Commissioner in her affidavit.

125 The University's external counsel also filed a letter with the Commissioner. In the letter, he stated that the "University must defend itself against the multiple legal matters commenced by [the applicant] and in so doing, must rely on solicitor-client privilege to ensure that communications involving the University General Counsel and its external counsel, for the purposes of giving advice and understanding the issues, remain confidential".

126 The Commissioner's delegate required the University to produce the records over which solicitor-client privilege was claimed. The delegate explained that production was required because the University had failed to provide adequate evidence of a claim of solicitor-client privilege.

127 The appellant conceded in the hearing before this Court that the University's claim of privilege complied with the requirements of Alberta civil litigation practice at the time, which was governed by *Dorchak v. Krupka*, 1997 ABCA 89, 196 A.R. 81 (Alta. C.A.). While I understand that these requirements have since evolved in light of the subsequent decision by the Alberta Court of Appeal in *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, 580 A.R. 265 (Alta. C.A.), it was, in my view, a reviewable error for the Commissioner's delegate to impose a more onerous standard on the University in

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relation to its assertion of privilege than that applicable in civil litigation before the courts. This conclusion is reinforced by the fact that the evidence filed with the Commissioner met the three-part test set out in *Solosky v. R.* (1979), [1980] 1 S.C.R. 821 (S.C.C.). The evidence — in particular the letter by the University's external legal counsel — clearly asserts that the documents are communications between solicitor (the University's external legal counsel) and client (the University's General Counsel, on behalf of the University); which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.

**IV. Disposition**

128 The express language and the full context of s. 56(3) of FOIPP demonstrate that the legislature intended to abrogate solicitor-client privilege to the extent of permitting the Commissioner to order production of records over which solicitor-client privilege is asserted when necessary to adjudicate the validity of that claim. However, the Commissioner made a reviewable error by ordering production in the face of the evidence submitted in relation to the claim of privilege.

129 I would dismiss the appeal with costs to the University throughout.

***Abella J.*:**

130 Most legal decisions made by tribunals touch on important legal questions, such as limitation periods in *British Columbia (Securities Commission) v. McLean*, [2013] 3 S.C.R. 895 (S.C.C.), or estoppel in *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, [2011] 3 S.C.R. 616 (S.C.C.). They have been found nonetheless to fall within the reasonableness test created in *Dunsmuir* for adjudicators applying their expertise in interpreting their own specialized mandates. We have not, before this case, excavated the legal concept from its statutory context in order to give it the singular stature *Dunsmuir* says attracts correctness.

131 This Court has decided six cases in recent years involving disclosure decisions by Information and Privacy Commissioners. In two of them — *UFCW, Local 401 v. Alberta (Information and Privacy Commissioner)*, [2013] 3 S.C.R. 733 (S.C.C.), and *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, [2008] 2 S.C.R. 574 (S.C.C.) — there was no reference to the standard of review. In the four remaining — *Ontario (Ministry of Community Safety & Correctional Services) v. Ontario (Information & Privacy Commissioner)*, [2014] 1 S.C.R. 674 (S.C.C.); *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [2014] 2 S.C.R. 3 (S.C.C.); *A.T.A. v. Alberta (Information & Privacy Commissioner)*, [2011] 3 S.C.R. 654 (S.C.C.); and *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, [2010] 1 S.C.R. 815 (S.C.C.) — the standard of review was held to be reasonableness. In the 2010 case of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, a Commissioner's decision was reviewed on the reasonableness standard, even though the issue involved the disclosure of documents covered by solicitor-client privilege.

132 In each case, a Commissioner was interpreting his or her home statute. Under New Brunswick (Board of Management) v. Dunsmuir[2008] 1 S.C.R. 190 (S.C.C.), and its progeny, that means the standard of review is reasonableness unless the question raised falls into one of the categories to which the correctness standard applies, such as questions of central importance to the legal system as a whole which are outside the tribunal's expertise.

133 Despite this clear lineage, we now find ourselves being asked to depart from what has been the accepted path for Information and Privacy Commissioners applying their specialized expertise in interpreting their own statutes, including when solicitor-client privilege is at issue, and asked to follow a new route for no discernible reason.

134 Solicitor-client privilege is neither more nor less important now than it was when we decided all of the previous cases under a reasonableness standard. That standard applied because, as here, the issue, while important, was well within the statutory mandate the Commissioner works with on a daily basis. It falls, in other words, within her expertise.

135 The Commissioner's mandate is to monitor the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, and ensure that its purposes are achieved. The Act gives individuals access to certain types of information held by public bodies, subject to specific exceptions. One of those exceptions is solicitor-client privilege, as set out in s. 27(1)(a) of the Act which states:

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**27(1)** The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, *including solicitor-client privilege* or parliamentary privilege,

It seems to me to be logically questionable to conclude that even though the legislature has given the Commissioner the express mandate to consider the application of solicitor-client privilege, it is nonetheless deemed to be outside her expertise. Such an approach inexplicably eliminates the conjunctive "and" from the *Dunsmuir* test that requires that the issue be both of central importance to the legal system *and* outside the expertise of the adjudicator. It also has the disruptive potential for rendering meaningless the presumption of deference to home statute expertise.

136 Moreover, she is not being asked to explain the content of solicitor-client privilege for the whole legal system, she is being asked to apply it in the context of one provision — *s. 56(3)* — of the *Freedom of Information and Protection of Privacy Act*, her enabling legislation. This is classic "reasonableness review" territory.

137 In my view, however, the Commissioner's decision to order disclosure was unreasonable because it did not sufficiently take into account how solicitor-client privilege works or why (see *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 (S.C.C.); Minister of National Revenue v. Thompson [2016 CarswellNat 1933S.C.C.], [2016] 1 S.C.R. 381; and *Blood Tribe*). As noted by Justices Côté and Cromwell, even if s. 56(3) had allowed the Commissioner to order production of documents protected by solicitor-client privilege, the University of Calgary had provided sufficient justification for solicitor-client privilege, particularly in light of the laws and practices applicable in the civil litigation context in Alberta. The Commissioner should have exercised her discretion in a manner that interfered with solicitor-client privilege only to the extent absolutely necessary to achieve the ends sought by the *Freedom of Information and Protection of Privacy Act*.

138 The importance and breadth of this privilege should have framed the Commissioner's interpretation of s. 56(3) to preclude disclosure. Because it did not, I agree that the decision should be set aside.

*Appeal dismissed.*

*Pourvoi rejeté.*

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**Most Negative Treatment:** Distinguished
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2008 CarswellNat 2244, 2008 CarswellNat 2245, 2008 SCC 44, 2008 D.T.E. 596, [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, 168 A.C.W.S. (3d) 411, 2008 C.L.L.C. 210-030, 294 D.L.R. (4th) 385, 376 N.R. 327, 67 C.P.R. (4th) 1, 74 Admin. L.R. (4th) 38, J.E. 2008-1398

# Privacy Commissioner of Canada (Appellant) and Blood Tribe Department of Health (Respondent) and Attorney General of Canada, Federation of Law Societies of Canada, Information Commissioner of Canada, New Brunswick Office of the Ombudsman, Information and Privacy Commissioner of British Columbia, Information and Privacy Commissioner of Ontario, Advocates' Society, Canadian Bar Association and Information and Privacy Commissioner of Alberta (Interveners)

McLachlin C.J.C., Binnie, Deschamps, Abella, Charron, Fish, Rothstein JJ.

Heard: February 21, 2008
Judgment: July 17, 2008 *
Docket: 31755

* A corrigendum issued by the Court on August 18, 2008 has been incorporated herein.

Proceedings: affirming *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2006), 2006 CAF 334, 2006 CarswellNat 4539, [2007] 2 F.C.R. 561, 274 D.L.R. (4th) 665, 2006 CarswellNat 3294, 2006 FCA 334, 61 Admin. L.R. (4th) 1, 53 C.P.R. (4th) 273, 354 N.R. 302 (F.C.A.); reversing *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2005), 2005 CF 328, 40 C.P.R. (4th) 7, 2005 CarswellNat 2285, 133 C.R.R. (2d) 124, *(*sub nom. *Blood Tribe Department of Health v. Privacy Commissioner (Can.))* 265 F.T.R. 276 (Eng.), 2005 CarswellNat 612, 2005 FC 328, [2005] 4 F.C.R. 34 (F.C.)

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Subject: Public; Evidence

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**Related Abridgment Classifications**

Evidence
XIV Privilege
XIV.1 Solicitor and client privilege
XIV.1.f Miscellaneous
Privacy and freedom of information
I Federal privacy legislation
I.2 Collection of personal information
I.2.c Protected status
Statutes
II Interpretation
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II.4.e Presumptions
II.4.e.i Substantial alteration of law
II.4.e.i.D Abrogation of rights
Statutes
II Interpretation
II.5 Extrinsic aids
II.5.d Statutes on same subject [in pari materia]

**Headnote**

Privacy and freedom of information --- Federal privacy legislation — Collection of personal information — Protected status
Upon being fired from her job, S asked respondent employer to show her all her personal records — When employer refused, S complained to appellant Privacy Commissioner, who requested records and received some but was denied access to "bundle of letters" pertaining to legal matters for which employer claimed solicitor-client privilege — Commissioner ordered production of privileged documents pursuant to s. 12(1)(a) and (c) of Personal Information Protection and Electronic Documents Act (PIPEDA) — Employer's application for judicial review of commissioner's decision was rejected — Employer successfully appealed and order was vacated — Commissioner appealed — Appeal dismissed — Commissioner's independence from parties did not mean her order did not infringe privilege — In commissioner's view, piercing privilege would become norm rather than exception — While s. 12 of Act gives commissioner some court-like procedural powers, she is not court of law — Authority to receive broad range of evidence cannot be read to empower commissioner to compel production of solicitor-client records from unwilling respondent — Less intrusive remedies were available to commissioner.
Evidence --- Privilege — Privileged communications — Solicitor and client — Miscellaneous
Upon being fired from her job, S asked respondent employer to show her all her personal records — When employer refused, S complained to appellant Privacy Commissioner, who requested records and received some but was denied access to records pertaining to legal matters for which employer claimed solicitor-client privilege — Commissioner ordered production of privileged documents pursuant to s. 12(1)(a) and (c) of Personal Information Protection and Electronic Documents Act (PIPEDA) — Employer's application for judicial review of commissioner's decision was rejected — Employer successfully appealed and order was vacated — Commissioner appealed — Appeal dismissed — Solicitor-client privilege regularly arises in both public and private sectors, and there is no language in PIPEDA comparable to s. 34(2) in Privacy Act to provide commissioner with argument that "notwithstanding . . . any privilege" she may examine privileged information in hands of private business or organization — Adverse inference was drawn by its absence from PIPEDA — Parliament either did not put its collective mind to solicitor-client issue or Parliament had no intention of giving commissioner power she claimed.
Statutes --- Interpretation — Construction — Presumptions — Substantial alteration of law — Abrogation of rights
Upon being fired from her job, S asked respondent employer to show her all her personal records — Employer refused without providing explanation — S complained to appellant Privacy Commissioner, who requested records and received some but was denied access to "bundle of letters" pertaining to legal matters for which employer claimed solicitor-client privilege — Commissioner ordered production of privileged documents pursuant to s. 12(1)(a) and (c) of Personal Information Protection and Electronic Documents Act — Employer's application for judicial review of commissioner's decision was rejected — Employer successfully appealed and order was vacated — Commissioner appealed — Appeal dismissed — Present court has held that

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legislative language that may, if broadly construed, allow incursions on solicitor-client privilege, must be interpreted restrictively — Privilege cannot be abrogated by inference — Similarly worded provisions in federal statutes show that it cannot be said that in all instances, Parliament intended to abrogate solicitor-client privilege — Solicitor-client privilege commands unique status within legal system and is integral to its workings.

Statutes --- Interpretation — Extrinsic aids — Statutes on same subject (in pari materia)

Upon being fired from her job, S asked respondent employer to show her all her personal records — Employer refused without providing explanation — S complained to appellant Privacy Commissioner, who requested records and received some but was denied access to "bundle of letters" pertaining to legal matters for which employer claimed solicitor-client privilege — Commissioner ordered production of privileged documents pursuant to s. 12(1)(a) and (c) of Personal Information Protection and Electronic Documents Act (PIPEDA) — Employer's application for judicial review of commissioner's decision was rejected — Employer successfully appealed and order was vacated — Commissioner appealed — Appeal dismissed — Privacy Commissioner's powers under PIPEDA are not identical — PIPEDA does not contain explicit language granting access to confidences such as is found in s. 34(2) of Privacy Act — Legislative scheme, thus interpreted, permits objectives of PIPEDA to be met while preserving solicitor-client privilege "as close to absolute as possible to ensure public confidence and retain relevance".

Vie privée et accès à l'information --- Législation fédérale sur la vie privée — Collecte de renseignements personnels — Statut protégé

Après son congédiement, S, une employée, a demandé à l'employeur intimé d'avoir accès à son dossier personnel — Suivant le refus de l'employeur, S a déposé une plainte auprès de la Commissaire à la protection de la vie privée, l'appelant, laquelle a demandé les documents et en a reçu certains mais l'accès à une « liasse de lettres » concernant des questions d'ordre juridique lui a été refusé par l'employeur sur la base du privilège du secret professionnel de l'avocat — Commissaire a ordonné, aux termes des art. 12(1)a) et c) de la Loi sur la protection des renseignements personnels et les documents électroniques (« LPRPDE »), la production des documents auxquels le privilège s'appliquait — Demande en contrôle judiciaire de l'employeur déposée à l'encontre de la décision de la commmissaire a été rejetée — Employeur a interjeté appel avec succès et l'ordonnance a été annulée — Commissaire a formé un pourvoi — Pourvoi rejeté — Indépendance de la commissaire à l'égard des parties ne signifiait pas que son ordonnance ne constituait pas une violation du privilège — Selon la commissaire, la levée du privilège constituerait la règle plutôt que l'exception — Même si l'art. 12 de la Loi lui donne des pouvoirs de procédure similaires à ceux d'un tribunal judiciaire, la commissaire n'est pas un tribunal judiciaire — Pouvoir de recevoir des éléments de preuve de toutes sortes ne saurait être interprété comme autorisant la commissaire à contraindre une personne à produire contre son gré des documents visés par le secret professionnel de l'avocat — Mesures moins attentatoires étaient à la portée de la commissaire.

Preuve --- Privilège — Communications privilégiées — Entre avocat et client — Divers

Après son congédiement, S, une employée, a demandé à l'employeur intimé d'avoir accès à son dossier personnel — Suivant le refus de l'employeur, S a déposé une plainte auprès de la Commissaire à la protection de la vie privée, l'appelant, laquelle a demandé les documents et en a reçu certains mais l'accès à une « liasse de lettres » concernant des questions d'ordre juridique lui a été refusé par l'employeur sur la base du privilège du secret professionnel de l'avocat — Commissaire a ordonné, aux termes des art. 12(1)a) et c) de la Loi sur la protection des renseignements personnels et les documents électroniques (« LPRPDE »), la production des documents auxquels le privilège s'appliquait — Demande en contrôle judiciaire de l'employeur déposée à l'encontre de la décision de la commmissaire a été rejetée — Employeur a interjeté appel avec succès et l'ordonnance a été annulée — Commissaire a formé un pourvoi — Pourvoi rejeté — Privilège du secret professionnel de l'avocat est régulièrement invoqué aussi bien dans le secteur public que dans le secteur privé et la LPRPDE ne contient pas de disposition analogue à l'art. 34(2) de la Loi sur la protection des renseignements personnels qui permettrait à la commissaire ne fût-ce que de soutenir que, « nonobstant toute immunité », elle peut examiner les renseignements auxquels s'attache le privilège et détenus par une entreprise ou une organisation privée — Conclusion défavorable a été tirée de son absence dans la LPRPDE — Soit le législateur ne s'est pas arrêté à la question du privilège du secret professionnel de l'avocat, soit il n'avait pas l'intention de conférer à la commissaire le pouvoir qu'elle revendiquait.

Lois --- Interprétation — Interprétation — Présomptions — Modification substantielle de la loi — Abrogation de droits

Après son congédiement, S, une employée, a demandé à l'employeur intimé d'avoir accès à son dossier personnel — Employeur a refusé sans fournir d'explication — S a déposé une plainte auprès de la Commissaire à la protection de la vie privée, l'appelant, laquelle a demandé les documents et en a reçu certains mais l'accès à une « liasse de lettres » concernant des questions d'ordre

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juridique lui a été refusé par l'employeur sur la base du privilège du secret professionnel de l'avocat — Commissaire a ordonné, aux termes des art. 12(1)a) et c) de la Loi sur la protection des renseignements personnels et les documents électroniques (« LPRPDE »), la production des documents auxquels le privilège s'appliquait — Demande en contrôle judiciaire de l'employeur déposée à l'encontre de la décision de la commmissaire a été rejetée — Employeur a interjeté appel avec succès et l'ordonnance a été annulée — Commissaire a formé un pourvoi — Pourvoi rejeté — Cour avait elle-même statué que les dispositions législatives susceptibles, si elles sont interprétées de façon large, d'autoriser des atteintes au privilège du secret professionnel de l'avocat doivent être interprétées de manière restrictive — Privilège ne peut être supprimé par inférence — Dispositions de lois fédérales rédigées de façon similaire démontraient qu'on ne pouvait affirmer que, dans tous les cas, le législateur avait voulu abroger le privilège du secret professionnnel de l'avocat — Privilège du secret professionnel de l'avocat commande en soi une place exceptionnelle dans le système juridique et fait partie intégrante des rouages du système juridique lui-même.

Lois --- Interprétation — Aides extrinsèques — Lois portant sur le même sujet (in pari materia)

Après son congédiement, S, une employée, a demandé à l'employeur intimé d'avoir accès à son dossier personnel — Employeur a refusé sans fournir d'explication — S a déposé une plainte auprès de la Commissaire à la protection de la vie privée, l'appelant, laquelle a demandé les documents et en a reçu certains mais l'accès à une « liasse de lettres » concernant des questions d'ordre juridique lui a été refusé par l'employeur sur la base du privilège du secret professionnel de l'avocat — Commissaire a ordonné, aux termes des art. 12(1)a) et c) de la Loi sur la protection des renseignements personnels et les documents électroniques (« LPRPDE »), la production des documents auxquels le privilège s'appliquait — Demande en contrôle judiciaire de l'employeur déposée à l'encontre de la décision de la commmissaire a été rejetée — Employeur a interjeté appel avec succès et l'ordonnance a été annulée — Commissaire a formé un pourvoi — Pourvoi rejeté — Pouvoirs conférés à la Commissaire à la protection de la vie privée en vertu de la LPRPDE ne sont pas identiques — LPRPDE ne contient pas de disposition explicite permettant l'accès aux renseignements confidentiels comme celle que l'on trouve à l'art. 34(2) de la Loi sur la protection des renseignements personnels — Régime législatif, ainsi interprété, permet la réalisation des objectifs de la LPRPDE tout en préservant le privilège du secret professionnel de l'avocat de façon « aussi absolue que possible pour assurer la confiance du public et demeurer pertinent ».

After being fired, S, a former employee, asked the respondent employer for access to her personal records. When the employer refused, S complained to the appellant Privacy Commissioner, who requested S's records. Some records were sent but the employer claimed solicitor-client privilege regarding others. The commissioner ordered production of the privileged documents pursuant to s. 12(1)(a) and (c) of the Personal Information Protection and Electronic Documents Act (PIPEDA).

The employer unsuccessfully applied for judicial review of the commissioner's order but then succeeded at the Court of Appeal. The order was vacated.

The commissioner appealed the decision by the Court of Appeal.

**Held:** The appeal was dismissed.

The only reason the commissioner gave for compelling the production and inspection of the privileged documents was that the employer indicated their existence. She was therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue. In the commissioner's view, however, piercing the privilege would become the norm rather than the exception.

To give effect to the policy of solicitor/client privilege, this Court has held that legislative language that may (if broadly construed) allow incursions on it, must be interpreted restrictively. The privilege cannot be abrogated by inference.

The authority to receive a broad range of evidence cannot be read to empower the commissioner to compel production of solicitor-client records from an unwilling respondent. The court's power to review a privileged document derives from its power to adjudicate disputed claims over legal rights, not from its power to compel production. In pursuit of her mandate, the commissioner may become adverse in interest to the party whose documents she wants to access. This is not true of a court.

The commissioner's powers under PIPEDA and the Privacy Act are not the same. PIPEDA does not contain explicit language granting access to confidences such as is found in s. 34(2) of the Privacy Act. The generality of the language of s. 12 of PIPEDA, which does not advert to issues raised by solicitor-client privilege, shows the importance of the prohibition against abrogation by inference.

Solicitor-client privilege is one of six enumerated grounds for refusing access to requested personal information, but there is no parity of legal status and importance among the exemptions. Solicitor-client privilege has a unique legal status.

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The commissioner had two alternative means to ensure that PIPEDA requirements were met. Under s. 18.3(1) of the Federal Courts Act, she could have referred a question of solicitor-client privilege to the Federal Court. Within the framework of PIPEDA itself, the commissioner had the right to report an impasse over privilege in her s. 13 PIPEDA report and, with the agreement of the complainant, bring an application to the Federal Court for relief under s. 15. The court is empowered to determine whether the solicitor-client privilege has been properly claimed. This permits verification while preserving the privilege as much as possible.
Après son congédiement, S, une employée, a demandé à l'employeur intimé d'avoir accès à son dossier personnel. Suivant le refus de l'employeur, S a déposé une plainte auprès de la Commissaire à la protection de la vie privée, laquelle a demandé le dossier de S. Certains documents ont été envoyés mais l'employeur a invoqué le privilège du secret professionnel de l'avocat concernant d'autres documents. La commissaire a ordonné, aux termes des art. 12(1)a) et c) de la Loi sur la protection des renseignements personnels et les documents électroniques (« LPRPDE »), la production des documents auxquels le privilège s'appliquait.
L'employeur a vainement présenté une demande de contrôle judiciaire à l'encontre de l'ordonnance de la commissaire mais a interjeté appel avec succès. L'ordonnance a été annulée.
La commissaire a formé un pourvoi à l'encontre de la décision de la Cour d'appel.
**Arrêt:** Le pourvoi a été rejeté.
La seule raison donnée par la commissaire pour contraindre la production et l'inspection des documents privilégiés était que l'employeur avait fait savoir que les documents en question existaient. Elle réclamait donc l'accès systématique à de tels documents chaque fois que le privilège du secret professionnel de l'avocat était invoqué dans le cadre d'un examen. Même les tribunaux refuseront d'examiner des documents protégés par le secret professionnel de l'avocat pour statuer sur l'existence du privilège, à moins que des éléments de preuve ou des arguments démontrent la nécessité de le faire pour trancher la question en toute justice. Or, de l'avis de la commissaire, la levée du privilège deviendrait la norme et non l'exception dans son travail quotidien.
Pour donner effet au principe du secret professionnel de l'avocat, cette Cour a statué que les dispositions législatives susceptibles (si elles sont interprétées de façon large) d'autoriser des atteintes au privilège du secret professionnel de l'avocat doivent être interprétées de manière restrictive. Le privilège ne peut être supprimé par inférence.
Le pouvoir de recevoir des éléments de preuve de toutes sortes ne saurait être interprété comme autorisant la commissaire à contraindre une personne à produire contre son gré des documents visés par le secret professionnel de l'avocat. Le pouvoir d'un tribunal judiciaire d'examiner un document privilégié ne découle pas de son pouvoir d'exiger la production de documents, mais de celui de statuer sur des demandes portant sur des droits. Dans l'exercice de son mandat, la commissaire peut avoir des intérêts opposés à ceux de l'organisation qui possède les documents auxquels la commissaire veut obtenir l'accès. Il n'en va pas ainsi d'un tribunal judiciaire.
La LPRPDE et la Loi sur la protection des renseignements personnels confèrent des pouvoirs différents à la commissaire. La LPRPDE ne contient pas de disposition explicite permettant l'accès aux renseignements confidentiels comme celle que l'on trouve à l'art. 34(2) de la Loi sur la protection des renseignements personnels. Le caractère général du texte de l'art. 12 de la LPRPDE, où il n'est fait aucune mention des questions que soulève le privilège du secret professionnel de l'avocat, montre l'importance de la règle selon laquelle le privilège ne peut être supprimé par inférence.
Le secret professionnel de l'avocat figure parmi les six motifs énumérés justifiant le refus de communiquer des renseignements personnels demandés, or il n'y a aucune parité entre les exemptions quant au statut juridique et à l'importance. Le secret professionnel de l'avocat occupe une place exceptionnelle dans le système juridique.
La commissaire avait deux autres moyens pour s'assurer que les exigences de la LPRPDE soient respectées. La commissaire aurait pu, aux termes de l'art. 18.3(1) de la Loi sur les Cours fédérales, renvoyer à la Cour fédérale une question relative au privilège du secret professionnel de l'avocat. Dans le cadre de la LPRPDE elle-même, la commissaire avait le droit de signaler, dans le rapport qu'elle dresse suivant l'art. 13 de la LPRPDE, les situations d'impasse relative au privilège et, avec le consentement du plaignant, d'exercer un recours devant la Cour fédérale sur le fondement de l'art. 15. La Cour a le pouvoir de déterminer si le privilège du secret professionnel de l'avocat a été revendiqué à bon droit. Ce recours permet la vérification tout en préservant autant que possible le privilège.
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*R. v. Fosty* (1991), [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke)* 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108, 1991 CarswellMan 206, 1991 CarswellMan 285 (S.C.C.) — referred to

*R. v. Lavallee, Rackel & Heintz* (2002), 216 D.L.R. (4th) 257, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 167 C.C.C. (3d) 1, 4 Alta. L.R. (4th) 1, 2002 CarswellAlta 1818, 2002 CarswellAlta 1819, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 164 O.A.C. 280, 2002 SCC 61, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 96 C.R.R. (2d) 189, [2002] 11 W.W.R. 191, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* [2002] 3 S.C.R. 209, 2002 D.T.C. 7267 (Eng.), 2002 D.T.C. 7287 (Fr.), 3 C.R. (6th) 209, [2002] 4 C.T.C. 143, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 292 N.R. 296, 312 A.R. 201, 281 W.A.C. 201, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 217 Nfld. & P.E.I.R. 183, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General))* 651 A.P.R. 183 (S.C.C.) — referred to

*R. v. McClure* (2001), 40 C.R. (5th) 1, 195 D.L.R. (4th) 513, 151 C.C.C. (3d) 321, 142 O.A.C. 201, 80 C.R.R. (2d) 217, 2001 SCC 14, 2001 CarswellOnt 496, 2001 CarswellOnt 497, [2001] 1 S.C.R. 445, 266 N.R. 275 (S.C.C.) — considered

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*R. v. Shirose* (1999), (sub nom. *R. v. Campbell)* 237 N.R. 86, 1999 CarswellOnt 948, 1999 CarswellOnt 949, 133 C.C.C. (3d) 257, (sub nom. *R. v. Campbell)* 42 O.R. (3d) 800 (note), 171 D.L.R. (4th) 193, (sub nom. *R. v. Campbell)* 119 O.A.C. 201, (sub nom. *R. v. Campbell)* 43 O.R. (3d) 256 (note), (sub nom. *R. v. Campbell)* [1999] 1 S.C.R. 565, 24 C.R. (5th) 365 (S.C.C.) — referred to

*R. v. Ulybel Enterprises Ltd.* (2001), 2001 SCC 56, 2001 CarswellNfld 239, 2001 CarswellNfld 240, 206 Nfld. & P.E.I.R. 304, 618 A.P.R. 304, 275 N.R. 201, 157 C.C.C. (3d) 353, 203 D.L.R. (4th) 513, 45 C.R. (5th) 1, [2001] 2 S.C.R. 867 (S.C.C.) — considered

*Smith v. Jones* (1999), 132 C.C.C. (3d) 225, 169 D.L.R. (4th) 385, 22 C.R. (5th) 203, (sub nom. *Jones v. Smith)* 60 C.R.R. (2d) 46, (sub nom. *Jones v. Smith)* 236 N.R. 201, 1999 CarswellBC 590, 1999 CarswellBC 591, [1999] 1 S.C.R. 455, (sub nom. *Jones v. Smith)* 120 B.C.A.C. 161, (sub nom. *Jones v. Smith)* 196 W.A.C. 161, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364, 1999 SCC 16 (S.C.C.) — referred to

*Société d'énergie Foster Wheeler ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.* (2004), 48 C.P.C. (5th) 1, [2004] 1 S.C.R. 456, (sub nom. *Société d'énergie Foster Wheeler Ltée v. Société intermunicipale de gestion & d'élimination des déchets (SIGED) Inc.)* 318 N.R. 111, 237 D.L.R. (4th) 417, 2004 CarswellQue 513, 2004 CarswellQue 514, 2004 SCC 18 (S.C.C.) — referred to

*Solosky v. Canada* (1979), 1979 CarswellNat 4, (sub nom. *Solosky v. R.)* [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495, 1979 CarswellNat 630 (S.C.C.) — referred to

**Statutes considered:**

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

s. 50 — referred to

*Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23

s. 50 — referred to

*Employment Equity Act*, S.C. 1995, c. 44

s. 29 — referred to

*Federal Courts Act*, R.S.C. 1985, c. F-7

s. 18.3(1) [en. 1990, c. 8, s. 5] — considered

*Interpretation Act*, R.S.C. 1985, c. I-21

Generally — referred to

s. 31(2) — considered

*Judicial Review Procedure Act*, R.S.O. 1990, c. J.1

s. 10 — referred to

*Lobbyists Registration Act*, R.S.C. 1985, c. 44 (4th Supp.)

s. 10.4 [en. 1995, c. 12, s. 5] — referred to

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5

Generally — referred to

s. 4(1)(a) — considered

s. 4(1)(b) — considered

s. 9(3) — considered

s. 9(3)(a) — considered

s. 11(1) — considered

s. 12 — considered

s. 12(1) — considered

s. 12(1)(a) — considered

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s. 12(1)(b) — considered

s. 12(1)(c) — considered

s. 13 — considered

s. 13(1)(a) — considered

s. 13(1)(b) — considered

s. 14 — considered

s. 14(1) — referred to

s. 15 — referred to

s. 15(a) — considered

s. 15(b) — considered

s. 15(c) — considered

s. 16 — considered

s. 17(1) — considered

s. 20(1) — considered

s. 20(3) — considered

s. 20(4) — considered

s. 20(5) — considered

Sched. 1, Principle 9, item 4.9 — considered

*Privacy Act*, S.C. 1980-81-82-83, c. 111, Sched. II

Generally — referred to

s. 34(2) — considered

*Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13

s. 12 — referred to

s. 99 — referred to

APPEAL from judgment reported at *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2006), 2006 CAF 334, 2006 CarswellNat 4539, [2007] 2 F.C.R. 561, 274 D.L.R. (4th) 665, 2006 CarswellNat 3294, 2006 FCA 334, 61 Admin. L.R. (4th) 1, 53 C.P.R. (4th) 273, 354 N.R. 302 (F.C.A.), vacating Privacy Commissioner's order to disclose records protected by solicitor-client privilege.

POURVOI à l'encontre d'un jugement publié à *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2006), 2006 CAF 334, 2006 CarswellNat 4539, [2007] 2 F.C.R. 561, 274 D.L.R. (4th) 665, 2006 CarswellNat 3294, 2006 FCA 334, 61 Admin. L.R. (4th) 1, 53 C.P.R. (4th) 273, 354 N.R. 302 (F.C.A.), annulant une ordonnance de la Commissaire à la protection de la vie privée de communiquer un dossier protégé par le privilège du secret professionnel de l'avocat.

***Binnie J.*:**

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1 This appeal requires the Court to resolve a conflict between, on the one hand, the Privacy Commissioner's statutory power to have access to personal information about a complainant for the purpose of ensuring compliance with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"), and, on the other hand, the right of the target of the complaint (in this case a former employer of the complainant) to keep solicitor-client confidences confidential. In my view, when the appropriate principles of statutory interpretation are applied to the general language of *PIPEDA*, the right of the individual or organization that is the target of the complaint to keep solicitor-client confidences confidential must prevail.

2 Section 12 of *PIPEDA* gives the Privacy Commissioner express statutory authority to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information ... whether or not it is or would be admissible in a court of law". She therefore argues that, as is the case with a court, she may review documents for which solicitor-client privilege is claimed to determine whether the claim is justified. I do not agree. The Privacy Commissioner is an officer of Parliament vested with administrative functions of great importance, but she does not, for the purpose of reviewing solicitor-client confidences, occupy the same position of independence and authority as a court. It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 of *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved to the courts. Express words are necessary to permit a regulator or other statutory official to "pierce" the privilege. Such clear and explicit language does not appear in *PIPEDA*. This was the view of the Federal Court of Appeal and I agree with it. I would dismiss the appeal.

**I. Facts**

3 Annette Soup was dismissed from her employment with the Blood Tribe Department of Health, in the spring of 2002. At the time of dismissal, the employer sought legal advice from its solicitors. Ms. Soup's employment file thus included the correspondence between the employer and its solicitors. There is no suggestion that this consultation was in any way improper in purpose or in content.

4 Following her dismissal, Ms. Soup asked to have access to her personnel file because she suspected that the employer had improperly collected inaccurate information and used that information to discredit her before its board. The employer denied Ms. Soup's request for access without giving reasons. Ms. Soup then filed a complaint with the Privacy Commissioner seeking access to her personal employment information. The Privacy Commissioner requested Ms. Soup's employment records. The employer provided some documents but withheld what it described as a "bundle of letters" from its solicitors over which a claim of solicitor-client privilege was advanced, relying on s. 9(3)(*a*) of *PIPEDA*, which provides:

> **9.** . . .
>
> (3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if
>
> (a) the information is protected by solicitor-client privilege...

5 The Privacy Commissioner, through her General Counsel, responded on July 16, 2003, as follows:

> In your letter you have framed the legal issue as "Is the Blood Tribe required by law to provide access to the solicitor-client privileged documents to the Office of the Privacy Commissioner?"
>
> Our answer to that question is an unqualified yes.... [The Privacy Commissioner takes the position that] in order to fulfil his mandate according to his standards he must be absolutely certain that the [s.] 9(3)(*a*) exemption has been properly invoked. In order to be certain either the Commissioner or his delegate must be provided with access to the documents in question.
>
> [Emphasis in original.]

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The Privacy Commissioner then ordered production of the privileged documents pursuant to s. 12(1)(*a*) and (c) of *PIPEDA*. The employer brought an application for judicial review to challenge the legality of the Privacy Commissioner's order. The application for judicial review was dismissed by the motions judge, but the Federal Court of Appeal allowed the appeal, set aside the decision of the Federal Court and vacated the Privacy Commissioner's order for production of solicitor-client records.

**II. Relevant Statutory Information**

6 See Appendix.

**III. Judicial History**

***A. Federal Court, [2005] 4 F.C.R. 34, 2005 FC 328 (F.C.)***

7 Mosley J. noted that, pursuant to s. 12(1)(*c*) of *PIPEDA*, the Privacy Commissioner may receive and accept any evidence and other information "whether or not it is or would be admissible in a court of law". He found that this language suggested that Parliament did not intend the Privacy Commissioner's investigations to be fettered by questions of privilege. The judge drew an analogy with the *Privacy Act*, S.C. 1980-81-82-83, c. 111, Sch. II (now R.S.C. 1985, c. P-21), in which courts have determined that the Privacy Commissioner is given the authority to review information to decide whether an exemption for reasons of national security has been properly claimed. Mosley J. observed that "this is an indication of Parliament's confidence in the [Privacy] Commissioner's ability to protect sensitive information" (para. 55). The Privacy Commissioner is given extraordinary powers to allow her to conduct investigations effectively and these powers can be exercised "in the same manner and to the same extent as a superior court of record" (s. 12(1)(*a*)). Mosley J. noted that a superior court has the power to compel production of documents to assess claims of solicitor-client privilege. Further, "[h]ad Parliament intended to prevent the Commissioner from verifying claims of privilege, it could have specifically excluded this power, as it has done under several other Acts" (para. 57).

***B. Federal Court of Appeal (Shadow, Pelletier and Malone JJ.A.), (2006), [2007] 2 F.C.R. 561, 2006 FCA 334 (F.C.A.)***

8 Malone J.A., writing for the court, noted the Privacy Commissioner's request of the employer's records was framed "in very broad terms" (para. 7). In his view, a statutory abrogation of solicitor-client privilege requires clear and express language: *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31 (S.C.C.). Moreover, "[o]n the present record, there have been no facts alleged that demonstrate why the privileged documents are in any way necessary to the Commissioner's investigation" (para. 18). Malone J.A. further noted that s. 20(5) of *PIPEDA* states that the Privacy Commissioner may disclose information relating to the commission of an offence to an attorney general. Although s. 12(1)(*a*) of *PIPEDA* gives the Privacy Commissioner similar powers to a superior court, it did not constitute a grant of the jurisdiction of a superior court, but merely allowed the Privacy Commissioner to issue subpoenas and orders that have the force of law for matters otherwise within her investigative jurisdiction. In his view, "[l]anguage that allows a tribunal to compel evidence in the same manner and to the same extent as a superior court ... does not extend the jurisdiction of a tribunal or commission" (para. 29) into matters of solicitor-client privilege.

**IV. Analysis**

9 Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible":

> [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

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(*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 35, quoted with approval in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36)

It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised. The privilege belongs to the client not the lawyer. In *Andrews v. Law Society of (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at p. 188, McIntyre J. affirmed yet again that the Court will not permit a solicitor to disclose a client's confidence.

10 At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity: *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 837; *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at pp. 885-87; *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.); *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.); *Société d'énergie Foster Wheeler ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18 (S.C.C.), at paras. 40-47; *R. v. McClure* [2001 CarswellOnt 496 (S.C.C.)], at paras. 23-27; *Blank v. Canada (Department of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39 (S.C.C.), at para. 26; *Ontario (Ministry of Correctional Services) v. Goodis*, [2006] 2 S.C.R. 32, 2006 SCC 31 (S.C.C.); *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36 (S.C.C.); *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, [2008] 1 S.C.R. 157, 2008 SCC 8 (S.C.C.). A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.). The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained "[a]s close to absolute as possible to ensure public confidence and retain relevance" (*R. v. McClure* at para. 35).

11 To give effect to this fundamental policy of the law, our Court has held that legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents: *R. v. Lavallee, Rackel & Heintz* [2002 CarswellAlta 1818 (S.C.C.)], at para. 18; *Pritchard*, at para. 33. This case falls squarely within that principle.

***A. The PIPEDA Complaints Procedure***

12 *PIPEDA* makes specific reference to "personal information that ... is about an employee of [an] organization ... that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business" (*PIPEDA*, s. 4(1)(*b*)). If an individual believes that such a business or organization has breached *PIPEDA* by denying a proper request for access to his or her own personal information, that individual has the right to file a written complaint under s. 11(1). Once a complaint is filed, s. 12 of *PIPEDA* requires the Privacy Commissioner to investigate its merits. Following her investigation, the Privacy Commissioner prepares a report containing findings and recommendations (s. 13). The report must be prepared within one year after the day on which the complaint was filed. Even where the Privacy Commissioner finds that an organization has improperly refused access to personal information, she has no authority to order an organization such as the respondent to provide it. She makes findings and recommendations. The complainant then has the option of seeking a remedy in the courts (s. 14), which alone can order an organization such as the respondent to provide the complainant with access to his or her personal information: *Englander v. Telus Communications Inc.* (2004), [2005] 2 F.C.R. 572, 2004 FCA 387 (F.C.A.). Section 15 permits the Privacy Commissioner to apply to the Federal Court in relation to any matter described in s. 14, with the consent of the complainant and within the time limit set out in that section. At that point, if not before, the Privacy Commissioner is in an adversarial relationship with the business or organization being complained about.

***B. The Need for Independent Verification***

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13 Individuals are often unaware of the nature and extent of information about themselves being collected and stored by numerous private organizations, including employers. Some of this information may be quite inaccurate.

> Not only is information circulated from unknown or out-of-date sources, but it is mixed and matched with other information purportedly relating to the same individuals. Digitalized attributes of one consumer may be mixed and matched with those of others who subjectively appear to belong to the same category of socioeconomic behaviour. Few data "subjects" ever see the information being held and exchanged under their names; fewer still are able to correct this information or have it withdrawn from circulation.
>
> (I. Lawson, *Privacy and Free Enterprise* (2nd ed. 1997), at p. 32)

Accordingly, Parliament recognized that a corollary to the protection of privacy is the right of individuals to access information about themselves held by others in order to verify its accuracy.

14 *PIPEDA* itself provides in Sch. I, at clause 4.9, of its statement of principles that

> [u]pon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

15 The Privacy Commissioner argues that

> this case is about calling the private sector to account for its claims of privilege over documents containing personal information of others. Whether their claims turn out to be completely right, honestly equivocal, overly broad, inadvertently wrong, or intentionally misleading, they must be independently verified in order to give proper meaning to the fundamental right of access to one's personal information. [Transcript, at p. 2]

I agree. However, the question raised by the appeal is whether the proper forum for this independent verification in the first instance is the court or the Privacy Commissioner herself.

***C. The Sweeping Nature of the Privacy Commissioner's Argument***

16 It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42). There was no cross-examination on the employer's affidavit. There was no basis in fact put forward by the Privacy Commissioner to show that the privilege was not properly claimed. As to the complainant, her concern was about what the employer *did*, not about the legal advice (if any) upon which the employer did it.

17 The only reason the Privacy Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Privacy Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue: see e.g. *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Gen. Div.)), at para. 20. In the Privacy Commissioner's view, however, piercing the privilege would become the norm rather than the exception in the course of her everyday work.

***D. The Privacy Commissioner's Argument Rests on a False Analogy Between it and the Court***

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18 It is common ground that *PIPEDA* does not *expressly* grant to the Privacy Commissioner the power to review documents in respect of which solicitor-client privilege is claimed — either to verify the privilege claim, or for any other purpose. The question is thus whether the legislation *implicitly* grants that power.

19 In support of her position, the Privacy Commissioner stresses the independence of her office from the parties and refers to the grant of some court-like powers under s. 12 of *PIPEDA*. She argues that acknowledging a power to review claims to privilege would be consistent with Parliament's objective of creating an inexpensive and expeditious process: "Just as courts must verify claims of privilege to ensure the integrity and proper functioning of the justice system", she argues, "the [Privacy] Commissioner must verify claims of solicitor-client privilege to ensure the integrity and proper functioning of the legislative scheme protecting fundamental privacy rights" (A.F., at para. 38).

20 The Privacy Commissioner is an officer of Parliament who carries out "impartial, independent and non-partisan investigations": *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13 (S.C.C.), at para. 33. She is an administrative investigator not an adjudicator. Yet she argues that "[a] common sense approach would recognize that the requisite *express* legislative authority need not exist in language as *specific* and *explicit* as the Court of Appeal would require, nor be assessed in total isolation from the overall legislative scheme and context" (A.F., at para. 64 (emphasis in original)). In her view, s. 12(1)(*a*) could hardly be broader, as it grants the Privacy Commissioner the same powers as a superior court of record. A superior court of record has the power to compel the production of, and to inspect, documents over which privilege is claimed. Accordingly, she argues, the Privacy Commissioner is vested with a similar authority in relation to documents over which solicitor-client privilege is claimed. The Information Commissioner, intervening in support of the [Privacy] Commissioner, points out that "verification of the privilege is the very object of the Privacy Commissioner's statutory ombudsperson function and not merely a preliminary step to determine the record's use for another purpose" (I.F., at para. 21).

21 I do not accept the validity of the analogy between the Privacy Commissioner and a court in this respect. The Privacy Commissioner is a stranger to the privilege. She argues that because of her independence from the parties her adjudication of a claim of privilege would not be an infringement of the privilege. I do not agree. Client confidence is the underlying basis for the privilege, and infringement must be assessed through the eyes of the client. To a client, compelled disclosure to an administrative officer, even if not disclosed further, would constitute an infringement of the confidentiality. The objection is all the more serious where (as here) there is a possibility of the privileged information being made public or used against the person entitled to the privilege: *Lavallee, Rackel & Heintz*, at para. 44; *Goodis*, at para. 21; *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*, [1993] 5 W.W.R. 710 (Alta. C.A.). While s. 12 gives the Privacy Commissioner some court-like procedural powers, she is not a court of law. The words of s. 12(1)(*a*) confer a power to compel production of

> any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record....

This amounts to a general production provision. In *Pritchard*, the Court dismissed a similar argument concerning s. 10 of the Ontario *Judicial Review Procedure Act*. We held that a general production provision that does not specifically indicate that the production must include records for which solicitor-client privilege is claimed is insufficient to compel the production of such records (*Pritchard*, at para. 35). On the other branch of her argument, the Privacy Commissioner points out that s. 12(1)(*c*) permits her in the course of exercising her powers of investigation to

> **12.** (1)
>
> (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law....

The authority to *receive* a broad range of evidence cannot be read to empower the Privacy Commissioner to *compel production* of solicitor-client records from an unwilling respondent. The language of s. 12 is simply incapable of carrying the Privacy Commissioner to her desired conclusion.

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22 In any event, a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.

***E. The Privacy Commissioner May Be Adversarial in Interest***

23 A major distinction between the Privacy Commissioner and a court, for present purposes, is that in pursuit of her mandate the Privacy Commissioner may become adverse in interest to the party whose documents she wants to access. This is not true of a court. Not only may she take the resisting employer to court but she may decide to share compelled information with prosecutorial authorities without court order or the consent of the party from whom the information was compelled. Although the general rule is non-disclosure, s. 20(5) of *PIPEDA* provides for such an exception:

> **20.** . . .
>
> (5) The Commissioner may disclose to the Attorney General of Canada or of a province, as the case may be, information relating to the commission of an offence against any law of Canada or a province on the part of an officer or employee of an organization if, in the Commissioner's opinion, there is evidence of an offence.

It is true, as mentioned earlier, that at common law privilege does not attach to communications criminal in themselves or intended to further a criminal purpose, but the wording of s. 20(5) ("information *relating to* the commission of an offence") is much broader than the narrow common law exception, and would authorize disclosure to a prosecutor of much that the common law would regard as solicitor-client confidences.

24 To meet the s. 20(5) objection, the Privacy Commissioner is obliged to resort to an argument that in my opinion contradicts the position she takes on s. 12 which (she says) should be read *broadly* to *include* documents over which solicitor-client privilege is claimed. On the other hand, she says, s. 20(5) should be read *narrowly* to *exclude* solicitor-client confidence because its wording "is not clearly and unambiguously intended to authorize the Commissioner to disclose privileged documents to the Attorney General" (A.F., at para. 48). However, such a distinction between ss. 12 and 20(5) cannot be made because both sections use words of the same level of generality and there is no persuasive reason to apply a contradictory approach to their interpretations.

25 Interestingly, the argument made by the Privacy Commissioner in support of reading down s. 20(5) is essentially the same as the argument the respondent makes in respect of a narrow reading of s. 12, namely, that clear and unambiguous statutory language is required to overcome solicitor-client privilege. Of course, if, as the employer contends, s. 12 does not grant the Privacy Commissioner access to solicitor-client documents in the first place, there is no need to read down s. 20(5) to forestall the onward transmission of such confidence to the Crown prosecutors.

26 It is the very generality of the language of s. 12, which does *not* advert to issues raised by solicitor-client privilege, that shows the importance of *Pritchard*'s prohibition against abrogation by inference. A search of Parliament's use of the expression "in the same manner and to the same extent" as a court reveals that there are about 14 other federal statutes with substantially identical wording to s. 12(1) of *PIPEDA*, including the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 99; *Lobbyists Registration Act*, R.S.C. 1985, c. 44,(4th Supp.), s. 10.4; *Employment Equity Act*, S.C. 1995, c. 44, s. 29; *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 50; and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 50. Looking at these provisions in their different statutory contexts shows that it certainly cannot be said that in all these instances Parliament intended to abrogate solicitor-client privilege. As the intervener Attorney General of Canada concedes in his factum:

> ... Parliament must be mindful of the importance of that privilege in the administration of justice. Consequently, if Parliament seeks to abrogate solicitor-client privilege it must do so in clear, precise and unequivocal language. Any ambiguity in the language of the legislation at issue must be resolved in favour of protecting the privilege and against any abrogation of the privilege. [para. 1]

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Therefore, the Attorney General of Canada submits, "[t]he ordinary and grammatical meaning of the words used in s. 12(1) of *PIPEDA* taken in their full and proper context, do not support the conclusion of the Commissioner" (para. 2). I agree.

***F. The Privacy Commissioner Argues by Analogy with her Powers Under the Privacy Act***

27 The Privacy Commissioner criticizes the Court of Appeal's decision in this case for introducing "unfounded discrepancies between the Commissioner's powers of investigation under the *Privacy Act* and *PIPEDA*, contrary to ... the plain language of these *Acts*" (A.F., at para. 120). She invokes the "principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter": *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 (S.C.C.), at para. 52; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 327-28; P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 288-89. She argues that Parliament could not have intended that the Commissioner's virtually identical powers of investigation be contradictory as between these constituent pieces of legislation.

28 However, the powers of the Privacy Commissioner under *PIPEDA* and the *Privacy Act* are not the same. For present purposes, as observed by the Federal Court of Appeal, it is sufficient to note that *PIPEDA* does not contain explicit language granting access to confidences such as is found in s. 34(2) of the *Privacy Act*, R.S.C. 1985, c. P-21:

> **34.** . . .
>
> (2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

29 The scope of the Privacy Commissioner's powers under s. 34(2) in relation to solicitor-client confidences has been the subject of divergent interpretations by the Federal Court of Appeal: see *Canada (Information Commissioner) v. Canada (Minister of Environment)* (2000), 187 D.L.R. (4th) 127 (Fed. C.A.), at para. 11; *Canada (Attorney General) v. Canada (Information Commissioner)*, [2005] 4 F.C.R. 673, 2005 FCA 199 (F.C.A.), at paras. 25 and 26. Its scope is not in issue here. There is no equivalent of s. 34(2) in *PIPEDA*. The Privacy Commissioner seeks to explain its absence on the basis that s. 34(2) "was enacted solely to address issues of crown privilege, which do not arise in the private sector". The fact is, however, that solicitor-client privilege regularly arises in *both* the public and private sectors, and there is no language in *PIPEDA* comparable to s. 34(2) even to provide the Privacy Commissioner with an argument that "notwithstanding ... any privilege" she may examine privileged information in the hands of a private business or organization. The proper interpretation of s. 34(2) must await a case in which it is squarely raised. Its only relevance to the present appeal is its absence from *PIPEDA*, an absence from which we may draw an adverse inference. It is not there because Parliament either did not put its collective mind to the solicitor-client issue or because Parliament had no intention of giving the Privacy Commissioner the power she now claims.

***G. Reliance Is Placed on a "Contextual Reading" of Section 9(3) of PIPEDA***

30 The Information Commissioner, intervening in support of the Privacy Commissioner, contends that by "including solicitor-client privilege (in s. 9(3)) as one of the six enumerated grounds for refusing access to requested personal information, Parliament clearly indicated its intention that the Privacy Commissioner would administer and verify claims of exemption based on solicitor-client privilege *in the same manner as she administers and verifies claims based on the other five exemption grounds*" (I.F., at para. 24 (emphasis in original)). This presupposes that there is a parity of legal status and importance among the s. 9(3) grounds, which include not only solicitor-client privilege but "confidential commercial information" and information "collect[ed] with[out] the knowledge or consent" of an individual for enumerated purposes. There is no such parity of legal status and importance. Solicitor-client privilege "commands a unique status within the legal system.... [It] is integral to the workings of the legal system itself (*McClure*, at para. 31; *Gruenke*, at p. 289). An argument that equates the status of solicitor-client privilege with "confidential commercial information" is simply a denial of its fundamental importance and illustrates the slippery slope on which the appellant's position would place its future health and vitality in the regulatory context.

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***H. Reliance on Section 31 of the Interpretation Act***

31 Reference was made to s. 31(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that:

> **31.** . . .
>
> (2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

The *Interpretation Act* is a statute of general application. It does not address solicitor-client confidences. The reality is that all of the appellant's arguments for "implied powers" or a "purposive interpretation" of *PIPEDA* are arguments for an abrogation by inference. The Privacy Commissioner's position is that her review of solicitor-client documents is "routinely necessary" in all cases where solicitor-client privilege is claimed. However, such routine access would contradict the principles explained in *Descôteaux* over 25 years ago:

> When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that [solicitor-client] confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> [Emphasis added; p. 875.]

The Privacy Commissioner has not made out a case that routine access to solicitor client confidences is "absolutely necessary" to achieve the ends sought by *PIPEDA*. There are other less intrusive remedies, as will now be referred to.

***I. The Privacy Commissioner Has Alternate Effective Remedies to Have Solicitor-Client Privilege Verified***

32 Parliament has provided the Privacy Commissioner with at least two alternative effective and expeditious means "of exercising [her] authority" to ensure that *PIPEDA* requirements are met.

33 Firstly, as the Privacy Commissioner conceded in the hearing of the appeal, she may, at any point in her investigation, refer a question of solicitor-client privilege to the Federal Court under s. 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides that:

> **18.3** (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

34 Secondly, within the framework of *PIPEDA* itself, the Privacy Commissioner has the right to report an impasse over privilege in her s. 13 report and, with the agreement of the complainant, bring an application to the Federal Court for relief under s. 15. The court is empowered, if it thinks it necessary, to review the contested material and determine whether the solicitor-client privilege has been properly claimed. This procedure permits verification while preserving the privilege as much as possible. The requirement that the court application "be heard and determined without delay and in a summary way unless the Court considers it inappropriate to do so" (s. 17(1)) is designed to expedite access to justice for the complainant. The legislative scheme, thus interpreted, permits the objectives of *PIPEDA* to be met while preserving solicitor-client privilege "as close to absolute as possible to ensure public confidence and retain relevance" (*McClure*, at para. 35).

**V. Disposition**

35 I would dismiss the appeal with costs in this Court.

*Appeal dismissed.*

*Pourvoi rejeté.*

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## Appendix

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5

**4.** (1) This Part applies to every organization in respect of personal information that

(a) the organization collects, uses or discloses in the course of commercial activities; or

(b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

. . . . .

**9.** . . .

(3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege;

(b) to do so would reveal confidential commercial information;

(c) to do so could reasonably be expected to threaten the life or security of another individual;

(c.1) the information was collected under paragraph 7(1)(*b*); or

(d) the information was generated in the course of a formal dispute resolution process.

However, in the circumstances described in paragraph (*b*) or (*c*), if giving access to the information would reveal confidential commercial information or could reasonably be expected to threaten the life or security of another individual, as the case may be, and that information is severable from the record containing any other information for which access is requested, the organization shall give the individual access after severing.

. . . . .

**12.** (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may

(a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;

(b) administer oaths;

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

. . . . .

**13.** (1) The Commissioner shall, within one year after the day on which a complaint is filed or is initiated by the Commissioner, prepare a report that contains

(a) the Commissioner's findings and recommendations;

(b) any settlement that was reached by the parties;

. . . . .

. . . . .

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**14.** (1) A complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause ... of Schedule 1 ...

. . .

**15.** The Commissioner may, in respect of a complaint that the Commissioner did not initiate,

(a) apply to the Court, within the time limited by section 14, for a hearing in respect of any matter described in that section, if the Commissioner has the consent of the complainant;

(b) appear before the Court on behalf of any complainant who has applied for a hearing under section 14; or

(c) with leave of the Court, appear as a party to any hearing applied for under section 14.

**16.** The Court may, in addition to any other remedies it may give,

(a) order an organization to correct its practices in order to comply with sections 5 to 10;

(b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and

(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

17. (1) An application made under section 14 or 15 shall be heard and determined without delay and in a summary way unless the Court considers it inappropriate to do so.

2) In any proceedings arising from an application made under section 14 or 15, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of any information or other material that the organization would be authorized to refuse to disclose if it were requested under clause 4.9 of Schedule 1.

. . . . .

**20.** (1) Subject to subsections (2) to (5), 13(3) and 19(1), the Commissioner or any person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part.

. . . . .

(3) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose, information that in the Commissioner's opinion is necessary to

(a) conduct an investigation or audit under this Part; or

(b) establish the grounds for findings and recommendations contained in any report under this Part.

(4) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose, information in the course of

(a) a prosecution for an offence under section 28;

(b) a prosecution for an offence under section 132 of the *Criminal Code* (perjury) in respect of a statement made under this Part;

(c) a hearing before the Court under this Part; or

(d) an appeal from a decision of the Court.

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(5) The Commissioner may disclose to the Attorney General of Canada or of a province, as the case may be, information relating to the commission of an offence against any law of Canada or a province on the part of an officer or employee of an organization if, in the Commissioner's opinion, there is evidence of an offence.

**End of Document**

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**Most Negative Treatment:** Check subsequent history and related treatments.

2016 SCC 52, 2016 CSC 52
Supreme Court of Canada

Lizotte c. Aviva Cie d'assurance du Canada

2016 CarswellQue 10692, 2016 CarswellQue 10693, 2016 SCC 52, 2016 CSC 52, [2016] 2 S.C.R. 521, [2016] S.C.J. No. 52, 272 A.C.W.S. (3d) 331, 404 D.L.R. (4th) 389, 62 C.C.L.I. (5th) 31, J.E. 2016-2030

# Karine Lizotte, in her capacity as assistant syndic of the Chambre de l'assurance de dommages (Appellant) and Aviva Insurance Company of Canada and Traders General Insurance Company (Respondents) and Canadian Bar Association, Advocates' Society and Barreau du Québec (Interveners)

McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown JJ.

Heard: March 24, 2016
Judgment: November 25, 2016
Docket: 36373

Proceedings: confirming *Lizotte c. Aviva, Cie d'assurances du Canada* (2015), EYB 2015-247424, 2015 QCCA 152, [2015] J.Q. No. 383, 2015 CarswellQue 384, Bich J.C.A., Gagnon J.C.A., St-Pierre J.C.A. (C.A. Que.) [Quebec]

Counsel: Claude G. Leduc, Olivier Charbonneau-Saulnier, for appellant
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Douglas C. Mitchell, Audrey Boctor, for intervener, Advocates' Society
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Subject: Civil Practice and Procedure; Constitutional; Corporate and Commercial; Evidence; Insurance; Public; Torts

**Related Abridgment Classifications**

Evidence
XIV Privilege
XIV.2 Litigation privilege

**Headnote**

Evidence --- Privilege — Litigation privilege

Litigation privilege — Fire damaged residence and one of insurer's claims adjusters investigated claim — Syndic of Chambre de l'assurance de dommages later received information to effect that adjuster had made certain errors in managing file — In course of her inquiry, syndic asked insurer to send her complete copy of its claim file — Insurer refused to do so on basis that some of requested documents were protected by litigation privilege — Syndic filed motion for declaratory judgment, arguing that s. 337 of Act Respecting the Distribution of Financial Products and Services created obligation to produce "any [ . . . ] document" concerning activities of representative whose professional conduct was being investigated — Syndic further argued that litigation privilege should be applied more flexibly than solicitor-client privilege as it was less important — Trial judge concluded that litigation privilege could not be abrogated absent express provision and syndic appealed — Court of Appeal upheld trial judge's judgment — Syndic appealed before Supreme Court of Canada — Appeal dismissed — Litigation privilege is fundamental principle of administration of justice — It is class privilege that exempts communications and documents that fall within its scope from compulsory disclosure, except where one of limited exceptions to non-disclosure applies — Any legislative provision capable of interfering with litigation privilege should be read narrowly — Legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language — Because s. 337 of Act provided only for production of "any [ . . . ] document" without further precision, it did not have effect of abrogating privilege — It

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followed that insurer was entitled to assert litigation privilege in this case and to refuse to provide syndic with documents that fell within scope of litigation privilege — None of exceptions to its application justified lifting privilege in this case — Therefore, courts below were right to hold that litigation privilege invoked by insurer could be asserted against syndic Act respecting the distribution of financial products and services, CQLR, c. D-9.2, s 337.

Preuve --- Privilège — Litigation privilege

Privilège relatif au litige — Incendie a ravagé une résidence et un des experts en sinistre de l'assureur a enquêté le sinistre — Syndique de la Chambre de l'assurance de dommages a, par la suite, reçu une information reprochant certains manquements à l'expert en sinistre dans sa gestion du dossier — Dans le cadre de son enquête, la syndique a demandé à l'assureur de lui faire parvenir une copie complète de son dossier de réclamation — Assureur a refusé de donner suite à la demande au motif que certains des documents recherchés étaient visés par le privilège relatif au litige — Syndique a déposé une requête en jugement déclaratoire, faisant valoir que l'art. 337 de la Loi sur la distribution de produits et services financiers prévoyait l'obligation de fournir « tout document » sur les activités d'un représentant soumis à supervision déontologique — Syndique a également fait valoir que le privilège relatif au litige devrait être appliqué de façon plus souple que le secret professionnel de l'avocat car il était moins important — Juge de première instance a conclu que le privilège relatif au litige ne pouvait être abrogé que par une disposition expresse et la syndique a interjeté appel — Cour d'appel a confirmé le jugement du juge de première instance — Syndique a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Privilège relatif au litige est une règle fondamentale pour l'administration de la justice — Il s'agit d'un privilège générique qui empêche la divulgation forcée des communications ou documents qu'il couvre, sauf si l'une des exceptions restreintes à leur non-divulgation s'applique — Toute disposition législative susceptible de porter atteinte au privilège relatif au litige doit être interprétée restrictivement — Législateur ne peut abroger ce privilège par inférence, mais uniquement au moyen de termes clairs, explicites et non équivoques — Puisque l'art. 337 de la Loi ne prévoit que la communication de « tout document » sans plus de précision, il n'a pas pour effet d'écarter ce privilège — Il s'ensuit que l'assureur pouvait invoquer ici le privilège relatif au litige et refuser de fournir à la syndique les documents visés par celui-ci — Aucune des exceptions à son application ne justifiait d'y passer outre ici — Par conséquent, les instances inférieures ont jugé à bon droit que le privilège relatif au litige invoqué par l'assureur était opposable à la syndique.

A fire damaged a residence and one of the insurer's claims adjusters investigated the claim. The syndic of the Chambre de l'assurance de dommages, a self-regulatory organization, later received information to the effect that the adjuster had made certain errors in managing the file and the syndic opened an inquiry. In the course of this inquiry, the syndic of the Chambre asked the insurer to send her a complete copy of its claim file with respect to the insured. The insurer refused to do so on the basis that some of the requested documents were protected by litigation privilege. The syndic filed a motion for a declaratory judgment, arguing that s. 337 of the Act Respecting the Distribution of Financial Products and Services created an obligation to produce "any [ . . . ] document" concerning the activities of a representative whose professional conduct was being investigated by the Chamber and that litigation privilege should be applied more flexibly than solicitor-client privilege as it was less important.

The trial judge concluded that litigation privilege could not be abrogated absent an express provision and the syndic appealed. The Court of Appeal upheld the trial judge's judgment, holding that even though litigation privilege was distinguishable from solicitor-client privilege, it was, to the same extent, a fundamentally important principle that could not be overridden without express language.

The syndic appealed before the Supreme Court of Canada.

**Held:** The appeal was dismissed.

Per Gascon J. (McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Côté, Brown JJ. concurring): Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.

The Court rendered a previous decision on solicitor-client privilege and it has since been settled law that any legislative provision capable of interfering with solicitor-client privilege should be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language. This principle applies to litigation privilege.

Given its importance, litigation privilege could not be abrogated by inference and could not be lifted absent a clear, explicit and unequivocal provision to that effect. Because s. 337 of the Act provided only for the production of "any [ . . . ] document"

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without further precision, it did not have the effect of abrogating the privilege. It followed that the insurer was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fell within the scope of litigation privilege. None of the exceptions to its application justified lifting the privilege in this case. Therefore, the courts below were right to hold that the litigation privilege invoked by the insurer could be asserted against the syndic.

Un incendie a ravagé une résidence et un des experts en sinistre de l'assureur a enquêté le sinistre. La syndique de la Chambre de l'assurance de dommages, un organisme d'autoréglementation, a, par la suite, reçu une information reprochant certains manquements à l'expert en sinistre dans sa gestion du dossier et la syndique a ouvert une enquête. Dans le cadre de cette enquête, la syndique a demandé à l'assureur de lui faire parvenir une copie complète de son dossier de réclamation relativement à l'assurée. L'assureur a refusé de donner suite à la demande au motif que certains des documents recherchés étaient visés par le privilège relatif au litige. La syndique a déposé une requête en jugement déclaratoire, faisant valoir que l'art. 337 de la Loi sur la distribution de produits et services financiers prévoyait l'obligation de fournir « tout document » sur les activités d'un représentant soumis à la supervision déontologique de la Chambre et que le privilège relatif au litige devrait être appliqué de façon plus souple que le secret professionnel de l'avocat car il est moins important.

Le juge de première instance a conclu que le privilège relatif au litige ne pouvait être abrogé que par une disposition expresse et la syndique a interjeté appel. La Cour d'appel a confirmé la décision du juge de première instance, estimant que même si le privilège relatif au litige se distinguait du secret professionnel de l'avocat, il s'agissait d'une règle d'importance tout aussi fondamentale qui ne pouvait être écartée que par des termes exprès.

La syndique a formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été rejeté.

Gascon, J. (McLachlin, J.C.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Côté, Brown, JJ., souscrivant à son opinion) : Bien que des distinctions s'imposent entre le secret professionnel de l'avocat et le privilège relatif au litige, ce dernier demeure une règle fondamentale pour l'administration de la justice qui se situe au coeur du système judiciaire, tant au Québec que dans les autres provinces. Il s'agit d'un privilège générique qui empêche la divulgation forcée des communications ou documents qu'il couvre, sauf si l'une des exceptions restreintes à leur non-divulgation s'applique.

La Cour a rendu une décision précédemment sur le secret professionnel de l'avocat et il est depuis lors établi en droit que toute disposition législative susceptible de porter atteinte au secret professionnel de l'avocat doit être interprétée restrictivement et qu'un législateur ne peut abroger ce secret par inférence, mais uniquement au moyen de termes clairs, explicites et non équivoques. Ce principe s'applique au privilège relatif au litige.

Vu son importance, le privilège relatif au litige ne peut être abrogé par inférence et ne peut être mis à l'écart que par une disposition claire, explicite et non équivoque à cet effet. Puisque l'art. 337 de la Loi ne prévoit que la communication de « tout document » sans plus de précision, il n'a pas pour effet d'écarter ce privilège. Il s'ensuit que l'assureur pouvait invoquer ici le privilège relatif au litige et refuser de fournir à la syndique les documents visés par celui-ci. Aucune des exceptions à son application ne justifiait d'y passer outre ici. Par conséquent, les instances inférieures ont jugé à bon droit que le privilège relatif au litige invoqué par l'assureur était opposable à la syndique.

