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May 7, 2024

By Electronic Mail: legislativeservices@victoria.ca

City of Victoria
1 Centennial Square
Victoria, BC V8W 1P6

Attention: Mayor & Council

Dear Sirs & Madams:

RE: Transient Accommodation Business Licence Renewal Application
CFS# 250057 – 867 Humboldt Street, Victoria, BC

Please accept this as the Appellants' response to the Licence Inspector's report dated April 25, 2024 (the **"Report"**). This response adopts the defined terms as defined in the Appellant's submission dated March 18, 2024 (the **"Initial Submission"**).

The Appellants rely on the supporting documents listed in **Schedule "A"** and authorities listed in **Schedule "B"** of the Initial Submission. Additional authorities cited in this response are listed in **Schedule "C"** enclosed.

The Property can be regarded as reasonably coming within the operation of a B&B

In the Initial Submission, the Appellants cited authorities for the rule that where a bylaw leaves a word undefined it is to be given a broad interpretation. The words "bed and breakfast" are not defined in the Bylaw, so these court decisions are binding in these circumstances.

Neilson involved a golf and country club which had purchased (with a related company) an adjacent property to open a restaurant, with the intention that the operation of the restaurant would

be contracted out to a private individual. The club already operated a restaurant on its original premises which was open to both members and the public.[1]

Neighbours of the club objected to the proposed restaurant and commenced a petition challenging the issuance of a permit by the building inspector on the basis that it contravened provisions of the applicable zoning bylaw.[2] A golf course was among the permitted uses, but a "commercial use" was not. The chambers judge found that the restaurant would be a commercial use if it catered to the public at large and declared the permit null and void.[3]

The Court of Appeal disagreed with the chambers judge's finding that the new restaurant fell within the bylaw's definition of commercial use.[4] Because the bylaw did not restrict the meaning of the words "golf course", they were to be given a broad interpretation encompassing "anything that can be regarded as reasonably coming within the operation of a golf course".[5] A golf club operating a golf course and which, in conjunction with the operation of the golf course, provided a restaurant on an adjacent property could "reasonably and naturally be said to operate the restaurant in question as a part of the operation of the golf course."[6]

This is consistent with guidance from the Supreme Court of Canada, with Spence J. opining in *Bayshore Shopping Centre Ltd. v. Nepean (Township)*, [1972] S.C.R. 755 (**"*Bayshore*"**) that "[n]o authority need be cited for the proposition that a man's property is his own which he may utilize as he deems fit so long as in such utilization he does not commit nuisance, entrap the unwary or act in breach of statutory prohibitions, and therefore by-laws restrictive of that right should be strictly construed."[7]

The Merriam-Webster dictionary defines "bed and breakfast" as "an establishment (such as an inn) offering lodging and breakfast".[8]

The word "lodging" is defined as:

> 1 a : a place to live : DWELLING

[1] See Document 10 of **Schedule "B"**: *Neilson* at paras. 3 – 4.
[2] See Document 10 of **Schedule "B"**: *Neilson* at para. 5.
[3] See Document 10 of **Schedule "B"**: *Neilson* at paras. 1, 10, 14.
[4] See Document 10 of **Schedule "B"**: *Neilson* at para. 15.
[5] See Document 10 of **Schedule "B"**: *Neilson* at para. 19.
[6] See Document 10 of **Schedule "B"**: *Neilson* at para. 20.
[7] See Document 1 of **Schedule "C"**: *Bayshore* at p. 14.
[8] See https://www.merriam-webster.com/dictionary/bed-and-breakfast.

b : LODGMENT

2 a (1): sleeping accommodations
found *lodging* in the barn

(2): a temporary place to stay
a *lodging* for the night

b: a room in the house of another used as a residence → usually used in plural

3: the act of lodging[9]

In this case, the Appellant's were offering lodging in the form of three suites.[10] No definition of the word lodging requires a common kitchen, bathroom or library, nor do they require that the lodging be provided in the operator's principal residence or single family dwelling.

The word "breakfast" is defined as:

1: the first meal of the day especially when taken in the morning

2: the food prepared for a breakfast
eat your *breakfast*[11]

The January 8, 2024 inspection of the Property revealed that cereal, granola bars, fruit, yogurt and beverages were provided in each suite. These are items normally consumed during the breakfast meal, but the Report finds it noteworthy that they were not served to guests in a shared space. The dictionary meaning of bed and breakfast merely requires that breakfast be "offered".

The word "offer" is defined as:

transitive verb

1 a: to present as an act of worship or devotion : SACRIFICE
to a Catholic church where she would *offer* a candle or so to his recovery

—F. M. Ford

b: to utter (something, such as a prayer) in devotion
offered up prayers of thanksgiving

2 a: to present for acceptance or rejection : TENDER
was *offered* a job

b: to present in order to satisfy a requirement
candidates for degrees may *offer* French as one of their foreign languages

3 a: PROPOSE, SUGGEST
offer a solution to a problem

[9] See https://www.merriam-webster.com/dictionary/lodging.
[10] See Schedule N in the Report.
[11] See https://www.merriam-webster.com/dictionary/breakfast.

b: to declare one's readiness or willingness
offered to help me

4 a: to try or begin to exert : PUT UP
offered stubborn resistance

b: THREATEN
offered to strike him with his cane

5 : **to make available** : AFFORD
The summit *offers* a panoramic view.

especially : to place (merchandise) on sale
offers a range of cameras at reasonable prices

6 : to present in performance or exhibition
offered a new comedy

7 : to propose as payment : BID
offered me $100 for the recliner[12]

[Emphasis added]

By making available various breakfast foods and beverages, the Appellants were offering breakfast to their guests within the ordinary meaning of those words. The requirement to serve breakfast in a common space has no basis in the wording of the Bylaw and should not be imported into the interpretation of the term "bed and breakfast", which should be construed broadly in accord with leading jurisprudence.

The Report implies that the purpose of re-zoning the Property in 1996 was limited to permitting its use as a B&B, construed strictly in the "traditional" sense. But this is belied by the examples of other zones in Victoria which place much greater restrictions on the use of properties, cited in the Initial Submission.

The R1-A6 Zone, Rockland Bed & Breakfast District permits "transient accommodation that is located in a building that is used as the principal residence of the operator of the transient accommodation."[13] This zone is located on Rockland Avenue, just to the north of Beacon Hill Park, in a residential neighbourhood.

[12] See https://www.merriam-webster.com/dictionary/offer.
[13] See Document 6 of **Schedule "B"**: Zoning Regulation Bylaw (No. 80-159), Schedule Part 1.71, R1-A6 ZONE, ROCKLAND BED & BREAKFAST DISTRICT.

The R2-28 Zone, Superior Bed & Breakfast District uses the same wording.[14] This zone is located on Superior Street, between Montreal Street and Oswego Street in James Bay, in a residential neighbourhood.

Even more restrictive is the R1-BB1 Zone, Oxford Bed & Breakfast District, which permits use as transient accommodation with the following conditions:

(i) that is located in a single family dwelling,

(ii) that is operated only by the family, or a member of it, and its employees for this purpose, that occupies the single family dwelling in which the transient accommodation is located,

(iii) that does not use more than 4 bedrooms,

(iv) that does not provide to its customers more than one meal per day or any meals after noon of any day,

(v) that does not provide liquor to its customers.[15]

This zone is located on Oxford Street, just to the east of Beacon Hill Park, in a residential neighbourhood.

So while other properties operating as B&Bs are located in purely residential neighbourhoods, the Property is at the southern edge of the downtown core adjacent to a theatre and across from a large hotel. Whereas the other properties have restrictions on their transient accommodation use, there are no such zoning limitations on the Property, of which the Zone permits "transient accommodation" without any conditions. In this way, the Property is similar to Abigail's Hotel – only two blocks away from the Property – in the T-25 Zone, McClure Transient Accommodation District which also permits "transient accommodation" without conditions.[16]

The only difference between the T-25 Zone and the Zone is their respective headings; the former contains the words "transient accommodation" and the latter "bed & breakfast". But this is not relevant.

[14] See Document 8 of **Schedule "B"**: Zoning Regulation Bylaw (No. 80-159), Part 2.85 - R2-28 ZONE, SUPERIOR BED & BREAKFAST DISTRICT.
[15] See Document 2 of **Schedule "C"**: Zoning Regulation Bylaw (No. 80-159), Part 1.64 – R1-BB1 ZONE, OXFORD BED & BREAKFAST DISTRICT at p. 17.
[16] See Document 3 of **Schedule "C"**: Zoning Regulation Bylaw (No. 80-159), Part 5.25 – T-25 ZONE, MCCLURE TRANSIENT ACCOMODATION DISTRICT at p. 18.

Section 11(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238 states:

> **11** (1) In an enactment, a head note to a provision or a reference after the end of a section or other division
>
> (a) is not part of the enactment, and
>
> (b) must be considered to have been added editorially for convenience of reference only.[17]

The Supreme Court of Canada has held that "[w]here the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the headings may be used to control the meaning of enacting words in themselves clear and unambiguous".[18]

As "transient accommodation" is a defined term in the Bylaw, there is no ambiguity. Therefore a consideration of the words "bed & breakfast" in the heading for the Zone are not required.

It was (and is) open to Council to amend the Bylaw to define the words "bed and breakfast" if a narrower interpretation of those words is deemed to be preferable. It was open to Council to include restrictions on the transient accommodation use in the Zone. But in the present circumstances there is no reason to import such a restrictive interpretation.

The Property can be regarded as reasonably coming within the operation of a B&B and the Decision to reject the Appellant's renewal because they were not operating a "traditional bed and breakfast" was unreasonable.

The Licence Inspector's *ex post facto* reliance on s. 8(1) of the *Business Licence Bylaw* cannot save an unreasonable decision

In the seminal decision *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (**"*Vavilov*"**), the Supreme Court of Canada stated that "the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it."[19] The requirement to provide adequate reasons is a "shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power".[20]

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[17] See Document 4 of **Schedule "C"**: *Interpretation Act*, R.S.B.C. 1996, c. 238 at p. 20.
[18] See Document 5 of **Schedule "C"**: *Canada (Attorney General) v. Jackson*, [1946] S.C.J. No. 21 at pp. 24 – 25, para. 18, as cited in *Schoenhalz v. Insurance Corp. of British Columbia*, 2016 BCSC 661 at para. 58 (Document 6 of **Schedule "C"** at p. 27).
[19] See Document 7 of **Schedule "C"**: *Vavilov* at p. 87, para. 95
[20] See Document 7 of **Schedule "C"**: *Vavilov* at p. 85, para. 79 [further citations omitted].

As our highest court has explained:

> 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 … 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.[21] [Further citations omitted]

In the Report the Licence Inspector relies on section 8 of the *Business Licence Bylaw* (No. 89-071) (the **"BLB"**) to justify the Decision. This provision states that:

> Before issuing any licence, the License Inspector may require evidence to his reasonable satisfaction that the applicant has complied with any and all applicable bylaws, regulations and statutes, and may require the applicant to give full particulars of all convictions of any offences recorded against the applicant anywhere in Canada during the two years immediately preceding the date of application.[22]

Mr. Dolan's letter of January 18, 2024 does not mention section 8 of the BLB, nor does it suggest that the Appellants' renewal was rejected because they failed to produce evidence of compliance with applicable bylaws, regulations and statutes.[23]

Ex post facto justifications raised on review or appeal from a decision cannot be used to fill gaps identified in that decision.[24]

Further, if the Appellants' renewal *was* rejected based on non-compliance with City bylaws this would have been arbitrary and capricious, and therefore unreasonable.

The Report ignores the fact that the City inspected the Property in July of 2023. Bylaw Officer Barry McLean's July 26, 2023 email mentions that the inspection revealed at that time that work

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[21] See Document 7 of **Schedule "C"**: *Vavilov* at at pp. 87 – 88, para. 96.
[22] See Document 8 of **Schedule "C"**: Business Licence Bylaw (No. 89-071) at p. 136.
[23] See Document 3 of **Schedule "A"**.
[24] See Document 9 of **Schedule "C"**: *Honey Fashions Ltd. v. Canada (Border Services Agency)*, 2020 FCA 64 at pp. 145 – 146, para. 40; Document 10 of **Schedule "C"**: *Peters First Nation v. Engstrom*, 2021 FCA 243 at p. 152, para. 23; Document 11 of **Schedule "C"**: *Uyanze c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2024 CF 554 at p. 155, para. 6.

had been done without a permit and that this would be "dealt with in a new file."[25] But Mr. McLean never followed up regarding the unpermitted work.

The Report mentions unspecified "safety" issues, but this is the first time such issues have been brought to the Appellants' attention. It is not fair for the City to inspect a property after granting a licence, tell the owners that everything is fine, and then reject the renewal of their business licence based on something the owners were never told they needed to remediate. Again, this is merely an *ex post facto* attempt to justify the Decision which was actually made based on the Licence Inspector's personal and subjective views of what a "traditional" B&B should be.

If section 8(1) of the BLB formed the basis of the Decision then this should have been communicated to the Appellants. Even so, to deny a business licence application based on concerns that could have been raised at an earlier date is arbitrary and capricious. The Decision was not justified, intelligible or transparent to those affected by it, and it was therefore unreasonable.

Kind regards,

CREASE HARMAN LLP
Per:

Spencer Evans

Spencer C. J. Evans
SCJE/

[25] See Document 6 of **Schedule "A"**.

Schedule "C": List of Additional Authorities

Bayshore Shopping Centre Ltd. v. Nepean (Township)

Supreme Court Reports

Supreme Court of Canada

Present: Fauteux C.J. and Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1972: March 10 / 1972: March 30.

[1972] S.C.R. 755 | *[1972] R.C.S. 755* | 1972 CanLII 8

Bayshore Shopping Centre Limited, Appellant; and The Corporation of the Township of Nepean and William Bourne and March Ridge Developments Limited, Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Municipal law — Zoning by-law — Proposed shopping centre — Individual components included within permitted uses — Whether "shopping centre" a permitted use although not listed.

The individual respondent, the building inspector of the respondent municipality, had been on the point of granting to the appellant a building permit for the erection of a shopping centre upon certain lands when the respondent development company commenced an action against the municipality alleging that the by-laws of the municipality applicable to the lands in question did not permit the erection of a shopping centre. Therefore the building inspector and the municipality refrained from issuing the building permit. The appellant thereupon served notice of application for an order of mandamus compelling such issuance and named as respondents to that application not only the building inspector and the municipality but also the development company. The application, which was opposed by the development company only, was granted by the chambers judge. On appeal, the Court of Appeal allowed the appeal and quashed the order. An appeal to this Court ensued.

The one vital issue upon the appeal was the true construction of By-law 39-62 of the respondent municipality and the determination of whether, upon the proper construction of the said by-law, the appellant was entitled to have the respondent building inspector and the respondent municipality issue to it a building permit or building permits for the construction of the shopping centre in accordance with its application for such permits.

Held: The appeal should be allowed and the order of the judge of first instance restored.

In the zoning by-law in question there was no mention of "shopping centre" in a permitted uses section of any zone but there was set out as permitted uses in Commercial-Regional C1 Zone the words "retail store", "a service shop" and "department store". The Court was of the opinion that the words "retail store" "service shop" and "department store" would as generic terms cover a shopping centre when there were no words in the permitted uses sections of the by-law to make a distinction between these words and a "shopping centre". The omission of the words "shopping centre" in all the permitted use sections of the by-law far from indicating the intention of the Council to prohibit the erection of such structures indicated that in its view they were already covered in the three different permitted uses referred to above.

The final words of the definition of "retail store", i.e. "but does not include any other retail outlet otherwise classified or defined in this by-law", were regarded as clear indication that the Council intended to include within the definition not only a "retail store" but all retail outlets which were not otherwise classified or defined. A shopping centre was nothing but a group of "retail outlets".

The presence of the words "planned shopping centre" in a section of the by-law applying to all zones and respecting required parking facilities did not indicate that a shopping centre was "otherwise classified". The suggestion that the inclusion of the words "planned shopping centre" in the parking requirement was preparatory for some future amendments which might permit such alleged presently prohibited structures was not accepted.

Cases Cited

Thomas C. Watkins Ltd. v. Cambridge Leaseholds Ltd. et al., 1966 S.C.R. v; Oshawa Wholesale Ltd. et al. v. Canadia Niagara Falls Ltd. et al., *1972 1 O.R. 481*, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario allowing an appeal from an order of Keith J., directing the issue of a building permit. Appeal allowed.
D.K. Laidlaw, Q.C., for the appellant. Walter D. Baker, Q.C., for the respondents, William Bourne and Township of Nepean. W.B. Williston, Q.C., and L.H. Mandel, for the respondent, March Ridge Developments Ltd.

Solicitors for the appellant: McCarthy & McCarthy, Toronto. Solicitors for the respondents, Township of Nepean and William Borne: Bell, Baker, Thompson & Oyen, Ottawa. Solicitors for the respondent, March Ridge Developments Ltd.: Thompson, Rogers, Toronto.

The judgment of the Court was delivered by

SPENCE J.

SPENCE J.:— This is an appeal of Bayshore Shipping Centre Limited from the judgment of the Court of Appeal for Ontario pronounced on December 15, 1971. By that judgment the Court of Appeal for Ontario had allowed an appeal from the order of Keith J., pronounced on November 12, 1971, directing the respondents William Bourne and the Corporation of the Township of Nepean to issue to the appellant as building permit for the erection of a shopping centre upon the lands in question. The said Bourne, the building inspector of the Township of Nepean, had been on the point of granting such a permit when the respondent, March Ridge Developments Limited, commended an action against the respondent township of Nepean alleging that the by-laws of that municipal corporation applicable to the lands in question did not permit the erection of a shopping centre. Therefore the respondents Bourne and the Township of Nepean refrained from issuing the building permit for which the appellants had applied. The appellant thereupon served notice of application for the said mandamus compelling such issuance and named as respondents to that application not only the said Bourne and Township of Nepean but the said March Ridge Developments Ltd. The respondents Bourne and Township of Nepean have never opposed the issue of the permit nor of an order of the Court directing that they do so issue the said permit and have taken such position before Keith J., the Court of Appeal for Ontario and this Court. The respondent March Ridge Developments Ltd. has opposed the issuance of the permit and the appellant's application throughout. Keith J., giving no written reasons for his disposition, granted the appellant's application and refused this respondent's application for a stay of execution. The Court of Appeal for Ontario in a unanimous judgment pronounced on December 15, 1971, allowed the respondent March Ridge Developments Ltd.'s appeal from the order of Keith J. and quashed his order. The appeal to this Court ensued.

All counsel before this Court agreed that the one vital issue upon the appeal was the true construction of By-law 39-62 of the respondent Township of Nepean and the determination of whether, upon the proper construction of the said by-law the appellant was entitled to have the respondents Bourne and the Township of Nepean issue to it a building permit or building permits for the construction of the shopping centre in accordance with its application for such permits. Other issues had been canvassed before Keith J. and the Court of Appeal for Ontario but in this Court all counsel ignored such other issues and confined their submissions to the one issue of the true construction of the said By-law 39-62.

It was the initial submission of counsel for the appellant that the Court of Appeal for Ontario fell into error in believing that the construction of the said By-law 39-62 could be governed by the judgment of the same Court

similarly constituted in Oshawa Wholesale Ltd. et al. v. Canadia Niagara Falls Ltd. et al. which had been argued immediately before the appeal in the present case and which is now reported in *[1972] 1 O.R. 481*. That appeal also dealt with an application to compel the issuance of a building permit for a shopping centre. The decision and that in the present case were the latest in a few appeals to the Court of Appeal for Ontario, at least one of which came to this Court which need to be mentioned upon this point.

In Thomas C. Watkins Ltd. v. Cambridge Leaseholds et al. [1966] S.C.R. v.], the learned judge of first instance had granted a mandamus directing the issue of a building permit for the erection of a department store. The majority of the Court of Appeal for Ontario dismissed an appeal from that order but McGillivray J.A. in dissenting reasons would have allowed the appeal and quashed the order upon the basis that the zoning by-law in question had set out five different commercial zones and in only one of them had listed as a permitted use a department store although retail stores were listed as permitted uses in all five zones. The application before the Court was for a department store in one of the other four zones. McGillivray J.A. said in his reasons:

> It is reasonable to believe that by making these two items separate and distinct in the by-law there are to bear a different connotation and that the term "retail store" is not sufficiently comprehensive to include department store.

Upon appeal to this Court argued on June 10, 1966, the appeal was allowed in an oral judgment in which this Court expressly adopted the dissenting reasons of McGillivray J.A.

A not dissimilar issue came before Houlden J. in the Oshawa Wholesale Ltd. case, an action to have declared void a building permit already issued for erection of what was termed by an expert witness a "sub-regional shopping centre". The zoning by-law in question never listed as a permitted use a "sub-regional shopping centre" or even a shopping centre without descriptive adjectives, but did permit "local shopping centre". These words were defined in the by-law to mean "a group of smaller related stores situate for direct service within a residential neighbourhood unit". Houlden J. in lengthy and very carefully considered reasons dealt with many issues not her relevant and held that the by-law having specifically permitted one type of shopping centre, and it the smallest one according to the expert opinion which he accepted, could not be interpreted to permit a much larger shopping centre under the permitted uses entitled "retail stores" or "supermarkets". Houlden J. therefore gave judgment for the plaintiff making a declaratory order that the building permit was null and void. The appeal by the developer to the Court of Appeal for Ontario I have already referred to and is the judgment thereon which that court adopted in deciding the appeal in the present case against the present appellant Bayshore Shopping Centre Ltd. In his oral reasons Aylesworth J.A. did not merely adopt the reasons of Houlden J. although the learned justice in appeal did point out the very limited permitted use of "local shopping centre". Aylesworth J.A. went much further and relying on the evidence of the expert witness and upon reference to shopping centres in one American decision and by Roach J.A. in Re Hamilton & Dominion Stores Ltd. [[1962] O.W.N. 227.], neither of which dealt with zoning by-laws, held a shopping centre was a "distinct and separate use not within the terms of the by-law in question ...". Despite the very broad character of the statement in the rationale for the decision, I agree with counsel for the appellant that the judgment in the Oshawa Wholesale case given upon a by-law having the unique feature which I have outlined cannot be taken to have determined the interpretation of the quite different provisions of By-law 39-62 in question in this present case.l

Therefore I turn to the interpretation of the by-law in question. This is By-law 39-62 of the Township of Nepean enacted on June 11, 1962, as amended. This by-law is a general zoning by-law concerning the northern part of the township by the provision of which persons are prohibited from using any land or erecting any building or structure expect in conformity with the provisions of the by-law. The lands as to which Bayshore as agent for the registered owner Ivanhoe Corporation, applied for the building permit, and which were situate at the intersection of Provincial Highway 7 (Richmond Road) and Bayshore Drive in the Township of Nepean are within the area zoned in the by-law as COMMERCIAL-REGIONAL C1 ZONE. That zone is the most comprehensive of the commercial zones dealt with in the by-law and if any shopping centre is permitted in the northern part of Nepean Township permission for the erection and use must be found in the permitted used listed under this Commercial-Regional C1-Zone.

The by-law in ss. 7:1:1 and 7:1:2 provides in part for the permitted used in C1 Zone as follows:

COMMERCIAL-REGIONAL C1 ZONE

7:1:1 Permitted Uses:

A retail store, a service shop and a departmental store for the conducting of any retail business. A commercial and public garage, a clinic, a commercial school, a custom workshop, dry cleaning distributing station and a tailor's shop. A Church, a library, a business office, an eating establishment, funeral home and chapel and a place of amusement. A hotel, a tavern and a public house. An automobile service station, subject to the provision of Section 5:10. (By-law No. 63-63)

. . .

7:1:2 Zone Requirements:

For uses other than for automobile service stations

(By-law No. 63-63)

Lot Area (Minimum) Nil

Lot Frontage (Minimum) Nil

Lot Coverage (Minimum) a) Commercial 80% b) on 2nd Storey 50% of lot

Height (Maximum) 60 ft.

Front Yard (Minimum) 75 ft.

Side Yard (Minimum) Nil

Except where a Commercial Zone abuts a Residential Zone, a 20 foot side yard shall be required on the side that so abuts.

Rear Yard (Minimum) 20% of lot depth

but not necessarily more than 30 feet nor less than 20 feet.

Off-street parking--See Sections 5:17 and 5:18

Off-street loading-- see Sections 5:19(a)

A retail store is defined in s. 2.87 as:

2.87 "Retail Store" shall mean a building or part of a building where goods, wares, merchandise, substances, articles or things are offered or kept for sale at retail and includes storage on or about the store premises of limited quantities of such goods, wares, merchandise, substances, articles, or things sufficient only to service such stores but does not include any retail outlet otherwise classified or defined in this By-law:

A service shop is defined in s. 2.92 as:

> 2.92 "Service Shop" shall mean a building or part of a building where services are provided such as barber's shop, a ladies hairdressing establishment, a shoe shine shop and other similar services;

and a Department Store is defined in s. 2.26 as:

> 2.26 "Department Store" shall mean the use of an enclosed building in which various types of commodities are kept for retail sale in separate parts of the one building on two or more floors;

It is not necessary to cite the many other definitions which appear in By-law 39-62. There was filed as an exhibit in the examination of C.J. Magwood, the secretary of Bayshore upon his affidavit a document entitled "Confidential Memorandum for Institutional Investors Bayshore" and counsel for the appellant cited parts of that document to illustrate what was to compose the proposed shopping centre. I quote several paragraphs thereof:

> THE PROJECT
>
> Introduction
>
> Bayshore Shopping Centre ("Bayshore") will be a regional shopping centre located in the Ottawa Metropolitan Area. Bayshore will consist of department stores operated by The T. Eaton Company Limited ("Eaton's") and Hudson's Bay Company Limited ("The Bay"), a Steinberg's Food Store and Miracle Mart Department Store operated by Steinberg's Limited "(Steinberg's"), and a two-level air conditioned mall serving approximately 100 additional stores. It will have a unique multi-level parking facility with approximately 3,200 parking spaces, of which more than half will be under cover for shopping convenience; each parking level will have direct access to one of the two main shopping levels.
>
> The Site
>
> Bayshore will be located on a 23.4 acre site, approximately 7 miles west of Ottawa's central business district, in the north-west quadrant of the interchange at Richmond Road (Highway 7) and the Queensway, two major arterial roads in the western portion of the Ottawa Metropolitan Area. The map on page 4 shoes the location of Bayshore in relation to the City of Ottawa and surrounding communities and shows access routes to Bayshore from these communities.
>
> The Company will purchase the site on or about October 31, 1971 from Ivanhoe Corporation in accordance with and subject to conditions set out in an option agreement dated June 14, 1971.
>
> A small shopping centre now operating on a portion of this site is to be demolished to make room for Bayshore. Existing zoning regulation permit the development and construction of Bayshore as planned and adequate municipal services are available.

It will be seen that the various components of the proposed shopping centre fall within the three definitions I have quoted. Counsel for the appellant has submitted that no component of the proposed shopping centre could fail to be within the permitted used outline in s. 7:1:1 quoted above and at the same time be an appropriate unit for shopping centre. After perusal of the permitted uses I agree with this submission.

There still remains for determination whether a shopping centre is within these permitted uses even if every component of the proposed shopping centre would be within one of them. I find little assistance from decisions which purport to indicate the philosophic attitude which the Court should adopt in construing zoning by-laws. No authority need be cited for the proposition that a man's property is his own which he may utilize as he deems fit so long as in such utilization he does not commit nuisance, entrap the unwary or act in breach of statutory prohibitions, and therefore by-laws restrictive of that right should be strictly construed. Yet it has been said that modern zoning provisions have been enacted to protect the whole community and should be construed liberally having in certain the public interest: R. v. Brown Camps Ltd. [*[1970] 1 O.R. 388*.]; Re Bruce and City of Toronto et al. [*[1971] 3 O.R. 62*.], at p. 67. But such statements usually ere made when the Court was considering an application to permit the encroachment into a residential zone of some building which it was residential zone of some building which it was alleged would seriously affect the amenities of life of the residents thereof. In this case the lands in question are

situate in a general commercial zone and every component of the proposed shopping centre would be the proper subject-matter of a building permit as a permitted use under the By-law 39-62. I therefore approach the interpretation and application of the by-law without acknowledging any compulsion to consider its provision either strictly or liberally.

It must be noted, and it is of prime importance, that nowhere in the permitted use sections of By-law 39-62 do the words "shopping centre" either alone or accompanied by any adjective appear. This situation contrasts strongly with that which was present in Thomas C. Walkins Ltd. v. Cambridge Leaseholds Ltd. et al., supra, where a permit was sought for the erection of a department store in a C1 Zone where it was not a listed permitted use but in C5 Zone a department store was so listed. It also contrasts with the Oshawa Wholesale case where a permit was sought for a "sub-regional shopping centre" in a zone where it was no a permitted use but in another zone there was listed as a permitted use a "local shopping centre". In view of such express reference elsewhere in the permitted uses sections of the by-law and its omission in the zone as to which the application for permit was made, the term "retail store" could not be held to cover in the former case, a "department store" and in the latter, a "sub-regional shopping centre". In the present case there is no mention of "shopping centre" in a permitted uses section of any zone but there is set out as permitted uses in the C1 Regional-Commercial Zone the words "retail store", "a service shop" and department store". McGillivray J.A., in his reasons in the Cambridge leaseholds case, which this Court as I have pointed out, adopted said:

> There can be little doubt, and counsel for the appellant, I believe, agrees, that as a generic term "retail store" would include a department store which is concerned with retail business, but the review of the various sections of the act manifest the intention, in my opinion, of making a distinction between a department store and retail store.

Applying the same analysis I am of the opinion that the words "retail store" "service shop" and "department store" would as generic terms cover a shopping centre when there are no words in the permitted uses sections of the by-law to make a distinction between these words and a "shopping centre"--a distinction which McGillivray J.A. found in the Cambridge Leaseholds case. I have reached the conclusion that the omission of the words "shopping centre" in all the permitted use sections of the by-law far from indicating the intention of the Council to prohibit the erection of such structures indicated that in its view they were already covered in the three different permitted uses to which I have referred.

The final words of the definition of "retail store" are significant:

> but does not include any other retail outlet otherwise classified or defined in this by-law (the italicizing is my own).

I regard these words as clear indication that the Council intended to include within the definition not only a "retail store" but all retail outlets which were not otherwise classified or defined. Certainly a shopping centre is nothing but a group of "retail outlets".

Counsel for the respondent March Ridge Developments Ltd. however, submits that a "shopping centre" is otherwise "classified". He agrees the words were not "defined" in the by-law but he points to the provision of s. 7:1:2 ... "off-street parking--See Section 5:17 and 5:18" and cites s. 5:17 the schedule of which reads in part as follows:

SCHEDULE

Type of Nature of Building or Structure	Minimum Required Parking Facilities
6. A retail store, service store, or other similar establishment, a planned	1 parking space for each 180 square feet of floor area

> shopping centre or
>
> department store

It must be noted that s. 5:17 is in a part of the by-law entitled SECTION 5 GENERAL PROVISIONS TO ALL ZONES which part covers very many provisions but does not deal with permitted uses. Secondly, as I have stressed before, there has been no mention of a shopping centre in any permitted uses section and to provide parking regulations for a use which was prohibited seems not only surplusage but contradictory. I am quite unable to accept the suggestion that the inclusion of the words "planned shopping centre" in the parking requirement was preparatory for some future amendments which might permit such alleged presently prohibited structures. Surely the wise time to make such requirements would be when the use were permitted. I am therefore not ready to agree that the presence of these words "planned shopping centre" in s. 5:17 indicate that shopping centre was "otherwise classified". The meaning I attach to those words is "otherwise in the By-law a permitted use".

On the other hand, I regard the presence of the words "planned shopping centre" in s. 5:17 as a clear indication that Council had shopping centres in mind when it enacted By-law 39-62 and believed the permitted uses "retail store", "service store" and "department store", as well as a "business office" "an eating establishment" and "an automobile service station", sufficient to authorize a permit for a shopping centre. Council however realized that a shopping centre presented special parking problems. It might well be that the parking appropriate to many retain stores, service stores and department stores all in one group sharing a common great parking area and that the parking requirement should be one referring to the total floor area and not limited to the floor area of each retail store, service store or department store. The Council therefore enacted the provision as to parking requirements found in s. 5:17.

I have found nothing in the By-law 39-62 which would prevent one lot, in this case almost twenty-four acres, being put to various permitted uses. All types of permitted uses may utilize one lot and in fact various permitted uses may occupy the same building although it would appear that a department store must occupy its own building.

Maxwell on Interpretation of Statutes, 12th ed. at p. 264, cites authority, if any need be cited for the proposition that one may have regard to the conduct of those who were responsible for the creation of a provision to ascertain their understanding of its meaning. This By-law 39-62 was, as I have said, enacted on June 11, 1962. Even if we may not take judicial notes of the many shopping centres which have been erected in Nepean Township since that date we have the evidence of the secretary of the appellant that there exists today on the very lands which are the subject of the application for building permit for a shopping centre, a much smaller one which had been erected since 1962. Therefore it is apparent that the Council which enacted By-law 39-62 and the building inspector who acted under its direction, have always believed that a shopping centre was a permitted use on Regional-Commercial Zone C-2. In confirmation of this I note that counsel for Nepean Township filed a factum on this appeal and submitted.

> By-law 39-62 has been in force since 1962 and, under its authority, shopping centre development has taken place on the site in question and other sites within the Township of Nepean

and further:

> ... the respondents Nepean and bourne had or have no grounds upon which to base a rejection of the application for Building Permit.

For these reasons I have concluded that the appeal should be allowed and the order of Keith J. pronounced on November 12, 1971, should be restored. The appellant and the respondents, the Township of Nepean and William Bourne, will be entitled to their costs throughout from the respondent March Ridge Developments Limited.

Appeal allowed with costs.

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PART 1.64 - R1-BB1 ZONE, OXFORD BED & BREAKFAST DISTRICT

Uses 1 The following uses are the only uses permitted in this Zone:

(a) a single family dwelling the principal use of which is occupancy by only one family;

(b) accessory uses that are incidental to or normally associated with a single family dwelling;

(c) transient accommodation

(i) that is located in a single family dwelling,

(ii) that is operated only by the family, or a member of it, and its employees for this purpose, that occupies the single family dwelling in which the transient accommodation is located,

(iii) that does not use more than 4 bedrooms,

(iv) that does not provide to its customers more than one meal per day or any meals after noon of any day,

(v) that does not provide liquor to its customers.

Parking 2 There must be at least 4 parking spaces on a lot.

General 3 Single family dwelling use is subject to the regulations applicable in the R-BB Zone, Single Family Dwelling (Bed and Breakfast) District.

PART 5.25 – T-25 ZONE, MCCLURE TRANSIENT ACCOMMODATION DISTRICT

5.25.1 Permitted Uses in this Zone

The following uses are the only uses permitted in this Zone:

a. Transient accommodation

5.25.2 Lot Area, Number of Buildings

a. Lot area (minimum)	1850m^2
b. Notwithstanding Section 19 of the General Regulations, more than one building is permitted on a lot subject to the regulations in this Part	

5.25.3 Floor Space Ratio

a. Floor space ratio (maximum)	0.64:1

5.25.4 Height, Storeys

a. Building height (maximum)	10.55m
b. Storeys (maximum)	4

5.25.5 Setbacks, Projections

a. Front yard setback (minimum)	7.5m
b. Rear yard setback (minimum)	7.5m
c. Side yard setback from interior lot lines (minimum)	3.5m
d. Side yard setback on a flanking street for a corner lot (minimum)	7.5m
e. Projections into setbacks (maximum)	
Cornices, fin walls, slab edges, eaves, window overhangs and sunscreens	0.75m
f. Nothwithstanding subsections (a), (b), and (d), front yard, rear yard and flanking street side yard setbacks shall not apply to entrance canopies, steps, patios and balconies forming part of a building	
g. Separation distance between buildings (minimum)	4.0m

PART 5.25 – T-25 ZONE, MCCLURE TRANSIENT ACCOMMODATION DISTRICT

5.25.6 Site Coverage, Open Site Space	
a. Site Coverage (maximum)	30%
b. Open site space (minimum)	27%

5.25.7 Vehicle and Bicycle Parking	
a. Vehicle parking (minimum)	Subject to the regulations in Schedule “C”
b. Bicycle parking (minimum)	Subject to the regulations in Schedule “C”

Bylaw 19-087 adopted September 19, 2019

Effect of private Acts

6 A provision in a private Act does not affect the rights of any person, except only as referred to or mentioned in that Act.

Enactment always speaking

7 (1) Every enactment must be construed as always speaking.

(2) If a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise.

Enactment remedial

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Section 35 of *Constitution Act, 1982* and Declaration

8.1 (1) In this section:

"Declaration" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;

"Indigenous peoples" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;

"regulation" has the same meaning as in the *Regulations Act*.

(2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.

(3) Every Act and regulation must be construed as being consistent with the Declaration.

Title and preamble

9 The title and preamble of an enactment are part of it and are intended to assist in explaining its meaning and object.

Enacting clause

10 The enacting clause of an Act of the Legislature may be in the following form: "Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:".

Reference aids and clarifications

11 (1) In an enactment, a head note to a provision or a reference after the end of a section or other division

(a) is not part of the enactment, and

(b) must be considered to have been added editorially for convenience of reference only.

(2) In an enactment, if a reference to a provision of the enactment or any other enactment is followed by italicized text in square brackets that is or purports to be descriptive of the subject matter of the provision, subsection (1) (a) and (b) applies to the text in square brackets.

(3) The Lieutenant Governor in Council may make regulations amending an enactment for the purpose of changing a reference to a specific minister or ministry in a provision of the enactment to the minister or ministry, as applicable, currently assigned responsibility in relation to the matter.

Definitions and interpretation provisions

12 Definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, apply to the whole enactment including the section containing a definition or interpretation provision.

Application of expressions in enactments to regulations

13 An expression used in a regulation has the same meaning as in the enactment authorizing the regulation.

Government bound by enactments; exception

14 (1) Unless it specifically provides otherwise, an enactment is binding on the government.

(2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the *Assessment Act*, does not bind or affect the government.

Power of repeal and amendment

15 (1) Every Act must be construed as to reserve to the Legislature the power of repealing or amending it, and of revoking, restricting or modifying a power, privilege or advantage that it vests in or grants to any person.

(2) An Act may be amended or repealed by an Act passed in the same session of the Legislature.

Proclamation

16 (1) In a proclamation, it is not necessary to mention that it is issued under an order of the Lieutenant Governor in Council.

Canada (Attorney General) v. Jackson

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: Kerwin, Taschereau, Rand, Kellock and Estey JJ.

1945: May 3, 4, November 8 / 1946: February 5, 6 /

1946: March 29.

[1946] S.C.J. No. 21 | [1946] S.C.R. 489 | [1946] 2 D.L.R. 481 | 59 C.R.T.C. 273 | 1946 CarswellNB 28

Attorney-General of Canada (Plaintiff), Appellant; and Leslie C. Jackson (Defendant), Respondent.

(28 paras.)

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Case Summary

Crown — Master and servant — Automobile — Collision — Member of Armed Services injured while riding as gratuitous passenger --Crown's disbursements for wages and medical and hospital services — Action by Crown to recover same from owner and driver of motor car — Civil wrong, actionable by servant, prerequisite to right of master to recover expenses — Application of section 50 A Exchequer Court Act to proceedings in provincial courts — Its constitutionality — Exchequer Court Act, section 50A, enacted Dom. 1943-44, c. 25, s. 1 — Motor Vehicle Act (N.B.) 1934, c. 20, s. 52.

One D., a soldier on active service in the Canadian Army, being on leave of absence, was travelling to his home as a guest passenger with the respondent in the latter's motor car. A collision occurred and D. was severely injured. The Crown (Dominion) disbursed a sum of $1,855.24 for wages paid and medical and hospital services furnished through its Army organization during the period of incapacitation. The Attorney-General of Canada brought suit in the Supreme Court of New Brunswick to recover that amount from the respondent. Section 50A of the Exchequer Court Act (enacted 1943-44, c. 25, s. 1) establishes a master-servant relationship between the Crown (Dominion) and a Canadian serviceman. Section 52 of the Motor Vehicle Act (N.B. 1934, c. 20) negatives any right of action against the owner or driver of a motor car for loss or damage resulting from injury to, or death of, a gratuitous passenger. The action was dismissed by the trial judge, and that judgment was affirmed by the appellate court.

Held that the appeal to this Court should be dismissed. The Crown, while bearing under section 50A the relation of master towards a serviceman, has no direct or specific right of recovery against a third person for expenses incurred through injury caused by the latter to the serviceman: such right depends on whether the serviceman himself has any right of action arising from the act of the third person. Hence, where D., being a gratuitous passenger in the respondent's automobile at the time of his injury, could bring no action against the respondent, neither can the Crown.

Held also that the provisions of section 50A applied not only to actions brought in the Exchequer Court of Canada, but also to proceedings brought in any provincial court.

Per Kellock J.:-- The constitutional validity of section 50A may be supported under section 91(7) of the B.N.A. Act.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division [(1945) 18 M.P.R. 138; [1945] 2 D.L.R. 438.], affirming the judgment of the trial judge, Le Blanc J. and dismissing an action by the Crown

(Dominion) to recover from the respondent, on the ground that he was a negligent driver of a motor car, amount of moneys paid to and on account of a Canadian serviceman injured while riding as a passenger.
F.P. Varcoe K.C. and W.R. Jackett, for the appellant. R.H. Allen, for the respondent at the hearing of the appeal. A.B. Gilbert K.C., for the respondent at the re-hearing ordered by the Court.

Solicitor for the appellant: F.P. Varcoe. Solicitors for the respondent: Allen & Allen.

The judgment of Kerwin, Taschereau, Rand and Estey JJ. was delivered by

RAND J.

1 This action arises out of injuries to a member of the Canadian Army in New Brunswick. The soldier, named Dunham, was on leave and was travelling to his home as a guest passenger with the respondent in the latter's auto. A collision occurred and the injuries resulted.

2 The claim is for wages paid and medical and hospital services furnished by the Crown through its Army organization during the period of incapacitation. It is based on negligence in the respondent, the relation of master and servant between the Crown and the serviceman, and the rule enabling a master to recover damages against one who negligently or wilfully injures his servant. This relation is put first as actual and alternatively as constructive by virtue of s. 50A of the Exchequer Court Act, enacted by c. 25, s. 1, of the statute of Canada 1943-44, as follows:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

3 The Motor Vehicle Act of New Brunswick, c. 20 of the statutes of 1934, has negatived any right of action of the serviceman against the respondent by s. 52, in the following language:

> 52(1) Notwithstanding anything contained in Section 48, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to or death of any person being carried in or upon or entering or getting on or alighting from such motor vehicle.

4 The Supreme Court of that province has held that the relation was not that of master and servant in fact and that s. 50A of the Exchequer Court Act, being included--as was assumed--in a group of sections headed "Rules for Adjudicating upon Claims", applied only to actions brought in that court.

5 I do not find it necessary to decide the first of these questions. As to the second, it may be remarked that the amendment is embodied in an Act which contains nothing to indicate inclusion within the fascicules mentioned; one could just as easily place it under the heading which immediately precedes s. 51 of the Exchequer Court Act, "Effect of payment on judgment". Its matter is foreign to rules for computing damages and its terms and purposes are clear. It might have been enacted as a separate statute and in that case it could hardly be contended that its wide provision did not apply to such a proceeding as the present: and I see no difference in the form which has been given to it.

6 But while the Crown, under the amendment, bears the relation of master toward the serviceman, the fact that the latter has no right of action arising from the act of the respondent puts, I think, an end to the controversy. The rule by which the master claims against a third person is an exception to the broad principle that one party to a contract cannot complain of negligence toward a co-contractor that interferes with the latter's performance of the contract: Cattle v. Stockton Waterworks Co. [(1875) L.R. 10 Q.B. 453.]. It applies whether the servant is at the time acting for the master or is engaged in his own affairs. There is no suggestion in the early cases that damages in loss of wages and medical and hospital expenses where those were actually suffered or incurred could not be recovered by the servant, and such claims are a common place today. Nor is it suggested that the master's right is independent of conduct or action by the servant which defeats the claim on his own part. What English authority

there is tends to the contrary: Williams v. Holland [(1833) 172 E.R. 1129.]; Chaplin v. Hawes [(1828) 172 E.r. 543.]. In Alton v. Midland R. Co. [(1865) 19 C.B. (N.S.) 213.], Willes J. uses this language which is not within the criticism that has been made of the judgment in that case:

> It must be admitted by the defendants that a long series of authorities has established that a master may sue for loss of services caused by a pure wrong, a trespass, to his servant, as by beating him. On the other hand, it is indisputable that no such action has ever been sustained in a case in which the injury to the servant was not actionable in respect of the civil wrong, but only in respect of a duty arising out of and founded upon a contract with the servant.

Although it is the contrast between a civil wrong and the breach of a contractual duty that is being pointed here, nevertheless a civil wrong actionable by the servant seems to be indicated as a prerequisite to the right of the master. In Admiralty Commissioners v. S.S. Amerika [[1917] A.C. 38, at 55.] Lord Sumner says:

> They are two separate causes of action in two different persons in respect of the same act.

The act here, in relation to the servant, is not in law culpable and unless we import into the right given to the master the conception of an independent duty running to him in addition to the duty to the servant--an introduction which, in view of our ignorance of the principle underlying the rule and the comparative modernity of the concept of duty in negligence, I think wholly unwarranted--we must conclude that it is the quality of the act vis-à-vis the servant which determines its significance for purpose of liability to the master. The notion of an act at once innocent and culpable would here be an innovation whatever the theory behind the liability; and I should say that if there is no wrong to the servant the act is innocuous toward the master.

7 This qualification of the rule has been applied in Ontario where the claim was asserted by a parent for injury to his child, a right based on the same theory of deprivation of service: McKittrick v. Byers [*[1926] 1 D.L.R. 342*.]. The United States authorities are uniform in the same view: Beach on Contributory Negligence, 3rd ed., p. 189. In these cases the cause of action of the master was held to be dependent upon a right in the servant and to be defeated by the contributory negligence of the latter.

8 The case of Norton v. Jason [(1651) 82 E.R. 809.], cited by Mr. Varcoe, decides only that the bar of the Statute of Limitations against the servant cannot be raised against the master. The case was of parent and child and there was no question of the existence of a cause of action in the daughter; but the fact that the point raised would seem rather to assume the necessity of a right in the servant to support that of the master.

9 The injuria to the master is, then, a loss of service arising from an act which is an actionable wrong against the servant: and its effect is to permit the master to recover damages to a large extent the same as those in a proper case recoverable by the servant.

10 This view is indirectly supported by the reasoning in Attorney-General v. Valle-Jones [[1935] 2 K.B. 209.], where it is said that if the wages and expenses had not been paid by the Crown they could have been recovered from the defendant by the injured serviceman. Conversely, if not recoverable directly by the servant, the law should not be circumvented through indirect but substantial recovery by the master.

11 As Dunham, then, could bring no action against the respondent, neither can the Crown. The amendment, s. 50A, does not purport to create a direct and specific right in the Crown: it places the Crown in a recognized common law relation only, and its rights are those arising from that relation under the rules of that law. The fact that jurisdiction over the civil right of the servant affects what might otherwise be a right in the Dominion Crown is immaterial. The Crown's right is of the same nature as that of a private person: it can arise here only from a wrong to the servant over which the jurisdiction of the province is exclusive.

12 Mr. Varcoe advanced the further contention that in any event the act of Jackson was a wrong against the Crown within the principle of Donoghue v. Stevenson [[1932] A.C. 562.]. There it was held by the House of Lords that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by the members public in the form in which he issues them is under a duty to take care in the manufacture of these

articles. Obviously the act of the manufacturer is specifically directed towards the consumer. If there were no consumer there would be no act, and it was not difficult to hold that, since a failure to observe care in that act might reasonably result in injury to the consumer, a duty toward the consumer to use care arose. But in the act with which we are dealing, only Dunham was in contemplation of the respondent. Conveying him to his home was a matter of fact to which the Crown was a stranger. Duty is annexed to prudent foresight of consequences in matter of fact and although we perhaps cannot say that a legal circumstance can never be a link in that fact, to apply the principle here would be to charge a person with a provision of contractual relations with third parties, which Cattle v. Stockton Waterworks [(1875) L.R. 10 Q.B. 453.] decided cannot be done.

13 The claim thus failing because of a fatal defect in the cause of action, I do not find it necessary to consider the interesting constitutional questions bearing upon the legislative fields of the Dominion and the Province that were so thoroughly canvassed on the re-argument.

14 I would dismiss the appeal with costs.

KELLOCK J.

15 This is an appeal by the plaintiff in an action brought in the Supreme Court of New Brunswick, King's Bench Division, for damages alleged to have been sustained by the Crown arising out of an injury to one Dunham, a member of the Veterans' Guard of Canada, on the 31st of October, 1940, the damages claimed being payments made by the Crown while Dunham was incapacitated. This soldier, a passenger in a motor vehicle owned and driven by the respondent, was injured when it came into collision with another motor vehicle occasioned, as it was alleged, by the negligence of the respondent. The trial judge found the respondent guilty of negligence, and this finding has not been interfered with by the Appeal Division. The trial judge, however, dismissed the action on the ground that the order in council under which payments had been made by the Crown had not been proven. The Appeal Division [*[1945] 2 D.L.R. 438*.] did not proceed upon this ground but on the ground that the action did not lie. Baxter C.J., who delivered the judgment of the Court, held that the relationship of master and servant, essential for the maintenance of such an action, did not obtain as between Dunham and the Crown. It was held also that s. 50A of the Exchequer Court Act, enacted by c. 25 of the statutes of Canada 1943-44, is not applicable to an action in a provincial court, and that in any event the claim was barred by virtue of s. 52 of the New Brunswick Motor Vehicle Act, c. 20 of the 1934 statutes, Dunham being a gratuitous passenger in the respondent's car at the time of the accident.

16 On this appeal the Crown contends that:

(1) the relationship of master and servant as between Dunham and the Crown did subsist at common law and that the point is now, in any event, concluded by s. 50A of the Exchequer Court Act;

(2) that section is not limited to proceedings in the Exchequer Court of Canada;

(3) section 52 of the Motor Vehicle Act does not affect the right of action of the appellant;

(4) the damages were properly proven.

It will be convenient to examine the second ground of appeal.

17 Sections 47 to 50A, inclusive, of R.S.C. 1927, c. 34, entitled "An Act Respecting the Exchequer Court of Canada", constitute a fascicules of sections under the heading "Rules for Adjudicating upon Claims". Section 50A was no doubt passed, partly at least, as a result of the decision of the Exchequer Court of Canada in McArthur v. The King [*[1943] Ex. C.R. 77*.]. That was the case of an action against the Crown under s. 19(c) of the Act but the new section is made to apply to an action by, as well as against, His Majesty. The judgment below proceeds upon the footing that this group of sections is governed by the above heading and is confined to claims in the Exchequer Court of Canada.