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s. 23 — considered

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en général — referred to

art. 11 — considered

*Code des professions*, RLRQ, c. C-26

en général — referred to

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art. 142 — considered

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en général — referred to

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art. 289 — considered

art. 312 — considered

art. 329 — considered

art. 337 — considered

art. 352 — considered

art. 353 — considered

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Generally — referred to

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s. 12 [rep. & sub. 2010, c. 23, s. 83] — considered

s. 12.1 [en. 2010, c. 23, s. 83] — considered

**Words and phrases considered:**

**class privilege**

There are two types of privileges in our law: class privileges and case-by-case privileges. A class privilege entails a presumption of non-disclosure once the conditions for its application are met. It is "more rigid than a privilege constituted on a case-by-

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case basis", which means that it "does not lend itself to the same extent to be tailored to fit the circumstances": *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 46. On the other hand, "[t]he scope of [a] case-by-case privilege", as the name suggests, "will depend, as does its very existence, on a case-by-case analysis, and may be total or partial" (*National Post*, at para. 52).

**litigation privilege**

Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts (...).

Litigation privilege is a common law rule of English origin (...). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor-client privilege (...).

Because of these origins, litigation privilege has sometimes been confused with solicitor-client privilege, both at common law and in Quebec law (...).

However, [the Supreme Court of Canada, in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319,] identified the following differences between them:

• The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);

• Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);

• Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);

• Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65);

• Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para. 60). It noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).

(...)

Although litigation privilege is distinguishable from solicitor-client privilege, the fact remains that (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case-by-case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality.

(...)

[L]itigation privilege is a class privilege.

**Termes et locutions cités:**

**privilège relatif au litige**

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Le privilège relatif au litige crée une immunité de divulgation pour les documents et communications dont l'objet principal est la préparation d'un litige. Les exemples classiques d'éléments couverts par ce privilège sont le dossier de l'avocat et les communications verbales ou écrites entre un avocat et des tiers, par exemple des témoins ou des experts (...)

Le privilège relatif au litige est une règle de common law d'origine anglaise (...). Au cours du 20e siècle, cette règle a été introduite au Canada, y compris au Québec, comme un privilège lié au secret professionnel de l'avocat (...).

En raison de ces origines, le privilège relatif au litige a parfois été confondu avec le secret professionnel de l'avocat, tant en common law qu'en droit québécois (...).

Toutefois, [la Cour suprême du Canada, dans l'arrêt *Blank c. Canada (Ministre de la Justice)*, 2006 CSC 39, [2006] 2 R.C.S. 319,] identifie les distinctions suivantes qui existent entre les deux :

• Le secret professionnel de l'avocat vise à préserver une *relation* alors que le privilège relatif au litige vise à assurer l'efficacité du *processus* contradictoire (par. 27);

• Le secret professionnel est permanent, alors que le privilège relatif au litige est temporaire et s'éteint avec le litige (par. 34 et 36);

• Le privilège relatif au litige s'applique à des parties non représentées, alors même qu'il n'y a aucun besoin de protéger l'accès à des services juridiques (par. 32);

• Le privilège relatif au litige couvre des documents non confidentiels (par. 28, citant R. J. Sharpe, « Claiming Privilege in the Discovery Process », dans *Special Lectures of the Law Society of Upper Canada* (1984), 163, p. 164-165);

• Le privilège relatif au litige n'a pas pour cible les communications entre un avocat et son client en tant que telles (par. 27).

La Cour précise également que le privilège relatif au litige, « contrairement au secret professionnel de l'avocat, n'est ni absolu quant à sa portée, ni illimité quant à sa durée » (*Blank*, par. 37). La Cour confirme en outre que seuls les documents dont « l'objet principal » (et non tous les documents dont un « objet important ») est la préparation du litige sont couverts par le privilège (par. 60). Elle note que la notion de « litige connexe », qui concerne un autre litige survenu après celui ayant donné lieu au privilège, peut prolonger l'application de celui-ci (par. 38- 41).

(...)

S'il se distingue du secret professionnel de l'avocat, le privilège relatif au litige demeure 1) un privilège générique, 2) sujet à des exceptions clairement définies, et non à une mise en balance au cas par cas, et 3) opposable aux tiers, y compris aux tiers enquêteurs ayant une obligation de confidentialité.

(...)

[L]e privilège relatif au litige se qualifie de privilège générique.

**privilèges génériques**

Notre droit reconnaît deux types de privilèges : les privilèges génériques et les privilèges reconnus au cas par cas. Un privilège générique comporte une présomption de non-divulgation une fois que ses conditions d'application sont établies. Il se veut « plus rigide qu'un privilège reconnu au cas par cas », de sorte qu'il « n'est pas possible de le redéfinir aussi librement pour l'adapter aux circonstances » : *R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477, par. 46. À l'opposé, un privilège reconnu au cas par cas, comme son nom l'indique, « peut être absolu ou partiel et sa portée dépend, comme son existence même, d'une analyse effectuée au cas par cas » (*National Post*, par. 52).

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APPEAL by syndic of self-regulatory organization from decision reported at *Lizotte c. Aviva, Cie d'assurances du Canada* (2015), 2015 QCCA 152, EYB 2015-247424, 2015 CarswellQue 384, [2015] J.Q. No. 383 (C.A. Que.), confirming decision dismissing syndic's motion seeking disclosure of insurer's claim file.

POURVOI formé par la syndique d'un organisme d'autoréglementation à l'encontre d'une décision publiée à *Lizotte c. Aviva, Cie d'assurances du Canada* (2015), 2015 QCCA 152, EYB 2015-247424, 2015 CarswellQue 384, [2015] J.Q. No. 383 (C.A. Que.), ayant confirmé une décision rejetant la requête de la syndique recherchant la communication du dossier de réclamation d'un assureur.

***Gascon J.*** **(McLachlin C.J.C. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ. concurring):**

**I. Overview**

1 Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. Although it differs from the professional secrecy of lawyers (solicitor-client privilege) in several respects, the two concepts do overlap to some extent. Since *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574, it has been settled law that any legislative provision capable of interfering with solicitor-client privilege must be read narrowly and that a legislature may not abrogate that privilege by inference, but may only do so using clear, explicit and unequivocal language. The issue in this appeal is whether this principle also applies to litigation privilege.

2 In the course of an inquiry into a claims adjuster, the appellant, the assistant syndic (the "syndic") of the Chambre de l'assurance de dommages (the" Chamber"), asked an insurer, the respondent Aviva Insurance Company of Canada, to send her a complete copy of its claim file with respect to one of its insured. Aviva refused to do so on the basis that some of the requested documents were protected by litigation privilege. In response to this refusal, the syndic filed a motion for a declaratory judgment, arguing that the relevant statutory provision created an obligation to produce "any ... document" concerning the activities of a representative whose professional conduct is being investigated by the Chamber, and that this was sufficient to lift the privilege. In the syndic's opinion, litigation privilege can be distinguished from solicitor-client privilege; it is less important and is not absolute, and should therefore be applied more flexibly.

3 The Superior Court concluded that litigation privilege cannot be abrogated absent an express provision. The Court of Appeal upheld the Superior Court's judgment, holding that even though litigation privilege is distinguishable from solicitor-client privilege, it is, to the same extent, a fundamentally important principle that cannot be overridden without express language.

4 I would dismiss the appeal. Although there are differences between solicitor-client privilege and litigation privilege, the latter is nonetheless a fundamental principle of the administration of justice that is central to the justice system both in Quebec and in the other provinces. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.

5 The requirements established in *Blood Tribe* apply to litigation privilege. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect. Because the section at issue provides only for the production of "any ... document" without further precision, it does not have the effect of abrogating the privilege. It follows that Aviva was entitled to assert litigation privilege in this case and to refuse to provide the syndic with the documents that fall within the scope of that privilege.

**II. Background**

6 The Chamber is a self-regulatory organization established by s. 284 of the Act *respecting the distribution of financial products and services*, CQLR, c. D-9.2 ("*ADFPS*"). It is responsible for overseeing the professional conduct of a number of representatives working in the insurance field, including claims adjusters, damage insurance agents and damage insurance brokers (ss. 289 and 312 *ADFPS*). In this regard, the Chamber has a role similar to that of a professional order governed by

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the Professional Code, CQLR, c. C-26, although it is not such an order. Its "mission [is] to ensure the protection of the public by maintaining discipline among and supervising the training and ethics of its members" (s. 312 *ADFPS*). For this purpose, the syndic of the Chamber inquires into any offences under the *ADFPS* or its regulations (s. 329 *ADFPS*). She may bring a complaint against a representative before the Chamber's discipline committee, and the complaint may result in a fine (ss. 352, 353 and 376 *ADFPS*).

7 In July 2008, a fire damaged the residence of a person insured by Aviva. Aviva assigned one of its claims adjusters, M.B., to investigate the claim. The syndic of the Chamber later received information to the effect that M.B. had made certain errors in managing the file. On January 24, 2011, the syndic opened an inquiry with respect to M.B. In the course of that inquiry, a member of the syndic's team sent Aviva a request for a [TRANSLATION] "complete copy of [its] file, both physical and electronic, for this claim", and for a list that would enable her "to identify the employees who worked on the file" (emphasis deleted). The syndic based this request on s. 337 *ADFPS*, which reads as follows:

> **337.** Insurers, firms, independent partnerships and mutual fund dealers and scholarship plan dealers registered in accordance with Title V of the Securities Act (chapter V-1.1) must, at the request of a syndic, forward any required document or information concerning the activities of a representative.

8 In response, Aviva produced a number of documents, but explained that it had withheld some on the basis that they were covered either by solicitor-client privilege or by litigation privilege. The syndic insisted, however, and made several subsequent requests for the complete claim file, explaining that she could not conduct her inquiry without it.

9 On June 30, 2011, the insured person in question brought legal proceedings against Aviva to obtain compensation. While that action was still pending in court, the syndic applied in June 2012 for a declaratory judgment against Aviva in order to obtain the documents it sought. On June 26, 2013, Aviva and the insured person reached an out-of-court settlement, and on October 17, 2013, Aviva finally sent the syndic the entire file regarding the insured person's claim.

10 Although that settled the dispute between the parties with respect to the production of the required documents, the syndic nevertheless proceeded with her motion for a declaratory judgment. As agreed by the parties, that motion raised the following question:

> [TRANSLATION] The parties agree that at the time when the ChaD (Chambre de l'assurance de dommages) made its request to the defendant on January 24, 2011, some of the documents included in the claim file of the insured person N.F. were not produced by the defendant on the basis of litigation privilege or of professional secrecy (solicitor-client privilege). Accordingly, was the defendant entitled to assert those privileges against the ChaD and to refuse on that basis to produce the documents covered by them?

11 The Superior Court judge who heard the motion held that it raised a [TRANSLATION] "genuine problem", because other insurers and claims adjusters had raised the same question in response to requests for documents from the Chamber's syndics. At the hearing of the motion, the syndic conceded that solicitor-client privilege could be asserted against her and that the issue before the court was therefore limited to litigation privilege. As well, Aviva abandoned its argument that some of the requested documents did not relate to "the activities of a representative" within the meaning of s. 337 *ADFPS*. As a result, no facts were at issue before the motion judge.

## III. Judicial History

### *A. Quebec Superior Court (2013 QCCS 6397)*

12 The Superior Court ruled in Aviva's favour. The motion judge began by observing that s. 9 of the Charter *of human rights and freedoms*, CQLR, c. C-12 (the "Quebec Charter"), grants quasi-constitutional protection to professional secrecy of lawyers, which is closely linked to [TRANSLATION] the "democratic values" (paras. 46 and 50-51 (CanLII)). Although claims adjusters are not bound to professional secrecy by law, counsel retained by a claims adjuster or an insurer is so bound (paras. 47-48). In *Blood Tribe*, it was held that an authority may not "pierce" solicitor-client privilege absent express words in the applicable

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legislation. Because the *ADFPS* (and s. 337 thereof) contains no express abrogation of solicitor-client privilege, the latter may be asserted against the syndic (paras. 53-56).

13 The motion judge then considered the syndic's argument that litigation privilege can be distinguished from solicitor-client privilege, in particular in that it is not protected by s. 9 of the Quebec Charter. In the motion judge's view, this argument represented a [TRANSLATION] "departure from the position taken by the Supreme Court in *Foster Wheeler*" (para. 63). In that case, LeBel J. had written that litigation privilege "is now being absorbed into the Quebec civil law concept of professional secrecy" (*Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*2004 SCC 18[2004] 1 S.C.R. 456, at para. 44). The motion judge also noted that the Federal Court had held, in two cases originating in common law provinces, that the principles applicable to solicitor-client privilege in the context of the statute at issue in Blood Tribe (the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA")) also applied to litigation privilege (paras. 64-67).

14 In light of the decision in *Foster Wheeler*, the motion judge considered himself bound to apply these principles to Quebec law and to find that, in the absence of express language, the *ADFPS* does not abrogate litigation privilege, which can therefore be asserted against the syndic (para. 68). He accordingly declared that both solicitor-client privilege and litigation privilege can be asserted against the syndic of the Chamber [TRANSLATION] "by anybody who receives a request for information" (para. 83).

***B. Quebec Court of Appeal (2015 QCCA 152)***

15 The Court of Appeal upheld the judgment on the motion, concluding that litigation privilege could be asserted against the syndic. In its view, the syndic had been right to concede that solicitor-client privilege could be asserted against her, since the legislature is required to use express language to abrogate that privilege, which it had not done in this case. The court also noted that, by way of comparison, express language had been used in ss. 14.3, 60.4 and 192 of the Professional Code (which does not apply to claims adjusters) in the context of disciplinary inquiries (paras. 23 and 30 (CanLII)).

16 Although solicitor-client privilege and litigation privilege must be viewed as being conceptually distinct, the Court of Appeal noted that in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, this Court had written that the two rules "serve a common cause: The secure and effective administration of justice according to law" (para. 25, quoting Blank, at para. 31). As well, the Federal Court, the Ontario Court of Appeal and the Alberta Court of Appeal had held that litigation and/or settlement privilege cannot be abrogated without clear and explicit language (paras. 31-32). In the Court of Appeal's view, the same reasoning applies to the instant case.

17 The Court of Appeal added that this Court had also stated in *Blank* that the Access to Information Act, R.S.C. 1985, c. A-1, had been enacted in a context in which the term "solicitor-client privilege" was understood to include litigation privilege (para. 29). Yet the same context had also applied when the *ADFPS* was enacted in 1998, and when the legislature made amendments to that Act after *Blank* was decided, it did not add anything to abrogate solicitor-client privilege or litigation privilege even though it had done so in the *Professional Code* with respect to professional secrecy (para. 30). The Court of Appeal concluded from this that litigation privilege could be asserted against the syndic. The court allowed the appeal, but solely to amend the motion judge's conclusion such that it would apply to [TRANSLATION] "the respondents" rather than to "any person" (para. 37).

**IV. Issue**

18 In this Court, the syndic rightly admits that solicitor-client privilege can be asserted against her in the context of a request for documents relating to a claim file. The central issue of the appeal is therefore whether Aviva could also assert litigation privilege against the syndic in the same context. To resolve it, I will have to determine whether litigation privilege may be abrogated using general rather than clear, explicit and unequivocal language and, accordingly, whether s. 337 *ADFPS* can be interpreted as establishing a valid abrogation of the privilege. Before doing so, however, I must first review the characteristics of litigation privilege.

**V. Analysis**

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### *A. Characteristics of Litigation Privilege*

19 Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 1009-10.

20 Litigation privilege is a common law rule of English origin: Lyell v. Kennedy (No. 2) (1883), 9 App. Cas. 81 (H.L.). It was introduced to Canada, including Quebec, in the 20th century as a privilege linked to solicitor-client privilege, which at the time was considered to be a rule of evidence that was necessary to ensure the proper conduct of trials: A. Cardinal, "Quelques aspects modernes du secret professionnel de l'avocat" (1984), 44 *R. du B*. 237, at pp. 266-67. In an oft-cited case, Jackett P. of the former Exchequer Court of Canada explained the purpose of litigation privilege, once known as the lawyer's brief rule, as follows:

> Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.
>
> [Emphasis added.]
>
> (*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, at pp. 33-34)

21 Because of these origins, litigation privilege has sometimes been confused with solicitor-client privilege, both at common law and in Quebec law: Royer and Lavallée, at pp. 1003-4; N. J. Williams, "Discovery of Civil Litigation Trial Preparation in Canada" (1980), 58 Can. Bar Rev. 1, at pp. 37-38.

22 However, since *Blank* was rendered in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable. In *Blank*, the Court stated that "[t]hey often co-exist and [that] one is sometimes mistakenly called by the other's name, but [that] they are not coterminous in space, time or meaning" (para. 1). It identified the following differences between them:

- The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process* (para. 27);
- Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends (paras. 34 and 36);
- Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services (para. 32);
- Litigation privilege applies to non-confidential documents (para. 28, quoting R. J. Sharpe, "Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65);
- Litigation privilege is not directed at communications between solicitors and clients as such (para. 27).

23 The Court also stated that litigation privilege, "unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration" (*Blank*, at para. 37). Moreover, the Court confirmed that only those documents whose "dominant purpose" is litigation (and not those for which litigation is a "substantial purpose") are covered by the privilege (para. 60). It

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noted that the concept of "related litigation", which concerns different proceedings that are brought after the litigation that gave rise to the privilege, may extend the privilege's effect (paras. 38-41).

24 While it is true that in *Blank*, the Court thus identified clear differences between litigation privilege and solicitor-client privilege, it also recognized that they have some characteristics in common. For instance, it noted that the two privileges "serve a common cause: The secure and effective administration of justice according to law" (para. 31). More specifically, litigation privilege serves that cause by "ensur[ing] the efficacy of the adversarial process" (para. 27) and maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165).

25 The differences identified in *Blank* between solicitor-client privilege and litigation privilege have been adopted in Quebec law: *Desjardins Assurances générales inc. v. Groupe Ledor inc., mutuelle d'assurances*2014 QCCA 1501, at para. 8 (CanLII); Canada (Procureur général) v. Chambre des notaires du Québec2014 QCCA 552, at para. 47 (CanLII); *Informatique Côté, Coulombe inc. v. Groupe Son X Plus inc.*2012 QCCA 2262, at para. 15 (CanLII); Union canadienne (L'), compagnie d'assurance v. St-Pierre2012 QCCA 433[2012] R.J.Q. 340, at paras. 23-24; Imperial Tobacco Canada ltée v. Létourneau2012 QCCA 2260, at paras. 7-8 (CanLII); *Société d'énergie de la Baie James v.* Groupe Aecon ltée2011 QCCA 646, at para. 14 (CanLII); Fournier Avocats inc. v. Cinar Corp.2010 QCCA 2278, at para. 21 (CanLII). In light of *Blank* and the subsequent case law, the earlier *obiter dictum* of LeBel J. in *Foster Wheeler* on which the motion judge relied in the instant case (para. 63) must be placed in its proper context. In *Foster Wheeler*, LeBel J. wrote that litigation privilege "is now being absorbed into the Quebec civil law concept of professional secrecy" (para. 44). However, that observation referred to a tendency that is no longer representative of the state of the law in Quebec. Moreover, because litigation privilege applies, for example, to an unrepresented party without the involvement of a professional counsellor (*Blank*, at para. 27), it cannot be said, despite the common characteristics, that it has been absorbed into, or constitutes a component or subcategory of, the institution of professional secrecy.

26 This being said, the syndic in the case at bar is relying on *Blank* and on the differences identified in it as the basis for three arguments that support her view that litigation privilege should be given a limited scope.

27 First, she submits that litigation privilege is not a class privilege and that this distinguishes it from solicitor-client privilege, as it is intended not to protect a relationship, but solely to facilitate a process. Although taking care not to say that litigation privilege is essentially a [TRANSLATION] "case-by-case privilege", she submits that it is nevertheless a "limited privilege that must yield where the ends of justice so require or where that is justified by an overriding public interest".

28 Next, the syndic argues that litigation privilege must be subjected to a balancing test. In her view, courts must in every case assess the harm that would result from the application of the privilege and consider the opposing interests in deciding whether it should apply. The very existence of the privilege thus depends on an analysis specific to a given situation rather than on the application of certain defined exceptions as is the case for solicitor-client privilege. The syndic considers that litigation privilege no longer reflects contemporary legal realities, which require more extensive co-operation in the courts, and that it should therefore be given a very narrow scope.

29 Finally, the syndic submits that it should not be possible to assert the privilege against someone who is not a party to the litigation in question. The Court should even adopt a [TRANSLATION] "third party investigator exception". In the syndic's opinion, such an exception should apply in favour of anyone who:

> [TRANSLATION] (i) is not a party to the litigation that gave rise to the privilege and is therefore a "third party" to the litigation who has no interest in it; (ii) has investigative powers conferred by the legislature in relation to a function being performed in the public interest; (iii) requests the production of documents that are directly relevant to the fulfillment of that function; (iv) has a duty of confidentiality that bars him or her from disclosing the requested documents, directly or indirectly, to the opposing party in the litigation that gave rise to the privilege; and (v) is authorized to disclose the documents only in a forum that itself is obligated and has the ability to maintain their confidentiality for at least as long as the duration of the litigation that gave rise to the privilege (and any related litigation). [A.F., at para. 136]

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30 I note that this last argument goes well beyond the narrow issue of legislative abrogation of the privilege raised in this appeal. The proposed exception, which is based on a balancing test, could cause the privilege to be inapplicable even before that issue arises. In support of the exception, the syndic asserts that her oath of discretion and duty of confidentiality substantially limit, or even eliminate, any risk of harm. In short, in a situation like the one in this case, the very limited scope of litigation privilege means that it should yield given the importance of the syndic's function of protecting the public.

31 I find these three arguments to be without merit. Although litigation privilege is distinguishable from solicitor-client privilege, the fact remains that (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case-by-case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality.

*(1) Litigation Privilege Is a Class Privilege*

32 There are two types of privileges in our law: class privileges and case-by-case privileges. A class privilege entails a presumption of non-disclosure once the conditions for its application are met. It is "more rigid than a privilege constituted on a case-by-case basis", which means that it "does not lend itself to the same extent to be tailored to fit the circumstances": R. v. National Post2010 SCC 16[2010] 1 S.C.R. 477, at para. 46. On the other hand, "[t]he scope of [a] case-by-case privilege", as the name suggests, "will depend, as does its very existence, on a case-by-case analysis, and may be total or partial" (*National Post*, at para. 52). The four "Wigmore criteria", the last of which is a balancing of the interests at stake, are applied:

> The "Wigmore criteria" consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good ("Sedulous[ly]" being defined ... as "diligent[ly] ... deliberately and consciously"). ... Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth....
>
> . . . . .
>
> The fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good). [paras. 53 and 58]

33 In my opinion, litigation privilege is a class privilege. Once the conditions for its application are met, that is, once there is a document created for "the dominant purpose of litigation" (*Blank*, at para. 59) and the litigation in question or related litigation is pending "or may reasonably be apprehended" (para. 38), there is a "*prima facie* presumption of inadmissibility" in the sense intended by Lamer C.J. in *R. v. Gruenke*, [1991] 3 S.C.R. 263:

> The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule).
>
> [Emphasis deleted; p. 286]

34 From this perspective, litigation privilege is similar to settlement privilege and informer privilege, which the Court has already characterized as class privileges: Sable Offshore Energy Inc. v. Ameron International Corp.2013 SCC 37[2013] 2 S.C.R. 623, at para. 12; R. v. Basi2009 SCC 52[2009] 3 S.C.R. 389, at para. 22. Like them, litigation privilege has long been recognized by the courts and has been considered to entail a presumption of immunity from disclosure once the conditions for its application have been met: *Blank*, at paras. 59-60; *Compagnie d'assurance AIG du Canada v. Solmax International inc.*2016 QCCA 258, at paras. 4-8 (CanLII); *Groupe Ledor inc.*, at paras. 8-9; *St-Pierre*, at para. 41; Axa Assurances inc. v. Pageau2009

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QCCA 1494, at para. 2 (CanLII); Conceicao Farms Inc. v. Zeneca Corp. 200683 O.R. (3d) 792(C.A.), at paras. 20-21; College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)2002 BCCA 665, 23 C.P.R. (4th) 185, at paras. 31-33 and 72; Apotex Fermentation Inc. v. Novopharm Ltd. 199495 Man. R. (2d) 186 (C.A.), at paras. 18-20; *R. v. Brouillette* (1992), 78 C.C.C. (3d) 350 (Que. C.A.), at p. 368; *Opron Construction Co. v. Alberta* (1989), 100 A.R. 58 (C.A.), at para. 5.

35 Furthermore, several courts and authors have, although sometimes diverging on the basis for the privilege or the applicable criteria, explicitly concluded that litigation privilege is in fact a class privilege: R. v. Lanthier2008 CanLII 13797(Ont. S.C.J.), at para. 6; Kennedy v. McKenzie200517 C.P.C. (6th) 229(Ont. S.C.J.), at para. 22; R. v. Soomel2003 BCSC 140, at para. 76 (CanLII); H. C. Stewart, *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-183; B. Billingsley, "'Ingathered' Records and the Scope of Litigation Privilege in Canada: Does Litigation Privilege Apply to Copies or Collections of Otherwise Unprivileged Documents?" (2014), 43 *Adv. Q*. 280, at pp. 283-85.

36 Thus, although litigation privilege differs from solicitor-client privilege in that its purpose is to facilitate a process — the adversary process (*Blank*, at para. 28, quoting Sharpe, at paras. 164-65) — and not to protect a relationship, it is nevertheless a class privilege. It is recognized by the common law courts, and it gives rise to a presumption of inadmissibility for a class of communications, namely those whose dominant purpose is preparation for litigation (*Blank*, at para. 60).

37 This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the "public interests" that are at issue (*National Post*, at para. 58).

*(2) Litigation Privilege Is Subject to Clearly Defined Exceptions and Not to a Case-by-Case Balancing Exercise*

38 Despite the fact that litigation privilege is a class privilege, the syndic proposes that the Court adopt the balancing test developed by Doherty J.A. of the Ontario Court of Appeal in his dissenting reasons in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321:

> Litigation privilege claims should be determined by first asking whether the material meets the dominant purpose test. ... If it meets that test, then it should be determined whether in the circumstances the harm flowing from non-disclosure clearly outweighs the benefit accruing from the recognition of the privacy interest of the party resisting production.
>
> [Emphasis added; p. 365.]

39 I disagree. In the context of privileges, the exercise of balancing competing interests is associated with case-by-case privileges (*National Post*, at para. 58), not class privileges. Rosenberg J.A., who wrote reasons concurring with those of Carthy J.A. for the majority in *Chrusz*, refused to apply such a test, citing the uncertainty that would be caused by a case-by-case approach of balancing the advantages and disadvantages of applying the privilege. I adopt his comments on this point:

> The litigation privilege is well established, even if some of the nuances are not. In my view, the competing interests or balancing approach proposed by Doherty J.A. is more appropriate for dealing with emerging claims of privilege. ... I am concerned that a balancing test would lead to unnecessary uncertainty and a proliferation of pre-trial motions in civil litigation.
>
> That is not to say that litigation privilege is absolute. The Supreme Court of Canada has made it clear that all of the established privileges are subject to some exceptions....
>
> In my view, with established privileges like solicitor-client privilege and litigation privilege it is preferable that the general rule be stated with as much clarity as possible. Deviations from the rule should be dealt with as clearly defined exceptions rather than as a new balancing exercise each time a privilege claim is made ....
>
> [Emphasis added; p. 369.]

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40 Moreover, other courts have cited Justice Rosenberg's analysis with approval: Brown v. Cape Breton (Regional Municipality)2011 NSCA 32, 302 N.S.R. (2d) 84, at paras. 57-58; Llewellyn v. Carter2008 PESCAD 12278 Nfld. & P.E.I.R. 96, at para. 52; *Kennedy*, at para. 39; Davies v. American Home Assurance Co. 200260 O.R. (3d) 512(S.C.J.), at paras. 43-46. Similarly, in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, this Court discussed the certainty that was needed in the case of another fundamental privilege, that of the police informer, explaining as follows why a case-by-case determination of whether relevant information is privileged would undermine the confidence of those who are protected by the privilege:

> Police rely heavily on informers. Because of its almost absolute nature, the privilege encourages other potential informers to come forward with some assurance of protection against reprisal. A more flexible rule that would leave disclosure up to the discretion of the individual trial judge would rob informers of that assurance and sap their willingness to cooperate.
>
> [Emphasis added; para. 30.]

The same considerations apply to litigation privilege.

41 What must be done therefore is to identify, where appropriate, specific exceptions to litigation privilege rather than conducting a balancing exercise in each case. In this regard, the Court held in *Smith v. Jones*, [1999] 1 S.C.R. 455, that the exceptions that apply to solicitor-client privilege are all applicable to litigation privilege, given that solicitor-client privilege is the "highest privilege recognized by the courts" (para. 44). These include the exceptions relating to public safety, to the innocence of the accused and to criminal communications (paras. 52-59 and 74-86). They also include the exception to litigation privilege recognized in *Blank* for "evidence of the claimant party's abuse of process or similar blameworthy conduct" (para. 44).

42 Other exceptions may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances. From this perspective, Aviva is proposing a new exception that is narrower than the balancing exercise being advocated by the syndic and that would apply only in the cases of urgency and of necessity. Unsurprisingly, the syndic says that she agrees with the substance of this exception.

43 The idea of an exception based on urgency and necessity is of course appealing. It would help compensate for the fact that, even though litigation privilege is temporary, it may sometimes delay access to certain documents that another party urgently needs in order to prevent serious harm. Such an exception would be based on criteria such as the need to obtain evidence to prevent serious harm, the impossibility of obtaining it by other means and the urgency of obtaining it before the [TRANSLATION] "natural" lapsing of the effects of litigation privilege.

44 This exception would certainly be much narrower than the excessively broad balancing exercise proposed by the syndic. What would be required would be not to ask in each case whether litigation privilege should protect a document whose dominant purpose is preparation for litigation, but to lift the privilege in the rare cases in which a party succeeds in discharging its heavy burden with regard to this exception. Therefore, in a situation similar to the one in this case, it would not be enough for a syndic to simply invoke the need to sanction alleged disciplinary breaches in order to lift the privilege. If that did suffice, such a request would always be sufficient to establish the urgency exception, and that exception would then become the rule. This, in my view, would be improper. To establish the urgency exception in a disciplinary context, the existence of an urgent investigation in which extraordinary harm is apprehended during the period in which litigation privilege applies would instead be needed.

45 However, the record of this appeal from a declaratory judgment reveals no facts that might be presented as concrete examples of circumstances that could justify the application of such an exception. Because the urgency that is required may vary in nature depending on the legal context of the case and the nature of the relationship between the parties, I consider it preferable to leave the actual adoption of such an exception and a detailed analysis of the conditions for its application for a later date. For now, it would be advisable to limit this discussion to the defined exceptions that have been mentioned above.

*(3) Litigation Privilege Can Be Asserted Against Third Parties, Including Third Party Investigators Who Have a Duty of Confidentiality*

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46 At the hearing, the syndic submitted, lastly, that in every case, it should not be possible to assert litigation privilege against third parties: it should apply only to parties to the litigation in question. In the case at bar, because the syndic is not a party to any litigation related to the litigation between the insurer and the insured person, that privilege cannot, in her opinion, be asserted against her. This is because of the limited purpose of the privilege, which is intended to facilitate the adversarial process in which the parties alone are involved. In the alternative, the syndic proposes the adoption of an exception to the effect that the privilege cannot be asserted against third party investigators who have a duty of confidentiality.

47 These arguments are unconvincing. I instead agree with the courts that have held that litigation privilege can be asserted against anyone, including administrative or criminal investigators, not just against the other party to the litigation: R. v. Kea200527 M.V.R. (5th) 182(Ont. S.C.J.), at paras. 43-44; D'Anjou v. Lamontagne2014 QCCQ 11999, at paras. 92-93 (CanLII).

48 There are several reasons that justify this conclusion. The first is that the disclosure of otherwise protected documents to third parties who do not have a duty of confidentiality would entail a serious risk for the party who benefits from the protection of litigation privilege. There would be nothing to prevent a third party to whom such documents are disclosed from subsequently disclosing them to the public or to the other party, which could have a serious adverse effect on the conduct of the litigation in question. The documents could then be presented to the court in a manner other than that contemplated by the party protected by the privilege. This is the very kind of harm that litigation privilege is meant to avoid: *Susan Hosiery Ltd.*, at pp. 33-34. Moreover, in *Blank*, which concerned the *Access to Information Act*, this Court held that a provision authorizing the government to invoke solicitor-client privilege could also be used to invoke litigation privilege in order to deny a request for access to information by a third party to the litigation (for example, the media or a member of the public) (para. 4).

49 There are also cases in which the courts have held that disclosure to a third party of a document covered by litigation privilege could result in a waiver of the privilege as against all: Rodriguez v. Woloszyn2013 ABQB 269554 A.R. 8, at para. 44; Aherne v. Chang2011 ONSC 3846, 337 D.L.R. (4th) 593, at paras. 12-13. The decisions in those cases are based on the assumption that litigation privilege can be asserted against third parties. To conclude that there are consequences associated with disclosure to third parties, one must first assume that confidentiality in relation to those parties corresponds to a normal application of the privilege.

50 As for the exception the syndic proposes for third party investigators who have a duty of confidentiality, it is hardly more justifiable. Even where a duty of confidentiality exists, the open court principle applies to proceedings that can be initiated by a syndic (s. 376 *ADFPS* and s. 142 of the Professional Code; art. 11 of the Code of Civil Procedure, CQLR, c. C-25.01). If, in the case at bar, the syndic had decided to file a complaint with the Chamber's discipline committee, or if she had decided to turn to the common law courts (to obtain, for example, an injunction against the person being investigated, as the syndic of the Barreau du Québec did in *Guay v. Gesca ltée*, 2013 QCCA 343, [2013] R.J.Q. 342), it is far from certain, in light of the open court principle, that the documents that would otherwise be protected by litigation privilege would not have had to be disclosed in the course of those proceedings.

51 In *Basi*, this Court held that informer privilege could not be lifted in favour of defence counsel merely because those counsel were bound by orders and undertakings of confidentiality. In the Court's opinion, "[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies" (para. 44). In that case, the fact that the third parties had duties of confidentiality and the reduced risk of harm did not preclude asserting informer privilege against them.

52 This reasoning applies with equal force to litigation privilege. It would not be appropriate to exclude third parties from the application of this privilege or to expose the privilege to the uncertainties of disciplinary and legal proceedings that could result in the disclosure of documents that would otherwise be protected. Moreover, even assuming that there is no risk that a syndic's inquiry will result in the disclosure of privileged documents, the possibility of a party's work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done. This makes it clear why it must be possible to assert litigation privilege against anyone, including a third party investigator who has a duty of confidentiality

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and discretion. I am thus of the view that unless such an investigator satisfies the requirements of a recognized exception to the privilege, it must be possible to assert the privilege against him or her.

53 I would add that any uncertainty in this regard could have a chilling effect on parties preparing for litigation, who may fear that documents otherwise covered by litigation privilege could be made public. The United States Supreme Court gave a good description of this chilling effect, which litigation privilege (referred to as the "work product doctrine") is in fact meant to avoid:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> [Emphasis added.]
>
> (*Hickman v. Taylor*, 329 U.S. 495(1947), at pp. 510-11)

54 In short, in the instant case, the courts below were right to hold that the litigation privilege invoked by Aviva could be asserted against the syndic. None of the exceptions to its application justify lifting the privilege in this case. Thus, all that remains to be determined is whether the privilege can, as the syndic submits, be lifted by applying the statutory provision — s. 337 *ADFPS* — that is central to the case.

***B. Was It Open to Aviva to Assert Litigation Privilege Against the Syndic in Order to Refuse to Produce the Requested Documents?***

55 The syndic argues that the rule from *Blood Tribe* on abrogating solicitor-client privilege must not apply to litigation privilege. She submits that a legislature may abrogate litigation privilege by statute without using express language. In her view, the words "any ... document" in s. 337 *ADFPS* must be interpreted in light of the statute's purpose, namely the protection of the public, and it must be concluded that litigation privilege cannot be asserted against the syndic, because that would [TRANSLATION] "interfere with" her work by delaying her access to the documents to which it applies.

56 Because litigation privilege is a common law rule, it will be helpful to reiterate the general principle that applies to legislative departures from such rules. This Court has held that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect: Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 3242003 SCC 42[2003] 2 S.C.R. 157, at para. 39; Slaight Communications Inc. v. Davidson[1989] 1 S.C.R. 1038, at p. 1077; see also R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 504-5. Professor Sullivan writes in this regard that "[t]he stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes" (p. 504).

57 The Court has therefore imposed strict requirements for the amendment or abrogation of certain fundamental common law rules. For example, in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the Court emphasized the need for clear and explicit language to oust the inherent general jurisdiction of the provincial superior courts (para. 46). The requirement for such language in this context, which originated in English law (Peacock v. Bell16671 Wms. Saund. 7385 E.R. 84, at pp. 87-88), is based on the fundamental role played by the inherent jurisdiction of the superior courts in the common law system inherited by Canada.

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58 Similarly, in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, the Court refused to consider informer privilege to have been abrogated by a provision of the Code of Civil Procedure, CQLR, c. C-25.01, finding that it was not "specific" enough (p. 103). In so doing, the Court emphasized the "public order" and "public interest" nature of informer privilege (p. 93). It was the fundamental importance of that privilege that led the Court to require explicit language for its abrogation.

59 *Blood Tribe*, on which much of the argument in this appeal was focused, was to the same effect. In it, the issue was whether solicitor-client privilege had been abrogated or diluted by a statutory provision that authorized an administrative investigator to compel a person to produce any records the investigator considered necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information ... that the [investigator] sees fit, whether or not it is or would be admissible in a court of law" (s. 12 *PIPEDA*, now s. 12.1 (S.C. 2010, c. 23, s. 83)). The Court held that the provision at issue was insufficient to abrogate solicitor-client privilege: "Open-textured language governing production of documents [does] not ... include solicitor-client documents" (para. 11 (emphasis deleted)). Instead, the legislature must use "clear and explicit language" to abrogate solicitor-client privilege (para. 2). The Court stated that the privilege "cannot be abrogated by inference" and added that any provisions that allow incursions on the privilege must be interpreted restrictively (para. 11).

60 To justify these requirements, the Court relied on the unique and foundational importance of solicitor-client privilege, which is "fundamental to the proper functioning of our legal system" (*Blood Tribe*, at para. 9). The Court cited a significant body of case law to the effect that the privilege is a "fundamental policy of the law" (para. 11) that must be "as close to absolute as possible to ensure public confidence and retain relevance" (para. 10, quoting R. v. McClure2001 SCC 14[2001] 1 S.C.R. 445, at para. 35). The Court also noted that solicitor-client privilege is of paramount importance because it promotes "access to justice", the "quality of justice" and "[the] free flow of legal advice" (para. 9). What I take from this is that in *Blood Tribe*, the Court held that there is a requirement similar to the one that applies in Quebec under s. 9 of the Quebec Charter, which provides that an "express" legislative override is necessary in order to abrogate professional secrecy.

61 This being said, *Blood Tribe* represents neither a return to the "plain meaning rule" nor an abandonment of the modern approach to statutory interpretation, the goal of which is not to focus solely on the specific words of the provision, but to read the words "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": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Blood Tribe*, at para. 26. First of all, the legislature does not necessarily have to use the term "solicitor-client privilege" in order to abrogate the privilege. An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege. Next, even where there is a specific reference to solicitor-client privilege, the chosen words must nevertheless be interpreted in order to determine whether there is in fact an abrogation and, if so, to assess its scope. The Court recently applied this modern approach to a statute that expressly abrogated solicitor-client privilege in order to determine its meaning and scope in Canada (National Revenue) v. Thompson2016 SCC 21[2016] 1 S.C.R. 381, at paras. 22-34. But in accordance with *Blood Tribe*, unless clear, explicit and unequivocal language has been used to abrogate solicitor-client privilege, it must be concluded that the privilege has not been abrogated.

62 In the syndic's view, these requirements that must be met in order to override certain rules of fundamental importance should not apply to litigation privilege. She bases this argument on the limited nature of the privilege, which is not absolute and which, in her opinion, requires a balancing of competing harms and interests.

63 I disagree. The requirements discussed in *Blood Tribe* apply with equal force to litigation privilege. Not only is litigation privilege a class privilege, but it serves an overriding "public interest" as that expression is used in *Bisaillon*. This public interest, as was explained in *Blank*, is "[t]he secure and effective administration of justice according to law" (para. 31). The purpose of litigation privilege is to "ensure the efficacy of the adversarial process" (*Blank*, at para. 27) by maintaining a "protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (para. 40, quoting Sharpe, at p. 165). By maintaining a protected area for the preparation of litigation, litigation privilege in its own way promotes "access to justice" and the "quality of justice" (*Blood Tribe*, at para. 9).

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64 There is of course no question that litigation privilege does not have the same status as solicitor-client privilege and that the former is less absolute than the latter. It is also clear that these two privileges, even though they may sometimes apply to the same documents, are conceptually distinct. Nonetheless, like solicitor-client privilege, litigation privilege is "fundamental to the proper functioning of our legal system" (*Blood Tribe*, at para. 9). It is central to the adversarial system that Quebec shares with the other provinces. As a number of courts have already pointed out, the Canadian justice system promotes the search for truth by allowing the parties to put their best cases before the court, thereby enabling the court to reach a decision with the best information possible: Penetanguishene Mental Health Centre v. Ontario2010 ONCA 197260 O.A.C. 125, at para. 39; Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.2010 BCSC 1494, 100 C.P.C. (6th) 70, at para. 15. The parties' ability to confidently develop strategies knowing that they cannot be compelled to disclose them is essential to the effectiveness of this process. In Quebec, as in the rest of the country, litigation privilege is therefore inextricably linked to certain founding values and is of fundamental importance. That is a sufficient basis for concluding that litigation privilege, like solicitor-client privilege, cannot be abrogated by inference and that clear, explicit and unequivocal language is required in order to lift it.

65 This conclusion is consistent with a robust line of authority. Like the Quebec Court of Appeal in the instant case, the Alberta Court of Appeal has also held that a party should not be denied the right to claim litigation privilege without "clear and explicit legislative language to that effect": TransAlta Corp. v. Market Surveillance Administrator2014 ABCA 196577 A.R. 32, at para. 36. As well, the Federal Court has applied the principles from *Blood Tribe* to litigation privilege in two cases: Privacy Commissioner of Canada v. Air Canada2010 FC 429, at paras. 14 and 30-37 (CanLII); State Farm Mutual Automobile Insurance Co. v. Privacy Commissioner of Canada2010 FC 736, at para. 115 (CanLII).

66 In the case at bar, s. 337 *ADFPS*, on which the syndic is relying, merely authorizes a request for the production of "any ... document" without further precision. This is what the Court characterized in *Blood Tribe* as a "general production provision that does not specifically indicate that the production must include records for which ... privilege is claimed" (para. 21). In fact, s. 337 *ADFPS* is even less specific than the provisions at issue in *Blood Tribe*, which empowered the investigator to obtain all the evidence he or she wished to obtain, "whether or not it is or would be admissible in a court of law" and "in the same manner and to the same extent as a superior court of record" (s. 12 *PIPEDA*, now s. 12.1).

67 A provision that merely refers to the production of "any ... document" does not contain sufficiently clear, explicit and unequivocal language to abrogate litigation privilege. There are a number of statutes that provide for the disclosure or production of "any document" without further precision. As the intervener Advocates' Society points out, Quebec's Code of Civil Procedure does so, as do the rules of civil procedure of several other provinces. Some courts have held in the past that rules of civil procedure providing for the disclosure of documents in very general terms did not contain the language that would be required in order to abrogate litigation privilege: Louch v. Decicco2007 BCSC 393, 39 C.P.C. (6th) 8, at para. 63; Ward v. Pasternak2015 BCSC 1190, at paras. 37-38 (CanLII). The same conclusion applies in the instant case.

***C. Collateral Issue: The Professional Code and Litigation Privilege***

68 I must address one final point. In response to certain comments made in the Court of Appeal's reasons, the Barreau du Québec has intervened in this Court to raise a collateral issue with respect to the scope of s. 192 of the Professional Code, as amended in 1994. That section explicitly abrogates professional secrecy in the context of a disciplinary inquiry, but does not refer to the assertion of litigation privilege by a professional in such a context. In its reasons, the Court of Appeal made two references to s. 192 (at paras. 23 and 30) to illustrate a situation in which the legislature has expressly abrogated professional secrecy, which it has not done in s. 337 *ADFPS*.

69 Wishing to clear up any ambiguity concerning the scope of those comments, the Barreau submits that s. 192 should be read as abrogating not only professional secrecy, but also litigation privilege, even though it does not actually mention the latter. The Barreau relies on *Blank*, in which this Court held that the protection afforded to solicitor-client privilege by s. 23 of the Access to Information Act, which did not mention litigation privilege, also applied to the latter privilege.

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70 Although I am mindful of the concerns expressed by the Barreau, I am of the opinion that it would not be appropriate for the Court to rule on this issue at this time without full argument in an adversarial context by all parties who might have an interest in it.

**VI. Disposition**

71 Litigation privilege is a class privilege that is distinct from solicitor-client privilege and is subject to certain defined exceptions that do not apply in this case. Given the absence of clear, explicit and unequivocal language in the *ADFPS* providing for the abrogation of this privilege, it may be asserted against the syndic, and the Superior Court and Court of Appeal were right to reach this conclusion. I would accordingly dismiss the appeal with costs to Aviva.

*Appeal dismissed.*

*Pourvoi rejeté.*

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**Most Negative Treatment:** Check subsequent history and related treatments.

2018 SKCA 34
Saskatchewan Court of Appeal

University of Saskatchewan v. Saskatchewan (Information and Privacy Commissioner)

2018 CarswellSask 240, 2018 SKCA 34, [2018] 7 W.W.R. 373, 18 C.P.C. (8th) 290, 292 A.C.W.S. (3d) 8, 36 Admin. L.R. (6th) 120, 414 C.R.R. (2d) 342

# The University of Saskatchewan (Appellant / Respondent) And The Office of the Information and Privacy Commissioner, Saskatchewan (Respondent / Applicant) And Attorney General for Saskatchewan (Intervenor)

Richards C.J.S., Caldwell, Schwann JJ.A.

Heard: October 19, 2017
Judgment: May 16, 2018
Docket: CACV3083

Proceedings: reversing *Saskatchewan (Office of the Information and Privacy Commissioner) v. University of Saskatchewan (2017), 2017 SKQB 140, 2017 CarswellSask 259, [2017] 11 W.W.R. 594*, R.C. Mills J. (Sask. Q.B.)

Counsel: John Beckman, Q.C., Robert Affleck, for Appellant
Jason Mohrbutter, Joanne Colledge-Miller, for Respondent
Alan Jacobson, for Intervenor

Subject: Constitutional; Public; Municipal; Human Rights

**Related Abridgment Classifications**

Privacy and freedom of information
V Freedom of information
V.3 Provincial legislation
V.3.c Practice and procedure

**Headnote**

Privacy and freedom of information --- Freedom of information — Provincial legislation — Practice and procedure

Solicitor-client privilege — Individual filed access to information request seeking certain records in university's possession — University provided documents except those that were subject to solicitor-client privilege — During course of review, Information and Privacy Commissioner requested university to produce records in relation to which privilege had been asserted, but university refused — Chambers judge granted Commissioner's application to compel production of records — Judge held that s. 43(1) of Local Authority Freedom of Information and Protection of Privacy Act granted Commissioner power to obtain information necessary to determine whether claim of solicitor-client privilege under s. 21 of Act was well-founded — University appealed — Appeal allowed — Judge did not err in concluding that s. 43(1) of Act empowered Commissioner to require production of records subject to solicitor-client privilege — Section 43(1) of Act was to be given its ordinary and grammatical meaning, which was that reference to "any privilege available at law" in s. 43(1) of Act included all aspects of solicitor-client privilege — Judge erred in his analysis by failing to examine dealings between university and Commissioner through lens of "absolutely necessary" principle — Commissioner was not entitled to request records simply because that was his usual practice or because, in response to ambiguously worded letter from Commissioner's office, university had chosen to provide affidavit averring in general terms that some records were privileged — Commissioner should have clarified his request and exhausted all options short of demanding production of records — Judge erred by sustaining Commissioner's request for production of records claimed to be subject to solicitor-client privilege The Local Authority Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. L-27.1, s 43(1).

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s. 43 — considered

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*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5

Generally — referred to

s. 12(1) — considered

s. 12(1)(a) — considered

s. 12(1)(c) — considered

**Rules considered:**

*Queen's Bench Rules*, Sask. Q.B. Rules 2013

R. 5-8 — considered

APPEAL by university from judgment reported at *Saskatchewan (Office of the Information and Privacy Commissioner) v. University of Saskatchewan* (2017), 2017 SKQB 140, 2017 CarswellSask 259, [2017] 11 W.W.R. 594 (Sask. Q.B.), granting Information and Privacy Commissioner's application for order directing university to produce certain records.

***Richards C.J.S.*:**

## I. INTRODUCTION

1 This appeal involves an examination of how the authority of the Information and Privacy Commissioner to require the production of documents intersects with solicitor-client privilege.

2 The University of Saskatchewan is a "local authority" within the meaning of that term as it is employed in *The* Local Authority Freedom of Information and Protection of Privacy Act, SS 1990-91, c L-27.1 [LAFOIPA].

3 An individual involved in a controversy with the University filed an access to information request with it. The University refused to divulge some of the records in issue, citing solicitor-client privilege. The applicant then asked the Commissioner to review the matter. In the course of conducting the review, the Commissioner requested the University to produce the records in relation to which privilege had been asserted so he could confirm if they were, in fact, privileged.

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4 The University refused to comply with the Commissioner's request and he therefore asked the Court of Queen's Bench for an order directing the University to produce the records. The University responded by arguing, among other things, that (a) properly construed, *LAFOIPA* does not give the Commissioner the authority to require the production of records subject to a claim of solicitor-client privilege, (b) if *LAFOIPA* does confer such an authority on the Commissioner, he should not have exercised it here, and (c) if *LAFOIPA* empowers the Commissioner to demand production of records said to be subject to solicitor-client privilege, then *LAFOIPA* violates the protection against unreasonable search and seizure guaranteed by s. 8 of the Charter.

5 The Chambers judge held that *LAFOIPA* gave the Commissioner the authority to require the production of the records in issue. He also concluded the constitutional issue raised by the University was not properly before him because the University exercised a governmental function under *LAFOIPA* and, therefore, could not rely on the Charter. The Chambers judge did not deal directly or expressly with the argument that, even if the Commissioner had the general authority to demand the production of the records in question, he should not have asked for them in the circumstances of this case.

6 The University appeals from the decision of the Chambers judge.

7 As explained below, the University's appeal must be allowed. The Chambers judge correctly determined that, in general terms, s. 43(1) of LAFOIPA empowers the Commissioner to require the production of records claimed to be subject to solicitor-client privilege. However, he erred in concluding the Commissioner had acted appropriately in requesting records of that kind in the circumstances of this case. It is unnecessary to deal with the University's Charter argument.

**II. AN OVERVIEW OF LAFOIPA**

8 *LAFOIPA* applies to "local authorities". Such authorities include, by way of example, boards of education, boards of public libraries, and the provincial health authority. By virtue of s. 2(f)(xi) of *LAFOIPA*, the University of Saskatchewan is also a local authority.

9 *LAFOIPA* is concerned with access to records. "Record" is defined in s. 2(j) to mean "a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records".

10 Subject to the provisions of *LAFOIPA* itself, every person must be permitted access to records in the possession of a local authority if he or she makes the required application (s. 5).

11 *LAFOIPA* sets out a variety of exceptions to the general principle of access. These relate to, for instance, records obtained in confidence from other governments (s. 13), records that, if released, would prejudice law enforcement operations (s. 14), and records that contain advice from officials (s. 16).

12 One of the exceptions to the right of access is designed to protect solicitor-client privilege. Section 21 of LAFOIPA does this by providing as follows:

> 21 A head may refuse to give access to a record that:
>
> (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;
>
> (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or
>
> (c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

13 Applications for access to records must be made in the prescribed form to the local authority (s. 6(1)). When an application is made, the head of the local authority considers the application and then adopts one of several courses of action including

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providing access to the record on payment of the prescribed fee or refusing access to the record. If access is refused, the head must set out the reason for the refusal by identifying the specific provision of *LAFOIPA* on which the refusal is based (s. 7).

14 When an applicant is not satisfied with the decision of the head of a local authority, he or she may apply to the Commissioner for a review (s. 38). Where the Commissioner concludes there are reasonable grounds to review any matter set out in such an application, he must conduct a review (s. 39). Section 39 reads as follows:

> 39(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 38, the commissioner shall review the matter.
>
> (2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:
>
> (a) is frivolous or vexatious;
>
> (a.1) does not affect the applicant or individual personally;
>
> (a.2) has not moved forward as the applicant or individual has failed to respond to the requests of the commissioner;
>
> (a.3) concerns a local authority that has an internal review process that has not been used;
>
> (a.4) concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure available through the professional body has not been used;
>
> (a.5) may be considered pursuant to another Act that provides a review or other mechanism to challenge a local authority's decision with respect to the collection, amendment, use or disclosure of personal information and that review or mechanism has not been used;
>
> (a.6) does not contain sufficient evidence;
>
> (a.7) has already been the subject of a report pursuant to section 44 by the commissioner;
>
> (b) is not made in good faith; or
>
> (c) concerns a trivial matter.

15 The powers of the Commissioner in conducting a review are set out in s. 43 of LAFOIPA. They include the power to require the production of a record. Section 43 is reproduced below:

> 43(1) Notwithstanding any other Act or any privilege available at law, the commissioner may, in a review:
>
> (a) require to be produced and examine any record that is in the possession or under the control of a local authority; and
>
> (b) enter and inspect any premises occupied by a local authority.
>
> (2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:
>
> (a) to give oral or written evidence on oath or affirmation; and
>
> (b) to produce any documents or things;
>
> that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.
>
> (3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

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16 The Commissioner has no authority to compel a head to produce a record to an applicant. Rather, the Commissioner provides a report on the completion of his review (s. 44(1)). In the report, the Commissioner may make recommendations with respect to any matter that was under review (s. 44(3)). The report is provided to both the head and the applicant (s. 44(2)). Within 30 days of receiving the report, the head must make a decision to either follow the recommendation of the Commissioner or make "any other decision that the head considers appropriate" (s. 45(a)). Within 30 days after receiving the decision of the head in this regard, an applicant may appeal the decision to the Court of Queen's Bench (s. 46(1)).

17 Appeals to the Court of Queen's Bench are *de novo*. The Court may examine any record *in camera* to determine on the merits whether it may be withheld pursuant to *LAFOIPA* (s. 47).

**III. BASIC FACTUAL BACKGROUND**

18 In April of 2015, an applicant adverse in interest to the University in various legal proceedings filed an access to information request pursuant to *LAFOIPA*. He sought electronic correspondence referring either to him, his employment history with the University, or a harassment complaint he had filed. The request was worded as follows:

> All correspondence in electronic form sent or received (including those deleted from her e-mail mailbox) by [name of the Dean of the University of Saskatchewan Library] that includes a reference to me by name (i.e.: "[full name of applicant]", or "[first name of applicant]", and/or "[last name of applicant]"), and/or a reference to my employment history (including changes to my employment positions held by me with the University of Saskatchewan), and/or a reference to the harassment complaint filed by me" [*sic*] for the time period of March 1, 2014-April 24, 2015.

19 The University provided records in response to the applicant's request, except those it said were covered by exemptions found in *LAFOIPA*.

20 The applicant was not satisfied with the University's response and, as was his right, he sought a review pursuant to s. 38 of LAFOIPA. On August 14, 2015, the Commissioner wrote to the University to advise of the review. In that regard, and referring to s. 43 of LAFOIPA, the Commissioner requested copies of all of the records in issue.

21 The University took the position that it was not required to provide the Commissioner with the records. Then, in mid-September of 2015, the Commissioner's office advised that it would not insist on seeing the records in relation to which solicitor-client privilege was being claimed and, by way of an ambiguously-worded alternative, said it would accept evidence that would assist the Commissioner to determine the merits of the claim for privilege. In response, the University provided an affidavit from one of its officials saying merely that he, the official, had been advised by counsel that "some of the documents are the subject of solicitor-client privilege".

22 The Commissioner advised that the affidavit did not allow him to determine if solicitor-client privilege was applicable to the records in question and reverted to the position that he was entitled to see the records. The University continued with its stance that the Commissioner did not need to review the records themselves and, ultimately, the Commissioner issued a formal Notice to Produce Records. It required production of all records responsive to the applicant's request over which solicitor-client privilege was being claimed.

23 The University did not comply with the Notice to Produce Records.

24 The Commissioner filed an Originating Application dated January 15, 2016. In it, he sought an order directing the University to comply with the Notice to Produce Records "for the limited purpose of permitting the Commissioner to determine whether the Records are properly subject to [the solicitor-client exemption]".

**IV. THE CHAMBERS DECISION**

25 The Chambers judge granted the order sought by the Commissioner. He interpreted s. 43(1) of LAFOIPA as empowering the Commissioner to require the production of records in relation to which solicitor-client privilege had been asserted. In so

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doing, the Chambers judge rejected the University's argument that *LAFOIPA* was not worded sufficiently clearly to effect such a result. At the same time, the Chambers judge also seemed to say a request for records subject to a claim of solicitor-client privilege would be appropriate only where the Commissioner had first asked for basic information about the records and considered the privilege claim in light of such information.

26 The Chambers judge rejected the University's argument that, if *LAFOIPA* allowed the Commissioner to require the production of privileged records, it violated the protection against unreasonable search and seizure guaranteed by s. 8 of the Charter. He reasoned that, in providing information pursuant to *LAFOIPA*, the University was fulfilling a governmental role and therefore could not rely on the Charter.

27 The Chambers judge did not deal directly with the question of whether, assuming s. 43(1) empowered the Commissioner to demand the production of records subject to a claim of privilege, he should have made such a demand on the facts of this case.

**V. ANALYSIS**

28 The University takes issue with the decision of the Chambers judge on a variety of fronts but its position can be reduced to three lines of argument:

> (a) *LAFOIPA* does not empower the Commissioner to require the production of records in relation to which solicitor-client privilege has been claimed;
>
> (b) if *LAFOIPA* empowers the Commissioner to require the production of records in relation to which solicitor-client privilege has been claimed, the Commissioner erred by demanding production in the circumstances of this case; and
>
> (c) if *LAFOIPA* empowers the Commissioner to require the production of records in relation to which solicitor-client privilege has been claimed, it violates s. 8 of the Charter.

I will address each of these arguments in turn.

***A. Does LAFOIPA empower the Commissioner to require production of the records subject to a claim of solicitor-client privilege?***

29 Solicitor-client privilege is essential to the proper functioning of our legal system. It ensures that individuals seeking assistance from lawyers can speak candidly and freely and thereby obtain effective advice. Absent the assurance of the confidentiality offered by the privilege, the ability of the citizenry to navigate through the shoals of the law would be severely compromised. See: *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44 (S.C.C.) at para 9, [2008] 2 S.C.R. 574 (S.C.C.) [*Blood Tribe*]; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (S.C.C.) at para 34, [2016] 2 S.C.R. 555 (S.C.C.) [*University of Calgary*]. As a result, solicitor-client privilege must offer a strong assurance of confidentiality. As stated in *R. v. McClure*, 2001 SCC 14 (S.C.C.) at para 35, [2001] 1 S.C.R. 445 (S.C.C.) [*McClure*]:

> ... [S]olicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

30 Solicitor-client privilege is more than a rule of evidence. It also has a substantive dimension that operates outside of the courtroom and whenever communications flow between a client and a lawyer acting in his or her capacity as a lawyer. See: *Société d'énergie Foster Wheeler ltée c. Société intermunicipale de gestion & d'élimination des déchets inc.*, 2004 SCC 18 (S.C.C.) at para 34, [2004] 1 S.C.R. 456 (S.C.C.); *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61 (S.C.C.) at para 49, [2002] 3 S.C.R. 209 (S.C.C.) [[hereinafter] *Lavallee*]; *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67 (S.)C.C. at para 11, [2003] 3 S.C.R. 193 (S.C.C.); *Solosky v. R.* (1979), [1980] 1 S.C.R. 821 (S.C.C.) at 839; *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.) at 875 [*Descôteaux*]; *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2015 SCC 7 (S.C.C.) at paras 8 and 84, [2015] 1 S.C.R. 401 (S.C.C.).

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31 Solicitor-client privilege is not absolute. It can be limited or abrogated by statute. The Supreme Court has repeatedly made this clear. See, for example: *McClure* at para 34; *Lavallee* at para 18; *Minister of National Revenue v. Thompson*, 2016 SCC 21 (S.C.C.) at para 25, [2016] 1 S.C.R. 381 (S.C.C.) [*Thompson*].

32 Nonetheless, the cornerstone importance of solicitor-client privilege is reflected in the approach the Supreme Court has taken to the interpretation of legislative provisions touching on it. A statute purporting to limit or abrogate the privilege must be interpreted "restrictively" and must demonstrate "a clear and unambiguous legislative intent to do so" before it will be given any such effect. See: University of Calgary at para 28.

33 It follows from all of this that solicitor-client privilege cannot be set aside by inference. The Supreme Court made the point this way in *Thompson*, as quoted at paragraph 28 of *University of Calgary*:

> ... it is only where legislative language evinces a clear intent to abrogate solicitor-client privilege in respect of specific information that a court may find that the statutory provision in question actually does so. Such an intent cannot simply be inferred from the nature of the statutory scheme or its legislative history, although these might provide supporting context where the language of the provision is already sufficiently clear. If the provision is not clear, however, it must not be found to be intended to strip solicitor-client privilege from communications or documents that this privilege would normally protect. [para 25]

34 All of that said, a legislature does not have to expressly use the words "solicitor-client privilege" in a statute to limit or abrogate the privilege. In the end, the effect of any statutory provision will depend on how clearly a legislative intention to affect the privilege is expressed. The words of the Supreme Court in *Lizotte c. Aviva Cie d'assurance du Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521 (S.C.C.), are instructive on this front:

> [61] ... First of all, the legislature does not necessarily have to use the term "solicitor-client privilege" in order to abrogate the privilege. An abrogation can be clear, explicit and unequivocal where the legislature uses another expression that can be interpreted as referring unambiguously to the privilege. Next, even where there is a specific reference to solicitor-client privilege, the chosen words must nevertheless be interpreted in order to determine whether there is in fact an abrogation and, if so, to assess its scope. The Court recently applied this modern approach to a statute that expressly abrogated solicitor-client privilege in order to determine its meaning and scope in *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381 , at paras. 22-34. But in accordance with *Blood Tribe*, unless clear, explicit and unequivocal language has been used to abrogate solicitor-client privilege, it must be concluded that the privilege has not been abrogated.
>
> (Emphasis added)

See also: *Law Society (Saskatchewan) v. EM & M Law Firm*, 2008 SKCA 128 (Sask. C.A.) at paras 46-52, (2008), 300 D.L.R. (4th) 462 (Sask. C.A.).

35 With this jurisprudential background in place, I turn now to the interpretation of *LAFOIPA*. This exercise must begin with the words of the Act and a consideration of their ordinary and grammatical meaning.

36 The key provision of *LAFOIPA* for purposes of this appeal is, of course, s. 43. For ease of reference, I reproduce ss. 43(1) and (2) again here:

> 43(1) Notwithstanding any other Act or any privilege available at law, the commissioner may, in a review:
>
> (a) require to be produced and examine any record that is in the possession or under the control of a local authority; and
>
> (b) enter and inspect any premises occupied by a local authority.
>
> (2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:

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(a) to give oral or written evidence on oath or affirmation; and

(b) to produce any documents or things;

that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

37 The plain meaning of s. 43(1) — "[n]otwithstanding any other Act or any privilege available at law" — is self-evidently broad. The reference to *any* privilege available at law is clear and doubtless embraces solicitor-client privilege. In this regard, *LAFOIPA* is very different than the legislation considered by the Supreme Court in *University of Calgary*. The words in issue there were to the effect that a public body had to produce records to the Commissioner "[d]espite any other enactment or *any privilege of the law of evidence*". The Court noted that solicitor-client privilege has a substantive aspect and is not merely an evidentiary rule. As a result, it held that the phrase "privilege of the law of evidence" was not sufficiently clear and unequivocal to reveal a legislative intention to set aside solicitor-client privilege.

38 Thus, in my view, there can be no doubt that, as a matter of ordinary and grammatical meaning, the reference to "any privilege available at law" in s. 43(1) includes all aspects of solicitor-client privilege.

39 However, in interpreting s. 43(1), it is also necessary to consider the contextual factors relevant to its construction.

40 As explained above, *LAFOIPA* establishes a statutory scheme to operationalize the right to access the records held by local authorities. The Commissioner is a central actor in this scheme and, simply put, one of his key roles is to facilitate a streamlined and simplified review of questions concerning whether a local authority is obliged to grant access to a record.

41 In my assessment, the University's interpretation of s. 43(1) is broadly inconsistent with *LAFOIPA*'s objectives. On its approach, an applicant who is denied access to a record on the basis of a claim of solicitor-client privilege will not have the comfort of knowing the Commissioner has reviewed the record and considered whether the claim is warranted even in extreme circumstances where, on the face of things, there appears to have been a clear error in asserting the privilege. Rather, according to the University, regardless of the apparent problems with a claim of solicitor-client privilege, the applicant's sole means of being satisfied the claim has been properly asserted would be by way of an appeal to the Court of Queen's Bench pursuant to s. 46 of LAFOIPA. Only by virtue of such an appeal, with its attendant delays, costs, and formalities, would an applicant be able to have an assurance that *LAFOIPA* has been properly applied and administered. In general terms, this fits uncomfortably with the overall thrust of *LAFOIPA* which, as indicated, contemplates expeditious reviews of such matters by the Commissioner.

42 For its part, the University points to two specific contextual features of *LAFOIPA* to advance its interpretation of s. 43(1). Its key argument in this regard involves s. 47(2). That provision concerns appeals to the Court of Queen's Bench by an applicant or a third party who wishes to contest a decision of a head to either grant or refuse access to a record. Section 47(2) reads as follows:

(2) Notwithstanding any other Act or any privilege that is available at law, the court may, on an appeal, examine any record in the possession or under the control of a local authority and no information shall be withheld from the court on any grounds.

43 The University notes that s. 47(2), while employing the same words "[n]otwithstanding ... any privilege that is available at law" as are found in s. 43(1), also goes on to provide "no information shall be withheld from the court on any grounds". It suggests that, if "any privilege available at law" includes solicitor-client privilege, then the words "no information shall be withheld from the court on any grounds" in s. 47(2) would be mere surplusage.

44 I see little merit in this line of reasoning. Section 47(2) does not conclude by saying "no *record* shall be withheld from the court on any grounds". Rather, it says no *information* shall be withheld on any grounds. The employment of these different terms in the same subsection — "information" versus "record" — is significant. It suggests rather clearly that the "no information shall be withheld from the court on any grounds" provision does not refer to records said to be subject to solicitor-client privilege.

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45 By way of contextual considerations, the University also notes s. 47(3) of LAFOIPA. This provision indicates that, on an appeal to the Court of Queen's Bench, the Court must take "every reasonable precaution, including, where appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid disclosure by the court" of information which a head could refuse to disclose or information as to whether a record exists. The University points to the lack of any parallel provision in *LAFOIPA* requiring the Commissioner to prevent the disclosure of information and suggests this means *LAFOIPA* does not contemplate the Commissioner dealing with, or having access to, records subject to solicitor-client privilege.

46 The full answer to this argument is found in s. 48 of LAFOIPA. It adopts ss. 45 to 47 of The Freedom of Information and Protection of Privacy Act, SS 1990-91, c F-22.01, and makes those provisions applicable in proceedings under *LAFOIPA*. Section 46 prohibits the Commissioner from disclosing any information that comes to his knowledge in the exercise of his responsibilities. It also imposes an obligation on the Commissioner to take every reasonable precaution to avoid disclosure of, and directs him not to disclose, the same kinds of information referred to in s. 47(3) of LAFOIPA. In other words, *LAFOIPA does* impose confidentiality obligations on the Commissioner. Those obligations, both in and of themselves and in comparison to the obligations imposed on the courts in the context of appeals, are consistent with the notion that the Commissioner is entitled to require the production of records subject to solicitor-client privilege.

47 In the end, therefore, I see nothing in the statutory context in which s. 43(1) of LAFOIPA is found to suggest it should be given anything other than its ordinary and grammatical meaning. As a result, I conclude that s. 43(1) empowers the Commissioner to require the production of records subject to, or said to be subject to, solicitor-client privilege. The Chambers judge made no error in his conclusion on this front.

***B. Should the Commissioner have required production of the records?***

48 The University's second argument is that, even if *LAFOIPA* allows the Commissioner to require the production of records in respect of which solicitor-client privilege has been asserted, this was not an appropriate case for the Commissioner to have exercised his authority in that regard. It contends the Chambers judge erred in concluding otherwise.

49 The touchstone principle engaged by this branch of the University's submission has been clearly established by the Supreme Court. A discretionary statutory authority to abrogate solicitor-client privilege must be exercised so as to interfere with the privilege only to the extent "absolutely necessary" to achieve the goals of the legislation in question. In *Descôteaux*, Lamer J., for a unanimous Court, said this at page 875:

> . . .
>
> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.
>
> (Emphasis added)

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See also: *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31 (S.C.C.) at paras 14-21, [2006] 2 S.C.R. 32 (S.C.C.) [*Goodis*]; *Thompson* at para 18.

50 Significantly, the "absolutely necessary" concept is very demanding. In *Goodis*, Rothstein J. explained that "[a]bsolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case" (para 20).

51 I note here, as well, that solicitor-client privilege belongs to the client, in this case the University. See: Blood Tribeat para 9. It follows that, seen through the University's eyes, disclosure of records to the Commissioner, even for the limited purpose of verifying the merits of the claim of solicitor-client privilege, is by definition a violation of the privilege.

52 The Supreme Court's decision in *University of Calgary* offers a helpful illustration of the "absolutely necessary" principle at work. In that case, the University of Calgary claimed solicitor-client privilege over records involving communications between it and its general and external counsel. In asserting the privilege, the University provided a list of documents identified by page numbers only. This way of presenting a claim for privilege complied with the requirements of Alberta civil litigation practice at the time. The Information and Privacy Commissioner's delegate then directed the University to substantiate its privilege claim by either providing him with a copy of the records in issue or providing additional information about the records including, for example, the date and length of each record and some information about the author and the addressee. The University did not comply and, as a result, the Commissioner's delegate issued a Notice to Produce Records. In response, the University sought judicial review of the delegate's decision to issue the Notice.

53 The Supreme Court found the Commissioner's delegate had erred in requesting production of the records in issue. Justice Côté, writing for the majority of the Court, noted that the University of Calgary's failure to present evidence of its privilege claim in the format required by the Commissioner's protocol was of no ultimate significance because the protocol had no legal status. Rather, it was merely a guide established by the Commissioner. Justice Côté went on to underline that the prevailing Alberta civil law authority at the time allowed parties to identify solicitor-client privileged documents by number. She found the Commissioner's delegate had acted improperly by demanding copies of the records in issue and concluded her analysis by saying this:

> [70] ... No evidence or argument was made to suggest that solicitor-client privilege had been falsely claimed by the University. In these circumstances, the delegate erred in concluding that the claim needed to be reviewed to fairly decide the issue. Justice Cromwell, writing in dissent but not on this point, arrived at the same conclusion.

54 In the present appeal, the University contends it is under the *University of Calgary* umbrella. It says this is so because it claimed solicitor-client privilege in relation to the records in issue and because, given there was no argument or evidence to the effect privilege had been improperly asserted, the Commissioner should not have required production of the records. Although I cannot accept all of the particulars of the University's argument, I agree with its bottom line. In my respectful view, the Chambers judge erred in his analysis by failing to examine the dealings between the University and the Commissioner through the lens of the "absolutely necessary" principle.

55 As noted above, the applicant asked the University for electronic correspondence referring either to him, his employment history, or a harassment complaint he had filed. The head of the University disclosed some of the records covered by the request but did not disclose those falling under various *LAFOIPA* exemptions. The applicant, acting pursuant to s. 38 of LAFOIPA, then sought a review by the Commissioner of the decision made by the head. The review application itself was not presented to the Chambers judge and we know nothing of the applicant's reasons for asking for a review. As a result, it is necessary to proceed on the basis that the review was not motivated by any particular concern about the claim of solicitor-client privilege or by any specific assertion or argument that the privilege had not been properly claimed. If any such considerations were at play here, they should have been put before the Chambers judge by the Commissioner.

56 Communications followed between counsel for the University, on the one hand, and the Commissioner and his office, on the other. The material before the Court does not paint a complete picture of those communications.

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57 I should perhaps note here that the Commissioner appears to have had a general practice of asking for a production of records said to be subject to solicitor-client privilege. I say this because, in his letter of November 30, 2015, discussed below, the Commissioner wrote, "I wish to emphasize that in asking you for copies of the records over which you claim solicitor-client privilege have [*sic*] been a long standing practice of the office and all lawyers dealing with our office have, during my time, complied with that request".

58 With this observation having been made as an aside, I return to the main story line. Counsel for the University wrote to the Commissioner on September 4, 2015, to submit that the University was not required to provide the records to which it had denied access. The letter itself is not included in the materials before this Court.

59 In response, on September 11, 2015, the Commissioner's office indicated to counsel for the University that it would not require the records in relation to which solicitor-client privilege was claimed and, instead, would accept evidence that would assist the Commissioner in determining the propriety of the privilege claim. The email read as follows:

> I've discussed your letter with the Commissioner. At this point, we will not require a copy of the records upon which solicitor-client privilege is claimed. We will accept a submission that includes evidence that will assist the Commissioner in verifying that these records are subject to solicitor-client privilege.
>
> The submission should also address the other issues involved in this review. Please provide a submission, index of records, and the records (where other exemptions besides subsection 21 of LA FOIP was applied) by September 28, 2015. I draw your attention to my office's resource *What to Expect During a Review with the IPC: A Resource for Public Bodies and Trustees* that provides guidance on how to prepare a submission, index of records, and the records.
>
> (Emphasis in original)

The "index of records" referred to in this correspondence appears to be a document quite similar to the affidavit of documents contemplated by *Queen's Bench Rule* 5-8.

60 As is apparent, the letter from the Commissioner's office was not drafted clearly. It could have been read as meaning the Commissioner was looking for evidence to verify the records claimed to be subject to solicitor-client privilege were in fact privileged and that, separately and distinctly, he was also asking both for the records falling outside of the solicitor-client privilege claim and for an index of those records. Alternatively, the letter could have been interpreted as meaning the Commissioner was asking for an index of *all* ostensibly exempt records, including those said to be the subject of solicitor-client privilege and, as well, asking that the records not subject to solicitor-client privilege be disclosed to him.

61 In any event, apparently without seeking any clarification of the September 11, 2015, email, counsel for the University responded to the Commissioner by providing him with no more than an affidavit sworn by Kevin Smith, the University's Manager of Contracts and Legal Services. In relevant part, the affidavit said this:

> 4. I am advised by Robert J. Affleck, our legal counsel, and do verily believe it to be true that documents were withheld due to their impact on other legal matters involving [the applicant]. Specifically, Robert J. Affleck advised that some of the documents are the subject of solicitor-client privilege, and I do verily believe the same to be true.
>
> (Emphasis added)

62 For perhaps understandable reasons, this did not satisfy the Commissioner. He replied by way of a letter dated November 4, 2015, saying Mr. Smith's affidavit did not allow him to determine if solicitor-client privilege was being properly invoked. However, the Commissioner then dug in. Rather than asking more unambiguously or directly for something in the nature of the "index of records" referred to in the September 11, 2015, email or an affidavit of documents in the form prescribed by *Queen's Bench Rule* 5-8, he returned directly to his original position and requested production of the records. The essential parts of the Commissioner's letter are reproduced below:

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. . .

The affidavit is insufficient for my office to determine that solicitor-client privilege is applicable to the records at issue.

First, there was no affidavit sworn by Mr. Affleck. The affidavit was taken by a person who is not practicing as a lawyer and is swearing to information he has been told. Second, it suggests that some of the records are subject to solicitor-client privilege. My office does not know which ones and in fact no list of the documents over which solicitor-client privilege is claimed has ever been provided. My office cannot tell whether Mr. Smith reviewed the documents in question. Thus, the approach by the U of S to support solicitor-client privilege is inadequate.

In a regular court proceeding, a party claiming solicitor-client privilege would still list those documents in a statement as to documents. The opposing party would still have an opportunity to review that list and where appropriate, apply to the court for an order to produce. This minimum requirement does not come close in Mr. Smith's affidavit.

Therefore, I respectfully request and ask that the U of S re-consider its position and provide my office with a copy of the records over which it asserts solicitor-client privilege. ...

. . .

Since 1992, government institutions and local authorities have been providing my office with documents over which they claim solicitor-client privilege. Our office reviews those documents, writes a report and current practice is the responsive record is destroyed. It is rather impossible to determine whether an exemption of solicitor-client privilege exists on a document which one has never seen.

. . .

(Emphasis added)

63 The University then responded in kind. Instead of seeking some sort of middle ground or offering to produce an index of records or an affidavit of documents, counsel for the University replied to the Commissioner on November 12, 2015, and advised that the University did not share the opinion that a review of the records was necessary. Counsel stated "[w]e have not been made aware of any basis for which your office believes solicitor-client privilege has not been properly invoked".

64 This led the Commissioner, on November 16, 2015, to reiterate his request for the University to provide copies of the records in relation to which it claimed solicitor-client privilege. The Commissioner advised that, if the records in question were not made available, he would have no choice but to make a court application to compel their production.

65 On November 30, 2015, the Commissioner issued a formal Notice to Produce Records to the University's designated *LAFOIPA* head. It required the production, by December 7, 2015, of "all records over which you have claimed solicitor-client privilege which are responsive to [the applicant's access to information request]". The Notice was accompanied by a covering letter from the Commissioner reading, in relevant part, as follows:

... It is clear from your last telephone message that your client is not prepared to supply my office with the records requested. I wish to emphasize that in asking you for copies of the records over which you claim solicitor-client privilege have been a long standing practice of the office and all lawyers dealing with our office have, during my time, complied with that request.

. . .

Also our office has a policy that as soon as the review is complete, the record provided to the office is destroyed. Alternatively, you could request return of the record as soon as my office has reviewed it. All of this is done because my office has a healthy respect for records which are subject to solicitor-client privilege.

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> The difficulty with your client's position is that it is impossible to determine whether the exemption of solicitor-client privilege applies without reviewing the record.
>
> . . .
>
> (Emphasis added)

66 The saga did not end there. The University has appended a document entitled "Review Report 153-2015 Part I" to its factum. The same document was also attached to the brief that the University filed with the Chambers judge. The Report was signed by the Commissioner on May 24, 2016, well prior to the date this matter was argued in Chambers. It was presumably prepared in partial discharge of the Commissioner's obligation, under s. 44 of LAFOIPA, to provide a written recommendation on completion of the review requested by an applicant pursuant to s. 38 of that Act. The Commissioner has taken no objection to the Report being before the Court.

67 The Report describes itself as being "Part I of a report which deals with the portion of the record which is not impacted by a claim of solicitor-client privilege". It indicates that the portion of the record concerning solicitor-client privilege will be dealt with in a subsequent Part II. The Report then goes on to deal with numerous emails withheld in whole or in part by the University pursuant to various provisions of *LAFOIPA*: s. 14(1)(d) (injurious to the conduct of legal proceedings), s. 16(1)(a) (advice, proposals, recommendations, analyses or policy options), s. 16(1)(b) (consultations or deliberations), s. 28(1) (personal information), and s. 30(2) (evaluative material).

68 The University explains that Mr. Smith's affidavit referring to "some" records being subject to solicitor-client privilege was provided before lines were being drawn in its dealings with the Commissioner between records said to be subject to solicitor-client privilege and records withheld from disclosure for the reasons canvassed in the Report. This is somewhat difficult to understand given that the September 11, 2015, email from the Commissioner's office, written before the Smith affidavit was sworn, drew such a distinction. However, and in any event, it seems clear that, as of the date of the Chambers hearing, the University was refusing to disclose to the Commissioner only those records in relation to which it was claiming solicitor-client privilege.

69 With the benefit of this factual background, it is now appropriate to consider the nature of the review that the Commissioner was obliged to conduct pursuant to s. 39 of LAFOIPA. More particularly, the question here is whether, given the situation he faced, it was "absolutely necessary" for the Commissioner to examine the records said to be subject to solicitor-client privilege in order to discharge his obligations under s. 39.

70 The essential contours of the term "review" as it is used in s. 39 are not difficult to map. A review rather obviously contemplates something in the nature of an assessment, examination or reconsideration of the decision of a head of a local authority. The purpose of any such exercise is to ensure local authorities administer the *LAFOIPA* access to information regime properly. In this regard, the content or nature of an appropriate review will necessarily be a function of the issues at stake and the concerns expressed by the applicant in, or in connection with, his or her request for the review. With respect to a review rooted in a denial of access based on a claim of solicitor-client privilege, the character of the review will have to reflect the special place solicitor-client privilege occupies in our legal system and the "absolutely necessary" principle discussed above.

71 The tug-of-war between the University and the Commissioner in this case took place against the background of a situation where the Commissioner understood the applicant to have been engaged in legal proceedings against the University on several fronts. Paragraph 23 of the Commissioner's Report, referred to above at paragraph 66, summarizes those proceedings by saying the applicant had:

- Threatened a civil lawsuit for his removal from the position of Associate Dean;

- Filed a harassment complaint pursuant to the Occupational Health and Safety provisions of *The Saskatchewan Employment Act* (the "OH&S Complaint"), which has resulted in an investigation;

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- Grieved a subsequent change in his employment duties within the library; and
- Filed a complaint that the University retaliated against him for the OH&S Complaint.

72 The knowledge of these various legal engagements no doubt indicated to the Commissioner that at least some documents subject to solicitor-client privilege would almost inevitably fall within the scope of the applicant's access to information request. In other words, there was certainly no basis in fact to suggest the University's claim of privilege was ill-founded in a general or overall sense. Moreover, there is no suggestion here that anyone, including the applicant, was arguing the University had inappropriately asserted its privilege in relation to particular records.

73 As a result, it must be taken that the Commissioner was seeking access to the records in question simply because the University had said those records existed and because his office had an established practice of asking for such records in the course of conducting a review pursuant to s. 39 of LAFOIPA. Significantly, and as noted, the Commissioner was not attempting to work through a specific complaint or argument that the privilege was being improperly asserted by the University. Further, he was not following up on something in the facts suggesting the privilege claim was inappropriate. In all of those circumstances, the "absolutely necessary" principle precluded the Commissioner from proceeding as he did to demand production of the records in issue. Let me explain this more fully.

74 I begin by acknowledging that, in the absence of anything suggesting the University's assertion of privilege was ill-founded, it could be argued the Commissioner was obliged to simply end his inquiry on receipt of Mr. Smith's affidavit, i.e., it could be argued the Commissioner should have contented himself with the University's general declaration that it was denying access to "some" records because they were subject to solicitor-client privilege. However, in my view, such an approach would not give appropriate or reasonable scope to the Commissioner's authority to conduct a review. In order to gain a proper measure of confidence that a claim of solicitor-client privilege is being asserted validly, the Commissioner must be able, at his discretion, to go beyond a statement by a local authority amounting to little more than "trust us". The Commissioner must also be able to request information that falls short of disclosing the records in issue, or otherwise piercing solicitor-client privilege, but that nonetheless helps him to satisfy himself that the privilege claim is being advanced legitimately.

75 The approach taken to solicitor-client privilege in the civil procedure context is instructive on this front. A litigant is not entitled to simply declare he or she has some undisclosed number of undescribed documents that are being withheld from production because they are subject to solicitor-client privilege. A naked "trust me" is not enough. Rather, as required by Rule 5-6, the litigant must prepare an affidavit of documents as *per* Form 5-6. Form 5-6 does not prescribe the format of the part of the affidavit dealing with claims of solicitor-client privilege in detail but it does require a "list" of such documents. Queen's Bench case law has filled out the picture and provided that the description of a document for which privilege is claimed must provide sufficient detail to identify the document and to allow a Chambers judge to determine whether a *prima facie* case for the claim of privilege has been made out. The usual or best practice is that, in relation to each record, an affidavit will contain such things as (a) the date of the record, (b) whether the record is a letter, a memo, a fax, and so forth, (c) the author of the record, (d) the recipient of the record, and (e) whether the record is an original or a copy. See, for example: *Brewster v. Quayle Agencies Inc.*, 2008 SKQB 137 (Sask. Q.B.) at para 6, (2008), 332 Sask. R. 192 (Sask. Q.B.).

76 All of this means there was an obvious step the Commissioner could have taken in this case short of demanding production of the records themselves. If he considered Mr. Smith's affidavit to be inadequate, the Commissioner could have clarified his request and expressly requested an "index of records" or the creation of something in the nature of the affidavit of documents used in the civil litigation context. Having unambiguously asked for an "index of records" or something similar, the Commissioner should have then held off requesting the records themselves until he had received and reviewed this extra information from the University. It might well have answered whatever questions he had about the privilege claim.

77 But, rather than providing clarification and asking the University to provide this additional level of information, the Commissioner reverted to requiring production of the records. In short, by choosing not to carefully follow up on what might

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be called the index of records or the affidavit of documents step, the Commissioner failed to proceed in a fashion that interfered with solicitor-client privilege only to the extent absolutely necessary.

78 I am bolstered in my thinking on this point by the Supreme Court's decision in *Blood Tribe*. It concerned a situation where an employee who had been dismissed from her job asked for access to her personal file. The employer denied the request and the employee then filed a complaint with the Privacy Commissioner pursuant to the Personal Information Protection and Electronic Document Act, SC 2000, c 5 [PIPEDA]. The Privacy Commissioner requested the records in issue. The employer declined to produce a "bundle of letters" over which it asserted solicitor-client privilege. The Privacy Commissioner ordered production of the privileged documents on the theory that she had to be certain that the solicitor-client privilege exemption was being properly invoked. In this regard, the Privacy Commissioner relied on what was then s. 12(1) of the PIPEDA, which read as follows:

> 12 (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may
>
> (a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;
>
> . . .
>
> (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;
>
> . . .

79 Justice Binnie, writing for a unanimous Court, observed that the Privacy Commissioner's position was grounded on an overly-broad conception of when it was appropriate for her to abrogate solicitor-client privilege. Justice Binnie said this:

> [16] It is undisputed that the employer in this case properly asserted by affidavit its solicitor-client privilege. At that stage there was "a presumption of fact, albeit a rebuttable one, to the effect that all communications between client and lawyer and the information they shared would be considered *prima facie* confidential in nature" (*Foster Wheeler*, at para. 42). There was no cross-examination on the employer's affidavit. There was no basis in fact put forward by the Privacy Commissioner to show that the privilege was not properly claimed. As to the complainant, her concern was about what the employer *did*, not about the legal advice (if any) upon which the employer did it.
>
> [17] The only reason the Privacy Commissioner gave for compelling the production and inspection of the documents in this case is that the employer indicated that such documents existed. She does not claim any necessity arising from the circumstances of this particular inquiry. The Privacy Commissioner is therefore demanding routine access to such documents in any case she investigates where solicitor-client privilege is invoked. Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue: see e.g. *Ansell Canada Inc. v. Ions World Corp.* (1998), 28 C.P.C. (4th) 60 (Ont. Ct. (Gen. Div.)), at para. 20. In the Privacy Commissioner's view, however, piercing the privilege would become the norm rather than the exception in the course of her everyday work.
>
> (Emphasis added)

80 The Supreme Court's reasoning in *University of Calgary* was to a similar effect. As noted above, in that case the University of Calgary had provided disclosure in keeping with the prevailing rules of civil procedure. In finding the Commissioner's delegate had erred by demanding production of privileged documents, the Court stressed there had been no evidence or argument to suggest solicitor-client privilege had been falsely claimed.

81 Let me recap. The Commissioner must be taken to have known from the various proceedings between the applicant and the University that it was almost certain the applicant's access request included records subject to solicitor-client privilege. The

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University then asserted solicitor-client privilege in relation to some records. There was nothing revealed by the circumstances — the applicant's application or the underlying facts — to suggest the privilege was being improperly claimed by the University.

82 If he was unsatisfied by the University's naked declaration that "some" documents were subject to solicitor-client privilege, the Commissioner should have interpreted his obligation to conduct a review under s. 39 of LAFOIPA as requiring him to begin by asking for further particulars about the records said to be privileged. I am referring here to the Commissioner seeking an "index of records" or something in the nature of an affidavit as to documents. But, this having been said, let me note as well that there is no magic in the precise format or detail of any such documents. The real point is that the Commissioner could have sought information, short of the records themselves, that would have shed light on the question of whether the University was properly asserting a privilege claim.

83 In my respectful view, the Commissioner was not entitled to request the records in issue simply because that was his usual practice or because, in response to an ambiguously worded letter from the Commissioner's office, the University had chosen to provide an affidavit averring, only in general terms, that some records were privileged. To repeat, if he was not satisfied with the University's affidavit, the Commissioner should have been at pains to exhaust all options short of demanding production of the records in issue. He could have done this by giving the University a clear and unambiguous opportunity to provide, by way of something in the nature of an index of records or affidavit of documents, additional information about such things as the number and nature of the records in question. Only if the University had failed to respond to a reasonable request for such additional information, or if that information or some surrounding circumstance had revealed a reasonable basis for questioning the claim of privilege, should the Commissioner have taken the step of seeking the records themselves.

84 In the end, therefore, I conclude the Chambers judge erred by sustaining the Commissioner's request for the production of records claimed by the University to be subject to solicitor-client privilege. I appreciate that this line of analysis imposes a rather exacting burden on the Commissioner when it comes to the discharge of his obligations under s. 39 of LAFOIPA. However, this is what the "absolutely necessary" principle demands.

***C. Does section 43(1) of LAFOIPA offend the Charter?***

85 The University's final argument is that, if s. 43(1) of LAFOIPA empowers the Commissioner to require the production of records claimed to be the subject of solicitor-client privilege, it violates s. 8 of the Charter and is therefore unconstitutional.

86 In view of my finding that the Commissioner erred in seeking production of the records subject to the claim of privilege, I need not deal with this argument in order to decide the University's appeal. Accordingly, in keeping with the notion that courts should decide constitutional questions only when necessary, I choose not to address the issues raised by the University on this front. See: *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.) at para 6.

**VI. CONCLUSION**

87 I conclude, for the reasons given above, that the University's appeal must be allowed. It is entitled to costs in the usual way.

***Caldwell J.A.*:**

I concur.

***Schwann J.A.*:**

I concur.

*Appeal allowed.*

**End of Document**

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2017 SCC 46, 2017 CSC 46
Supreme Court of Canada

Canada (Procureur général) c. Thouin

2017 CarswellQue 8001, 2017 CarswellQue 8002, 2017 SCC 46, 2017 CSC 46, [2017] 2 S.C.R. 184, [2017] S.C.J. No. 46, 10 C.P.C. (8th) 223, 24 Admin. L.R. (6th) 179, 284 A.C.W.S. (3d) 319, 414 D.L.R. (4th) 201

# Attorney General of Canada (Appellant) and Daniel Thouin and Automobile Protection Association (Respondents)

Ultramar Ltd., Olco Petroleum Group ULC, Irving Oil Limited, Alimentation Couche-Tard inc., Dépan-Escompte Couche-Tard inc., Couche-Tard inc., Global Fuels Inc., Global Fuels (Québec) Inc., Philippe Gosselin & Associés ltée, Céline Bonin and Claude Bédard (Appellants) and Daniel Thouin and Automobile Protection Association (Respondents) and Attorney General of Quebec (Intervener)

McLachlin C.J.C., Abella, Moldaver, Wagner, Gascon, Brown, Rowe JJ.

Heard: May 24, 2017
Judgment: September 28, 2017
Docket: 36869

Proceedings: reversing *Canada (Procureure générale) c. Thouin* (2015), 2015 CarswellQue 13777, EYB 2015-260295, 2015 QCCA 2159, 2015 CarswellQue 12468, Mainville J.C.A., Parent J.C.A., Émond J.C.A. (C.A. Que.) [Quebec]

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Louis Belleau and Luc Jobin, for Appellant Céline Bonin
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Stéphane Rochette, for Intervener

Subject: Civil Practice and Procedure; Corporate and Commercial; Evidence; Public

**Related Abridgment Classifications**

Public law
I Crown
I.5 Practice and procedure involving Crown in right of Canada
I.5.j Miscellaneous

**Headnote**

Public law --- Crown — Practice and procedure involving Crown in right of Canada — Miscellaneous

Crown immunity — Over period of ten years, investigation was conducted regarding determination of gasoline prices by certain oil companies and retailers — In course of that investigation, more than 220,000 private communications were recorded — Class action was commenced against those oil companies and retailers, claiming that they had conspired to fix gasoline prices — Representative in that action applied for permission to examine chief investigator and access communications intercepted in course of investigation — Trial judge granted permission to summon chief investigator to be examined on discovery — In his view, Supreme Court of Canada had confirmed, in previous decision, that judge could order Crown to disclose all communications intercepted during investigation — Court of Appeal was instead of view that question of Crown immunity remained unresolved and, therefore, undertook its own interpretation of Crown Liability and Proceedings Act (CLPA) — Court

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of Appeal ultimately found that absence of clear language expressly limiting application of s. 27 of CLPA to proceedings against Crown supported absence of Crown immunity and that chief investigator could be examined on discovery even though Crown was not party in proceedings — Attorney General of Canada appealed before Supreme Court of Canada — Appeal allowed — Based on wording of Interpretation Act, unless immunity is clearly lifted, Crown continues to have it — Here, s. 27 of CLPA does not indicate clear and unequivocal intention on Parliament's part to lift Crown's immunity by requiring Crown to submit to discovery in proceedings in which it is not a party — Legislative and parliamentary history also supported that conclusion — Therefore, chief investigator could refuse, on basis of Crown's immunity, to submit to examination on discovery at issue in this case Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s 27.

Droit public --- Couronne — Procédure impliquant la Couronne du chef du Canada — Divers

Immunité de l'État — Au cours d'une période de dix ans, une enquête a été menée concernant la détermination du prix de l'essence par certaines pétrolières et certains détaillants — Dans le cadre de cette enquête, plus de 220 000 communications privées ont été enregistrées — Action collective a été déposée à l'encontre des pétrolières et des détaillants, faisant valoir que ces derniers avaient comploté pour fixer les prix de l'essence — Représentant dans le cadre de cette action a demandé la permission d'interroger l'enquêteur-chef et d'accéder aux communications interceptées dans le cadre de l'enquête — Juge de première instance a permis l'assignation de l'enquêteur-chef pour un interrogatoire préalable — Selon lui, la Cour suprême du Canada, dans une decision précédente, a confirmé qu'un juge pouvait ordonner à l'État de faire part aux demandeurs l'ensemble des communications interceptées au cours d'une enquête — Cour d'appel était, pour sa part, d'avis que la question de l'immunité de l'État demeurait non résolue et, en conséquence, a procédé à sa propre interprétation de la Loi sur la responsabilité civile de l'État (LRCÉ) — Au terme de son analyse, la Cour d'appel a conclu que l'absence de termes clairs limitant expressément l'application de l'art. 27 de la LRCÉ aux seuls litiges où l'État est poursuivi militait en faveur de l'absence d'une immunité de l'État et de la possibilité d'assujettir l'enquêteur-chef à un interrogatoire préalable même si l'État n'était pas partie au litige — Procureur général du Canada a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Considérant le libellé de la Loi d'interprétation, sans dérogation claire à l'immunité, l'État en jouit toujours — En l'espèce, l'art. 27 de la LRCÉ ne dénote pas une intention claire et non équivoque du législateur de déroger à l'immunité de l'État relative à son assujettissement à un interrogatoire préalable lorsqu'il n'est pas partie au litige — Historique législatif ainsi que les travaux préparatoires étayaient aussi cette conclusion — Par conséquent, l'enquêteur-chef pouvait invoquer l'immunité de l'État et ainsi refuser d'être assujetti à l'interrogatoire préalable recherché en l'espèce.

In 2004, the Competition Bureau began an investigation following allegations that certain oil companies and retailers had conspired to fix gasoline prices. During the next 10 years, the Bureau recorded more than 220,000 private communications. Meanwhile, the Automobile Protection Association instituted a class action against the oil companies and retailers, claiming that those companies and retailers had conspired to fix gasoline prices. The representative in that action applied for permission to examine the chief investigator and for an order requiring the Attorney General of Canada (AGC), as the Bureau's legal representative, to disclose all intercepted communications and all documents in the Bureau's file from its investigation.

The trial judge granted permission to summon the chief investigator to be examined on discovery solely for the purpose of obtaining information about any knowledge he had specific to the territory covered by the class action, and also ordered the disclosure of any recordings and documents relevant to the proceedings in this case. In his view, the Supreme Court of Canada had confirmed, in a previous decision, that a judge could order the Crown to disclose all communications intercepted during an investigation to the plaintiffs under the Code of Civil Procedure (CCP). The AGC appealed.

The Court of Appeal was instead of the view that the question of Crown immunity remained unresolved and, therefore, undertook its own interpretation of the Crown Liability and Proceedings Act (CLPA) in order to determine whether that Act expressly lifted the Crown's immunity under s. 17 of the Interpretation Act. The Court of Appeal ultimately found that the absence of clear language expressly limiting the application of s. 27 of the CLPA to proceedings against the Crown supported the absence of Crown immunity and that the chief investigator could be examined on discovery under the CCP even though the Crown was not a party in the proceedings. The AGC appealed before the Supreme Court of Canada.

**Held:** The appeal was allowed.

Per Gascon, Brown JJ. (McLachlin C.J.C., Abella, Moldaver, Wagner, Rowe JJ. concurring): The courts below erred in their interpretation of the CLPA. Based on the wording of the Interpretation Act, unless the immunity is clearly lifted, the Crown continues to have it. Here, s. 27 of the CLPA does not indicate a clear and unequivocal intention on Parliament's part to lift the Crown's immunity by requiring the Crown to submit to discovery in proceedings in which it is not a party. The legislative and

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parliamentary history also supported that conclusion. Hence, both the fact that Parliament has not imposed a clear obligation to submit to discovery in proceedings in which the Crown is not a party and the legislative and parliamentary history of s. 27 of the CLPA favoured the recognition of a residual immunity in such cases. Therefore, the chief investigator could refuse, on the basis of the Crown's immunity, to submit to the examination on discovery at issue in this case.

En 2004, le Bureau de la concurrence a ouvert une enquête à la suite d'allégations selon lesquelles des petrolières et des détaillants auraient comploté pour fixer les prix de l'essence. Au cours des dix années suivantes, le Bureau a enregistré plus de 220 000 communications privées. Entretemps, l'Association pour la protection automobile a déposé une action collective à l'encontre des pétrolières et des détaillants, faisant valoir que ces derniers avaient comploté pour fixer les prix de l'essence. Le représentant dans le cadre de cette action a demandé la permission d'interroger l'enquêteur-chef ainsi qu'une ordonnance enjoignant au procureur général du Canada (PGC), en sa qualité de représentant légal du Bureau, de lui faire part de toutes les communications interceptées et de tous les documents que renfermait le dossier constitué par le Bureau dans le cadre de son enquête.

Le juge de première instance a permis l'assignation de l'enquêteur-chef pour un interrogatoire préalable à la seule fin d'obtenir des précisions sur les éléments d'information dont ce dernier disposait au sujet des territoires visés par l'action collective et a également ordonné, le cas échéant, la communication des enregistrements et documents pertinents se rapportant au litige visé. Selon lui, la Cour suprême du Canada, dans une decision précédente, a confirmé qu'un juge pouvait ordonner à l'État de faire part aux demandeurs l'ensemble des communications interceptées au cours d'une enquête, et ce en vertu de l'art. 402 du Code de procédure civile (CPC). Le PGC a interjeté appel.

La Cour d'appel était, pour sa part, d'avis que la question de l'immunité de l'État demeurait non résolue et, en conséquence, a procédé à sa propre interprétation de la Loi sur la responsabilité civile de l'État (LRCÉ) afin de déterminer si celle-ci écarte expressément l'immunité de l'État codifiée à l'art. 17 de la Loi d'interprétation. Au terme de son analyse, la Cour d'appel a conclu que l'absence de termes clairs limitant expressément l'application de l'art. 27 de la LRCÉ aux seuls litiges où l'État est poursuivi militait en faveur de l'absence d'une immunité de l'État et de la possibilité d'assujettir l'enquêteur-chef à un interrogatoire préalable en vertu du CPC même si l'État n'était pas partie au litige. Le PGC a formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été accueilli.

Gascon, Brown, JJ. (McLachlin, J.C.C., Abella, Moldaver, Wagner, Rowe, JJ., souscrivant à leur opinion) : Les cours inférieures ont erré dans leur interprétation de la LRCÉ. Considérant le libellé de la Loi d'interprétation, sans dérogation claire à l'immunité, l'État en jouit toujours. En l'espèce, l'art. 27 de la LRCÉ ne dénote pas une intention claire et non équivoque du législateur de déroger à l'immunité de l'État relative à son assujettissement à un interrogatoire préalable lorsqu'il n'est pas partie au litige. L'historique législatif ainsi que les travaux préparatoires étayaient aussi cette conclusion. Ainsi, tant le fait que le législateur n'ait pas prévu un assujettissement clair à l'interrogatoire préalable dans le cas où l'État n'est pas partie au litige que l'historique législatif et les travaux préparatoires relatifs à l'art. 27 de la LRCÉ militaient en faveur de la reconnaissance d'une immunité résiduelle dans ce cas. Par conséquent, l'enquêteur-chef pouvait invoquer l'immunité de l'État et ainsi refuser d'être assujetti à l'interrogatoire préalable recherché en l'espèce.

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art. 24 — considered

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art. 26 — considered

art. 27 — considered

art. 34 — considered

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*Loi sur la responsabilité de la Couronne*, S.R.C. 1970, ch. C-38

art. 14 — referred to

*Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7

**Words and phrases considered:**

**contentieux administratif**

[T]he French expression "contentieux administratif" relates to proceedings in which the Crown is a party (G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd. ed. 1982), at p. 1).

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**Termes et locutions cités:**

**contentieux administratif**

[L]'expression « contentieux administratif » désigne une instance à laquelle l'État est partie (G. Pépin et Y. Ouellette, *Principes de contentieux administratif* (2e éd. 1982),p. 1).

APPEAL from judgment reported at *Canada (Procureure générale) c. Thouin* (2015), 2015 QCCA 2159, EYB 2015-260295, 2015 CarswellQue 12468, 2015 CarswellQue 13777 (C.A. Que.), holding that chief investigator of investigation conducted by Competition Bureau did not have Crown immunity and could be examined.

POURVOI formé à l'encontre d'un arrêt publié à *Canada (Procureure générale) c. Thouin* (2015), 2015 QCCA 2159, EYB 2015-260295, 2015 CarswellQue 12468, 2015 CarswellQue 13777 (C.A. Que.), ayant conclu que l'enquêteur-chef d'une enquête menée par le Bureau de la concurrence ne jouissait pas de l'immunité de l'État et pouvait être interrogé.

***Gascon, Brown JJ.*** **(McLachlin C.J.C., Abella, Moldaver, Wagner and Rowe JJ. concurring):**

**I. Introduction**

1 Crown immunity is deeply entrenched in our law. The Court has held that to override this immunity, which originated in the common law, requires clear and unequivocal legislative language. Over the years, both Parliament and the provincial legislatures have gradually placed limits on this immunity in order to draw the legal position of the Crown and its servants closer to that of other Canadian litigants. This is true in, among other areas, that of civil liability. Ultimately, it is up to the courts to give meaning to legislative provisions that narrow the limits of the immunity and to determine its scope, where necessary.

2 The issue in this appeal is whether, under the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (“CLPA”), the obligation to submit to discovery in proceedings in which one is not a party applies to the federal Crown ("Crown"). More specifically, we must determine whether a chief investigator from the federal government's Competition Bureau ("chief investigator") may be required to submit to discovery under the rules of civil procedure that apply in Quebec in proceedings in which neither the Crown nor the chief investigator is a party. If so, we must then determine whether, in ordering the examination on discovery of the chief investigator, the Superior Court and the Court of Appeal erred with respect to the principles governing civil procedure in Quebec, including that of proportionality.

3 For the reasons that follow, we are of the view that the courts below erred in their interpretation of the CLPA. Provincial rules on discovery do not apply to the Crown in proceedings in which it is not a party. The chief investigator may therefore refuse, on the basis of the Crown's immunity from discovery, to submit to the examination on discovery at issue in this case.

**II. Facts**

4 The respondent Daniel Thouin is the designated member in a class action instituted by the respondent Automobile Protection Association ("respondents") against the appellant oil companies and retailers. The group on whose behalf he is acting consists of various people who claim to have purchased gasoline in 14 cities or regions of Quebec and who were allegedly the victims of a conspiracy by those oil companies and retailers to fix gasoline prices. The case proceeded in parallel with a similar class action concerning other cities or regions, that of Simon Jacques, Marcel Lafontaine and the Automobile Protection Association.

5 The representatives in the two actions applied for permission to examine the chief investigator and for an order requiring the Attorney General of Canada ("AGC"), as the Competition Bureau's legal representative, to disclose to them all intercepted communications and all documents in the Bureau's file from its "Octane" investigation. That investigation had been launched in response to allegations that certain oil companies and retailers, including the appellants, had conspired to fix gasoline prices. During the 10 years of the "Octane" investigation, which began in 2004, the Bureau recorded more than 220,000 private communications.

**III. Decisions of the Courts Below**

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***A. Judgment of the Superior Court — 2015 QCCS 1432 (C.S. Que.)***

6 Godbout J., who heard the motion, granted permission to summon the chief investigator to be examined on discovery solely for the purpose of obtaining information about any knowledge he had specific to the territory covered by the class action, and also ordered the disclosure of any recordings and documents relevant to the proceedings in this case.

7 The AGC argued that the Crown had immunity under the CLPA given that it was not a party in the proceedings, but Godbout J. nonetheless granted permission to summon the chief investigator. He drew a parallel between the motion before him in Mr. Thouin's case and the one that had been at issue in this Court in *Jacques c. Pétroles Irving inc.*, 2014 SCC 66, [2014] 3 S.C.R. 287 (S.C.C.) . In his view, this Court had confirmed in *Jacques* that a judge could order the Crown to disclose all communications intercepted during the "Octane" investigation to the plaintiffs under art. 402 of the Code of Civil Procedure, CQLR, c. C-25 (“C.C.P.”), which was then in force. He found that, like art. 402 of the C.C.P., the provision at issue in *Jacques c. Pétroles Irving inc.*, art. (2014), 398 para. 1 (S.C.C.) (3) C.C.P., which concerns examination on discovery, excludes the immunity, because both articles are in the same chapter of the C.C.P., entitled "Special Proceedings Relating to Production of Evidence" (paras. 19-20).

***B. Judgment of the Court of Appeal — 2015 QCCA 2159 (C.A. Que.)***

8 The Court of Appeal, per Émond J.A., was instead of the view that this Court had not ruled on Crown immunity under the CLPA in *Jacques*, which meant that this question remained unresolved. The Court of Appeal therefore undertook its own interpretation of the CLPA in order to determine whether that Act expressly lifts the Crown's immunity under s. 17 of the Interpretation Act, R.S.C. 1985, c. I-21, thereby making it possible to apply the C.C.P.'s rules on examination on discovery to the Crown even in proceedings in which it is not a party.

9 The Court of Appeal rejected the interpretation proposed by the AGC to the effect that all the provisions of Part II of the CLPA, including s. 27, which provides that "the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings", apply only to proceedings against the Crown. Relying in part on the rule of consistent expression (*expressio unius est exclusio alterius*), it found that the absence of clear language expressly limiting the application of s. 27 to proceedings against the Crown supported the absence of Crown immunity and the possibility of requiring the Crown to submit to discovery in this case. In the court's opinion, s. 27 establishes a general rule that applies in *any* proceedings by, against or involving the Crown. If Parliament had intended the rule in s. 27 to apply only to proceedings by or against the Crown, it would have said so, as it did elsewhere in the CLPA.

10 The Court of Appeal concluded that s. 27 of the CLPA therefore lifts the Crown's immunity and that the chief investigator could be examined on discovery under the C.C.P. even though the Crown was not a party in the proceedings. The court was also of the view that the motion judge had properly considered the question of proportionality of the examination on discovery. In light of the great deference owed to case management decisions, it found that appellate intervention was not warranted.

**IV. Issues**

11 The AGC and the other appellants — oil companies and retailers — argue that the Court of Appeal erred in holding that Quebec rules of civil procedure apply to the Crown by virtue of s. 27 of the CLPA and that the chief investigator can as a result be examined on discovery even though the Crown is not a party in the proceedings. The central question in this appeal is whether Parliament has clearly and unequivocally lifted Crown immunity in such a case. In the event that we answer this question in the affirmative, the appellants further argue that the examination was permitted improperly and in violation of the principles of the C.C.P. on the disclosure of evidence, including that of proportionality.

**V. Relevant Legislative Provisions**

12 Crown immunity is recognized in s. 17 of the Interpretation Act, which reads as follows:

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> **17** No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

13 The respondents counter with s. 27 of the CLPA, the effect of which, they argue, is that the rules of practice and procedure of, in this case, the Quebec courts can apply to the Crown even in proceedings in which it is not a party. The Court of Appeal adopted this same interpretation. Section 27 of the CLPA reads as follows:

> **27** Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings.

14 Section 34 of the CLPA is also relevant to this appeal. It authorizes the Governor in Council to make regulations concerning the procedure that applies in proceedings involving the Crown:

> **34** The Governor in Council may make regulations
>
> (a) prescribing rules of practice and procedure in respect of proceedings by, against or involving the Crown, including tariffs of fees and costs;
>
> (b) prescribing forms for the purposes of proceedings referred to in paragraph (a);
>
> (c) respecting the issue of certificates of judgments against the Crown;
>
> (d) making applicable to any proceedings by, against or involving the Crown all or any of the rules of evidence applicable in similar proceedings between subject and subject; and
>
> (e) generally respecting proceedings by, against or involving the Crown.

15 The parties in this appeal also cite s. 7 of the Crown Liability and Proceedings (Provincial Court) Regulations, SOR/91-604 ("Regulations"):

> **7** Subject to sections 37 to 39 of the *Canada Evidence Act*, where, under the provincial rules, there is [a] provision under which, if an action were an action between a corporation (other than an agency of the Crown) and another person, an officer or servant of the corporation could be examined for discovery, such officer or servant of the Crown or an agency of the Crown, as the case may be, as may be designated for the purpose by the Deputy Attorney General or after such designation by order of the court, may be examined for discovery during an action subject to the same conditions and with the same effect as would apply to the examination for discovery of the officer or servant of a corporation.

## VI. Analysis

### *A. Crown Immunity*

16 Crown immunity has evolved over time in English and Canadian legislation and case law. At common law, the Crown could in times past be sued in contract or on a proprietary claim (K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 1-40). However, it had "a number of prerogatives that rendered civil litigation against it very difficult" (*ibid.*). This was because the Crown was exempt from several obligations that applied to ordinary litigants, including the obligation to provide documentary or oral discovery (*ibid.*).

17 Thus, because of its immunity, the Crown was historically exempt from the obligation to submit to discovery in proceedings in which it was a party. This was the case even though it could require the opposing party to be examined for discovery, and even where it was acting as plaintiff (Morley, at p. 1-40; see also P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 90). This particular immunity was recognized in Canadian court decisions that predated the statutory provisions on Crown liability. The Alberta Court of Appeal explained the immunity as follows in *Associated Investors of Canada Ltd., Re* (1988), 49 D.L.R. (4th) 57 (Alta. C.A.):

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> In my view, the rule that the Crown and its agents are not subject to discovery does not arise from the assertion of a Crown prerogative but from an accident of history. Nevertheless, I am bound by precedent to require statutory authority, strictly construed, authorizing discovery of a Crown agent or officer. [p. 61]

18 If this immunity meant that the Crown was not then required to submit to discovery in proceedings in which it *was* a party, it stands to reason that, at common law, the Crown was certainly not required to do so in proceedings in which it *was not* a party.

19 That being said, there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent. In *Lizotte c. Aviva Cie d'assurance du Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521 (S.C.C.), this Court summarized the case law on this point and noted "that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect" (para. 56; see also *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 (S.C.C.), at para. 39; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1077; and R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 504-5).

20 In this regard, s. 17 of the Interpretation Act now serves as a starting point in each case in which the Crown might have immunity. It reads as follows: "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment." In short, unless the immunity is clearly lifted, the Crown continues to have it. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3(S.C.C.), the Court recognized that s. 17 is indeed the starting point for the analysis regarding immunity and that, as a result, where there are no express words in an Act to the effect that the Act applies to the Crown, "it ... remains to be decided whether the Crown is bound by necessary implication" (p. 50).

21 In the past, language similar to the words "except as mentioned or referred to" in s. 17 had been used in s. 16 of the Interpretation Act, R.S.C. 1970, c. I-23, which provided that no enactment could bind the Crown, "except only as therein mentioned or referred to". In *Oldman River* and in *Alberta Government Telephones v. Canadian Radio-Television & Telecommunications Commission*, [1989] 2 S.C.R. 225(S.C.C.), the Court interpreted this wording and concluded that a legislature must use express language to lift Crown immunity unless it can be inferred that the purpose of the Act would be wholly frustrated if the Crown were not bound (see also H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. IX.90).

22 With these principles in mind, it must therefore be determined whether, in the instant case, Parliament has lifted the common law Crown immunity from discovery and, if so, to what extent.

***B. Limits on the Crown's Immunity From Discovery***

23 In about 1950, Parliament, drawing on the Crown Proceedings Act, 1947 (U.K.), 10 & 11 Geo. 6, c. 44, that had been enacted in the United Kingdom, began to impose limits on the scope of the common law Crown immunity. In 1953, it passed the Crown Liability Act, S.C. 1952-53, c. 30 (Morley, at p. 1-41; Hogg, Monahan and Wright, at p. 9), which had the effect of expanding Crown liability and thus bringing the Crown's legal position closer to that of ordinary litigants. That *Crown Liability Act* was the predecessor of the CLPA that is at issue in this appeal. Today, Crown immunity still exists at the federal level in the context of civil proceedings, but only within the limits set in the CLPA and the Federal Courts Act, R.S.C. 1985, c. F-7, the scope of which Parliament remains free to change (Brun, Tremblay and Brouillet, at paras. IX.72 to IX.73). It follows that the Crown is not in exactly the same legal position as ordinary litigants, since it still retains certain residual privileges and immunities under the current legislation.

24 From this perspective, it should be noted that s. 27 of the CLPA now provides that the Crown is subject to the "rules of practice and procedure of the court" where proceedings in which it is a party are taken. The effect of this section is that the Crown's immunity is lifted in such cases and that the rules of civil procedure, including those on discovery, apply to the Crown. Parliament made a clear choice when it introduced s. 27 into the CLPA, thereby imposing the application of such rules on the Crown in proceedings in which it is a party.

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25 The respondents argue that s. 27 of the CLPA lifts Crown immunity in the case of provincial rules of procedure even in proceedings in which the Crown is not a party. Like the AGC and the other appellants, we disagree with the respondents' assertions. Section 27 of the CLPA does not indicate a clear and unequivocal intention on Parliament's part to lift the Crown's immunity by requiring the Crown to submit to discovery in proceedings in which it is not a party. Our reasoning is based on the recognized principles of statutory interpretation.

***C. Interpretation of the CLPA***

26 The Court observed in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27(S.C.C.), that "there is only one principle or approach, namely, the words of an Act 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" (para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd. ed. 1983), at p. 87; see also Sullivan, at p. 14). In the case at bar, this modern approach to interpretation favours the appellants' position.

*(1) Wording of Section 27 of the CLPA*

27 The language used in s. 27 of the CLPA is clear as regards the possibility of requiring the Crown to submit to discovery in proceedings in which it is a party. However, that language is far from unequivocal as regards the same possibility in proceedings in which the Crown is not a party. Indeed, the respondents conceded this point at the hearing in this Court (transcript, at p. 125). Only clear language to the effect that the rules of procedure of the court where proceedings in which the Crown is a third party are taken apply to the Crown could have justified an order that the chief investigator submit to discovery in this case. Section 27 simply provides that "the rules of practice and procedure of the court in which *proceedings* are taken apply in those proceedings". At first blush, this section does not apply where the Crown is not a party. Its words do not show a clear and explicit intention to bind the Crown in all proceedings in which it is involved. This is particularly clear when the words of the section are interpreted in the context of the CLPA as a whole.

*(2) Context and Structure of the CLPA and the Regulations*

28 When s. 27 is considered in light of all the sections of the CLPA, it is clear that it applies only to proceedings in which the Crown is a party. The part of the Act in which the section is found and the structure of the CLPA as a whole support this conclusion, and this is true in both official languages.

29 Section 27 is in Part II of the Act, which is entitled "Proceedings" ("*Contentieux administratif*" in French), and more specifically in a subpart entitled "Procedure". Part II, which governs proceedings in administrative litigation, sets out the rules that apply at each stage, addressing in turn the topics of jurisdiction, procedure, costs, execution of judgment, interest, tenders, and prescription and limitation. As is explained in the academic literature, the French expression "*contentieux administratif*" relates to proceedings in which the Crown is a party (G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd. ed. 1982), at p. 1).

30 The purpose of the subpart entitled "Procedure" is equally clear: to establish rules with respect not only to the initiation of proceedings against the Crown (s. 23), but also to defences (s. 24) and to the applicable procedure in such proceedings (ss. 25 and 26). Section 27 completes the circle for proceedings against the Crown by identifying the rules of practice and procedure that will apply to them. Sections 23 to 27, which make up this subpart, thus set out the rules relating to proceedings in which the Crown is a party. Section 27, which is the last section in this subpart, simply specifies what rules apply in such proceedings. It is clear from the subpart's other provisions that s. 27 can apply only if the Crown is a party. A failure to consider s. 27 in light of these other provisions, which concern "proceedings against the Crown" ("*poursuites visant l'État*"), would result in a distorted picture of that section.

31 In our view, the words "in which proceedings are taken" and "those proceedings" in the English version of s. 27 necessarily refer to the provisions of the same subpart that concern "proceedings against the Crown" (ss. 23, 24, 25 and 26). This is also

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clearly the case in the French version of the CLPA, in which the words "*les instances*" must necessarily refer to "*poursuites exercées contre lui*" (ss. 24 and 25) and "*procès instruits contre l'État*" (s. 26).

32 Finally, s. 34, which is in the subpart entitled "Regulations", simply creates a mechanism by which Crown immunity may be lifted. This section does not in itself provide a basis for arguing that s. 27 applies in proceedings in which the Crown is not a party. The immunity must still have been expressly lifted. The words "by, against or involving" used in s. 34 could have been used in s. 27 to lift the immunity in proceedings by, against or "involving" the Crown, but they were not.

33 Moreover, despite the making of the Regulations, which the parties cite and the relevant provision of which is reproduced above, we agree with the appellants that s. 7 of these regulations can apply only in proceedings in which the Crown is a party. This section merely equates the Crown with a corporation and applies "where, under the provincial rules, there is [a] provision under which, if an action were an action *between* a corporation (other than an agency of the Crown) and another person, an officer or servant *of the corporation* could be examined for discovery". On its face, this section is not a rule of practice in respect of proceedings involving the Crown other than as a party. It does not lead to a different conclusion than the one that results from the application of the principles of interpretation to s. 27 of the CLPA.

*(3) Legislative History*

34 The legislative and parliamentary history also supports the position of the AGC and the other appellants in this appeal. The legislative history of the CLPA is important in this case because the question before the Court relates to Crown immunity, and Crown immunity may not be lifted without clear statutory language. The parliamentary history is also important for the purpose of clarifying what Parliament intended when it amended the provision at issue in this case (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 462-68, and *Rizzo & Rizzo Shoes Ltd. (Re)*, at para. 35).

35 The legislative history reveals that s. 14 of the Crown Liability Act, R.S.C. 1970, c. C-38, is the predecessor of the current s. 27 of the CLPA. In this regard, certain passages drawn from the parliamentary history that led to the revision of the CLPA are very helpful. These include the following:

> [TRANSLATION] Parliament used the reform to specify which rules of procedure would apply to proceedings involving the Crown in the provincial courts in question. In this regard, Minister of Justice Doug Lewis stated the following in the House of Commons:
>
> . . . . .
>
> > Sixth, consequent upon the increased role of provincial courts in the area of Crown proceedings, it is necessary that there be legislation dealing generally with practice and procedure when the Crown is a party to litigation. [Emphasis in original.]
>
> (See A.F., at para. 50, quoting *House of Commons Debates*, vol. IV, 2nd Sess., 34th Parl., November 1, 1989, at p. 5415.)

36 These words confirm the intention that emerges from the CLPA. That Act has evolved such that the obligation to submit to discovery in proceedings in which one *is a party* now applies to the Crown, but it does no more than that.

37 Thus, both the fact that Parliament has not imposed a clear obligation to submit to discovery in proceedings in which the Crown *is not* a party and the legislative and parliamentary history of s. 27 of the CLPA favour the recognition of a residual immunity in such cases.

38 It should be noted that this view is shared by Hogg, Monahan and Wright. In their opinion, the Crown's immunity from discovery continues to exist in proceedings in which the Crown is not a party:

> In Canada, the United Kingdom Act became the basis for the Uniform Model Act of 1950, which in turn became the basis for provincial Crown proceedings statutes. Each province has now subjected the Crown to discovery. So has the federal Parliament.

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. . . . .

> These statutory provisions have not completely abolished the Crown's immunity from discovery.... In the United Kingdom, New Zealand, most Australian jurisdictions, the Canadian federal jurisdiction and British Columbia, the Crown is subject to discovery whenever it is a "party". Even in these jurisdictions, the Crown would be immune from discovery if it was not a party. [Footnotes omitted; pp. 91-92.]

*(4) Case Law of Appellate Courts*

39 We note that in the instant case, the Court of Appeal cited *Temelini v. Ontario Provincial Police Commissioner* (1999), 44 O.R. (3d) 609(Ont. C.A.), in support of its conclusion that s. 27 of the CLPA lifts the Crown's immunity and that the rule it establishes applies to any proceeding that might involve the Crown, whether as a party or otherwise (C.A. reasons, at paras. 56-57). After considering other cases in which the Ontario Court of Appeal's decision in *Temelini* had been cited, it applied that court's reasoning to the case at bar. With all due respect, we are of the opinion that the Ontario Court of Appeal's interpretation in *Temelini* is wrong. Regardless of the modern trend toward limiting Crown immunity (C.A. reasons, at para. 54), the interpretation of the CLPA does not lead to the conclusion that Parliament lifted the Crown's immunity in proceedings in which the Crown is not a party. The decisions in the case at bar and in *Temelini* were based on the presumption of consistent expression (C.A. reasons, at paras. 53 and 56). Given our interpretation of the CLPA, the presumption of consistent expression cannot on its own suggest that Parliament has changed the common law; a clear expression of its intention to do so is required.

40 We conclude that the common law immunity from discovery continues to apply to the Crown in proceedings in which it is not a party.

***D. The Question Raised by This Case Was Not Decided in Jacques***

41 In closing, we wish to be clear that the Court of Appeal was right to conclude that this Court had not, in *Jacques*, decided the question with respect to Crown immunity under the CLPA that is raised by the instant case (C.A. reasons, at para. 17). The issue in *Jacques* was instead whether a party in a civil proceeding can request the disclosure of recordings of private communications intercepted by the state in the course of a criminal investigation. To resolve it, the Court considered ss. 29 and 36 of the Competition Act, R.S.C. 1985, c. C-34, and s. 193 of the Criminal Code, R.S.C. 1985, c. C-46, and held that they did not preclude the disclosure of the recordings. The Court did not address Crown immunity under the CLPA.

42 Nonetheless, we note that *Jacques* confirmed that, in other areas of civil procedure, the immunity has been lifted even in proceedings in which the Crown is not a party. This is true, as the AGC concedes in the case at bar, for the disclosure of documents, as s. 8 of the Regulations requires the Crown to submit, as if it were an ordinary litigant, to an application for disclosure such as the ones provided for in art. 402 of the C.C.P.; it was such an application that was at issue in *Jacques* . As the AGC also concedes in this Court, the immunity has also been lifted where the Crown is summoned to testify at trial; this has been recognized both judicially (*Canada Deposit Insurance Corp.*) and in the academic literature (Hogg, Monahan and Wright, at p. 92). Of course, the application of provincial rules of civil procedure to the Crown remains subject in each of the situations in question to the limits imposed by, among other principles, the proportionality rule and the prohibition against fishing expeditions. However, given that the respondents' proceeding in this case concerns neither of those situations, there is no need to address this other aspect of the dispute between the parties.

**VII. Conclusion**

43 Section 27 of the CLPA does not clearly and unequivocally lift the Crown's common law immunity from discovery in proceedings in which the Crown is not a party. In the instant case, that immunity meant that the Crown could not be required to submit to discovery under the Quebec rules of civil procedure. In the absence of a clear and unequivocal expression of legislative intent, it is not open to the courts to depart from a recognized common law rule in this regard. The chief investigator could refuse, on the basis of the Crown's immunity from discovery, to submit to the examination on discovery at issue in this case.

44 We would therefore allow the appeal, set aside the decisions of the courts below and dismiss the respondents' motion for the examination on discovery of the chief investigator, with costs to the appellants throughout.

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*Appeal allowed.*

*Pourvoi accueilli.*

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**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Neufeld v. Hansman | 2021 BCCA 222, 2021 CarswellBC 1816, 459 D.L.R. (4th) 121, 71 C.C.E.L. (4th) 191, 74 C.C.L.T. (4th) 216, 50 B.C.L.R. (6th) 217, 332 A.C.W.S. (3d) 392 | (B.C. C.A., Jun 9, 2021)

2020 SCC 22, 2020 CSC 22
Supreme Court of Canada

1704604 Ontario Ltd. v. Pointes Protection Association

2020 CarswellOnt 12650, 2020 CarswellOnt 12651, 2020 SCC 22, 2020 CSC 22, [2020] S.C.J. No. 22, 157 O.R. (3d) 79 (note), 321 A.C.W.S. (3d) 592, 449 D.L.R. (4th) 1, 467 C.R.R. (2d) 1, 55 C.P.C. (8th) 1, 68 C.C.L.T. (4th) 1, 6 M.P.L.R. (6th) 1, 72 Admin. L.R. (6th) 1

# 1704604 Ontario Limited (Appellant) v. Pointes Protection Association, Peter Gagnon, Lou Simionetti, Patricia Grattan, Gay Gartshore, Rick Gartshore and Glen Stortini (Respondents) and British Columbia Civil Liberties Association, Greenpeace Canada, Canadian Constitution Foundation, Ecojustice Canada Society, Centre for Free Expression, Canadian Association of Journalists, Communications Workers of America / Canada, West Coast Legal Education and Action Fund, Atira Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, Women Against Violence Against Women Rape Crisis Center, Canadian Civil Liberties Association, Ad IDEM / Canadian Media Lawyers Association, Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, Aboriginal Peoples Television Network and Postmedia Network Inc. (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: November 12, 2019
Judgment: September 10, 2020
Docket: 38376

Proceedings: affirming *1704604 Ontario Ltd. v. Pointes Protection Association* (2018), 426 D.L.R. (4th) 233, 46 Admin. L.R. (6th) 70, 50 C.C.L.T. (4th) 173, 142 O.R. (3d) 161, 23 C.P.C. (8th) 312, 79 M.P.L.R. (5th) 179, 2018 CarswellOnt 14179, 2018 ONCA 685, D.M. Brown J.A., Doherty J.A., Grant Huscroft J.A. (Ont. C.A.); additional reasons at *1704604 Ontario Ltd. v. Pointes Protection Association* (2018), 2018 ONCA 853, 2018 CarswellOnt 17537, 50 C.C.L.T. (4th) 211, 80 M.P.L.R. (5th) 181, 23 C.P.C. (8th) 350, David Brown J.A., Doherty J.A., Grant Huscrof J.A. (Ont. C.A.); reversing *1704604 Ontario Ltd. v. Pointes Protection Assn.* (2016), 84 C.P.C. (7th) 298, 2016 ONSC 2884, 2016 CarswellOnt 7322, E. Gareau J. (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Contracts; Property; Public; Torts; Municipal
**Related Abridgment Classifications**
Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.a General principles
Contracts
IX Performance or breach
IX.8 Breach
IX.8.d Miscellaneous
Statutes
II Interpretation
II.7 Judicial consideration of statutes
II.7.g Ontario
Torts
XXIII Practice and procedure
XXIII.7 Strategic Lawsuits Against Public Participation [SLAPP]
XXIII.7.a Dismissal of action
**Headnote**
Statutes --- Interpretation — Judicial consideration of statutes — Ontario
Plaintiff, land developer, obtained approval from regional conservation authority to develop land, and defendants, not-for-profit association and six of its members, applied for judicial review of decision to approve project — Parties entered into agreement in which defendants promised that in any subsequent proceedings, they would not advance position that regional conservation authority resolutions were contrary to relevant environmental legislation — Plaintiff's application to city for official plan amendment was defeated, plaintiff appealed, association was granted party status and defendant president of association gave testimony before Ontario Municipal Board (OMB) that development would result in significant environmental damage — Plaintiff's application for development approval was dismissed and subsequently plaintiff brought action seeking damages, because it alleged that defendants breached minutes of settlement, as president of association gave evidence at hearing — Defendants brought unsuccessful motion for order dismissing action pursuant to s. 137.1 of Courts of Justice Act, and motions judge found that statements made by president were expression as defined in s. 137.1(2) of Act, because expression was about environmental issue in public forum before public body — Defendants satisfied onus set out in s. 137.1(3) of Act and onus shifted to plaintiff to satisfy s. 137.1(4), and it was found that plaintiff's claim had substantial merit and was claim that should be considered by court — Defendants successfully appealed, and Court of Appeal found that given language used in agreement, there was no reasonable prospect that plaintiff could convince reasonable trier that there was substantial merit to its claim that agreement foreclosed defendant president's testimony before OMB — Plaintiff appealed — Appeal dismissed — Section 137.1 of Act placed initial burden on moving party, defendant, to satisfy judge that proceeding arose from expression relating to matter of public interest, and once that showing was made, burden shifted to responding party, plaintiff, to satisfy judge that there were grounds to believe proceeding had substantial merit — Final weighing exercise under s. 137.1(4)(b) of Act was fundamental crux of analysis — Anti-SLAPP Advisory Panel and legislative debates emphasized balancing and proportionality between public interest in allowing meritorious lawsuits to proceed and public interest in protecting expression on matters of public interest, and s. 137.1(4)(b) was intended to optimize that balance Courts of Justice Act, R.S.O. 1990, c. C.43, s 137.1.
Torts --- Miscellaneous

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Plaintiff, land developer, obtained approval from regional conservation authority to develop land, and defendants, not-for-profit association and six of its members, applied for judicial review of decision to approve project — Parties entered into agreement in which defendants promised that in any subsequent proceedings, they would not advance position that regional conservation authority resolutions were contrary to relevant environmental legislation — Plaintiff's application to city for official plan amendment was defeated, plaintiff appealed, association was granted party status and defendant president of association gave testimony before Ontario Municipal Board (OMB) that development would result in significant environmental damage — Plaintiff's application for development approval was dismissed and subsequently plaintiff brought action seeking damages, because it alleged that defendants breached minutes of settlement, as president of association gave evidence at hearing — Defendants brought unsuccessful motion for order dismissing action pursuant to s. 137.1 of Courts of Justice Act, and motions judge found that statements made by president were expression as defined in s. 137.1(2) of Act, because expression was about environmental issue in public forum before public body — Defendants satisfied onus set out in s. 137.1(3) of Act and onus shifted to plaintiff to satisfy s. 137.1(4), and it was found that plaintiff's claim had substantial merit and was claim that should be considered by court — Defendants successfully appealed, and Court of Appeal found that given language used in agreement, there was no reasonable prospect that plaintiff could convince reasonable trier that there was substantial merit to its claim that agreement foreclosed defendant president's testimony before OMB — Plaintiff appealed — Appeal dismissed — Many different types of proceedings could arise from expression, and legislative background of s. 137.1 of Act indicated that broad and liberal interpretation was warranted at s. 137.1(3) stage of framework — This meant that proceedings that arose from expression were not limited to those directly concerned with expression, such as defamation suits — Current proceeding was good example of type of proceeding that was not defamation suit, but that nonetheless arose from expression and fell within ambit of s. 137.1(3), as it was breach of contract claim premised on expression made by defendant president.