18 Where the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the

headings may be used to control the meaning of enacting words in themselves clear and unambiguous: The "Cairnbahn" [[1914] P. 25, at 30 and 38.]; Fletcher v. Birkenhead Corporation [[1907] 1 K.B. 205, at 214 and 218.].

19 Section 50A taken by itself is not ambiguous. I think it is not to be applied only to proceedings in the Exchequer Court of Canada. It is not expressly limited as are ss. 47, 48 and 50. Section 49 is not limited in terms and there appears to be no reason why its terms should not apply to the subject-matter of proceedings taken by the Crown in a provincial court.

20 Section 50A does not depend for its constitutional validity, in my opinion, upon s. 101 of the British North America Act. It may be supported under s. 91(7). In Grand Trunk Railway Co. v. Attorney General of Canada [*[1907] A.C. 65*.], Lord Dunedin at p. 68 said:

> It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature--which is admitted--it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation.

This principle applies equally to the present question, namely, the relationship between a soldier and the Crown. I assume that there is no other question which would render the provisions of the section inapplicable at the time of the occurrence here in question to the relations between Dunham and the Crown.

21 Coming to the third question, s. 52 of the Motor Vehicle Act reads as follows:

> 52(1) Notwithstanding anything contained in Section 48, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for hire or gain, shall not be liable for any loss or damage resulting from bodily injury to or death of any person being carried in or upon or entering or getting on or alighting from such motor vehicle.

Mr. Varcoe contends that the cause of action arising in favour of a master who loses the services of his servant through injury to the servant caused by the wrongful act of a third person is independent of any cause of action which may enure to the servant himself. He argues that an act, causing loss to the master through injury to the servant, may be wrongful quo ad the master and therefore actionable, even although, by reason of the existence of a statutory provision which disentitles the servant to sue but which does not affect the quality of the act, the servant himself has no remedy. Put another way, he says that if the injury to the servant is "justifiable", neither the master nor the servant has any cause of action but a provision which merely bars proceedings by the servant does not affect the cause of action vested in the master. He submits that the statutory provision here in question is of the latter character and does not purport to affect the quality of the act.

22 Mr. Varcoe referred to the judgment of Lord Blackburn in Darley Main Colliery Co. v. Mitchell [(1886) 11 App. Cas. 127.] where in referring to the action "per quod" he said at p. 142:

> ... but no amount of damage would give the master an action if the beating were justifiable.

Mr. Varcoe argues that "justifiable" is to be interpreted as "innocent" (Machado v. Fontes [[1897] 2 Q.B. 231.]) and as by reason of s. 37 of the Motor Vehicle Act negligence in the operation of a motor vehicle on a highway is made the subject of a penalty, the conduct of the respondent is not innocent.

23 It is important to keep in mind that the cause of action here in question is an anomalous one, having arisen at a time when the relationship of master and servant was based on status and that it is illogical in a society based on contractual obligation: per Lord Parker in The "Amerika", [[1917] A.C. 38.] at p. 45 and per Lord Sumner in the same case at pp. 54 and 60. In the words of Lord Sumner at p. 60:

> Indeed, what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from time when service was a status.

The cause of action, therefore, is not to be extended beyond limits already marked out, however logical it might be to do so.

24 A convenient statement of the action per quod is to be found in Blackburn and George on Torts, 1944 ed., p. 181, namely:

> If A deprives B of his servant's services by a tort committed against the servant, B may sue A. In such a case B must prove (i) that A's actions are a tort against the servant; (ii) that B has thereby lost his servant's services.

Accordingly, if the defendant's conduct does not constitute a tort against the servant, the master has no cause of action.

25 The provisions of sub-section (1) of section 52 of the Act eliminate any duty to take care civilly as between persons in the relative positions of the respondent and Dunham. That being so there is no negligence on the part of the respondent. There is therefore no tort which Dunham can rely on and there is no authority to which we have been referred or which I have been able to find establishing a right on the part of a master to sue in such circumstances. The fact that the respondent's conduct may render him liable to a penalty is not enough.

26 The action for seduction referred to by Lord Sumner in the case cited [(1833) 6 Car & P. 23.] as the most artificial aspect of the action per quod is again itself anomalous in that the woman has no right of action: Salmond on Torts, 10th ed., pp. 356 and 361. In the case of a parent and child however, the parent's right to sue for damages for injury to the child was always affected at common law by contributory negligence on the part of the child: Blais v. Yachuk [*[1946] S.C.R. 1*, at 18.]; Hall v. Hollander [(1825) 4 B. & C. 660.]; Williams v. Holland [(1833) 6 Car. & P. 23.]; McKittrick v. Byers [*(1926) 58 O.L.R. 158*.]. I can find no authority showing that in the case of a true master and servant relation, the result was not the same. Unless therefore there be a wrong of which the servant can complain, with the single exception of seduction, referred to above, the master has no cause of action and in the case at bar there is no such wrong.

27 It is not necessary to deal with the other points argued. The appeal must be dismissed with costs.

28 Appeal dismissed with costs.

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Schoenhalz v. Insurance Corp. of British Columbia

Canadian Insurance Law Reporter Cases

Supreme Court of British Columbia

Before: Hyslop J

Decision: April 14, 2016.

Docket No. 49165

Canadian Insurance Law Reporter Cases > Cases > 2010s > 2016

[2016] I.L.R. para. I-5875 | *[2016] B.C.J. No. 743* | *2016 BCSC 661*

Trissteen Schoenhalz v. Insurance Corporation of British Columbia

History of Proceedings: Related to *Schoenhalz v. Reeves*, *[2013] I.L.R. para. M-2703* (BCSC)

Case Summary

Automobile insurance — Uninsured motorist — Entitlement to coverage — Plaintiff was injured in motor vehicle accident in 2007 at age 17 — R, who was 15 and did not have licence, was driver — Vehicle was owned by plaintiff and R's friend's mother — Mother only gave her son and his friend L consent to drive — In tort action, plaintiff obtained judgment against R — Plaintiff sought compensation from Uninsured Motorist Protection Fund under s. 20 of Insurance (Vehicle) Act — Defendant Insurance Corporation of British Columbia ("ICBC") argued claim was barred by s. 91 — Court found ICBC failed to discharge burden to prove plaintiff knew or ought to have known vehicle was being operated without owner's consent — Section 91 was not limited to stolen vehicles — Wording of s. 91 is clear and unambiguous — Unique circumstances of this case were that plaintiff and R were very young — Court did not find plaintiff subjectively knew R did not have consent from owner to drive — Plaintiff's claim was not barred by s. 91 — Action allowed — Insurance (Vehicle) Act, *RSBC 1996, c. 231, s. 20*, 91.

Facts: The plaintiff was injured in a motor vehicle accident in 2007 at age 17. R, who was 15 and did not have a licence, was driving the vehicle. The vehicle was owned by H. H's son, S, and his friend, L, who both had licences and permission to drive, had driven with R and the plaintiff to a campsite. L had given the keys to R and asked R and S to drive to a store. R lost control of the vehicle. In the plaintiff's tort action, she obtained judgment against R in the amount of $282,992 (see *[2013] I.L.R. para. M-2703* (BCSC)). The Court had found that H did not give R consent to drive the car and that S did not act as H's agent. The plaintiff brought an action under section 20 of the *Insurance (Vehicle) Act* (the "Act") for the defendant Insurance Corporation of British Columbia ("ICBC") to pay her $282,992 or its limits out of the Uninsured Motorist Protection Fund. ICBC argued that the claim was barred by section 91 of the Act, as the plaintiff knew or ought to have known that the vehicle was being operated without the owner's consent.
HELD: The action was allowed.

ICBC failed to discharge its burden to prove that the plaintiff knew or ought to have known that the vehicle was being operated without the consent of the owner. Although the heading of section 91 reads "Limitation on recovery in relation to stolen vehicles," the section is not limited to stolen vehicles. The Court found the wording of section 91 clear and unambiguous. It is intended to prevent recovery when a party was injured while in a vehicle they knew or ought to have known was being driven without the consent of the owner. Both the plaintiff and R believed that S owned the car, and the basis for that belief was reasonable. The Court did not find that the plaintiff subjectively knew that R did not have consent from the owner to drive. The unique circumstances of this case were that the

plaintiff and R were very young. ICBC did not prove that an ordinarily prudent 17-year-old would turn their mind to the question of consent when asked to drive a car. The plaintiff's claim was not barred by section 91.

Counsel

J.B. Carter and L. Bergerman for the plaintiff; J.D. James for the defendant

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H. HYSLOP J.

INTRODUCTION

1 The plaintiff, Trissteen Schoenhalz ("Ms. Schoenhalz"), seeks a declaration that she is entitled to an order pursuant to s. 20 of the *Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231* [*Act*], that the defendant, the Insurance Corporation of British Columbia ("ICBC") pay her $282,992.82 or its limits. She also seeks her costs, assessed at Scale B.

2 I rendered a judgment cited at *Schoenhalz v. Reeves*, *2013 BCSC 1196* ("Reasons"), where I granted a judgment in favour of the plaintiff against Chelsea Reeves ("Ms. Reeves") in the amount sought against ICBC in this action. Ms. Schoenhalz was injured in a motor vehicle accident which occurred on May 12, 2007. Ms. Reeves was driving a vehicle owned by the defendant, Brenda Hammond, in which Ms. Schoenhalz was a passenger. At the time of the accident, Ms. Reeves was 15 years old and not licensed to drive a motor vehicle. I found Ms. Reeves negligent in the Reasons. I found that Ms. Reeves did not have the consent of either Brenda Hammond or her son, Steven Hammond ("Steven"), to drive the vehicle.

3 The purpose of s. 20 of the *Act* is to provide a 'last-resort' for compensation to an injured person who obtains a judgment against an uninsured motorist: *McVea (Guardian ad litem of) v. British Columbia (Attorney General)*, *2005 BCCA 104* at para. 37, and *Buxton v. Tang*, *2007 BCSC 1101* at para. 7. Ms. Schoenhalz is not insured under s.

20, nor is there the creation of a contract between Ms. Schoenhalz and ICBC. It simply allows her to seek the amount of her judgement against ICBC.

4 ICBC does not allege that Ms. Schoenhalz's claim under s. 20 of the *Act* was improperly made. Ms. Schoenhalz swore and filed with ICBC all necessary declarations to make her claim.

5 At the trial of this action, *viva voce* evidence was not presented. Counsel for the parties agreed at a trial management conference that the evidence would be restricted to the pleadings, the Reasons, the record of the tort action, and the dates of birth of the relevant participants. It was agreed that the record would include the evidence in the tort action of Ms. Schoenhalz, the defendants, Ms. Reeves, Brenda Hammond, and Steven, and the notices to admit and the replies to the notices to admit in this action.

6 There are no reported cases as to the presentation of evidence to the court in actions brought pursuant to s. 20 of the *Act*. Presenting the evidence in this fashion is analogous to the presentation of evidence pursuant to s. 76(2) of the *Act*. Section 76(2) of the *Act* permits a person with a judgment against a tort feasor who was covered by third party liability insurance with ICBC or another insurer to recover up to the limits of the third party liability insurance policy. Under both s. 20(9) and s. 76(2), the plaintiff must have a judgment before an action for enforcement can be commenced. Section 76(2) requires the claim against the insured to be of the indemnity provided in the insurance policy. Section 20(9) requires that any claim under this section meets the requirements of the *Act* and its regulations.

7 The presentation of the evidence as proposed by Ms. Schoenhalz and ICBC is supported by *Collier v. Insurance Corp. of British Columbia* *(1995), 100 B.C.L.R. (2d) 201* (C.A.), and *Global General Insurance Co. v. Finlay*, *[1961] S.C.R. 539*, in s. 76(2)-like cases. Given the similarity of the legislative provisions at issue and the pre-requisites to launching such an action, I find this was the correct way to present the evidence at this trial.

FACTS

8 I will repeat the facts set out by ICBC with some exceptions.

9 Ms. Schoenhalz's version of the facts does not diverge from those set out by ICBC, other than to refer to some arguments that I rejected.

10 On May 12, 2007, five teenagers; Ms. Schoenhalz, Ms. Reeves, Steven, Luke Holman ("Luke"), and Dave Cochran travelled by car in a 1986 Camaro to Dry Lake Provincial Campground near Tappen for an outing. Luke was driving the Camaro to their destination.

11 The registered owner of the Camaro was Brenda Hammond.

12 Brenda Hammond had no objections to Steven's friend, Luke, driving the Camaro. Luke had a driver's license and had previously driven the Camaro with Steven as a passenger. Steven also had a driver's license.

13 All the occupants of the Camaro who travelled to the lake were friends, except for Steven and Ms. Schoenhalz. Ms. Schoenhalz and Ms. Reeves were close friends. Brenda Hammond had met Ms. Reeves briefly, but did not know her. Brenda Hammond did not know Ms. Schoenhalz.

14 At the time of the accident, Steven was 17 years of age. Luke was older than Steven; he was almost 20 years of age.

15 At the time of the accident, Ms. Reeves was 15. Steven knew this fact. Ms. Schoenhalz also knew Ms. Reeves was 15 and did not have a driver's license. Ms. Schoenhalz also did not have a driver's license. Ms. Schoenhalz was born May 8, 1990; she turned 17 four days prior to the accident.

16 Ms. Reeves testified that she had never driven on a public highway. However, Ms. Schoenhalz testified that she saw Ms. Reeves drive into her mother's driveway with Luke. Luke had his driving license, and Ms. Reeves knew this.

17 Ms. Schoenhalz testified that she knew a person needed a license to drive a car.

18 Both Ms. Reeves and Ms. Schoenhalz stated that they thought Steven was the owner of the car. Ms. Schoenhalz stated that she understood they needed the permission of the owner to drive the car.

19 After the teenagers reached the campsite, Luke asked Ms. Reeves and Ms. Schoenhalz to leave because he wanted "smokies", or hot dogs. Luke did not want to drive to get them. Luke first handed the keys to drive to Ms. Schoenhalz. Steven was not present when this occurred, as he had gone to collect firewood. Ms. Reeves entered the Camaro with Ms. Schoenhalz, who was in the driver's seat. However, the Camaro had a standard transmission, which Ms. Schoenhalz did not know how to operate. Ms. Schoenhalz and Ms. Reeves switched places and Ms. Reeves drove the vehicle.

20 There was no discussion or concern at the campsite by either Ms. Schoenhalz or Ms. Reeves as to whether they had consent to drive the Camaro.

21 Luke had put the keys to the Camaro in his pocket when they arrived at the campsite. Ms. Reeves testified that she thought she have been given permission by Luke to drive the car. Steven confirmed that Luke was in possession of the keys when they reached the campsite and he did not ask for them back. Steven also confirmed that he did not give permission to anyone else to drive the car.

22 Ms Reeves lost control of the car and it went over a bank. The car rolled several times. Ms. Schoenhalz was badly injured and suffered third degree burns to various parts of her body.

23 In her notice of civil claim, Ms. Schoenhalz alleged that the accident was caused by the negligence of Ms. Reeves. She also alleged that Steven and Ms. Hammond were negligent in consenting to Ms. Reeves' operation of the vehicle.

24 In their response, Ms. Hammond and Steven argued that Ms. Reeves was operating the vehicle without express or implied consent.

25 In the Reasons, I found that Brenda Hammond did not expect her Camaro would be driven by an unlicensed driver. She did not express her consent to Ms. Reeves driving her vehicle: para 181. Steven did not act as Ms. Hammond's agent and could not consent to the vehicle being operated by an underage driver: para. 181. There is no evidence to show that Brenda Hammond permitted anyone other than her son Steven and his friend Luke to drive the Camaro, or that she had willingness or an expectation that others would drive the Camaro: para 195. Brenda Hammond did not implicitly consent to Mr. Reeves driving her Camaro.

26 Alternatively, I stated in the Reasons if Steven was an owner, he did not consent to Ms. Reeves driving the Camaro: para 196.

LEGISLATIVE FRAMEWORK

27 Section 20(1) and (9) of the *Act* reads as follows:

Uninsured vehicles

20 (1) In this section:

"claimant" means a person who alleges that he or she has a right of action against an uninsured motorist for damages arising from bodily injury to or the death of a person, or loss of or damage to

property, caused by or arising out of the use or operation of a motor vehicle, but does not include a person who is entitled to bring an action against the corporation under section 24;

"motor vehicle" includes a trailer, but does not include

(a) a motor vehicle or trailer in respect of which there exists proof of financial responsibility given in the manner provided for by sections 106 to 113 of the *Motor Vehicle Act*, or

(b) a motor vehicle or trailer owned by, or by an agent of, the Crown in right of any other province or of Canada;

"owner", in relation to a motor vehicle, includes a lessee;

"uninsured motor vehicle" means a motor vehicle used or operated or owned by an uninsured motorist;

"uninsured motorist" means a person who uses or operates a motor vehicle on a highway in British Columbia when he or she is not insured under third party liability insurance coverage that provides indemnity in a prescribed amount, not less than $100 000, against liability imposed by law arising from bodily injury to or the death of a person, or loss of or damage to property, caused by or arising out of the use or operation of a motor vehicle, and includes the owner of a motor vehicle that is used or operated on a highway in British Columbia when the owner is not so insured.

...

(9) If the corporation enters into a settlement with a claimant or a claimant obtains a judgment against an uninsured motorist in accordance with this section and the claimant has otherwise complied with this section and the regulations, the corporation may, subject to the regulations, pay all or part of the settlement or judgment.

28 In denying compensation to Ms. Schoenhalz, ICBC relies on s. 91 of the *Act,* which limits recovery to an injured passenger in a vehicle they knew or ought to have known was being driven without the consent of the owner. Section 91 reads as follows:

Limitation on recovery in relation to stolen vehicles

91 (1) This section applies to a person who

(a) suffered bodily injury, death or loss of or damage to property that is caused by the use or operation of a vehicle, and

(b) at the time of the accident as a result of which the bodily injury, death or loss of or damage to property was suffered, was an operator of, or a passenger in or on, a vehicle that the person knew or ought to have known was being operated without the consent of the owner, and, in the case of a leased motor vehicle, the lessee.

(2) Despite the *Negligence Act* and section 100 of this Act,

...

(b) a person referred to in subsection (1) is not entitled to any recovery from the corporation under section 20.

ISSUES

1. Does s. 91 function such that ICBC bears the burden to prove that Ms. Schoenhalz's claim is barred, or does Ms. Schoenhalz have to prove her claim under s. 20 taking s. 91 into account?
2. Should the Court look to sources such as the heading to s. 91 and the *Handsard* debates to assist it in interpreting s. 91?
3. Is Ms. Schoenhalz's claim to collect her judgement barred by s. 91 of the *Act*?

POSITIONS

Plaintiff

29 Ms. Schoenhalz argues that ICBC has the burden of proving that her claim is barred by s. 91. Ms. Schoenhalz submits that she has brought a properly constituted application for benefits under s. 20 of the *Act*. Because ICBC has taken the position that Ms. Schoenhalz's recovery is limited by the application of s. 91 of the *Act*, the burden of proof lies with ICBC to establish that s. 91 applies.

30 Ms. Schoenhalz argues that the heading to s. 91 should be considered in its application. She argues that the use of the word "stolen" in the heading requires an intention to deny the owner possession of the vehicle, which is not present here. Ms. Schoenhalz also argues that the *Handsard* debates relevant to the enactment of s. 91 should be considered.

31 In regard to the application of s. 91 of the *Act,* Ms. Schoenhalz argues the issue is the state of mind of herself and Ms. Reeves. She argues that there is no indication that she knew or ought to have known that the vehicle was being operated without the consent of the owner. She argues the question for the Court is not whether Ms. Hammond would have permitted Ms. Reeves to drive the car had she been asked.

Defendant

32 ICBC's position is that the onus is on Ms. Schoenhalz to bring her claim within s. 20, taking into account s. 91 of the *Act*.

33 ICBC argues that the principles of legislative construction and the general approach to statutory interpretation apply to any interpretation of ss. 20 and 91 of the *Act*. ICBC submits that neither the heading to s. 91 nor the relevant *Hansard* debates are required to interpret s. 91

34 Pursuant to s. 91 of the *Act*, ICBC argues that Ms. Schoenhalz cannot successfully make a claim for compensation pursuant to s. 20 of the *Act* because she knew or ought to have known that the vehicle was being operated without the consent of the owner.

BURDEN OF PROOF

35 As previously stated, Ms. Shoenhalz alleges that ICBC has the burden of proving that she as a passenger knew or ought to have known the motor vehicle was being operated without Ms. Hammond's consent.

36 Ms. Shoenhalz relies on two cases: *Chrysler Financial Services of Canada Inc. v. ICBC,* 2011 BCSC 1795, and *Bevacqua v. I.C.B.C.*, 1999 BCCA 553. In both cases there was a contract of insurance. In both cases ICBC disputed paying the loss.

37 In *Chrysler,* ICBC alleged that the insured was involved with a theft of the vehicle at issue. In *Bevacqua*, ICBC alleged that the insured caused vandalism to his vehicle. The court held in both cases that the insured had the obligation of proving the loss fell within the coverage of the insured. ICBC had the obligation to prove intentional conduct to vitiate the claim on a balance of probabilities.

38 ICBC argues that the onus is on Ms. Shoenhalz to prove that her claim comes within s. 20, taking into account s. 91 of the *Act*. In support of this position, ICBC relies on *Hudson v. Insurance Corp. of British Columbia* (1991), 83 D.L.R. (4th) 377, and *Derbyshire v. ICBC*, 2011 BCSC 170. These are cases where an insurance agreement existed, and it was the obligation of the insured to prove that the loss occurred within the risk covered under that agreement. In *Hudson*, the vehicle was insured for pleasure. The loss that the vehicle suffered occurred in a parking lot, where the insured had left it in order to drive to work in a car pool. The court found that using it to travel to work and leaving it in the parking lot left the vehicle uninsured. The onus of proof was on the insured to prove his policy covered the risk.

39 The distinction between these two burdens of proof is set out in *Derbyshire*:

> [13] The alternative ground put forward by ICBC, that of s. 96(f) regarding the contribution which it is said has been played indirectly or directly by the pre-existing degenerative changes, also does not succeed, and I say so whether we regard s. 96(f) as an exclusion on coverage in respect of which the onus of proof would be on ICBC, or whether we regard it simply as a limitation on the scope of coverages available, in which case the onus would be on the plaintiff.

40 I reject these arguments. These burdens of proof are limited to situations where there is an insurance policy and a claim is made under the insurance policy. The insurance policy determines the obligations of the insured and the insurer. As previously stated, s. 20 does not create an insurance policy between Ms. Shoenhalz and ICBC. There are no contractual obligations between Ms. Shoenhalz and ICBC.

41 Section 91 is a defence available to ICBC to reject a claim under s. 20. The burden of proof rests with ICBC to prove that Ms. Shoenhalz knew that the Camaro was being operated without the consent of the owner or alternatively, ought to have known it was being operated without the consent of the owner.

ANALYSIS

Principles of Statutory Interpretation

42 The issue before the Court is an interpretation of s. 91 and how it applies to s. 20 of the *Act.* Specifically, I must determine whether Ms. Schoenhalz's claim against ICBC is barred by s. 91. Counsel for both Ms. Schoenhalz and ICBC state there are no cases in British Columbia relating to the interpretation of s. 91 and its effect on s. 20.

43 The starting point is the Supreme Court of Canada's adoption of Driedger's modern principle of construction of statutes in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27. Justice Iacobucci stated:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today 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.

44 Justice Iacobucci at para. 22 in *Rizzo* stated that he also relied on the Ontario *Interpretation Act*, R.S.O. 1980, c. 219, which he quoted:

> ..."shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

45 The following section of the British Columbia *Interpretation Act*, *R.S.B.C. 1996, c. 238* [*IA*], has similar objectives:

> **Enactment remedial**
>
> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

46 *Sullivan on the Construction of Statutes*, 6th ed.(Markham, ON: Lexis Nexis Canada, 2014) ("*Sullivan*") (the successor to *Driedger*) breaks down interpretation of statutes and regulations into three dimensions:

1. The textual meaning, which *Driedger* calls the grammatical and ordinary sense of the words.
2. Legislative intent, which is that all words in the enactment are there for a reason:

> ...the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.
>
> (Page 8 at s.2.4.)

3. The modern principle is compliance with legal norms, as explained by *Driedger*:

> These norms are part of the "entire context" in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Dreidger. In the second edition he wrote:
>
> It may be convenient to regard 'intention of Parliament' as composed of four elements, namely
>
> * the expressed intention - the intention expressed by the enacted words;
> * the implied intention - the intention that may legitimately be implied from the enacted words;
> * the presumed intention - the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and
> * the declared intention - the intention that Parliament itself has said may be or must be or must not be imputed to it.
>
> (Page 8 at s.2.5.)

47 A summary of these principles of *Driedger* are stated in *Sullivan*:

> s2.9 At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.

48 ICBC argues that s. 91 should be interpreted in accordance to the general approach to statutory interpretation. As stated in *Wormell v. Insurance Corp. of British Columbia*, *2011 BCCA 166*:

> [18] Although it is in the insurance context, what is at issue in this case is a regulation. The general approach to statutory interpretation remains that stated by Elmer Driedger in his *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87:
>
> > Today 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.
>
> See *Bell ExpressVu Limited Partnership v. Rex*, *2002 SCC 42*, *[2002] 2 S.C.R. 559* at para. 26.
>
> [19] Also relevant is the presumption against tautology. The presumption is described by Ruth Sullivan in, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 159 and 162:
>
> > It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.
> >
> > ...