Contracts --- Performance or breach — Breach — Miscellaneous

Plaintiff, land developer, obtained approval from regional conservation authority to develop land, and defendants, not-for-profit association and six of its members, applied for judicial review of decision to approve project — Parties entered into agreement in which defendants promised that in any subsequent proceedings, they would not advance position that regional conservation authority resolutions were contrary to relevant environmental legislation — Plaintiff's application to city for official plan amendment was defeated, plaintiff appealed, association was granted party status and defendant president of association gave testimony before Ontario Municipal Board (OMB) that development would result in significant environmental damage — Plaintiff's application for development approval was dismissed and subsequently plaintiff brought action seeking damages, because it alleged that defendants breached minutes of settlement, as president of association gave evidence at hearing — Defendants brought unsuccessful motion for order dismissing action pursuant to s. 137.1 of Courts of Justice Act, and motions judge found that statements made by president were expression as defined in s. 137.1(2) of Act, because expression was about environmental issue in public forum before public body — Defendants satisfied onus set out in s. 137.1(3) of Act and onus shifted to plaintiff to satisfy s. 137.1(4), and it was found that plaintiff's claim had substantial merit and was claim that should be considered by court — Defendants successfully appealed, and Court of Appeal found that given language used in agreement, there was no reasonable prospect that plaintiff could convince reasonable trier that there was substantial merit to its claim that agreement foreclosed defendant president's testimony before OMB — Plaintiff appealed — Appeal dismissed — Plaintiff's claim was based solely on breach of agreement, and whether or not action had "substantial merit" rested solely on interpretation of agreement, which was fundamentally contract — Applying customary principles of contractual interpretation, which motion judge failed to do, it was found that plaintiff's action was not legally tenable and supported by evidence that was reasonably capable of belief such that its claim could be said to have real prospect of success — Language of agreement was clear on its face; it restricted defendant president's expression only as it related to conservation authority's decision and to judicial review of that decision.

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — General principles

Plaintiff, land developer, obtained approval from regional conservation authority to develop land, and defendants, not-for-profit association and six of its members, applied for judicial review of decision to approve project — Parties entered into agreement in which defendants promised that in any subsequent proceedings, they would not advance position that regional conservation authority resolutions were contrary to relevant environmental legislation — Plaintiff's application to city for official plan amendment was defeated, plaintiff appealed, association was granted party status and defendant president of association gave testimony before Ontario Municipal Board (OMB) that development would result in significant environmental damage

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— Plaintiff's application for development approval was dismissed and subsequently plaintiff brought action seeking damages, because it alleged that defendants breached minutes of settlement, as president of association gave evidence at hearing — Defendants brought unsuccessful motion for order dismissing action pursuant to s. 137.1 of Courts of Justice Act, and motions judge found that statements made by president were expression as defined in s. 137.1(2) of Act, because expression was about environmental issue in public forum before public body — Defendants satisfied onus set out in s. 137.1(3) of Act and onus shifted to plaintiff to satisfy s. 137.1(4), and it was found that plaintiff's claim had substantial merit and was claim that should be considered by court — Defendants successfully appealed, and Court of Appeal found that given language used in agreement, there was no reasonable prospect that plaintiff could convince reasonable trier that there was substantial merit to its claim that agreement foreclosed defendant president's testimony before OMB — Plaintiff appealed — Appeal dismissed — Court of Appeal was correct in dismissing plaintiff's underlying breach of contract action — Plaintiff's claim was based solely on breach of agreement, and whether or not action had "substantial merit" rested solely on interpretation of agreement, which was fundamentally contract — Applying customary principles of contractual interpretation, which motion judge failed to do, it was found that plaintiff's action was not legally tenable and supported by evidence that was reasonably capable of belief such that its claim could be said to have real prospect of success.

Lois --- Interprétation — Examen judiciaire des lois — Ontario

Demandeur, un promoteur immobilier, a obtenu l'approbation de l'office de protection de la nature concernant son projet de développement, et les défendeurs, une société sans but lucratif et six membres de son comité exécutif, ont déposé une requête en contrôle judiciaire concernant cette décision — Parties ont conclu une entente en vertu de laquelle les défendeurs se sont engagés à ne pas faire valoir, dans le cadre de toute autre procédure ultérieure, que les résolutions adoptées par l'office contrevenaient aux dispositions de la législation environnementale applicable — Requête que le demandeur a déposée auprès de la ville en vue d'une modification officielle au plan a été battue, le demandeur a interjeté appel, l'association a obtenu le statut de partie et le président de l'association, un des défendeurs, a témoigné devant la Commission des affaires municipales de l'Ontario (CAMO), affirmant que le projet de développement causerait des dommages importants à l'environnement — Requête du demandeur en vue de faire approuver le projet a été rejetée et le demandeur a ensuite déposé une action en dommages-intérêts, alléguant que les défendeurs avaient violé l'entente à l'amiable, puisque le président de l'association a témoigné lors de l'audience — Défendeurs ont déposé, en vain, une requête visant à obtenir une ordonnance en rejet de l'action en vertu de l'art. 137.1 de la Loi sur les tribunaux judiciaires, et le juge des requêtes a conclu que les déclarations du président constituaient une forme d'expression, telle que définie à l'art. 137.1(2) de la Loi, puisque l'expression concernait une question environnementale dans le cadre d'un forum public devant un organisme public — Défendeurs ont satisfait au fardeau établi à l'art. 137.1(3) de la Loi et le fardeau s'est déplacé sur le demandeur, lequel devait satisfaire aux exigences de l'art. 137.1(4), et on a conclu que le bien-fondé de la demande du demandeur était substantiel et que la réclamation devait être considérée par le tribunal — Défendeurs ont interjeté appel, avec succès, et la Cour d'appel a conclu qu'étant donné le libellé utilisé dans l'entente, il n'y avait aucune possibilité raisonnable que le demandeur puisse convaincre un juge des faits raisonnable que le bien-fondé de sa demande visant à interdire le témoignage du président de la société demanderesse devant la CAMO était substantiel — Demandeur a formé un pourvoi — Pourvoi rejeté — Article 137.1 de la Loi imposait à l'auteur de la requête, le défendeur dans l'instance, le fardeau initial de convaincre le juge que l'instance découlait du fait d'une expression relative à une affaire d'intérêt public, et dès lors que cette démonstration était faite, le fardeau était inversé et il incombait à l'intimé, le demandeur dans l'instance, de convaincre le juge de l'existence de motifs de croire que le bien-fondé de l'instance sous-jacente était substantiel — Exercice final d'évaluation exigé par l'art. 137.1(4)b) de la Loi constituait le noeud de l'analyse — Comité consultatif pour contrer les poursuites-bâillons et les débats parlementaires traduisaient un même souci d'équilibre et de proportionnalité entre le fait de permettre aux poursuites bien fondées d'aller de l'avant et l'intérêt public à protéger l'expression sur des affaires d'intérêt public, et l'art. 137.1(4)b) avait pour but d'optimiser cet équilibre.

Délits civils --- Divers

Demandeur, un promoteur immobilier, a obtenu l'approbation de l'office de protection de la nature concernant son projet de développement, et les défendeurs, une société sans but lucratif et six membres de son comité exécutif, ont déposé une requête en contrôle judiciaire concernant cette décision — Parties ont conclu une entente en vertu de laquelle les défendeurs se sont engagés à ne pas faire valoir, dans le cadre de toute autre procédure ultérieure, que les résolutions adoptées par l'office contrevenaient aux dispositions de la législation environnementale applicable — Requête que le demandeur a déposée auprès de la ville en vue d'une modification officielle au plan a été battue, le demandeur a interjeté appel, l'association a obtenu le statut de partie et le

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président de l'association, un des défendeurs, a témoigné devant la Commission des affaires municipales de l'Ontario (CAMO), affirmant que le projet de développement causerait des dommages importants à l'environnement — Requête du demandeur en vue de faire approuver le projet a été rejetée et le demandeur a ensuite déposé une action en dommages-intérêts, alléguant que les défendeurs avaient violé l'entente à l'amiable, puisque le président de l'association a témoigné lors de l'audience — Défendeurs ont déposé, en vain, une requête visant à obtenir une ordonnance en rejet de l'action en vertu de l'art. 137.1 de la Loi sur les tribunaux judiciaires, et le juge des requêtes a conclu que les déclarations du président constituaient une forme d'expression, telle que définie à l'art. 137.1(2) de la Loi, puisque l'expression concernait une question environnementale dans le cadre d'un forum public devant un organisme public — Défendeurs ont satisfait au fardeau établi à l'art. 137.1(3) de la Loi et le fardeau s'est déplacé sur le demandeur, lequel devait satisfaire aux exigences de l'art. 137.1(4), et on a conclu que le bien-fondé de la demande du demandeur était substantiel et que la réclamation devait être considérée par le tribunal — Défendeurs ont interjeté appel, avec succès, et la Cour d'appel a conclu qu'étant donné le libellé utilisé dans l'entente, il n'y avait aucune possibilité raisonnable que le demandeur puisse convaincre un juge des faits raisonnable que le bien-fondé de sa demande visant à interdire le témoignage du président de la société demanderesse devant la CAMO était substantiel — Demandeur a formé un pourvoi — Pourvoi rejeté — Toutes sortes d'instances pouvaient découler du fait de l'expression et, d'après ce que révélait l'historique législatif de l'art. 137.1 de la Loi, il y avait lieu d'interpréter cet énoncé de manière large et libérale à l'étape de l'analyse exigée par l'art. 137.1(3) — Ainsi, les instances découlant du fait d'une expression ne se limitaient pas à celles qui visaient directement l'expression, comme, par exemple, les actions en diffamation — Une bonne illustration d'un type d'instance qui n'est pas une poursuite en diffamation, mais qui découle néanmoins du fait d'une expression et tombe sous le coup de l'art. 137.1(3), était l'instance sous-jacente en l'espèce, soit une poursuite pour bris de contrat fondée sur une expression du président défendeur.

Contrats --- Exécution ou défaut d'exécution — Défaut d'exécution — Divers

Demandeur, un promoteur immobilier, a obtenu l'approbation de l'office de protection de la nature concernant son projet de développement, et les défendeurs, une société sans but lucratif et six membres de son comité exécutif, ont déposé une requête en contrôle judiciaire concernant cette décision — Parties ont conclu une entente en vertu de laquelle les défendeurs se sont engagés à ne pas faire valoir, dans le cadre de toute autre procédure ultérieure, que les résolutions adoptées par l'office contrevenaient aux dispositions de la législation environnementale applicable — Requête que le demandeur a déposée auprès de la ville en vue d'une modification officielle au plan a été battue, le demandeur a interjeté appel, l'association a obtenu le statut de partie et le président de l'association, un des défendeurs, a témoigné devant la Commission des affaires municipales de l'Ontario (CAMO), affirmant que le projet de développement causerait des dommages importants à l'environnement — Requête du demandeur en vue de faire approuver le projet a été rejetée et le demandeur a ensuite déposé une action en dommages-intérêts, alléguant que les défendeurs avaient violé l'entente à l'amiable, puisque le président de l'association a témoigné lors de l'audience — Défendeurs ont déposé, en vain, une requête visant à obtenir une ordonnance en rejet de l'action en vertu de l'art. 137.1 de la Loi sur les tribunaux judiciaires, et le juge des requêtes a conclu que les déclarations du président constituaient une forme d'expression, telle que définie à l'art. 137.1(2) de la Loi, puisque l'expression concernait une question environnementale dans le cadre d'un forum public devant un organisme public — Défendeurs ont satisfait au fardeau établi à l'art. 137.1(3) de la Loi et le fardeau s'est déplacé sur le demandeur, lequel devait satisfaire aux exigences de l'art. 137.1(4), et on a conclu que le bien-fondé de la demande du demandeur était substantiel et que la réclamation devait être considérée par le tribunal — Défendeurs ont interjeté appel, avec succès, et la Cour d'appel a conclu qu'étant donné le libellé utilisé dans l'entente, il n'y avait aucune possibilité raisonnable que le demandeur puisse convaincre un juge des faits raisonnable que le bien-fondé de sa demande visant à interdire le témoignage du président de la société demanderesse devant la CAMO était substantiel — Demandeur a formé un pourvoi — Pourvoi rejeté — Action du demandeur était fondée uniquement sur le non-respect de l'entente, et la question de savoir si l'action avait un « bien-fondé [ . . . ] substantiel » reposait entièrement sur l'interprétation donnée à l'entente, laquelle était fondamentalement un contrat — Après avoir appliqué les principes usuels d'interprétation contractuelle, ce que le juge des motions n'a pas fait, il fallait conclure que l'action du demandeur n'était pas juridiquement défendable et ne s'appuyait pas sur des éléments de preuve raisonnablement dignes de foi, permettant d'affirmer que la demande avait une possibilité réelle de succès — Texte de l'entente était clair à sa face même : il limitait l'expression du président défendeur uniquement à l'égard de la décision de l'office de protection de la nature et du contrôle judiciaire de cette décision.

Procédure civile --- Jugement rendu sans procès — Arrêt des procédures ou rejet de l'action — Principes généraux

Demandeur, un promoteur immobilier, a obtenu l'approbation de l'office de protection de la nature concernant son projet de développement, et les défendeurs, une société sans but lucratif et six membres de son comité exécutif, ont déposé une requête en

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contrôle judiciaire concernant cette décision — Parties ont conclu une entente en vertu de laquelle les défendeurs se sont engagés à ne pas faire valoir, dans le cadre de toute autre procédure ultérieure, que les résolutions adoptées par l'office contrevenaient aux dispositions de la législation environnementale applicable — Requête que le demandeur a déposée auprès de la ville en vue d'une modification officielle au plan a été battue, le demandeur a interjeté appel, l'association a obtenu le statut de partie et le président de l'association, un des défendeurs, a témoigné devant la Commission des affaires municipales de l'Ontario (CAMO), affirmant que le projet de développement causerait des dommages importants à l'environnement — Requête du demandeur en vue de faire approuver le projet a été rejetée et le demandeur a ensuite déposé une action en dommages-intérêts, alléguant que les défendeurs avaient violé l'entente à l'amiable, puisque le président de l'association a témoigné lors de l'audience — Défendeurs ont déposé, en vain, une requête visant à obtenir une ordonnance en rejet de l'action en vertu de l'art. 137.1 de la Loi sur les tribunaux judiciaires, et le juge des requêtes a conclu que les déclarations du président constituaient une forme d'expression, telle que définie à l'art. 137.1(2) de la Loi, puisque l'expression concernait une question environnementale dans le cadre d'un forum public devant un organisme public — Défendeurs ont satisfait au fardeau établi à l'art. 137.1(3) de la Loi et le fardeau s'est déplacé sur le demandeur, lequel devait satisfaire aux exigences de l'art. 137.1(4), et on a conclu que le bien-fondé de la demande du demandeur était substantiel et que la réclamation devait être considérée par le tribunal — Défendeurs ont interjeté appel, avec succès, et la Cour d'appel a conclu qu'étant donné le libellé utilisé dans l'entente, il n'y avait aucune possibilité raisonnable que le demandeur puisse convaincre un juge des faits raisonnable que le bien-fondé de sa demande visant à interdire le témoignage du président de la société demanderesse devant la CAMO était substantiel — Demandeur a formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison de rejeter l'action sous-jacente du demandeur pour bris de contrat — Action du demandeur était fondée uniquement sur le non-respect de l'entente, et la question de savoir si l'action avait un « bien-fondé [ . . . ] substantiel » reposait entièrement sur l'interprétation donnée à l'entente, laquelle était fondamentalement un contrat — Après avoir appliqué les principes usuels d'interprétation contractuelle, ce que le juge des motions n'a pas fait, il fallait conclure que l'action du demandeur n'était pas juridiquement défendable et ne s'appuyait pas sur des éléments de preuve raisonnablement dignes de foi, permettant d'affirmer que la demande avait une possibilité réelle de succès.

The plaintiff, a land developer, wanted to develop a 91-lot subdivision in the city. The defendants, a not-for-profit association and six members of its executive committee, opposed the development on environmental grounds. The plaintiff successfully obtained approval from the regional conservation authority, and the defendants brought an application for judicial review. City council rejected the plaintiff's application and the plaintiff appealed to the Ontario Municipal Board (OMB). The parties settled the judicial review proceeding by way of minutes of settlement (agreement). The agreement put limitations on the future conduct of the defendants, specifically, the defendants agreed that in any proceeding before the OMB or in any other subsequent legal proceeding that they would not advance the position that the resolutions passed by the authority were illegal, invalid or contrary to the relevant environmental legislation. At the OMB hearing, the defendant president of the association gave testimony that the development would result in significant environmental damage. The OMB dismissed the plaintiff's appeal. The plaintiff brought a $6 million breach of contract action against the defendants. The defendants brought a motion under s. 137.1 of the Courts of Justice Act (CJA) to have the action dismissed. The defendants' motion was dismissed by the motion judge and they appealed. The Court of Appeal allowed the defendants' appeal, granted its s. 137.1 motion, and dismissed the plaintiff's lawsuit. The Court of Appeal found that the motion judge did not examine the record to determine if there were reasonable grounds to believe that the plaintiff's claim had substantial merit. Given the language used in the agreement, there was no reasonable prospect that the plaintiff could convince a reasonable trier that there was substantial merit to its claim that the agreement foreclosed the defendant president's testimony before the board. The plaintiff appealed.

**Held:** The appeal was dismissed.

Per Côté J. (Wagner C.J.C., Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer JJ. concurring): Strategic Lawsuits Against Public Participation (SLAPPs) were lawsuits initiated against individuals or organizations that spoke out or took positions on an issue of public interest. SLAPPs were generally initiated by plaintiffs who engaged the court process and used litigation not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others. In Ontario, the provincial legislature enacted the Ontario Protection of Public Participation Act, 2015, which amended the CJA by introducing ss. 137.1 to 137.5. The effect of those sections of the CJA was to mitigate the harmful effects of lawsuits that aimed to limit the expression of others.

What was crucial was that many different types of proceedings could arise from an expression, and the legislative background of s. 137.1 of the CJA indicated that a broad and liberal interpretation was warranted at the s. 137.1(3) stage of the framework.

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This meant that proceedings that arose from an expression were not limited to those directly concerned with expression, such as defamation suits. A good example of a type of proceeding that was not a defamation suit, but that nonetheless arose from an expression and fell within the ambit of s. 137.1(3), was the underlying proceeding here, which was a breach of contract claim premised on an expression made by the defendant president.

In this case, the defendant president's testimony was captured by the statutory definition of expression, as it was a verbal communication made publicly pursuant to s. 137.1(2). The materials before the motion judge supported a finding that the expression related to a matter of public interest. The proceeding brought by the plaintiff arose from that expression. It was a breach of contract action premised on an alleged breach of the agreement resulting from the defendant president's testimony at the OMB. There was thus a clear nexus between the defendant president's expression and the underlying proceeding. Therefore, the defendant president met its threshold burden under s. 137.1(3) with little difficulty.

As the defendant president had met its onus on the threshold question, the burden now shifted to the plaintiff, under s. 137.1(4) of the CJA, to show that there were grounds to believe that its breach of contract action had substantial merit. In this case, the plaintiff's action lacked substantial merit. The plaintiff's claim was based solely on a breach of the agreement. Accordingly, whether or not the action had "substantial merit" rested solely on the interpretation of the agreement, which was fundamentally a contract. Applying the customary principles of contractual interpretation, which the motion judge failed to do, it was found that the plaintiff's action was not legally tenable and supported by evidence that was reasonably capable of belief such that its claim could be said to have a real prospect of success. Accordingly, it did not have substantial merit.

Under s. 137.1(4)(b) of the CJA, the burden was on the plaintiff to show on a balance of probabilities that it likely had suffered or will suffer harm, that such harm was a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighed the deleterious effects on expression and public participation.

In this case, the harm likely to be or have been suffered by the plaintiff as a result of the defendant president's expression lay at the very low end of the spectrum and, correspondingly, so too did the public interest in allowing the proceeding to continue. On the other hand, the public interest in the defendant president's expression was at the higher end of the spectrum. It was clear that the plaintiff could not establish on a balance of probabilities that the harm suffered as a result of the defendant president's expression was sufficiently serious that the public interest in permitting the proceeding to continue outweighed the public interest in protecting that expression. Therefore, the Court of Appeal was correct in dismissing the plaintiff's underlying breach of contract action.

Accordingly, the appeal should be dismissed.

Le demandeur, un promoteur immobilier, voulait aménager un lotissement comportant 91 lots dans une ville. Les défendeurs, une société sans but lucratif et six membres de son comité exécutif, se sont opposés au projet de développement en invoquant des motifs liés à l'environnement. Le demandeur a obtenu l'approbation de l'office de protection de la nature et les défendeurs ont déposé une requête en contrôle judiciaire. Le conseil de ville a refusé la demande présentée par le demandeur, et ce dernier a interjeté appel à la Commission des affaires municipales de l'Ontario (CAMO). Les parties ont réglé la demande de contrôle judiciaire en concluant une entente à l'amiable. Cette entente imposait certaines restrictions sur la conduite future des défendeurs; plus particulièrement, les défendeurs se sont engagés à ne pas faire valoir, dans le cadre d'une audience ou instance tenue devant la CAMO ou dans le cadre de toute autre poursuite judiciaire ultérieure, que les résolutions adoptées par l'office étaient illégales ou invalides ou qu'elles contrevenaient aux dispositions de la législation environnementale applicable. Lors de l'audience tenue devant la CAMO, le président de la société défenderesse a affirmé dans son témoignage que le projet de développement causerait des dommages importants à l'environnement. La CAMO a rejeté l'appel interjeté par le demandeur. Le demandeur a déposé une action visant à obtenir 6 millions de dollars pour bris de contrat à l'encontre des défendeurs. Ces derniers ont déposé une requête en vertu de l'art. 137.1 de la Loi sur les tribunaux judiciaires (LTJ) afin de faire rejeter l'action. Cette requête a été rejetée par le juge des requêtes et les défendeurs ont interjeté appel.

La Cour d'appel a accueilli l'appel interjeté par les défendeurs, a accordé la requête déposée en vertu de l'art. 137.1 et a rejeté la poursuite du demandeur. La Cour d'appel a conclu que le juge des requêtes n'avait pas examiné le dossier afin de déterminer s'il y avait des motifs raisonnables de croire que le bien-fondé de la demande du demandeur était substantiel. Compte tenu de la manière dont l'entente a été rédigée, il n'y avait aucune possibilité raisonnable que le demandeur puisse convaincre un juge des faits raisonnable que le bien-fondé de sa demande visant à interdire le témoignage du président de la société demanderesse devant la CAMO était substantiel. Le demandeur a formé un pourvoi.

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**Arrêt:** Le pourvoi a été rejeté.

Côté, J. (Wagner, J.C.C., Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer, JJ., souscrivant à son opinion) : Les poursuites stratégiques contre la mobilisation publique (poursuites-bâillons ou SLAPP) étaient des poursuites intentées contre des individus ou des organisations qui s'exprimaient ou qui prenaient position sur une question d'intérêt public. Les poursuites-bâillons étaient généralement des actions intentées par des demandeurs qui mettaient en branle le processus judiciaire et recouraient aux tribunaux non pas comme moyen direct de faire valoir le bien-fondé d'une demande légitime, mais comme moyen indirect de limiter l'expression d'autres personnes. En Ontario, la législature provinciale a adopté la Loi de 2015 sur la protection du droit à la participation aux affaires publiques, laquelle a modifié la LTJ en ajoutant les art. 137.1 à 137.5. Ces dispositions de la LTJ visaient à limiter les effets néfastes de poursuites judiciaires ayant pour but de limiter l'expression d'autres personnes.

Il était essentiel de comprendre que toutes sortes d'instances pouvaient découler du fait de l'expression et, d'après ce que révélait l'historique législatif de l'art. 137.1 de la LTJ, il y avait lieu d'interpréter cet énoncé de manière large et libérale à l'étape de l'analyse exigée par l'art. 137.1(3). Ainsi, les instances découlant du fait d'une expression ne se limitaient pas à celles qui visaient directement l'expression, comme, par exemple, les actions en diffamation. Une bonne illustration d'un type d'instance qui n'est pas une poursuite en diffamation, mais qui découle néanmoins du fait d'une expression et tombe sous le coup de l'art. 137.1(3), était l'instance sous-jacente en l'espèce, soit une poursuite pour bris de contrat fondée sur une expression du président défendeur. En l'espèce, le témoignage du président défendeur était visé par la définition du terme « expression » énoncée dans la LTJ, puisqu'il s'agissait d'une communication faite verbalement en public en vertu de l'art. 137.1(2). Les documents dont disposait le juge des motions permettaient de conclure que l'expression avait été faite relativement à une affaire d'intérêt public. La poursuite intentée par le demandeur découlait du fait de cette expression. Il s'agissait d'une action pour bris de contrat fondée sur le non-respect de l'entente résultant du témoignage du président défendeur devant la CAMO. Il existait donc un lien manifeste entre l'expression du président défendeur et l'instance sous-jacente. Par conséquent, le président défendeur satisfaisait au fardeau initial que lui imposait l'art. 137.1(3) sans trop de difficultés.

Le président défendeur s'étant acquitté de son fardeau initial, il incombait ensuite au demandeur de démontrer, en vertu de l'art. 137.1(4) de la LTJ, qu'il existait des motifs de croire que le bien-fondé de son action pour bris de contrat était substantiel. En l'espèce, l'action du demandeur n'avait pas de bien-fondé substantiel. Elle était fondée uniquement sur le non-respect de l'entente. La question de savoir si l'action avait un « bien-fondé [ . . . ] substantiel » reposait donc entièrement sur l'interprétation donnée à l'entente, laquelle était fondamentalement un contrat. Après avoir appliqué les principes usuels d'interprétation contractuelle, ce que le juge des motions n'a pas fait, il fallait conclure que l'action du demandeur n'était pas juridiquement défendable et ne s'appuyait pas sur des éléments de preuve raisonnablement dignes de foi, permettant d'affirmer que la demande avait une possibilité réelle de succès. Elle était donc dénuée de bien-fondé substantiel.

En vertu de l'art. 137.1(4)b) de la LTJ, il incombait au demandeur d'établir, selon la prépondérance des probabilités, qu'il a subi ou subira vraisemblablement un préjudice, que ce préjudice est subi du fait de l'expression préalablement démontrée en application de l'art. 137.1(3), et que l'intérêt public correspondant à permettre la poursuite de l'instance sous-jacente l'emportait sur les effets préjudiciables causés à la liberté d'expression et à la participation aux affaires publiques.

En l'espèce, le préjudice que le demandeur subit ou a subi vraisemblablement du fait de l'expression du président défendeur était des plus limités et, en conséquence, l'intérêt public à permettre la poursuite de l'instance l'était aussi. En revanche, l'intérêt public à protéger l'expression du président défendeur était des plus élevés. À l'évidence, le demandeur ne pouvait établir, suivant la prépondérance des probabilités, que le préjudice subi du fait de l'expression du président défendeur était suffisamment grave pour que l'intérêt public à permettre la poursuite de l'instance l'emportât sur l'intérêt public à protéger cette expression. Par conséquent, la Cour d'appel a eu raison de rejeter l'action sous-jacente du demandeur pour bris de contrat.

Ainsi, le pourvoi devrait être rejeté.

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*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

*Hryniak v. Mauldin* (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.) — followed

*Hunt v. T & N plc* (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — considered

*Klepper v. Lulham* (2017), 2017 QCCA 2069, 2017 CarswellQue 11660 (C.A. Que.) — considered

*Knight v. Imperial Tobacco Canada Ltd.* (2011), 2011 SCC 42, 2011 CarswellBC 1968, 2011 CarswellBC 1969, 21 B.C.L.R. (5th) 215, [2011] 11 W.W.R. 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 335 D.L.R. (4th) 513, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 419 N.R. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 308 B.C.A.C. 1, (sub nom. *British Columbia v. Imperial Tobacco Canada Ltd.)* 521 W.A.C. 1, 83 C.B.R. (5th) 169, [2011] 3 S.C.R. 45 (S.C.C.) — considered

*Lascaris v. B'nai Brith Canada* (2019), 2019 ONCA 163, 2019 CarswellOnt 2913, 144 O.R. (3d) 211, 431 D.L.R. (4th) 486, 45 C.P.C. (8th) 319 (Ont. C.A.) — referred to

*London Artists Ltd. v. Littler* (1968), [1969] 2 Q.B. 375, [1969] 2 All E.R. 193 (Eng. C.A.) — considered

*Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)* (2005), 2005 SCC 40, 2005 CarswellNat 1740, 2005 CarswellNat 1741, (sub nom. *Mugesera v. Canada (Minister of Citizenship & Immigration))* 197 C.C.C. (3d) 233, 254

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D.L.R. (4th) 200, 30 C.R. (6th) 39, 28 Admin. L.R. (4th) 161, 47 Imm. L.R. (3d) 16, (sub nom. *Mugesera v. Canada (Minister of Citizenship & Immigration)*) 335 N.R. 229, [2005] 2 S.C.R. 100, 2005 CSC 40 (S.C.C.) — considered

*New Brunswick v. O'Leary* (1995), 125 D.L.R. (4th) 609, 183 N.R. 229, [1995] 2 S.C.R. 967, 163 N.B.R. (2d) 97, 419 A.P.R. 97, (sub nom. *O'Leary v. R.*) 95 C.L.L.C. 210-028, 1995 CarswellNB 154, 1995 CarswellNB 154F, [1995] L.V.I. 2687-2, 1995 SCC 109 (S.C.C.) — considered

*Ontario (Environment and Climate Change) v. Geil* (2018), 2018 ONCA 1030, 2018 CarswellOnt 21137, 22 C.E.L.R. (4th) 48, 371 C.C.C. (3d) 149 (Ont. C.A.) — referred to

*Ontario (Registrar of Alcohol and Gaming Commission) v. 751809 Ontario Inc.* (2013), 2013 ONCA 157, 2013 CarswellOnt 2980, (sub nom. *Ontario (Alcohol and Gaming Commission) v. 751809 Ontario Inc.)* 115 O.R. (3d) 24, 302 O.A.C. 387, 359 D.L.R. (4th) 550 (Ont. C.A.) — referred to

*Platnick v. Bent* (2018), 2018 ONCA 687, 2018 CarswellOnt 14124, 82 C.C.L.I. (5th) 191, 23 C.P.C. (8th) 275, 426 D.L.R. (4th) 60, 417 C.R.R. (2d) 350, 419 C.R.R. (2d) 61 (Ont. C.A.) — considered

*Quick v. MacKenzie* (1997), 1997 CarswellOnt 1410, (sub nom. *Sheppard v. Co-operators General Insurance Co.)* [1997] I.L.R. I-3437, (sub nom. *Sheppard v. Co-operators General Insurance Co.)* 99 O.A.C. 390, 43 C.C.L.I. (2d) 262, (sub nom. *Sheppard v. Co-operators General Insurance Co.)* 33 O.R. (3d) 362 (Ont. C.A.) — considered

*R. v. Canadian Broadcasting Corp.* (2018), 2018 SCC 5, 2018 CSC 5, 2018 CarswellAlta 206, 2018 CarswellAlta 207, [2018] 2 W.W.R. 431, 11 C.P.C. (8th) 221, 63 Alta. L.R. (6th) 1, 417 D.L.R. (4th) 587, 44 C.R. (7th) 1, 358 C.C.C. (3d) 143, [2018] 1 S.C.R. 196 (S.C.C.) — considered

*R. v. Driscoll* (1987), 54 Alta. L.R. (2d) 251, 79 A.R. 298, [1987] 6 W.W.R. 748, 60 C.R. (3d) 88, 38 C.C.C. (3d) 28, 1987 CarswellAlta 190 (Alta. C.A.) — considered

*R. v. Keegstra* (1990), 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — considered

*R. v. Sharpe* (2001), 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1 (S.C.C.) — referred to

*R. v. Summers* (2014), 2014 SCC 26, 2014 CSC 26, 2014 CarswellOnt 4479, 2014 CarswellOnt 4480, 9 C.R. (7th) 223, 456 N.R. 1, 308 C.C.C. (3d) 471, 316 O.A.C. 349, 371 D.L.R. (4th) 581, [2014] 1 S.C.R. 575, 307 C.R.R. (2d) 96, 130 O.R. (3d) 80 (note) (S.C.C.) — referred to

*R. v. Topp* (2011), 2011 SCC 43, 2011 CarswellOnt 9422, 2011 CarswellOnt 9423, 336 D.L.R. (4th) 432, 272 C.C.C. (3d) 417, 86 C.R. (6th) 271, 421 N.R. 95, [2011] 3 S.C.R. 119, 283 O.A.C. 1 (S.C.C.) — considered

*Rizzo & Rizzo Shoes Ltd., Re* (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered

*Shannon v. 1610635 Alberta Inc.* (2014), 2014 ABCA 393, 2014 CarswellAlta 2134, 379 D.L.R. (4th) 458, [2015] I.L.R. I-5675, 41 C.C.L.I. (5th) 291, 588 A.R. 76, 626 W.A.C. 76, 70 C.P.C. (7th) 29, 8 Alta. L.R. (6th) 249 (Alta. C.A.) — considered

*Teal Cedar Products Ltd. v. British Columbia* (2017), 2017 SCC 32, 2017 CSC 32, 2017 CarswellBC 1648, 2017 CarswellBC 1649, 4 L.C.R. (2d) 1, 98 B.C.L.R. (5th) 211, [2017] 9 W.W.R. 1, 411 D.L.R. (4th) 385, [2017] 1 S.C.R. 688 (S.C.C.) — referred to

*Thomson Newspapers Co. v. Canada (Attorney General)* (1998), 1998 CarswellOnt 1981, 1998 CarswellOnt 1982, 159 D.L.R. (4th) 385, 226 N.R. 1, 51 C.R.R. (2d) 189, 109 O.A.C. 201, [1998] 1 S.C.R. 877, 5 B.H.R.C. 567, 38 O.R. (3d) 735 (S.C.C.) — referred to

*Veneruzzo v. Storey* (2018), 2018 ONCA 688, 2018 CarswellOnt 14127, 23 C.P.C. (8th) 352 (Ont. C.A.) — referred to

**Statutes considered:**

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(b) — considered

s. 15 — referred to

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*Conservation Authorities Act*, R.S.O. 1990, c. C.27
Generally — referred to
*Courts of Justice Act*, R.S.O. 1990, c. C.43
s. 137.1 [en. 2015, c. 23, s. 3] — considered

s. 137.1(1) [en. 2015, c. 23, s. 3] — considered

s. 137.1(2) "expression" [en. 2015, c. 23, s. 3] — considered

s. 137.1(3) [en. 2015, c. 23, s. 3] — considered

s. 137.1(4) [en. 2015, c. 23, s. 3] — considered

s. 137.1(4)(a) [en. 2015, c. 23, s. 3] — considered

s. 137.1(4)(a)(i) [en. 2015, c. 23, s. 3] — considered

s. 137.1(4)(a)(ii) [en. 2015, c. 23, s. 3] — considered

s. 137.1(4)(b) [en. 2015, c. 23, s. 3] — considered

s. 137.1(7) [en. 2015, c. 23, s. 3] — considered

ss. 137.1-137.5 [en. 2015, c. 23, s. 3] — referred to

s. 137.2(1) [en. 2015, c. 23, s. 3] — considered
*Planning Act*, R.S.O. 1990, c. P.13
Generally — referred to

s. 2 — considered

s. 51(24) — referred to
*Protection of Public Participation Act, 2015*, S.O. 2015, c. 23
Generally — referred to

APPEAL by plaintiff from judgment reported in *1704604 Ontario Ltd. v. Pointes Protection Association* (2018), 2018 ONCA 685, 2018 CarswellOnt 14179, 23 C.P.C. (8th) 312, 142 O.R. (3d) 161, 79 M.P.L.R. (5th) 179, 426 D.L.R. (4th) 233, 50 C.C.L.T. (4th) 173, 46 Admin. L.R. (6th) 70 (Ont. C.A.), which dismissed its breach of contract action.

POURVOI formé par le demandeur à l'encontre d'une décision publiée à *1704604 Ontario Ltd. v. Pointes Protection Association* (2018), 2018 ONCA 685, 2018 CarswellOnt 14179, 23 C.P.C. (8th) 312, 142 O.R. (3d) 161, 79 M.P.L.R. (5th) 179, 426 D.L.R. (4th) 233, 50 C.C.L.T. (4th) 173, 46 Admin. L.R. (6th) 70 (Ont. C.A.), laquelle a rejeté son action en bris de contrat.

***Côté J.*** **(Wagner C.J.C., Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer JJ. concurring):**

1 Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society. This case is about what happens when individuals and organizations use litigation as a tool to quell such expression, which, in turn, quells participation and engagement in matters of public interest. More specifically, this Court is being asked to decide whether an action brought by 1704604 Ontario Limited ("170 Ontario") against the Pointes Protection Association and six of its members (collectively "Pointes Protection") can proceed, or whether it must be dismissed under s. 137.1 of the Courts of Justice Act, R.S.O. 1990, c. C.43 (“CJA”). For the reasons that follow, I am of the view that 170 Ontario's lawsuit must be dismissed. I would accordingly dismiss the appeal before this Court.

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## I. Introduction

2 Strategic lawsuits against public participation ("SLAPPs") are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.

3 In light of the increased proliferation of SLAPPs, provincial legislatures (in Ontario, British Columbia, and Quebec) have enacted laws to mitigate their harmful effects. These laws are occasionally referred to as "anti-SLAPP" legislation (2018 ONCA 685, 142 O.R. (3d) 161 (Ont. C.A.); Galloway v. A.B.2019 BCCA 38530 B.C.L.R. (6th) 245(B.C. C.A.); *Klepper v. Lulham*, 2017 QCCA 2069 (C.A. Que.) (CanLII); B. Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (2014)).

4 At issue here is such a law. In November 2015, the Ontario Protection of Public Participation Act, 2015, S.O. 2015, c. 23 ("Act"), came into force. The Act amended the *CJA*, by introducing, in relevant part, ss. 137.1 to 137.5.

5 In this appeal, the Court is effectively being asked to shed light and offer guidance on how to properly apply the framework set out in s. 137.1 of the CJA. Accordingly, I endeavour to do so below, but not without first providing some background on the legislation at issue in Part II. Subsequently, in Part III, I set out the proper legal framework for dealing with s. 137.1 motions. Finally, in Part IV, I apply the established legal framework to the facts of this case.

## II. Background

6 Before I explain the parameters of the s. 137.1 framework, it is necessary, as part of the exercise of statutory interpretation, to outline the legislative background of the bill which brought s. 137.1 into effect. Such legislative background and history offer contextual clues to and insight into the legislative purpose of the bill, as well as indicia of the proper interpretation of the provisions at issue, which will be explored in turn below. Indeed, this Court has reiterated on numerous occasions that the modern approach to statutory interpretation requires that the words of a statute 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" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21).

7 In 2010, the Attorney General of Ontario mandated an Anti-SLAPP Advisory Panel ("Panel") to advise the government on how to respond to the proliferation of SLAPPs. The Panel was chaired by experts and examined a plethora of materials, including legal articles, relevant statutes from other jurisdictions, and advocacy documents. The Panel also invited comments and submissions from the public and interested parties. All of this culminated in the *Anti-Slapp Advisory Panel: Report to the Attorney General* ("APR"), which was published in October 2010.

8 The APR "concluded that it is desirable for Ontario to enact legislation against the use of legal processes that affect people's ability or willingness to express views or take action on matters of public interest" (para. 10). The APR looked extensively at the need for such legislation (paras. 6-16), then provided suggestions on the content of the legislation and outlined the concerns underlying that content.

9 The APR advocated a "broad scope of protection" (para. 29) that would "ensure that the full scope of legitimate participation in public matters is made subject to the special procedure" (para. 31). Fundamental to the APR's proposal was the theme of balancing and proportionality. While "an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff's action from proceeding" (para. 36), "the fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed" (para. 37). To reconcile these considerations, the APR proposed a multi-step test that ended up being substantively similar to the one later adopted by the legislature.

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10 In November 2015, Ontario brought into force Bill 52, Protection of Public Participation Act, 2015, 1st Sess., 41st Leg., 2015, which, as noted above, amended the *CJA* by introducing ss. 137.1 to 137.5. The purposes of those provisions were specified in the legislation itself, in s. 137.1(1) of the CJA:

> **137.1** (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

11 This was prompted by the APR, which stated that the "legislation should include a purpose clause for the benefit of judicial interpretation" (Summary of Recommendations, para. 2). While legislative purpose bears on the exercise of statutory interpretation regardless of whether a purpose clause exists, the fact that the APR explicitly urged legislators to include such a clause for the *benefit of judicial interpretation*, and that legislators consciously obliged, demonstrates that the purpose clause in s. 137.1(1) commands considerable interpretative authority.

12 Further indications of legislative intention can be gleaned from the debates in the Legislative Assembly of Ontario. At second reading of the bill, the Attorney General of Ontario at the time, the Hon. Madeleine Meilleur, stated the following:

> If passed, this legislation will allow courts to quickly identify and deal with strategic lawsuits, minimizing the emotional and financial strain on defendants, as well as the waste of court resources.
>
> . . . . .
>
> Our proposed legislation strikes a balance that will help ensure abusive litigation is stopped, but legitimate action can continue.
>
> This proposed legislation is about preventing strategic lawsuits. Anyone who has a legitimate claim of libel or slander should not be discouraged by this legislation.
>
> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 41A, 1st Sess., 41st Parl., December 10, 2014, at p. 1975)

13 Ultimately, the legislative debates preceding the passage of the Act echoed the same concerns expressed by the Panel in the APR. Indeed, parliamentarians acknowledged as much: "[t]his bill came forward as a result of a report from 2010" (p. 1975 (Ms. Sylvia Jones)); "a made-in-Ontario approach to address the issue of strategic lawsuits based on consensus, recommendations of an expert advisory panel and extensive stakeholder consultation" (p. 1975 (Hon. Madeleine Meilleur)). Accordingly, it should come as no surprise that the final test adopted in the legislation was very similar substantively to the test proposed in the APR. This makes it clear that the APR had a considerable influence on the legislation which was enacted and which is now at issue before this Court.

14 For this reason, the Panel and its APR are persuasive authority for the purposes of statutory interpretation. It must be remembered that "[l]egislative history includes material relating to the conception, preparation and passage of the enactment", and this "may often be [an] important par[t] of the context to be examined as part of the modern approach to statutory interpretation" (*Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 43 ("*CHRC*")). Indeed, the late Peter W. Hogg defined legislative history as including the following:

> 1. [T]he report of a royal commission or law reform commission or parliamentary committee recommending that a statute be enacted;

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. . . . .

> 3. a report or study produced outside government which existed at the time of the enactment of the statute and was relied upon by the government that introduced the legislation ....
>
> (*Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at pp. 60-1 to 60-2)

While reports like the APR are generally "admissible for any purpose the court thinks appropriate", the weight accorded to them depends on the circumstances (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 685; see also *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575(S.C.C.), at para. 51). As I have explained, the APR was the clear impetus for the legislation, and was relied upon heavily by the legislature in drafting s. 137.1 of the CJA. Accordingly, it is a persuasive source that "provide[s] helpful information about the background and purpose of the legislation" (*CHRC*, at para. 44).

15 In light of the foregoing, I turn in Part III below to the interpretation of the statutory text of s. 137.1(3) and (4), informed by the legislative history and the purposes that animate these provisions. As already mentioned, this is in accordance with what this Court has referred to as the modern approach to statutory interpretation.

**III. Framework**

16 As indicated above, s. 137.1 is the provision in the *CJA* that is meant to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. The final statutory language adopted makes it clear how the APR and the legislative debates informed the drafting of the provision: there is an invocation of the need for the expression to relate to a matter of public interest; the underlying proceeding must have substantial merit (beyond "technical validity", as the APR noted, at para. 37); and the public interest in protecting the expression must be weighed against the public interest in permitting the underlying proceeding to continue (echoing the importance of balance repeatedly noted in the APR and the legislative debates).

17 The relevant portions of s. 137.1 are reproduced below:

> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.
>
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

18 In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed. It is important to recognize that the final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis: as noted repeatedly above, the APR and the legislative debates emphasized balancing and proportionality between the public interest in

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allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest. Section 137.1(4)(b) is intended to optimize that balance.

19 In the following section, I offer an explanation of each step of the s. 137.1 analysis, including what is expected of each party and how the relevant terms used in the provision must operate. This analysis of the framework is grounded in the words of the statute read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, while remaining mindful of the legislative background and informed particularly by the APR and the legislative debates.

### *A. Section 137.1(3) — Threshold Burden on the Moving Party*

20 Section 137.1(3) is reproduced for convenience below, with my own emphasis placed on the terms requiring further illumination:

> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

21 Fundamentally, this is a two-part analysis. The burden is on the moving party to show that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. This is a threshold burden, which means that it is necessary for the moving party to meet this burden in order to even proceed to s. 137.1(4) for the ultimate determination of whether the proceeding should be dismissed.

22 However, while the term "expression" is expressly defined in the statute, other terms are in need of elaboration in order to understand how the moving party can satisfy its threshold burden.

23 First, what does "satisfies" require? I am in agreement with Doherty J.A. of the Court of Appeal for Ontario that "satisfies" requires the moving party to meet its burden on a balance of probabilities (C.A. reasons, at para. 51). This is in accordance with the jurisprudence interpreting the word "satisfied" (*R. v. Topp*, 2011 SCC 43, [2011] 3 S.C.R. 119 (S.C.C.), at paras. 24-25; *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at paras. 49 and 53; *Shannon v. 1610635 Alberta Inc.*, 2014 ABCA 393, 588 A.R. 76 (Alta. C.A.), at paras. 14-15; *R. v. Driscoll* (1987), 79 A.R. 298 (Alta. C.A.), at paras. 17-18). Accordingly, the moving party must be able to demonstrate on a balance of probabilities that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest.

24 Second, what does "arises from" require? By definition, "arises from" implies an element of causality. In other words, if a proceeding "arises from" an expression, this must mean that the expression is somehow causally related to the proceeding. [1] What is crucial is that many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework. This means that proceedings arising from an expression are not limited to those *directly* concerned with expression, such as defamation suits. A good example of a type of proceeding that is not a defamation suit, but that nonetheless arises from an expression and falls within the ambit of s. 137.1(3), is the underlying proceeding here, which is a breach of contract claim premised on an expression made by the defendant (this is explored in further detail in Part IV of these reasons). Indeed, the APR explicitly discouraged the use of the term "SLAPP" in the final legislation in order to avoid narrowly confining the s. 137.1 procedure (para. 22), and the legislature obliged.

1 I do not believe that a precise level of causation needs to be identified, as courts have consistently been able to grapple with and apply the "arising from" standard (*Allstate Insurance Co. of Canada v. Aftab*, 2015 ONCA 349, 335 O.A.C. 172 (Ont. C.A.); *Quick v. MacKenzie* (1997), 33 O.R. (3d) 362 (Ont. C.A.); *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967 (S.C.C.); *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.)).

25 Third, what does "expression" mean? The term "expression" is defined broadly in s. 137.1(2) of the CJA itself: "In this section, 'expression' means any communication, regardless of whether it is made verbally or non-verbally, whether it is made

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publicly or privately, and whether or not it is directed at a person or entity." This is not in need of further clarification, as the text makes it abundantly clear that "expression" is defined expansively.

26 Fourth, and finally, what does "relates to a matter of public interest" mean? These words should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1(3). Indeed, the APR clearly stated that a "broader test will ensure that the full scope of legitimate participation in public matters is made subject to the special procedure" (at para. 31) and that therefore a "broad scope of protection" is preferable (para. 29).

27 In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a "matter of public interest". The same principles apply in the present context. The expression should be assessed "as a whole", and it must be asked whether "some segment of the community would have a genuine interest in receiving information on the subject" (paras. 101-2). While there is "no single 'test'", "[t]he public has a genuine stake in knowing about many matters" ranging across a variety of topics (paras. 103 and 106). This Court rejected the "narrow" interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, "[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence" (para. 106).

28 The statutory language used in s. 137.1(3) confirms that "public interest" ought to be given a broad interpretation. Indeed, "public interest" is preceded by the modifier "*a matter* of". This is important, as it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest — there is no qualitative assessment of the expression at this stage. The question is only whether the expression pertains to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one.

29 Nonetheless, expression that *relates* to a matter of public interest must be distinguished from expression that simply *makes reference* to something of public interest, or to a matter about which the public is merely curious. Neither of the latter two forms of expression will be sufficient for the moving party to meet its burden under s. 137.1(3) (see Torstar, at para. 102).

30 Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about. The animating purpose of s. 137.1 should not be forgotten: s. 137.1 was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that is public participation in democracy. If the bar is set too high at s. 137.1(3), the motion judge will never reach the crux of the inquiry that lies in the weighing exercise at s. 137.1(4)(b). Thus, in light of the legislative purpose and background of s. 137.1, it is important to interpret an "expression" that "relates to a matter of public interest" in a generous and expansive fashion.

31 In conclusion, s. 137.1(3) places a threshold burden on the moving party to show on a balance of probabilities (i) that the underlying proceeding does, in fact, arise from its expression, regardless of the nature of the proceeding, and (ii) that such expression relates to a matter of public interest, defined broadly. To the extent that this burden is met by the moving party, then s. 137.1(4) will be triggered and the burden will shift to the responding party to show that its underlying proceeding should not be dismissed. I proceed to analyze that provision below.

### *B. Section 137.1(4) — Shifting of the Burden to the Responding Party*

32 Section 137.1(4) is reproduced for convenience below:

> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and

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> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

33 As the text of this provision makes explicit, the burden is on the *responding party* (i.e. the plaintiff in the underlying proceeding) to satisfy the motion judge of *both* (a) *and* (b). Therefore, if *either* (a) *or* (b) is not met, then this will be fatal to the plaintiff[2] discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both (a) *and* (b) are met, then the proceeding will be allowed to continue. While (a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence, (b) is open-endedly concerned with what is at the heart of the legislation at issue and anti-SLAPP legislation generally: the weighing of the public interest in vindicating legitimate claims through the courts against the resulting potential for quelling expression that has already been determined under s. 137.1(3) to be related to a matter of public interest.

2 I will refer to the "moving party" as the "defendant", and the "responding party" as the "plaintiff" in these reasons interchangeably. This is for convenience and clarity, and should not be taken as restricting the statutory language in any future case.

*(1) Section 137.1(4)(a) — Merits-Based Hurdle*

34 In brief, s. 137.1(4)(a) requires the plaintiff to "satisf[y] the judge" that there are "grounds to believe" that (i) its underlying proceeding has "substantial merit" and that (ii) the defendant has "no valid defence".

35 Unlike with s. 137.1(3), "satisfies" is statutorily circumscribed in s. 137.1(4)(a) by an express standard: "grounds to believe". In other words, since the statutory language of s. 137.1(3) required that the motion judge simply be "satisfie[d]", this necessitated a determination of what is sufficient to satisfy the motion judge. What is sufficient for the motion judge to be satisfied for the purposes of s. 137.1(4)(a)? Here, the legislature has expressly answered the question — the motion judge must be satisfied that there are *grounds to believe*. Therefore, at this juncture, before I explore what exactly is required by s. 137.1(4)(a)(i) and (ii), it must be determined what "grounds to believe" requires. This necessitates a consideration of the words themselves and their statutory context.

36 The words "grounds to believe" plainly refer to the existence of a basis or source (i.e. "grounds") for reaching a *belief* or conclusion that the legislated criteria have been met. In the context of a s. 137.1 motion, that basis or source must be anchored in the nature of the procedure and record contemplated by the legislative scheme. It must be borne in mind that a s. 137.1 motion can be brought at "*any time*" after a proceeding has commenced (see s. 137.2(1)).

37 Accordingly, in determining whether there exist grounds to believe at the s. 137.1(4)(a) stage, courts must be acutely aware of the limited record, the timing of the motion in the litigation process, and the potentiality of future evidence arising. Introducing too high a standard of proof into what is a preliminary assessment under s. 137.1(4)(a) might suggest that the *outcome* has been adjudicated, rather than the *likelihood* of an outcome. To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence.

38 Section 137.1(4)(a) may therefore be interpreted by distinguishing a motion made under s. 137.1 from a motion to strike and a motion for summary judgment, both of which are tools that remain available to parties notwithstanding the existence of s. 137.1. The very fact that the legislature created s. 137.1 as a mechanism indicates that a s. 137.1 motion was meant to fulfil a different purpose than these other motions. While a summary judgment motion allows parties to file a more extensive record and a motion to strike is adjudicated solely on the pleadings, s. 137.1 contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that lends itself to the inquiry mandated under s. 137.1(4)(a). Thus, although the limited record at this stage does not allow for the ultimate adjudication of the issues, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record (the extent of such consideration will be explored further in the next section).

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39 Accordingly, I conclude that "grounds to believe" requires that there be a basis in the record and the law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence.

40 The foregoing conclusion is consistent with the interpretation this Court has given to the expression "grounds to believe" in other contexts. Indeed, this standard has been found to require "something more than mere suspicion, but less than ... proof on the balance of probabilities" (*Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (S.C.C.), at para. 114). This interpretation has been adopted in the regulatory context as well (see, e.g., *Ontario (Registrar of Alcohol and Gaming Commission) v. 751809 Ontario Inc.*, 2013 ONCA 157, 115 O.R. (3d) 24 (Ont. C.A.), at paras. 18-24; *Ontario (Environment and Climate Change) v. Geil*, 2018 ONCA 1030, 371 C.C.C. (3d) 149 (Ont. C.A.)).

41 Importantly, the assessment under s. 137.1(4)(a) must be made from the motion judge's perspective. With respect, I am of the view that the Court of Appeal for Ontario incorrectly removed the motion judge's assessment of the evidence from the equation in favour of a theoretical assessment by a "reasonable trier" (para. 82). The clear wording of s. 137.1(4) requires "the judge" hearing the motion to determine if there exist "grounds to believe". Making the application of the standard depend on a "reasonable trier" improperly excludes the express discretion and authority conferred on the motion judge by the text of the provision. The test is thus a subjective one, as it depends on the motion judge's determination.

42 Taking all of the foregoing together, what s. 137.1(4)(a) asks, in effect, is whether the motion judge concludes from his or her assessment of the record that there is a basis in fact and in law — taking into account the context of the proceeding — to support a finding that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

43 I turn now to consider what s. 137.1(4)(a)(i) and (ii) mean in substantive terms and how the plaintiff can satisfy its burden under s. 137.1(4)(a).

**(a) Section 137.1(4)(a)(i) — Substantial Merit**

44 The question under s. 137.1(4)(a)(i) is whether the underlying proceeding has "substantial merit". I proceed to elucidate what "substantial merit" means and what the responding party (i.e. plaintiff) needs to show in order to satisfy its burden.

45 I begin with an analysis of the statutory text. The legislature's express choice to use the specific word *substantial* as a qualifier must be given effect. Indeed, the use of the word *substantial* functions markedly differently than a qualifier such as having *some* merit, *any* merit, or just *merit* absent a qualifier. *Black's Law Dictionary* acts as an interpretive aid in discerning the exact meaning of "substantial", which it defines as follows:

> 1. Of, relating to, or involving substance, material <substantial change in circumstances>. 2. Real and not imaginary; having actual, not fictitious, existence <a substantial case on the merits>. 3. Important, essential, and material; of real worth and importance <a substantial right>.
>
> (*Black's Law Dictionary* (11th ed. 2019), at p. 1728)

46 This definition of "substantial" must be read in the context of s. 137.1(4)(a)(i), in which this word modifies "merit". Accordingly, it must be asked what is meant by "merit". The use of the word "merit" in the context of a s. 137.1 motion fundamentally calls for a determination of the prospect of success of the underlying proceeding. Indeed, what is at stake here is the potential dismissal of the proceeding without any opportunity to amend it: while the threshold burden under s. 137.1(3) is concerned with identifying an expression relating to a matter of public interest for protection, s. 137.1(4) engages the competing interest at play — ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it; this is why the burden is on the *plaintiff* to ensure that its claim is not dismissed. Thus, given its ordinary meaning and when read in context, "merit" refers fundamentally to the strength of the underlying claim, as a stronger claim corresponds with a weaker justification to dismiss the underlying proceeding.

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47 Legislative intent provides a further indication of how "substantial merit" ought to be interpreted. Indeed, "statutory interpretation cannot be founded on the wording of the legislation alone" (*Rizzo & Rizzo Shoes Ltd., Re*, at para. 21). The APR did not offer much guidance on the meaning of "substantial merit". It stated, however, that "the fact that a plaintiff's claim may have only *technical validity* should not be sufficient to allow the action to proceed" (para. 37 (emphasis added)). This was echoed in the Legislative Assembly of Ontario: "I do not believe that *a mere technical case* — without actual harm — should be allowed to suppress the kind of democratic expression that is crucial for our democracy" (at p. 1972 (emphasis added) (Hon. Madeleine Meilleur)); "[i]t is also important that we recognize the strain that *frivolous* lawsuits place on our province's busy court system" (at p. 1973 (emphasis added) (Mr. Lorenzo Berardinetti)); "this legislation protects the people from *frivolous* lawsuits" (at p. 1975 (emphasis added) (Mr. Randy Pettapiece)); "if someone does have a legitimate claim that is not *frivolous* ... you can still bring that type of lawsuit" (*Official Report of Debates (Hansard)*, No. 112, 1st Sess., 41st Parl., October 27, 2015, at p. 6025 (emphasis added) (Mr. Jagmeet Singh)). While I acknowledge that the above excerpt from the APR is from the "Balancing interests" section of that report, the consistency of the language used in the legislative debates shows that the same concern informed the legislature's understanding of how s. 137.1 would operate. It was clearly of the view that even if a proceeding was not merely frivolous or vexatious, or was technically valid, this should not be sufficient to allow the proceeding to continue. This is fundamentally a question that depends on the *merits* of the underlying proceeding, which makes the foregoing references well-suited as an interpretive aid under s. 137.1(4)(a)(i) given the statutory language ultimately used in the provision. Accordingly, it is clear from the legislative context that the words "substantial merit" are animated by a concern with making sure that, at a minimum, neither "frivolous" suits nor suits with only "technical" validity are sufficient to withstand a s. 137.1 motion. Substantial merit must mean something more.

48 However, while frivolous suits are clearly insufficient, "something more" cannot require a showing that a claim is likely to succeed either, as some parties have posited. Neither the plain meaning nor the legal definition of "substantial" comports with a "likely to succeed" standard. The legislative and statutory context does not support such a standard either. If "substantial merit" requires a showing of being likely to succeed, this could unduly prevent cases from proceeding to the crux of the inquiry that is the weighing exercise under s. 137.1(4)(b). Given the importance of the weighing exercise in the legislative history, this cannot possibly be what the legislature contemplated. Indeed, nothing in the legislative history — whether in the APR or in the legislative debates — points to a "likely to succeed" standard as the threshold for the plaintiff to prevail at the merits-based hurdle of s. 137.1. While the plaintiff need not definitively demonstrate that its claim is more likely than not to succeed, the claim must nonetheless be sufficiently strong that terminating it at a preliminary stage would undermine the legislature's objective of ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim.

49 Therefore, I conclude from the foregoing exercise of statutory interpretation that for an underlying proceeding to have "substantial merit", it must have a real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law — taking into account the stage of the proceeding — for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

50 Importantly, this standard is more demanding than the one applicable on a motion to strike, which requires that the claim have *some* chance of success under the "plain and obvious" test (*Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.)). It is also more demanding than requiring that the claim have a *reasonable* prospect of success, which is a standard that this Court has also used to animate the "plain and obvious" test (*Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at paras. 17-20). In light of the existence of a record, the substantial merit standard calls for an assessment of the evidentiary basis for the claim — this is why the claim must be supported by evidence that is reasonably capable of belief. This is consistent with the APR's references to "substant*ive*" merit, which inherently calls for an assessment of the basis or evidentiary foundation for a claim. I reiterate, however, that a claim with merely *some* chance of success will not be sufficient to prevail. Nor will a claim that has been merely nudged over the line of having some chance of success. A real prospect of success means that the plaintiff's success is more than a possibility; it requires more than an arguable case. As I said in the preceding paragraph, a real prospect of success requires that the claim have a prospect of success that, while not amounting to a demonstrated likelihood

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of success, tends to weigh more in favour of the plaintiff. For a judge undertaking this inquiry, it is critical to recall that a s. 137.1 motion is not a determinative adjudication of the merits of the proceeding and, rather than having to be established on a balance of probabilities, substantial merit is instead tempered by a "grounds to believe" burden.

51 The substantial merit standard is less stringent, however, than the "strong *prima facie* case" threshold, which requires a "strong likelihood of success" (*R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 (S.C.C.)), or the test for summary judgment, under which a legally sound claim supported by evidence reasonably capable of belief may nonetheless raise "no genuine issue requiring a trial" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.)). While *Hryniak* was admittedly decided in the context of summary judgment motions, which call for an ultimate determination of the merits of a proceeding, that case is relevant at this juncture in order to assess the role of s. 137.1 motions: such motions do not exist in a vacuum and must necessarily be fulfilling a function different than other motions. Although too low a standard risks defeating the purpose of the distinct process for dismissal established by s. 137.1, too high a standard risks promoting a counter-productive culture whereby parties are forced to routinely compile detailed records similar to those expected on summary judgment motions or even trials.

52 It is therefore important to recognize how s. 137.1 motions differ from summary judgment motions, as briefly touched on in the preceding section. Section 137.1 motions are made at an earlier stage in the litigation process, with much more limited evidence and corresponding procedural limitations (see s. 137.2). As a result, a motion judge deciding a s. 137.1 motion should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced. This might also include a preliminary assessment of credibility — indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgment motion, which would be insurmountable at this stage of the proceedings.

53 Finally, in determining the ambit of "substantial merit", the statutory context of s. 137.1 must be borne in mind: even if a lawsuit clears the merits-based hurdle at s. 137.1(4)(a), it remains vulnerable to summary dismissal as a result of the public interest weighing exercise under s. 137.1(4)(b), which provides courts with a robust backstop to protect freedom of expression.

54 In summary, in light of the foregoing analysis, to discharge its burden under s. 137.1(4)(a)(i), the plaintiff must satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success.

**(b) Section 137.1(4)(a)(ii) — No Valid Defence**

55 Section 137.1(4)(a)(ii) requires the responding party (i.e. plaintiff) to satisfy the motion judge that there are "grounds to believe" that the moving party (i.e. defendant) has "no valid defence" in the underlying proceeding.

56 While the burden has admittedly shifted to the plaintiff under s. 137.1(4), it would be unreasonable to encumber the plaintiff at the s. 137.1(4)(a)(ii) stage with the task of anticipating every defence the defendant might raise and then rebutting those defences. Instead, s. 137.1(4)(a)(ii) operates as a *de facto* burden-shifting provision in itself, under which the moving party (i.e. defendant) must *first* put in play the defences it intends to present and the responding party (i.e. plaintiff) must *then* show that there are grounds to believe that those defences are not valid.

57 In other words, once the moving party has put a defence in play, the onus is back on the responding party (i.e. plaintiff) to demonstrate that there are grounds to believe that there is "no valid defence".

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58 The word *no* is absolute, and the corollary is that if there is *any* defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. As with the substantial merit prong, the motion judge here must make a determination of validity on a limited record at an early stage in the litigation process — accordingly, this context should be taken into account in assessing whether a defence is valid. The motion judge must therefore be able to engage in a limited assessment of the evidence in determining the validity of the defence.

59 I interpret the query on *validity* under s. 137.1(4)(a)(ii) as mirroring the query on substantial merit under s. 137.1(4)(a)(i). Fundamentally, both entail an assessment by the motion judge of the strength of the claim or of any defences as part of an overall assessment under s. 137.1(4)(a) of the prospect of success of the underlying claim. Having (i) and (ii) mirror each other to the extent possible makes sense given the fact that a prototypical s. 137.1 motion will be made in relation to a defamation or tort action and that affirmative defences to such an action normally involve well-articulated tests. The legislative drafting that nests both (i) and (ii) under s. 137.1(4)(a) confirms this interpretation. Indeed, in a defamation action, for example, a claim must be made out, and then the burden shifts to the defendant to identify any affirmative defences to the claim. The way that (i) and (ii) are nested under (a) reflects this: the substantial merit of the claim is analyzed and then the validity of any potential defences. For this reason, I interpret (ii) as an extension of (i), and I would analyze both in a similar fashion whereby the motion judge must first determine whether the plaintiff's underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success, and must then determine whether the plaintiff has shown that the defence, or defences, put in play are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. In other words, "substantial merit" and "no valid defence" should be seen as constituent parts of an overall assessment of the prospect of success of the underlying claim.

60 In summary, s. 137.1(4)(a)(ii) operates, in effect, as a burden-shifting provision in itself: the moving party (i.e. defendant) must put potential defences in play, and the responding party (i.e. plaintiff) must show that *none* of those defences are valid in order to meet its burden. Mirroring the "substantial merit" prong, under which the plaintiff must show that there are grounds to believe that its claim has a real prospect of success, the "no valid defence" prong requires the plaintiff, who bears the statutory burden, to show that there are grounds to believe that the defences have no real prospect of success. This makes sense, since s. 137.1(4)(a) as a whole is fundamentally concerned with the strength of the underlying proceeding.

*(2) Section 137.1(4)(b) — Public Interest Hurdle*

61 At last, I arrive at what is the crux of the analysis. Section 137.1(4)(b) provides that, to avoid having its proceeding dismissed, the responding party must satisfy the motion judge that

> the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

62 As I have often mentioned in these reasons, this provision is the core of s. 137.1. The purpose of s. 137.1 is to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. While s. 137.1(4)(a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence in order to ensure that the proceeding is meritorious, s. 137.1(4)(b) open-endedly engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications. In this way, s. 137.1(4)(b) is the key portion of the s. 137.1 analysis, as it serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue.

63 Statutory interpretation is a contextual exercise that requires reading a provision with and in light of other provisions: accordingly, if the bar is set too high at s. 137.1(4)(a)(i) or (ii), a motion judge will never reach s. 137.1(4)(b) — this cannot possibly be what the legislature contemplated given the legislative history and intent behind s. 137.1. The legislature repeatedly emphasized proportionality as the paramount consideration in determining whether a lawsuit should be dismissed. Weighing the

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public interest in freedom of expression and public participation against the public interest in vindicating a meritorious claim is a theme that runs through the entire legislative history, and this informs how s. 137.1 should be judicially understood.

64 The import of s. 137.1(4)(b) is made abundantly evident by looking at the context in which s. 137.1 was enacted. For example, the APR urged that "[t]here should be no special safeguards to prevent abuse. *The balancing of interests at the heart* of the remedy will allow appropriate disposition of cases" (Summary of Recommendations, para. 20 (emphasis added)). This goal of achieving balance was echoed during the readings of the bill in the Legislative Assembly of Ontario. At second reading, the Attorney General of Ontario stated the following:

> [TRANSLATION] Balance has been a recurring theme: the need to strike a balance that will dismiss abusive lawsuits while permitting legitimate actions. I can assure you that we have heard everything that has been said to us. Balance is a key feature of this bill.
>
> (Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur))

The theme of balance was raised frequently throughout the debates by multiple members across party lines (Legislative Assembly of Ontario (2014), at pp. 1972-74 (Mr. Lorenzo Berardinetti); p. 1974 (Mr. Chris Ballard); p. 1975 (Hon. Madeleine Meilleur)). (See also Legislative Assembly of Ontario (2015), at p. 6017 (Hon. Madeleine Meilleur); p. 6021 (Mr. Lorenzo Berardinetti); pp. 6025-27 (Mr. Jagmeet Singh).)