> Although the presumption against tautology is frequently invoked, it is also easily rebutted. This can be done by coming up with a meaning or function for the words in question, to show that they are not in fact meaningless or superfluous. It can also be done by suggesting reasons why in these circumstances the legislature may have wished to be redundant or to include superfluous words. Repetition is not an evil when it serves an intelligible purpose.

See also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, *2006 SCC 20*, *[2006] 1 S.C.R. 715* at paras. 45-46, and *Hill v. William Hill (Park Lane) Ltd.*, [1949] A.C. 530 (H.L.) at 546.

49 In *Wormell*, Mr. Wormell had been awarded a judgement that ICBC refused to pay. Mr. Wormell sued ICBC pursuant to s. 76 of the *Act*, seeking a declaration that ICBC was liable under the tortfeasor's insurance coverage and seeking payment of the amount of the judgment.

50 Although there was an insurance policy in *Wormell,* what was at issue was the interpretation of a regulation under the *Act.* The court cited the above principles of statutory interpretation and dismissed ICBC's appeal.

51 Sections 20 and 91 fall under different parts of the *Act.* Section 20 falls in Part 1 - Universal Compulsory Vehicle Insurance. Section 91 falls under Part 5 - General Provisions.

52 Section 74 of the *Act* states that Part 5 applies to all insurance policies issued in British Columbia, and the claims of insurance and the insured and insurers related to the insurance. Part 5 of the *Act* focuses on various defences and exemptions that ICBC can establish. For example, Part 5 allows ICBC to step into the shoes of the insured and defend a claim brought against them (s. 77), or permits ICBC to deny compensation where the insured makes a willingly false statement with respect to the claim (s. 75). On the other hand, it also permits recovery against ICBC. For example, s. 76 permits a person who has a judgement against an insured to start an action against ICBC to satisfy their judgement.

Headings in Legislation

53 Both parties made submissions as to whether the heading of s. 91 should be used to interpret the provision below. Section 91 is titled "Limitation on recovery in relation to stolen vehicles".

54 Ms. Shoenhalz argues that the word "consent" as it is used in the text of s. 91 is limited to theft. She argues that the heading of s. 91 limits recovery of a passenger or driver that knew or ought to have known that the vehicle was stolen.

55 Ms. Shoenhalz argues that the determining factor is her state of mind when she rode as a passenger in Brenda Hammond's vehicle, and not whether Ms. Reeves had Brenda Hammond's consent to drive the vehicle. Neither she nor Ms. Reeves intended to steal the vehicle.

56 Headings are referred to in s. 11 of the *IA*:

Reference aids and clarifications

> 11 (1) In an enactment, a head note to a provision or a
>
> reference after the end of a section or other division
>
> (a) is not part of the enactment, and
>
> (b) must be considered to have been added editorially for convenience of reference only.
>
> (2) In an enactment, if a reference to a provision of the enactment or any other enactment is followed by italicized text in square brackets that is or purports to be descriptive of the subject matter of the provision, subsection (1) (a) and (b) applies to the text in square brackets.

(3) The Lieutenant Governor in Council may make regulations amending an enactment for the purpose of changing a reference to a specific minister or ministry in a provision of the enactment to the minister or ministry, as applicable, currently assigned responsibility in relation to the matter.

57 *Sullivan* states the following on headings:

s14.50 *General.* In Parliamentary procedure headings are not considered an integral part of a bill as it goes through the legislative process. This peculiarity is reflected in some Canadian Interpretation Acts, which state that headings do not form part of the enactment in which they are found or (what amounts to the same thing, they are included for convenience only. This treatment is unsatisfactory. To any person reading legislation, headings appear to be as much a part of the enactment as any other component. There is no apparent reason why they should be assigned an inferior status.

58 *Sullivan* refers to the varied case law on headings, where some courts have refused to consider headings, while other courts resort to headings to resolve an ambiguity. *Sullivan* quotes the following passage from *Canada (Attorney General) v. Jackson*, *[1946] S.C.J. No. 21*, *[1946] 2 D.L.R. 481* at 486-87 (S.C.C.):

... to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the headings may be used to control the meaning of the enacting words in themselves clear and unambiguous ...

Page 460 at s 14.51

59 In *Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357*, Justice Estey interpreted ss. 6(1), (2), (3) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), in the context of s. 28(c) of the Ontario *Law Society Act,* R.S.O. 1980, c. 233. In doing so he stated that the *Charter* was not subject to either federal or provincial interpretation acts, because of the *Charter's* supremacy. The *Charter* comes from neither level of the legislative branches of government, but from the Constitution itself. He concludes at para. 22:

... It is clear that these headings were systematically and deliberately included as an integral part of the Charter for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the Charter.

60 Justice Estey discusses headings and their legislation in *Upper Canada*:

[22] The question of the role of the heading in the interpretation of statutes appears to be open. The same must, of course, be true where the Court is engaged in the analysis of a constitutional provision. Here we have a charter of individual rights incorporated in the broader expanse of the Constitution. ...

[23] At a minimum the heading must be examined and some attempt made to discern the intent of the makers of the document from the language of the heading. It is at best one step in the constitutional interpretation process. It is difficult to foresee a situation where the heading will be of controlling importance. It is, on the other hand, almost as difficult to contemplate a situation where the heading could be cursorily rejected although, in some situations, such as in the case of "Legal Rights" which in the Charter is at the head of eight disparate sections, the heading will likely be seen as being only an announcement of the obvious.

61 In order to determine the purpose of s. 6(2) of the *Charter*, Mr. Justice Estey was required to reconcile s. 6 with the heading introducing it. He stated at para. 24:

... the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning. Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document. This general approach I take to be consonant with the thinking expressed in the Canadian, British and United States authorities and texts discussed above.

62 At para. 25, Mr. Justice Estey reflects on how the heading "Mobility Rights" might impact each subsection of s. 6 of the *Charter.* Mr. Justice Estey, after analyzing s. 6 of the *Charter*, concludes:

> [28] ...Reading s. 6(2)*(b)* in light of the exceptions set out in s. 6(3)*(a)* also explains why the words "in any province" are used: citizens and permanent residents have the right, under s. 6(2)*(b)*, to earn a living in any province subject to the laws and practices of "general application" in that province which do not discriminate primarily on the basis of provincial residency.
>
> [29] There are many considerations which lead one to adopt the third interpretation of para. *(b)*, supra. Paragraph *(b)* is thereby accorded a meaning consistent with the heading of s. 6. The trans-provincial border commuter is accorded the right to work under *(b)* without the need of establishing residence in the province of employment in exercise of the right under para. *(a)*. There is a separation of function and purpose between *(a)* and *(b)*, and the need for separate clauses is demonstrated. The presence of s. 6(3)*(a)*, already discussed, is another supporting consideration.

63 ICBC's position is the words "a vehicle that the person knew or ought to have known was being operated without the consent of the owner" do not relate just to theft.

64 ICBC argues that the *IA* specifically addresses legislative headings and strongly indicates that a heading is not part of an enactment. ICBC argues that the heading of s. 91 must be seen as added editorially, and for convenience of reference only.

65 ICBC acknowledges that the courts in British Columbia have developed certain exceptions to this clear statement of law in s. 11(1) of the *IA.* One exception exists "where sections grouped under a heading will be presumed to be related to one another in some particular way." ICBC cites *Re Peters and the District of Chilliwack (1987), 43 D.L.R. (4th) 523*, and *British Columbia (Director of Civil Forfeiture) v. Violette*, *2014 BCSC 1520*.

66 In *Peters*, the issue was whether a municipal by-law prohibiting intensive pig farming was a zoning by-law. If it was a zoning by-law, it required a public hearing. No public hearing was held. The appellant argued this made the by-law invalid.

67 In considering whether it was a zoning by-law requiring a public hearing, Mr. Justice Lambert stated the following at p. 527:

> The true question we are looking at here is whether, in this statutory scheme, this by-law, and by-laws like it, are by-laws within s. 720, in relation to which the legislature has said that a public hearing must take place. In my opinion, the structure of the *Act* and the close linkage in the *Act* between s. 716 and s. 720 makes it clear that, in the time those sections were in effect, s. 720 was intended, in the scheme of the legislation, to apply to those by-laws that were passed under s. 716 and came within the general heading of zoning.
>
> Section 932 came under the heading of "Miscellaneous Powers" and came in Part 28 of the *Municipal Act*. In my opinion, s. 932 was not linked closely with s. 720 and its location in the *Act* did not suggest that it formed one of the group of by-laws for which public hearings were required.

68 Mr. Justice Lambert considered the s. 11 of the *IA*. He concludes at p. 527-528 by saying:

> The effect of that section is that the headings that followed the designation of Part 21 of the *Municipal Act* and the headings that followed the designation of Part 28 of the *Municipal Act* are not to be used explicitly as tools of interpretation. But in approaching the *Act* as I have done I have looked at the sections in groups within Parts, and while I have referred to the titles, the titles are not an essential part of the reasoning which leads me to conclude that the scheme of the *Act* comtemplates that only those zoning by-laws passed under s. 716 are required to meet the public hearing requirements of s. 720 and that the miscellaneous by-laws passed under s. 933 are not required to meet the public hearing requirements, even if they deal as part of their subject-matter with the regulation and use of land and the dividing of land into areas in order to deal with regulating the keeping of swine and carrying out the other subjects of s. 933.

69 In *Violette*, the underlying action was pursuant to the *Civil Forfeiture Act*, *S.B.C. 2005, c. 29*. The Crown was seeking particulars pursuant to Rule 21-1(7) of the *Supreme Court Civil Rules* (the "*Rules*"). The issue was whether the respondent had to provide particulars sought by the Director of Civil Forfeiture.

70 In the *Rules*, Rule 21-1(7) falls under the heading "Admiralty Matters". Mr. Justice Davies in *Violette* considered the relationship between Rule 21-1(1) and the heading under which these rules fall.

71 The Director argued that the headings have no substantive importance, citing s. 11 of the *IA* and Rule 1-1(3), which similarly states:

> (3) The titles and headings of these Supreme Court Civil Rules are for convenience only and are not intended as a guide to interpretation.

72 After analyzing Rule 21-1(7), Justice Davies concluded that the words "other property" in Rule 21-1(7) applied to the context of admiralty matters. In coming to this conclusion, Davies J. also considered *Tilbury Cement Ltd. v. Seaspan International Ltd.* *(1991), 47 C.P.C. (2d) 292* (B.C.S.C.), which considered the legislative predecessor to Rule 21-1(7). Justice Davies relied upon Justice Trainor's comments in *Tilbury Cement*:

> In dealing with maritime torts this court sits as an admiralty court exercising admiralty jurisdiction with responsibility to apply Canadian maritime law which is uniform throughout Canada. Recognition of this jurisdiction is to be found in Rule 55 of the Rules of Court which deal specifically with admiralty jurisdiction. [Emphasis in *Violette*]

73 In *Violette,* Davies J. concluded that Rule 21-1(7) applied only in the context of an admiralty matter.

74 ICBC argues that s. 91 stands alone in Part 5 of the *Act* and therefore does not fall under this exception. Therefore, the heading should not be read as part of s. 91.

75 Further, ICBC argues that despite these exceptions, the heading to s. 91 creates ambiguity in an otherwise clear provision. Therefore, it should not be given any weight.

76 Ms. Schoenhalz argues that the title of s. 91 should be considered, and indicates that s. 91 only applies to a vehicle that has been stolen. She argues that she did not know and should not have known that the vehicle qualified as stolen.

77 Ms. Shoenhalz states the following in her submissions:

> 41. It is submitted that stealing a vehicle is something significantly greater than merely operating a vehicle without the consent either express or implied of the owner. As the definitions indicate, stealing is a dishonest act which is intended to deprive the owner of the benefit of ownership or possession permanently. This is distinct from a situation where an individual is merely operating the vehicle without the consent, express or implied, of the owner perhaps by mistake or misunderstanding.
>
> 42. The act of stealing can only occur in circumstances where there is no consent from the owner. But not every act of operating a vehicle without the consent of the owner can be considered stealing.

Ms. Schoenhalz does not refer to any examples.

78 Ms. Schoenhalz argues that notwithstanding s. 11 of the *IA,* courts have used headings for statutory interpretation and viewed them as an indication of legislative intent. Counsel for Ms. Shoenhalz relies on *Jacobs v. Laumaillet*, *2010 BCSC 1229*, and *Arts Umbrella v. British Columbia (Assessor of Area 09 - Vancouver),* *2007 BCCA 45*.

79 *Jacobs* is about priorities among or between creditors whose indebtedness is perfected under the *Personal*

Property Security Act, R.S.B.C. 1996, c. 359. Justice Butler made the following comment about the role of headings in interpreting legislation:

> [30] The residual priority rules and other priority rules are found in Part 3 of the *PPSA*, which is entitled "Perfection and Priorities". Sections 59 and 60 are found in Part 5 of the *PPSA*, entitled "Rights and Remedies on Default" which, as its title would suggest, is concerned with how and when a secured party may enforce the security agreement and deal with the collateral.
>
> [31] Section 11 of the *Interpretation Act*, *R.S.B.C. 1996, c. 238*, provides that a heading to a provision is not part of an enactment and must be considered to have been added editorially or for convenience of reference only. Notwithstanding this provision, courts have favoured the view that for the purposes of statutory interpretation, headings should be read and relied on like any other contextual feature. Headings are a valid indicator of legislative intent and may be taken into account on interpretation: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 392-397; *Arts Umbrella v. British Columbia (Assessor Of Area 9 - Vancouver)*, *2007 BCCA 45* at para. 3.
>
> [32] When provisions are grouped together under headings, it is presumed that they are related to one another in some particular way; there is a shared subject or a common feature to the provisions. Conversely, the placement of provisions elsewhere under a different heading suggests the absence of such a relationship.

80 In *Arts Umbrella*, counsel agreed:

> [3] ...that section headings can be used as a guide to interpretation of a statute (*Law Society of Upper Canada v. Skapinker*, *[1984] 1 S.C.R. 357* at 13-14, *9 D.L.R. (4th) 161*). Both parties further agree that the legislative history of the appeal provisions of the *Act* is the most effective guide to the task before me; however they disagree as to the correct interpretation of that history.

81 I disagree with ICBC's position. Section 91 does not stand alone. Earlier in these reasons I referred to the effect of Part 5 of the *Act.* I find that Part 5 offers a variety of remedies and avenues of action. The sections of Part 5 dictate situations where ICBC may avoid liability, and situations where ICBC must accept it. Although it is of no assistance to the Court, I find that the heading of "General Provisions" could be used to interpret s. 91. However, the heading that counsel refers to, "Limitation on recovery in relation to stolen vehicles", does not fall under this exception.

82 Therefore, the heading specifically introducing s. 91 cannot be used to define its meaning, particularly when there is nothing ambiguous in the text. There is nothing ambiguous in the text of s. 91. Headings should not be of controlling importance. The heading in this case indicates that a lack of consent includes a bar on recovery in relation to stolen vehicles. The heading of s. 91 does not have any effect on the interpretation of s. 91.

General Interpretation of s. 91

83 I will now turn to the arguments made as to how the text of s. 91 should be interpreted.

84 ICBC urges the Court to compare the words "know" and "knowingly" in s. 91 with the wording for the underinsured motorist protection ("UMP") claims under s. 148.1(3)(b) of the *Insurance (Vehicle) Regulation, B.C. Reg. 447/83 ("Regulation")*. Section 148.1(3)(b) of the *Regulation* states:

> (3) No coverage is provided under the underinsured motorist protection to an insured who is
>
> ...
>
> (b) an operator of, or a passenger in or on, a vehicle that the operator or passenger knew or ought to have known was being operated without the consent of the owner ...

85 UMP is available pursuant to a contract of insurance. There is no reference to theft in the *Regulation.* Pursuant to s. 148.2 of the *Regulation*, the resolution of UMP claims as to entitlement and amount are resolved by arbitration.

86 In support of its position, ICBC refers to *Dorey v. ICBC*, an arbitration award dated May 27, 2003. In that

decision, the arbitrator interpreted the phrase that the person "knew" or "ought to have known" that the vehicle was being operated without the consent of the owner.

87 In *Dorey*, there was a serious motor vehicle accident in which four people died. Amongst others, Mr. Dorey, a passenger in the vehicle, was injured. There were insufficient funds to pay all the judgements and Mr. Dorey brought a claim under the UMP provisions in the *Regulation.*

88 At the time of the accident, Marc Vezina was driving Ms. Pysh's vehicle. Marian Anne Pysh, the owner of the vehicle, did not know Mr. Vezina or Mr. Dorey.

89 On the day of the accident, Ms. Pysh had given her son Joshua, then age 16, permission to drive to the lake together with a friend to fish. Ms. Pysh, despite some evidence to the contrary, did not know that other young men were going to the lake with Joshua. Mr. Vezina, who was age 20, eventually took over the driving of Ms. Pysh's car to drive to the lake.

90 Mr. Vezina was driving southbound on the Chase-Faulkland Road when Mr. Vezina lost control of the car and it came across into the northbound lane colliding with a motorcycle, killing the driver.

91 There was lack of evidence as to whether Mr. Vezina had or did not have a driver's license. Mr. Vezina died in the accident.

92 It was found in a summary trial that Mr. Vezina was negligent and that his actions were the sole cause of the accident. Further, the court found that Mr. Vezina did not have the consent of the owner to drive the vehicle. Therefore Mr. Vezina was an uninsured driver under s. 20 of the *Act*. Mr. Vezina died without sufficient assets to meet the personal injury claims - in particular Mr. Dorey's. Mr. Dorey and the other parties settled their claims against Mr. Vezina, deceased, by an agreed division amongst the parties of the $200,000, permitted by s. 20 of the *Act*. It was agreed that Mr. Dorey's claim against the uninsured motorists' funds (s. 20) was not a bar to his claim under UMP.

93 For purposes of the arbitration, it was agreed that the claimant was "insured" as defined by s. 148.1 of the *Insurance (Vehicle) Regulation*, *B.C. Reg. 447/83* ("*Regulation"*). Mr. Vezina was an underinsured motorist as defined by s. 148.1 of the *Regulation*.

94 ICBC alleged that Mr. Dorey's claim was barred and that he was not entitled to damages on the basis that he knew or ought to have known that at the time of the accident Mr. Vezina operated the vehicle without the consent of Ms. Pysh. ICBC relied on s. 148.1(3) of the *Regulation,* which contains similar language to s. 91 of the *Act.*

95 In his decision, the arbitrator concluded that Mr. Dorey was *prima facie* entitled to UMP compensation and that the onus was on ICBC to prove on a balance of probabilities that Mr. Dorey was not entitled to coverage because of *Regulation*, s. 148.1(3)(b). The arbitrator concluded that Mr. Vezina drove Ms. Pysh's vehicle with the express consent of Joshua.

96 The arbitrator found that Mr. Dorey was unaware of the restrictions that Ms. Pysh had placed on Joshua as it related to driving her vehicle, which was that Joshua and his friend were going to the lake to fish.

97 The arbitrator found that Ms. Pysh's vehicle was never stolen, and in fact, Joshua was an occupant of the car whenever it was driven.

98 The arbitrator stated in para. 32 of his reasons that there was nothing in the language of the *Regulation* to restrict drivers and passengers in vehicles receiving compensation limited to being stolen. The arbitrator went on to say:

> ...Where the vehicle is not stolen, and the original borrower remains in possession of and an occupant in the vehicle, and where constraints regarding use are known to the original borrower and not disclosed to

> others in the vehicle, the burden of establishing facts that show a passenger ought to have known the owner would not consent should be onerous, even before taking into account that s. 148.1(3)(b) is an exclusion from coverage.

99 *Dorey* is not binding on this Court. However, in some ways the facts are similar to the facts in the case before me. The most obvious is that the drivers of the vehicle did not have the consent of the owners to drive it. Unlike Joshua, Steven did not consent to Ms. Reeves, or for that matter, Ms. Schoenhalz, driving the vehicle. Joshua did consent to Mr. Vezina driving his mother's vehicle.

100 Other than the similarity and the intent of the language that an operator and a passenger know or ought to have known that the vehicle was being operated without the consent of the owner, UMP is coverage is a contract of insurance between Mr. Psych and ICBC. Ms. Psych had a valid owner's certificate. In my opinion, this distinguishes the facts in *Dorey.*

101 ICBC's written submissions contained several additional arguments as to how other statutory provisions and surrounding case law should be used to interpret words found in s. 91. I do not accept these arguments but I shall summarize some of them here.

102 ICBC referred to instances where the word "permit" is used in the *Regulation.* An example includes s. 55(5) of the *Regulation,* where an individual is not authorized and qualified by law to operate a vehicle. ICBC argues Ms. Reeves did not have a license and even if there was consent, there would be still no coverage. I do not think that this argument is relevant, as the words that need to be interpreted do not include the word "permit".

103 ICBC also referred to the use of the work "belief" in the *Regulation* in ss. 96(b)(iii) and 49(1)(g). ICBC cited British Columbia cases that discuss whether the circumstances of the complainant should have caused the applicant seeking benefits to believe there was insurance on the vehicle. For example, ICBC cited *Chamberlin v. Insurance Corporation of British Columbia*, *2005 BCSC 1074*, where the court found it was reasonable that the insured relied on her husband to renew the insurance every year, even though he had forgotten to do so before the accident occurred. I do not find these cases are analogous to the case before the Court and I do not accept this argument.

104 ICBC compares the requirements of consent under s. 91 of the *Act* with implied consent under s. 86 of the *Motor Vehicle Act, R.S.B.C. 1996, c. 318*. In support of this, ICBC cites *Godsman v. Peck (1997), 29 B.C.L.R. (3d) 37* (C.A.). This case is about consent. I have already concluded in the Reasons that neither Steven nor Brenda Hammond gave express or implied consent to Ms. Reeves to drive the Camaro. Having decided that consent was not given, any analysis of implied or other kinds of consent is not required.

105 This brings me to the English case of *White (A.P.) v. White and the Motor Insurers Bureau,* [2001] UKHL 9, on which ICBC relies on in interpreting the words "knew or ought to have known". The facts in *White* were that two brothers, Brian and Shane, were in a single motor vehicle accident in which Shane was driving and Brian was a passenger. Brian was seriously injured. Shane was found to be at fault for the accident. Shane was unlicensed to drive and did not have insurance. He could not pay his brother's claim. Brian did not know that his brother Shane was unlicensed. Brian knew that in the past his brother had driven without a license.

106 In Britain, all insurance companies are required to contribute to a fund to compensate victims who could not collect on their judgments for injuries, MIB. The obligations of MIB are not found in any act of parliament and therefore the scheme is entirely contractual: *White* at para. 7. The MIB is contractually permitted to reject a claim of compensation when a person voluntarily enters a vehicle and knows it was uninsured.

107 The court in *White* held that the phrase "ought to have known" includes "where a passenger gave no thought to the question of insurance, even though an ordinarily prudent person, in his position and with his knowledge, would have made enquiries": para. 17. Based on *White,* ICBC submits that "ought to have known" will also cover

the situation where the person gave some thought to the question of consent but carelessly failed to make reasonable inquiries.

108 Although the scheme in *White* is contractual; in this case, this scheme is legislative. However, their purposes are the same, which is to provide minimum compensation to persons injured in automobile accidents where the vehicle or driver is not insured. I am not bound by *White*, but I find it persuasive as to how s. 91 should be interpreted.

HANSARD

109 In absence of any caselaw on point, I shall also examine legislative debates relevant to s. 91.

110 In support of considering extrinsic evidence, which includes the *Hansard* debates, *Sullivan* states:

> s23.4 This chapter begins by suggesting reasons why extrinsic aids might appropriately be relied on in interpretation: because they are part of the legal context; because they offer evidence or external context; because they are a source of authoritative opinion about the meaning or purpose of legislation; because they are part of the understanding on which legislation was enacted. This is followed by consideration of whether extrinsic materials should be consulted even if the legislative text appears to be plain rather than ambiguous. The chapter then reviews the rules governing the admissibility and use of extrinsic aids under the following headings: (1) legislative evolution (2) legislative history; (3) legal scholarship; (4) administrative interpretation; and (5) judicial interpretation.

111 Arising from legislative history, *Sullivan* refers to the exclusionary rule, which she defines at s.23.59 and s.23.60. *Sullivan* states:

> s23.61 This way of thinking is evident in the remarks of Muldoon J. in *Ru- parel v. Canada (Minister of Employment & Immigration).* In support of a particular interpretation of the *Immigration Act*, counsel invited the court to examine the remarks made by the Minister of Employment and Immigration upon moving for second reading of the Act. Muldoon J. refused for several reasons, including the following:
>
> > Other good reasons for rejecting speeches in Parliamentary debates is that they are not law, they sometimes misstate the law, and are frequently made for partisan advantage or public effect. In the instant example, whereas the Minister proudly mentioned [a particular point] (*Hansard*, at page 3075) ..., the Opposition spokesman ... in welcoming the proposed reforms (*Hansard,* at page 3078) chose to ignore that [point]... Whose version, in one chamber of the bicameral Parliament, can be said to unlock any secrets of interpretation?

112 Further objections are listed by *Sullivan* such as having ministers, members, and bureaucrats who cannot speak for the Legislature as a whole make points about the legislation in question. Additional concerns include the loss of materials and the assessment and the reliability of the materials.