65 I pause here to explain my use of the expression "weighing exercise" and to briefly address whether there is a substantive difference between a *weighing* exercise and a *balancing* exercise, and which exercise s. 137.1(4)(b) requires. This concern was raised by the British Columbia Civil Liberties Association as an intervener before this Court.

66 Here, the provision *expressly* requires that one consideration "*outweig[h]*" the other. I am of the view that this is substantively different than if the statute had required that the two considerations be *balanced* against one another. The difference can be illustrated by the following quantification of weighing and balancing: where one factor must *outweigh* the other, the ratio between the two must be at least 51/49; in contrast, where one factor must be *balanced* against the other, a ratio of 50/50, or even 45/55, might be sufficient for a judge to rule in favour of the former. The word "outweighs" necessarily precludes such a conclusion.

67 While I do not purport to decide for all statutes the definitive difference between weighing and balancing, the fact that the statute *here* requires that one consideration outweigh the other, and not simply that the considerations be balanced against one another, should be relevant to a motion judge's consideration of whether the plaintiff has satisfied its burden under s. 137.1(4)(b).

**(a) Harm Analysis**

68 Harm is principally important in order for the plaintiff to meet its burden under s. 137.1(4)(b). The statutory provision expressly contemplates the *harm* suffered by the responding party *as a result* of the moving party's expression being weighed against the public interest in protecting that expression. As a prerequisite to the weighing exercise, the statutory language therefore requires two showings: (i) the existence of harm and (ii) causation — the harm was suffered *as a result* of the moving party's expression.

69 Either monetary harm or non-monetary harm can be relevant to demonstrating (i) above. I am in agreement with the Attorney General of Ontario at the time the legislation was debated, who recognized at second reading "that reputation is one of the most valuable assets a person or a business can possess" (Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur)). Accordingly, harm is not limited to monetary harm, and neither type of harm is more important than the other. Nor is harm synonymous with the damages alleged. The text of the provision does not depend on a particular *kind* of harm, but expressly refers only to *harm* in general.

70 Further, since s. 137.1(4)(b) is, in effect, a weighing exercise, there is no threshold requirement for the harm to be sufficiently worthy of consideration. The magnitude of the harm becomes relevant when the motion judge must determine

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whether it is "sufficiently serious" that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. In other words, the magnitude of the harm simply adds weight to one side of the weighing exercise.

71 This does not mean that the harm pleaded by the plaintiff should be taken at face value or that bald assertions are sufficient. But I would not go so far as to require a fully developed damages brief, nor would I require that the harm be monetized, as the question here relates to the *existence* of harm, not its quantification. The statutory language employed in s. 137.1(4)(b) is "harm *likely* to", which modifies both "be" and "have been"; this indicates that the plaintiff need not *prove* harm or causation, but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link. The evidentiary burden might depend on the nature of the substantive law that is applied, although it must be borne in mind that a s. 137.1 motion is not an adjudication on the merits: for example, in a defamation action, harm (and therefore general damages) is presumed, but the plaintiff would still have to support a claim for special damages. Importantly, though, no definitive determination of harm or causation is required.

72 I add that, naturally, evidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm (C.A. reasons, at para. 92). Causation is not, however, an all-or-nothing proposition, in the sense that while the causal chain between the defendant's expression and the harm suffered by the plaintiff may be weaker for *some* elements of the harm suffered, it might nonetheless be strong for *other* elements. This is a case-by-case inquiry undertaken by the motion judge.

**(b) Weighing of the Public Interest**

73 Once harm has been established and shown to be causally related to the expression, s. 137.1(4)(b) requires that the harm and corresponding public interest in permitting the proceeding to continue be weighed *against* the public interest in protecting the expression. Therefore, as under s. 137.1(3), public interest becomes critical to the analysis.

74 However, the term "public interest" is used differently in s. 137.1(4)(b) than in s. 137.1(3). Under s. 137.1(3), the query is concerned with whether the expression relates to a *matter* of public interest. The assessment is not qualitative — i.e. it does not matter whether the expression helps or hampers the public interest. Under s. 137.1(4)(b), in contrast, the legislature expressly makes the public interest relevant to specific goals: permitting the proceeding to continue and protecting the impugned expression. Therefore, not just *any matter* of public interest will be relevant. Instead, the *quality* of the expression, and the *motivation* behind it, are relevant here.

75 Indeed, "a statement that contains deliberate falsehoods, [or] gratuitous personal attacks ... may still be an expression that relates to a matter of public interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, [or] vitriol" (C.A. reasons, at para. 94, citing *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380 (Ont. S.C.J.), at paras. 82-84 and 96-103, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568 (Ont. C.A.)).

76 While judges should be wary of the inquiry descending into a moralistic taste test, this Court recognized as early as *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), that not all expression is created equal: "While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b)" (p. 760).

77 The weighing exercise under s. 137.1(4)(b) can thus be informed by this Court's s. 2(b) Canadian Charter of Rights and Freedoms jurisprudence, which grounds the level of protection afforded to expression in the nature of the expression (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 (S.C.C.), at para. 181). For example, the inquiry might look to the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing (*Sharpe*, at para. 182; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at para. 24). The closer the expression is to any of these core values, the greater the public interest in protecting it.

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78 I outline below some further factors that may bear on the public interest weighing exercise under s. 137.1(4)(b). I note that in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60 (Ont. C.A.), at para. 99, Doherty J.A. made reference to recognized "indicia of a SLAPP suit" (emphasis omitted). He recognized four indicia in particular: (1) "a history of the plaintiff using litigation or the threat of litigation to silence critics"; (2) "a financial or power imbalance that strongly favours the plaintiff"; (3) "a punitive or retributory purpose animating the plaintiff's bringing of the claim"; and (4) "minimal or nominal damages suffered by the plaintiff" (para. 99). Doherty J.A. found that where these indicia are present, the weighing exercise favours granting the s. 137.1 motion and dismissing the underlying proceeding. The Court of Appeal for Ontario has since applied these indicia in a number of cases (see, e.g., *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211 (Ont. C.A.)).

79 I am of the view that these four indicia may bear on the analysis *only to the extent* that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature. This is because the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP. Therefore, for this reason, the only factors that might be relevant in guiding that weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

80 Accordingly, additional factors may also prove useful. For example, the following factors, in no particular order of importance, may be relevant for the motion judge to consider: the importance of the expression, the history of litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the Charter or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise.

81 Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy.

82 In conclusion, under s. 137.1(4)(b), the burden is on the plaintiff — i.e. the responding party — to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is *a result* of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a s. 137.1 motion.

## IV. Application to This Case

83 In the following section, I apply the s. 137.1 framework to the facts of this case. I provide first an overview of the facts and procedural history, and subsequently apply the s. 137.1 framework to those facts. I ultimately reach the conclusion that Pointes Protection's s. 137.1 motion should be granted and consequently that 170 Ontario's underlying action should be dismissed.

### *A. Factual Overview*

84 The appellant, 170 Ontario, wanted to develop a 91-lot subdivision in the city of Sault Ste. Marie. In order to do so, it was necessary for 170 Ontario to obtain the approval of both the Sault Ste. Marie Region Conservation Authority ("SSMRCA") and the Sault Ste. Marie City Council ("City Council").

85 Pointes Protection Association and six members of its executive committee are the respondents before this Court. Pointes Protection Association is a not-for-profit corporation created to provide a coordinated response to 170 Ontario's development

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proposal on behalf of affected residents. Pointes Protection opposed the proposed development, particularly on environmental grounds.

86 170 Ontario successfully obtained the SSMRCA's approval, which Pointes Protection then contested by bringing an application for judicial review of the SSMRCA's decision. While that application was pending, 170 Ontario sought approval from the City Council. Its application to the City Council was rejected, and it appealed to the Ontario Municipal Board ("OMB), which granted Pointes Protection standing to participate.

87 This context is important, because while Pointes Protection's application for judicial review of the SSMRCA's decision and 170 Ontario's appeal to the OMB were both pending, the parties settled the judicial review proceeding by way of minutes of settlement ("Agreement").

88 Under the terms of the Agreement, Pointes Protection's judicial review application was to be dismissed on consent without costs. Crucial to this appeal, however, is the fact that the Agreement also imposed limitations on Pointes Protection's future conduct. In particular, arts. 4 and 6 of the Agreement provided as follows:

> 4) The Pointes Protection Association (hereinafter the "PPA") and its executive committee members comprised of Peter Gagnon, Lou Sim[i]onetti, Pat Gratton and Gay Gartshore together with Rick Gartshore, and Glen Stortini (the named individuals hereinafter referred to collectively as the "PPA members") undertake and agree not to take any further court proceeding seeking the same or similar relief as set out in the within Notice of Application;
>
> . . . . .
>
> 6) The PPA and the PPA members undertake and agree that in any hearing or proceeding before the Ontario Municipal Board (OMB) or any other subsequent legal proceeding that they will not advance the position that the Resolutions passed by the SSMRCA on December 13th 2012 in regards to the Pointe Estates Development under subsection 3(1) of Ontario Reg. 176/06 are illegal or invalid or contrary to the provisions of the Conservation Authorities Act R.S.O. 1990 c. C.27 and Ontario Reg. 176/06 being the Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses or that the SSMRCA exceeded its jurisdiction by passing the above noted Resolutions with no reasonable evidence to support its decision and considered factors extraneous to those set out in subsection 3(1) of Ont. Reg. 176/06 ....
>
> [Emphasis added.]
>
> (A.R., vol. II, at pp. 196-97)

89 At the OMB hearing of 170 Ontario's appeal from the City Council's refusal, Peter Gagnon, the president of Pointes Protection Association and a signatory of the Agreement, testified. This testimony is the root of the breach of contract action later initiated by 170 Ontario against Pointes Protection, which gives rise to this appeal. Mr. Gagnon testified that 170 Ontario's proposed development would result in a loss of wetland area and in environmental damage to the region. Though 170 Ontario objected at the time to Mr. Gagnon's testimony, the OMB Member hearing the appeal permitted him to give evidence on the wetland issue insofar as it was relevant to the planning merits question and not to the conservation question, which was within the purview of the SSMRCA. Following the hearing, the OMB eventually dismissed 170 Ontario's appeal and thereby upheld the City Council's refusal of its development plan. 170 Ontario has accordingly not moved forward with that plan.

90 What gives rise to this appeal is what followed the OMB's dismissal of 170 Ontario's appeal: 170 Ontario initiated a breach of contract action against Pointes Protection. In its statement of claim, 170 Ontario took the position that Mr. Gagnon's testimony at the OMB hearing on behalf of Pointes Protection breached the Agreement because (1) the defendants sought the same relief as in their judicial review application, (2) the defendants gave evidence regarding the wetland issue, which had been "[i]mplicit[ly]" (A.R., vol. II, at p. 33) settled by the Agreement, and (3) the defendants advanced the position that the SSMRCA approval was contrary to the Conservation Authorities Act, R.S.O. 1990, c. C.27. 170 Ontario claimed $6 million in damages, that is, $5 million in general damages and $1 million in punitive and aggravated damages.

91 Pointes Protection, for its part, did not file a statement of defence, but instead brought a motion under s. 137.1 of the CJA to have the action dismissed.

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### *B. Procedural History*

*(1) Ontario Superior Court (Gareau J.), 2016 ONSC 2884, 84 C.P.C. (7th) 298 (Ont. S.C.J.)*

92 The motion judge, Gareau J., dismissed Pointes Protection's s. 137.1 motion and allowed 170 Ontario's action to proceed. First, on the threshold burden, he concluded that Mr. Gagnon's testimony concerning the potential environmental impact of the proposed development constituted an expression relating to a matter of public interest as required by s. 137.1(3) (paras. 29-40). However, turning to the merits-based and public interest hurdles in s. 137.1(4)(a) and (b), Gareau J. found that 170 Ontario had met its burden (paras. 41-56).

*(2) Court of Appeal for Ontario (Doherty, Brown and Huscroft JJ.A.)*

93 Pointes Protection's appeal was heard together with five other appeals [3] before a single panel of the Court of Appeal for Ontario. This was in light of the fact that the Court of Appeal had not previously considered s. 137.1 of the CJA and that each of the appeals involved the proper interpretation of the s. 137.1 framework. Therefore, while each of the appeals raised discrete issues, the Court of Appeal's reasons in Pointes Protection's appeal were controlling as regards the appropriate analysis of the s. 137.1 framework.

3 Those appeals were *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1 (Ont. C.A.); *Platnick*; Veneruzzo v. Storey2018 ONCA 68823 C.P.C. (8th) 352(Ont. C.A.); *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54 (Ont. C.A.); and *Able Translations Ltd.*.

94 Doherty J.A., writing for a unanimous court, allowed Pointes Protection's appeal, granted its s. 137.1 motion, and dismissed 170 Ontario's lawsuit (para. 124). First, on the threshold burden, he noted that 170 Ontario was not challenging Gareau J.'s finding that Mr. Gagnon's testimony constituted an expression relating to a matter of public interest under s. 137.1(3), and therefore it was not in dispute that Pointes Protection had met its burden on this prong.

95 Doherty J.A. disagreed with the motion judge's findings on s. 137.1(4)(a) and (b). With regard to substantial merit, Doherty J.A. found that the motion judge had erred by not examining the record and considering the relevant principles of contractual interpretation. Turning to substantial merit himself, he held that 170 Ontario's action lacked substantial merit (paras. 113-17). Acknowledging that this alone would be sufficient to dismiss the action, he nonetheless analyzed the other prongs of s. 137.1(4) for completeness (para. 117). He quickly disposed of the motion judge's finding that there was no valid defence by pointing out that the judge had "wrongly put the onus on Pointes [Protection]" (para. 119). Finally, on the public interest hurdle, Doherty J.A. identified no harm to 170 Ontario aside from interference with its reasonable expectation of finality in the litigation, an expectation that was dependent entirely on the correctness of its interpretation of the Agreement (paras. 120-21). Therefore, Doherty J.A. found that 170 Ontario could not meet its burden on any of the s. 137.1(4) prongs.

96 The Court of Appeal for Ontario accordingly allowed Pointes Protection's appeal, set aside the motion judge's order, and entered an order dismissing 170 Ontario's action (para. 124).

### *C. Application of the Section 137.1 Framework*

97 Applying the framework set out in Part III of these reasons, I ultimately reach the same conclusion as the Court of Appeal: 170 Ontario's action lacks substantial merit, and the harm likely to be or have been suffered by 170 Ontario and the corresponding public interest in allowing the proceeding to continue do not outweigh the public interest in protecting Pointes Protection's expression. I review the findings of both the motion judge and the Court of Appeal on a standard of correctness because — as the reasons outlined in Part III made clear — their interpretation of the s. 137.1 framework raises questions of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 8 and 36; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688 (S.C.C.), at para. 78).

*(1) Section 137.1(3) — Threshold Burden*

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98 Mr. Gagnon's testimony constitutes an expression that relates to a matter of public interest, and 170 Ontario's breach of contract action arises from that expression. Therefore, Pointes Protection meets its threshold burden under s. 137.1(3) with little difficulty.

99 First, Mr. Gagnon's testimony is captured by the statutory definition of expression, as it is a verbal communication made publicly (s. 137.1(2)).

100 Second, the materials before the motion judge support a finding that the expression relates to a matter of public interest. Mr. Gagnon's testimony focused on the environmental impact of a proposed private development. A large group of residents and voters was deeply invested in the ecological consequences of the Pointe Estates development. There was extensive evidence in the record concerning the broad local media coverage of the development proposal itself, as well as the proceedings of the SSMRCA, the City Council, and the OMB. This was a matter that affected "people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others" (per Lord Denning in *London Artists Ltd. v. Littler* (1968), [1969] 2 All E.R. 193 (Eng. C.A.), at p. 198, cited in Torstar, at para. 104).

101 Accordingly, I am in agreement with both the motion judge and the Court of Appeal that Mr. Gagnon's testimony at the OMB constitutes an expression on a matter of public interest.

102 I also agree with the courts below that the proceeding brought by 170 Ontario "arises from" that expression. It is a breach of contract action premised on an alleged breach of the Agreement resulting from Mr. Gagnon's testimony at the OMB. There is thus a clear nexus between Mr. Gagnon's expression and the underlying proceeding.

103 Therefore, I am satisfied on a balance of probabilities that 170 Ontario's breach of contract action arises from an expression that relates to a matter of public interest.

*(2) Section 137.1(4)(a) — Merits-Based Hurdle*

104 Since Pointes Protection has met its onus on the threshold question, the burden now shifts to 170 Ontario to show that there are grounds to believe that its breach of contract action has substantial merit and that Pointes Protection has no valid defence.

105 I agree with the Court of Appeal's conclusion that 170 Ontario's action lacks substantial merit. 170 Ontario's claim is based solely on a breach of the Agreement. Accordingly, whether or not the action has "substantial merit" rests solely on the interpretation of the Agreement, which is fundamentally a contract. Applying the customary principles of contractual interpretation, which the motion judge failed to do, I find that 170 Ontario's action is not legally tenable and supported by evidence that is reasonably capable of belief such that its claim can be said to have a real prospect of success; it thus does not have substantial merit.

106 It is well established that the interpretation of a written contractual provision must be grounded in the text and that the provision must be read in light of the entire contract. The surrounding circumstances can be relied on in the interpretive process, but not to the point that they distort the explicit language of the agreement (*Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at para. 57).

107 In this case, the interpretation advanced by 170 Ontario does not flow from the plain language of the Agreement or from the factual matrix surrounding it. The reading urged by 170 Ontario would distort the ordinary meaning of the words in a manner that exceeds the bounds of appropriate judicial intervention in matters of contractual interpretation.

108 The language of the Agreement is clear on its face: it restricts Pointes Protection's expression only as it relates to the SSMRCA's decision and to judicial review of that decision. 170 Ontario's argument is tantamount to asking this Court to read in *ex post* a term that does not exist in the Agreement. The Agreement expressly bars Pointes Protection from "advanc[ing] the position" that the SSMRCA's decision was "illegal or invalid or contrary to" the *Conservation Authorities Act* (A.R., vol. II, at p. 197). The Agreement also prohibits Pointes Protection from "seeking the same or similar relief as set out in the within Notice of Application", in which it was alleged that the SSMRCA had erred in the course of its decision-making process (p. 196). The

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Agreement is expressly limited to settling and foreclosing the foregoing. There is *nothing* in its plain language which could possibly foreclose Pointes Protection from advancing an argument, as here, that does not pertain to the SSMRCA's decision. That argument might admittedly depend on the same evidence, but there is nothing in the Agreement that suggests that the evidentiary foundation of Pointes Protection's challenge to the SSMRCA's decision is precluded from being used in a proceeding unrelated to that decision.

109 170 Ontario's submission that any argument raised with the SSMRCA is covered by an *implied* term of the Agreement stretches the Agreement beyond any reasonable parameter. Pointes Protection specifically sought to preserve its right to participate in the OMB proceeding during the negotiations leading to the Agreement (A.R., vol. II, at pp. 192-93). Common sense indicates that its purpose in participating in the OMB proceeding would have been to advance its ultimate position against 170 Ontario's proposed land development. It is unclear what Pointes Protection would have raised at the OMB hearing other than the issues that were its primary concern: wetland destruction, flooding, drainage, and other environmental impacts. The Agreement expressly settled the application for judicial review of the SSMRCA's decision and, correspondingly, prevented any future use of arguments to the effect that the SSMRCA had erred in that decision; the Agreement did not contemplate or preclude Pointes Protection's advancement of its concerns generally.

110 In my view, Doherty J.A.'s characterization of the situation at para. 114 of his reasons was apt and correct:

> 170 Ontario's reliance on an "implicit" term in the agreement to preclude the defendants from raising the wetlands issue in testimony before the OMB is not, in my view, an interpretation of the agreement that flows reasonably from the language or the factual context of the agreement. When the parties entered into the agreement, Pointes had standing at the OMB and 170 Ontario knew that the defendants would oppose the development at the OMB. Nothing in the agreement touched on the defendants' participation in the OMB proceedings. Specifically, nothing in the agreement suggested that Pointes could not oppose 170 Ontario's development at the OMB. 170 Ontario must be taken to have known full well the range of factual issues that could be raised on its appeal before the OMB. Those issues included some that had been considered, albeit in a different regulatory context, by the SSMRCA.
>
> [Emphasis added.]

111 Accordingly, 170 Ontario's breach of contract action cannot be seen as legally tenable and supported by evidence that is reasonably capable of belief such that its claim can be said to have a real prospect of success.

112 I therefore reach the conclusion under s. 137.1(4)(a)(i) that there is no substantial merit to 170 Ontario's action. Given this conclusion, it is not necessary to consider s. 137.1(4)(a)(ii) and the defences raised by Pointes Protection (absolute privilege and estoppel). This is because 170 Ontario's failure to satisfy s. 137.1(4)(a)(i) is sufficient to say that it has failed to satisfy s. 137.1(4)(a) as a whole. In any case, the conclusion that 170 Ontario's interpretation of the Agreement has no substantial merit inevitably leads to the conclusion that it would not be able to show that Pointes Protection's interpretation of the Agreement is not valid (C.A. reasons, at para. 119).

*(3) Section 137.1(4)(b) — Public Interest Hurdle*

113 Even if there were grounds to believe that 170 Ontario's action has substantial merit, and setting aside the issue of whether there are grounds to believe that Pointes Protection has no valid defence available, I would nonetheless conclude independently that the action should be dismissed because the harm, if any, to 170 Ontario resulting from the expression and the corresponding public interest in permitting the proceeding to continue do not outweigh the public interest in protecting Pointes Protection's expression in this particular case.

**(a) Harm Allegedly Suffered and Public Interest in Permitting 170 Ontario's Action to Continue**

114 170 Ontario claims two sources of harm that arise from Mr. Gagnon's testimony at the OMB. The first harm alleged is financial. Not only has 170 Ontario claimed $6 million in damages, but it also points out that it gave up its right to costs on

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the security for costs motion when it settled the judicial review application. The second harm is non-pecuniary and rests on the importance of courts fostering the principle of finality of litigation through contractual mechanisms, such as the Agreement here.

115 Turning first to the financial damages alleged to have been suffered, I note that 170 Ontario has not provided any theory concerning the nature or quantum of those damages. I acknowledge that a fully developed damages brief is not necessary on a s. 137.1 motion. I also acknowledge that a motion judge is not required to make definite findings of fact on issues of causation. However, in this case, there is simply a dearth of evidence on the motion linking Mr. Gagnon's testimony to any of the undefined damages that are claimed.

116 Assuming quantifiable and demonstrable harm, 170 Ontario's argument presupposes that 170 Ontario suffered a loss as a result of Mr. Gagnon's testimony at the OMB (i.e. the expression). However, it is nearly impossible to conjecture that Mr. Gagnon's testimony was the reason why the OMB upheld the City Council's refusal of 170 Ontario's development application. Indeed, Mr. Gagnon was only one of six witnesses who testified in opposition to the development (A.R., vol. III, at p. 31). Moreover, the OMB identified several grounds for dismissing the appeal in its entirety: the development application did not have appropriate regard for matters of provincial interest, was not consistent with the Provincial Policy statement, was contrary to the Official Plan of the City of Sault Ste. Marie, did not have appropriate regard for the provisions of s. 51(24) of the Planning Act, R.S.O. 1990, c. P.13, and the development application in its entirety did "not represent good planning" (A.R., vol. III, at pp. 13-14). Though the OMB explicitly accepted Mr. Gagnon's evidence, that evidence was merely one of many contributing factors in its ultimate dismissal of 170 Ontario's appeal, and may not have been a factor at all in the constellation that comprise of why the City Council refused 170 Ontario's development plan in the first place.

117 To be absolutely clear, the preceding paragraph should not be taken to be an affirmation of the reasonableness of the OMB's decision, which is not before this Court and in respect of which leave to appeal to the Divisional Court was denied (Avery v. Pointes Protection Assn.2016 ONSC 646360 M.P.L.R. (5th) 70(Ont. Div. Ct.)). Rather, it is simply meant to demonstrate that 170 Ontario cannot convincingly show that any harm it might have suffered as a result of Mr. Gagnon's expression was in fact sufficient to establish any significant public interest in allowing its breach of contract action to proceed.

118 The second harm alleged by 170 Ontario has to do with finality in litigation, which is undoubtedly an important value. However, the value of finality in litigation is relevant at the s. 137.1(4)(b) stage only to the extent that it relates to harm suffered by the plaintiff, not harm in general. Here, I am willing to accept that this is the case, since 170 Ontario alleges that it is being deprived of a benefit for which it bargained in settling the judicial review proceeding with Pointes Protection. Nonetheless, in my view, finality in litigation is not compromised by dismissing 170 Ontario's breach of contract action: the Agreement continues to be binding between the parties, and Pointes Protection continues to be foreclosed from advancing the position that the SSMRCA's decision was invalid or illegal. I am in agreement with the Court of Appeal that "170 Ontario's reasonable expectation of finality is dependent entirely on the correctness of its interpretation of the agreement" (para. 120). As I discussed above, the Agreement cannot reasonably be read as precluding Mr. Gagnon's testimony before the OMB. Therefore, finality in litigation is not squarely engaged and cannot be given any significant weight at this stage.

119 In summary, in light of the foregoing, I must conclude that the harm likely to be or have been suffered by 170 Ontario as a result of Mr. Gagnon's expression lies at the very low end of the spectrum and, correspondingly, so too does the public interest in allowing the proceeding to continue.

**(b) Public Interest in Protecting Pointes Protection's Expression**

120 The public interest in protecting Mr. Gagnon's expression is significant for two reasons. First, the public has a strong interest in the subject matter of the expression, which relates to the ecological impact and environmental degradation associated with a proposed large-scale development. Second, the form of the expression, namely testimony before an adjudicative tribunal, militates in favour of protecting it.

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121 First, with respect to the subject matter of the impugned expression in this case, it must be borne in mind that Mr. Gagnon was providing evidence regarding a matter of local and ecological significance. The express purpose of s. 137.1 is to "encourage" and "promote" public participation in debates on matters which invite this kind of public attention.

122 Further, the OMB is required to carry out its obligations under the *Planning Act* with regard to "matters of provincial interest", which are defined as including the protection of ecological systems, the conservation of features with significant interest, and the orderly development of safe and healthy communities (s. 2). These "matters of provincial interest" intersect to a large degree with the public interest, and the opportunity to express an opinion on these issues during what is a public deliberative process ought to be encouraged.

123 Second, with respect to the form of expression, courts have closely guarded the principle of participation in the process of tribunal decision making. Where a claim is founded on evidence to be provided before a tribunal, there is a risk that witnesses will be deterred from participating in the adjudicative process because of a fear of legal retaliation. For this reason, courts recognize, for example, an absolute privilege that attaches to testimony given "in the ordinary course of any proceedings", regardless of whether it is relevant or irrelevant, malicious or not (*Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38 (Ont. C.A.), at para. 34, citing *Halsbury's Laws of England* (4th ed. 1997), vol. 28, at para. 97). Indeed, here, reducing the "risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action" is an express statutory purpose set out in s. 137.1(1).

124 Strengthening the integrity of the justice system by encouraging truthful and open testimony is inextricably linked to the freedom of participants to express themselves in the forums concerned without fear of retribution. I accordingly consider that the public interest in protecting Pointes Protection's expression falls at the higher end of the spectrum.

**(c) Weighing of the Public Interest**

125 As I have discussed, the harm likely to be or have been suffered by 170 Ontario lies at the very low end of the spectrum, and so too then does the public interest in allowing the proceeding to continue. On the other hand, the public interest in Pointes Protection's expression is at the higher end of the spectrum.

126 It is thus clear that 170 Ontario cannot establish on a balance of probabilities that the harm suffered as a result of Pointes Protection's expression is sufficiently serious that the public interest in permitting the proceeding to continue *outweighs* the public interest in protecting that expression.

*(4) Conclusion on the Application of the Framework*

127 For the foregoing reasons, I would grant Pointes Protection's s. 137.1 motion on either of the independent grounds that 170 Ontario's action lacks substantial merit and that 170 Ontario is unable to demonstrate that the weighing of the public interest favours permitting the proceeding to continue. Accordingly, the Court of Appeal for Ontario was correct in dismissing 170 Ontario's underlying breach of contract action.

**V. Conclusion**

128 The appeal is dismissed.

129 With regard to costs, the legislature expressly contemplated a costs regime for s. 137.1 motions. Indeed, s. 137.1(7) sets out an award of costs as the default rule if a s. 137.1 motion is granted, unless a judge determines that "such an award is not appropriate in the circumstances." That would not be the case here. I would therefore simply award party-and-party costs to the respondents, as per this Court's ordinary practice.

*Appeal dismissed.*

*Pourvoi rejeté.*

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**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Kinley Estate v. Howatt | 2021 NSSC 119, 2021 CarswellNS 236, 333 A.C.W.S. (3d) 671 | (N.S. S.C., Apr 9, 2021)

2019 SCC 65, 2019 CSC 65
Supreme Court of Canada

Canada (Minister of Citizenship and Immigration) v. Vavilov

2019 CarswellNat 7883, 2019 CarswellNat 7884, 2019 SCC 65, 2019 CSC 65, [2019] S.C.J. No. 65, 312 A.C.W.S. (3d) 460, 441 D.L.R. (4th) 1, 59 Admin. L.R. (6th) 1, 69 Imm. L.R. (4th) 1, EYB 2019-335761

# Minister of Citizenship and Immigration (Appellant) and Alexander Vavilov (Respondent) and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.

Heard: December 4-6, 2018
Judgment: December 19, 2019
Docket: 37748

Proceedings: affirming *Vavilov v. Canada (Citizenship and Immigration)* (2017), 2017 CAF 132, 2017 CarswellNat 9490, 2017 CarswellNat 2791, 2017 FCA 132, [2018] 3 F.C.R. 75, 30 Admin. L.R. (6th) 1, [2017] F.C.J. No. 638, 52 Imm. L.R. (4th) 1, David Stratas J.A., Mary J.L. Gleason J.A., Wyman W. Webb J.A. (F.C.A.); reversing *Vavilov v. Canada (Minister of Citizenship and Immigration)* (2015), [2016] F.C.R. 39, 38 Imm. L.R. (4th) 110, 2015 FC 960, 2015 CarswellNat 3740, 2015 CarswellNat 4747, 2015 CF 960, B. Richard Bell J. (F.C.)

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Subject: Civil Practice and Procedure; Constitutional; Immigration; Public
**Related Abridgment Classifications**
Administrative law
III Standard of review
III.2 Reasonableness
III.2.c Miscellaneous
Immigration and citizenship
VII Citizenship
VII.2 Citizenship by birth
VII.2.a General principles
**Headnote**
Administrative law --- Standard of review — Reasonableness — Miscellaneous
Applicant's parents were foreign agents who entered Canada and assumed identities of deceased Canadians — Parents returned to Russia from United States (US), and applicant's passport and US citizenship were revoked — Applicant amended birth certificate to parents' true identities to obtain Certificate of Canadian Citizenship — Registrar cancelled certificate as parents were not lawfully Canadian citizens or permanent residents and were employees/representatives of foreign government under s. 3(2)(a) of Citizenship Act — Applicant's application for judicial review was dismissed on basis that anyone who moved to Canada with goal of establishing life to further foreign intelligence operation was in service of, or employee/representative of,

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foreign government — Applicant's appeal to Federal Court was dismissed and appeal to Federal Court of Appeal was allowed — Minister of Citizenship and Immigration appealed — Appeal dismissed — New course was established for reviewing merits of administrative determinations — Reasonableness is presumptive standard for review and can be rebutted where legislature intends different standard to apply, or where rule of law requires it — Rationales including specialized expertise may be reasons for legislature to delegate decision-making authority, but very fact that legislature opted to delegate authority was basis for default position of reasonableness review, and expertise was no longer relevant factor, as it had been using contextual review approach — Where legislature has provided for appeal from administrative decision to court, there is departure from reasonableness standard and court hearing appeal should apply appellate standards of review — Rule of law requires correctness standard for constitutional questions, general questions of law of central importance to legal system as whole, and questions regarding jurisdictional boundaries between administrative bodies — "Matters of true jurisdiction" is not distinct category attracting correctness review — Focus of reasonableness review must be on decision made, including both reasoning process and outcome — Reasonable decision is justified, transparent and intelligible, and is justified in relation to relevant legal and factual constraints.

Immigration and citizenship --- Citizenship — Citizenship by birth — General principles

Applicant's parents were foreign agents who entered Canada and assumed identities of deceased Canadians — Parents returned to Russia from United States (US) and applicant's passport and US citizenship were revoked — Applicant amended birth certificate to parents' true identities to obtain Certificate of Canadian Citizenship — Registrar cancelled certificate as parents were not lawfully Canadian citizens or permanent residents and were employees/representatives of foreign government under s. 3(2)(a) of Citizenship Act — Applicant's application for judicial review was dismissed on basis that anyone who moved to Canada with goal of establishing life to further foreign intelligence operation was in service of, or employee/representative of, foreign government — Applicant's appeal to Federal Court was dismissed and appeal to Federal Court of Appeal was allowed — Minister of Citizenship and Immigration appealed — Appeal dismissed — Standard of review was reasonableness — Registrar's determination was not reasonable in finding that applicant's parents had been other representatives or employees in Canada of foreign government within meaning of s. 3(2)(a) of Act — Registrar failed to justify her interpretation in light of constraints imposed by s. 3 of Act considered as whole, and by other legislation and international treaties that inform purpose of s. 3, by jurisprudence on interpretation of s. 3(2)(a), and by potential consequences of her interpretation — Section 3(2)(a) of Act was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities — Officials responsible for files were aware that s. 3(2)(a) of Act was informed by principle that individuals subject to exception were not obliged to law of Canada, and were also aware that interpretation they had adopted was novel one — Registrar's determination failed to provide rationale for expanded interpretation of Act — Registrar's determination had same effect as revocation of citizenship Citizenship Act, R.S.C. 1985, c. C-29, s 3(2)(a).

Droit administratif --- Norme de contrôle — Caractère raisonnable — Divers

Parents du requérant étaient des agents étrangers qui sont entrés au Canada et ont usurpé l'identité de deux Canadiens décédés — Parents sont retournés en Russie à partir des États-Unis et le passeport ainsi que la citoyenneté américaine du requérant ont été révoqués — Requérant a modifié son certificat de naissance et utilisé la véritable identité de ses parents dans le but d'obtenir un certificat de citoyenneté canadienne — Greffière a annulé le certificat au motif que les parents n'étaient pas légalement citoyens canadiens ou résidents permanents, mais étaient des représentants ou employés au service d'un gouvernement étranger pour les besoins de l'art. 3(2)a) de la Loi sur la citoyenneté — Demande du requérant en contrôle judiciaire a été rejetée au motif que quiconque déménage au Canada avec l'objectif explicite de s'établir afin de poursuivre une opération de renseignements étrangère le faisait au service d'un gouvernement étranger ou en tant que représentant ou employé au service d'un tel gouvernement — Appel du requérant à la Cour fédérale a été rejeté et l'appel à la Cour d'appel fédérale a été accueilli — Ministre de la Citoyenneté et de l'Immigration a formé un pourvoi — Pourvoi rejeté — Nouvelle voie a été tracée pour contrôler une décision administrative au fond — Norme de la décision raisonnable est la norme de contrôle présumée et cette présomption peut être réfutée si l'intention du législateur est qu'une autre norme de contrôle s'applique ou dans les cas où la primauté du droit l'exige — Si l'expertise spécialisée et d'autres considérations peuvent justifier qu'une législature prévoit la délégation du pouvoir décisionnel, le simple fait que la législature ait choisi de prévoir une délégation de pouvoir constituait la base d'une approche par défaut justifiant l'application de la norme de la décision raisonnable et l'expertise n'était plus un facteur pertinent, en ce qu'elle avait retenu l'approche consistant à procéder à un contrôle contextuel — Lorsque la législature a prévu que l'appel à l'encontre d'une décision rendue en matière administrative doit être interjeté devant un tribunal

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en particulier, on s'écarte de la norme de la décision raisonnable et le tribunal saisi de l'appel devrait appliquer les normes de contrôle applicables en appel — Primauté du droit requiert que la norme de la décision correcte s'applique aux questions constitutionnelles, aux questions de droit générales d'importance capitale pour le système juridique dans son ensemble et aux questions liées aux délimitations des compétences respectives d'organismes administratifs — [TRADUCTION] « Véritables questions de compétence » ne constituent pas une catégorie à part justifiant l'application de la norme de la décision correcte — Contrôle d'une décision en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision — Décision raisonnable est justifiée, intelligible et transparente et est justifiée par rapport aux contraintes juridiques et factuelles.

Immigration et citoyenneté --- Citoyenneté — Citoyenneté à la naissance — Principes généraux

Parents du requérant étaient des agents étrangers qui sont entrés au Canada et ont usurpé l'identité de deux Canadiens décédés — Parents sont retournés en Russie à partir des États-Unis et le passeport ainsi que la citoyenneté américaine du requérant ont été révoqués — Requérant a modifié son certificat de naissance et utilisé la véritable identité de ses parents dans le but d'obtenir un certificat de citoyenneté canadienne — Greffière a annulé le certificat au motif que les parents n'étaient pas légalement citoyens canadiens ou résidents permanents, mais étaient des représentants ou employés au service d'un gouvernement étranger pour les besoins de l'art. 3(2)a) de la Loi sur la citoyenneté — Demande du requérant en contrôle judiciaire a été rejetée au motif que quiconque déménage au Canada avec l'objectif explicite de s'établir afin de poursuivre une opération de renseignements étrangère le faisait au service d'un gouvernement étranger ou en tant que représentant ou employé au service d'un tel gouvernement — Appel du requérant à la Cour fédérale a été rejeté et l'appel à la Cour d'appel fédérale a été accueilli — Ministre de la Citoyenneté et de l'Immigration a formé un pourvoi — Pourvoi rejeté — Norme de contrôle applicable était celle de la décision raisonnable — Décision de la greffière n'était pas raisonnable en ce qu'elle a conclu que les parents du requérant avaient été les représentants ou employés au service au Canada d'un gouvernement étranger au sens de l'art. 3(2) de la Loi — Greffière n'a pas justifié son interprétation à la lumière des contraintes qu'imposent l'art. 3 de la Loi pris dans son ensemble, d'autres lois et traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence relative à l'interprétation de l'art. 3(2)a), et les conséquences possibles de son interprétation — Article 3(2)a) de la Loi n'était pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques — Fonctionnaires chargées des dossiers savaient que l'art. 3(2)a) de la Loi reposait sur le principe que les personnes faisant l'objet de l'exception n'étaient pas assujetties aux lois canadiennes et étaient également au fait du caractère inédit de l'interprétation adoptée — Décision de la greffière ne comprenait pas les motifs justifiant une interprétation élargie de la Loi — Décision de la greffière a eu le même effet qu'une révocation de la citoyenneté.

The applicant was born in Canada after his parents entered Canada from Russia and assumed the identities of two deceased Canadians. The parents were issued passports, moved to France and then to the United States, where they obtained American citizenship. The parents were exposed as unregistered agents of a foreign government engaged in the paid collection of intelligence. In 2010, the applicant's parents were returned to Russia via a spy swap and the applicant's passport and American citizenship were revoked. The applicant moved to Russia and was issued a new identity. The applicant subsequently attempted to obtain a Canadian passport after amending his birth certificate to his parents' true identities. The applicant obtained a Certificate of Canadian Citizenship, but the registrar cancelled the certificate on the ground that the applicant's parents were not lawfully Canadian citizens or permanent residents, but were employees or representatives of a foreign government for the purposes of s. 3(2)(a) of the Citizenship Act. The applicant's application for judicial review was dismissed on the basis that anyone who moved to Canada with the explicit goal of establishing life to further foreign intelligence operation, in Canada or another country, was doing so in the service of, or as an employee or representative of, a foreign government.

The applicant's appeal to the Federal Court was dismissed.

The applicant's appeal to the Federal Court of Appeal was allowed. The appellate court found the registrar's decision to revoke the applicant's citizenship was not supportable, defensible or acceptable, so it was unreasonable. The applicant's parents were not "employee[s] in Canada of a foreign government" under s. 3(2)(a) of the Act, which meant that this paragraph did not apply. The purpose of the paragraph was to prohibit the Canadian-born children of employees of foreign governments from obtaining Canadian citizenship. The intent of the amendment of the paragraph was to ensure it applied only to those employees who benefit from diplomatic privileges and immunities from civil and/or criminal law. As such, "employee[s] in Canada of a foreign government" included only those who enjoyed diplomatic privileges and immunities under the Vienna Convention on Diplomatic Relations. The appellate court found the types of privileges accorded to diplomats and their families were not

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consistent with the obligations of citizenship, which was why they could not acquire citizenship. People subject to Canadian laws have duties and responsibilities to Canada and a person born to such a person becomes a Canadian citizen upon birth. Diplomatic immunity is required to trigger s. 3(2)(a). At no time did the applicant's parents enjoy any immunity.

The appellate court found the registrar's approach was inadequate and unacceptable. There was a failure to consider the context and purpose of the section. The registrar adopted the reasoning of an analyst, which had only a very short paragraph on legislative history and failed to have any consideration of other parts of s. 3(2). On the facts, s. 3(1)(a) was the governing provision. As a person born in Canada in 1994, the applicant was entitled to citizenship.

The Minister of Citizenship and Immigration appealed.

**Held:** The appeal was dismissed.

Per Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.: A new course was established for reviewing the merits of an administrative determination. Reasonableness is the presumptive standard for review. This standard can be rebutted where the legislature intends a different standard to apply, or where the rule of law requires it.

Rationales including specialized expertise may be reasons for a legislature to delegate decision-making authority, but the very fact that the legislature opted to delegate authority was the basis for a default position of reasonableness review, and expertise was no longer a relevant factor, as it had been using a contextual review approach.

Where the legislature has provided for an appeal from an administrative decision to a court, there is a departure from the reasonableness standard and the court hearing the appeal should apply appellate standards of review.

The rule of law requires a correctness standard for constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between administrative bodies. Merely being of wider public concern, or touching on an important issue, is insufficient to meet the test of a general question of law of central importance. "Matters of true jurisdiction" is not a distinct category attracting a correctness review. Other categories might arise in future cases, but new categories of correctness review should not be routinely established.

The focus of a reasonableness review must be on the decision made, including both the reasoning process and the outcome. Reasonableness is a single standard, and contextual elements of a decision do not modulate the standard. Reasons should be read in light of the record and recognize that administrative decision-makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge. A reasonable decision is justified, transparent and intelligible, and is justified in relation to relevant legal and factual constraints. Where no reasons have been provided, the determination will still be examined in the light of relevant constraints, although it is more likely that the analysis will focus on the outcome rather than the reasoning process.

In the case at bar, the standard of review was reasonableness. The registrar's determination was not reasonable in finding that the applicant's parents had been other representatives or employees in Canada of a foreign government within the meaning of s. 3(2)(a) of the Act. The registrar failed to justify her interpretation in the light of the constraints imposed by s. 3 of the Act considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Section 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. What matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. The applicant raised many of these considerations but the registrar failed to address them in her reasons and did not perform more than a cursory review of legislative history.

The officials responsible for the files were aware that s. 3(2)(a) of the Act was informed by the principle that individuals subject to the exception were not obliged to the law of Canada, and they were also aware that the interpretation they had adopted was a novel one. The registrar knew this but failed to provide a rationale for this expanded interpretation. Rules concerning citizenship require a high degree of interpretive consistency. The registrar's determination had the same effect as a revocation of citizenship.

Per Abella, Karakatsanis JJ. (concurring): The majority decision fundamentally reoriented the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. The majority's framework rested on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignored the specialized expertise of administrative decision-makers. Correctness review was permitted only for questions "of central importance to the legal system and outside the specialized expertise of the adjudicator". Broadening this category

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from its original characterization unduly expanded the issues available for judicial substitution. The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" was misplaced and disregarded long-accepted institutional distinctions between how courts and administrative decision-makers function. If an applicant were to challenge multiple aspects of an administrative determination, some falling within an appeal clause and others not, complexity and barriers to access to justice could arise. The judgment disregarded precedent and stare decisis and disregarded the high threshold necessary to overturn previous decisions.

A more modest approach was justified. A standard of review framework with a meaningful rule of deference, based on both the legislative choice to delegate decision-making authority to an administrative actor and on the specialized expertise that these decision-makers possess and develop in applying their mandates, was required. Outside of the correctness categories from earlier caselaw, and absent clear and explicit legislative direction on the standard of review, administrative decisions should be reviewed for reasonableness. The category of "true questions of jurisdiction" should be eliminated. The approach to reasonableness should focus on deference. Deference informs the attitude a reviewing court must adopt towards an administrative decision-maker, affects how a court frames the question it must answer, and affects how a reviewing court evaluates challenges to an administrative decision.

In the case at bar, the standard of review was reasonableness. The registrar's reasons failed to respond to the applicant's extensive and compelling submissions about the objectives of s. 3(2)(a) of the Act. The analyst misunderstood arguments on this point. The text of s. 3(2)(c) could be seen as undermining the registrar's interpretation, as the language suggests that s. 3(2)(a) covers only those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

Le requérant est né au Canada après que ses parents soient arrivés au Canada en provenance de la Russie et aient usurpé l'identité de deux Canadiens décédés. Les parents ont obtenu des passeports, ont déménagé en France puis aux États-Unis, où ils ont obtenu la citoyenneté américaine. Les parents ont été démasqués en tant qu'agents non accrédités d'un gouvernement étranger se livrant à la collecte rémunérée de renseignements. En 2010, les parents du requérant sont retournés en Russie à la suite d'un échange d'espions et le passeport du requérant ainsi que sa citoyenneté américaine ont été révoqués. Le requérant s'est installé en Russie et a obtenu une nouvelle identité. Par la suite, le requérant a tenté d'obtenir un passeport canadien après avoir modifié son certificat de naissance et utilisé la véritable identité de ses parents. Le requérant a obtenu un certificat de citoyenneté canadienne, mais la greffière a annulé le certificat au motif que les parents du requérant n'étaient pas légalement citoyens canadiens ou résidents permanents, mais étaient des représentants ou employés au service d'un gouvernement étranger pour les besoins de l'art. 3(2)a) de la Loi sur la citoyenneté. La demande du requérant en contrôle judiciaire a été rejetée au motif que quiconque déménage au Canada avec l'objectif explicite de s'établir afin de poursuivre une opération de renseignements étrangère, au Canada ou dans un autre pays, le faisait au service d'un gouvernement étranger ou en tant que représentant ou employé au service d'un tel gouvernement.

L'appel du requérant à la Cour fédérale a été rejeté.

L'appel du requérant à la Cour d'appel fédérale a été accueilli. La Cour d'appel a estimé que la décision de la greffière de révoquer la citoyenneté du requérant n'appartenait pas aux décisions acceptables ou justifiables et n'était donc pas raisonnable. Les parents du requérant n'étaient pas « au service au Canada d'un gouvernement étranger » en vertu de l'art. 3(2)a) de la Loi, ce qui signifiait que ce paragraphe ne s'appliquait pas. L'objectif de ce paragraphe était d'interdire que les enfants nés au Canada de parents au service d'un gouvernement étranger n'obtiennent la citoyenneté canadienne. L'intention de la modification à ce paragraphe était de s'assurer qu'il s'appliquât seulement aux employés qui bénéficiaient de privilèges diplomatiques et d'immunités de juridiction civile et/ou pénale. Comme telles, les personnes « au service au Canada d'un gouvernement étranger » comprenaient seulement celles qui jouissaient de privilèges et immunités diplomatiques conférés par la Convention de Vienne sur les relations diplomatiques. La Cour d'appel a conclu que les types de privilèges conférés aux diplomates et à leur famille n'étaient pas compatibles avec les obligations de la citoyenneté, ce qui expliquait pourquoi ils ne pouvaient acquérir la citoyenneté. Les personnes assujetties aux lois canadiennes ont des obligations envers le Canada et une personne née d'une telle personne devient citoyen canadien au moment de sa naissance. L'immunité diplomatique est nécessaire pour l'application de ce paragraphe. Or, les parents du requérant n'ont bénéficié de quelque immunité que ce soit à aucun moment.

La Cour d'appel a conclu que l'approche de la greffière était inadéquate et inacceptable. Le contexte et l'objet de cet article n'ont pas été pris en compte. La greffière a fait sien le raisonnement de l'analyste, dont le rapport ne contenait qu'un très court paragraphe concernant l'origine législative et ne faisait aucun renvoi aux autres alinéas de l'art. 3(2). Sur la base des faits, l'art.

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3(1) était la disposition principale. En tant que personne née au Canada en 1994, le requérant se qualifiait pour l'obtention de la citoyenneté.

Le ministre de la Citoyenneté et de l'Immigration a formé un pourvoi.

**Arrêt:** Le pourvoi a été rejeté.

Wagner, J.C.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin, JJ. : Une nouvelle voie a été tracée pour contrôler une décision administrative au fond. La norme de la décision raisonnable est la norme de contrôle présumée. Cette présomption peut être réfutée si l'intention du législateur est qu'une autre norme de contrôle s'applique ou dans les cas où la primauté du droit l'exige. Si l'expertise spécialisée et d'autres considérations peuvent toutes justifier qu'une législature prévoit la délégation du pouvoir décisionnel, le simple fait que la législature ait choisi de prévoir une délégation de pouvoir constituait la base d'une approche par défaut justifiant l'application de la norme de la décision raisonnable et l'expertise n'était plus un facteur pertinent, en ce qu'elle avait retenu l'approche consistant à procéder à un contrôle contextuel.

Lorsque la législature a prévu que l'appel à l'encontre d'une décision rendue en matière administrative doit être interjeté devant un tribunal en particulier, on s'écarte de la norme de la décision raisonnable et le tribunal saisi de l'appel devrait appliquer les normes de contrôle applicables en appel.

La primauté du droit requiert que la norme de la décision correcte s'applique aux questions constitutionnelles, aux questions de droit générales d'importance capitale pour le système juridique dans son ensemble et aux questions liées aux délimitations des compétences respectives d'organismes administratifs. Il n'est suffisant qu'une question soit simplement d'un plus grand intérêt public ou qu'elle soulève un sujet important pour satisfaire au critère de la question de droit d'importance capitale. Les [TRADUCTION] « véritables questions de compétence » ne constituent pas une catégorie à part justifiant l'application de la norme de la décision correcte. D'autres catégories sont susceptibles d'apparaître dans les décisions qui seront rendues plus tard, mais de nouvelles catégories justifiant l'application de la norme de la décision correcte ne devraient pas être établies avec légèreté.

Le contrôle d'une décision en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision. La norme de la décision raisonnable est une norme unique et les éléments contextuels d'une décision n'altèrent pas cette norme. Les motifs devraient être interprétés eu égard au dossier et reconnaître que l'on ne peut pas toujours s'attendre à ce que les décideurs administratifs déploient toute la gamme de techniques juridiques auxquelles on peut s'attendre de la part d'un avocat ou d'un juge. Une décision raisonnable est justifiée, intelligible et transparente et est justifiée par rapport aux contraintes juridiques et factuelles. Lorsqu'aucun motif n'a été fourni, la décision doit tout de même être examinée à la lumière des contraintes pertinentes, bien qu'il soit davantage probable que l'analyse se concentre sur le résultat plutôt que sur le raisonnement.

Dans le présent dossier, la norme de contrôle applicable était celle de la décision raisonnable. La décision de la greffière n'était pas raisonnable en ce qu'elle a conclu que les parents du requérant avaient été les représentants ou employés au service au Canada d'un gouvernement étranger au sens de l'art. 3(2) de la Loi. La greffière n'a pas justifié son interprétation à la lumière des contraintes qu'imposent l'art. 3 de la Loi pris dans son ensemble, d'autres lois et traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence relative à l'interprétation de l'art. 3(2)a), et les conséquences possibles de son interprétation. L'article 3(2)a) n'était pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques. Ce qui importe, pour les besoins de l'art. 3(2)a), n'est pas de savoir si une personne se livre à des activités au service d'un État étranger alors qu'elle se trouve au Canada, mais plutôt si la personne s'était vu accorder, à l'époque pertinente, des privilèges et immunités diplomatiques. Le requérant a soulevé plusieurs de ces considérations, mais la greffière n'en a pas traité dans ses motifs et n'a pas fait davantage que se livrer à un examen superficiel de l'historique législatif.

Les fonctionnaires chargées des dossiers savaient que l'art. 3(2)a) de la Loi reposait sur le principe que les personnes faisant l'objet de l'exception n'étaient pas assujetties aux lois canadiennes et étaient également au fait du caractère inédit de l'interprétation adoptée. La greffière avait connaissance des éléments susmentionnés, mais elle n'a pas motivé cette interprétation élargie. Les règles concernant la citoyenneté commandent une grande uniformité en matière d'interprétation. La décision de la greffière dans la présente affaire a eu le même effet qu'une révocation de la citoyenneté.

Abella, Karakatsanis, JJ. (souscrivant à l'opinion des juges majoritaires) : Les juges majoritaires réorientent complètement le rapport qui existait depuis des décennies entre les acteurs administratifs et la magistrature, en élargissant considérablement les circonstances dans lesquelles les juges généralistes pourront substituer leur propre opinion à celle des décideurs spécialisés qui

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exercent leur mandat au quotidien. Le cadre établi par les juges majoritaires reposait sur une conception du contrôle judiciaire qui était à la fois erronée et incomplète et qui négligeait sans raison valable l'expertise spécialisée des décideurs administratifs. La norme de la décision correcte n'était applicable qu'à l'égard de questions qui sont « d'importance capitale pour le système juridique et qui échappent au domaine d'expertise de l'arbitre ». Étendre cette catégorie par rapport à son acception initiale avait pour conséquence d'étendre indûment les questions pour lesquelles les cours peuvent substituer leur propre opinion à celle des décideurs administratifs. Le fait que les juges majoritaires invoquent la « présomption d'uniformité d'expression » en se fondant uniquement sur le mot « appel » était malavisé et négligeait les distinctions institutionnelles qui sont reconnues depuis longtemps en ce qui concerne le mode de fonctionnement des cours et des décideurs administratifs. Si un requérant conteste plusieurs aspects de la décision administrative dont certains relèvent d'une disposition créant un droit d'appel et d'autres non, cela pourrait donner lieu à une incitation à la complexité et un obstacle à l'accès à la justice. Les motifs de la majorité ne tiennent pas compte des précédents et de la règle du stare decisis et du critère rigoureux auquel il faut satisfaire pour pouvoir écarter l'une des décisions de la Cour.

Une approche plus modeste était justifiée. Un cadre d'analyse de la norme de contrôle qui repose sur une règle de déférence significative et fondée à la fois sur le choix du législateur de déléguer des pouvoirs décisionnels à des acteurs administratifs et sur l'expertise spécialisée que ces décideurs possèdent et acquièrent au fur et à mesure qu'ils s'acquittent de leur mandat était nécessaire. Exception faite des catégories assujetties à la norme de la décision correcte établies dans une décision précédente, et à défaut de directives claires et explicites du législateur sur la norme de contrôle applicable, c'est la norme de la décision raisonnable qui s'applique au contrôle judiciaire des décisions administratives. La catégorie des « questions touchant véritablement à la compétence » devrait être éliminée. La conception du contrôle judiciaire selon la norme de la décision raisonnable devrait être centrée sur le principe de la déférence. La déférence influence l'attitude que la cour de révision doit adopter à l'égard du décideur administratif, influence la façon dont la cour formule la question à laquelle elle doit répondre et influe sur la façon dont elle évalue la contestation dont fait l'objet la décision administrative.

Dans le présent dossier, la norme de contrôle applicable était celle de la décision raisonnable. Dans ses motifs, la greffière n'a pas répondu aux arguments abondants et convaincants que le requérant a invoqués au sujet des objectifs de l'art. 3(2)a) de la Loi. L'analyste a mal compris les arguments sur ce point. Le libellé de l'art. 3(2)c) pouvait être perçu comme sapant l'interprétation de la greffière, car ce texte laisse croire que l'art. 3(2)a) ne vise que les personnes « au service au Canada d'un gouvernement étranger » qui jouissent de privilèges et immunités diplomatiques.

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*R. v. Salituro* (1991), 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654, 131 N.R. 161, 68 C.C.C. (3d) 289, 1991 CarswellOnt 124, 1991 CarswellOnt 1031 (S.C.C.) — referred to

*R. v. Taylor (Jack)* (2016), [2016] 4 All E.R. 617, [2016] UKSC 5 (U.K. S.C.) — referred to

*Rasanen v. Rosemount Instruments Ltd.* (1994), 1 C.C.E.L. (2d) 161, 94 C.L.L.C. 14,024, 17 O.R. (3d) 267, 112 D.L.R. (4th) 683, 68 O.A.C. 284, 1994 CarswellOnt 960 (Ont. C.A.) — considered

*Rascal Trucking Ltd. v. Nishi* (2013), 2013 SCC 33, 2013 CarswellBC 1716, 2013 CarswellBC 1717, 359 D.L.R. (4th) 575, 45 B.C.L.R. (5th) 1, [2013] 8 W.W.R. 419, 88 E.T.R. (3d) 1, 445 N.R. 293, 336 B.C.A.C. 50, 574 W.A.C. 50, 16 B.L.R. (5th) 1, *(*sub nom. *Nishi v. Rascal Trucking Ltd.)* [2013] 2 S.C.R. 438 (S.C.C.) — referred to

*Ryan v. Law Society (New Brunswick)* (2003), 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 31 C.P.C. (5th) 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, *(*sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 2003 CSC 20 (S.C.C.) — considered

*S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1974] 1 W.W.R. 653, 41 D.L.R. (3d) 6, *(*sub nom. *U.I.E.S., local 333 c. Nipawin District Staff Nurses Assn.)* [1975] 1 S.C.R. 382, 73 C.L.L.C. 14,193, 1973 CarswellSask 120, 1973 CarswellSask 145 (S.C.C.) — referred to

*South Africa (Republic) v. Grootboom* (2000), [2000] ZACC 19 (South Africa Constitutional Ct.) — considered

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*Suresh v. Canada (Minister of Citizenship & Immigration)* (2002), 2002 SCC 1, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CSC 1 (S.C.C.) — referred to

*Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298* (1988), 35 Admin. L.R. 153, 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault)* [1988] 2 S.C.R. 1048, 1988 CarswellQue 125, 1988 CarswellQue 148 (S.C.C.) — considered

*Toronto (City) v. C.U.P.E., Local 79* (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

*U.A.W., Local 720 v. Volvo Canada Ltd.* (1979), [1980] 1 S.C.R. 178, 27 N.R. 502, 33 N.S.R. (2d) 22, 57 A.P.R. 22, 99 D.L.R. (3d) 193, 79 C.L.L.C. 14,210, 1979 CarswellNS 109F, 1979 CarswellNS 109 (S.C.C.) — referred to

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*Willers v. Joyce* (2016), [2017] 2 All E.R. 383, [2016] UKSC 44 (U.K. S.C.) — referred to

*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)* (2018), 2018 SCC 4, 2018 CSC 4, 2018 CarswellNat 158, 2018 CarswellNat 159, 417 D.L.R. (4th) 239, 32 Admin. L.R. (6th) 1, [2018] 1 S.C.R. 83, [2018] 4 C.N.L.R. 225 (S.C.C.) — referred to

*Wilson v. Atomic Energy of Canada Ltd.* (2016), 2016 SCC 29, 2016 CSC 29, 2016 CarswellNat 2998, 2016 CarswellNat 2999, D.T.E. 2016T-547, 2 Admin. L.R. (6th) 181, 32 C.C.E.L. (4th) 1, 399 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Wilson)* 485 N.R. 99, 2016 C.L.L.C. 210-040, [2016] 1 S.C.R. 770 (S.C.C.) — referred to

**Statutes considered by *Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.*:**

*Administrative Tribunals Act*, S.B.C. 2004, c. 45

s. 58 — referred to

s. 59 — referred to

s. 59(1) — referred to

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 15 — referred to

*Canadian Citizenship Act*, R.S.C. 1970, c. C-19

s. 5(3)(b) — considered

*Citizenship Act*, R.S.C. 1985, c. C-29

Generally — referred to

s. 3 — considered

s. 3(1) — considered

s. 3(1)(a) — considered

s. 3(1)(b) — referred to

s. 3(2) — considered

s. 3(2)(a) — considered

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s. 3(2)(c) — considered

s. 10 — referred to

s. 22.1 [en. 2014, c. 22, s. 20] — referred to

s. 22.1(1) [en. 2014, c. 22, s. 20] — considered

ss. 22.1-22.4 [en. 2014, c. 22, s. 20] — referred to

*Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 96 — considered

*Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 35 — referred to

*Federal Courts Act*, R.S.C. 1985, c. F-7

ss. 18-18.2 — referred to

s. 18.4 [en. 1990, c. 8, s. 5] — referred to

s. 27 — referred to

s. 28 — referred to

*Foreign Missions and International Organizations Act*, S.C. 1991, c. 41

Generally — referred to

s. 3 — referred to

s. 3(1) — referred to

s. 4 — referred to

Sched. II — referred to

Sched. II, Article 1 — referred to

Sched. II, Article 41 — referred to

Sched. II, Article 43 — referred to

Sched. II, Article 49 — referred to

Sched. II, Article 53 — referred to

*Human Rights Code*, R.S.B.C. 1996, c. 210

s. 32 — referred to

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27

Generally — referred to

ss. 35-37 — referred to

*Interpretation Act*, R.S.C. 1985, c. I-21

Generally — referred to

s. 35(1) "diplomatic or consular officer" — considered

*Municipal Government Act*, R.S.A. 2000, c. M-26

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s. 470 — referred to

s. 470(1) — referred to

**Statutes considered by *Abella, Karakatsanis JJ.*:**

*Administrative Tribunals Act*, S.B.C. 2004, c. 45

Generally — referred to

*Canadian Citizenship Act*, R.S.C. 1970, c. C-19

s. 5(3)(b)(i) — considered

s. 5(3)(b)(ii) — considered

*Citizenship Act*, R.S.C. 1985, c. C-29

Generally — referred to

s. 3(1)(a) — considered

s. 3(2) — considered

s. 3(2)(a) — considered

s. 3(2)(c) — considered

*Customs Tariff*, S.C. 1997, c. 36

Generally — referred to

*Foreign Missions and International Organizations Act*, S.C. 1991, c. 41

Generally — referred to

*Interpretation Act*, R.S.C. 1985, c. I-21

s. 35(1) "diplomatic or consular officer" — considered

*Ontario Human Rights Code, 1961-62*, S.O. 1961-62, c. 93

s. 3 — considered

*Securities Act*, R.S.B.C. 1996, c. 418

s. 159 — referred to

**Treaties considered by *Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.*:**

*Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223

Article II — considered

*Vienna Convention on Consular Relations, 1963*, C.T.S. 1974/25; 596 U.N.T.S. 261

Generally — referred to

*Vienna Convention on Diplomatic Relations, 1961*, C.T.S. 1966/29; 500 U.N.T.S. 95

Generally — referred to

**Treaties considered by *Abella, Karakatsanis JJ.*:**

*Vienna Convention on Consular Relations, 1963*, C.T.S. 1974/25; 596 U.N.T.S. 261

Generally — referred to

*Vienna Convention on Diplomatic Relations, 1961*, C.T.S. 1966/29; 500 U.N.T.S. 95

Generally — referred to

**Regulations considered by *Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.*:**

*Citizenship Act*, R.S.C. 1985, c. C-29

*Citizenship Regulations*, SOR/93-246

s. 26 — referred to

s. 26(3) — considered

**Words and phrases considered:**

**diplomatic or consular officer or other representative or employee in Canada of a foreign government**

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Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a) of *Citizenship Act*, R.S.C. , 1985, c. C-29] applies to individuals who have not been granted diplomatic privileges and immunities in Canada.
**Termes et locutions cités:**

**agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger**

Notre examen de la décision de la greffière mène à la conclusion qu'il était déraisonnable de sa part de décider que les mots « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » [que l'on retrouve à l'art. 3(2)a) de la *Loi sur la citoyenneté*, L.R.C. 1985, c. C-29] visent les individus à qui on n'a pas accordé de privilèges et d'immunités diplomatiques au Canada.

APPEAL by Minister of Citizenship and Immigration from judgment reported at *Vavilov v. Canada (Citizenship and Immigration)* (2017), 2017 FCA 132, 2017 CarswellNat 2791, [2017] F.C.J. No. 638, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, 2017 CAF 132, 2017 CarswellNat 9490, [2018] 3 F.C.R. 75 (F.C.A.), granting application for judicial review of determination regarding citizenship.

POURVOI formé par le ministre de la Citoyenneté et de l'Immigration à l'encontre d'un jugement publié à *Vavilov v. Canada (Citizenship and Immigration)* (2017), 2017 FCA 132, 2017 CarswellNat 2791, [2017] F.C.J. No. 638, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, 2017 CAF 132, 2017 CarswellNat 9490, [2018] 3 F.C.R. 75 (F.C.A.), ayant accordé une demande en contrôle judiciaire d'une décision rendue en matière de citoyenneté.

***Wagner C.J.C., Moldaver, Gascon, Côté, Brown, Rowe, Martin JJ.*:**

1 This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 (S.C.C.) ), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

2 In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) : that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

3 We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the Citizenship Act, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the Citizenship Regulations, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

**I. Need for Clarification and Simplification of the Law of Judicial Review**

4 Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory

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delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

5 Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

6 In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir* , some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

7 The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir* 's promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir* , a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir* , the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) ; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (S.C.C.) , at para. 46; *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135 (S.C.C.) , at para. 55; *Canadian Artists' Representation / Le Front des artistes canadiens v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 (S.C.C.) , at para. 13; *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.) , at paras. 26 and 28; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) , at para. 25; *Dunsmuir* , at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.) , at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean* , at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.) , at para. 32; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 (S.C.C.) ("*CHRC*"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. 527.

8 In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see Dunsmuir , at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

9 The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770(S.C.C.) , at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

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10 This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

11 The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.

12 These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir* 's promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

14 On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 C.J.A.L.P. 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 U.T.L.J. 458, at pp. 467-70.

15 In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

**II. Determining the Applicable Standard of Review**

16 In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

17 The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is

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where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir* , at paras. 62-64; *McLean* , at para. 22) in order to identify the appropriate standard.

18 Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101(S.C.C.) , at para. 47; *Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489(S.C.C.) , at paras. 24-27; *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.) , at paras. 56-57 and 129-31, 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.) , at paras. 43-44; *R. v. Bernard*, [1988] 2 S.C.R. 833 (S.C.C.) , at pp. 849-50.