113 However, *Sullivan* states that using legislative history to interpret an enactment may be justified:

> s23.66 The theoretical objections to the use of legislative history are more difficult to answer, but there are number of ways in which their use can be justified. First, it may be plausible in particular circumstances to conclude that a provision was enacted by the legislature on the understanding expressed by a Minister or contained in some other material comprising legislative history. As a corporate entity, the legislature can express itself only through legislation, but it can hear and read and respond to whatever is put before it. This includes not only statements made on the floor of the legislature, but any materials involved in the legislative process. In the case of legislation dealing with technical matters, it may include information supplied by experts in the field.
>
> s23.67 Second, the courts regularly rely on the opinions of other interpreters. Although such opinions are not binding, they may have considerable persuasive force. Because participants in the legislative process regard legislation from a unique vantage point, as insiders, their opinions about the meaning or purpose of an enactment may be worth taking into account. Of course, some opinions are more authoritative than

> others. In a Parliamentary system of government, there is likely to be a relatively small number of individuals whose intentions largely control the content of legislative initiatives. In the case of statutes, this would include the recommending Minister, who will reflect the views of Cabinet; it would also include the Parliamentarians who comprise a majority of the Committee that reviews the bill. In the case of regulations, at the federal level, it would include the bureaucrats who prepare the regulatory impact assessment ' statement that is published with the regulations.

114 The courts have stated that extrinsic evidence such as *Hansard* can be used to assist the court in resolving an ambiguity to determine why the Legislature was enacting certain legislation: *Bingo City Games Inc. v. B.C. Lottery Corp*., 2005 BCSC 25.

115 In *Rizzo*, Iacobucci J. used the legislative debates in Ontario to support his position in interpreting the *Ontario Employment Standards Act.* He stated:

> [34] This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA.* With regard to the new severance pay provision he stated:
>
> > The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
> >
> > . . .
> >
> > . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.
> >
> > (*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)
>
> Moreover, in the legislative debates regarding the proposed amendments the Minister stated:
>
> > For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.
> >
> > (*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)
>
> [35] Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:
>
> > . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

116 The Supreme Court of Canada in *Canada 3008 Inc., Re: Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, reconfirmed *Rizzo,* when Justice Binnie referred to *Hansard* for the legislative history of an enactment:

> [57] Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 35; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484. In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it clear that Parliament did not intend *CANSCA* to replace or override the existing regulatory framework but rather to fit cohesively within it. In introducing *CANSCA*, the Minister of Transport stated that the Aeronautics Act, which establishes the essential regulatory framework to maintain safety in the aviation industry, "will always take precedence over the commercialization legislation" (*House of Commons Debates,* March 25, 1996, at p 1154). In the Ontario Court of Appeal, Cronk J.A. highlighted a number of other instances where

government spokespersons emphasized to Members of Parliament that *CANSCA* was to fit within the existing regulatory framework which generally favours the narrow meaning of "owner"; see, e.g. *House of Commons Debates*, May 15, 1996, at p. 2834; May 29,1996, at p. 3144; June 4, 1996, at pp. 3394 and 3410; and Debates of the Senate, June 10, 1996, at pp. 588-89.

[58] In 1985, during passage of the *Aeronautics Act*, a concern was raised in Parliament that liability under s. 4.4(5) (that Act's liability provision) could extend to legal titleholders. In response, the Government inserted the term "registered owner". The Parliamentary Secretary to the Minister of Transport specifically stated that the change was made to ensure that liability did not extend to those who had a security or other financial interest in the aircraft; *House of Commons Debates*, vol. IV, 1st Sess., 33rd Parl., June 20, 1985, pp. 6065-66.

[59] In 1996, the Government considered Bill C-20 (which became *CANSCA*) as it transferred the operation of the civil navigation system from Transport Canada to NAV Canada. The Clause by Clause Analysis brief presented to the Senate Committee explained that s. 55 is based on the wording of the equivalent section of the *Aeronautics Act* which, as stated, restricts "owner" to *registered owner*; see "Clause by Clause Analysis for the *Civil Air Navigation Services Commercialization Act*", as presented to the Senate Committee on Transport and Communications, at pp. 51-52. However, the textual discrepancy noted above was not addressed.

117 Although it is of limited weight, I find that I can look to the statements of the Legislature in the *Hansard* debates.

What was the intention of the legislature when ss. 19.2(1) and (2) were enacted (now s. 91 of the *Act*)?

118 In 1997, the British Columbia legislature enacted ss. 19.1 and 19.2 under the *Traffic Safety Statutes Amendment Act,* S.B.C. 1997, c. 43, s. 51. The sections read as follows:

Limitation on recovery for acts of violence

19.1 If the dominant cause of any injury or death is the use of any weapon or any object, other than a motor vehicle or trailer, used as a weapon,

(a) the corporation is not liable under this Act or the regulations, including, without limitation, under section 20, 21 or 24 or under the plan established under this Act and the regulations, to indemnify or to pay any benefit to or make any other payment to

(i) the person using the weapon or object,

(ii) the person suffering the injury or death, or

(iii) a spouse, child, parent or personal representative of a person referred to in subparagraph (i) or (ii), and

(b) the person using the weapon or object is not a designated defendant, as that term is defined in section 52, for the purposes of Part 3.

Limitation on recovery in relation to stolen motor vehicles

19.2 (1) This section applies to a person who

(a) suffered injury, death or loss of or damage to property that arises out of the use or operation of a motor vehicle, and

(b) at the time of the accident as a result of which the injury, death or loss of or damage to property was suffered, was an operator of, or a passenger in or on, a motor vehicle that the person knew or ought to have known was being operated without the consent of the owner.

(2) Despite the *Negligence Act* and section 56 of this Act,

(a) if 2 or more persons are found at fault for the injury, death or loss of or damage to property referred to in subsection (1), they are liable to the person referred to in that subsection for any damages awarded for that injury, death or loss of or damage to property in the degree to which they are respectively found to have been at fault and are not liable to make contribution to and indemnify each other respecting that liability or any payment made in relation to it, and

(b) a person referred to in subsection (1) is not entitled to any recovery from the corporation under section 20.

119 Both ss. 19.1 and 19.2 were repealed in 2003 by the *Insurance (Motor Vehicle) Amendment Act,* S.B.C. 2003, c. 94, s. 14. Section 91 was enacted in their place.

120 When s. 19.2 was repealed and s. 91 was enacted in its place, there was no mention of the section by the Legislature. However, given the similarly of the two sections, the discussion of the provision when it was first enacted as s. 19.2 is applicable to s. 91. There was extensive discussion surrounding the enactment of s. 19.2 when the *Traffic Safety Statue Amendment Act* was before the Legislature.

121 During the First Reading, during the afternoon of June 17, 1997, the Honourable A. Petter (the member responsible for the bill) said that the bill was designed to take aim at auto crime and fraud, and the scheme represented "the most aggressive road safety program ever, aimed at making B.C. roads safer, reducing auto theft and fraud, and keeping auto insurance rates affordable."

122 During the Second Reading, in the morning of July 22, 1997, Hon. A. Petter stated the following:

> We will be greatly reducing insurance protection for those who participate in auto theft, including those who are passengers and a party to auto theft. From now on, any person who knows or ought to know that a car is stolen will not be eligible for future wage loss from ICBC.

123 The most extensive discussion of the provisions of 19.2 occurred during the Committee stage, which took place during the afternoon of July 24, 1997. I include significant portions of what was said in support of s. 19.2.

> ...
>
> **Hon. A. Petter:** Again, an example for me helps to explain the policy issue and how it has been defined here. If you have a situation where two or three individuals have, in concert, in a common enterprise decided to steal a car, and one happens to be the driver and then gets into an accident, right now the others can sue the driver, if the driver is at fault, and recover, with ICBC having to provide full insurance coverage as though the driver were being sued by an innocent party. What this does is, it says no. That person in the passenger seat who undertook that criminal activity knowingly and as a participant, accessory or what have you should be no better off than the driver -- should be able to recover the same limited benefits that are available, but should not be treated as an innocent bystander or participant as, say, a pedestrian or someone in another car.
>
> That does send a strong signal that when people enter into a course of conduct, particularly the stealing of a car, which is the most common in the circumstance we're thinking of here, they run the risks. Whether they're behind the driver's seat or they're encouraging that activity by sitting in the passenger's seat or indeed in the back seat, they should run the same risks. They should not be able to position themselves as though they were some kind of innocent party outside the enterprise that caused the accident.
>
> Again, these are choices that are made. But I think this is a move in the right direction from a public policy point of view -- albeit it will have some small saving in monetary terms to ICBC, as well, but in my view that's not the primary motivation.
>
> **G. Plant:** I want to make one other point in this context, although it's really just by way of an observation on the challenge that will face the courts. One of the phenomena in legislation that I find most interesting is the phenomenon of unintended consequences. The operation of this limitation is conditional on a situation arising where the vehicle is being used without the consent of the owner. Of course, there already is a long tradition in insurance law, including ICBC insurance law in British Columbia, of cases around the question

> of whether or not a motor vehicle is being used with or without the consent of the owner. I hope this section will be construed by the judiciary purposively, in a way which does not encourage some kind of accidental new industry around litigating consent in this context, because that would be unfortunate and, hopefully, will not come to pass.
>
> I guess the other issue is that there are two ways that you can deal with limiting recovery. One is that you can limit a person's right to recover at law -- that is, you can limit the liability of somebody altogether. The second way you can deal with it is to limit the Insurance Corporation's obligation to indemnify people in respect of those situations. That would leave the person, who for the sake of this argument I'll call the innocent victim - - although that may be an incorrect description -- with the option to still pursue the person who was negligent and to take his or her chances with respect to whether or not that individual had any assets that would be worth trying to recover at the end of the day.
>
> It looks to me that this section makes a public policy decision to limit recovery generally rather than to limit the right of action against the corporation. But that's only because I haven't yet read my way all the way through section 19.2(2)(a). It may be that (2)(b) moves us exactly into the second category. Because this is the only opportunity I'll have to get public clarification of that, could I have the minister's confirmation of which of these two categories we're in here?
>
> **Hon. A. Petter:** No, in fact the choice that has been made is the other choice that the member outlined. It's illustrated in 19.2(2)(b), where it says: ". . .a person referred to in subsection (1) is not entitled to any recovery from the corporation under section 20."
>
> So let's take the circumstance, and I'll see if I get it right. My officials will no doubt tell me if I don't. In the circumstance I outlined, if the driver were insured, the passenger would not be able to recover against that driver's insurance. If the driver were not insured, the passenger would not be able to recover against ICBC, based on the uninsured-motorist protection. That may be the confusion here. But if the driver has the means and the passenger has the will to pursue a private action, then as I understand it, there's nothing here that prevents that from happening.
>
> What's being prevented is the kind of coverage in which the corporation would stand behind the insurance risk of the driver. In the two instances I've given, what this section says is that the corporation will not provide insurance on behalf of the driver either as an uninsured motorist or as an insured motorist, in those circumstances.
>
> **G. Plant:** Picking up on that, the first question that occurs to me is: what, then, is the purpose of subsection 19.2(2)(a)? I don't want to try and unpack all of it. But am I right that it has something to do with the rules of contributory negligence around apportioning fault and ensuring that the innocent victim in this case doesn't have the ability to get through the back door that which we're trying to prevent him from getting through the front door?
>
> **Hon. A. Petter:** What paragraph 19.2(2)(a) does is simply ensure that the liability is several, so that you cannot visit the liability upon -- a term the member will appreciate -- the party with deep pockets. You have to in fact visit it according to the apportionment of liability.
>
> [My emphasis]

124 These comments make it clear that ICBC will no longer provide compensation to people injured in a motor vehicle accident who participate in theft of a car or should have known the car was stolen.

125 The plaintiff argues that legislative history, including *Hansard,* has been relied upon by the Supreme Court of Canada to determine legislative intent. She referred to *H.L. v. Canada (Attorney General)*, *2005 SCC 25*, for this proposition.

126 The issue before the Supreme Court of Canada in *H.L.* was the applicable standard of appellate review on questions of fact in Saskatchewan. In *H.L.*, the Court referred to Saskatchewan *Hansard* for the purpose of the enactment in question, which was "to update and clarify some of the provisions": para. 105. The Court cited

statements from *Hansard* where the Legislature said the act in question "doesn't change the jurisdiction of the Court of Appeal in any way, it simply restates the historical jurisdiction of the court in a way that can be understood by users of the Act": para. 10. Mr. Justice Fish for the Court said:

> [106] Though of limited weight, *Hansard* evidence can assist in determining the background and purpose of legislation: *Rizzo & Rizzo Shoes Ltd. (Re)*, *[1998] 1 S.C.R. 27*, at para. 35. In this case, it is particularly apposite, since it was contended by the Attorney General for Saskatchewan, an intervener in this Court, that the legislature's purpose in revising *The Court of Appeal Act* was to "clarify" that the Court of Appeal was to be placed "in a position of conducting an appeal by rehearing".

127 The plaintiff argues in this case that *Hansard* makes it certain and unequivocal that the enactment was directed at a passenger who was in injured in the course of the common enterprise with the driver to steal a car.

128 The plaintiff concludes that s. 91 is directed at "depriving a person of insurance coverage who was involved in criminal activity".

129 ICBC's position is that *Hansard* is not admissible in this case. Even if it is admissible, it is not useful for interpretation, but is only relevant as to the background and the purpose of the legislation. ICBC argues *Hansard* is not intended to be direct evidence used interpret legislation: *Rizzo* at paras. 35, 40, and *Reference Re: Firearms Act (Can)*, 2000 SC 31 at para. 17. ICBC argues that *Hansard* cannot be used to override plain language or read additional requirements into legislation: *R. v. McDonald*, *2012 BCCA 475* at para 14. I note the *McDonald* case does not consider *Hansard* debates, but another form of extrinsic evidence.

130 ICBC argues that in Mr. Petter's words in *Hansard* are not just focussed on stealing cars, but on situations other than stealing a car.

131 Ms. Schoenhalz is correct that the discussion in *Hansard* was focussed on stolen vehicles. It provides background to the passing of the legislation. However, given the clear text of s. 91, I find that I do not need to resort to the *Hansard* debates to interpret the section. However, even after a consideration of *Hansard,* there is nothing in the legislative discussion to indicate the legislation is limited to stolen vehicles. It is intended to prevent recovery when a party was injured while in a vehicle they knew or ought to have known was being driven without the consent of the owner, which naturally includes stolen vehicles.

DECISION

132 I conclude that the wording of s. 91 is clear and unambiguous. A driver who knows that the vehicle is being driven at the time of the accident without the consent of the owner cannot make a claim for compensation from what is known as the Uninsured Motorist Protection Fund which arises from s. 20 of the *Act*. Whether or not the vehicle is stolen is not determinative.

133 However, in these unusual circumstances, I find that ICBC has failed to discharge its burden to prove that Ms. Schoenhalz knew or ought to have known Ms. Reeves did not have permission of the owner to drive the vehicle.

134 "Knew or ought to have known" needs to be interpreted from Ms. Schoenhalz's perspective. Both Ms. Schoenhalz and Ms. Reeves were of the belief that Steven owned the car. The basis of this belief was reasonable, in that Ms. Schoenhalz had been in the vehicle before with Ms. Reeves, Luke and Steven. On the day of the accident, she was picked up and rode in the Camaro with Luke driving and Ms. Reeves and Steven as passengers. Ms. Schoenhalz did not know that Ms. Hammond was the owner, and there was no evidence before me that should have indicated to Ms. Schoenhalz that Steven was not the owner.

135 It is important to my decision that both Ms. Reeves and Ms. Schoenhalz thought Steven owned the car. While this does not affect my decision regarding liability, it is entirely relevant to the operation of s. 91. Section 91 asks the court to examine what the claimant, in this case Ms. Schoenhalz, knew or ought to have known about consent to

operate the vehicle. Therefore, as Ms. Schoenhalz's counsel suggests, I must approach s. 91 from her perspective, both subjectively and objectively.

136 I reiterate that ICBC has the burden of proving of a balance of probabilities that Ms. Schoenhalz knew or ought to have known Ms. Reeves did not have consent of the owner to drive the car.

137 I find that ICBC has not proven that Ms. Schoenhalz subjectively knew Ms. Reeves did not have the consent of the owner to operate the vehicle.

138 The more difficult question is whether ICBC has proven that an ordinary and prudent 17 year old girl, in Ms. Schoenhalz's position and with her knowledge, should have known Ms. Reeves did not have permission to drive the car. I reiterate once again that Ms. Schoenhalz reasonably believed Steven was the owner. ICBC has not proven that it would be unreasonable for a 17 year old girl to accept that Luke, who had driven the vehicle and maintained possession of the keys, could give them Steven's permission to drive the car. It seems reasonable that a young girl would believe that Luke, the eldest of the group, was able to give them Steven's permission when he directed them to take the car. I am not saying this would be a reasonable assumption for an adult to make. It surely would not. I limit my findings to Ms. Schoenhalz's specific circumstances. In this case, I find ICBC has not proven that Ms. Schoenhalz should have known Ms. Reeves did not have permission to drive the car.

139 Essential to my decision is the fact that both Ms. Schoenhalz and Ms. Reeves were incredibly young at the time of the accident. I find that the statement in para. 17 in *White*, where the court stated that the phrase 'ought to have known' encompassed "where a passenger gave no thought to the question of insurance, even though an ordinarily prudent person, in his position and with his knowledge, would have made enquiries" is helpful in my interpretation of s. 91. In my opinion, ICBC has not met the burden of proving that an ordinarily prudent 17 year old girl will turn their mind to the question of consent when asked to drive a car.

140 This situation is factually distinct from *White,* where I infer the two men were older. I note that Shane, the driver, had actually been disqualified from driving. It appears the brothers had a history of intentional illegal and uninsured driving, which they had discussed amongst themselves: para. 18. It seems logical to infer that the brothers in *White* clearly understood the implications of unlicensed driving and the operation of vehicle insurance.

141 In conclusion, the unique factual circumstances of this case, where I must consider the mental state of a very young girl, bring me to my decision. I find that ICBC has not proven that Ms. Schoenhalz's claim is barred by s. 91.

ORDER

142 The plaintiff's action is allowed with costs, pursuant to Appendix B, Scale B of the *Rules*, after their assessment.

H. HYSLOP J.

End of Document

Canada (Minister of Citizenship and Immigration) v. Vavilov

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, C. Gascon, S. Côté, R. Brown, M. Rowe and S.L. Martin JJ.

Heard: December 4, 5, 6, 2018;

Judgment: December 19, 2019.

File No.: 37748.

[2019] S.C.J. No. 65 | [2019] A.C.S. no 65 | 2019 SCC 65 | [2019] 4 S.C.R. 653 | 2020EXP-27 | 441 D.L.R. (4th) 1 | 59 Admin. L.R. (6th) 1 | 69 Imm. L.R. (4th) 1 | EYB 2019-335761 | 2019 CarswellNat 7883

Minister of Citizenship and Immigration, Appellant; v. 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

(343 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Administrative law — Judicial review and statutory appeal — Standard of review — Reasonableness — Appeal from Federal Court of Appeal judgment setting aside decision of Canadian Registrar of Citizenship (Registrar) cancelling Vavilov's certificate of citizenship, dismissed — Revised framework for determining standard of review began with presumption that reasonableness was applicable standard in all cases — Reviewing courts should derogate from this presumption only where required by clear indication of legislative intent or by rule of law — In conducting reasonableness review, court had to consider outcome of administrative decision in light of its underlying rationale to ensure transparency, intelligibility and justification — Section 3 of Citizenship Act did not intend s. 3(2)(a) to apply to children of individuals who had not been granted diplomatic privileges and immunities — Registrar's failure to justify decision with respect to these constraints rendered interpretation unreasonable — No purpose would be served by remitting this matter to Registrar — Vavilov was Canadian citizen.

Immigration law — Naturalization or citizenship — Right to citizenship — Persons born in Canada — Loss of or disqualification from citizenship — Appeals and judicial review — Citizenship Act and Regulations — Interpretation — Appeal from Federal Court of Appeal judgment setting aside decision of Canadian Registrar of Citizenship (Registrar) cancelling Vavilov's certificate of citizenship, dismissed — Revised framework for determining standard of review began with presumption that reasonableness was applicable standard in all cases — Reviewing courts should derogate from this presumption only where required by clear indication of legislative intent or by rule of law — In conducting reasonableness review, court had to consider outcome of administrative decision in light of its underlying rationale to ensure transparency, intelligibility and justification — Section 3 of Citizenship Act did not intend s. 3(2)(a) to apply to children of individuals who had not been granted diplomatic privileges and immunities — Registrar's failure to justify decision with respect to these constraints rendered interpretation unreasonable — No purpose would be served by remitting this matter to Registrar — Vavilov was Canadian citizen.

Appeal from a judgment of the Federal Court of Appeal setting aside a decision of the Canadian Registrar of Citizenship (Registrar) cancelling Vavilov's certificate of citizenship. Vavilov was born in Canada and his parents were later revealed to be Russian spies. The Registrar found, on the basis of an interpretation of s.á3(2)(a) of the Citizenship Act, that Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the Citizenship Regulations. The Court viewed the appeal as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in Dunsmuir and subsequent cases.
HELD: Appeal dismissed.

Reasonableness review was an approach meant to ensure that courts intervene in administrative matters only where it was truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point was the principle of judicial restraint and respect for the distinct role of administrative decision makers. However, it was not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remained a robust form of review. In conducting a reasonableness review, a court had to consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole was transparent, intelligible and justified. The Court should 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. The standard of review analysis required courts to give effect to the legislature's institutional design choices to delegate authority through statute. There was no convincing reason to presume that legislatures meant something different when they used the word "appeal" in an administrative law statute than they did in a criminal or commercial law context. Respect for the rule of law required 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. Written reasons were the means by which the decision maker communicated the rationale for its decision. A principled approach to reasonableness review was one which put those reasons first. To be reasonable, a decision had to be based on reasoning that was both rational and logical. A failure in this respect could lead a reviewing court to conclude that a decision must be set aside. The decision also had to be justified in relation to the relevant constellation of law and facts. Whether an interpretation was 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. Where the reasonableness standard was applied in conducting a judicial review, the choice of remedy had to be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature had entrusted the matter to the administrative decision maker, and not to the court, to decide. Applying this analysis, the standard to be applied in reviewing the merits of the Registrar's decision in this case was reasonableness. The Registrar failed to justify her interpretation of s.á3(2)(a) of the Citizenship Act in light of the constraints imposed by the text of s.á3 as a whole, by other legislation and international treaties that informed the purpose of s. 3, by the jurisprudence on the interpretation of s.á3(2)(a), and by the potential consequences of her interpretation. It was unreasonable for the Registrar to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applied to individuals who had not been granted diplomatic privileges and immunities in Canada. Vavilov's parents had not been granted such privileges and immunities. Rules concerning citizenship

required a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. Since Vavilov's parents, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. As a person who was born in Canada after February 14, 1977, Vavilov's status was governed only by the general rule set out in s. 3(1)(a) of the Citizenship Act. He was a Canadian citizen.

Statutes, Regulations and Rules Cited:

Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of QuÚbec with respect to applications for appeal, Bill 32, 1st Sess., 42nd Leg., Quebec, 2019,

Administrative Tribunals Act, S.B.C. 2004, c.á45, s. 58, s. 59

Canadian Charter of Rights and Freedoms 1982, s. 1

Canadian Citizenship Act, R.S.C. 1970, c.áC19, s. 5(3)

Citizenship Act, *R.S.C. 1985, c. C29, s. 3*, s. 10, s. 22.1-22.4

Citizenship Regulations, SOR/93246, s. 26

Constitution Act, 1867, s. 96

Constitution Act, 1982, s. 35

Federal Courts Act, R.S.C. 1985, c.áF7, s. 18-18.2, s. 18.4, s. 27, s. 28

Foreign Missions and International Organizations Act, S.C. 1991, c.á41, s. 3, s. 4, Sch. I,II s. 1, Sch. I,II s. 41, Sch. I,II s. 43, Sch. I,II s. 49, Sch. I,II s. 53

Human Rights Code, R.S.B.C. 1996, c.á210, s. 32

Immigration and Refugee Protection Act, S.C. 2001, c.á27, s. 35-37

Interpretation Act, R.S.C. 1985, c.áI21, s. 35(1)

Municipal Government Act, R.S.A. 2000, c.áM26, s. 470

Ontario Human Rights Code, 196162, S.O. 196162, c.á93, s. 3

Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, 500 U.N.T.S. 223, art. II

Vienna Convention on Consular Relations, Can. T.S. 1974 No.á25,

Vienna Convention on Diplomatic Relations, Can. T.S. 1966 No.á29,

Subsequent History:

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

Court Catchwords:

Administrative law -- Judicial review -- Standard of review -- Proper approach to judicial review of administrative decisions -- Proper approach to reasonableness review.

Citizenship -- Canadian citizens -- Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies -- Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen -- Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth -- Whether Registrar's decision to cancel certificate of citizenship was reasonable -- Citizenship Act, R.S.C. 1985, c. 29, s. 3(2)(a).

Court Summary:

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per **Wagner** C.J. and **Moldaver**, **Gascon**, **Côté**, **Brown**, **Rowe** and **Martin** JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldly and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. 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 fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, 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. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

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 to apply. This will be the case where it has explicitly prescribed the applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for 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. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of 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. Second, there is no satisfactory justification for the recent trend in the Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. 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. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal 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. First, 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. Second, 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 because they require uniform and consistent answers. Third, 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 since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore 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.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category 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 this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, 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 administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is 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. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified.

In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. 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. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. 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. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because 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. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken 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. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, 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 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, are all elements that will generally be relevant in evaluating whether a given decision

is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. 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. 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. 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.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. 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.

Furthermore, 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. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, 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. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. 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.