19 On this point, we recall the observation of Gibbs J. in Queensland v. Commonwealth1977139 C.L.R. 585(Australia H.C.), which this Court endorsed in Craig , at para. 26:

> No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

20 Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig* , at paras. 28-30; *Henry* , at paras. 45-47; *Fraser* , at para. 135 (per Rothstein J., concurring in the result); Bernard , at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Canada (Minister of Indian Affairs & Northern Development) v. Ranville*, [1982] 2 S.C.R. 518(S.C.C.) , at p. 528; Bernard , at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740(S.C.C.) , at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law": Bernard , at p. 858. These considerations apply here.

21 Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in Dunsmuir , at para. 133, are still apt:

> [J]udicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied .... If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis] .... A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome ....

Regrettably, we find ourselves in a similar position following *Dunsmuir* . As Karakatsanis J. observed in Edmonton East, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review." While

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counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson* , at para. 25, per Abella J.

22 As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing Dunsmuir , at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

***A. Presumption That Reasonableness Is the Applicable Standard***

23 Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

24 Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir* , at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the Constitution Act, 1867, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir* , at para. 31; *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220(S.C.C.) , at pp. 236-37; *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048(S.C.C.) , at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

25 For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

26 Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227(S.C.C.) , the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.* , at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

27 In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.* , at p. 236; *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982(S.C.C.) , at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) , at pp. 591-92; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748(S.C.C.) , at paras. 50-53; *Dunsmuir* , at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93; see also Dunsmuir , at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative

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context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa* , at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach, which was first set out in *Bibeault* , a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., Pezim , at pp. 591-92; *Southam*, at paras. 50-53; *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226(S.C.C.) , at paras. 28-29; *Deputy Minister of National Revenue v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100 (S.C.C.) , at paras. 28-32; *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, [2002] 1 S.C.R. 249 (S.C.C.) , at para. 50.

28 Unfortunately, this contextual analysis proved to be unwieldly and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

29 Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

30 While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa* , for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir* , at para. 27.

31 We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

32 That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from

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the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

***B. Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent***

33 This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.) , at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

*(1) Legislated Standards of Review*

34 Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779 (S.C.C.) , at paras. 31-32; *Khosa* , at paras. 18-19; *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.) , at para. 20; *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 (S.C.C.) , at para. 55; *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108 (S.C.C.) , at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587 (S.C.C.) , at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795 (S.C.C.) , at para. 28.

35 It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the Administrative Tribunals Act, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); Human Rights Code, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

*(2) Statutory Appeal Mechanisms*

36 We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Bhadauria v. Seneca College of Applied Arts & Technology*, [1981] 2 S.C.R. 181 (S.C.C.) , at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

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37 It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235(S.C.C.) , at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen* , at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

38 We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig* , at para. 27. Our conclusion is based on the following considerations.

39 First, there has been significant judicial and academic criticism of this Court's recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, "What is a 'reasonable decision'?" (2018), 31 C.J.A.L.P. 225, at p. 244; the Hon. J.T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 27, at p. 33; Daly, at pp. 541-42; Québec (Procureure générale) c. Montréal (Ville)2016 QCCA 210817 Admin. L.R. (6th) 328(C.A. Que.), at paras. 36-46; *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311(F.C.A.), at paras. 190-92, per Nadon J.A., concurring, and at 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1(Alta. C.A.), at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22(N.S. C.A.) , at paras. 250, 255-64 and 274-302, per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14(N.S. C.A.) , at paras. 9-14. These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

40 This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig* , at para. 29; *R. v. Robinson*, [1996] 1 S.C.R. 683 (S.C.C.) , at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa* , at para. 87, per Rothstein J., concurring in the result.

41 Second, there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.) , at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former "pragmatic and functional" approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., Pezim , at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739(S.C.C.) , at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan* , at paras. 30-31; *Dr. Q* , at para. 27; *Mattel*, at paras. 26-27; *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.) , at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television*

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*Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476 (S.C.C.) , at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.) , at para. 7.

42 The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim* . In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities* , at paras. 9-19; *Monsanto* , at paras. 6-16.

43 Yet as, in *Dunsmuir* , *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

44 More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., Federal Courts Act, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.

45 That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.) , at p. 838.

46 Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative expertise — what it called the "specialization of duties" principle in Pezim , at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

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47 The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

48 Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada's judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied "sparingly" (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was "all but complete": reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita* , at para. 35; *McLean* , at para. 22; *Edmonton East*, at para. 32; *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283(S.C.C.) , at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir* . A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

49 In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

50 We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

51 Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the Federal Courts Act, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see Khosa , at para. 34. Another example is the current version of s. 470 of Alberta's Municipal Government Act, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

52 Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial

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review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

***C. The Applicable Standard Is Correctness Where Required by the Rule of Law***

53 In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir* , at para. 58.

54 When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir* , at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

*(1) Constitutional Questions*

55 Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the Constitution Act, 1982, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir* , para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.) .

56 The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

57 Although the *amici* questioned the approach to the standard of review set out in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) , a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré* ) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the Charter (see, e.g., *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.) , at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

*(2) General Questions of Law of Central Importance to the Legal System as a Whole*

58 In *Dunsmuir* , a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.) , at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

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59 As the majority of the Court recognized in *Dunsmuir* , the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir* , para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see Toronto (City) , at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 (S.C.C.) , at para. 20; *Canadian National Railway* , at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (S.C.C.) , at para. 17; *Saguenay*, at para. 51; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.) ("*Mowat*"), at para. 22; *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29 (S.C.C.) , at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary* , at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

60 This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)* , at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary* , at para. 20); and the scope of parliamentary privilege (*Chagnon* , at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

61 We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458 (S.C.C.) , at para. 66; *McLean* , at para. 28; *Barreau du Québec c. Québec (Procureure générale)*, 2017 SCC 56, [2017] 2 S.C.R. 488 (S.C.C.) , at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, [2011] 3 S.C.R. 616 (S.C.C.) , at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean* , at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway* , at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec* , at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

62 In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

*(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies*

63 Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir* , para. 61. One such question arose in *Regina Police Assn. v. Regina (City) Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360 (S.C.C.) , in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a

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comprehensive legislative regime. Similarly, in *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, 2004 SCC 39, [2004] 2 S.C.R. 185 (S.C.C.) , the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

64 Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see British Columbia Telephone Co. , at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

***D. A Note Regarding Jurisdictional Questions***

65 We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see Dunsmuir , at para. 59; *Québec (Procureure générale) c. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3 (S.C.C.) , at para. 32. Since *Dunsmuir* , however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean* , at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin* , at paras. 32-36; *CHRC*, at paras. 31-41.

66 As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly City of Arlington v. Federal Communications Commission569 U.S. 290(U.S. Sup. Ct. 2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360(S.C.C.) ; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635 (S.C.C.) .

67 In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

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68 Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in Arlington, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" ....

***E. Other Circumstances Requiring a Derogation from the Presumption of Reasonableness Review***

69 In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting Dunsmuir , at para. 145, per Binnie J., concurring.

70 However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

71 The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level — such that a

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statute comes to mean, simultaneously, both "yes" and "no" — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

72 We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756(S.C.C.) , this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4, [2001] 1 S.C.R. 221 (S.C.C.) , at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see Domtar , at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and require a court to step in is not obvious. Given these practical difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

**III. Performing Reasonableness Review**

73 This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

74 In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": *amici curiae* factum, at para. 12.

75 We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.

***A. Procedural Fairness and Substantive Review***

76 Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review.

77 It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) , at p. 682; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817(S.C.C.) , at paras. 22-23; *Moreau-Bérubé* , at paras. 74-75; *Dunsmuir* , at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker* , at para. 21. In *Baker* , this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker* , at paras. 23-27; see also *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)*, 2004 SCC 48, [2004] 2 S.C.R. 650 (S.C.C.) , at para. 5. Cases in which

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written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker* , at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

78 In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

79 Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869(S.C.C.) , at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine* , at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker* , "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

80 The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker* , at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment*: *Making Judicial Decisions* (2018), at p. 134; see also Sheppard , at para. 23.

81 Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker* , at para. 39. In *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708(S.C.C.) , the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting Dunsmuir , at para. 47; see also *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3(S.C.C.) , at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

***B. Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes***

82 Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir* , at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.) , at para. 10; *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) , at para. 10.

83 It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) , that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan* , at paras. 50-51. Instead, the reviewing court must consider

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only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

84 As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see Dunsmuir , at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

86 Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir* , at paras. 47-49. In *Dunsmuir* , this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir* , "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

87 This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 (S.C.C.) , at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

***C. Reasonableness Is a Single Standard That Accounts for Context***

88 In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

89 Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa* , at para. 59; *Catalyst* , at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 (S.C.C.), at para. 44; *Wilson* , at para. 22, per

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Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 (S.C.C.) , at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 (S.C.C.), at para. 53.

90 The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

***D. Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given***

91 A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

92 Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

93 An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see Dunsmuir , at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

94 The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

95 That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

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96 Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines* , at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

97 Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267 (F.C.), at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn ....

98 As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135 (B.C. C.A.) , at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

### *E. A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir* , at paras. 47 and 74; *Catalyst* , at para. 13.

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100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

101 What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

*(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning*

102 To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan* , at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139; see also *Mora Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151(F.C.), at paras. 57-59.

103 While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see Wright v. Nova Scotia (Human Rights Commission)2017 NSSC 1123 Admin. L.R. (6th) 110(N.S. S.C.); *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17 (F.C.), at para. 21) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Gamez Blas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92 (F.C.), at paras. 54-66; *Reid v. Ontario (Criminal Injuries Compensation Board)*, 2015 ONSC 6578 (Ont. Div. Ct.) ; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051 (F.C.A.) ; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520 (F.C.A.) , at para. 47).

104 Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

*(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

105 In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir* , at para. 47; *Catalyst* , at para. 13; *Nor-Man Regional Health Authority* , at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

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106 It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

107 A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

**(a) Governing Statutory Scheme**

108 Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst* , at paras. 15 and 25-28; see also Green , at para. 44. As Rand J. noted in *Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.) , at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine , at para. 7; *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 SCC 14, [2010] 1 S.C.R. 427(S.C.C.) , at paras. 32-33; *Nor-Man Regional Health Authority* , at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)* , at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.) , at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see Delta Air Lines , at para. 18.

109 As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

110 Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's

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authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

**(b) Other Statutory or Common Law**

111 It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir* , at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (S.C.C.) , at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)* , at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir* , at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 (F.C.A.) , at paras. 93-98.

112 Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 Alta. L.R. 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

113 That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority* , at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines* , at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

114 We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with ... the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292(S.C.C.) , at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754 (S.C.C.) , at para. 40. Since *Baker* , it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker* , at paras. 69-71.

**(c) Principles of Statutory Interpretation**

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115 Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

116 Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan* , at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

117 A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) , at para. 21, and *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) , at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., Interpretation Act, R.S.C. 1985, c. I-21.

118 This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

119 Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

120 But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601(S.C.C.) , at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

121 The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

122 It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not

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likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405 (S.C.C.) , at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

123 There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

124 Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir* , at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52 (F.C.A.) ., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

**(d) Evidence Before the Decision Maker**

125 It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker":*CHRC*, at para. 55; see also Khosa , at para. 64; *Dr. Q* , at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen* , at paras. 15-18; *Dr. Q* , at para. 38; *Dunsmuir* , at para. 53.

126 That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir* , para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see Southam, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker* , for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

**(e) Submissions of the Parties**

127 The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted

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in the right to be heard: *Baker* , at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

128 Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker* , at para. 39.

**(f) Past Practices and Past Decisions**

129 Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar* , "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

130 Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid ... conflicting results": *I.W.A., Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.) , at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

131 Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker* , at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

132 As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

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**(g) Impact of the Decision on the Affected Individual**

133 It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker* , at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

134 Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84(S.C.C.) .

135 Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

***F. Review in the Absence of Reasons***

136 Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine , at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker* , at para. 43.

137 Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst* ; *Green* ; *Trinity Western University* . However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker* , at para. 44. For example, as McLachlin C.J. noted in *Catalyst* , "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw ... clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli* .

138 There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

***G. A Note on Remedial Discretion***

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139 Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

140 Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see Delta Air Lines , at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

141 Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines* , at paras. 30-31.

142 However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (F.C.A.) , at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland (Offshore Petroleum Board)*, [1994] 1 S.C.R. 202 (S.C.C.) , at pp. 228-30; *Renaud c. Québec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855(S.C.C.) ; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772 (S.C.C.) , at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 (F.C.A.), at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.), at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 (Ont. C.A.) , at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.) , at paras. 45-51; *Alberta Teachers*, at para. 55.

**IV. Role of Prior Jurisprudence**

143 Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases — including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less

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precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

144 This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

145 Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

**V. Mr. Vavilov's Application for Judicial Review**

146 The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of the Citizenship Act and cancelled his certificate of citizenship under s. 26(3) of the Citizenship Regulations. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

***A. Facts***

147 Mr. Vavilov was born in Toronto as Alexander Foley on [date omitted]. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

148 Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

149 Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

150 Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully

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attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

151 However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the Citizenship Act, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the Citizenship Regulations.

***B. Procedural History***

*(1) Registrar's Decision*

152 In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the Citizenship Regulations on the basis that he was not entitled to it. The Registrar summarized her position as follows:

> a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.
>
> b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.
>
> c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".
>
> d) Accordingly, pursuant to s. 3(2)(a) of the Citizenship Act, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the Citizenship Act (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

153 For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the Citizenship Act. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

154 In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the Citizenship Act": A.R., Vol. I, at p. 3. The report was dated June 24, 2014.

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155 In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the Citizenship Act, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the Citizenship Act, which reads as follows:

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

156 The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the Interpretation Act and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase "other representative or employee in Canada of a foreign government."

157 The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the Canadian Citizenship Act, R.S.C. 1970, c. C-19, excluded from citizenship children whose "responsible parent" at the time of birth was:

> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

158 The analyst reasoned that because s. 3(2)(a) "makes reference to 'representatives or employees of a foreign government,' but does not link the representatives or employees to 'attached to or in the service of a foreign diplomatic mission or consulate in Canada' (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff'": A.R., vol. I, at p. 7.

159 Although the analyst acknowledged that "Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions", she concluded that they were nonetheless "unofficial employees or representatives" of Russia at the time of Mr. Vavilov's birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the Citizenship Act, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian Registrar of Citizenship "recall" Mr. Vavilov's certificate on the basis that he was not, and had never been, entitled to citizenship.

*(2) Federal Court (Bell J.), 2015 FC 960, [2016] F.C.R. 39 (F.C.)*

160 Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar's decision in the Federal Court pursuant to s. 22.1 of the Citizenship Act. His application was dismissed.

161 The Federal Court rejected Mr. Vavilov's argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court's view, the

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Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

162 The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the Citizenship Act. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

163 Finally, the Federal Court was satisfied, given the evidence, that the Registrar's conclusion that Mr. Vavilov's parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

*(3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75 (F.C.A.)*

164 A majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal from the Federal Court's judgment and quashed the Registrar's decision.

165 The Court of Appeal unanimously rejected Mr. Vavilov's argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal's view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

166 The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the Citizenship Act was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

167 The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in Canada of a foreign government" in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

168 The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

***C. Analysis***

*(1) Standard of Review*

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169 Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

170 When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the Citizenship Act lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

*(2) Review for Reasonableness*

171 The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the Citizenship Act.

172 In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the Citizenship Act in light of the constraints imposed by the text of s. 3 of the Citizenship Act considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

173 Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

**(a) Section 3(2) of the Citizenship Act**

174 The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the Citizenship Act. Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14, 1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

175 The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy

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working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

176 As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

**(b) The Foreign Missions and International Organizations Act and the Treaties It Implements**

177 Before the Registrar, Mr. Vavilov argued that s. 3(2) of the Citizenship Act must be read in conjunction with both the Foreign Missions and International Organizations Act, S.C. 1991, c. 41 ("FMIOA"), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 ("*VCDR*"). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the FMIOA.

178 To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: Citizenship Act, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the Citizenship Act as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the Citizenship Act to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that "[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State". Mr. Vavilov made the following submission to the Registrar:

> The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.
>
> Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation

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> would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.
>
> (A.R., vol. IV, at pp. 449-50)

179 In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67 (F.C.), a case which was referred to in the analyst's report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

> Of particular interest are the special rules relating to the jus soli, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reasons of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'
>
> In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'. Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Emphasis deleted.]
>
> (Brownlie, at pp. 392-93).

180 Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the Citizenship Act was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as "conform[ing] to international custom" and as having been drafted with the intention of "exclud[ing] children born in Canada to diplomats from becoming Canadian citizens": Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, "a number of other people would be affected such as those working for large foreign corporations": ibid Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

181 In attempting to distinguish the meaning of the phrase "other representative or employee in Canada of a foreign government" from that of the term "diplomatic or consular officer", the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov's submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

182 It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa* , at para. 40; see also Pushpanathan , at para. 51; *Baker* , at para. 70; *Scierie Thomas-Louis Tremblay inc. c. J.R. Normand inc.*,

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2005 SCC 46, [2005] 2 S.C.R. 401 (S.C.C.) , at para. 39; *Hape* , at paras. 53-54; *B010 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (S.C.C.) , at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127 (S.C.C.) , at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398 (S.C.C.) , at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

**(c) Jurisprudence Interpreting Section 3(2) of the Citizenship Act**

183 Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the Citizenship Act in a footnote, she dismissed them as being irrelevant on the basis that they related only to "individuals whose parents maintained diplomatic status in Canada at the time of their birth". But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov's case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi* ; *Lee v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204 (F.C.); and *Hitti c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2007 FC 294, 310 F.T.R. 168 (Eng.) (F.C.) — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

184 In *Al-Ghamdi* , the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the Citizenship Act in reviewing a decision in which Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

> The only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats ....

185 The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the Citizenship Act and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi* , at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi* , at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the Charter, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an "extraordinary array of privileges under the *Foreign Missions and International Organizations Act*": *Al-Ghamdi* , at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of the Charter, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi* , at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi* , at paras. 3, 9, 27, 28, 56 and 59.

186 In *Lee* , another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that "[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the Citizenship Act are children of individuals with diplomatic status": *Lee* , at para. 77. The court found in *Lee* that the "functional duties of the applicant's father" were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the Citizenship Act: para. 58. Rather, what mattered was

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only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

187 *Hitti* , the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the Citizenship Act, their holders had never been entitled to them. In that case, the applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti* , at paras. 6 and 9; see also Interpretation Act, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

188 What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi* , the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

**(d) Possible Consequences of the Registrar's Interpretation**

189 When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

> Well, usually the way we use section 3(2)(a) is for — you're right, for diplomats and that they don't — because they are not — they are not obliged ... to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status. But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that.
>
> (R.R. transcript, at pp. 87-88)

190 In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged ... to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

191 Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.) , in which Iacobucci J., writing for this Court, stated: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship": para. 68. This was reiterated in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.) , in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

192 It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can

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therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 (S.C.C.) , at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

193 Moreover, we would note that despite following a different legal process, the Registrar's decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as "a kind of 'political death'" — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014), 40 Queen's L.J. 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada's position with respect to Mr. Vavilov's citizenship and recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the Citizenship Regulations and the revocation of an individual's citizenship (as set out in s. 10 of the Citizenship Act) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

***D. Conclusion***

194 Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the Citizenship Act considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

195 As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the Citizenship Act to apply to children of individuals who have not been granted diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

196 Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the Citizenship Act. He is a Canadian citizen.

***E. Disposition***

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197 The appeal is dismissed with costs throughout to Mr. Vavilov.

***Abella, Karakatsanis JJ.*:**

198 Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227(S.C.C.) , this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

199 Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation's evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

200 We support the majority's decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of "true questions of jurisdiction". These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190(S.C.C.) .

201 But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court's jurisprudence for the last four decades. The majority's reasons are an encomium for correctness and a eulogy for deference.

**The Evolution of Canadian Administrative Law**

202 The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

203 In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied

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clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

204 The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts — but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 Can. Bar Rev. 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour/Le Travail* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

205 Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around "reasonableness" and "correctness", and determining when each standard applies. On the one hand, "reasonableness" review expects courts to defer to decisions by specialized decision-makers that "are defensible in respect of the facts and law"; on the other, "correctness" review allows courts to substitute their own opinions for those of the initial decision-maker (*Dunsmuir* , at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

206 The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute "law" (Kevin M. Stack, "Overcoming Dicey in Administrative Law" (2018), 68 U.T.L.J. 293, at p. 294).

207 The canonical example of Dicey's approach at work is the House of Lords' decision in *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147(U.K. H.L.) , the judicial progenitor of "jurisdictional error". *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors" capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive*. [Emphasis added; p. 171.]

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208 The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*, [1970] S.C.R. 425(S.C.C.) , and *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756 (S.C.C.) . These cases "took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal", and in each case, "th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal" (*Canada (Attorney General) v. P.S.A.C.*, [1991] 1 S.C.R. 614 (S.C.C.) , at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life* , for example, this Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell* , this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the Ontario Human Rights Code, 1961-62, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

209 As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service* Alliance, at p. 650; *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324(S.C.C.) , at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 C.J.A.L.P. 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R.A. MacDonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

210 In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the "jurisdictional error" model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir* , at para. 35; *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339(S.C.C.) , at para. 45; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, [2011] 3 S.C.R. 654(S.C.C.) , at para. 33; *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230(S.C.C.) , at para. 31). The Court instead endorsed an approach that respected the legislature's decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could "bristl[e] with ambiguities" and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.* , the decision was protected by a privative clause (pp. 230 and 234-36).

211 By championing "curial deference" to administrative bodies, *C.U.P.E.* embraced "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" (National Corn Growers , at p. 1336, per Wilson J., concurring; *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.) , at p. 800). As one scholar has observed:

> ... legislatures and courts in ... Canada have come to settle on the idea that the functional capacities of administrative agencies — their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change — justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state*. [Emphasis added.]
>
> (Stack, at p. 310)

212 In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada's approach to administrative law — one based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice

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system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

213 A new institutional relationship between the courts and administrative actors was thus being forged, based on "an understanding of the role of expertise in the modern administrative state" which "acknowledge[d] that judges are not always in the best position to interpret the law" (The Hon. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 Queen's L.J. 859, at p. 866).

214 In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048(S.C.C.) , the Court introduced the "pragmatic and functional" approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal's existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator "intend[ed] the question to be within the jurisdiction conferred on the tribunal" (p. 1087; see also p. 1088). If so, the tribunal's decision could only be set aside if it was "patently unreasonable" (p. 1086).

215 Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers* , Wilson J. noted that part of the process of moving away from Dicey's framework and towards a more sophisticated understanding of the role of administrative tribunals:

> ... has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

216 By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision ... [e]ven where the tribunal's enabling statute provides explicitly for appellate review" (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316(S.C.C.) , at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be "the most important" (*Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748(S.C.C.) , at para. 50).

217 Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise" (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) , at p. 591; see also *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722(S.C.C.) , at pp. 1745-46). Critically, the Court's willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

218 In *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982(S.C.C.) , the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault* , namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4)

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the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

219 Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.) , at paras. 21 and 29-34; *Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672 (S.C.C.) , at para. 45; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.) , at paras. 88-92 and 100).

220 Next came *Dunsmuir* , which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court's administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its "home" statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

221 Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para. 49). They noted that "in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (para. 49, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93).

222 Post-*Dunsmuir* , this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see Khosa , at para. 25; *R. v. Conway*, [2010] 1 S.C.R. 765(S.C.C.) , at para. 53; *British Columbia (Securities Commission) v. McLean*, [2013] 3 S.C.R. 895 (S.C.C.) , at paras. 30-33). Drawing on the concept of specialized expertise, the Court's post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker's interpretation of its home or closely-related statutes (see *Alberta Teachers' Association* , at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3 (S.C.C.) , at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise ... (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

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223 And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293 (S.C.C.) , the majority recognized:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer .... [E]xpertise is something that inheres in a tribunal itself as an institution: "... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions". [Citation omitted; para. 33.]

224 The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

225 As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [2009] 2 S.C.R. 764 (S.C.C.) , *Alliance Pipeline Ltd. v. Smith*, [2011] 1 S.C.R. 160 (S.C.C.) , *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219 (S.C.C.) , and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80 (S.C.C.) , the Court applied the reasonableness standard without even *referring* to the presence of an appeal clause. When appeal clauses *were* discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

226 In *Khosa* , Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language ... a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 (S.C.C.) ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean* , decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque* , Gascon J. affirmed that

> [w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal .... [para. 38]

227 In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence from this Court" (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that "a statutory right of appeal is not a new 'category' of correctness review" (para. 70).

228 By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir* 's promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

> *This contextual approach should be applied sparingly*. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" .... After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano* [*Edmonton East*], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis

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> may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano* [*Edmonton East*], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

229 In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir* , the meaning of "true questions of jurisdiction" and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

**The Majority's Reasons**

230 The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a "presumption of reasonableness review", this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as "expertise ... institutional experience ... proximity and responsiveness to stakeholders ... prompt[ness], flexib[ility], and efficien[cy]; and ... access to justice", the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

231 In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir* , at para. 49). As Iacobucci J. observed in *Southam*:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

232 Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.) , at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157(S.C.C.) , at para. 53). Specialization and expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan* , at para. 36; *Dr. Q* at paras. 29-30; Pezim , at pp. 591-92 and 596).

233 All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.* , at p. 236; *McLean* , at para. 37). As Professor H.W. Arthurs said:

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> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.
>
> ("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

234 Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (National Corn Growers , at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.* , Dickson J. fused expertise and legislative intent by explaining that an administrative body's specialized expertise can be essential to achieving the purposes of a statutory scheme:

> The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

235 Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (Bradco Construction, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir* , the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean* , at para. 40; see also Conway , at para. 53; *Mowat*, at para. 30; *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, [2011] 3 S.C.R. 708(S.C.C.) , at para. 13; *Doré c. Québec (Tribunal des professions)*, [2012] 1 S.C.R. 395 (S.C.C.) , at para. 35; *Mouvement laïque* , at para. 46; *Khosa* , at para. 25; *Edmonton East*, at para. 33).

236 Although the majority's approach extolls respect for the legislature's "institutional design choices", it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

237 Nor are we persuaded by the majority's claim that "if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not". Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

238 We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on "the reality that ... those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Khosa* , at para. 25; see also *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, [2011] 3 S.C.R. 616 (S.C.C.) , at para. 53; *Edmonton East*, at para. 33).

239 The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates

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to expanded correctness review. The majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

240 In the majority's framework, deference gives way whenever the "rule of law" demands it. The majority's approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey's 19th century philosophy.

241 The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law" had to be "reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (para. 30). As discussed in *Dunsmuir* , the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 C.J.A.L.P. 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770(S.C.C.) , at para. 31, per Abella J.).

242 Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.) , at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

> ... the aims of administrative law ... generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.
>
> (Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

243 These goals are compromised when a narrow conception of the "rule of law" is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

244 The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room ... for both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 U.B.C. L. Rev. 443, at p. 483). We would leave *Dunsmuir* 's description of this category undisturbed. [1]

1 Other than one of the two *amici*, no one asked us to modify this category.

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245 We also disagree with the majority's reformulation of "legislative intent" to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

246 In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

247 The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235(S.C.C.) , must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

248 In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect. [2]

2 The "constitutional concerns" cited by the majority are no answer to this dilemma — nothing in *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220(S.C.C.) , prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 Rev. Const. Stud. 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

249 In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (Pezim , at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

250 Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done. [3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66(S.C.C.) , that, absent exceptional circumstances, the existence of a statutory right of appeal does not displace the presumption that the standard of reasonableness applies. [4] The majority, however, has inexplicably chosen the template proposed by the *amici*, [5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

3 See Administrative Tribunals Act, S.B.C. 2004, c. 45. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not

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dictate what those standards would be: see Bill 32, An Act *mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

4 The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

5 Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

251 The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

252 Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque* , at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. 527, at pp. 542-43; The Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 U.N.B.L.J. 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

253 The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa* , at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir* , which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

254 But the aspect of the majority's decision with the greatest potential to undermine both the integrity of this Court's decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

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255 *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Craig v. R.*, [2012] 2 S.C.R. 489(S.C.C.) , the case about horizontal *stare decisis* on which the majority relies:

> The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).
>
> Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled ....*
>
> Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585(H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:
>
> > No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

256 Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a "special justification", which must be over and above the belief that a prior case was wrongly decided (Kimble v. Marvel Entertainment, LLC135 S.Ct. 2401(U.S. Sup. Ct. 2015), at p. 2409; see also Halliburton Co. v. Erica P. John Fund, Inc.573 U.S. 258(U.S. Sup. Ct. 2014), at p. 266; Kisor v. Wilkie139 S.Ct. 2400(U.S. Sup. Ct. 2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

257 Similarly, the House of Lords "require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it" (*Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)* (1977), 51 T.C. 708(U.K. H.L.) , at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor (Jack)*, [2016] UKSC 5, [2016] 4 All E.R. 617(U.K. S.C.), at para. 19; *Willers v. Joyce*, [2016] UKSC 44, [2017] 2 All E.R. 383(U.K. S.C.), at para. 7; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897(U.K. S.C.), at paras. 22-23).

258 New Zealand's Supreme Court views "caution, often considerable caution" as the "touchstone" of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent "merely because, if the matter were being decided afresh, the Court might take a different view" (Couch v. Attorney-General (No. 2) [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

259 Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (Lee v. New South Wales Crime Commission [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *South Africa (Republic) v. Grootboom*[2010] ZACC 19 , 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.* [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

260 The virtues of horizontal *stare decisis* are widely recognized. The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (Kimble , at p. 2409, citing Payne v. Tennessee501 U.S. 808(U.S. Tenn. S.C. 1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Bedford v. Canada (Attorney General)*, [2013] 3 S.C.R. 1101(S.C.C.) , at para. 38; *R. v. Bernard*, [1988] 2 S.C.R. 833(S.C.C.) , at p. 849; *Canada (Minister of Indian*

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*Affairs & Northern Development) v. Ranville*, [1982] 2 S.C.R. 518(S.C.C.) , at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (Michigan v. Bay Mills Indian Community572 U.S. 782(U.S. Sup. Ct. 2014), at p. 798; Kimble , at p. 2409; Kisor , at p. 2422; see also *Camps Bay* , at pp. 55-56; Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012), 111 Mich. L. Rev. 1, at p. 28; Lewis F. Powell, Jr., "Stare Decisis and Judicial Restraint" (1990), 47 Wash. & Lee L. Rev. 281, at p. 288).

261 Respect for precedent also safeguards this Court's institutional legitimacy. The precedential value of a judgment of this Court does not "expire with the tenure of the particular panel of judges that decided it" (*Plourde c. Québec (Commission des relations du travail)*, [2009] 3 S.C.R. 465(S.C.C.) , at para. 13). American cases have stressed similar themes:

> There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.
>
> (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833(U.S. Sup. Ct. 1992), at p. 866; see also *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assoc.*, 450 U.S. 147(U.S. Sup. Ct. 1981), at p. 153, per Stevens J., concurring.)

262 Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

> overruling precedent damages the public's conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble a ticket valid only for the day of purchase.
>
> ("Overruling Precedent" (1986), 21 *Is.L.R.* 269, at p. 275)

263 The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

264 The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

265 The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa* , at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque* , at para. 38; *Edmonton East*, at paras. 27-31; see also McLean , at para. 21).

266 Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer* , at para. 22; *Casey* , at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they

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never liked it in the first instance" (Knick v. Township of Scott, Pennsylvania139 S.Ct. 2162(U.S. Sup. Ct. 2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble* :

> ... an argument that we got something wrong — even a good argument to that effect — cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification" — over and above the belief "that the precedent was wrongly decided." [Citation omitted; p. 2409.]

267 But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim* ; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132(S.C.C.) ; *Dr. Q* ; *Ryan* ; *Cartaway*; *VIA Rail*; *Proprio Direct inc. c. Pigeon*, [2008] 2 S.C.R. 195(S.C.C.) ; *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, [2009] 2 S.C.R. 678(S.C.C.) ; *McLean* ; *Bell Canada (2009)*; *ATCO Gas* ; *Mouvement laïque* ; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis and to "home statute" deference (*C.U.P.E.* ; *National Corn Growers* ; *Domtar Inc.* ; *Bradco Construction*; *Southam*; *Pushpanathan* ; *Alberta Teachers' Association* ; *Canadian Human Rights Commission*, among many others).

268 Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court's strong reluctance to overturn precedents that "represen[t] the considered views of firm majorities" (*Craig* , at para. 24; *Fraser v. Ontario (Attorney General)*, [2011] 2 S.C.R. 3(S.C.C.) , at para. 57; see also *Rascal Trucking Ltd. v. Nishi*, [2013] 2 S.C.R. 438(S.C.C.) , at paras. 23-24), or to overrule decisions of a "recent vintage" (*Fraser* , at para. 57; see also Nishi , at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a 34-year-old precedent; *R. v. Henry*, [2005] 3 S.C.R. 609(S.C.C.) , overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

269 The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean* , for example, this Court acknowledged that a limitations period in British Columbia's Securities Act [6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

6 R.S.B.C. 1996, c. 418, s. 159

270 The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; Kimble , at pp. 2410-11). By changing the entire status quo, the majority's approach will undermine legal certainty — "the foundational principle upon which the common law relies" (*Bedford* , at para. 38; see also Cromwell, at p. 315).

271 Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our

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past decisions is even less compelling (*R. v. Binus*, [1967] S.C.R. 594(S.C.C.) , at p. 601; see also Kimble , at p. 2409; Kisor , at pp. 2422-23; Bilski v. Kappos561 U.S. 59(U.S. Sup. Ct. 2010), at pp. 601-2).

272 Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor* . There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (Bowles v. Seminole Rock & Sand Co.325 U.S. 410(U.S. Sup. Ct. 1945); Auer v. Robbins519 U.S. 452(U.S. Sup. Ct. 1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by lower courts thousands of times (p. 2422). She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

> ... even if we are wrong about *Auer*, "Congress remains free to alter what we have done." In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history — and Congress's continuing ability to take up Kisor's arguments — we would need a particularly "special justification" to now reverse *Auer*. [Citations omitted; pp. 2422-23]

273 In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 U.N.B.L.J. 87; The Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 C.J.A.L.P. 67, at p. 79; The Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 C.J.A.L.P. 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 C.J.A.L.P. 67).

274 A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court*. As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.

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> Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]
>
> (paras. 65-66, citing *Baker v. Campbell*, [1983] HCA 39, (1983), 153 C.L.R. 52(Australia H.C.), at pp. 102-3)

275 This Court, in fact, has been clear that "criticism of a judgment is not sufficient to justify overruling it" (*Fraser* , at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, [2016] 1 S.C.R. 631(S.C.C.) , or even *Housen* , which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401(S.C.C.) , at para. 76; see also Paul M. Perell, "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 Can. Bus. L.J. 434, at p. 436).

276 To justify circumventing this Court's jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect, is wrong. Ever since *Bell Canada (1989)* and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Deputy Minister of National Revenue v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100(S.C.C.) , at paras. 27-33; *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84(S.C.C.) , at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45(S.C.C.) , at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

277 For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

278 This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court's existing jurisprudence.

**Going Forward**

279 In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. "[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine" (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

> Judicial modesty is .... a disposition to respect precedents (as embodying the opinions of others), to learn from their and others' experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

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280 Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The* Rule of Law (2010):

> ... it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]

(See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, [1991] 3 S.C.R. 654(S.C.C.), at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842(S.C.C.), at para. 42; *R. v. Brown*, [2008] 1 S.C.R. 456(S.C.C.), at paras. 14-16, per Lebel J., and 73-74, per Binnie J., concurring.)

281 Lord Bingham's comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

282 So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir* . These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures' court to modify the standards of review if they wish.

283 To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

284 We also acknowledge that this Court should offer additional direction on conducting reasonableness review. [7] We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Irving Pulp & Paper Ltd. v. CEP, Local 30*, [2013] 2 S.C.R. 458(S.C.C.) , at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

7 Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

285 Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture

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of suspicion towards administrative decision making. We are also concerned by the majority's warning that administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

286 We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer" [8] to an administrative decision (see Dunsmuir , at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

8 Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

287 In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

288 First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir* , at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77(S.C.C.) , at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir* , at paras. 48-49). Reviewing courts must pay "respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

289 Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa* , at paras. 59 and 61-62; *Dunsmuir* , at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

290 This Court has often endorsed this approach to conducting reasonableness review. In *Ryan* , for example, Iacobucci J. explained:

> ... When deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been .... The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness .... Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]

(See also *U.A.W., Local 720 v. Volvo Canada Ltd.* (1979), [1980] 1 S.C.R. 178(S.C.C.), at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Canada (Citizenship and Immigration)*, 2019 FC 1251(F.C.), at para. 22, per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in Administrative Law" (2017), 68 *U.N.B.L.J.* 68, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

291 Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake*

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*Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83(S.C.C.) , at para. 108; *Khela v. Mission Institution*, [2014] 1 S.C.R. 502(S.C.C.) , at para. 64; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809(S.C.C.) , at para. 71; *Ryan* , at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada* (1979), [1980] 1 S.C.R. 115(S.C.C.) , at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

292 Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir* , at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5(S.C.C.) , at para. 18). Administrative law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) , at para. 158 (dissenting in part, but not on this point):

> ... not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate ....

293 Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association* , at para. 47; *Wilson* , at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 (S.C.C.) , at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive — but it does not alter the deferential posture of the reviewing court (*Suresh* , at para. 40).

294 Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail. [295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required. [9]

9 Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817(S.C.C.) , at para. 43.

296 The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake* , at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

297 Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and

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on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean* , at para. 40).

298 Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

299 Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration ... than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (National Corn Growers , at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

300 When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir* , at para. 47; *Khosa* , at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

301 Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations Assn. (Alberta) v. Driver Iron Inc.*, [2012] 3 S.C.R. 405 (S.C.C.) , at para. 3; *Newfoundland Nurses*, at para. 16, citing *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.) , at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake* , at para. 37; *Delta Air Lines Inc. v. Lukács*, [2018] 1 S.C.R. 6(S.C.C.) , at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association* , at paras. 53 and 56).

302 The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan, at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker* , at para. 44), which may not be conducive to the production of "archival" reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123).

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303 Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 U.N.B.L.J. 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker* , at para. 44; see also Williams Lake , at para. 37; *Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71(Ont. C.A.) , at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history (*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3(S.C.C.) , at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are "consistent with the process of reasoning" applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" (*Lukács* , at para. 24).

304 The "adequacy" of reasons, in other words, is not "a stand-alone basis for quashing a decision" (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works & Government Services)*, [2012] 2 S.C.R. 108 (S.C.C.) , at para. 44; *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559 (S.C.C.) , at para. 52; *Williams Lake* , at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

305 In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

306 We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

307 We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason* , at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 Mod. L. Rev. 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

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308 Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

309 Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (National Corn Growers , at p. 1336, per Wilson J., concurring; *Domtar Inc.* , at p. 800). Further, not only are statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 Colum. L. Rev. 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

310 Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

311 Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

312 We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association* , at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293(S.C.C.) , at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.* , at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

313 In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review,

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judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

**Application to Mr. Vavilov**

314 Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the Citizenship Act, R.S.C. 1985, c. C-29.

315 The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

316 The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

317 Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

318 In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

319 From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

320 On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

321 The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

322 The Federal Court ((2015), [2016] F.C.R. 39(F.C.)) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

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323 The Federal Court of Appeal (2017[2018] 3 F.C.R. 75(F.C.A.)) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

324 As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's interpretation of the Act in this case. As such, the standard of review is reasonableness.

325 The following provisions of the *Citizenship Act* are relevant to this appeal:

> **Persons who are citizens**
>
> **3 (1)** Subject to this Act, a person is a citizen if
>
> (a) the person was born in Canada after February 14, 1977;
>
> . . . . .
>
> **Not applicable to children of foreign diplomats, etc.**
>
> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

326 The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

327 In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

328 The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

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329 The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the Canadian Citizenship Act, R.S.C. 1970, c. C-19:

> **Not applicable to children of foreign diplomats, etc.**
>
> (3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent
>
> (a) is an alien who has not been lawfully admitted to Canada for permanent residence; and
>
> (b) is
>
> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

330 The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the Interpretation Act, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic mission, the analyst determined "it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

331 Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

332 In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

333 In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

334 First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the Foreign Missions and International Organizations Act, S.C. 1991, c. 41 ("FMIOA"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. (1983), 1966 No. 29 (Australia H.C.) , Sched. I to the FMIOA, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the FMIOA, which deal with diplomatic privileges and immunities. He submitted that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

335 Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

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336 Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 (S.C.C.) , at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 539(S.C.C.) , at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (Ont. S.C.J.) ; *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. Prov. Div.) ; Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)200764 Imm. L.R. (3d) 67(F.C.)).

337 The Federal Court's decision in *Al-Ghamdi* , a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

338 The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

339 The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

340 In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

341 By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2) that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

342 Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

343 We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

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*Appeal dismissed.*

*Pourvoi rejeté.*

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**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** Pétroles Goyer ltée c. Agence du revenu du Québec | 2019 QCCQ 4436, 2019 CarswellQue 6264, EYB 2019-314324 | (C.Q., Apr 10, 2019)

2006 SCC 20
Supreme Court of Canada

Placer Dome Canada Ltd. v. Ontario (Minister of Finance)

2006 CarswellOnt 3112, 2006 CarswellOnt 3113, 2006 SCC 20, [2006] 1 S.C.R. 715, [2006] S.C.J. No. 20, 147 A.C.W.S. (3d) 914, 2006 D.T.C. 6532 (Eng.), 210 O.A.C. 342, 266 D.L.R. (4th) 513, 348 N.R. 148, J.E. 2006-1100

# Ontario (Minister of Finance), Appellant and Placer Dome Canada Limited, Respondent

Abella J., Bastarache J., Binnie J., Charron J., Deschamps J., Fish J., LeBel J.

Heard: November 17, 2005
Judgment: May 25, 2006
Docket: 30580

Proceedings: reversing *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)* (2004), 190 O.A.C. 157, 2004 CarswellOnt 3491 (Ont. C.A.); reversing *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)* (2002), 2002 CarswellOnt 3165, 61 O.R. (3d) 628 (Ont. S.C.J.)

Counsel: Anita C. Veiga, Leslie M. McIntosh, for Appellant
Al Meghji, Mahmud Jamal, Jacqueline Code, for Respondent

Subject: Tax — Miscellaneous; Provincial Tax
**Related Abridgment Classifications**
Tax
I General principles
I.3 Interpretation of taxing statutes
I.3.r Words and phrases
Tax
V Provincial taxation
V.9 Ontario
V.9.h Mining tax
**Headnote**
Taxation --- General tax principles — Interpretation of taxing statutes — Rules of construction — Words and phrases
PDI and subsidiaries were involved in exploration, production and sale of gold — In 1995 and 1996, PDI and subsidiaries owned total of 13 gold mines located in various countries — PDC, subsidiary of PDI, operated five gold mines in Canada — In 1995 and 1996, PDC entered into certain financial transactions, executed by PDI on behalf of PDC as part of "hedging program" — Purpose of transactions was to protect worldwide output of PDI and subsidiaries from fluctuations in spot price of gold — All gold produced by PDC in 1995 and 1996 was sold to bullion dealers at spot market price at time of sales and none of it was delivered or dealt with pursuant to planned transactions — After entering into transactions, PDI allocated them among subsidiaries — Agreement between PDI and PDC stipulated that, with exception of amounts of precious metals and foreign currency to be hedged, on which PDI would take instruction from PDC, PDI would be free to conduct hedging activity on PDC's behalf in manner to be determined at PDI's discretion — Net gains realized from transactions totalled $6,423,000 and $11,440,000 in 1995 and 1996, respectively — Pursuant to Mining Tax Act, Minister assessed PDC for taxes concerning net

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gains realized from transactions — PDC's appeal was dismissed — PDC's appeal to Court of Appeal was allowed — Appellate Court found that trial judge did not properly apply Mining Tax Act, and rather employed broader definition of "hedging" as per Generally Accepted Accounting Principles — Minister appealed — Appeal allowed — Broader definition of "hedging", as contemplated by trial judge, was correct, and was consistent with statutory definition — Hedging not restricted to transactions which result in delivery of output from Ontario mine — Parties agreed that transactions at issue constituted hedging in ordinary sense of term — Transactions not speculative because gold allocated to them did not exceed actual production from mines — Forward sales and future contracts need not take place on recognized commodity exchange to constitute hedging — Forward sales by definition do not take place on commodities markets — Price may be "fixed", as contemplated by Act, by forward sale contract or by option — Futures contracts rarely settled by physical delivery — Intolerable uncertainty in terms of Act not created by broader definition of hedging — Minister's practice regarding Act not determinative of its application.

Taxation --- Provincial and territorial taxes — Ontario — Mining tax

PDI, and subsidiaries were involved in exploration, production and sale of gold — In 1995 and 1996, PDI and subsidiaries owned total of 13 gold mines located in various countries — PDC, subsidiary of PDI, operated five gold mines in Canada — In 1995 and 1996, PDC entered into certain financial transactions, executed by PDI on behalf of PDC as part of "hedging program" — Purpose of transactions was to protect worldwide output of PDI and subsidiaries from fluctuations in spot price of gold — All gold produced by PDC in 1995 and 1996 was sold to bullion dealers at spot market price at time of sales and none of it was delivered or dealt with pursuant to planned transactions — After entering into transactions, PDI allocated them among subsidiaries — Agreement between PDI and PDC stipulated that, with exception of amounts of precious metals and foreign currency to be hedged, on which PDI would take instruction from PDC, PDI would be free to conduct hedging activity on PDC's behalf in manner to be determined at PDI's discretion — Net gains realized from transactions totalled $6,423,000 and $11,440,000 in 1995 and 1996, respectively — Pursuant to Mining Tax Act, Minister assessed PDC for taxes concerning net gains realized from transactions — PDC's appeal was dismissed — PDC's appeal to Court of Appeal was allowed — Appellate Court found that trial judge did not properly apply Mining Tax Act, and rather employed broader definition of "hedging" as per Generally Accepted Accounting Principles — Minister appealed — Appeal allowed — Broader definition of "hedging", as contemplated by trial judge, was correct, and was consistent with statutory definition — Hedging not restricted to transactions which result in delivery of output from Ontario mine — Parties agreed that transactions at issue constituted hedging in ordinary sense of term — Transactions not speculative because gold allocated to them did not exceed actual production from mines — Forward sales and future contracts need not take place on recognized commodity exchange to constitute hedging — Forward sales by definition do not take place on commodities markets — Price may be "fixed", as contemplated by Act, by forward sale contract or by option — Futures contracts rarely settled by physical delivery — Intolerable uncertainty in terms of Act not created by broader definition of hedging — Minister's practice regarding Act not determinative of its application.

Taxation --- Principes fiscaux généraux — Interprétation des lois fiscales — Règles d'interprétation — Termes et locutions

PDI et ses filiales exerçaient des activités d'exploration de gisements aurifères ainsi que de production et de vente d'or — En 1995 et 1996, PDI et ses filiales possédaient un total de 13 mines aurifères situées dans divers pays — PDC, une filiale de PDI, exploitait cinq mines aurifères situées au Canada — En 1995 et 1996, PDC a conclu certaines opérations financières, qui furent effectuées en son nom par PDI dans le cadre d'un « programme de couverture » — Opérations avaient pour but de protéger la production mondiale de PDI et de ses filiales contre les fluctuations du prix au comptant de l'or — Tout l'or produit par PDC en 1995 et 1996 a été vendu à des courtiers en lingots d'or au prix du marché au comptant au moment de la vente et aucune de ces opérations ne s'est dénouée par une livraison physique d'or ni n'a été traitée en conformité aux transactions planifiées — Après avoir conclu ces opérations, PDI les a attribuées à ses filiales — Convention entre PDI et PDC stipulait que PDI serait libre d'effectuer à son gré des opérations de couverture au nom de PDC, exception faite des directives que PDC donnerait au sujet des quantités de métaux précieux devant faire l'objet d'une opération de couverture — Gains nets tirés de ces opérations s'élevaient à 6 423 000 $ en 1995 et à 11 440 000 $ en 1996 — Conformément à la Loi de l'impôt sur l'exploitation minière (LIEM), le ministère a établi une cotisation pour PDC pour l'impôt à payer sur les gains nets tirés des opérations — Appel de PDC a été rejeté — Cour d'appel a accueilli le pourvoi de PDC — Cour d'appel a conclu que le premier juge n'avait pas appliqué correctement la LIEM, car il avait utilisé une définition plus large du terme « couverture » conformément aux principes comptables généralement reconnus — Ministre a interjeté appel — Pourvoi accueilli — Définition plus large du terme « couverture » envisagée par le premier juge était correcte ainsi que compatible avec la définition légale — Couverture ne se limite pas aux opérations qui donnent lieu à la livraison de la production d'une mine ontarienne — Parties étaient d'accord que

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les opérations en cause correspondaient à de la couverture au sens ordinaire du terme — Opérations n'étaient pas spéculatives puisque la quantité d'or qui leur était attribuée n'excédait pas la production véritable des mines — Ventes à terme ou contrats à terme n'avaient pas à être conclus sur le parquet d'une Bourse de commerce reconnue pour qu'ils constituent de la couverture — Par définition, les ventes à terme n'ont pas lieu sur le parquet d'une Bourse de commerce — Comme l'envisage la Loi, le prix ne peut être « fixé » que par un contrat de vente à terme ou par une option — Contrats à terme se terminent rarement par une livraison physique — Aucune incertitude intolérable découlant des termes de la Loi ne résultait de la définition plus large du terme « couverture » — Pratique du ministre en ce qui concerne la Loi n'était pas déterminante quant à l'application de celle-ci.
Taxation --- Impôts provinciaux et territoriaux — Ontario — Impôt minier
PDI et ses filiales exerçaient des activités d'exploration de gisements aurifères ainsi que de production et de vente d'or — En 1995 et 1996, PDI et ses filiales possédaient un total de 13 mines aurifères situées dans divers pays — PDC, une filiale de PDI, exploitait cinq mines aurifères situées au Canada — En 1995 et 1996, PDC a conclu certaines opérations financières, qui furent effectuées en son nom par PDI dans le cadre d'un « programme de couverture » — Opérations avaient pour but de protéger la production mondiale de PDI et de ses filiales contre les fluctuations du prix au comptant de l'or — Tout l'or produit par PDC en 1995 et 1996 a été vendu à des courtiers en lingots d'or au prix du marché au comptant au moment de la vente et aucune de ces opérations ne s'est dénouée par une livraison physique d'or ni n'a été traitée en conformité aux transactions planifiées — Après avoir conclu ces opérations, PDI les a attribuées à ses filiales — Convention entre PDI et PDC stipulait que PDI serait libre d'effectuer à son gré des opérations de couverture au nom de PDC, exception faite des directives que PDC donnerait au sujet des quantités de métaux précieux devant faire l'objet d'une opération de couverture — Gains nets tirés de ces opérations s'élevaient à 6 423 000 $ en 1995 et à 11 440 000 $ en 1996 — Conformément à la Loi de l'impôt sur l'exploitation minière (LIEM), le ministère a établi une cotisation pour PDC pour l'impôt à payer sur les gains nets tirés des opérations — Appel de PDC a été rejeté — Cour d'appel a accueilli le pourvoi de PDC — Cour d'appel a conclu que le premier juge n'avait pas appliqué correctement la LIEM, car il avait utilisé une définition plus large du terme « couverture » conformément aux principes comptables généralement reconnus — Ministre a interjeté appel — Pourvoi accueilli — Définition plus large du terme « couverture » envisagée par le premier juge était correcte ainsi que compatible avec la définition légale — Couverture ne se limite pas aux opérations qui donnent lieu à la livraison de la production d'une mine ontarienne — Parties étaient d'accord que les opérations en cause correspondaient à de la couverture au sens ordinaire du terme — Opérations n'étaient pas spéculatives puisque la quantité d'or qui leur était attribuée n'excédait pas la production véritable des mines — Ventes à terme ou contrats à terme n'avaient pas à être conclus sur le parquet d'une Bourse de commerce reconnue pour qu'ils constituent de la couverture — Par définition, les ventes à terme n'ont pas lieu sur le parquet d'une Bourse de commerce — Comme l'envisage la Loi, le prix ne peut être « fixé » que par un contrat de vente à terme ou par une option — Contrats à terme se terminent rarement par une livraison physique — Aucune incertitude intolérable découlant des termes de la Loi ne résultait de la définition plus large du terme « couverture » — Pratique du ministre en ce qui concerne la Loi n'était pas déterminante quant à l'application de celle-ci.
During the relevant period, PDI, a Canadian resident corporation, and its subsidiaries were involved in the exploration, production and sale of gold worldwide. In 1995 and 1996, PDI and its subsidiaries owned a total of 13 gold mines located in various countries across the world. At all material times PDC, a wholly-owned subsidiary of PDI, operated five gold mines in Canada.
In 1995 and 1996, PDC entered into certain financial transactions (the "Transactions"). The Transactions were executed by PDI on behalf of PDC as part of a "hedging program". The purpose of the Transactions was to protect the worldwide output of PDI and its subsidiaries from fluctuations in the spot price of gold. All gold produced by PDC in 1995 and 1996 was sold to bullion dealers at the spot market price at the time of the sales and none of it was delivered or dealt with pursuant to, or for the purpose of, the Transactions. Shortly after entering into the Transactions, PDI allocated them among the subsidiaries. An agreement between PDI and PDC stipulated that, with the exception of the amounts of precious metals and foreign currency to be hedged, on which PDI would take instruction from PDC, PDI would be free to conduct hedging activity on PDC's behalf in a manner to be determined at PDI's discretion.
The net gains realized from the Transactions were $6,423,000 and $11,440,000 in 1995 and 1996, respectively. Pursuant to the Mining Tax Act, the Minister of Finance for Ontario assessed PDC for taxes concerning the net gains realized from the Transactions. PDC appealed the assessments. In dismissing the appeal, the trial judge concluded that the Transactions fell within the definition of "hedging" under the Act and, hence, the net gains derived therefrom were subject to tax.

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PDC's appeal was allowed. The appellate court found that the trial judge erred in failing to respect the definition of hedging as set out in the Mining Tax Act. The appellate court found the statutory definition was clear, unambiguous and precise. However, instead of applying the precise language of the definition to the facts before him, the appellate court found the trial judge erroneously employed a broader definition based upon the meaning of hedging under Generally Accepted Accounting Principles. The trial judge's concept of hedging did not fix a price for the output of a mine and was at odds with the purpose of the Act which is to tax the value of the resource taken from the ground. Hedging, as viewed by the trial judge, involved a risk management activity but such activity, on the facts of the case, did not generate profit from the gold taken from the mine.

The appellate court further found the trial judge erred in finding that only some link is required between an operator's hedging transactions and the output of the mine. The appellate court found the language of the definition of hedging in the Act is precise and does not lend itself to finding "some link" or "a sufficient link" between the transactions and the output of the mines.

The appellate court found that the trial judge erred in finding that "all consideration" referred to in the definition of "proceeds" in the Act contemplated a net amount. The appellate court found consideration is not defined under the Act and it was therefore appropriate to rely on the common law. The appellate court found that consideration is inherently a gross concept, and nothing exists in the common law definition of consideration to suggest it is a net concept.

The appellate court found the trial judge erred in concluding that "forward sales" included "options". The appellate court found an option cannot be a forward sale because it is only when the option is exercised that an agreement of purchase and sale takes place. The options in question did not fall within the definition of hedging.

The Minister appealed.

**Held:** The appeal was allowed.

Per Lebel J. (Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.A. concurring): The broader definition of "hedging", as contemplated by the trial judge, was correct, and was consistent with the statutory definition. Hedging is not restricted to transactions which result in the delivery of output from Ontario mines. The parties agreed that transactions at issue constituted hedging in the ordinary sense of the term. The transactions were not speculative because the gold allocated to them did not exceed actual production from the mines. Forward sales and future contracts need not take place on recognized commodity exchanges to constitute hedging. Forward sales, in fact, by definition do not take place on commodities markets. Prices may be "fixed", as contemplated by the Act, by forward sale contract or by option. Futures contracts are rarely settled by physical delivery. Intolerable uncertainty in terms of Act was not created by the broader definition of hedging. The Minister's past practice regarding Act not determinative of its application.

Au cours de la période pertinente, PDI, une compagnie résidente du Canada, et ses filiales exerçaient des activités d'exploration de gisement aurifères ainsi que de production et de vente d'or. En 1995 et 1996, PDI et ses filiales possédaient un total de 13 mines aurifères situées dans divers pays à travers le monde. À tous les moments pertinents, PDC, une filiale en propriété exclusive de PDI, exploitait cinq mines aurifères situées au Canada.

En 1995 et 1996, PDC a conclu certaines opérations financières (les « opérations »). Celles-ci ont été effectuées en son nom par PDI dans le cadre d'un « programme de couverture ». Ces opérations visaient à protéger la production mondiale de PDI et de ses filiales contre les fluctuations du prix au comptant de l'or. Tout l'or produit par PDC en 1995 et 1996 a été vendu à des courtiers en lingots d'or au prix du marché au comptant; aucune de ces opérations ne s'est dénouée par une livraison physique d'or ni n'a été traitée en conformité aux opérations planifiées. PDI a attribué ces opérations à ses filiales peu de temps après les avoir effectuées. Une convention entre PDI et PDC stipulait que PDI serait libre d'effectuer à son gré des opérations de couverture au nom de PDC, exception faite des directives que PDC donnerait au sujet des quantités de métaux précieux devant faire l'objet d'une opération de couverture

Les gains nets tirés de ces opérations s'élevaient à 6 423 000 $ en 1995 et à 11 440 000 $ en 1996. Conformément à la Loi de l'impôt sur l'exploitation minière, le ministre des Finances de l'Ontario a établi, pour PDC, une cotisation pour l'impôt à payer sur les gains nets tirés des opérations. PDC est allé en appel des cotisations établies. Le premier juge a rejeté l'appel, au motif que les opérations entraient dans la définition de « couverture » en vertu de la Loi et, donc, que les gains nets qui en étaient tirés étaient assujettis à l'impôt.

Le pourvoi de PDC a été accueilli. La Cour d'appel a conclu que le premier juge avait commis une erreur en omettant de se conformer à la définition de couverture énoncée dans la Loi de l'impôt sur l'exploitation minière. Elle a conclu que la définition énoncée dans la Loi était claire, précise et non ambiguë. Elle a estimé que le premier juge n'avait pas appliqué aux faits les termes spécifiques de la définition et qu'il avait plutôt employé à tort une définition large fondée sur la signification du terme

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couverture selon les principes comptables généralement connus. Le concept de couverture retenu par le juge ne fixait aucun prix pour la production d'une mine et était contraire à l'objectif de la Loi, qui vise à imposer la valeur de la ressource extraite du sol. Selon le premier juge, une couverture implique une certaine gestion de risque, sauf que ce type d'activité, selon les faits de l'espèce, n'avait tiré aucun profit de l'or extrait de la mine.

La Cour d'appel a de plus estimé que le premier juge avait commis une erreur en concluant qu'il fallait prouver l'existence d'un lien entre les opérations de couverture et la production de la mine. Elle a conclu que le libellé de la définition de « couverture » dans la Loi était précis et ne nécessitait pas de conclure à l'existence d'un lien ou d'un lien suffisant entre les opérations et la production des mines.

La Cour d'appel a conclu que le premier juge avait commis une erreur en concluant que l'expression « toute contrepartie », à laquelle renvoyait la définition du terme « recettes » dans la Loi, envisageait un montant net. Elle a conclu que, le terme « contrepartie » n'était pas défini dans la Loi et qu'il était, par conséquent, approprié de se référer à la common law. Elle a conclu que la contrepartie est forcément une valeur brute et que rien dans la définition de contrepartie émanant de la common law ne suggère qu'il s'agisse d'un concept de valeur nette.

La Cour d'appel a conclu que le juge avait erré en concluant que la « vente à terme » incluait les « options ». Selon elle, une option ne pouvait constituer une vente à terme étant donné qu'un contrat d'achat et de vente ne peut avoir lieu qu'après l'exercice d'une option. Les options en cause n'entraient pas dans la définition de couverture.

Le ministre a interjeté appel.

**Arrêt:** Le pourvoi a été accueilli.

LeBel, J. (Bastarache, Binnie, Deschamps, Fish, Abella et Charron, JJ., souscrivant à son opinion): La définition plus large de « couverture » envisagée par le juge du procès était correcte et compatible avec la définition légale. La couverture ne se limite pas aux transactions qui donnent lieu à la livraison de la production des mines ontariennes. Les parties étaient d'accord que les opérations en cause constituaient de la couverture au sens ordinaire de ce terme. Ces opérations n'étaient pas spéculatives puisque la quantité d'or qui leur était attribuée n'excédait pas la production véritable des mines. Les ventes à terme ou les contrats à terme n'avaient pas à être conclus sur le parquet d'une Bourse de commerce reconnue pour qu'ils constituent de la couverture. Par définition, les ventes à terme n'ont pas lieu sur le parquet d'une Bourse de commerce. Comme l'envisage la Loi, les prix peuvents être « fixé[s] » par une vente à terme ou par option. Les contrats à terme se terminent rarement par une livraison physique. La définition large de la couverture ne résultait pas en une incertitude intolérable découlant des termes de la Loi. La pratique du ministre en ce qui concerne la Loi n'était pas déterminante quant à l'application de celle-ci.

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APPEAL by Minister of Finance from judgment reported at *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)* (2004), 190 O.A.C. 157, 2004 CarswellOnt 3491 (Ont. C.A.), regarding applicability of *Mining Tax Act.*

POURVOI du ministre des Finances à l'encontre de l'arrêt publié à *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)* (2004), 190 O.A.C. 157, 2004 CarswellOnt 3491 (C.A. Ont.), en ce qui concerne les conditions d'application de la *Loi de l'impôt sur l'exploitation minière*

***Lebel J.*:**

**I. Introduction**

1 The issue at the core of this appeal concerns the proper interpretation of "hedging" in s. 1(1) of the *Mining Tax Act*, R.S.O. 1990, c. M.15, in order to determine the scope of the tax base under the Act. Hedging, as it is commonly understood, refers to transactions that offset financial risk inherent in other transactions, such as price risk or foreign exchange risk. In the present case, the Court is called upon to determine whether the definition of "hedging" in the *Mining Tax Act* is informed by, or is narrower than, the commonly understood meaning of the term. Specifically, the Court must decide whether the statutory definition is restricted to transactions that result in the physical delivery of the output of an Ontario mine or includes profits derived from "hedging" programs in respect of mining operations.

2 Until 1998, the Minister of Finance's own administrative practice excluded financial transactions from the statutory definition of "hedging" unless those transactions resulted in the delivery of output from an Ontario mine. In 1995 and 1996, Placer Dome Canada Limited ("PDC") realized gains of $6,423,000 and $11,440,000, respectively, from certain financial transactions. Consistent with the Minister's administrative practice prevailing at the time, it excluded those gains from its computation of profits under the *Mining Tax Act* because no gold had been delivered pursuant to those transactions. By the time PDC was reassessed in 2000, the Minister's policy had changed. Under the new policy, transactions constitute "hedging" so long as they are entered into prior to the delivery of output and to the extent that the volume of the transactions does not exceed the productive capacity of the Ontario mine. This would mean that certain non-speculative transactions which fix the ultimate price of mine output would fall within the statutory definition of "hedging", even if such transactions did not result in the physical delivery of output. Thus, the Minister sought to include the gains in PDC's profits for the tax years in question. PDC appealed this reassessment. Although PDC was unsuccessful before Cullity J. of the Ontario Superior Court of Justice, a majority of the Court of Appeal for Ontario allowed PDC's appeal.

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3 I conclude that the definition of "hedging" in the *Mining Tax Act* extends to transactions that do not result in the physical delivery of output from an Ontario mine. This interpretation avoids the redundancy that results, on PDC's interpretation, between the statutory definitions of "hedging" and "proceeds" of mining operations. Moreover, it ensures that resources are taxed at their "locked in" value or their "realized price".

**II. Background**

4 PDC is a wholly owned subsidiary of Placer Dome International ("PDI"). PDI has approximately 50 direct and indirect subsidiaries around the world and, together with those subsidiaries, is engaged in the international exploration, production and sale of gold. In 1995 and 1996, PDC, or a predecessor prior to an amalgamation, operated three mines in Ontario: the Campbell Red Lake underground mine, the Detour Lake mine and the Dome mine. It also operated the Sigma gold mine in Quebec and the Endako molybdenum mine in British Columbia, and owned all the shares of a corporation that operated the Kiena gold mine in Quebec.

5 It is not disputed by the parties that all the gold produced by PDC in 1995 and 1996 was sold to bullion dealers at, or approximately at, the spot market price and that none of the gold produced was the subject of a forward sale or a futures contract. At issue in the present case is a series of transactions entered into by PDI on PDC's behalf as part of a comprehensive program designed to manage the risk associated with fluctuations in the spot price of gold. Those transactions included forward contracts, spot deferred contracts, fixed interest floating lease rate contracts, put options and call options. It is common ground that none of these transactions were settled by physical delivery of gold from any of PDC's Ontario mines.

6 On December 21, 1993, PDC entered into an agency agreement with PDI whereby PDI was designated PDC's exclusive agent for the purpose of conducting hedging activity. In 1995 and 1996, pursuant to that agreement, PDI carried out hedging transactions on PDC's behalf in order to protect the PDI Group from fluctuations in the spot price of gold. Under the terms of the agreement, PDI took instruction from PDC as to the amounts of precious metals to be hedged, but was otherwise free to conduct hedging activity on PDC's behalf at its discretion. On or shortly after entering into these transactions, PDI allocated them to PDC. In its internal bookkeeping and financial statements and in computing its income from gold production for the purpose of claiming a resource allowance in its corporate tax returns, PDC, in turn, allocated the transactions among its Canadian mines on the basis of proportionate production from each mine. The gold that was so allocated was less than the actual production from the mines. The total net gains that PDC realized from these transactions were $6,423,000 in 1995 and $11,440,000 in 1996.

**III. Legislative Framework and Application of the Law**

7 The present appeal concerns only a very specific and limited part of the taxation regime of the mining industry in Canada. Over the years, this industry has seen the rise and fall of a number of rules and policies designed to address its particular needs and difficulties. Many of them will be found, for example, in the *Income Tax Act* (R.S.C. 1985, c. 1 (5th Supp.)), more particularly in provisions about the deductibility of Crown royalties or mining taxes and, for a long time, about depletion allowances.