The question of the appropriate remedy -- specifically, 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 - - is multi-faceted. The choice of remedy must be guided by the rationale for applying the reasonableness 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, 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. 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 for reconsideration with the benefit of the court's reasons. However, 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. An intention that the administrative decision maker decide the matter at first

instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. 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 efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. 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 administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, 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 V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies -- its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per **Abella** and **Karakatsanis** JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of

jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for deference. 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 fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

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 and reads out the foundations of the modern understanding of legislative intent. Instead of 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. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. 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. Specialized expertise has become the core rationale for deference. 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. Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. In interpreting their enabling statutes, 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. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting *de novo* review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument -- i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with

the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the 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 of *stare decisis*. 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 societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. 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 hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision. Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. 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. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the

decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and 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, among other factors. Third, deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and 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. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of 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 to ensure they go to the reasonableness of the decision rather than representing a mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading 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. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Stratas, Webb and Gleason JJ.A.), *2017 FCA 132*, *[2018] 3 F.C.R. 75*, *52 Imm. L.R. (4th) 1*, *30 Admin. L.R. (6th) 1*, [2017] F.C.J. No. 638 (QL), *2017 CarswellNat 2791* (WL Can.), setting aside a decision of Bell J., [2015 FC 960](), [2016] 2 F.C.R. 39, [38 Imm. L.R. (4th) 110](), [2015] F.C.J. No. 981 (QL), [2015 CarswellNat 3740]() (WL Can.). Appeal dismissed.

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Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

1 THE CHIEF JUSTICE R. WAGNER AND M.J. MOLDAVER, C. GASCON, S. COTÉ, R. BROWN, M. ROWE AND S.L. MARTIN JJ. This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66), 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: that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

3 We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a)

of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

I. Need for Clarification and Simplification of the Law of Judicial Review

4 Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

5 Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

6 In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

7 The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *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, at para. 13; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, 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 *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, 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, at para. 32; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 ("*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*, at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

10 This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

11 The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.

12 These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

13 Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

14 On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" *(2014), 64 U.T.L.J. 458*, at pp. 467-70.

15 In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

II. Determining the Applicable Standard of Review

16 In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

17 The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

18 Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Canada (Attorney General) v. Bedford*, *2013 SCC 72*, *[2013] 3 S.C.R. 1101*, at para. 47; *Canada v. Craig*, *2012 SCC 43*, *[2012] 2 S.C.R. 489*, at paras. 24-27; *Ontario (Attorney General) v. Fraser*, *2011 SCC 20*, *[2011] 2 S.C.R. 3*, at paras. 56-57 and 129-31, 139; *R. v. Henry*, *2005 SCC 76*, *[2005] 3 S.C.R. 609*, at paras. 43-44; *R. v. Bernard*, *[1988] 2 S.C.R. 833*, at pp. 849-50.

19 On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), 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: *Minister of Indian Affairs and Northern Development v. Ranville*, *[1982] 2 S.C.R. 518*, at p. 528; *Bernard*,

at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law": *Bernard*, at p. 858. These considerations apply here.

21 Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in *Dunsmuir*, at para. 133, are still apt:

> [J]udicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied ... . If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis] ... . A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome ... .

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review." While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

22 As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. *Presumption That Reasonableness Is the Applicable Standard*

23 Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

24 Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 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. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 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 Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 50-53; *Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Dunsmuir*, at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach, which was first set out in *Bibeault*, a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 28-29; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at paras. 28-32; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 50.

28 Unfortunately, this contextual analysis proved to be unwieldly and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

29 Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

30 While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-

making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

31 We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

32 That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

B. *Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent*

33 This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, *2003 SCC 29*, *[2003] 1 S.C.R. 539*, 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*, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, *2011 SCC 52*, *[2011] 3 S.C.R. 422*, at para. 20; *Moore v. British Columbia (Education)*, *2012 SCC 61*, *[2012] 3 S.C.R. 360*, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, *2014 SCC 39*, *[2014] 2 S.C.R. 108*, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, *2016 SCC 25*, *[2016] 1 S.C.R. 587*, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, *2017 SCC 62*, *[2017] 2 S.C.R. 795*, 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": *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

37 It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 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) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, at paras. 36-46; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311, 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, 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, at paras. 250, 255-64 and 274-302 (CanLII), per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paras. 9-14 (CanLII). 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, 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, 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, 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; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, 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: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [*[1985] 1 S.C.R. 831*](), at p. 838.

46 Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative expertise -- what it called the "specialization of duties" principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

47 The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

48 Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada's judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied "sparingly" (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was "all but complete": reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita*, at para. 35; *McLean*, at para. 22; *Edmonton East*, at para. 32; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [*2012 SCC 35*](), [*[2012] 2 S.C.R. 283*](), at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir*. A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

49 In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal

mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

50 We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

51 Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, *R.S.A. 2000, c. M-26*, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

52 Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

C. *The Applicable Standard Is Correctness Where Required by the Rule of Law*

53 In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

54 When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account -- and indeed, it may find that reasoning persuasive and adopt it -- the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

55 Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [*[1998] 1 S.C.R. 322*](#).

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 v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, 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., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, 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, at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

59 As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, 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, at para. 17; *Saguenay*, at para. 51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, 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., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 66; *McLean*, at para. 28; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, 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 (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, 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. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, 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; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, 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, Texas v. Federal Communications Commission*, 569 U.S. 290 (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**; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

67 In *CHRC*, the majority, while noting this inherent difficulty -- and the negative impact on litigants of the resulting uncertainty in the law -- nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category -- in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority -- can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

68 Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker -- perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms -- and has provided no right of appeal to a court -- the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" ... .

E. *Other Circumstances Requiring a Derogation from the Presumption of Reasonableness Review*

69 In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

70 However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

71 The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level -- such that a statute comes to mean, simultaneously, both "yes" and "no" -- the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

72 We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, 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 *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, 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, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 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 v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

78 In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

79 Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, 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 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, *2011 SCC 62*, *[2011] 3 S.C.R. 708*, 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 and Immigration)*, *2002 SCC 1*, *[2002] 1 S.C.R. 3*, 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*, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *[1997] 3 S.C.R. 3*, 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*, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker -- including both the rationale for the decision and the outcome to which it led -- was unreasonable.

84 As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

85 Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court

to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

86 Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

87 This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, 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**, at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, 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**, at para. 53.

90 The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each

decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

D. *Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given*

91 A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

92 Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge -- nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision -- indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

93 An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

94 The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

95 That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

96 Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so

would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

97 Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, 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, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness -- justification, transparency and intelligibility -- and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

100 The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It

would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

101 What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

102 To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, *2014 FC 750*, *27 Imm. L.R. (4th) 151*, 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 11*, *23 Admin. L.R. (6th) 110*; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Citizenship and Immigration)*, *2016 FC 17*, at para. 21 (CanLII)) 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 *Blas v. Canada (Citizenship and Immigration)*, *2014 FC 629*, *26 Imm. L.R. (4th) 92*, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, *2015 ONSC 6578*; *Lloyd v. Canada (Attorney General)*, *2016 FCA 115*, *2016 D.T.C. 5051*; *Taman v. Canada (Attorney General)*, *2017 FCA 1*, *[2017] 3 F.C.R. 520*, at para. 47).

104 Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

105 In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

106 It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme;

other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

107 A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

108 Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [*[1959] S.C.R. 121*](), 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 (City) v. Montreal Port Authority*, [*2010 SCC 14*](), [*[2010] 1 S.C.R. 427*](), 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 Limited*, [*2010 FCA 193*](), [*[2011] 4 F.C.R. 203*](), at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

109 As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

110 Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language -- for example, "in the public interest" -- it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an

administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) *Other Statutory or Common Law*

111 It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, 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, 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, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

(c) *Principles of Statutory Interpretation*

115 Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

116 Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

117 A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, 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. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

121 The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior -- albeit plausible -- merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

122 It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, 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., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

125 It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

126 That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

(e) *Submissions of the Parties*

127 The principles of justification and transparency require that an administrative decision maker's reasons

meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

128 Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

129 Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker -- expectations that do not evaporate simply because the parties are not before a judge.

130 Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid ... conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

131 Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

132 As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a

correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) *Impact of the Decision on the Affected Individual*

133 It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

134 Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, *2002 SCC 3*, *[2002] 1 S.C.R. 84*.

135 Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. *Review in the Absence of Reasons*

136 Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

137 Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw ... clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

138 There will nonetheless be situations in which no reasons have been provided and neither the record nor the

larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

139 Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

140 Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

141 Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

142 However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, *2014 FCA 95*, at paras. 18-19 (CanLII). 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*, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, *[1999] 3 S.C.R. 855*; *Groia v. Law Society of Upper Canada*, *2018 SCC 27*, *[2018] 1 S.C.R. 772*, at para. 161; *Sharif v. Canada (Attorney General)*, *2018 FCA 205*, *50 C.R. (7th) 1*, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, *2017 FCA 45*, *411 D.L.R. (4th) 175*, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, *2017 ONCA 319*, at paras. 54 and 88 (CanLII). 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 (Fisheries and Oceans)*, *2010 SCC 2*, *[2010] 1 S.C.R. 6*, at paras. 45-51; *Alberta Teachers*, at para. 55.

IV. Role of Prior Jurisprudence

143 Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to

determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases -- including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis -- will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

144 This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

145 Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

V. Mr. Vavilov's Application for Judicial Review

146 The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act* and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

A. *Facts*

147 Mr. Vavilov was born in Toronto as Alexander Foley on June 3, 1994. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

148 Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

149 Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport,

learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

150 Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

151 However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the *Citizenship Act*, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the *Citizenship Regulations*.

B. *Procedural History*

(1) Registrar's Decision

152 In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the *Citizenship Regulations* on the basis that he was not entitled to it. The Registrar summarized her position as follows:

> a)Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.
>
> b)In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.
>
> c)As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".
>
> d)Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

153 For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the *Citizenship Act*. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

154 In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the

investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the *Citizenship Act*": A.R., Vol. I, at p. 3. The report was dated June 24, 2014.

155 In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the *Citizenship Act*, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the *Citizenship Act*, which reads as follows:

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

156 The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the *Interpretation Act* and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase "other representative or employee in Canada of a foreign government."

157 The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the *Canadian Citizenship Act,* R.S.C. 1970, c. C-19, excluded from citizenship children whose "responsible parent" at the time of birth was:

> (i) a foreign diplomatic or consular officer or a representative of a foreign
>
> government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

158 The analyst reasoned that because s. 3(2)(a) "makes reference to 'representatives or employees of a foreign government,' but does not link the representatives or employees to 'attached to or in the service of a foreign diplomatic mission or consulate in Canada' (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff'": A.R., vol. I, at p. 7.

159 Although the analyst acknowledged that "Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions", she concluded that they were nonetheless "unofficial employees or representatives" of Russia at the time of Mr. Vavilov's birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the *Citizenship Act*, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian

Registrar of Citizenship "recall" Mr. Vavilov's certificate on the basis that he was not, and had never been, entitled to citizenship.

(2) Federal Court (Bell J.), *2015 FC 960*, *[2016] 2 F.C.R. 39*

160 Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar's decision in the Federal Court pursuant to s. 22.1 of the *Citizenship Act*. His application was dismissed.

161 The Federal Court rejected Mr. Vavilov's argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court's view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

162 The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

163 Finally, the Federal Court was satisfied, given the evidence, that the Registrar's conclusion that Mr. Vavilov's parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

(3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), *2017 FCA 132*, *[2018] 3 F.C.R. 75*

164 A majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal from the Federal Court's judgment and quashed the Registrar's decision.

165 The Court of Appeal unanimously rejected Mr. Vavilov's argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal's view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

166 The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the *Citizenship Act* was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

167 The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in Canada of a foreign government" in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

168 The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

C. *Analysis*

(1) Standard of Review

169 Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

170 When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

(2) Review for Reasonableness

171 The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*.

172 In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements -- viewed individually and cumulatively -- strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

173 Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

(a) *Section 3(2) of the Citizenship Act*

174 The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of

the *Citizenship Act.* Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14, 1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

175 The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

176 As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) -- including those who are "employee[s] in Canada of a foreign government" -- must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

(b) *The Foreign Missions and International Organizations Act and the Treaties It Implements*

177 Before the Registrar, Mr. Vavilov argued that s. 3(2) of the *Citizenship Act* must be read in conjunction with both the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 ("*VCDR*"). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*.

178 To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: *Citizenship Act*, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the *Citizenship Act* as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the *Citizenship Act* to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that "[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation

of the law of the receiving State, acquire the nationality of that State". Mr. Vavilov made the following submission to the Registrar:

> The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.
>
> Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.

(A.R., vol. IV, at pp. 449-50)

179 In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L. R. (3d) 67, 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; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53- 54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, 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 and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; and *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 169 -- it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

184 In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

> The only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats ... .

185 The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi*, at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an

"extraordinary array of privileges under the *Foreign Missions and International Organizations Act*": *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of the *Charter*, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

186 In *Lee*, another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that "[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status": *Lee*, at para. 77. The court found in *Lee* that the "functional duties of the applicant's father" were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*: para. 58. Rather, what mattered was only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

187 *Hitti*, the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation Act*, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

188 What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi*, the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

(d) *Possible Consequences of the Registrar's Interpretation*

189 When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

> Well, usually the way we use section 3(2)(a) is for - you're right, for diplomats and that they don't -- because they are not -- they are not obliged ... to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status. But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that.
>
> (R.R. transcript, at pp. 87-88)

190 In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle

that individuals subject to the exception are "not obliged ... to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

191 Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, *[1997] 1 S.C.R. 358*, 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 and Immigration) v. Tobiass*, *[1997] 3 S.C.R. 391*, in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

192 It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies -- its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights -- that of citizenship under s. 3(1) in this case -- which otherwise benefit from a liberal and broad interpretation: *Brossard (Town) v. Québec (Commission des droits de la personne)*, *[1988] 2 S.C.R. 279*, at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

193 Moreover, we would note that despite following a different legal process, the Registrar's decision in this case had the same effect as a revocation of citizenship -- a process which has been described by scholars as "a kind of 'political death'" -- depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" *(2014), 40 Queen's L.J. 1*, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada's position with respect to Mr. Vavilov's citizenship and recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the *Citizenship Regulations* and the revocation of an individual's citizenship (as set out in s. 10 of the *Citizenship Act*) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

D. *Conclusion*

194 Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the *Citizenship Act* considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

195 As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination.

Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support -- including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself -- for the conclusion that Parliament did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

196 Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the *Citizenship Act*. He is a Canadian citizen.

E. *Disposition*

197 The appeal is dismissed with costs throughout to Mr. Vavilov.

The following are the reasons delivered by

R.S. ABELLA AND A. KARAKATSANIS JJ. (concurring)

198 Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, 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.

201 But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court's jurisprudence for the last four decades. The majority's reasons are an encomium for correctness and a eulogy for deference.

The Evolution of Canadian Administrative Law

202 The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

203 In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

204 The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts -- but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* *(1994), 17 O.R. (3d) 267* (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*, [1969] 2 A.C. 147, the judicial progenitor of "jurisdictional error". *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors" capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account.Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* [Emphasis added; p. 171.]

208 The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, *[1970] S.C.R. 425*, and *Bell v. Ontario Human Rights Commission*, *[1971] S.C.R. 756*. 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. Public Service Alliance of Canada*, *[1991] 1 S.C.R. 614*, 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 (Import Tribunal)*, *[1990] 2 S.C.R. 1324*, 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 (Citizenship and Immigration) v. Khosa*, *[2009] 1 S.C.R. 339*, at para. 45; *Alberta (Information and Privacy*

Commissioner) v. Alberta Teachers' Association, [2011] 3 S.C.R. 654, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, 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. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 800). As one scholar has observed:

> ... legislatures and courts in ... Canada have come to settle on the idea that the functional capacities of administrative agencies - their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change - justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state*. [Emphasis added.]
>
> (Stack, at p. 310)

212 In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada's approach to administrative law -- one based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

213 A new institutional relationship between the courts and administrative actors was thus being forged, based on "an understanding of the role of expertise in the modern administrative state" which "acknowledge[d] that judges are not always in the best position to interpret the law" (The Hon. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 Queen's L.J. 859, at p. 866).

214 In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 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" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 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 and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 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, at p. 591; see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, 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 Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

219 Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paras. 21 and 29-34; *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, at para. 45; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 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, at para. 53; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, 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, at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise ... (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

223 And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, 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. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219, and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80, 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 (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim*

and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

> [w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal ... . [para. 38]

227 In *Edmonton East*, the Court considered -- and again rejected -- the argument that statutory appeals should form a new category of correctness review. As the majority noted, "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies -- as the Court of Appeal did in this case -- would go against strong jurisprudence from this Court" (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that "a statutory right of appeal is not a new 'category' of correctness review" (para. 70).

228 By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* -- which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir*'s promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

> *This contextual approach should be applied sparingly*. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" ... . After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano* [*Edmonton East*], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano* [*Edmonton East*], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

229 In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir*, the meaning of "true questions of jurisdiction" and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

The Majority's Reasons

230 The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a "presumption of reasonableness review", this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as "expertise ... institutional experience ... proximity and responsiveness to stakeholders ... prompt[ness], flexib[ility], and efficien[cy]; and ... access to justice", the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

231 In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding

the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

232 Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 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) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, at para. 53). Specialization and expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan*, at para. 36; *Dr. Q* at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

233 All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.*, at p. 236; *McLean*, at para. 37). As Professor H.W. Arthurs said:

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.
>
> ("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

234 Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (*National Corn Growers*, at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.*, Dickson J. fused expertise and legislative intent by explaining that an administrative body's specialized expertise can be essential to achieving the purposes of a statutory scheme:

> The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

235 Over time, specialized expertise would become the core rationale for deferring to administrative decision-

makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, at para. 13; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 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 *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, at para. 53; *Edmonton East*, at para. 33).

239 The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates to expanded correctness review. The majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

240 In the majority's framework, deference gives way whenever the "rule of law" demands it. The majority's approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey's 19th century philosophy.

241 The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law" had to be "reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, 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, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the

particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

> ... the aims of administrative law ... generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.
>
> (Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

243 These goals are compromised when a narrow conception of the "rule of law" is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

244 The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room ... for both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" *(2014), 47 U.B.C. L. Rev. 443*, at p. 483). We would leave *Dunsmuir*'s description of this category undisturbed.[1]

245 We also disagree with the majority's reformulation of "legislative intent" to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

246 In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

247 The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, *[2002] 2 S.C.R. 235*, must be inflexibly applied to every right of "appeal" within

a statute -- with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it -- is entirely unsupported by our jurisprudence.

248 In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect.[2]

249 In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (*Pezim*, at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

250 Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done.[3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, *2019 SCC 66*, that, absent exceptional circumstances, the existence of a statutory right of appeal does not displace the presumption that the standard of reasonableness applies.[4] The majority, however, has inexplicably chosen the template proposed by the *amici*,[5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

251 The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal -- some in highly specialized fields, such as broadcasting, securities regulation and international trade -- will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal -- the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

252 Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque*, at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" *(2016), 62 McGill L.J. 527*, at pp. 542-43; The Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" *(2017), 68 U.N.B.L.J. 145*, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

253 The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa*, at para. 26).

The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence -- and desirability -- of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

254 But the aspect of the majority's decision with the greatest potential to undermine both the integrity of this Court's decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

255 *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Canada v. Craig*, [2012] 2 S.C.R. 489, 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, LLC.*, 135 S. Ct. 2401 (2015), at p. 2409; see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), at p. 266; *Kisor v. Wilkie*, 139 S. Ct. 2400 (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* (1977), 51 T.C. 708, at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617, at para. 19; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, at para. 7; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897, 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; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [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. Tennessee*, 501 U.S. 808 (1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 38; *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (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 v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465, 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, Governor of Pennsylvania*, 505 U.S. 833 (1992), at p. 866; see also *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981), at p. 153, per Stevens J., concurring.)

262 Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

> overruling precedent damages the public's conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble a ticket valid only for the day of purchase.
>
> ("Overruling Precedent" (1986), 21 *Is.L.R.* 269, at p. 275)

263 The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

264 The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons -- its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other

institutional advantages from the analysis. The lack of any justification for this foundational shift -- repeatedly invoked by the majority to sanitize further overturning of precedent -- undercuts the majority's stated respect for *stare decisis* principles.

265 The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal -- an approach rejected by several prior panels of this Court in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa*, at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque*, at para. 38; *Edmonton East*, at paras. 27-31; see also *McLean*, at para. 21).

266 Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer*, at para. 22; *Casey*, at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance" (*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (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; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678; *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; *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 57; see also *Nishi v. Rascal Trucking Ltd.*, [2013] 2 S.C.R. 438, 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, overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

269 The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean*, for example, this Court acknowledged that a limitations period in British Columbia's *Securities Act*[6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court

offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

270 The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; *Kimble*, at pp. 2410-11). By changing the entire status quo, the majority's approach will undermine legal certainty -- "the foundational principle upon which the common law relies" (*Bedford*, at para. 38; see also Cromwell, at p. 315).

271 Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned -- that in enacting such routes, legislatures were unequivocally directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise -- legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility -- and continued absence -- of legislative correction, the case for overturning our past decisions is even less compelling (*Binus v. The Queen*, [1967] S.C.R. 594, at p. 601; see also *Kimble*, at p. 2409; *Kisor*, at pp. 2422-23; *Bilski v. Kappos*, *Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (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, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by lower courts thousands of times (p. 2422). She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

> ... even if we are wrong about *Auer*, "Congress remains free to alter what we have done." In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history -- and Congress's continuing ability to take up Kisor's arguments -- we would need a particularly "special justification" to now reverse *Auer*. [Citations omitted; pp. 2422-23]

273 In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 U.N.B.L.J. 87; The Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67, at

p. 79; The Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67).

274 A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.
>
> Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]
>
> (paras. 65-66, citing *Baker v. Campbell*, [1983] HCA 39, 153 C.L.R. 52, 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, or even *Housen*, which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 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, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at paras. 27-33; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

277 For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly

complex", justifies the conclusion that *all* of our administrative law precedents -- even those unconnected to the practical difficulties in applying *Dunsmuir* -- are suddenly fair game.

278 This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court's existing jurisprudence.

Going Forward

279 In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. "[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine" (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

> Judicial modesty is ... . a disposition to respect precedents (as embodying the opinions of others), to learn from their and others' experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

280 Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The Rule of Law* (2010):

> ... it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]
>
> (See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, 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" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision -- a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

285 Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority's warning that administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

286 We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review -- whether described as "correctness", "reasonableness" or in other terms -- is fundamentally about "whether or not a reviewing court should defer"[8] to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

287 In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

288 First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 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 *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251, at para. 22 (CanLII), per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in Administrative Law" (2017), 68 U.N.B.L.J. 68, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

291 Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, *[2005] 3 S.C.R. 809*, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, 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, 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, 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 and Immigration)*, [2002] 1 S.C.R. 3, at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive -- but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

294 Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification

for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail.

295 Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required.[9]

296 The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake*, at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

297 Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean*, at para. 40).

298 Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

299 Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration ... than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (*National Corn Growers*, at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

300 When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a

natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

301 Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405, at para. 3; *Newfoundland Nurses*, at para. 16, citing *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, 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, at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association*, at paras. 53 and 56).

302 The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan, at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker*, at para. 44), which may not be conducive to the production of "archival" reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123).

303 Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 U.N.B.L.J. 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71, 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, 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 and Government Services)*, [2012] 2 S.C.R. 108, at para. 44; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

305 In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry

must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

306 We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" *(2014), 66 S.C.L.R. (2d) 233*, at p. 250).

307 We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason*, at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

308 Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

309 Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

310 Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

311 Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the

Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

312 We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293, at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

313 In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

Application to Mr. Vavilov

314 Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

315 The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

316 The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

317 Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

318 In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government

subsequently revoked Mr. Vavilov's passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

319 From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

320 On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

321 The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

322 The Federal Court (*[2016] 2 F.C.R. 39*) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

323 The Federal Court of Appeal (*[2018] 3 F.C.R. 75*) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

324 As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's interpretation of the Act in this case. As such, the standard of review is reasonableness.

325 The following provisions of the *Citizenship Act* are relevant to this appeal:

> **Persons who are citizens**
>
> **3 (1)** Subject to this Act, a person is a citizen if
>
> **(a)** the person was born in Canada after February 14, 1977;
>
> ...
>
> **Not applicable to children of foreign diplomats, etc.**
>
> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> **(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> **(b)** an employee in the service of a person referred to in paragraph (a); or

> **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

326 The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

327 In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

328 The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

329 The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19:

> **Not applicable to children of foreign diplomats, etc.**
>
> (3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent
>
> (*a*) is an alien who has not been lawfully admitted to Canada for permanent residence; and
>
> (*b*) is
>
> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

330 The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the *Interpretation Act*, *R.S.C. 1985, c. I-21*, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic mission, the analyst determined "it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

331 Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no

evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

332 In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

333 In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

334 First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, Sched. I to the *FMIOA*, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the *FMIOA*, which deal with diplomatic privileges and immunities. He submitted that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

335 Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

336 Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Town) v. Quebec Commission des droits de la personne*, [1988] 2 S.C.R. 279, at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, 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 (QL) (S.C.J.); *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. C.J.); *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)* (2007), 64 Imm. L.R. (3d) 67 (F.C.)).

337 The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

338 The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature -- namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

339 The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of

the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

340 In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

341 By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2) that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

342 Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

343 We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.
Appeal dismissed with costs throughout.

Solicitors:

Solicitor for the appellant: Attorney General of Canada, Toronto.

Solicitors for the respondent: Jackman Nazami & Associates, Toronto; University of Windsor -- Faculty of Law, Windsor.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

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

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Canadian Council for Refugees: The Law Office of Jamie Liew, Ottawa.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission: Ontario Securities Commission, Toronto.

Solicitor for the intervener the Ecojustice Canada Society: Ecojustice Canada Society, Toronto.

Solicitor for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers'

Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick): Workplace Safety and Insurance Appeals Tribunal, Toronto.

Solicitors for the intervener the British Columbia International Commercial Arbitration Centre Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Council of Canadian Administrative Tribunals: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec: Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto; Rae Christen Jeffries, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

Solicitors for the intervener the Queen's Prison Law Clinic: Stockwoods, Toronto.

Solicitors for the intervener the Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Parkdale Community Legal Services: Parkdale Community Legal Services, Toronto.

Solicitors for the intervener the Cambridge Comparative Administrative Law Forum: Cambridge University -- The Faculty of Law, Cambridge, U.K.; White & Case, Washington, D.C.

Solicitors for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Caza Saikaley, Ottawa.

Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Centre for Criminology & Sociolegal Studies -- University of Toronto, Toronto; Legal Aid Ontario, Toronto.

Solicitor for the intervener the Community & Legal Aid Services Programme: Community & Legal Aid Services Programme, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Nguyen, Tutunjian & Cliche-Rivard, Montréal; Hadekel Shams, Montréal.

Solicitors for the intervener the First Nations Child & Family Caring Society of Canada: Stikeman Elliott, Ottawa.

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1 Other than one of the two *amici*, no one asked us to modify this category.

2 The "constitutional concerns" cited by the majority are no answer to this dilemma - nothing in *Crevier v. Attorney General of Quebec*, *[1981] 2 S.C.R. 220*, prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 Rev. Const. Stud. 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action - The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

3 See *Administrative Tribunals Act*, *S.B.C. 2004, c. 45*. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

4 The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

5 Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

6 *R.S.B.C. 1996, c. 418, s. 159*

7 Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

8 Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

9 Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817*, at para. 43.

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(b) he had paid in advance to the City the licence fee prescribed in this bylaw, and if no licence fee is presscribed in this bylaw then such licence fee as may be prescribed in another bylaw having application;

(c) he displays such licence in a conspicuous place on the premises, if any, to which the licence applies.

6 Except as otherwise provided by bylaw, each licence shall be in writing, shall be issued by the Licence Inspector, and shall identify the licensee and the nature of the business authorized.

7 An application for a licence shall be made in writing on a form prescribed by the Licence Inspector.

8 (1) Before issuing any licence, the License Inspector may require evidence to his reasonable satisfaction that the applicant has complied with any and all applicable bylaws, regulations and statutes, and may require the applicant to give full particulars of all convictions of any offences recorded against the applicant anywhere in Canada during the two years immediately preceding the date of application.

(2) The License Inspector may also obtain a report from any police force on the applicant's criminal record, and no liability for defamation shall attach to the City or any of its employees or to any member of any police force for communicating such information in good faith, whether or not the information is accurate.

(3) The Licence Inspector may issue or renew a business licence for a business that holds a Liquor Primary or Liquor Primary Club Licence issued under the Liquor Control and Licensing Regulation, B.C. Regulation No. 244/2002, only if the applicant for the business licence

(a) enters with the City into a Good Neighbour Agreement, in the form attached as Schedule B to this bylaw, that includes the conditions set out in paragraph (b); and thereby

(b) agrees that the applicant will:

(i) ensure that noise emissions from the business do not disturb the neighbourhood and comply with the City's bylaws dealing with the regulation of noise,

(ii) ensure that the business does not play amplified music, between 11:00 p.m. and the business' closing time, outside of the building where the business is located,

(iii) post a sign at the entrance of the place of business advising of the dress code, if any, the admission fee and the identification requirements in connection with permitted entry to the business,

(iv) require on-duty employees to wear distinctive identification badges displaying an identification number,

(v) maintain a list that fully identifies all employees by name and identification number,

(vi) employ security personnel to patrol the outdoor areas of the place of business, to monitor the activity of patrons in those areas, particularly at closing time, and to ensure orderly dispersal of patrons as they leave the place of business,

(vii) employ reasonable screening measures to ensure that patrons entering the business premises are at least 19 years of age and that no weapons or illegal drugs are brought onto the business premises,

(viii) not permit patrons to carry or consume alcoholic beverages in areas that are not licensed for that purpose, including the outdoor areas of the place of business,

(ix) when requested, allow those patrons who have consumed liquor at that place of business the use of one of the business' telephones, free of charge, for the purpose of telephoning a taxi or other transportation,

(x) each night after the business closes, inspect its outdoor areas and ensure that they are free of litter, garbage and broken glass,

(xi) ensure that at all times the queue of patrons waiting for entry into the place of business does not impede or obstruct pedestrian traffic along a sidewalk or interfere with access or egress to another place of business,

(xii) immediately remove all graffiti that is placed from time to time on the exterior of the building in which the business is located.

(4) The requirements set out in subsection (3)(b) are conditions that the applicant must comply with throughout the term of its business licence and any renewal term.

9 Until the contrary is proved a person shall be deemed to carry on a trade, business, profession, occupation, calling, employment or purpose without a valid and subsisting licence if he performs a single transaction which is normally performed only by persons engaged in the trade, business, profession, occupation, calling, employment or purpose.

10 (1) Except as otherwise expressly provided in this bylaw every licence shall be valid for a term of one year, commencing on the 16th day of January and terminating on the 15th day of January next, provided that if a licence is issued after the 16th day of January in any year it shall be valid only until the 15th day of January next, but the full licence fee shall nevertheless be payable.

(2) A person who holds a licence under this bylaw must renew the licence and pay the annual licence fee on or before January 15 for as long as that person continues to operate the business.

Honey Fashions Ltd. v. Canada (Border Services Agency)

Federal Court Judgments

Federal Court of Appeal

Montréal, Quebec

R. Boivin, Y. de Montigny and M.J.L. Gleason JJ.A.

Heard: November 6, 2019.

Judgment: March 19, 2020.

Docket: A-407-18

[2020] F.C.J. No. 354 | [2020] A.C.F. no 354 | 2020 FCA 64 | 445 D.L.R. (4th) 522 | 2020 CarswellNat 807

Between The Attorney General of Canada, Appellant, and Honey Fashions Ltd., Respondent

(52 paras.)

Case Summary

Taxation — Customs and excise — Customs — Tariff classification — Imports — Appeal by the Attorney General from a decision setting aside the decisions of the Canada Border Services Agency (CBSA) denying respondent's name change requests to designate respondent as importer of record of goods previously imported by others, so that respondent could obtain remissions under Textile and Apparel Remission Order dismissed — Federal Court did not err in finding that respondent had a legitimate expectation, based on a clear, unambiguous and unqualified regular practice by the CBSA that the CBSA would accept its name change requests and approve the drawback claims.

Appeal by the Attorney General from a decision setting aside the decisions of the Canada Border Services Agency (CBSA) denying the respondent's claims for duty remission made under the Textile and Apparel Remission Order. The Remission orders were part of a program that allowed listed companies to import certain goods duty-free as long as they met the conditions specified in the orders. For many years, the CBSA allowed eligible Canadian manufacturers to contract with Canadian importers so that Canadian manufacturers could take advantage of their remission entitlements. In 2010, the CBSA discovered irregularities in its administration of the Remission program regarding the transfer of remission entitlements between several companies. A Review of the program revealed CBSA had been permitting certain eligible companies to transfer their remission entitlement to other companies in cases it should not have, all with the goal of ensuring that the benefits of the remission program would flow to the Canadian manufacturers. A procedure was developed to be followed where the incorrect party had been named as the importer of record but where the true importer was entitled to remission of duties. To correct the situation, the 2014 Remission Order was enacted that governed the administration of the Program from 2008 until 2012. The CBSA denied the respondent's 2011 and 2012 resubmitted claims on the basis that the documents provided did not clearly establish that the name change was the result of an error of the importer or the CBSA. Both the 2011 and 2012 claims were rejected without any explanation or justification as to why those claims ought to be treated differently from earlier ones. The Federal Court found that the respondent had a legitimate expectation, based on a clear, unambiguous and unqualified regular practice, that the CBSA would accept its name change requests and approve the drawback claims.
HELD: Appeal dismissed.

The Federal Court did not err in finding that it was unreasonable for the CBSA to apparently reverse an administrative practice and deny name change requests to designate the respondent as importer of record of goods that had been previously imported by others, so that the respondent could obtain remissions under the Program.

While the decisions of the CBSA were arguably consistent with the Customs Act and the applicable Remission Order, the impugned decisions of the CBSA were at odds with past practices and past decisions of accepting post-importation name changes on the basis of post-partnering agreements. In the circumstances of this case, the CBSA should have provided an explanation to the respondent with respect to its departure from past practice. The Federal Court did not err in finding that the CBSA had a policy dating back from the inception of the Program of approving post-importation name changes and that the CBSA's refusal to accept the respondent's importer name change requests were made contrary to its legitimate expectations.

Statutes, Regulations and Rules Cited:

Customs Act, *R.S.C. 1985, c. 1 (2nd Supp.), s. 7.1*

Customs Tariff, *S.C. 1997, c. 36*, R

Excise Act, 2001, *S.C. 2002, c.2*,

Excise Tax Act, *R.S.C. 1985, c. E-15*,

Federal Courts Rules, *S.O.R./98-106, Rule 303*

Special Import Measures Act, *R.S.C. 1985, c. S-15*

Textile and Apparel Remission Order, 2014, *SOR/2014-278* (TARO 2014),

Counsel

Stéphanie Lauriault David Di Sante, for the Appellant.

Peter Kirby Alexandra Logvin, for the Respondent.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

Y. de MONTIGNY J.A.

1 This is an appeal from a decision of Justice Zinn of the Federal Court (the Applications Judge) dated November 7, 2018, which granted two applications for judicial review made by Honey Fashions Ltd. (Honey Fashions, or the respondent). The Federal Court set aside the decisions made by the Canada Border Services Agency (CBSA), which denied Honey Fashions' claims for duty remission made under the *Textile and Apparel Remission Order, 2014*, *SOR/2014-278* (TARO 2014).

2 The central issue is whether it was unreasonable for the CBSA to apparently reverse an administrative practice and deny name change requests to designate Honey Fashions as importer of record of goods that had been previously imported by others, so that Honey Fashions could obtain remissions under the TARO 2014 program. For the reasons that follow, I have concluded that, in light of the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *2019 SCC 65*, *441 D.L.R. (4th) 1* (*Vavilov*), the Federal Court did not err in quashing these two decisions of the CBSA. The appeal should therefore be dismissed.

Facts

3 All goods imported to Canada are subject to the provisions of the *Customs Act*, *R.S.C. 1985, c. 1 (2nd Supp.)*, the *Customs Tariff*, *S.C. 1997, c. 36*, the *Excise Act*, *2001, S.C. 2002, c. 22*, the *Excise Tax Act*, *R.S.C. 1985, c. E-*

15, and the *Special Import Measures Act*, R.S.C. 1985, S-15, by which customs duties and taxes are assessed. However, the Governor in Council may, on recommendation of the responsible minister, remit all or a portion of the customs duties by way of a remission order.

4 In 1988, the Department of Finance introduced a series of remission orders, intended to help Canadian textile and apparel manufacturers face the challenges of increased international competition. This program allowed listed companies (eligible companies) to import certain goods duty-free as long as they met the conditions specified in the orders. As a result, it was thought that Canadian manufacturers could rationalize their production by specializing in only a few lines while earning remission credits to import complimentary goods, thereby allowing Canadian apparel manufacturers to market a complete fashion line.

5 In 1997-98, these orders were superseded by updated versions to comply with the *North American Free Trade Agreement* (NAFTA). The new version of the program set a capped annual remission entitlement for each listed company, based on the total amount of remission that each manufacturer had received in 1995. The six remission orders listed below formed the basis of the TARO program :

* *Tailored Collar Shirts Remission Order, 1997* (SOR/97-291);

* *Outerwear Greige Fabrics Remission Order, 1998* (SOR/98-86);

* *Shirting Fabrics Remission Order, 1998* (SOR/98-87);

* *Outerwear Apparel Remission Order, 1998* (SOR/98-88);

* *Blouses, Shirts and Co-ordinates Remission Order, 1998* (SOR/98-89); and

* *Outerwear Fabrics Remission Order, 1998* (SOR/98-90).

6 Many manufacturers preferred to focus on manufacturing textiles and apparel in Canada. They had limited, if any, interest in becoming importers. As a result, they began looking for ways to earn the benefits of the program as Canadian manufacturers without being obliged to start or expand an importing business. It appears that for many years, officials of the Department of Finance and of the CBSA allowed eligible Canadian manufacturers to contract with Canadian importers so that Canadian manufacturers could take advantage of their remission entitlements, all with the goal of ensuring that the benefits of the remission program would flow to the Canadian manufacturers.

7 As evidence of that practice, the respondent filed the affidavit of Stephen Yanow, the president of a blouse manufacturer which used the TARO program and whose main business between 1998 and 2012 was matching eligible Canadian manufacturers with Canadian importers who imported qualifying goods. He testified that officials of the Department of Finance approved of that practice, and attached as an exhibit to his affidavit a memorandum (for information) from an official of that Department to that effect. The Applications Judge quoted that memorandum in full at paragraph 10 of his reasons. The memorandum addressed the emerging practice of "remission brokers", which it described in the following way :

> The "remission broker" is a recent phenomenon. These are customs brokers or consultants who identify manufacturers who have not used all of their import entitlement. For a fee, they locate importers who are interested in buying the entitlement. Depending on how you look at it, they essentially provide a service to manufacturers to locate importers willing to purchase excess entitlement. In this way, the manufacturers will receive some of the remission benefit (in the form of cash) that they otherwise would not have used.
>
> Appeal Book, vol. 2, p. 447

8 The Department official advised that such a possibility was contemplated at the inception of the program, and that such a practice was in compliance with the conditions set out in the remission Orders and the *Customs Act* :

> Finance was apprised at the inception of the program about the possibility of selling of entitlement and, as it is currently taking place, the practice is in compliance with the conditions set out in the remission Orders and the Customs Act. (There is no requirement in the Orders that the importer of record be the owner of the goods imported. Manufacturers are simply acting as agents for third party owners and

> paying a remitted duty - the benefit of which is passed on to the owner.) In fact, it could be argued that it is the marketplace at work.
>
> Appeal Book, vol. 2, p. 448

9 In the summer of 2010, the CBSA discovered irregularities in its administration of the TARO program regarding the transfer of remission entitlements between several companies. It suspended the processing of all TARO program claims in the fall of 2010, and undertook a comprehensive Quality Assurance Review (QAR) of the program. As a result, Honey Fashions' claims for duty remission on goods imported in 2006, 2007, 2008 and 2009 were held in abeyance.

10 The QAR confirmed three errors committed by the CBSA, one of which being that the CBSA had been permitting certain eligible companies to transfer their remission entitlement, presumably for a fee, to other companies in cases it should not have. Once these irregularities were discovered, the CBSA developed and issued Memorandum D8-11-7 on November 28, 2012 (Policy on the Transfer of Entitlement Pursuant to the Textile and Apparel Remission Orders), which explains how entitlements to remission of customs duties pursuant to the remission orders may be transferred. It explains that the entitlements of an eligible manufacturer cannot be bought, sold or transferred, but can be re-allocated permanently to another company when that other company acquires, purchases or otherwise takes control of the operation of the eligible manufacturer.

11 The above-mentioned memorandum additionally recognizes the possibility of entering into "partnering agreements". Paragraph 5 of the Memorandum states as follows :

> Subject to conditions, an eligible manufacturer or eligible fabric producer (one who is named in the Schedule to the Order), may enter into a partnering agreement with another company in order to realize its full remission allocation in a given year. In this way, the eligible company is the importer of record for the goods and the other company is the owner or consignee of the goods.

12 Such an agreement is subject to some conditions, one of which is that the agreement must be finalized and dated "prior to the release of the imported goods by the CBSA" (Memorandum D8-11-7, at para. 5(b)).

13 Paragraph 6 of the Memorandum also seemingly allows a party that has imported goods and paid the duty on those goods to be subsequently replaced as the importer of record by an eligible manufacturer, by way of a name change request. Such a name change request must be made at the same time and on the same form as the claim for remission by the eligible manufacturer. This paragraph reads in part as follows :

> If goods that are subject to a partnering agreement and for which remission is or will be claimed have already been imported and accounted for in the name of the other company (i.e., the owner or purchaser), it will be necessary to amend the importer name before remission will be approved. In such cases, a name change request must be submitted in accordance with instructions set out in CBSA Memorandum D17-2-3, *Importer Name/Account Number or Business Number Changes*.

14 Memorandum D17-2-3, referenced in Memorandum D8-11-7, outlines the procedures to be followed when an importer name change is necessary due to error on the part of the importer or the CBSA. Pursuant to section 7.1 of the *Customs Act*, all information provided to the CBSA must be "true, accurate and complete". Paragraphs 14 to 22 of this Memorandum set out the procedure to be followed where the incorrect party has been named as the importer of record but where the true importer was entitled to conditions, exemptions and/or privilege (such as remission of duties under TARO). Paragraph 22 provides that the name change request must be :

> (a) supported by documents (e.g., purchase orders, commercial invoices, cancelled cheques, fax transmissions, written correspondence), which clearly indicate the claimant's interest and the part played by the claimant in the import transaction;
>
> (b) supported by a letter from the importer of record, disclaiming involvement in the importation; and

(c) Supported by a clear and complete explanation of why the party named as the importer on the original accounting document was so named, and why the importer/broker/agent now believes that a second party is the true importer.

15 The CBSA recognized that the errors identified in the QAR were entirely its fault. Since Schedule 1 manufacturers who received remissions had relied in good faith on representations made and authorizations issued by CBSA officials, and had made business decisions accordingly, the CBSA concluded that it would be unfair to revoke the authorizations and seek to collect the duty that had been remitted.

16 To correct the situation, TARO 2014 was enacted. It governed the administration of the TARO program from 2008 until 2012, the year the TARO program ended. TARO 2014 was designed to ensure that eligible Schedule 1 manufacturers received their full entitlement to remission up to 2012. Remissions to the companies listed in Schedule 1 to the Order were subject to the following conditions : a) the goods were imported into Canada between January 1, 2008 and December 31, 2012; b) the erroneous authorization for the remission must have been issued by the CBSA on or before December 31, 2012; and c) an application for the remission is received by the CBSA on or before the deadline set out in Schedule 2 of the Order. The conditions from the six original and separate TARO programs were also incorporated into TARO 2014.

17 Honey Fashions is one of the companies listed on Schedule 1 of TARO 2014. Three of its drawback claims are relevant for the purpose of this appeal, each of which was accompanied by a name change request :

* Claim 262903 related to goods imported in 2009. It was filed on November 22, 2010 - before the QAR and before TARO 2014. It was held in abeyance during the review process and approved by Gilles Cormier, a CBSA official, on April 30, 2015;

* Claim M270228 for $68,512.48, dated October 19, 2016, related to imports occurring in 2011 and sought remission pursuant to the *Outerwear Apparel Remission Order*;

* Drawback claim M270217 for $3,071,133.83, dated December 23, 2016, related to imports occurring in 2012 and sought remission pursuant to the *Blouses, Shirts and Co- Ordinates Remission Order*.

18 The last two claims were essentially resubmissions of past drawback claims that had been refused by the CBSA in February and August 2016 because they did not provide the proper documentation required in accordance with Memorandum D17-2-3. The resubmitted claims were accompanied by additional letters and arguments, but Honey Fashions did not provide the substantiating documents required by the Memorandum for their name change requests. On September 6, 2017 a senior official of the CBSA denied both of the resubmitted claims, on the basis that the documents provided "do not clearly establish that the name change is the result of an error of the importer or the [CBSA] or that the terms of Memorandum D17-2-3 have been met" (Appeal Book, vol. 1, pp. 175 and 292).

The impugned decision

19 Applying the reasonableness standard, the Federal Court found in favour of Honey Fashions. Reasoning that the decision to deny Honey Fashions the remissions under the TARO program stands or falls with the decision not to accept the name change requests, the Court focused on that decision and determined that it was made in breach of the CBSA's duty of fairness in addition to being arbitrary and unreasonable.

20 The Federal Court found that Honey Fashions had a legitimate expectation, based on a clear, unambiguous and unqualified regular practice, that the CBSA would accept their name change requests and approve the drawback claims. In denying the claims without detailed reasons for what the Federal Court characterized as a "change in the procedure for changing the importer of record", the CBSA treated Honey Fashions unfairly (Reasons, at paras. 43-48).

21 The Federal Court also found that the CBSA's decision was unreasonable because it lacked justification, transparency and intelligibility. In the Federal Court's view, there was no material difference between the claim filed in 2010 and the claims filed in 2015 (and refiled in 2016). Although acknowledging that CBSA officials are not

subject to the doctrine of *stare decisis*, the Federal Court found the decision to grant the former but deny the latter without additional explanation to be arbitrary, and thus unreasonable.

Issues

22 In my view, the only issue to be decided by this Court is whether the Applications Judge erred in its application of the reasonableness standard of review to the CBSA's decisions. The parties have also challenged the Applications Judge's ruling on procedural fairness but for reasons developed below, I do not think that issue need be addressed here, if only because it appears to be a mere restatement of the conclusion on substantive reasonableness.

23 The Federal Court's finding that the CBSA has jurisdiction to determine the identity of the importer of goods into Canada is not under appeal.

Preliminary Matter

24 The original appellants in this appeal were the Attorney General of Canada and the President of the Canada Border Services Agency. They were the unsuccessful respondents in the application for judicial review in the Federal Court.

25 According to Rule 303 of the *Federal Courts Rules*, *S.O.R./98-106*, however, the Attorney General of Canada should have been the only respondent in the Federal Court. As a result, the Attorney General of Canada is the only proper appellant in this Court. The style of cause should therefore be amended to reflect that change, and the President of the Canada Border Services Agency should be removed as an appellant.

Analysis

26 After the hearing of this appeal, the Supreme Court of Canada released its decision in *Vavilov*. This Court thus requested further written submissions from the parties with respect to the applicable standard of review. There is no dispute between the parties that when this Court sits on appeal of a decision by the Federal Court reviewing an administrative decision, our task is to determine whether the application judge correctly identified the appropriate standard of review and applied it correctly : *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47 [*Agraira*]. In the case at bar, both parties agree that reasonableness remains the applicable standard of review.

27 Understandably, the appellant and the respondent focus on different aspects of the *Vavilov* decision. The appellant acknowledges that where a decision maker departs from longstanding practices or established internal authority, the departure must be explained in its reasons. However, the appellant argues that the CBSA did not break with its longstanding practices because it has consistently considered importer name change requests in the context of its evaluation of remission claims under TARO. In the appellant's view, Honey Fashions' longstanding practice of submitting post-importation name change requests without substantiating evidence must not be conflated with the CBSA's past decisions to accept its request without substantiating evidence.

28 The respondent retorts that the majority in *Vavilov* stressed the importance of justification for administrative decision makers, and that a more robust form of review is called for to ensure consistency and to guard against the threat of arbitrariness. Accordingly, in the respondent's view, the Federal Court was right to focus on the CBSA's reasons and on the need for the CBSA to explain its abrupt policy change. Relying more explicitly on paragraph 131 of *Vavilov*, the respondent stresses that one of the factors constraining the reasonableness of a decision is the need to provide explanations when a decision departs from longstanding practices or established internal decisions. Needless to say, Honey Fashions strongly disagrees with the appellant's submissions that past practices and internal decisions are not the same.

29 In my view, the respondent rightly points to the importance given by the Supreme Court in *Vavilov* to the

justification of a decision. To the extent that reasons have been provided, the reviewing court must pay close attention to those reasons to ensure that the decision is the result of an "internally coherent and rational chain of analysis" (*Vavilov*, at para. 85). In other words, the reasons may be as important as the result. As the majority stated at paragraph 86 :

> 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.

30 In addition to the reasons provided, *Vavilov* directs the reviewing court to examine the reasonableness of an administrative decision in terms of the legal and factual constraints on the decision maker's discretion. Among the constraints that bear on the reasonableness of a decision are the governing statutory scheme, the evidence before the decision maker, past practices and past decisions, and the impact of the decision on the affected individual. I will turn to each of these factors as they are the most relevant to the resolution of this dispute.

31 Because they exercise delegated authority, administrative decision makers must obviously act within the powers they receive by statute; accordingly, the governing statutory scheme is of crucial importance in determining the reasonableness of their decisions. In that respect, the range of discretion given to a decision maker will be of particular interest in assessing whether they have acted within the confines of the law.

32 In the case at bar, the appellant claims that the CBSA's decisions comply with the rationale and purview of the statutory scheme under which the decisions were made, namely section 7.1 of the *Customs Act* and the TAROs. For situations like this, the D8-11-7 Memorandum directs parties to file name change requests "in accordance with instructions set out in CBSA Memorandum D17-2-3". In each of the remission claims at issue, Honey Fashions provided accounting documentation that identified another company as importer of the qualifying goods. The drawback claims included letters noting the CBSA's memorandum on importer name changes, and indicating that "incorrect party has been named as importer of record" (Tevel affidavit, Appeal Book, vol. 1, Tab 7, Ex. E, pp. 332, 341-342, 351, 354 and 362).

33 The D17-2-3 Memorandum is very clear on what documentation is required in support of a name change application (see paragraph 14, above). A pre-importation partnering agreement would have been acceptable substantiating evidence, as well as any documents clearly establishing that the claimant was the true importer. Honey Fashions did not provide the necessary documentation; instead, it tried to rely on a declaration that it was assuming the obligations of importer of record with the consent of the original importer (Appeal Book, vol. 1, pp. 300, 387).