8 Under s. 3(1) of the *Mining Tax Act*, mine operators pay tax based on profit. Profit is defined in s. 3(5) as proceeds less allowable deductions, and "proceeds" is defined in s. 1(1) as follows:

> "proceeds" means the total consideration that is received or is receivable from another person or persons, in any currency, whether in cash or non-cash form, from the output of the mine, including all by-products sold, or the amount determined in the prescribed manner, and all consideration received or receivable from hedging and future sales or forward sales of the output of the mine, converted at the date of receipt of the consideration to the equivalent in Canadian funds, if receivable in funds of another country;

Thus, this definition includes three components: (a) total consideration from the output of the mine; (b) all consideration from hedging; and (c) all consideration from future or forward sales of the output of the mine.

9 "Hedging" is defined in s. 1(1) as follows:

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> "hedging" means the fixing of a price for output of a mine before delivery by means of a forward sale or a futures contract on a recognized commodity exchange, or the purchase or sale forward of a foreign currency related directly to the proceeds of the output of a mine, but does not include speculative currency hedging except to the extent that the hedging transaction determines the final price and proceeds for the output;

10 It is well established that in resolving doubt about the meaning of a tax provision, the administrative practice and interpretation adopted by the Minister, while not determinative, are important factors to be weighed: see *Harel v. Quebec (Deputy Minister of Revenue)* (1977), [1978] 1 S.C.R. 851 (S.C.C.), at p. 859, *per* de Grandpré J.; *Will-Kare Paving & Contracting Ltd. v. R.*, [2000] 1 S.C.R. 915, 2000 SCC 36 (S.C.C.), at para. 66, *per* Binnie J. (dissenting, but not on this point). Prior to 1998, the Minister took the position that a hedging transaction only fell within the statutory definition if it was settled by physical delivery of the mining operator's output. In October 1998, the Minister's policy changed. Under the new policy, transactions that did not result in physical delivery would be caught by the statutory definition so long as they were entered into prior to the delivery of output and to the extent that the quantities of the commodity hedged did not exceed the operator's output for the taxation year in question.

11 There is no dispute that at the time PDC filed its mining tax returns for the years in question, it did so in conformity with the administrative practice prevailing at the time. However, by the time that PDC's returns were reassessed in 2000, the policy had changed. While PDC emphasizes that its returns were consistent with the Minister's own practice at the time they were filed and argues that the former policy is entitled to substantial weight in interpreting the *Mining Tax Act*, the Minister submits that it is not estopped from changing its practice having decided that its original interpretation was incorrect.

12 The Minister argues that PDC's interpretation and, indeed, its own interpretation under the former administrative practice, result in a substantial redundancy between the statutory definitions of "hedging" and "proceeds". In the Minister's view, "hedging" encompasses transactions that do not culminate in delivery of output so long as there is a sufficient nexus between the output of the mine and the hedging contract.

13 PDC responds that the definition of "hedging" in the *Mining Tax Act* is limited to transactions that result in the physical delivery of the output of an Ontario mine. Any redundancy in the *Mining Tax Act*, it submits, cannot displace the clear words of that provision.

## IV. Judicial History

### *A. Superior Court of Justice (2002), 61 O.R. (3d) 628 (Ont. S.C.J.)*

14 Cullity J. dismissed PDC's appeal from the confirmation of the assessments by the Minister. He relied in part on the principles outlined in *Echo Bay Mines Ltd. v. R.*, [1992] 3 F.C. 707 (Fed. T.D.), about the general purpose, characteristics and methods of hedging and held that those principles should inform the meaning of the definition of "hedging" in the *Mining Tax Act*. In his view, the terms of the statutory definition make it clear that there must be a nexus, or "some link", between the output of a mine and the financial transaction, but restricting that definition to transactions that culminate in the delivery of the output of the mine would introduce a significant redundancy into the Act. Specifically, if hedging "by means of a forward sale" were restricted to sales that are settled by delivery of output, then that part of the statutory definition would be deprived of any meaning that is not already covered by the inclusion in the definition of "proceeds" of the "total consideration ... from the output of the mine".

15 The trial judge stated that whether or not there is a sufficient link between a hedging transaction and output is a question of fact. In light of a number of factors, including: (a) the underlying purpose of the transactions; (b) the existence and terms of the agency agreement between PDI and PDC; (c) the allocation of the transactions to PDC pursuant to that agreement; and (d) PDC's treatment of the gains and losses for the purpose of its internal accounting and corporate tax returns, Cullity J. concluded that the transactions were related to the output of PDC's mines. He observed that any other conclusion would not have been reasonable or realistic in the circumstances.

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***B. Court of Appeal for Ontario (2004), 190 O.A.C. 157 (Ont. C.A.)***

16 Writing for the majority, Armstrong J.A. allowed PDC's appeal. In his view, the definition of "hedging" in the *Mining Tax Act* was clear, unambiguous and precise, and was restricted to contracts that were settled by physical delivery of gold from an Ontario mine. Applying this interpretation, two findings of fact made by the trial judge were determinative: (a) all gold produced by PDC's Ontario mines was sold to bullion dealers at approximately the spot market price; and (b) none of the gold was the subject of a forward sales contract. In light of those facts, Armstrong J.A. found it impossible to conclude that the transactions could be said to fix the price for output of the Ontario mines. The principles articulated in *Echo Bay Mines* were inapplicable as that case involved the interpretation of a different statute, one in which no statutory definition for hedging was provided. Moreover, in applying expert evidence adduced in *Echo Bay Mines* to fill a perceived deficiency in the record before him, Armstrong J.A. considered that Cullity J. had run afoul of the rule against judicial innovation articulated by this Court in *Ludmer c. Ministre du Revenu national*, [2001] 2 S.C.R. 1082, 2001 SCC 62 (S.C.C.), at para. 38.

17 Armstrong J.A. concluded that there was no fatal redundancy in the Act because there could be future sales or forward sales contracts relating to the output of the mine that are not caught by the definition of "hedging" in the Act, "either because they do not take place on a recognized commodity exchange or for some other reason" (para. 40). In the alternative, he held that any such redundancy could not displace the plain meaning of the provisions at issue. He was reinforced in his conclusion by the observation that, while consideration is inherently a gross concept, gains and losses from hedging transactions are necessarily computed as net values. Including a net amount within the computation of consideration would distort fundamental concepts of accounting. He also opined that the Minister's administrative practice was entitled to be given some weight based on the principles articulated in *Harel* and *Will-Kare Paving*. He noted that the burden for proving that the *Mining Tax Act* imposes a tax on net gains from the transactions rests with the Minister, relying on Gonthier J.'s statement in *Québec (Communauté urbaine) c. Notre-Dame de Bonsecours (Corp.)*, [1994] 3 S.C.R. 3 (S.C.C.), for that purpose. If mistaken in the view that the statutory definition of "hedging" was unambiguous, Armstrong J.A. would have resolved any reasonable doubt in favour of the taxpayer in accordance with the residual presumption.

18 Gillese J.A. would have dismissed PDC's appeal. In her view, the statutory definition is ambiguous in that it admits of two reasonable interpretations. The "narrow" interpretation, which was reflected in the Minister's former administrative practice, restricts "hedging" to contracts, the subject matter of which is the outputs of a mine. The "broad" interpretation, reflected in the Minister's new administrative practice (and the Minister's position in the present case), encompasses contracts which have as their subject matter something other than the output of a mine, but which can nevertheless be said to fix the price for the output of a mine. In her view, the narrow interpretation results in a serious redundancy between the second and third elements of the statutory definition of "proceeds", that is, "hedging" and "forward sales of the output of the mine", respectively. She concluded that the broad interpretation is preferable and that the statutory definition refers to contracts with a subject matter other than the output of a mine so long as those contracts are: (a) formed prior to delivery of output; (b) on a recognized commodity exchange; and (c) the means by which the price for the output of an Ontario mine is fixed.

19 In addressing the subsidiary arguments, Gillese J.A. concluded that the Minister was not estopped from changing his administrative practice and, if anything, the change in administrative practice supported the view that the statutory definition is ambiguous. She noted that hedging is necessarily a net concept and that, as a result, "consideration from hedging" has to be a net concept in the circumstances. On the question of whether options could properly be considered forward sales contracts, she noted that the characterization by the trial judge of the transactions is a mixed question of law and fact and, as such, is entitled to some deference.

**V. Analysis**

***A. The Issue***

20 As I have noted, the central issue in this case concerns the computation of profits for the purpose of the *Mining Tax Act*. Specifically, the issue is whether the statutory definition of "hedging" encompasses financial transactions that are not settled

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by physical delivery of the output of an Ontario mine. I will first address the principles of statutory interpretation applicable to taxation statutes. Next, I will briefly review the nature and mechanisms of hedging, as that term is used under generally accepted accounting principles ("GAAP"). Finally, I will turn to an analysis of the statutory provision at issue in this appeal.

***B. Interpretation of Tax Statutes***

*(1) General Principles*

21 In *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 (S.C.C.), this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act 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" (p. 578): see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. R.*, [2005] 2 S.C.R. 601, 2005 SCC 54 (S.C.C.), at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.

22 On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities". The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".

23 The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.). Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.

24 Although there is a residual presumption in favour of the taxpayer, it is residual only and applies in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue: *Notre-Dame de Bon-Secours*, at p. 19. Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue. In my view, the residual presumption does not assist PDC in the present case because the ambiguity in the *Mining Tax Act* can be resolved through the application of the ordinary principles of statutory interpretation. I will say more on this below.

*(2) The Burden of Proof*

25 The parties disagree on who bears the burden of proof in this case. The burden of proof under the *Mining Tax Act* is set out in s. 8(7). That section referentially incorporates s. 80(18) of the *Corporations Tax Act*, R.S.O. 1990, c. C.40, which provides that:

> ... [a]n assessment, subject to being varied or vacated on an objection or appeal and subject to a reassessment, shall be deemed to be valid and binding despite any error, defect or omission therein or in any proceeding under this Act relating thereto.

Thus, the taxpayer bears the burden of establishing that the factual findings upon which the Minister based the assessment are wrong. This is the same burden that applies under the *Income Tax Act*, s. 152(8): see V. Krishna, *The Fundamentals of Canadian Income Tax* (8th ed. 2004), at p. 35; *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486 (S.C.C.).

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26 PDC and the majority of the Court of Appeal, cite *Notre-Dame de Bon-Secours* for the proposition that the party claiming the benefit of a legislative provision has the burden of showing that he or she is entitled to rely on it. Specifically, at p. 15, Gonthier J. held:

> The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and with the taxpayer in the case of a provision creating a tax exemption.

Gonthier J.'s statement in *Notre-Dame de Bon-Secours* was *obiter dicta*, made in the context of explaining the traditional rule that tax legislation must be strictly construed. His point was simply that the residual presumption in favour of the taxpayer, which follows from the strict construction rule, was distinct from the concept of burden of proof. The burden of proof was not at issue in the case before him, and Gonthier J.'s comment was made in passing, without reference to the leading case law establishing the burden of proof in tax cases. The fundamental rules on the allocation of evidentiary burden in this matter remain valid. I cannot accept that, with this statement, he intended to overrule an established body of jurisprudence. The taxpayer bears the burden of displacing the Minister's factual assumptions, but the concept of burden of proof is not applicable to the interpretation of a statute, which is necessarily a question of law: *Johnston* .

27 Before moving on from this point, I wish to address the similar observation made in the context of explaining the analytical approach to the general anti-avoidance rule ("GAAR") in *Canada Trustco*, at paras. 64-65. In that case, the Court noted that, as a practical matter, the taxpayer was not required to disprove that he or she had violated the object, spirit or purpose of the provision. Rather, the Minister, who is in a better position than the taxpayer to make submissions as to the legislative intent behind particular taxation provisions, was obliged to identify the purpose of the provisions and to show how that purpose would be frustrated or defeated by the taxpayer's arrangements.

28 The statement in *Canada Trustco* is distinguishable in that it applies in cases where the taxpayer has complied with the letter of the law, and where the Minister seeks to rely on GAAR to nevertheless disallow the taxpayer's claim on the basis that it is inconsistent with the object and spirit of the provision in question. It would be both impractical and unduly onerous to require a taxpayer whose transaction falls within the four corners of a tax provision to also disprove that he or she has violated the object, spirit or purpose of the provision. The same line of reasoning does not apply in the present case where the meaning of the provision is ambiguous. In a case such as the present one, the meaning of the relevant provision is a question of law, and there is no onus on either party in respect of it — the duty to ascertain the correct interpretation lies with the court.

***C. Hedging***

29 In order to give some context to the discussion of the statutory definition of "hedging", I will begin with a brief overview of hedging, as it is commonly understood under GAAP. The transactions at issue in the present case are financial derivatives. Generally speaking, financial derivatives are contracts whose value is based on the value of an underlying asset, reference rate, or index. As Professors Grottenthaler and Henderson explain, there are essentially two reasons for entering into such a contract — to speculate on the movement of the underlying asset, reference rate or index, or to hedge exposure to a particular financial risk such as the risk posed by volatility in the prices of commodities: see M. E. Grottenthaler and P. J. Henderson, *The Law of Financial Derivatives in Canada* (8th ed. 2003), at p. 1-8. This distinction between speculation and hedging is an important one. A transaction is a hedge where the party to it genuinely has assets or liabilities exposed to market fluctuations, while speculation is "the degree to which a hedger engages in derivatives transactions with a notional value in excess of its actual risk exposure": see B. W. Kraus, "The Use and Regulation of Derivative Financial Products in Canada" (1999), 9 *W.R.L.S.I.* 31, at p. 38. Because the gold that was allocated to the transactions at issue in the present case did not exceed the actual production from the respective mines, the transactions were not speculative in the ordinary sense of the term.

30 The two basic types of derivative transactions are forward contracts and options: see Grottenthaler and Henderson, at pp. 1-4 *et seq.* A forward contract is a contract that obligates one party to buy, and another party to sell, a specified amount of a particular asset at a specified price, on a given date in the future. The obligation contained in a forward contract is two-sided in that both parties are obligated to perform the contract. By contrast, an option which grants the purchaser upon payment of a

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premium the right, but not the obligation, to purchase ("call option") or sell ("put option") an asset on a specified date is a one-sided obligation. Nevertheless, they both function as hedging tools.

31 Derivative transactions may be settled in a number of different ways: physical delivery of the underlying asset, cash settlement or offsetting contract. Most derivative contracts, however, are not settled by physical delivery. The most important point about settlement is that, at least for the purposes of GAAP, the way in which a derivative contract functions as a "hedge" is unaffected by the method by which the contract is settled.

32 An example may be useful at this stage to better illustrate how hedging transactions work and to identify the distinction between hedging and speculation. Assume that on January 1, 2006, the price of gold is $200/oz. Company A is a gold producer and wishes to hedge its exposure to fluctuating gold prices. On January 21, A enters into a forward sale contract for 100 oz. of gold at $200/oz. If the price of gold falls, the value of the hedging contract *increases*. Conversely, if the price of gold increases, the value of the contract decreases. It is this characteristic that separates a hedge from a purely speculative transaction. The producer who faces genuine exposure to price fluctuations effectively trades some of the opportunity for gains that would accompany increasing gold prices for security against decreasing gold prices. This relationship is most visible where derivative transactions are cash settled (as they most commonly are). If, on July 31, the price of gold has fallen to $100/oz., the contract may be cash settled by a payment of the difference between the strike price ($20,000) and the spot market price at the time of settlement ($10,000). Thus, the counterparty to the forward sale contract would issue a cheque to A for $10,000. The greater the margin by which the price of gold decreases, the greater the profit on the hedging contract.

33 In *Echo Bay Mines*, the Trial Division of the Federal Court considered the principles of hedging under GAAP. In that case, the taxpayer was a silver producer that had entered into forward sales contracts in order to protect itself against the risk of declining silver prices. When the price of silver fell, the taxpayer realized gains on those contracts by closing them out or rolling them over. None of the contracts resulted in the delivery of any silver. Nevertheless, the taxpayer treated those gains as "resource profits" on the basis that they were income from the production of minerals in Canada. Doing so enabled the taxpayer to take advantage of the resource allowance, as provided for in s. 20(1)(v.l) of the *Income Tax Act* and s. 1204(1) of the *Income Tax Regulations*. MacKay J. accepted that

> ...under generally accepted accounting principles, a producer's gain or loss from its execution of forward sales contracts may be considered a "hedge" and therefore matched against the production of the goods produced, if four conditions are met....
>
> 1. The item to be hedged exposes the enterprise to price (or interest rate) risk.
>
> 2. The futures contract reduces that exposure and is designated as a hedge.
>
> 3. The significant characteristics and expected terms of the anticipated transactions are identified.
>
> 4. It is probable that the anticipated transaction will occur. [pp. 715-16]

He concluded at p. 733 that the price received for the silver produced was the sum of receipts from delivery of actual production and from the settlement of forward sales contracts.

34 The decision in *Echo Bay Mines* illustrates the way in which financial transactions, though they may not be settled by physical delivery of the output of an Ontario mine, may nevertheless be said to "fix the price" for that output. I agree with the following endorsement of the decision in *Echo Bay Mines*:

> This conclusion is clearly a sensible one. If the transactions had been physically settled then the gain or loss on the transactions would have been the actual revenue or loss from the sale of the silver and would have been on income account. Treating the gain or loss on the forward contracts having the same economic result in any different way would have created an unjustified artificial distinction. (Grottenthaler and Henderson, at pp. 11-8 and 11-9)

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From the perspective of what constitutes hedging under GAAP, the distinction between cash-settled and delivery-settled contracts is arbitrary.

35 Although I am mindful that *Echo Bay Mines* concerned a different statute, one in which "hedging" is not a defined term, I conclude that the general principles articulated in that case have some relevance here. The central issue in *Echo Bay Mines* was whether gains and losses from hedging were sufficiently linked to the underlying transactions, namely the production and sale of silver, to constitute "resource profits" within the meaning of the Regulations under the *Income Tax Act*. In essence, the court in *Echo Bay Mines* was grappling with the same question that is raised in the present case: Can synthetic derivative transactions be said to "fix the price" for the underlying commodity even where those transactions do not result in the delivery of the underlying commodity?

***D. The Inclusion of Hedging Profits***

36 The parties agree that the transactions at issue in the present case constitute "hedging" in the ordinary sense of the term. However, notwithstanding that it is common in the industry vernacular to speak of "realized price" as the aggregate of proceeds from spot sales and gains and losses from hedging, PDC argued before this Court that the price for the output of an Ontario mine could only be "fixed", for the purpose of the *Mining Tax Act*, by a transaction that culminated in the physical delivery of that output. I turn, then, to a consideration of the meaning of the statutory definition of "hedging".

37 The definition of "hedging" first appeared in 1975 in the Regulation to the *Mining Tax Act, 1972*, S.O. 1972, c. 140: O. Reg. 126/75. At that time, profit was calculated under s. 3(3) of the Act using: (a) the amount of gross receipts from the output of the mine during the taxation year; (b) where the output was not sold but was treated by or for the producer of the mine, the amount of the actual market value of the output at the pit's mouth; or (c) where there was no means for determining the actual value at the pit's mouth in (b), the amount at which the mine assessor appraised the output. The method by which the assessor was to appraise output under (c) was set out in s. 4(1) of the Regulation. It was only in this last context that the definition of "hedging" came into play. In 1987, the definition of "hedging" was introduced into the Act itself and incorporated into the definition of "proceeds": *Mining Tax Amendment Act, 1987*, S.O. 1987, c. 11.

38 PDC raised several arguments, based on the statutory and constitutional limits on the power of the Lieutenant Governor in Council at the time, about the meaning of "hedging" when it was first introduced in the Regulation. Specifically, PDC argues that no power had been vested in the Lieutenant Governor in Council to make regulations imposing a new tax or expanding the existing tax base, and that any such attempt would have been contrary to s. 53 of the *Constitution Act, 1867*, which requires that bills imposing any tax originate in the House of Commons. Both of these arguments depend for their validity on the proposition that the 1975 Regulation created a new tax or expanded the tax base. I am not satisfied that the 1975 Regulation can be so construed — it did not alter the primary definition of "gross receipts" in the Act, but merely clarified the method by which a subsidiary, discretionary amount was to be assessed. This does not, in my view, constitute a change of the radical nature that PDC suggests.

39 In any event, whatever the precise effect of the 1975 Regulation, which need not be decided in this case, it is clear that the decision to incorporate the definition of "hedging" into the Act itself in 1987 signified a change in the statutory framework for the computation of profit. Hedging gains were no longer included in income only where it was otherwise impossible to ascertain the market value of the output of a mine before processing. The Act now includes them in every case as an integral component of the statutory definition of "proceeds". No constitutional or other impediment in 1987 prevented the enactment of such a provision, with respect to either of the proposed definitions. Since the definitions of "hedging" and "proceeds" remain unchanged in the present Act, the task at hand is to set out the precise nature and scope of the 1987 amendments. Although both parties rely on Hansard evidence related to the movement of the hedging provision from the Regulation to the Act, I find that evidence to be ambiguous and of little assistance in this case. Accordingly, any analysis of the 1987 amendments must be grounded in an examination of the scheme and context of the revised Act.

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40 At the outset, I note that I do not find the arguments based on the Minister's administrative practice to be helpful in the present case. The fact is that there are two administrative practices — one corresponding to each of the proposed interpretations. The shift in the Minister's practice is reflective of the ambiguity that inheres in the statute itself and cannot be relied upon as an interpretive tool except to support the view that the statutory definition falls short of being clear, precise and unambiguous. Although administrative practice can be an "important factor" in case of doubt about the meaning of legislation, it is not determinative: *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), at p. 37. In a case such as the present one where a statutory provision admits of more than one possible meaning, the Minister, having decided that its former interpretation was incorrect, is not precluded from changing its practice.

41 PDC argues that the Minister's change in administrative practice is arbitrary and unfair, noting that in the same month the Minister argued for the application of the new administrative policy before Cullity J. in the present case, and for the application of the former administrative policy in *Inco Ltd. v. Ontario (Minister of Finance)*, [2002] O.J. No. 4391 (Ont. S.C.J.). Inco had incurred substantial losses on its hedging activities in its taxation years 1988 to 1990 and sought to deduct those losses based on the decision in *Echo Bay Mines*. The critical distinction between the present case and *Inco*, however, is that the statutory limitation period for reassessment in *Inco* expired while the old administrative policy was still in place. Whenever the Minister changes its administrative practice, it is inevitable that different taxpayers will have been taxed differently under the same provision depending on whether they were assessed prior to, or after, the change in policy. The line between taxpayers who fall on either side of the administrative policy must be drawn somewhere, and doing so on the basis of whether a taxpayer's taxation year is open or closed under the statute is a principled and practical approach.

42 As I noted above, "proceeds" is defined in s. 1(1) of the *Mining Tax Act* in terms of three components: (a) consideration received from the output of a mine; (b) consideration from hedging; and (c) consideration from future sales or forward sales of the output of the mine.

43 "Hedging" is also defined in terms of a number of elements. Although only one of those elements is at issue in the present appeal, it is worth parsing the full definition in order to better appreciate the context and scheme within which the disputed phrase is placed. Specifically, "hedging" means:

> (a) the fixing of a price for output of a mine before delivery by means of
>
> (i) a forward sale or
>
> (ii) a futures contract on a recognized commodity exchange;
>
> (b) the purchase or sale forward of a foreign currency related directly to the proceeds of the output of a mine; and
>
> (c) speculative currency hedging, to the extent that the hedging transaction determines the final price and proceeds for the output.

Only "the fixing of a price for output of a mine before delivery by means of a forward sale" is at issue in the present appeal. I note at this stage that my parsing of the definition of "hedging" differs from both the majority and dissenting reasons of the Court of Appeal. Both Armstrong J.A. and Gillese J.A. suggested that forward sales and futures contracts, as the terms are used in the definition of "hedging", must take place on a recognized commodity exchange. However, such a view does not accord with the ordinary usage of these terms. Forward sales are by definition "over-the-counter" products, while futures contracts are by definition exchange-traded. Indeed, futures contracts are simply an exchange-traded form of forward sales contracts: C. W. Smithson, "A Building Block Approach to Financial Engineering: An Introduction to Forwards, Futures, Swaps and Options" (1997), 1017 PLI/Corp 9. The significance of this point is that "forward sales" within the meaning of the definition of "hedging" cannot be distinguished from "forward sales" in the third element of the definition of "proceeds" on the basis that the former take place on a recognized commodity exchange while the latter do not. I will say more on this point below.

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44 The difficulty that arises in coming to a plausible interpretation of this provision is that the Act does not specify what it means to "fix the price" for output of a mine by means of a forward sale. At first blush, it might seem that fixing a price is simply setting the price that will be paid upon delivery of the output. Indeed, this is the interpretation advocated for by PDC (the narrow interpretation). If that were so, however, the legislature would not have needed this element in the statutory definition of "hedging" as the price received upon delivery of the output would clearly fall within "[all] consideration that is received ... from the output of the mine", the first component of the definition of "proceeds", and within "all consideration received ... from ... future sales or forward sales of the output of the mine", the third component.

45 Under the presumption against tautology, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": see R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159. To the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant: *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 (U.K. H.L.), at p. 546, *per* Viscount Simon.

46 Although the presumption is rebuttable where it can be shown that the words do serve a function, or that the words were added for greater certainty, I do not think that either of those arguments can succeed in the present case. Here, a definition was introduced into the *Mining Tax Act* for a term that appears only once in the Act, outside its definitional section. Moreover, the value of a forward sale contract that is settled by delivery of output is for all intents and purposes just the price received for the output. There is no doubt that this amount would be caught by the definition of proceeds, and there would have been no need for the legislature to include this element in a statutory definition of "hedging". In the circumstances, the presumption against tautology carries considerable weight.

47 It follows that "the fixing of a price for output of a mine" cannot be restricted to transactions that are settled by delivery of output. This is, in my opinion, consistent with the context of the statutory definition. In addition to "the fixing of a price ... by means of a forward sale", the definition of "hedging" refers to "the fixing of a price ... by means of ... a futures contract on a recognized commodity exchange", "the purchase or sale forward of a foreign currency related directly to the proceeds of the output of a mine", and "does not include speculative currency hedging". It is significant that futures contracts are seldom settled by physical delivery. Similarly, a sale or purchase forward of foreign currency is a separate transaction from the sale of an underlying commodity and would not itself be settled by physical delivery of the commodity. In short, the other elements in the statutory definition of "hedging" are consistent with the broader interpretation.

48 PDC relies on the fact that the Minister successfully applied the "hedging" provision of the *Mining Tax Act* to impose and collect tax from mining companies under the former administrative policy as evidence that the narrow interpretation of "hedging" does not introduce redundancy into the *Mining Tax Act*. This argument is unpersuasive. Redundancy does not necessarily prevent the consistent or successful application of a statutory provision. Rather, an interpretation that gives rise to a redundancy simply fails to give full effect to all of the elements in the statutory provision.

49 In my view, in light of the scheme and context of the *Mining Tax Act*, the statutory definition of "hedging" must refer to something more than transactions that are settled by delivery of output. The "some link" test applied by Cullity J. is an appropriate response to the gap left in the *Mining Tax Act* by the failure to express more clearly what constitutes the "fixing of a price" for output of a mine. Moreover, the "some link" test accords with general accounting practices. It is certain that well-accepted business and accounting principles are not rules of law. They should not be used to displace rules of law, as legislatures are not bound by them and may modify them as they see fit for tax purposes. They must therefore play a subsidiary role to clear rules of law. However, this Court has readily acknowledged that "it would be unwise for the law to eschew the valuable guidance offered by well-established business principles" where statutory definitions are absent or incomplete: see *Canderel Ltd. v. R.*, [1998] 1 S.C.R. 147 (S.C.C.), at para. 35.

50 Before this Court, PDC argued that the interpretation urged by the Minister would introduce intolerable uncertainty into the *Mining Tax Act*. Without a bright line for distinguishing hedging transactions for the purpose of the *Mining Tax Act*, such as a delivery requirement, taxpayers would be unable to effectively predict their tax situations and to order their affairs intelligently. This argument is not compelling. The fact that the taxpayer can and does, presumably on a principled basis, determine whether

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hedging profits relate directly to the output of a mine, for the purpose of claiming the resource allowance under the *Income Tax Act* and the Ontario *Corporations Tax Act* belies PDC's predictability argument. I note, in this vein, that PDC used the same financial information that it submitted with its tax return under the *Mining Tax Act* to claim that its hedging gains qualified as "resource profits" so as to entitle it to the resource allowance under the *Corporations Tax Act*.

51 The statutory provisions at issue in this case are far from flawless. Although the broad interpretation that I have adopted substantially resolves the redundancy problem, it gives rise to some unexpected consequences of its own. That being said, I do not find that any of these consequences is serious enough to outweigh the substantial redundancy that results on the narrow interpretation of "hedging". Although, as PDC has pointed out, "consideration" is generally a gross concept, in the context of the definition of "proceeds", "all consideration from hedging" must necessarily refer to a net concept. Any distortion to the ordinary commercial use of "consideration" is inherent in the *Mining Tax Act* itself. Similarly, although forward sales and options are distinguished from one another in terms of the particular way in which each is used to hedge price risk, both are used in much the same way to "fix the price" for output. PDC's argument about the serious distortion implicit in treating options as a subset of forward sales is belied by the PDC's own Annual Reports for the tax years in question. Those reports provide that "the Corporation employs forward sales contracts *including spot deferred contracts and options* to hedge prices for anticipated gold sales" (emphasis added).

52 The *Mining Tax Act* defines "hedging" as the fixing of a price for the output of a mine before delivery by means of, *inter alia*, a forward sale. Options, as Cullity J. noted, are simply contingent forward sales, and they fix the price for output in much the same way that forward contracts do. To attach substantially different tax consequences, within the context of a provision that taxes "proceeds from hedging" to two forms of transactions that serve the same function *as hedging tools* would be an absurd result that the legislature could not have intended. Thus, I am unable to conclude that any of the subsidiary arguments raised by PDC outweigh the substantial redundancy that results from its proposed interpretation.

**VI. Disposition**

53 For these reasons, I would allow the appeal with costs throughout.

*Appeal allowed with costs throughout*.

*Appeal allowed.*

*Pourvoi accueilli.*

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**Most Negative Treatment:** Recently added (treatment not yet designated)
**Most Recent Recently added (treatment not yet designated):** Sagkeeng v. Government of Manitoba et al | 2021 MBCA 88, 2021 CarswellMan 595 | (Man. C.A., Oct 21, 2021)

2014 SCC 40, 2014 CSC 40
Supreme Court of Canada

Canadian National Railway v. Canada (Attorney General)

2014 CarswellNat 1625, 2014 CarswellNat 1626, 2014 SCC 40, 2014 CSC 40, [2014] 2 S.C.R. 135, [2014] S.C.J. No. 40, 240 A.C.W.S. (3d) 262, 371 D.L.R. (4th) 219, 458 N.R. 150, 67 Admin. L.R. (5th) 220

# Canadian National Railway Company, Appellant and Attorney General of Canada, Peace River Coal Inc. and Canadian Industrial Transportation Association, Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: January 14, 2014
Judgment: May 23, 2014
Docket: 35145

Proceedings: affirming *Canadian National Railway v. Canada (Attorney General)* (2012), 2012 CAF 278, 2012 CarswellNat 5639, 2012 FCA 278, 2012 CarswellNat 4527, [2012] F.C.J. No. 1438, 440 N.R. 217, David Stratas J.A., Eleanor R. Dawson J.A., Johanne Gauthier J.A. (F.C.A.); affirming *Canadian National Railway v. Canada (Attorney General)* (2011), 398 F.T.R. 218 (Eng.), 2011 FC 1201, 2011 CarswellNat 4297, 2011 CF 1201, 2011 CarswellNat 5850, Roger T. Hughes J. (F.C.)

Counsel: Guy J. Pratte, Nadia Effendi, Éric Harvey, for Appellant
Peter Southey, Sean Gaudet, for Respondent, Attorney General of Canada
Forrest C. Hume, Cynthia A. Millar, for Respondents, Peace River Coal Inc. and the Canadian Industrial Transportation Association

Subject: Civil Practice and Procedure; Constitutional; Public
**Related Abridgment Classifications**
Transportation
III Railways
III.1 Federal regulatory boards
III.1.a Jurisdiction
**Headnote**
Transportation --- Railways — Federal regulatory boards — Orders and decisions — Jurisdiction to issue order or make decision — Miscellaneous
Railway entered into confidential contract to transport goods from shipper's facility — Rates were subject to railway's fuel surcharge tariff — Railway subsequently introduced lower tariff, but it did not apply to existing contracts — Shipper applied to Canadian Transportation Agency ("CTA") for order requiring railway to establish reasonable fuel surcharge — CTA dismissed application on basis that it lacked jurisdiction — Shipper's trade association successfully petitioned Governor in Council ("GIC") to rescind CTA's decision — Railway brought successful application for judicial review, and decision of CTA was restored — Shipper successfully appealed — Railway appealed — Appeal dismissed — GIC's interpretation of s. 120.1(1) of Canada Transportation Act was supported by reasonable view of provision's purpose — It was open to GIC to conclude that Parliament's intention in including complaint-based mechanism in Act was to rebalance legislative framework in favour of shippers in industry where there were circumstances of railway market power — There was evidence before GIC that confidential contracts

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were standard in industry — Accordingly, without deciding whether in any particular case confidential contract would preclude shipper from relief under s. 120.1, GIC's interpretation of s. 120.1 of Act was reasonable — Leaving access to s. 120.1 complaint mechanism available to parties to confidential contracts can reasonably be said to be consistent with Parliament's intention to provide measure of protection for shippers.

Droit autochtone --- Questions d'ordre constitutionnel — Divers

Compagnie de chemin de fer a conclu un contrat confidentiel dans le but de permettre le transport de marchandises à partir des installations d'un fournisseur — Taux devaient être calculés en fonction du tarif de supplément carburant de la compagnie de chemin de fer — Compagnie de chemin de fer a, par la suite, introduit un tarif plus économique qui, par contre, ne s'appliquait pas aux contrats déjà signés — Expéditeur s'est adressé à l'Office des transports du Canada (« OTC ») dans le but d'obtenir une ordonnance enjoignant à la compagnie de chemin de fer d'établir un tarif de supplément carburant raisonnable — OTC a rejeté la demande au motif qu'elle n'avait pas compétence — Association commerciale de l'expéditeur a déposé avec succès une requête auprès du gouverneur en conseil en vue de faire annuler la décision de l'OTC — Compagnie de chemin de fer a déposé avec succès une requête en contrôle judiciaire, et la décision de l'OTC a été rétablie — Expéditeur a interjeté appel avec succès — Compagnie de chemin de fer a formé un pourvoi — Pourvoi rejeté — Interprétation de l'art. 120.1(1) de la Loi sur les transports au Canada donnée par le gouverneur en conseil était fondée sur une interprétation raisonnable de l'objet de cette disposition — Gouverneur en conseil pouvait conclure qu'en incluant ce mécanisme des plaintes dans la Loi, le législateur avait l'intention de rééquilibrer le cadre législatif en faveur des expéditeurs au sein d'une industrie dans laquelle les compagnies de chemin de fer peuvent bénéficier d'une puissance commerciale — Preuve indiquait au gouverneur en conseil que les contrats confidentiels étaient la norme au sein de l'industrie — En conséquence, sans décider si, dans un cas donné, un contrat confidentiel pourrait priver un expéditeur d'un recours prévu à l'art. 120.1 de la Loi, l'interprétation de l'art. 120.1 donnée par le gouverneur en conseil était raisonnable — Il était raisonnable de conclure que le fait de laisser aux parties à des contrats confidentiels l'accès au mécanisme des plaintes prévu à l'art. 120.1 était conforme à l'intention du législateur, qui est d'offrir une certaine protection aux expéditeurs.

Railway entered into a confidential contract to transport goods from the shipper's facility. The rates were subject to railway's fuel surcharge tariff. Railway subsequently introduced a lower tariff, but it did not apply to existing contracts.

Shipper applied to Canadian Transportation Agency ("CTA") for order requiring railway to establish reasonable fuel surcharge. CTA dismissed the application on the basis that it lacked jurisdiction. Shipper's trade association successfully petitioned Governor in Council ("GIC") to rescind CTA's decision. Railway brought successful application for judicial review, and decision of CTA was restored. Shipper successfully appealed decision. Railway appealed.

**Held:** The appeal was dismissed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. concurring): GIC's interpretation of s. 120.1(1) of Canada Transportation Act was supported by a reasonable view of the provision's purpose. It was open to GIC to conclude that Parliament's intention in including this complaint-based mechanism in the Act was to rebalance the legislative framework in favour of shippers in an industry where there are circumstances of railway market power.

There was evidence before GIC that confidential contracts are standard in the industry. Accordingly, without deciding whether in any particular case a confidential contract would preclude a shipper from relief under s. 120.1, GIC's interpretation of s. 120.1 of Act was reasonable. Leaving access to the s. 120.1 complaint mechanism available to parties to confidential contracts can reasonably be said to be consistent with Parliament's intention to provide a measure of protection for shippers.

Une compagnie de chemin de fer a conclu un contrat confidentiel dans le but de permettre le transport de marchandises à partir des installations d'un fournisseur. Les taux devaient être calculés en fonction du tarif de supplément carburant de la compagnie de chemin de fer. La compagnie de chemin de fer a, par la suite, introduit un tarif plus économique qui, par contre, ne s'appliquait pas aux contrats déjà signés.

Un expéditeur s'est adressé à l'Office des transports du Canada (« OTC ») dans le but d'obtenir une ordonnance enjoignant à la compagnie de chemin de fer d'établir un tarif de supplément carburant raisonnable. L'OTC a rejeté la demande au motif qu'elle n'avait pas compétence. L'association commerciale de l'expéditeur a déposé avec succès une requête auprès du gouverneur en conseil dans le but de faire annuler la décision de l'OTC. La compagnie de chemin de fer a déposé avec succès une requête en contrôle judiciaire, et la décision de l'OTC a été rétablie. L'expéditeur a interjeté appel avec succès. La compagnie de chemin de fer a formé un pourvoi.

**Arrêt:** Le pourvoi a été rejeté.

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Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Cromwell, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : L'interprétation de l'art. 120.1(1) de la Loi sur les transports au Canada donnée par le gouverneur en conseil était fondée sur une interprétation raisonnable de l'objet de cette disposition. Le gouverneur en conseil pouvait conclure qu'en incluant ce mécanisme des plaintes dans la Loi, le législateur avait l'intention de rééquilibrer le cadre législatif en faveur des expéditeurs au sein d'une industrie dans laquelle les compagnies de chemin de fer peuvent bénéficier d'une puissance commerciale.

La preuve indiquait au gouverneur en conseil que les contrats confidentiels sont la norme au sein de l'industrie. En conséquence, sans décider si, dans un cas donné, un contrat confidentiel pourrait priver un expéditeur d'un recours prévu à l'art. 120.1 de la Loi, l'interprétation de l'art. 120.1 donnée par le gouverneur en conseil était raisonnable. Il était raisonnable de conclure que le fait de laisser aux parties à des contrats confidentiels l'accès au mécanisme des plaintes prévu à l'art. 120.1 était conforme à l'intention du législateur, qui est d'offrir une certaine protection aux expéditeurs.

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POURVOI formé par une compagnie de chemin de fer à l'encontre d'une décision publiée à *Canadian National Railway v. Canada (Attorney General)* (2012), 2012 FCA 278, 2012 CarswellNat 4527, 2012 CAF 278, 2012 CarswellNat 5639, 440 N.R. 217, [2012] F.C.J. No. 1438 (F.C.A.), ayant accueilli l'appel interjeté par un expéditeur.

***Rothstein J.*** **(McLachlin C.J.C., LeBel, Abella, Cromwell, Karakatsanis, Wagner JJ. concurring):**

**I. Overview**

1 In *The Railway Act, 1868*, S.C. 1868, c. 68, the Governor in Council was given the power to approve railway freight rates in Canada. In 1903, the regulation of freight rates devolved to the Board of Railway Commissioners and the role of the Governor in Council changed to that of a reviewing body with the power to vary or rescind decisions of the Board of Railway Commissioners. Section 40 of the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), continues this role for the Governor in Council to vary or rescind any decision or order of the Canadian Transportation Agency ("Agency").

2 The questions at issue in this appeal centre on whether the Governor in Council was empowered to vary or rescind a decision of the Agency on a point of law. In my respectful opinion, the Governor in Council has such authority.

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**II. Facts**

3 This appeal concerns a confidential contract between the Canadian National Railway Company ("CN") and Peace River Coal Inc. ("PRC"). PRC operates a coal loading facility at Trend, British Columbia. The confidential contract, effective for the period from January 1, 2008 to June 30, 2010, was for shipping coal from Trend to Ridley Terminals in Prince Rupert, British Columbia.

4 The confidential contract incorporated by reference all applicable tariffs, rules and regulations. In particular, it incorporated "Fuel Surcharge Tariff CN 7402 series, supplements thereto or reissues thereof", which provided for the addition of a mileage-based fuel surcharge to the base rate CN charged for carriage of freight. The surcharge would be applied when the monthly average price of highway diesel fuel equalled or exceeded a set price called the "strike price". Tariff 7402 set the strike price at US$1.25 per gallon. CN and PRC both understood that, during the lifetime of the contract, CN could unilaterally make changes to Tariff 7402. The contract did not provide a mechanism for PRC to challenge any change to the Tariff unilaterally made by CN.

5 On February 21, 2008, CN advised its customers that, effective April 1, 2008, it would be introducing Tariff 7403, which provided for a strike price of US$2.30 per gallon. However, Tariff 7402 would remain in effect until the expiration of those contracts to which Tariff 7402 applied.

6 PRC asked CN to apply Tariff 7403 to PRC's traffic as of April 1, 2008. CN declined this request.

7 On April 22, 2008, PRC applied to the Agency under s. 120.1 of the *CTA* for an order establishing a reasonable fuel surcharge to apply to PRC's traffic. PRC requested that the Agency require CN to vary its charges in Tariff 7402 to reflect the charges in Tariff 7403; that is, that its rates for the movement of its coal from Trend to Ridley Terminals in its confidential contract could not be increased by a fuel surcharge until the strike price of US$2.30 per gallon was equalled or exceeded.

8 On motion by CN, the Agency dismissed PRC's application on the ground that PRC was asking the Agency to amend its confidential contract, which the Agency said it did not have the jurisdiction to do. PRC did not seek leave to appeal to the Federal Court of Appeal, despite having the option to do so pursuant to s. 41 of the Act, which provides for a right of appeal, on leave being obtained, on a matter of law or jurisdiction brought within one month of the Agency's decision.

9 Six months after the Agency's decision, the Canadian Industrial Transportation Association ("CITA"), a trade association representing the interests of shippers, filed a petition with the Governor in Council requesting a variance of the Agency's decision pursuant to s. 40 of the *CTA*. PRC is a member of CITA. CITA asked the Governor in Council to direct the Agency that the confidential contract between PRC and CN does not preclude the Agency from assessing the reasonableness of the fuel surcharge in Tariff 7402. On June 10, 2010, the Governor in Council rescinded the Agency's decision.

**III. Relevant Statutory Provisions**

10 The relevant statutory provisions are contained in the Appendix. The statutory provisions most directly at issue in this appeal are ss. 40, 41 and 120.1 of the *CTA*.

**IV. Administrative Decisions**

***A. The Decision of the Agency***

11 CN brought a preliminary motion before the Agency, seeking to dismiss PRC's application on two grounds: (1) the Agency did not have jurisdiction to amend the terms of a confidential contract under s. 120.1 of the *CTA* and (2) the fuel surcharge was part of the rate for the movement of traffic such that s. 120.1(7) would preclude review of the surcharge under s. 120.1 of the *CTA*.

12 The Agency found that PRC was seeking to have the fuel surcharge provided for in the contract changed to reflect a different fuel surcharge.

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13 Citing certainty and predictability of contract, the Agency found that the parties were bound by the contract and that it had no jurisdiction to change the terms of a contract under s. 120.1. The Agency did not find it necessary to go on to consider whether the fuel surcharge forms part of the rate for the movement of traffic within the meaning of s. 120.1(7). The Agency dismissed PRC's application.

***B. The Decision of the Governor in Council***

14 The Governor in Council rescinded the Agency's decision. The Order in Council, P.C. 2010-749, stated that s. 120.1 of the *CTA* is a complaint-based regulatory remedy against unreasonable charges for the movement of traffic imposed by a railway company. Section 120.1 is aimed at benefiting all shippers subject to the charges in the challenged tariff rather than only benefiting the complainant. The complaint filed by PRC was for the benefit of all shippers subject to the charge contained in Tariff 7402, which applies to more than one shipper.

15 The Order in Council stated that the Governor in Council was of the opinion that, while the existence and terms and conditions of a confidential contract are relevant to whether PRC will benefit from an order made by the Agency under s. 120.1, the confidential contract had no bearing on the reasonableness of a charge in a tariff that applies to more than one shipper and is not a tariff referred to in s. 165(3) of the *CTA*.

**V. Judicial History**

***A. Federal Court of Canada, 2011 FC 1201, 398 F.T.R. 218 (Eng.) (F.C.)***

16 CN sought judicial review of the Governor in Council's decision. Hughes J. set aside the Order of the Governor in Council and restored the Agency's decision. Hughes J. characterized the issue before the Governor in Council as one of "pure jurisdiction" as it centred on the Agency's jurisdiction over PRC's application and determined that the applicable standard of review was correctness (para. 68).

17 Hughes J. found that PRC was seeking to have the fuel surcharge in the contract changed to reflect a different fuel surcharge. He also held that Tariff 7402 was part of the "rate" for the movement of traffic and was therefore exempt from review by the Agency on the basis of s. 120.1(7). The Agency had no power to vary a contract entered into by the parties and did not have jurisdiction to review rates which are covered by the s. 120.1(7) exemption. Although the Governor in Council has the authority to determine questions of law and jurisdiction, the decision of the Governor in Council to rescind the Agency's decision was incorrect.

***B. Federal Court of Appeal, 2012 FCA 278, 440 N.R. 217 (F.C.A.)***

18 The Federal Court of Appeal set aside the judgment of the Federal Court and dismissed CN's application for judicial review of the Governor in Council's decision.

19 Applying a reasonableness standard, Dawson J.A. held that the decision of the Governor in Council was reasonable. She determined that "the effect of the Governor in Council's decision was to impugn the Agency's factual determination that [PRC's] application sought an order requiring new fuel surcharge rates to apply to the contract" (para. 43). The Governor in Council substituted its own view, which was that PRC's application was for the benefit of all shippers. Dawson J.A. held that the characterization by the Governor in Council of the nature of PRC's application to the Agency was a question of fact that carried a policy component. Accordingly, it was not necessary for the Federal Court of Appeal to consider whether the Governor in Council is a proper forum for determining questions of law and jurisdiction.

20 Dawson J.A. concluded that the specific remedy sought, together with the fact that s. 120.1 is "aimed at benefiting all shippers subject to the challenged tariff, provided a basis upon which the Governor in Council could reasonably conclude that PRC's application was for the benefit of all shippers subject to the alleged charge" (para. 50). She held that the Governor in Council's decision was supported by the evidence and fell within a range of outcomes defensible in respect of the facts and law. The decision was therefore reasonable. In addition, as the Agency declined to decide whether the fuel surcharge was part

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of the rate for the movement of traffic within the meaning of s. 120.1(7), the Federal Court judge sitting on judicial review erred by determining this issue, which remained a live issue before the Agency. The s. 120.1(7) issue was not a proper basis for setting aside the decision of the Governor in Council. Making the judgment that the Federal Court ought to have pronounced, the Federal Court of Appeal dismissed CN's application for judicial review.

**VI. Issues**

21 This appeal raises four issues:

(1) What was the nature of the question answered by the Governor in Council in this case?

(2) What is the scope of the Governor in Council's authority under s. 40 of the *CTA*?

(3) What is the applicable standard of review?

(4) Does the Governor in Council's decision withstand judicial review?

**VII. Background to the Regulatory Scheme**

***A. Section 120.1 of the CTA***

22 Section 120.1 was added to the legislation following a 2001 statutory review of the Act and as part of amendments aimed at updating the legislative framework (Parliamentary Information and Research Service, Legislative Summary LS-569E "Bill C-8: An Act to Amend the Canada Transportation Act (Railway Transportation)", revised June 27, 2008, at p. 1). Shippers had expressed concerns about incidental or ancillary charges, applied over and above freight rates for the movement of traffic. Examples of such charges include those imposed for cleaning cars, storing cars, weighing product and demurrage, a charge imposed for taking longer than the permitted free time to load or unload a car. Unlike rates for the movement of traffic from origin to destination, which may be challenged through final offer arbitration, shippers had limited recourse to challenge incidental or ancillary charges established unilaterally by the railway companies (Standing Committee on Transport, Infrastructure and Communities, Evidence, No. 2, 2nd Sess., 39th Parl., November 22, 2007, at p. 2).

23 The amendments came as part of a move towards partial re-regulation in the rail sector after two decades of deregulation. Beginning with legislative reform in 1987 and continuing with further amendments in 1996, the goals of deregulation were to increase efficiency and improve service in the rail industry in Canada (Standing Committee on Transport, Infrastructure and Communities, Evidence, No. 3, 2nd Sess., 39th Parl., November 27, 2007, at pp. 1-2). Although deregulation was seen to achieve these aims, rail services were and are not provided in a perfectly competitive marketplace. In certain circumstances, the railway companies were seen to have superior market power to shippers. This superior market power of the railway companies, combined with the complaints of shippers over railway service and rates, led to Parliament's efforts to respond to these concerns (Standing Committee on Transport, Infrastructure and Communities, November 22, 2007, at p. 1). As the Honourable Lawrence Cannon, Minister of Transport, Infrastructure and Communities explained: "I believe the time has come to rebalance the legislative framework in favour of shippers" (*ibid.*, at p. 2).

24 In the context of this "rebalancing" in favour of shippers, s. 120.1 was introduced to provide a new remedy for shippers who are subject to unreasonable charges or associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper, other than a tariff resulting from a decision of an arbitrator in a final offer arbitration. It provides that, if, on complaint in writing to the Agency, the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may establish new charges or associated terms and conditions. Under s. 120.1(7), this complaint-based remedy does not apply to rates for the movement of traffic from origin to destination.

***B. Confidential Contracts***

25 Under s. 126 of the *CTA*, carriers and shippers may enter into confidential contracts. A confidential contract may pertain to the rates to be charged by the railway company to the shipper, reductions or allowances pertaining to rates in tariffs, rebates

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or allowances pertaining to rates in tariffs or confidential contracts, any conditions relating to the traffic to be moved by the railway company and the manner in which the railway company shall fulfill its service obligations.

26 Confidential contracts were introduced in 1987 amendments to railway legislation (*National Transportation Act, 1987*, S.C. 1987, c. 34, s. 120). Parliament provided for confidential contracts in order to promote flexibility in negotiations between railway companies and shippers for rates and services (*Freedom to Move: The Legislation: Overview of National Transportation Legislation 1986* (1986), at p. 8). Confidential contracts provide an alternative to the historic requirement that a railway company could only charge a rate in respect of the movement of traffic if the rate was set out in a tariff that had been issued and published by the railway company.

27 Where a rate is not contained in a confidential contract, typically when a confidential contract expires, a shipper dissatisfied with the rate proposed by the railway company may submit the matter to the Agency for final offer arbitration (*CTA*, s. 161). The Agency itself does not conduct the final offer arbitration. Rather, if the parties do not agree upon the arbitrator or if no arbitrator is chosen, the arbitrator will be appointed by the Agency (*CTA*, s. 162(1)(*a*)). However, a party to a confidential contract cannot submit a matter governed by the confidential contract to the Agency for final offer arbitration unless the parties consent (*CTA*, s. 126(2)).

28 As the evidence in this case established, it is common railway industry practice to include a term in confidential contracts which incorporates by reference all of the railway's tariffs covering ancillary and incidental charges (CITA petition, at para. 27, cited in Federal Court of Appeal reasons, at para. 38).

**VIII. Analysis**

***A. The Nature of the Question Answered by the Governor in Council***

29 The Governor in Council rescinded the Agency's decision. PRC argues, and the Federal Court of Appeal found, that the issue before the Governor in Council was predominantly fact-based and, in addition, carried a policy component. PRC submits that the Agency mischaracterized its application as it was not in fact seeking to have the Agency amend the terms of its confidential contract. Rather, PRC alleges that a finding by the Agency that the fuel surcharge in Tariff 7402 is unreasonable could result in an order from the Agency requiring CN to vary the fuel surcharge, such that a higher strike price would apply to shippers subject to Tariff 7402, including PRC. As I understand it, PRC's position is that, because the confidential contract states that fuel surcharges would be subject to supplements or reissuances of Tariff 7402, any variance of the fuel surcharge would be incorporated by reference into the confidential contract by reason of the issuance of a supplement to or reissuance of Tariff 7402, without constituting an amendment to the contract. Accordingly, the Agency mischaracterized PRC's application and the Governor in Council simply disagreed with the Agency in this regard — a question of fact that it says carried a policy component in light of the purpose of s. 120.1.

30 The Order in Council contained two key findings. First, the Governor in Council found that PRC's complaint was for the benefit of all shippers subject to the fuel surcharge contained in Tariff 7402. Tariff 7402 applied to more than one shipper and was not a tariff referred to in s. 165(3) of the *CTA* (a tariff resulting from a decision of a final offer arbitrator). As these are the statutory conditions for bringing a complaint, PRC's application met the requirements of s. 120.1 of the *CTA*.

31 Second, the Governor in Council stated that while the existence of a confidential contract between a railway company and a complainant and the terms and conditions of such contract are relevant to the question of whether the complainant will benefit from any order made by the Agency under that section, a confidential contract has no bearing on the reasonableness of the charge that is found in a tariff that applies to more than one shipper.

32 Having regard to these two findings, the Governor in Council determined that the Agency can hear a complaint brought by a party to a confidential contract under s. 120.1. The necessary implication of the Governor in Council's key findings is that, where an applicant meets the statutory requirements of s. 120.1(1), the Agency must consider the reasonableness of the charge, notwithstanding the existence of a confidential contract. The decision therefore held that a confidential contract is not

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an impediment to a shipper's ability to bring a complaint under s. 120.1 about charges in a tariff that applies to more than one shipper. This decision was a matter of statutory interpretation.

33 An issue of statutory interpretation is a question of law. In the present case, policy considerations that are at the heart of the complaint mechanism underlie the question of whether a party to a confidential contract can bring a complaint under s. 120.1. These policy considerations include the market power of a railway company in some circumstances and the relatively weaker position of shippers in those circumstances. These policy considerations may be at the root of the Governor in Council's interest in the statutory interpretation issue. However, although there may be policy considerations underlying the question at issue, that does not transform the nature of the question to one of policy or fact. The question of whether a party to a confidential contract can bring a complaint under s. 120.1 is one of law.

***B. The Scope of the Governor in Council's Authority Under Section 40 of the CTA***

34 That the Governor in Council answered a question of law in this case raises the issue of whether the Governor in Council has the authority to do so. CN argues that s. 40 of the *CTA* does not confer authority on the Governor in Council to determine matters of law or jurisdiction. Rather, questions of law or jurisdiction must be appealed to the Federal Court of Appeal pursuant to s. 41 of the *CTA*. The Governor in Council only has authority to determine questions of fact and policy. With respect, I cannot agree.

35 For ease of reference, I produce the text of ss. 40 and 41(1) here:

> **40.** The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.
>
> **41.** (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

36 The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1, citing E. A. Driedger, *The Construction of Statutes* (1974), at p. 67).

37 Section 40 does not contain any express limitations on the Governor in Council's authority. Unlike s. 41, which places a number of restrictions on the right of appeal to the Federal Court of Appeal, s. 40 states that the Governor in Council may at any time vary or rescind *any* decision, order, rule or regulation of the Agency on petition of a party or an interested person, or even on the Governor in Council's own motion. There is no language in the provision that suggests the Governor in Council's authority is in any way circumscribed, nor is the Governor in Council's authority restricted to answering issues of fact or policy.

38 In *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), this Court described s. 64 of the *National Transportation Act*, the predecessor provision to the current s. 40, as providing for an "unlimited or unconditional" right to petition the Governor in Council, a "quite different" avenue of review from the right of appeal on questions of law or jurisdiction to the Federal Court of Appeal (p. 745). Section 64 was substantially the same as the current s. 40.

39 As Estey J. explained, "[t]here can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1)" (p. 745) (Although Estey J.'s conclusion, at p. 759, that the trappings of procedural fairness could not be implied into the provision may not represent the current view of how natural justice operates in an administrative context, the issue of procedural fairness owed by the Governor in Council is not before this Court.) Of course, the Governor in Council is "constrained by statute" and cannot, in the course

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of exercising its authority under s. 40, enact or change a law of Parliament (*Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194, [2011] 3 F.C.R. 344 (F.C.A.), at para. 29; see *Inuit Tapirisat*, at p. 752).

40 For the purposes of this appeal, it remains the case that the only inherent limitation is that the Governor in Council is not empowered to address issues arising under the *CTA ab initio*: "Cabinet's authority is restricted to matters already dealt with by the Commission, and such matters must be orders, decisions, rules or regulations ..." (*Vancouver Island Railway, An Act Respecting, Re*, [1994] 2 S.C.R. 41 (S.C.C.), at p. 119, citing B. S. Romaniuk and H. N. Janisch, "*Competition in Telecommunications: Who Polices the Transition?* (1986) 18 *Ottawa L. Rev.* 561, at p. 628). In this sense, the Governor in Council does not have any substantive law-making capacity by virtue of s. 40; however, this restriction does not mean that questions of law are excluded from the scope of the Governor in Council's authority on review of Agency decisions.

41 By contrast, where Parliament intended to circumscribe an avenue of review, it did so expressly. Section 41, for example, places a number of restrictions on the right to appeal a decision of the Agency to the Federal Court of Appeal: appeals under s. 41 are limited to questions of law or jurisdiction, leave to appeal must be obtained and the application for leave must be made within one month of the date of the decision, order, rule or regulation being appealed from, unless there are special circumstances which justify extending the time limit. The limitations contained in s. 41 provide strong indication that Parliament directed its attention to the issue of restrictions on the avenues of review and included intended limitations expressly.

42 Unlike s. 40 of the *CTA*, Parliament has expressly limited the scope of the Governor in Council's authority under other legislation. The *Broadcasting Act*, S.C. 1991, c. 11, empowers the Governor in Council to set aside or refer back decisions made by the Canadian Radio-television and Telecommunications Commission only if the Governor in Council is "satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1)" of the legislation (s. 28(1)). This kind of limitation is not found in s. 40 of the *CTA*. The indication is that where Parliament has intended to limit the Governor in Council's authority, it has done so expressly.

43 CN argues that s. 40 should be read as limiting the Governor in Council's authority to questions of fact or policy on the basis of the legislative history of ss. 40 and 41. CN maintains that Parliament's intention was to leave questions of law to the courts.

44 However, the legislative history is ambiguous. Although some of the Hansard references to which reference was made seem to indicate that Parliament's intention was for the Governor in Council to review questions of fact and policy (*Debates of the House of Commons of the Dominion of Canada*, vol. LVIII, 3rd Sess. 9th Parl. ("*1903 Debates*"), March 20, 1903, at p. 248, per Hon. A.G. Blair, and vol. XI, 1st Sess., 27th Parl. ("*1967 Debates*"), January 10, 1967, at p. 11630, per Hon. J. W. Pickersgill), the Hansard also contains ministerial statements suggesting that the Governor in Council's power was intended to be untrammelled (*1903 Debates*, March 20, 1903, at p. 259, per Hon. A. G. Blair).

45 The *1967 Debates* include a statement by the Minister of Transport that the legislation provided for "an appeal on questions of fact to the governor in council" (January 10, 1967, at p. 11630). Although this correctly states the Governor in Council's legislative authority to determine questions of fact, this statement does not provide evidence of Parliament's intention to limit the Governor in Council's authority to reviewing questions of fact alone. In addition, although he was Minister of Transport at the time of the 1967 enactment of the *National Transportation Act*, S.C. 1966-67, c. 69, Mr. Pickersgill's interpretation of earlier enactments by other parliaments do not provide evidence of the intent of the legislature at the time of the earlier enactments. As such, the Hansard evidence does not establish an unambiguous parliamentary intention to limit the authority of the Governor in Council.

46 In my view, the Hansard evidence does confirm that Parliament intended to prevent questions of fact from being appealed to the Federal Court of Appeal. This does not, without more, demonstrate that the Governor in Council's role was intended to be limited to review of questions of fact or policy alone.

47 This Court has observed that, while Hansard evidence is admitted as relevant to the background and purpose of the legislation, courts must remain mindful of the limited reliability and weight of such evidence (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 35; *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484; Sullivan, *supra*, at pp.

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608-14). Hansard references may be relied on as evidence of the background and purpose of the legislation or, in some cases, as direct evidence of purpose (*Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 44, per LeBel and Cromwell JJ.). Here, Hansard is advanced as evidence of legislative intent. However, such references will not be helpful in interpreting the words of a legislative provision where the references are themselves ambiguous (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 (S.C.C.), at para. 39, per LeBel J.). Accordingly, the evidence relied on by CN in this case does not support the argument that an implied restriction to questions of fact and policy should be read into the otherwise broad and unrestricted language in s. 40.

48 CN submits that it is rare for the Governor in Council to vary or rescind an administrative decision on a question of law. I accept that it is unusual for the Governor in Council to determine a question of law and agree that the Governor in Council is generally concerned with issues of policy and fact. Although it is rare for the Governor in Council to determine a question of law, this does not mean that the Governor in Council has no authority under the statute to do so. Indeed, parties may prefer to comply with the requirements of s. 41 and seek leave to appeal to the Federal Court of Appeal, where a traditional full hearing on the matter will be carried out. Although these may be practical or strategic considerations, they do not alter the fact that the legislation does not restrict the Governor in Council from determining a question of law.

49 Accordingly, petitions to the Governor in Council are not restricted to issues of fact or policy. The Governor in Council has the authority to answer legal questions. This authority is properly supervised by the courts in the course of judicial review.

***C. Standard of Review***

50 Determining the appropriate standard of review in this case involves consideration of two issues. First, does the standard of review analysis set out by this Court in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), apply to decisions of the Governor in Council? Second, what is the applicable standard of review in this case?

*(1) The Dunsmuir Framework Applies to Decisions of the Governor in Council*

51 This case is not about whether a regulation made by the Governor in Council was *intra vires* its authority. Unlike cases involving challenges to the *vires* of regulations, such as *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (S.C.C.), the Governor in Council does not act in a legislative capacity when it exercises its authority under s. 40 of the *CTA* to deal with a decision or order of the Agency. The issue is the review framework that should apply to such a determination by the Governor in Council. I am of the view that the *Dunsmuir* framework is the appropriate mechanism for the court's judicial review of a s. 40 adjudicative decision of the Governor in Council.

52 When the Governor in Council exercises its statutory authority under s. 40 of the *CTA*, it engages in its own substantive adjudication of the issue brought before it. The decision of the Governor in Council is then subject to judicial review by the Federal Court (*Public Mobile*, at para. 26). In this way, the court exercises a supervisory function over the Governor in Council, a public authority exercising the statutory powers delegated to it under s. 40 of the *CTA*.

53 *Dunsmuir* is not limited to judicial review of tribunal decisions (paras. 27-28; *Public Mobile*, at para. 30). Rather, in *Dunsmuir*, the standard of review analysis was discussed in the context of "various administrative bodies", "all exercises of public authority", "those who exercise statutory powers", and "administrative decision makers" (paras. 27, 28 and 49).

54 This Court has applied the *Dunsmuir* framework to a variety of administrative bodies (see, for example, *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at paras. 13 and 35, per McLachlin C.J.). The precedents instruct that the *Dunsmuir* framework applies to administrative decision-makers generally and not just to administrative tribunals. The *Dunsmuir* framework thus is applicable to adjudicative decisions of the Governor in Council.

*(2) The Applicable Standard of Review*

55 It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (*Dunsmuir*, at para. 54; *Alliance Pipeline*

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*Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.), at para. 28; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 30). In such cases, there is a presumption of deferential review, unless the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction (*Dunsmuir*, at paras. 58-61, and *Alberta Teachers' Association*, at para. 30, citing *Canada (Canadian Human Rights Commission)*, at para. 18, and *Dunsmuir*, at paras. 58-61).

56 Economic regulation is an area with which the Governor in Council has particular familiarity. Authority similar to that conferred in s. 40 of the *CTA* — that is authority to vary or rescind decisions of other administrative bodies — is found in a variety of federal economic regulatory legislation (*Telecommunications Act*, S.C. 1993, c. 38, s. 12; *Broadcasting Act*, at s. 28; *Canada Marine Act*, s.c. 1998, c. 10, ss. 52(2) and 94(3); *Pilotage Act*, R.S.C. 1985, c. P-14, s. 35(7); *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, s. 51). The issues arising under these statutes are linked by the shared economic regulatory purpose of the legislation. The cluster of economic regulatory statutes in respect of which the Governor in Council is given authority to vary or rescind decisions of the tribunals administering the legislation is an indication of a parliamentary intention to recognize that the Governor in Council has particular familiarity with such matters. The presumption of reasonableness review therefore applies to adjudicative decisions of the Governor in Council under s. 40.

57 Although this indication of parliamentary intent is sufficient to justify a reasonableness review of the decision of the Governor in Council in this case, further support is found in the history of the Governor in Council's involvement in the regulation of railways in Canada. The Governor in Council has always been closely connected to the regulation of railways in Canada. In the first session of the first Parliament of the Dominion, *The Railway Act, 1868*, was passed. This legislation, the first incarnation of the present Act, provided that "[t]he Governor General may, from time to time, appoint such Members of the Privy Council, to the number of four at least, as he may see fit, to constitute the Railway Committee of the Privy Council" (s. 23). In amendments to the Act in 1888, the jurisdiction of the Railway Committee of the Privy Council was extended beyond regulatory powers to include the power to hear and determine any application respecting "[a]ny manner, act or thing which by this ... is sanctioned, required to be done, or prohibited" (*The Railway Act*, S.C. 1888, c. 29, s. 11(*r*); see also H. E. B. Coyne, *The Railway Law of Canada* (1947), at p. vi).

58 Although primary administrative jurisdiction over *The Railway Act* was later delegated to the Board of Railway Commissioners (the body that later became the Agency) in order to further efficiency in addressing issues arising under *The Railway Act*, the Governor in Council maintained an oversight role (*The Railway Act, 1903*, S.C. 1903, c. 58; Coyne, at pp. vi-vii). The long history of the Governor in Council's involvement in transportation law and policy indicates that this is an area closely connected to the Governor in Council's review function. Parliament has maintained a robust role for the Governor in Council in this area through s. 40, which confers broad authority on the Governor in Council to address any orders or decisions of the Agency, including those involving questions of law. When reviewing orders or decisions of the Agency in its s. 40 role, the Governor in Council acts in an adjudicative capacity and determines *de novo* substantive issues that were before the Agency. In this way, Parliament has recognized the Governor in Council's longstanding involvement in this area. As such, the principle that deference will usually result where a tribunal is interpreting statutes closely connected to its function, with which it will have particular familiarity, can be said to apply in this case.

59 The presumption of deference is not rebutted here. The question at issue does not fall within one of the established categories of questions to which correctness review applies. In the present case, there is no issue of constitutionality or competing jurisdiction between tribunals.

60 This is also not a question of central importance to the legal system as a whole. The question at issue centres on the interpretation of s. 120.1 of the *CTA*. The question is particular to this specific regulatory regime as it involves confidential contracts as provided for under the *CTA* and the availability of a complaint-based mechanism that is limited to shippers that meet the statutory conditions under s. 120.1(1). This question does not have precedential value outside of issues arising under this statutory scheme.

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61 To the extent that questions of true jurisdiction or *vires* have any currency, the Governor in Council's determination of whether a party to a confidential contract can bring a complaint under s. 120.1 does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter (see *Dunsmuir*, at para. 59). Rather, it is simply a question of statutory interpretation involving the issue of whether the s. 120.1 complaint mechanism is available to certain parties. This could not be a true question of jurisdiction or *vires* of the Governor in Council — the decision maker under review in this case.

62 In this case, the Governor in Council was interpreting the *CTA*, legislation closely related to its economic regulation review function. This issue of statutory interpretation does not fall within any of the categories of questions to which a correctness review applies. As such, the applicable standard of review is reasonableness.

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

63 In the present case, the Governor in Council concluded that a party to a confidential contract is able to bring a complaint under s. 120.1 of the *CTA* in certain circumstances. In my view, this decision was reasonable.

64 The wording of s. 120.1 provides the basis for the Governor in Council's decision. Section 120.1(1) sets out the circumstances under which the Agency can inquire into the reasonableness of a charge imposed by a railway company: the shipper bringing the complaint must be subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services; the charges must be found in a tariff; the tariff must apply to more than one shipper; and the tariff must not be one referred to in s. 165(3) (a tariff resulting from a decision of a final offer arbitrator). As noted by the Governor in Council, PRC met all of these conditions. As such, the only reason to preclude PRC from bringing a complaint under s. 120.1 is the existence of the confidential contract between PRC and CN.

65 The Governor in Council concluded that, while the terms of a confidential contract are relevant to whether PRC may benefit from any order made by the Agency, the existence of a confidential contract does not bar a shipper from applying for a reasonableness assessment under s. 120.1(1). This conclusion is consistent with the terms of the *CTA*, which do not preclude the Agency from reviewing the reasonableness of a charge contained in a tariff applicable to more than one shipper, whether or not it is incorporated by reference into a confidential contract. There was also no evidence in this case that the parties attempted to contract out of the availability of the s. 120.1 remedy, nor is it necessary in this case to decide whether a shipper could contract out of the recourse provided by s. 120.1. The Governor in Council also did not resolve the question of whether PRC could benefit from any change to the tariff and this remains an open question.

66 The Governor in Council's interpretation of s. 120.1(1) is also supported by a reasonable view of the provision's purpose. It was open to the Governor in Council to conclude that Parliament's intention in including this complaint-based mechanism in the Act was to rebalance the legislative framework in favour of shippers in an industry where there are circumstances of railway market power. We are not deciding in this case whether the confidential contract between PRC and CN would preclude PRC from any relief ordered by the Agency under s. 120.1 or whether a mileage-based fuel surcharge tariff is a rate for the movement of traffic under s. 120.1(7). However, there was evidence before the Governor in Council that confidential contracts are standard in the industry (CITA petition to the Governor in Council, at para. 27, found in the Federal Court of Appeal reasons, at para. 38). Accordingly, without deciding whether in any particular case a confidential contract would preclude a shipper from relief under s. 120.1, the Governor in Council's interpretation of s. 120.1 was reasonable. Leaving access to the s. 120.1 complaint mechanism available to parties to confidential contracts can reasonably be said to be consistent with Parliament's intention to provide a measure of protection for shippers.

67 The Governor in Council's decision is supported by the facts and the wording of s. 120.1(1), and it is consistent with Parliament's intention. The Governor in Council's decision was reasonable.

***E. Rate for the Movement of Traffic***

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68 I agree with the Federal Court of Appeal that, as the Agency did not consider the question of whether fuel surcharges are a component of the "rates for the movement of traffic" within the meaning of s. 120.1(7) and the Governor in Council did not make any finding in this regard, this question remains a live issue before the Agency (Federal Court of Appeal reasons, at paras. 52-56). It is within the Agency's jurisdiction to determine this question and it remains open for the Agency to do so.

**IX. Conclusion**

69 I would dismiss the appeal with costs to the Attorney General of Canada and one set of costs to PRC and CITA.

*Appeal dismissed.*

*Pourvoi rejeté.*

**Appendix**

*Canada Transportation Act*, S.C. 1996, c. 10

**40.** The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

**41.** (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

. . . . .

**120.1** (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

(2) An order made under subsection (1) remains in effect for the period, not exceeding one year, specified in the order.

(3) In deciding whether any charges or associated terms and conditions are unreasonable, the Agency shall take into account the following factors:

(a) the objective of the charges or associated terms and conditions;

(b) the industry practice in setting the charges or associated terms and conditions;

(c) in the case of a complaint relating to the provision of any incidental service, the existence of an effective, adequate and competitive alternative to the provision of that service; and

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(d) any other factor that the Agency considers relevant.

(4) Any charges or associated terms and conditions established by the Agency shall be commercially fair and reasonable to the shippers who are subject to them as well as to the railway company that issued the tariff containing them.

(5) The railway company shall, without delay after the Agency establishes any charges or associated terms and conditions, vary its tariff to reflect those charges or associated terms and conditions.

(6) The railway company shall not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in subsection (2) has expired.

(7) For greater certainty, this section does not apply to rates for the movement of traffic.

. . . . .

**126.** (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting

(a) the rates to be charged by the company to the shipper;

(b) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;

(c) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;

(d) any conditions relating to the traffic to be moved by the company; and

(e) the manner in which the company shall fulfill its service obligations under section 113.

(1.1) If a shipper wishes to enter into a contract under subsection (1) with a railway company respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may request that the railway company make it an offer to enter into such a contract.

(1.2) The request must describe the traffic to which it relates, the services requested by the shipper with respect to the traffic and any undertaking that the shipper is prepared to give to the railway company with respect to the traffic or services.

(1.3) The railway company must make its offer within 30 days after the day on which it receives the request.

(1.4) Subject to subsection (1.5), the railway company is not required to include in its offer terms with respect to a matter that

(a) is governed by a written agreement to which the shipper and the railway company are parties;

(b) is the subject of an order, other than an interim order, made under subsection 116(4);

(c) is set out in a tariff referred to in subsection 136(4) or 165(3); or

(d) is the subject of an arbitration decision made under section 169.37.

(1.5) The railway company must include in its offer terms with respect to a matter that is governed by an agreement, the subject of an order or decision or set out in a tariff, referred to in subsection (1.4) if the agreement, order, decision or tariff expires within two months after the day on which the railway company receives the request referred to in subsection (1.1). The terms must apply to a period that begins after the agreement, order, decision or tariff expires.

(2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

. . . . .

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**161.** (1) A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

. . . . .

**162.** (1) Notwithstanding any application filed with the Agency by a carrier in respect of a matter, within five days after final offers are received under subsection 161.1(1), the Agency shall refer the matter for arbitration

(a) if the parties did not agree that the arbitration should be conducted by a panel of three arbitrators, to the arbitrator, if any, named under paragraph 161(2)(*e*) or, if that arbitrator is not, in the opinion of the Agency, available to conduct the arbitration or no arbitrator is named, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration; and

(b) if the parties agreed that the arbitration should be conducted by a panel of three arbitrators,

(i) to the arbitrators named by the parties under paragraph 161(2)(*e*) and to any arbitrator who those arbitrators have, within 10 days after the submission was served under subsection 161(2), notified the Agency that they have agreed on, or if those arbitrators did not so notify the Agency, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration, or

(ii) if an arbitrator referred to in subparagraph (i) is not, in the opinion of the Agency, available to conduct the arbitration, to the arbitrators named in that subparagraph who are available and to an arbitrator chosen by the Agency from the list of arbitrators referred to in section 169 who the Agency determines is appropriate and available to conduct the arbitration.

. . . . .

**165.** (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier.

. . . . .

(3) The carrier shall, without delay after the arbitrator's decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless, where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential.

**End of Document**

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2002 FCA 270
Federal Court of Canada — Appeal Division

Canada (Information Commissioner) v. Canada (Minister of Citizenship & Immigration)

2002 CarswellNat 1476, 2002 CarswellNat 4367, 2002 FCA 270, [2002] F.C.J. No. 950, [2003] 1 F.C. 219, 115 A.C.W.S. (3d) 2, 1 Admin. L.R. (4th) 270, 21 C.P.R. (4th) 30, 228 F.T.R. 319 (note), 291 N.R. 236

# The Information Commissioner of Canada, Appellant and The Minister of Citizenship and Immigration, Respondent and Philip W. Pirie Added, Respondent and The Privacy Commissioner of Canada, Intervener

Noël, Evans, Décary JJ.A.

Heard: June 4, 2002
Judgment: June 21, 2002
Docket: A-326-01

Proceedings: reversing (2001), 3 F.C. 384, 33 Admin. L.R. (3d) 250, 202 F.T.R. 112, 2001 CarswellNat 598, 2001 FCT 231 (Federal Court of Canada — Appeal Division)

Counsel: *Daniel Brunet* and *Patricia Boyd*, for appellant
*Christopher Rupar*, for respondent
*Dougald Brown* and *Steven Welchner*, for intervener

Subject: Intellectual Property; Property; Public
**Related Abridgment Classifications**
Privacy and freedom of information
I Federal privacy legislation
I.2 Collection of personal information
I.2.a Definitions
Privacy and freedom of information
V Freedom of information
V.2 Federal legislation
V.2.b Grounds for refusal
V.2.b.ii Protected personal information

**Headnote**

Public authorities --- Freedom of information — Federal legislation — Grounds for refusal — Personal information

In response to allegations of discriminatory behaviour and harassment, Minister of Citizenship and Immigration ordered administrative review of Case Processing Centre where respondent was director — Independent consultant conducted confidential interviews of staff and former employees — Following disclosure of report, respondent was dismissed — Respondent sought access to notes from interviews — Following two disclosures of requested documents, respondent complained to information commissioner — Commissioner recommended disclosure of views or opinions expressed by others about respondent and identities of those individuals, and views or opinions expressed by public officials in course of employment — Minister resisted disclosure of names and information that would reveal identities of interviewees — Commissioner applied for judicial review of Minister's decision — Application was granted in part — Applications judge found that s. 3 "personal information" (i) of Privacy Act warranted non-disclosure of names and opinions of interviewees, but that exception under s. 3(j) allowed disclosure in respect of managers responsible for prevention of harassment or administration of harassment policy — Commissioner appealed — Appeal allowed — Section 3 "personal information" (i) of Act did not apply and disclosure was mandated pursuant to s. 3(e) and 3(g) — Right to access information existed and use of that information was irrelevant

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— Promise of confidentiality made by department could not override obligation imposed by statute to release information — Future effect of disclosure was not valid ground for refusal — When specific example under defined term in Act excludes type of information from enumeration, exclusion is not caught by general inclusion clause — Section 3(e) clearly states that personal opinions of persons are that person's personal information except when they are expressed about second person, in which case they become part of second person's personal information.

**Table of Authorities**

**Cases considered by *Décary J.A.*:**

*Canada (Information Commissioner) v. Canada (Immigration & Refugee Board)*, 1997 CarswellNat 2436, (sub nom. *Information Commissioner (Can.) v. Immigration and Refugee Board (Can.))* 140 F.T.R. 140, 4 Admin. L.R. (3d) 96, 82 C.P.R. (3d) 290 (Fed. T.D.) — considered

*Canada Post Corp. v. Canada (Minister of Public Works)*, 64 F.T.R. 62, 50 C.P.R. (3d) 253, (sub nom. *Societe canadienne des postes v. Canada)* [1993] 3 F.C. 320, 19 Admin. L.R. (2d) 230, 1993 CarswellNat 824, (sub nom. *Societe canadienne des postes v. Canada)* 1993 CarswellNat 1325 (Fed. T.D.) — considered

*Canada Post Corp. v. Canada (Minister of Public Works)*, 30 Admin. L.R. (2d) 242, 179 N.R. 350, (sub nom. *Societe canadienne des postes v. Canada)* [1995] 2 F.C. 110, 91 F.T.R. 320 (note), 60 C.P.R. (3d) 441, 1995 CarswellNat 652, (sub nom. *Societe canadienne des postes v. Canada)* 1995 CarswellNat 688 (Fed. C.A.) — referred to

*Dagg v. Canada (Minister of Finance)*, 1997 CarswellNat 870, 1997 CarswellNat 869, 213 N.R. 161, 148 D.L.R. (4th) 385, 46 Admin. L.R. (2d) 155, [1997] 2 S.C.R. 403, 132 F.T.R. 55 (note) (S.C.C.) — considered

*Lavigne v. Canada (Commissioner of Official Languages)*, 1998 CarswellNat 2079, 157 F.T.R. 15 (Fed. T.D.) — considered

*Lavigne v. Canada (Commissioner of Official Languages)*, 2000 CarswellNat 1984, 261 N.R. 19, 186 F.T.R. 160 (note) (Fed. C.A.) — referred to

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*Rubin v. Canada (Minister of Transport)*, 221 N.R. 145, 154 D.L.R. (4th) 414, 134 F.T.R. 240 (note), 1997 CarswellNat 2190, [1998] 2 F.C. 430 (Fed. C.A.) — considered

*Ruby v. Canada (Solicitor General)*, 2000 CarswellNat 1106, 187 D.L.R. (4th) 675, (sub nom. *Ruby v. Royal Canadian Mounted Police)* 256 N.R. 278, 6 C.P.R. (4th) 289, [2000] 3 F.C. 589, (sub nom. *Ruby v. Royal Canadian Mounted Police)* 184 F.T.R. 159 (note), 2000 CarswellNat 3423 (Fed. C.A.) — considered

*Ruby v. Canada (Solicitor General)*, 2001 CarswellNat 22, 2001 CarswellNat 23, (sub nom. *Ruby v. Royal Canadian Mounted Police)* 267 N.R. 192 (note) (S.C.C.) — referred to

**Statutes considered:**

*Access to Information Act*, R.S.C. 1985, c. A-1

Generally — considered

s. 16(1)(c) — considered

s. 16(1)(c)(ii) — considered

s. 17 — referred to

s. 19(1) — considered

s. 20(1) — referred to

s. 49 — referred to

*Privacy Act*, R.S.C. 1985, c. P-21

Generally — considered

s. 3 "personal information" — considered

s. 3 "personal information" (a)-(i) — referred to

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s. 3 "personal information" (e) — considered

s. 3 "personal information" (g) — considered

s. 3 "personal information" (h) — considered

s. 3 "personal information" (i) — considered

s. 3 "personal information" (j) — considered

s. 8(1) — considered

s. 12(2) — considered

s. 22(1)(b) — referred to

**Words and phrases considered**

**personal information**

Paragraph 3(e) [of the *Privacy Act*, R.S.C. 1985, c. P-21] makes it clear that the personal opinions of an individual (an interviewee) are his "personal information" *except* when they are about [a second] individual . . . in which case para. 3(e) provides that they become the "personal information" of [that second individual].

APPEAL of judgment reported at 2001 CarswellNat 598, 2001 CarswellNat 2431, 2001 FCT 231, [2001] 3 F.C. 384, 33 Admin. L.R. (3d) 250, 202 F.T.R. 112 (Fed. T.D.), allowing judicial review of decision of Minister of Citizneship and Immigration to omit personal details found in statements made by interviewed employees.

***Décary J.A.*:**

1 This is an appeal from a judgment of Madam Justice Dawson reported at [2001] 3 F.C. 384 (Fed. T.D.). The principal issue is whether the names of individuals interviewed in the course of an administrative review, who expressed views or opinions about a senior officer of the Department of Citizenship and Immigration (the Department), and portions of their interviews which would identify them, are exempted from disclosure as their "personal information" as defined in paragraph 3(*i*) of the *Privacy Act*.

2 The relevant facts can be simply put. Allegations of discriminatory behaviour and harassment at the Department's Case Processing Centre (the Centre) in Vegreville, Alberta, prompted the respondent (the Minister) to request an independent consultant to "examine corporate culture, values and systems in the [Centre] with a view to enhancing respect in the workplace for all individuals". Interviews were conducted in April, May and June of 1996 on a voluntary basis. Employees who participated were advised that the interviews would be confidential; managers who participated were not so advised. The notes from the interviews were to be maintained by the consultant and were not to be passed to the Department. The final report was provided to the Department on July 1, 1996, and it was eventually made public.

3 On July 10, 1996, Mr. Pirie, the Director of the Centre, was given a copy of the report. That very day, he was relieved of his duties. On July 31, 1996, he sought access to the notes from the interviews. As a result of that request, the interview notes then in the possession of the consultant came into the possession of the Department. Mr. Pirie was denied access to the notes in part. He then complained to the Information Commissioner of Canada (the Information Commissioner) and further disclosures were made. In the end, the names of the persons interviewed, along with information regarding their position, were not disclosed. In addition, views or opinions about Mr. Pirie were severed from the records disclosed to him when their disclosure would indirectly disclose the identity of the person who expressed them.

4 The Department relied at different times on paragraph 16(1)(*c*), section 17 and subsection 20(1) of the *Access to Information Act* (the Access Act) to refuse disclosure to Mr. Pirie. In the end, however, it relied only on subsection 19(1) of the Access Act

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and the definition of personal information contained in section 3 of the *Privacy Act* to which subsection 19(1) of the Access Act refers.

5 The Applications Judge found that paragraph 3(*i*) of the *Privacy Act* warranted non-disclosure of the names and opinions of the interviewees. She then went on to determine whether the information was nevertheless to be disclosed as a result of the exception found in paragraph 3(*j*). She ruled that the exception applied, but only with respect to the names and opinions of the interviewees who had responsibility to prevent harassment in the workplace. In the end, she ordered the disclosure of "the identities of all managers with responsibility to prevent harassment in the workplace or to administer a harassment policy who were interviewed together with any of their recorded opinions or views which have not already been disclosed to Mr. Pirie".

6 I have reached the conclusion, with respect, that paragraph 3(*i*) of the *Privacy Act* does not apply, or does not prevail in the present instance, and that disclosure is mandated pursuant to paragraphs 3(*e*) and 3(*g*). In the circumstances, there will be no need to discuss the application of paragraph 3(*j*), except to note that all parties agree that the Applications Judge erred in relying on it.

7 The Privacy Commissioner of Canada (the Privacy Commissioner) was granted leave to intervene. He supports the position of the Information Commissioner.

8 I would like, at the outset, to make four preliminary observations.

9 First, at the hearing, some time was spent by counsel in discussing the impact of the report and the interview notes on the career of Mr. Pirie and the course of action that would be open to him under the Access Act or otherwise should disclosure be ordered. This discussion is, in my view, irrelevant. What is at issue, here, is whether Mr. Pirie has the right of access to the impugned information, not what he intends to do with it, nor the reasons that prompted his request for disclosure (see *Lavigne v. Canada (Commissioner of Official Languages)* (1998), 157 F.T.R. 15 (Fed. T.D.), Dubé J., at para. 28, affirmed (2000), 261 N.R. 19 (Fed. C.A.), affirmed 2002 SCC 53 (S.C.C.)).

10 Second, a comparison of the documents at issue, before and after severance of the names of the interviewees and any information that could identify them, clearly reveals that much of the information the Department is prepared to disclose to Mr. Pirie would be incomprehensible to him and that many of the views expressed would not even be disclosed. For all practical purposes, the right given to Mr. Pirie under subsection 12(2) of the *Privacy Act* to "request correction of the personal information" would be meaningless. As noted by this Court in *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (Fed. C.A.), l(leave to appeal to the Supreme Court of Canada granted [2001 CarswellNat 22 (S.C.C.)], appeal heard April 24, 2002, SCC 28029), at para. 167:

> We accept the appellant's submission that in order for the right to informational privacy to have any substantive meaning it must be concerned with both the acquisition of personal information and its subsequent use.

In the case at bar, for example, one wonders what use Mr. Pirie ("Phil") may make of the following information contained at page 2813 of Volume 10 of the Appeal Book:

> Did not feel Phil was interested in diversity. He didn't get along with her
>
> The only reason he transferred was that he wanted to get rid of
>
> When asked when Phil knew about racism in the CPC, she said right away because knew.

11 Third, the promise of confidentiality made by the Department to some of the interviewees cannot override the obligation imposed by statute to release the information, nor be opposed to Mr. Pirie should he be entitled to disclosure (see *Canada (Information Commissioner) v. Canada (Immigration & Refugee Board)* (1997), 140 F.T.R. 140 (Fed. T.D.), Richard J., at para. 26; *Lavigne*, *supra*).

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12 Fourth, the chilling effect disclosure might have on possible future investigations has been consistently denied as a ground for refusing disclosure (see *Rubin v. Canada (Minister of Transport)* (1997), [1998] 2 F.C. 430 (Fed. C.A.), at 445, *Canada (Information Commissioner) v. Canada (Immigration & Refugee Board)*), *supra*, para. 45, *Lavigne*, *supra*). I appreciate that these decisions were rendered in the context of paragraph 16(1)(*c*) of the Access Act and of paragraph 22(1)(*b*) of the *Privacy Act*, but the principles they set out with respect to investigative bodies involved in the detection of crime or law enforcement are even more applicable to informal investigations of an administrative nature such as in the case at bar. If Parliament is prepared to protect the identity of a confidential source of information only during the course of "lawful investigations" contemplated by these paragraphs, one can hardly make a policy argument that it is necessary to protect the name of a witness in an informal inquiry in order to avoid jeopardizing the conduct of such inquiries in the future.

13 For the sake of convenience, I reproduce below the provisions of the *Privacy Act* and of the Access Act to which I later refer:

***Privacy Act***

**3.** In this Act,

...

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(*c*) any identifying number, symbol or other particular assigned to the individual,

(*d*) the address, fingerprints or blood type of the individual,

(*e*) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(*f*) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

***Loi sur la protection des renseignements personnels***

**3.** Les définitions qui suivent s'appliquent à la présente loi.

...

« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment:

*a*) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

*b*) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

*c*) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

*d*) son adresse, ses empreintes digitales ou son groupe sanguin;

*e*) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

*f*) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

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(*g*) the views or opinions of another individual about the individual,

(*h*) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph

(*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(*i*) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of

*g*) les idées ou opinions d'autrui sur lui;

*h*) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa

*e*), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

*i*) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant:

*j*) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment:

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresses et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

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employment, and
(v) the personal opinions or views of the individual given in the course of employment,

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,
(*l*) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and
(*m*) information about an individual who has been dead for more than twenty years;

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

*k*) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;

*l*) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;

*m*) un individu décédé depuis plus de vingt ans.

[My emphasis]

***Access to Information Act***
**16**. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

...
(*c*) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

...
(ii) that would reveal the identity of a confidential source of information, or...

***Loi sur l'accès à l'information***
**16**. (1) Le responsable d'une institution fédérale peut refuser la communication de documents:

...
*c*) contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment:

...
(ii) des renseignements qui permettraient de remonter à une source de renseignements confidentielle,...

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**19**. (1) Subject to subsection (2), the head of a government institution shall refus to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

**19**. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

14 Both the Access Act and the *Privacy Act* "recognize that, in so far as it is encompassed by the definition of 'personal information' in s. 3 of the *Privacy Act*, privacy is paramount over access" (*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at para. 48). However, most cases that have reached the courts pitted individuals alleging their private interests for disclosure against government institutions relying on public interest to oppose disclosure, or were strictly concerned with the disclosure of personal information about oneself which an individual had himself revealed to a government institution. In contrast, this case is about the competing interests under the *Privacy Act* of two individuals who contend that the impugned information is their personal information and who are fighting over its disclosure. Mr. Pirie, on the one hand, claims that the views expressed about him by the interviewees and the identity of the interviewees are his "personal information" pursuant to paragraph 3(*g*). On the other hand, interviewees (whom I deem for the purposes of these reasons to be represented by the Minister) claim that the views they have expressed about Mr. Pirie are, pursuant to paragraph 3(*i*), their own "personal information" insofar as their names and any information likely to identify them are concerned.

15 Given the expansive meaning attributed to "personal information" in *Dagg*, *supra*, it is clear that the same information can be "personal" to more than one individual. However, the scheme of the *Privacy Act* requires that one interest must prevail over the other, since a government institution cannot, with respect to the same information, both disclose it with the consent of one individual in accordance with subsection 8(1) of the *Privacy Act*, and refuse to disclose it because of the lack of consent of another individual. The failure to recognize that one piece of information may be personal to two different individuals with competing interests in its disclosure is at the root of the incorrect interpretation which, in my respectful view, was proposed by the Minister and eventually adopted by the Applications Judge.

16 In the case at bar, the Applications Judge found that the information in dispute was personal to both Mr. Pirie and to the interviewees under the general opening words of the definition of "personal information" in section 3 of the *Privacy Act*. She went on to "review the balance of the definition of personal information, that is the enumerated exemplifiers, to ensure that the above conclusion, based upon the opening words of the definition alone, accords with the balance of the definition" (at para. 21).

17 The Applications Judge eventually concluded that, even though paragraphs 3(*e*) and 3(*g*) make it clear that interviewees' opinions about Mr. Pirie are Mr. Pirie's personal information, these paragraphs deal with the substance of the opinions and are silent with respect to the names or identities of the holders of the opinions. Relying on *Dagg*, *supra*, she found that since the names or identities of the interviewees were not expressly mentioned in paragraphs 3(*e*) and 3(*g*), they were captured by the broad opening words of the definition. She also rejected the argument based on paragraph 3(*h*) to the effect that, in view of the specific exclusion of the name in paragraph 3(*h*), dealing with part of the exclusion found in paragraph 3(*e*), the absence of any reference to the exclusion of a person's name in paragraph 3(*g*) should be taken as an indication of Parliament's intent that an identifiable individual may not anonymously express an opinion about another individual. She found the argument "at first glance persuasive" (para. 36), but declined to accept that approach to statutory interpretation "where the general opening words of the definition are intended to be the primary source of interpretation and the subsequent enumeration merely exemplifiers".

18 She then moved on to paragraph 3(*i*), which deals expressly with an individual's name and makes the name of the individual the personal information of the latter "in one of two situations: first, where the name appears with other personal information relating to the individual; second, where disclosure of the name would reveal information (not necessarily personal information) about the individual" (para. 26). She found that the first branch of paragraph 3(*i*) did not apply, because the name of the interviewees did not appear with other personal information about them, but that the second branch of the paragraph did apply because the disclosure of their names would reveal information about them, namely that they participated in the

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administrative review. In the end, she decided that paragraphs 3(*e*) and 3(*g*) did not apply because paragraph 3(*i*) applied. In my view, she erred in concluding that these paragraphs could not co-exist.

19 With respect to paragraphs 3(*e*), (*g*) and (*h*), the conclusion of the Applications Judge is based on the premise that in *Dagg*, *supra*, the Supreme Court of Canada invited courts, when determining whether a given information is "personal information", to minimize the significance of the examples given in paragraphs (*a*) to (*i*) of the definition of "personal information" in section 3 of the *Privacy Act*.

20 The relevant passage from the reasons of La Forest J. (who, on this issue, was speaking for the Court) is found in paragraph 68:

> ...In its opening paragraph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289-91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.

21 With respect, this statement has to be read in context. La Forest J. was merely stating the obvious, i.e. when a definition uses the words "including, without restricting the generality of the foregoing", that definition is "undeniably expansive" and is not limited to the matters thereafter specially enumerated. In saying that "if a government record is captured" by the opening words, "it does not matter that it does not fall within any of the specific examples", he was not saying that it did not matter that a government record was expressly or impliedly excluded by one of the specific examples. Indeed, referring to the opening words of the definition, he went on to say, at para. 69: "[i]ts intent seems to be to capture any information about a specific person, subject only to specific exceptions".

22 When, as in the case at bar, a specific example excludes a certain type of information from the definition of "personal information", the exclusion cannot be ignored on the ground that the example is merely an illustration, and that what is excluded by the example is nevertheless captured by the opening words. Parliament cannot have intended to include in the general words what it has excluded in the examples given. There is a significant difference between a record that does not come within the purview of an example and a record that is excluded by that very example.

23 Paragraph 3(*e*) makes it clear that the personal opinions of an individual (an interviewee) are his "personal information" *except* when they are about another individual (Mr. Pirie) in which case paragraph 3(*g*) provides that they become the "personal information" of Mr. Pirie.

24 Paragraph 3(*h*), on the other hand, resolves any doubt as to whether paragraph 3(*e*) included the identity of the holder of the opinions or views in the words "personal opinions or views of an individual". Only when the views concern a proposal for a grant, an award or a prize, is the identity of their holder excluded. We know, from the legislative history of the definition of "personal information" in the *Privacy Act*, that paragraph 3(*h*) was added to "clarify that these assessments will be available to the individuals whose proposals have been assessed, but the identity of the assessor would not be available" (the Hon. Francis Fox, Minutes of Proceedings and Evidence of the standing Committee on Justice and Legal Affairs on Bill C-43 (1980-83) at 94:171-172). Had Parliament intended this "clarification" to apply to the whole of paragraph 3(*e*), it would surely have said so and simply added the clarification to the end of that paragraph. In using the word "clarification", the Hon. Fox confirms, in my view, that the very notion of "opinion or belief *of an individual*" (my emphasis) would otherwise contemplate the source of that opinion or belief, i.e. the identity of the individual holding it. An opinion presumes an opinion-holder.

25 Contrary to the Applications Judge, I conclude that the name and identity of interviewees are as much the personal information of Mr. Pirie, pursuant to paragraph 3(*g*), as is the substance of the opinions or views expressed.

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26 With respect to paragraph 3(*i*), I agree with the Applications Judge that its first branch is not applicable in the circumstances. As regards the second branch, I disagree with the conclusion that it may be applied to the contextual information (as opposed to the name) that could reveal the identity of interviewees. Paragraph 3(*i*) applies where the disclosure of the name *itself* would reveal information about the individual. Where the name does not appear, the information does not fall under paragraph 3(*i*) (see *Dagg*, *supra*, at para. 82).

27 Still with regard to the second branch of paragraph 3(*i*), I entertain some doubt that the words "information about the individual" have the sweeping meaning that La Forest J., in *obiter* in *Dagg*, *supra*, at para. 85, gave them, but I cannot fault the Applications Judge for having relied on it and I have little choice myself but to hold that the name itself of an interviewee is personal information of the latter under paragraph 3(*i*), although, as we shall see, this finding has no impact on my ultimate conclusion.

28 In the end, I find that the name of interviewees and the contextual information that may lead to their identification are the personal information of Mr. Pirie pursuant to paragraph 3(*g*) and that the name of interviewees is also their personal information pursuant to paragraph 3(*i*). There is no issue, then, that Mr. Pirie is entitled to the disclosure of the contextual information. But what about the disclosure of the name? A choice has to be made between the right of Mr. Pirie to seek its disclosure and the right of the interviewees to oppose it. Whose interest should prevail?

29 The balancing exercise has to take into consideration, in my view, the private interests of both Mr. Pirie and the interviewees, as well as the public interest in disclosure and in non-disclosure, respectively.

30 The private interest of the interviewees is in hiding the fact that they participated in the inquiry and keeping confidential conversations they had with an investigator (I note, however, that the managers who were interviewed were not given any promise of confidentiality and cannot allege that private interest). Preserving their anonymity would ensure that their working or personal relationship with Mr. Pirie is not jeopardized and, more importantly, would protect them from any possible legal action that Mr. Pirie could bring on the basis of the views expressed.

31 This private interest is minimal. The fact that the interviewees participated in the inquiry has, in itself, little significance and, to the extent that they can justify the views they expressed, they should not fear the consequences of the disclosure, although, obviously, there may be some. To the extent that they cannot justify their views, they might have reason to fear. The fear, however, is caused not by the disclosure but by the fact that the views were expressed in the first place and that, perhaps, they were not justifiable.

32 The public interest in the non-disclosure which is alleged by the Minister is that of the chilling effect the disclosure might have on future investigations, coupled with the fact that promises of confidentiality made by (or on behalf of) a government institution will not be given effect. I have dealt with this argument in paragraphs 10 and 11 of these reasons and readily rejected it.

33 The private interest of Mr. Pirie, on the other hand, is significant. Implicit, if not explicit in the report and in the action taken by the Department as a result of the publication of the report, is the fact that he bears some responsibility for the problems which were found to exist at the Centre. Surely, he must be given the opportunity to know what was said, and by whom, against him, if only to exercise his right under subsection 12(2) of the *Privacy Act* to clear his name in the Department's archives.

34 The public interest in the disclosure is to ensure fairness in the conduct of administrative inquiries. Whatever the rules of procedural propriety applicable in a given case, fairness will generally require that witnesses not be given a blank cheque and that persons against whom unfavourable views are expressed be given the opportunity to be informed of such views, to challenge their accuracy and to correct them if need be.

35 I therefore conclude that both the private interest of Mr. Pirie and the public interest mandate the disclosure of the name of the interviewees.

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36 This conclusion is consistent with the comments made by Privacy Commissioner Grace in his testimony before the Standing Committee on Public Accounts, on December 12, 1989, that one of the rights conferred by the *Privacy Act*

> ...is to know what accusations against us are recorded in government files and who has made them. Whether such accusations are true and well intentioned, as some may be, or false and malicious, as other may be, it is fundamental to our notion of justice that accusations not be secret nor accusers faceless.
>
> [Minutes of Proceedings and Evidence on the Standing Committee on Public Accounts, 12-12-1089, House of Commons, Issue No. 20, p. 20:10]

37 This conclusion is also consistent with the administrative interpretation of the *Privacy Act* given in a Treasury Board Manual. I appreciate that the Manual is at best an aid to the interpretation of the *Privacy Act*, that it represents only the opinion of the Treasury Board or the officials and that they are not binding on government institutions and even less so on the courts (see *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (Fed. T.D.), at 341, affirmed [1995] 2 F.C. 110 (Fed. C.A.)). Yet, the convergent views of the main and competing actors involved in this type of dispute, i.e. the Treasury Board, the Information Commissioner and the Privacy Commissioner, may offer "persuasive opinion on the purpose or meaning of legislation" (Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., Toronto: Butterworths, 1994, at 469-471). Here is what the Manual has to say:

> ...Where the possibility of an invasion of privacy exists, institutions must either sever the information about the other individual from the record or, where this is not possible, exempt the information.
>
> For practical and administrative purposes, therefore, information about more than one individual should be separated within the personal information bank whenever possible.
>
> This exemption does not cover the name of a source of information about an individual (e.g. the source of an opinion or critique of an individual's work), except in some specific cases. As provided in paragraphs 3(e) and (h) of the definition of personal information, the exemption covers the name of a referee or judge for a grant, award or prize for those institutions named in the Regulations (Schedule I). Except as provided in paragraphs 3(e) and (h) of the Act, the name of the source and the information or opinion about the individual cannot be exempted. Any other personal information about the source, (e.g. address, title, nationality, etc.), must be severed before the record is disclosed. The name of a source and his or her opinions may, of course, be withheld if they qualify for exemption on other grounds.
>
> [Treasury Board Manual on Privacy and Data Protection, Ottawa: Minister of Supply and Services Canada, 1993, at pp. 33-34] [My emphasis]

38 Further, in a July 19, 2001 Memorandum to the Director of Human Resources regarding the "Application and interpretation of the *Access to Information Act* and the *Privacy Act* for the TB policy on the Prevention and Resolution of Harassment in the Workplace", the Treasury Board noted:

> [C]omplainants, respondents and other involved parties, have the right to know what was said about them and by whom.

That Memorandum added:

> All persons being interviewed during the course of a harassment investigation must be informed that information they provide concerning another may be provided to that person. Given this, it is important that absolute promises of confidentiality not be made.

39 In view of the conclusion I have reached, it will not be necessary to rule on other conclusions reached by the Applications Judge. In addition, the cross-appeal filed by the respondent which relates to paragraph 3(*j*) should be dismissed without costs as no longer having any object.

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40 For these reasons, I would allow the appeal, set aside the decision of the Applications Judge and issue an Order pursuant to section 49 of the *Access to Information Act* directing the Minister of Citizenship and Immigration Canada to disclose to the requester, Mr. Philip Pirie, the records or parts thereof that, according to these reasons for judgment, do not qualify for exemption under subsection 19(1) of the Act.

41 No costs were sought by the appellant, and none should be awarded.

***Marc Noël, J.A.*:**

I agree.

***John M Evans, J.A.*:**

I agree.

*Appeal allowed.*

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2020 FCA 213
Federal Court of Appeal

Ahamed v. Canada

2020 CarswellNat 5296, 2020 FCA 213, [2021] 4 C.T.C. 5,
2020 D.T.C. 5093, 326 A.C.W.S. (3d) 690, 58 C.C.P.B. (2nd) 1

# CANADIAN WESTERN TRUST COMPANY AS TRUSTEE OF THE FAREED AHAMED TFSA (Appellant) and HER MAJESTY THE QUEEN (Respondent)

Johanne Gauthier, Yves de Montigny, George R. Locke JJ.A.

Heard: October 22, 2020
Judgment: December 10, 2020
Docket: A-206-19

Proceedings: affirming *Canadian Western Trust Company as Trustee of the Fareed Ahamed TFSA v. The Queen* (2019), 2019 CarswellNat 2253, 2019 TCC 121, *(*sub nom. *Canadian Western v. The Queen)* 2019 D.T.C. 1085, F.J. Pizzitelli J. (T.C.C. [General Procedure])

Counsel: Timothy W. Clarke, for Appellant
Perry Derksen, for Respondent

Subject: Corporate and Commercial; Income Tax (Federal); Public

**Related Abridgment Classifications**

Tax
II Income tax
II.23 Administration and enforcement
II.23.n Practice and procedure on appeals
II.23.n.vi Discovery

**Headnote**

Tax --- Income tax — Administration and enforcement — Practice and procedure on appeals — Discovery

Minister reassessed taxpayer trust company under Income Tax Act (ITA), and taxpayer appealed — Taxpayer unsuccessfully requested copies of documents in public domain including information bulletins and technical interpretations, and for unredacted internal finance documents of which it had obtained redacted versions under Access to Information Act — Minister also refused to answer taxpayer's questions, including about draft statement of agreed facts and about purpose of ITA provisions — Taxpayer's motion to compel Minister to produce documents and to answer questions was dismissed — Taxpayer appealed — Appeal dismissed — Taxpayer's argument of bias on part of Tax Court judge came nowhere near what was required to meet its legal burden — Tax Court judge did not err in finding that certain documents sought were in public domain, even if they were difficult to obtain, or in characterizing taxpayer's request as effort to have Minister do its research for it — While it was not impossible that non-public documents could be relevant to exercise of statutory interpretation, question was whether documents in question here had institutional quality such that they could represent government's position concerning legislation at issue — Tax Court judge's refusal to order production of unredacted documents or order Minister to answer questions about them was exercise of residual discretion to refuse production even where documents might have marginal relevance, and involved no reviewable error — Tax Court judge did not make palpable and overriding error in concluding that Minister had already made position clear on object, spirit and purpose, and policy behind statutory provisions in issue and that ordering answers to questions would invite legal argument — Tax Court judge did not state that taxpayer could not ask questions about relevant documents if they concerned question of law, but simply meant that parties could not use discovery to question opposing party as to which documents would be relied on for which legal arguments — While it appeared that taxpayer was incorrect in claiming

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that Minister had admitted everything in draft Statement of Agreed Facts, it was appropriate to refuse to order answer to question of which facts were disputed where taxpayer did not assert any unadmitted facts.

**Table of Authorities**

**Cases considered by *George R. Locke J.A.*:**

*Badawy v. 1038482 Alaberta Ltd.* (2019), 2019 FCA 150, 2019 CarswellNat 2133 (F.C.A.) — followed

*Canadian Pacific Railway Company v. Canada (Attorney General)* (2018), 2018 FCA 69, 2018 CarswellNat 1433, 2018 CAF 69, 2018 CarswellNat 8988, [2019] 1 F.C.R. 121 (F.C.A.) — followed

*Delisle c. Canada (Sous-procureur général)* (1999), 1999 CarswellQue 2840, 1999 CarswellQue 2841, (sub nom. *Delisle v. Attorney General of Canada)* 99 C.L.L.C. 220-066, (sub nom. *Delisle v. Canada (Attorney General))* 244 N.R. 33, (sub nom. *Delisle v. Canada (Deputy Attorney General))* 176 D.L.R. (4th) 513, (sub nom. *Delisle v. Canada (Attorney General))* 66 C.R.R. (2d) 14, [1999] 2 S.C.R. 989 (S.C.C.) — followed

*Housen v. Nikolaisen* (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — followed

*Madison Pacific Properties Inc. v. Canada* (2019), 2019 FCA 19, 2019 CarswellNat 187, 2019 D.T.C. 5012, [2019] 6 C.T.C. 196, 2019 CAF 19, 2019 CarswellNat 10126 (F.C.A.) — considered

*Mikisew Cree First Nation v. Canada (Governor General in Council)* (2018), 2018 SCC 40, 2018 CSC 40, 2018 CarswellNat 5579, 2018 CarswellNat 5580, 20 C.E.L.R. (4th) 1, 426 D.L.R. (4th) 647, [2019] 1 C.N.L.R. 277, [2018] 2 S.C.R. 765, 420 C.R.R. (2d) 285 (S.C.C.) — considered

*Pepper (Inspector of Taxes) v. Hart* (1992), [1993] 1 All E.R. 42, [1993] A.C. 593, [1992] 3 W.L.R. 1032, 65 T.C. 421, [1993] I.C.R. 291, [1992] B.T.C. 591 (U.K. H.L.) — considered

*R. v. S. (R.D.)* (1997), 1997 CarswellNS 301, 1997 CarswellNS 302, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) — followed

*Reference re Upper Churchill Water Rights Reversion Act, 1980* (1981), 134 D.L.R. (3d) 288, 36 Nfld. & P.E.I.R. 273, 101 A.P.R. 273, 1981 CarswellNfld 45 (Nfld. C.A.) — considered

*Reference re Upper Churchill Water Rights Reversion Act, 1980* (1984), [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1, 53 N.R. 268, (sub nom. *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General))* 47 Nfld. & P.E.I.R. 125, (sub nom. *Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General))* 139 A.P.R. 125, 1984 CarswellNfld 40, 1984 CarswellNfld 40F (S.C.C.) — referred to

*Roberts v. R.* (2003), 2003 SCC 45, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 231 D.L.R. (4th) 1, 19 B.C.L.R. (4th) 195, (sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, [2004] 2 W.W.R. 1, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, (sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342, (sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259 (S.C.C.) — followed

*Superior Plus Corp. v. R.* (2016), 2016 TCC 217, 2016 CarswellNat 4808, [2017] 1 C.T.C. 2188, 2016 D.T.C. 1178, 2016 CCI 217, 2016 CarswellNat 11464 (T.C.C. [General Procedure]) — considered

*Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)* (2015), 2015 SCC 25, 2015 CSC 25, 2015 CarswellYukon 37, 2015 CarswellYukon 38, 383 D.L.R. (4th) 579, 84 Admin. L.R. (5th) 185, (sub nom. *Commission scolaire francophone du Yukon No. 23 v. Yukon (Procureure générale))* 471 N.R. 206, (sub nom. *Commission scolaire francophone du Yukon No. 23 v. Yukon (Procureure générale))* 370 B.C.A.C. 1, (sub nom. *Commission scolaire francophone du Yukon No. 23 v. Yukon (Procureure générale))* 635 W.A.C. 1, [2015] 2 S.C.R. 282, 75 B.C.L.R. (5th) 1, [2015] 11 W.W.R. 217, 336 C.R.R. (2d) 137 (S.C.C.) — followed

**Statutes considered:**

*Access to Information Act*, R.S.C. 1985, c. A-1

Generally — referred to

*Budget Implementation Act, 2008*, S.C. 2008, c. 28

Generally — referred to

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

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APPEAL by taxpayer from judgment reported at *Canadian Western Trust Company as Trustee of the Fareed Ahamed TFSA v. The Queen* (2019), 2019 TCC 121, 2019 CarswellNat 2253, 2019 D.T.C. 1085 (T.C.C. [General Procedure]), dismissing its motion to compel Minister to produce documents and answer questions.

***George R. Locke J.A.*:**

**I. Overview**

1 This decision concerns an appeal from a decision of the Tax Court of Canada (2019 TCC 121 (T.C.C. [General Procedure]), per Pizzitelli J.) which dismissed the appellant's motion to compel the respondent, as part of discovery, to provide certain documents and answers to certain questions. The appellant's motion was in the context of an appeal before the Tax Court in which the parties agree that the only issue in dispute concerns the interpretation of a statutory provision. Specifically, the question is whether trading activities of the kind carried on by the appellant constitute carrying on a business so as to require the payment of tax despite the appellant being a Tax-Free Savings Account (TFSA) trustee.

2 The appellant alleges many errors by the Tax Court, but not all of these have to be addressed in order to dispose of this appeal.

3 The parties agree, and I concur, that the standard of review in this appeal is as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) (*Housen*). The standard of correctness applies to questions of law (see *Housen* at para. 8), but findings of fact or of mixed fact and law, unless there is an extricable question of law, are reviewable only where the court below has made a palpable and overriding error (see *Housen* at paras. 10 and 36).

4 The appellant adds that this Court should not defer to a motions judge on findings of fact or mixed fact and law where that judge has failed to demonstrate impartiality. The appellant argues that the Tax Court gave rise to a reasonable apprehension of bias by (i) basing its decision on a number of issues that had not been raised or addressed by the parties, and (ii) awarding costs in any event of the cause.

**II. Bias**

5 I will deal with the bias argument first. I start by noting that bias allegations do not lend themselves to a standard of review analysis at all: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 (F.C.A.) at para. 55. If an appellant is successful in showing that a lower court's decision gave rise to a reasonable apprehension of bias, then the appeal will be allowed based on a breach of natural justice arising from that bias. On the other hand, if an appellant is not successful in such an argument, then bias cannot be the basis of a successful appeal. Either way, deference is not a factor. Parties are simply entitled to an impartial decision.

6 In any case, the appellant's arguments on bias come nowhere near what is required. The appellant recognizes its legal burden, which is to show that an informed person, viewing the matter realistically and practically - and having thought the matter through - would think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly (*Roberts v. R.*, 2003 SCC 45, [2003] 2 S.C.R. 259 (S.C.C.) at para. 60; *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 (S.C.C.) at paras. 20-21, 26; *Badawy v. 1038482 Alaberta Ltd.*, 2019 FCA 150 (F.C.A.) at para. 21).

7 The appellant's assertions concerning issues not raised or addressed by the parties and costs awarded in any event of the cause are clearly insufficient. If the Tax Court had erred on either of these points, such an error might be a basis to allow the appeal, but it would not, without more, suggest bias. Moreover, the appellant's list of seven findings and rulings by the Tax Court that were not subject to argument (see paragraph 38 of the appellant's memorandum of fact and law) is unconvincing. Most of those points were not determinative and were unnecessary to the Tax Court's decision. For example, as discussed below, the appellant mischaracterizes the Tax Court's comments concerning the limits of its power to review a decision to redact portions of documents produced under the *Access to Information Act*, R.S.C. 1985, c. A-1 (AIA). Moreover, those comments were not the basis of the Tax Court's decision to refuse to order the production of unredacted versions of those documents.

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8 I agree with the respondent, and the appellant acknowledges, that bias allegations should not be undertaken lightly because they call into question not simply the personal integrity of the judge, but the integrity of the administration of justice (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 (S.C.C.) at para. 113). I also agree with the respondent that bias allegations should not have been made in this appeal.

**III. Analysis of Substantive Issues on Appeal**

9 My discussion of the substantive issues is not organized in the same way as the appellant has organized its arguments, but it addresses all of the discovery questions in issue.

10 I preface this analysis by noting an overarching argument by the appellant that the errors allegedly made by the Tax Court were extricable errors of law, and hence subject to review on a standard of correctness. The appellant argues that, though the Tax Court correctly stated the legal test to be applied, it failed to apply that test. I disagree that this case concerns any extricable error of law. Rather, the appellant's arguments are effectively that the Tax Court erred in its application of the law to the facts of this case. I am not convinced that the Tax Court failed to apply the legal test described in its decision, or applied a different legal test. It follows that the standard of palpable and overriding error applies.

***A. Public Documents***

11 The Tax Court found that certain of the documents sought by the appellant are in the public domain, and refused to order production for that reason, since such an order would amount to requiring the respondent to do the appellant's research.

12 The appellant argues that the documents said to be available to the public are not, in fact, publicly available since the appellant has been unable to obtain the documents despite diligent efforts. The appellant does not argue that such documents are confidential, or impossible to obtain. For example, question 11 asserts that the documents sought therein are "very difficult to obtain." Also, question 14 argues simply that "[i]t may be easier for the respondent to locate" the documents sought therein.

13 In my view, such documents are publicly available even if they are allegedly difficult to obtain. The Tax Court did not err in characterizing the appellant's request as an effort to have the respondent do its research, and in refusing to order production of such documents.

14 This section addresses the appellant's questions 11-14.

***B. Non-Public Documents***

15 The Tax Court also refused to order production of, and answers to questions about, internal Department of Finance documents on the basis, among other things, that they are of very little or no relevance to the statutory interpretation issue in the underlying appeal before the Tax Court.

16 The discussion in this section addresses the appellant's questions 24-30, 36, 38 and 39. Questions 24-30 all concern a redacted table that the appellant obtained pursuant to a request under the AIA. The table is entitled "Comparison of tax characteristics of proposed LSP and DSP and existing RRSP and RESP" and is dated January 19, 2007. The appellant notes that LSP later came to be referred to as TFSA when they were introduced in the *Budget Implementation Act, 2008*, S.C. 2008, c. 28, which was tabled on February 26, 2008, and received Royal Assent on June 18, 2008. The appellant focuses on the third page of the table, and a row entitled "Carrying on a business." On that row, entries under the columns headed "LSP" and "RRSP" read, respectively, "Exemption applies only to income derived from investing of funds, thus unrelated business income would be taxable" and "Taxable on unrelated business income." Questions 24-30 are reproduced here:

> 24. Does this table accurately reflect the Department of Finance's policy in January 2007 on the kind of business income that is taxable or exempt to a TFSA and an RRSP?
>
> 25. If so, what is meant by "unrelated business income"?

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> 26. The table seems to imply that "related business income" is exempt. If so, what is meant by related taxable income?
>
> 27. Does this table accurately reflect the Department of Finance's (and Parliament's) legislative intent and policy in relation to the kind of business income that is taxable or exempt to a TFSA and an RRSP when section 246.2(6) [sic, 146.2(6)] was enacted?
>
> 28. If the table does not accurately reflect such policy, or the policy was subsequently changed as a matter of fact, when was that policy changed?
>
> 29. As a matter of fact, what policy replaced it?
>
> 30. If the policy was changed please produce any document produced by or in the possession of the Department of Finance which supports such a change (including, but not limited to memoranda or other guidance provided by the Policy Division of the Department of Finance).

17 By these questions, the appellant asks about the meaning of certain references in the table, whether the table reflects the "legislative intent and policy" of the Department of Finance and Parliament, any changes to such policy, and documents related to any such changed policy.

18 The remaining questions in issue in this section, questions 36, 38 and 39, seek (i) an unredacted version of this and other documents obtained pursuant to a request under the AIA, and (ii) admissions that said documents were made in the usual and ordinary course of business.

19 On the overarching issue of relevance, the Tax Court correctly noted various general principles applicable to discovery, including (i) that it should be broadly and liberally construed, (ii) that the threshold is lower in discovery than at trial, (iii) that earlier drafts of a final position paper do not have to be disclosed, and (iv) that even where relevance is established, the Court has a residual discretion to refuse document production.

20 The appellant argues that the redacted internal Department of Finance documents are relevant to statutory interpretation, and should be produced in unredacted form. The appellant argues that documents prepared by government employees participating in the legislative process are admissible as permissible extrinsic aids. The appellant argues that relevance is not limited to documents that are published or otherwise available to the public.

21 The Tax Court based its finding that the internal documents in question are of marginal relevance on *Superior Plus Corp. v. R.*, 2016 TCC 217 (T.C.C. [General Procedure]) at para. 34, which provides such documents are not relevant to ascertaining the Minister's mental process in auditing and assessing a taxpayer, unless they have been communicated to the Minister. The respondent argues that the Tax Court was correct to apply the same reasoning to statutory interpretation: internal finance documents that have not been communicated to the Minister are not relevant to ascertaining Parliamentary intent.

22 It is tempting to follow this reasoning and to agree with the respondent's position that documents must be publicly available in order to be relevant to statutory interpretation. Otherwise, it would be possible for members of the public to be left without access to certain information that is necessary to fully understand a particular law with which they are required to comply. Such a situation would be problematic for the reasons mentioned in *Pepper (Inspector of Taxes) v. Hart*, [1992] 3 W.L.R. 1032 (U.K. H.L.) at 1042:

> A statute is, after all, the formal and complete intimation to the citizen of a particular rule of the law which he is enjoined, sometimes under penalty, to obey and by which he is both expected and entitled to regulate his conduct. We must, therefore, I believe, be very cautious in opening the door to the reception of material not readily or ordinarily accessible to the citizen whose rights and duties are to be affected by the words in which the legislature has elected to express its will.

23 Notwithstanding this concern, the appellant argues that the scope of documents that could be relevant to statutory interpretation is viewed more broadly. For example, the appellant cites *Delisle c. Canada (Sous-procureur général)*, [1999] 2

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S.C.R. 989 (S.C.C.) (*Delisle*), which concerned an argument that a provision of a federal statute violated the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11. As part of his analysis on behalf of the majority of the Court in *Delisle*, Bastarache J. considered the purpose of the statutory provision in question in the course of interpreting it. At para. 17, he stated as follows:

> [...]Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance in determining the purpose of a statute in order to evaluate whether it is consistent with the *Charter*. Generally, the Court must not strike down an enactment which does not infringe the *Charter* in its meaning, form or effects, which would force Parliament to re-enact the same text, but with an extrinsic demonstration of a valid purpose. That would be an absurd scenario because it would ascribe a direct statutory effect to simple statements, internal reports and other external sources which, while they are useful when a judge must determine the meaning of an obscure provision, are not sufficient to strike down a statutory enactment which is otherwise consistent with the *Charter*. Legislative intent must have an institutional quality, as it is impossible to know what each member of Parliament was thinking. It must reflect what was known to the members at the time of the vote. It must also have regard to the fact that the members were called upon to vote on a specific wording, for which an institutional explanation was provided. The wording and justification thereof are important precisely because members have a duty to understand the meaning of the statute on which they are voting. This is more important than speculation on the subjective intention of those who proposed the enactment. (emphasis added)

24 This passage recognizes the potential relevance of internal documents to the interpretation of "obscure" statutory provisions. It is not clear what constitutes "obscure", and I do not reach a conclusion on this point. I note that this passage does not state clearly whether internal, non-public documents can be relevant to statutory interpretation. In fact, the focus on "what was known to the members [of Parliament] at the time of the vote," suggests that non-public documents are *not* relevant.

25 Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed., (Toronto: LexisNexis, 2014) at §23.11 casts a broad net for the types of documents that can be relevant to statutory interpretation:

> Like evidence of external context, opinions about the purpose and meaning of legislation can be found anywhere: before enactment, in the materials generated by government employees participating in the legislative process (instructing officers, drafters, legal opinion givers) and, after enactment, in interpretive guidelines issued by administrative agencies, in judicial or administrative case law and in the daily decisions of government employees charged with administering the legislation. Until recently, the primary source of opinion about the meaning of legislation was judicial case law. Courts were unwilling to look at the practice of bureaucrats or the opinions of administrative tribunals and, except for standard textbooks, scholarly opinion was largely ignored. The current tendency, however, is to look at any material that meets the threshold test of relevance and reliability.

26 Again, this passage does not state clearly that non-public documents can be relevant to statutory interpretation. However, it does appear that the legislative process (during which relevant documents could be created) begins early. In *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 (S.C.C.) (*Mikisew Cree First Nation*) at para. 120, Brown J. stated that "the legislative process begins with a bill's formative stages, even where the bill is developed by ministers of the Crown." Brown J went on in paragraph 121 to state

> Public servants making policy recommendations prior to the formulation and introduction of a bill are not "executing" existing legislative policy or direction. Their actions, rather, are directed to informing potential changes to legislative policy and are squarely legislative in nature.

27 Care must be taken not to read *Mikisew Cree First Nation* too broadly. That case concerned whether the law-making process (described at paragraph 116 thereof as the steps from initial policy development to royal assent) was subject to the Crown's duty to consult indigenous peoples about steps that could adversely affect their rights. *Mikisew Cree First Nation* was not concerned with statutory interpretation.

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28 Sullivan, relying on the Newfoundland Court of Appeal decision in *Reference re Upper Churchill Water Rights Reversion Act, 1980* (1981), 134 D.L.R. (3d) 288, 36 Nfld. & P.E.I.R. 273 (Nfld. C.A.), rev'd [1984] 1 S.C.R. 297 (S.C.C.) (*Upper Churchill*), goes on at §23.13 to state:

> When the purpose of a provision is discussed or its meaning explained during the enactment process, and the legislation is then passed on that understanding, the explanation or discussion offers persuasive (if not conclusive) evidence of the legislature's intent.

29 However, the Supreme Court of Canada in *Upper Churchill* offered a more nuanced approach to the relevance of extrinsic evidence. After discussing the relaxation of the former general exclusionary rule against admissibility of extrinsic evidence, the Court stated at p. 318:

> It will therefore be open to the Court in a proper case to receive and consider extrinsic evidence on the operation and effect of the legislation. In view of the positions of the parties, particularly the appellants' contention that the *Reversion Act* has extra-provincial effect, this is, in my opinion, such a case.
>
> I agree with the Court of Appeal in the present case that extrinsic evidence is admissible to show the background against which the legislation was enacted. I also agree that such evidence is not receivable as an aid to construction of the statute. However, I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well. This was also the view of Dickson J. in the *Reference re Residential Tenancies Act, 1979*, [[1981] 1 S.C.R. 714], at p. 721, where he said:
>
> > In my view a court may, in a proper case, require to be informed as to what the effect of the legislation will be. The object or purpose of the Act in question may also call for consideration though, generally speaking, speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight.
>
> This view is subject, of course, to the limitation suggested by Dickson J., at p. 723 of the same case, that only evidence which is not inherently unreliable or offending against public policy should be admissible...

30 Not only does the Supreme Court leave room for cases where extrinsic evidence will not be relevant, but it also limits the issues to which such evidence might be relevant. Moreover, it should be noted that *Upper Churchill* was in a constitutional law context, in which the Supreme Court has traditionally been more open to extrinsic evidence (see p. 317).

31 In the end, though there are good reasons to be reluctant to consider non-public documents in the exercise of statutory interpretation, it is difficult to state unequivocally that such documents could never be relevant. The better question is whether the documents in question in the present appeal have an institutional quality such that they could represent the government's position concerning the legislation at issue. If not, such documents are not relevant.

32 It is important to bear in mind that this appeal concerns whether the Tax Court made a palpable and overriding error in applying the law to the facts. Accordingly, this Court owes deference to the Tax Court on issues of mixed fact and law.

33 It is also important to bear in mind that jurisprudence must always be considered in its proper factual context. It is helpful to observe that questions 24-30 in this case concern a document that predates the legislative provision of interest. That document is hence similar to the "earlier drafts of a final position paper" which do not have to be disclosed (see paragraph 19 above).

34 The Tax Court was equivocal about the relevance of the internal documents in question. At paragraph 18 of its decision, in dealing with discovery question 39, it concluded that they "have very little or no relevance." The Tax Court did not state here that the documents in question had no relevance whatsoever. Therefore, I understand the Tax Court's refusal to order production of the unredacted documents sought in question 39 to be an exercise of its residual discretion to refuse document production even when the documents in question may have marginal relevance.

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35 Later, the Tax Court reached the same conclusion at paragraph 34 concerning questions 24-30. Here, the Tax Court did not equivocate as it did at paragraph 18; it simply stated that the internal documents in question were "irrelevant." However, the Tax Court stated that it was adopting the same reasoning as in paragraph 18, and I take that to include the equivocation. Finally, at paragraphs 37 and 38, the Tax Court reached the same conclusion about questions 36 and 38, agreeing with the respondent's position that the documents in question were "irrelevant." Again, I take the Tax Court's conclusion to include the equivocation of paragraph 18.

36 In my view, the Tax Court made no palpable and overriding error in refusing to order production of unredacted copies of the internal documents in question. Nor did the Tax Court make any palpable and overriding error in refusing to order that the respondent answer questions related to such documents.

37 Before concluding this section, I wish to address two aspects of the Tax Court's reasons. First, the appellant argues that paragraph 12 suggests that the Tax Court does not have the power to overrule the Information Commissioner's refusal to order production of an unredacted version of a document that has been obtained, with redactions, by means of an AIA request. That is not what the Tax Court stated, and it is incorrect. The criteria applicable to production of documents during discovery are quite distinct from those applicable to disclosure of documents under the AIA. It is clear from the Tax Court's reasons that it was of the view that the internal documents in question were of marginal relevance. As indicated above, this was a proper basis to refuse production. The reference to challenging the redaction of documents with the Information Commissioner seems to have been simply a suggested alternative approach that the appellant could try.

38 The second aspect of the Tax Court's reasons that I wish to address concerns paragraph 38. There, the Tax Court referred to "earlier versions" of certain documents that the appellant seeks. The appellant asserts that it never requested earlier versions of any documents. Again, the conclusion concerning the marginal relevance of internal documents remains, and that was a proper basis for refusing questions thereon. If the Tax Court was confused about the specific internal documents in issue, it makes no difference here. Even if such an error were palpable, it would not be overriding. It is clear that the Tax Court would have refused to order the questions answered regardless of whether or not they were earlier versions. In any case, I believe that the Tax Court was not confused. As indicated in paragraph 33 above, I believe that it was referring to old documents discussing possible policies that might be considered "earlier drafts of a final position paper," and which need not be produced.

***C. Legal Position vs. Legal Argument***

39 The Tax Court refused to order that the respondent provide information concerning factual assumptions surrounding the object, spirit and purpose and the policy behind the statutory provisions in issue. It based itself, in part, on the view that the appellant was seeking more than the respondent's legal position, but rather information concerning the respondent's legal argument (to which it is not entitled in discovery). The Tax Court was satisfied that the respondent's legal position was already clear.

40 The appellant objects arguing that the information it seeks concerns the respondent's legal position and is relevant.

41 In my view, the Tax Court did not err either in observing that factual assumptions are matters for pleading, not discovery, or in finding that the respondent has already communicated its legal position. The appellant has not convinced me that the Tax Court made a palpable and overriding error or erred on an extricable question of law in concluding that the respondent had already made its position clear and that ordering answers to the questions in issue would invite legal argument.

42 Paragraph 27 of the Tax Court decision (as well as paragraph 18 thereof) cites an *obiter dicta* statement in *Madison Pacific Properties Inc. v. Canada*, 2019 FCA 19 (F.C.A.) at para. 28 (*MP Properties*) in support of the conclusion that the questions in issue lacked relevance because the statutory interpretation issue in dispute in the underlying appeal before the Tax Court is a question of law, not a question of fact:

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> [27] [...]The statutory interpretation of these sections is a question of law, and not a matter of fact and is for the Court to ultimately determine at trial as referenced in *MP Properties* by Gleason J. at paragraph 28 above referred to, the Appellant is entitled to know the Respondent's position on the law, but not its [*sic*] evidence it relies on nor its legal argument.[...]

43 In my view, the statements in *MP Properties* and by the Tax Court should not be taken as an indication that a party is not entitled during discovery to obtain, and ask questions about, relevant documents simply because they concern a question of law. Rather, I understand these statements to mean that a party may not use discovery to question an opposing party as to which of the documents on the record will be relied on for which legal arguments. Such questions essentially seek the opponent's legal argument rather than its legal position.

44 The discussion in this section addresses the appellant's questions 1, 2, 10 and 19.

***D. Draft Statement of Agreed Facts***

45 The Tax Court refused to order that the respondent indicate any facts described in the draft Statement of Agreed Facts that it disputes. In doing so, the Tax Court noted the appellant's own position that the facts at issue are already admitted by the respondent. The Tax Court also noted that the draft Statement of Agreed Facts is privileged and confidential, and further that it was not proper to ask whether the respondent refutes any question amongst many.

46 In my view, the appellant's assertion that all of the facts included in the draft Statement of Agreed Facts have already been admitted in the pleadings is sufficient to dismiss this aspect of the appeal (see paragraphs 83 and 125 of its memorandum). In light of this acknowledgement, it follows that the appellant does not point to any facts in the draft Statement of Agreed Facts that are in dispute, which would be necessary to justify requiring the respondent to answer. Reviewing the pleadings carefully, it appears that the respondent does not actually admit everything in the draft Statement of Agreed Facts. Though most of the statements in the document are admitted, it seems that a few are not. Therefore, the appellant's assertion that all of the facts in the document are admitted appears to be untrue. In any case, this does not change the fact that it was appropriate to refuse to order an answer to the appellant's question since the appellant does not assert any unadmitted facts which could justify such an order.

47 Even though it is not necessary to address this point, I note that the appellant argues that the Tax Court erred at paragraph 22 in stating:

> A party should not be put in the position on discovery of having to recall by memory all of the facts that may have been admitted in the pleadings.

48 The appellant suggests that the reference to "recall by memory" indicates that the Tax Court failed to understand that the discovery in issue was in writing (not in person) and that the Minister had abundant time to prepare its answers. I disagree. I do not believe that the Tax Court misunderstood the circumstances of the discovery. Paragraphs 1 and 12 of the reasons clearly recognize that the discovery was in writing. Reading paragraph 22 as a whole, I believe that the Tax Court was concerned with the burden on the respondent of having to answer such a broad question with myriad potential implications.

49 The discussion in this section addresses the appellant's question 31.

**IV. Conclusion**

50 For the foregoing reasons, I would dismiss the present appeal with costs.

51 The parties agreed on the amounts of their respective costs. Accordingly, I would set the respondent's costs of this appeal at an all-inclusive amount of $2,750.

***Johanne Gauthier J.A.*:**

I agree.

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***Yves de Montigny J.A.*:**

I agree.

*Appeal dismissed.*

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AUDITOR GENERAL OF ONTARIO
Applicant

-and-

LAURENTIAN UNIVERSITY
Respondent

Court File No. CV-21-00669471-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
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