34 I agree with the appellant that for the CBSA to comply with the *Customs Act*, it had to ensure that the person who causes the goods to be exported to Canada was truly the importer before it could approve retroactively an importer name change request. This is consistent with section 7.1 of the *Customs Act*, which requires that all information provided to the CBSA shall be true, accurate and complete, and with the plain and ordinary meaning of "importer". There is certainly an argument to be made that if the CBSA is precluded from excluding post-importation involvement and is forced to accept name change requests on the basis of a partnering agreement entered into after the goods are effectively imported to Canada, it would be constrained from performing its regulatory functions of verification and would be acting contrary to section 7.1 of the *Customs Act*.

35 If the reasonableness of the decisions under review were to be assessed on the sole basis of their conformity with the overall legislative scheme pursuant to which they were made, they might pass muster. The decisions of the CBSA are arguably consistent with the *Customs Act* and the applicable TAROs. To that extent, they may be considered reasonable in the abstract.

36 The respondent claims, however, that the impugned decisions of the CBSA are at odds with past practices and past decisions. Relying on testimonial and documentary evidence, Honey Fashions argued that there was a

consistent and longstanding departmental practice of accepting post-importation name changes on the basis of post-partnering agreements. The Applications Judge accepted that evidence in the following terms :

> [47] The uncontradicted evidence before the Court is that Honey Fashions has participated in the TARO Program since its inception, that it was not a major importer of apparel but took full advantage of its entitlements under the program by becoming the importer of record of goods previously imported by others. It did so by filing a name change with the CBSA to record it as the importer of record, with the agreement of the initial importer. This procedure was accepted and arguably endorsed by the CBSA. Until the decisions under review were made "CBSA officials consistently accepted the name change notification to change the importer of record, and processed Honey Fashions' remission applications on the basis that Honey Fashion was the importer of record." The change in the procedure for changing the importer of record had dramatic consequences to Honey Fashions.

37 In its initial submissions, the appellant stressed that the doctrine of *stare decisis* does not apply to administrative decision makers, and that they are not required to explain the differences between two separate decisions. Following the release of *Vavilov*, counsel recognized that departures from longstanding practices or established internal authority must now be explained, but argued that there was no such departure in the case at bar. In a somewhat specious argument, counsel contends that the CBSA's practice has not changed in the context of a claim for remission of customs duties because its decision to accept the name change in the past is not a practice but a substantive outcome. To quote from their written submissions (at paragraph 6 of their January 31, 2020 letter), "[e]ssentially, Honey Fashions conflates *their* alleged long- standing practice of submitting post-importation name change requests without substantiating evidence, with the CBSA's past *decisions* to accept their request without substantiating evidence". In my view, this is a distinction without a difference and, as such, an argument without merit.

38 First of all, I note that the Supreme Court uses "past practices" and "past decisions" interchangeably in *Vavilov*, and is more concerned with the need for coherence and justification than with semantics. What matters is that like cases be treated alike and that outcomes shall not be dependant on the identity of the individual decision maker (at para. 130). In that spirit, it matters not whether a course of action is labelled as "past practices" or "past decisions". Of course, I agree with the appellant that the CBSA must always be able to exercise its discretion to determine how and when verification for compliance is conducted, and to consider importer name change requests in the context of its evaluation of remission of customs duty claims under TARO. However, if the evidence establishes that the CBSA has consistently allowed importer name change requests for remission of customs duties without requiring substantiating evidence showing pre-importation partnering agreements, these past decisions amount to past practices (both for Honey Fashions and the CBSA).

39 As previously mentioned at paragraph 18 of these reasons, both the 2011 and 2012 claims were rejected without any explanation or justification as to why those claims ought to be treated differently from earlier ones. This is particularly egregious considering that the 2009 claim had been accepted on the basis of the same information given by Honey Fashions (although admittedly on the basis of the pre-QAR policies and before CBSA issued the D8-11-7 Memorandum). Once again, this is not to say that the CBSA was bound to follow the same course of action it had followed in the past. CBSA was indeed entitled to modify its policy in order to comply with the *Customs Act*, provided that in so doing, its interpretation is reasonable. However, in the circumstances of this case, the CBSA should have provided an explanation to Honey Fashions with respect to its departure from past practice. As the Supreme Court stated in *Vavilov* (at para. 131) :

> 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.

40 I am therefore of the view that the decisions of the CBSA were not reasonable in light of this important contextual consideration in the present case. It was not sufficient to claim, *ex post facto*, that the decisions made by the CBSA official complied with the rationale and purview of the statutory scheme under which they were made. In

light of the impact of the decisions on the respondent, CBSA had to provide it with an explanation as to why the past practice was not followed and, presumably, why a post-importation partnering agreement would be contrary to section 7.1 of the *Customs Act* and would undermine the customs scheme when such agreements had been accepted without question in the past. Accordingly, on the basis of the recent teachings of the Supreme Court in *Vavilov*, it was open to the Federal Court to hone in on the fact that the CBSA official made no reference to his earlier decision or to the longstanding departmental practice of accepting name change requests without certain supporting documentation. I therefore agree with the Federal Court's conclusion that the CBSA's decisions lack justification, transparency and intelligibility.

41 Finally, the appellant challenges the Federal Court's factual finding that the CBSA had a policy dating back from the inception of the TARO program of approving post-importation name changes. They argue that, in the absence of direct evidence, the Federal Court could only consider serious, precise and concordant presumptions, the like of which do not arise from this record. The respondent, on the other hand, asserts that there was direct evidence as well as supportive indirect evidence allowing the Applications Judge to find that the CBSA "arguably endorsed" such a practice.

42 I accept the appellant's submission that the testimonies of Bernie Tevel and Stephen Yanow are not sufficient to establish that the CBSA was aware of and endorsed Honey Fashions' practice to claim duty remission on goods previously imported by others. These individuals could certainly testify that the CBSA routinely accepted name change notifications changing the name of the importer of record on the customs entry forms from the original importer to the Canadian manufacturer, without any indication as to whether the agreement was made prior to or after the importation. But they cannot purport to know what the CBSA was aware of at the time these decisions were made, and in particular whether the CBSA was aware that the importer name changes were based on post-importation agreements. This is precisely why the Federal Court was careful to state that this procedure was accepted "and arguably endorsed" by the CBSA (Reasons, at para. 47).

43 This is not the only basis, however, upon which the Federal Court came to the conclusion that there is direct evidence that the CBSA consistently accepted post-importation name change notifications to allow Schedule 1 manufacturers to claim remissions for goods previously imported by others. It noted that this administrative process was not flagged during the QAR as an unacceptable or illegitimate practice, and was not objected to in the course of the audits to which Honey Fashions was subjected at least three times (Reasons, at para. 48). These factual findings are entitled to a high degree of deference.

44 The appellant further submits that the Federal Court improperly relied on indirect evidence (primarily an internal memorandum from a Minister of Finance official dated April 26, 1993, and Memorandum D8-11-7) to conclude that the CBSA accepted post-importation name change notifications. I agree with the appellant that these two documents are inconclusive and would be insufficient, in and of themselves, to establish that the CBSA has endorsed and condoned post-importation name change agreements. However, this is beyond the point.

45 First of all, it is not at all clear that the Federal Court relied on that evidence to reach its conclusion. There was enough direct evidence to the same effect in the record. More importantly, Memorandum D8-11-7 could not have been offered as proof of the CBSA practice, since it was only released in late 2014. It could only be presented as being consistent with the alleged CBSA practice and in support of the direct evidence. Ultimately, I find the indirect evidence of little help for the resolution of the questions before us.

46 In light of all the foregoing, I am of the view that the Federal Court did not err in finding that the decision by the CBSA not to accept the name change requests was unreasonable. If anything, that conclusion is bolstered by the recent decision of the Supreme Court in *Vavilov*, with its insistence on the need for a reasonable decision to be justified in light of the legal and factual constraints that bear on that decision. A decision maker cannot deviate from earlier decisions or from a longstanding past practice, especially when it is too late for those affected by these decisions to adjust their behaviour accordingly, without providing a reasonable explanation for that departure.

47 As for the Federal Court's finding that the CBSA's refusal to accept Honey Fashions' importer name change

requests were made contrary to its legitimate expectations, I need not say much. I agree with the appellant that the respondent did not raise the duty of fairness before the Federal Court either in its Notices of Application, in its Memoranda of Fact and Law, or at the hearing. Allegations were made that the decisions being challenged were unfair and arbitrary, but these arguments were meant to substantiate the purported unreasonableness of the decisions, not a breach of procedural fairness.

48 As a matter of fairness, courts should constrain themselves to the grounds raised in the pleadings. As the Supreme Court stated in *Saadati v. Moorhead*, *2017 SCC 28*, *[2017] 1 S.C.R. 543* at para. 9, "each party is entitled to know and respond to the case that it must answer". I accept that the respondent did argue unfairness in relation to its legitimate expectations, but this was not sufficient in my view to squarely raise procedural fairness *per se*. It is clear from a transcript of the hearing that the parties never joined issue on that question (see, in particular, Appeal Book, vol. 2, at pp. 629, 657 and 671), and it was therefore an error of law for the Federal Court to conclude that the appellant violated Honey Fashions' legitimate expectations.

49 Be that as it may, the Federal Court's procedural fairness analysis was really a substantive review in disguise. Its conclusion with respect to procedural fairness appears to be nothing more than a restatement of its conclusion on substantive reasonableness, as is readily apparent from these two findings :

> * Procedural fairness : The Federal Court found "a clear, unambiguous and unqualified regular administrative practice of the CBSA that the name change...would be accepted". On this basis, Honey Fashions had a legitimate expectation that the CBSA would accept its subsequent name change applications. The decision was unfair because it departed from previous decisions without explaining why (Reasons, at para. 46).
>
> * Substantive reasonableness : CBSA's decisions were unreasonable because it did not accept the name change applications in spite of its previous decisions and the "long- standing departmental practice" (Reasons, at para. 53).

50 Finally, I also agree with the appellant that the doctrine of legitimate expectations cannot give rise to substantive rights : *Agraira* at para. 97; *Reference Re Canada Assistance Plan (B.C.)*, *[1991] 2 S.C.R. 525*, *83 D.L.R. (4th) 297* at p. 557; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, *2013 FCA 250*, *[2014] 2 F.C.R. 557* at para. 75. Past practices, therefore, could not ground a legitimate expectation that a request for a name change to the importer of record would be granted in the future even if such a practice is established. The Court may only grant appropriate procedural remedies in the event that the conditions for the application of this doctrine are met : see *C.U.P.E. v. Ontario (Minister of Labour)*, *2003 SCC 29*, *[2003] 1 S.C.R. 539* at para. 131.

51 Moreover, legitimate expectations is only one of the factors to be considered in determining what procedural fairness requires in a given context : *Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817*, *174 D.L.R. (4th) 193* at paras. 22-28. In the case at bar, there is no suggestion that Honey Fashions was not given a fair procedure, including notice and an opportunity to provide additional substantiation for its claims. I find, therefore, that the Federal Court erred in concluding that the decision by the CBSA not to grant the name change requests was made in breach of its duty of fairness.

Conclusion

52 For all of the above reasons, I would dismiss the appeal, maintain the judgment of the Federal Court, and return the remission claims of Honey Fashions to the CBSA for redetermination in accordance with these reasons, the whole with costs in this Court and in the Court below. I would amend the style of cause and remove the President of the Canada Border Services Agency as an appellant. The style of cause on these Reasons and on the Judgment should reflect this amendment.

Y. de MONTIGNY J.A.

R. BOIVIN J.A.:— I agree.

M.J.L. GLEASON J.A.:— I agree.

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Peters First Nation v. Engstrom

Federal Court Judgments

Federal Court of Appeal

Vancouver, British Columbia

J.D.D. Pelletier, D.J. Rennie and M.J.L. Gleason JJ.A.

Heard: December 2, 2021.

Judgment: December 20, 2021.

Docket: A-86-20

[2021] F.C.J. No. 2090 | 2021 FCA 243

Between Peters First Nation Band Council, Norma Webb in Her capacity as Chief of Peters First Nation, David Peters in His capacity as Councillor of Peters First Nation and Victoria Peters in Her capacity as Councillor of Peters First Nation, Appellants, and Brandon Lee Engstrom and Amber Rachel Ragan, Respondents

(35 paras.)

Case Summary

Aboriginal law — Communities and governance — Membership in community — Application for membership — Requirements and entitlement — Appeal by Council of Peters First Nation from dismissal of judicial review of decision requiring Council to admit applicants as members — Council rejected applicants' applicant for membership — Federal Court found applicant qualified for admission as members — Applicants were biological children of father who was registered as member on Band list — Council improperly interpreted Membership Code by placing age limit on application — Applicants satisfied conditions for membership.

Appeal by the Peters First Nation Band Council (Council) from a decision allowing an application for judicial review and ordering that the Band take all necessary steps to grant membership in the Peters First Nation Indian Band to the applicants, Brandon Lee Engstrom and Amber Rachel Ragan. The applicants applied to the Council for membership in the Band. The Membership Code provided that membership was available to everyone who was a natural child of a parent whose name was registered on the Band list. Both applicants were natural children of a father whose name was on the Band list, but their applications for membership were rejected. The Council took the position that the applicants were ineligible for membership because they were 18 or over when they applied, and because a child applying for membership must have the consent of both parents, which the applicants did not have. The applicants' application for judicial review of the refusal of membership was granted and the Federal Court ordered that the Band take all necessary steps to grant the applicants' membership. The Band appealed.
HELD: Appeal dismissed.

The Federal Court correctly selected reasonableness as standard of review of decisions refusing membership and correctly applied the reasonableness standard to the Council's interpretation of natural child. The Council's interpretation of the Membership Code was not reasonable. It was undisputed that the applicants were the biological children of a father who was registered as a member on the Band list. The term "natural child" had an ordinary meaning the same as "biological child", and referred to descendancy or biological relationship between offspring and parent. The use of the term was not limited to people under certain age. The language used in the Membership Code also suggested that "natural child" was not restricted by age. The Council's own conduct in assessing applications indicated that age was not relevant to being a natural child as they did not screen for age, there was no mention of an age requirement in the first decision refusing membership, and age was not mentioned during the general meeting to consider appeals. The Membership Code did not have to be read to take into account

effects that an increase in membership would have on the governance and economic well-being of the current members as that consideration was neither mentioned in the Code nor in the deliberations of Council. The Band's economic situation could not be used to read requirements into the Membership Code that did not exist or were contrary to the plain meaning of Code. The legislative history of the Code also supported the interpretation of the term "natural child" to include all persons born of a Band member. The Federal Court did not err in ordering Council to grant the applicants' membership. The applicants satisfied the conditions for Band membership. It was open to the Federal Court to conclude that the interests of justice were not served by having the question return to Council for a third time. Reconsideration should be avoided where outcome was inevitable and remitting case would serve no useful purpose.

Counsel

Stan H. Ashcroft, for the Appellants.

Karey Brooks, for the Respondents.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

D.J. RENNIE J.A.

1 The Peters First Nation Band Council appeals from the judgment of the Federal Court (*2020 FC 286*, *per* Barnes J.) allowing the respondents' application for judicial review and ordering that the Band take all necessary steps to grant the respondents membership in the Peters First Nation Indian Band.

2 The appellants appeal on two grounds.

3 The Band contends that the Federal Court erred in concluding that the respondents were eligible for membership under the Membership Code of the Peters First Nation. The Federal Court held that, having regard to the text of the Membership Code and the evidence surrounding its application by the Band, the only reasonable interpretation was that the definition of "natural child" included persons claiming membership who were the biological children of band members, regardless of age.

4 The Band also challenges the order of the Federal Court that the Band grant membership to the respondents forthwith, contending that the question of membership ought to have been remitted to the Band for reconsideration.

5 I see no merit in either of these arguments. However, some context is necessary to understand why I have reached this conclusion.

6 In December 2015, the respondents submitted applications for membership in the Band. In July 2016, the Band Council issued decision letters rejecting the respondents' applications. The decision letters did not provide reasons, merely stating that under the Membership Code they were not entitled to become members.

7 The respondents filed a notice of appeal and, as provided by the Membership Code, the Band Council convened a general meeting of the Band to vote on both appeals. The respondents' appeals were voted on as a single question and were dismissed by a 19 to 18 vote. The Chief and two councillors who made the original decision, appellants in this proceeding, also voted.

8 The respondents then brought an application for judicial review of the decision to deny them membership.

9 The Federal Court granted the application (*Peters v. Peters First Nation Band*, *2018 FC 544*, 2018 CarswellNat

2702 [*Peters*]), finding the decisions unreasonable and procedurally unfair. The decisions refusing membership were set aside and the matter was remitted to the Band Council for redetermination.

10 Three months later the Band Council again rejected the respondents' applications for membership. In refusing membership, the Band concluded that the respondents would "not promote harmony and the common good" of the First Nation, that they were not under the age of 18 and that the consent of both parents was required.

11 Again, the respondents appealed. However, the Band Council refused to convene a general meeting to vote on the appeals, reasoning that the previous decision to reject the previous appeals was "final".

12 Again, the respondents sought judicial review in the Federal Court, resulting in the judgment that is the subject of this appeal.

13 The governing standard of review is as expressed in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 12 W.W.R. 1 at paragraph 12. The question before this Court is whether the Federal Court adopted the correct standard of review and applied it correctly. The Federal Court judge's discretionary decision not to remit the question to the Band Council is reviewable on a standard of palpable and over-riding error.

14 The Federal Court correctly selected reasonableness as the standard of review of the decisions refusing membership (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*]) and correctly applied the reasonableness standard to the Band Council's interpretation of "natural child". I see no error in the judge's discretionary decision not to return the question of membership to the Band.

Was the Band Council's interpretation of the Membership Code reasonable?

15 The primary legal constraint on the reasonableness of a decision like the present is the legal and evidentiary framework (*Vavilov* at para. 120). A decision-maker must interpret the law, regulations and rules that apply to the matter before it in a way that is consistent with the text, context and purpose of the relevant provision. Where the words employed are precise and unequivocal, their ordinary meaning will usually be determinative. In such situations, it is not open to the decision-maker to adopt an inferior interpretation merely because it is plausibly available or expedient.

16 The legal framework governing the Band Council's decision-making is the Membership Code. The relevant section of the Code provides:

> Part III -- Membership Criteria
>
> 1. Membership in the Peters Indian Band shall consist of the following persons:
>
> ...
>
> E. everyone who is a natural child of a parent whose name is registered on the Band List;
>
> ...

17 It is undisputed that the respondents are the biological children of a father who was at the relevant time registered as a member on the Band List.

18 The term "natural child" has an ordinary meaning. Now more commonly referred to as a "biological child", it references descendancy or the biological relationship between the offspring and parent, and its usage is not limited to only people under a certain age. The term natural child contrasts with the term adopted child, a distinction reflected in the jurisprudence (see, *e.g., In Re Gage*, [1962] S.C.R. 241, 1962 CanLII 2 (SCC); *Hope v. Raeder Estate*, 1994 CanLII 2185 (BCCA), [1994] 2 B.C.L.R. (3d) 58 (BCCA); *Podolsky v. Podolsky*, 1980 CanLII 2438 (MBCA), [1980] 111 D.L.R. (3d) 159 (MBCA); *Plut v. Plut Estate*, 1991 CanLII 1329 (BCCA), [1991] B.C.J. No. 942; *Strong v. Marshall Estate*, 2009 NSCA 25, 309 D.L.R. (4th) 459).

19 Black's Law Dictionary (11th ed., 2019) defines natural child as "[a] child by birth, as distinguished from an adopted child."

20 The context of Article 1.E also supports the view that the term "natural child" is not restricted by age. Membership in Peters First Nation shall "consist of" ... "everyone" who is a natural child of a band member. This suggests that membership automatically follows paternal and maternal lineage.

21 The reasonableness of a decision may also be constrained by other factors, in addition to the legal framework. Of particular pertinence to this case, these include the facts and evidence before the decision maker, past practice and policies and the impact of the decision on an individual.

22 Here, the evidentiary context casts doubt on the reasonableness of the Band Council's interpretation of the term. The applicants' membership applications were not summarily screened out on the basis of age. No mention of an age requirement was made in the first decision refusing membership, nor was age mentioned during the general meeting to consider the appeals. The appellants were questioned about their character and whether they had criminal records, but not about their age. During cross-examination on an affidavit filed in the first judicial review, one of the councillors who made the decision to refuse membership could not point to any document or prior decision of the Band suggesting that age was a requirement.

23 The age requirement first appears in the Band's memorandum of argument on the first judicial review, prompting the Federal Court judge to observe that "the various rationales subsequently provided by the Band Council were developed *ex post facto*" and that the "justifications were offered in piecemeal fashion long after the decisions had been communicated to the Applicants" (*Peters* at para. 51). I agree with this characterization of the evidence.

24 The Band submits that the Membership Code must be read to take into account the effects that an increase in membership will have on the governance and the economic well-being of current Band members. Again, this consideration is neither mentioned in the Membership Code nor in the deliberations of Band Council. The Band's economic situation cannot be used to read requirements into the Membership Code that do not exist or are contrary to the plain meaning of the Membership Code.

25 Lastly, the Band points to the decision *Norris v Matsqui First Nation*, *2012 FC 1469*, *[2013] 1 C.N.L.R. 227* [*Norris*], contending that the Membership Code in *Norris* is analogous to its Membership Code and that this Court should adopt the same interpretation of the Code as the Code in *Norris*. It is sufficient to observe that the Membership Code in *Norris* had key differences from the Code at issue. The Code in Norris contained an explicit provision governing the age of a "child" and specific membership criteria for children.

26 The legislative history of the Code also supports the interpretation of the term "natural child" to include all persons born of a band member.

27 In September 2016, a proposal was brought forward to the general band membership that the Peters First Nation Code be amended to include an age requirement. The proposed new Membership Code defined child as "a child under the age of 18", whether biological or legally adopted. The proposed Code stated that a person "who has status as an Indian and is a Child of a Parent whose name is registered on the Membership List is eligible to apply for Membership and shall automatically be accepted ...". Persons between the ages of 19 and 30 and with Indian status with at least one parent who is a member would be eligible to apply for membership. Membership would be determined by a vote.

28 The proposed amendment was a matter of debate and controversy and was ultimately rejected by the Band. However, the proposed, and rejected Code reflects the interpretation of the current Code the Band Council advanced in the Federal Court and now in this Court.

Did the Federal Court err in the remedy granted?

29 The Supreme Court has consistently held there will be circumstances where the ordinary tools of statutory interpretation will make it clear that there is only one reasonable interpretation (see, *e.g., Vavilov* at para. 124; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 35; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 64; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38). This Court, and other appellate courts across Canada have also recognized that reasonableness encompasses situations where there is only one possible interpretation (see, *e.g., Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, 2019 CarswellNat 14755 at para. 61; *English v. Richmond (City)*, 2021 BCCA 442, 2021 CarswellBC 3665 at para. 120; *Ontario Nurses' Association v. Participating Nursing Homes*, 2021 ONCA 148, 154 O.R. (3d) 225 at para. 84).

30 For the reasons outlined above, the term "natural child" can only have one reasonable meaning. This is not a term for which there is a range of reasonable outcomes.

31 Given that there is only one reasonable interpretation of the term, the Federal Court did not err in ordering the Band Council to grant the respondents' membership. The Membership Code stated that the membership *shall* consist of the following persons: "everyone who is a natural child of a parent whose name is registered on the Band List". *Shall* is not discretionary and as the criteria is met, the only conclusion is that the respondents satisfy the conditions for band membership. The undisputed fact of paternity combined with the express terms of the Membership Code are sufficient to support an order that the respondents are entitled to membership in Peters First Nation.

32 Counsel for the Band argues that the question of band membership, particularly in a small band like the Peters First Nation, is critical to maintaining social cohesion, cultural traditions and values. Membership, it is argued, is essential to identity.

33 I do not question this argument or the legitimacy of any of these considerations, and in the ordinary course the Federal Court would return questions of Band membership to a Band for redetermination. However, in the circumstances of this case, these arguments also weigh in favour of an order directing the respondents to be granted membership. Given the importance of Band membership to an individual's sense of identity, culture and values, rules governing membership must survive reasonableness review and the requirements of procedural fairness.

34 As is apparent from the lengthy history of this matter, it was open to the Federal Court to have concluded that the interests of justice were not served by having this question return to the Band Council for a third time. Nearly six years have passed since the first applications for membership were made, during the course of which the respondents' rights to procedural fairness were breached on two occasions and there has been ample evidence of bad faith on the part of Band Council. Fairness and efficiency also support the decision not to return the question to the Band for a third time. Reconsideration should be avoided where the outcome is inevitable and remitting the case would serve no useful purpose.

35 I would dismiss the appeal with costs to the respondents, which I would fix at $30,000.00.

D.J. RENNIE J.A.
J.D.D. PELLETIER J.A.:— I agree.
M.J.L. GLEASON J.A.:— I agree.

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Uyanze c. Canada (Ministre de la Citoyenneté et de l'Immigration)

Jugements de la Cour fédérale du Canada

Cour fédérale

Ottawa (Ontario)

Le juge Y. Roy

Entendu : le 3 avril 2024.

Rendu : le 9 avril 2024.

Dossier : IMM-6210-23

[2024] A.C.F. no 645 | 2024 CF 554

Entre Ganea Uyanze, demandeur, et Le ministre de la Citoyenneté et de l'Immigration, défendeur

(24 paragr.)

Avocats

M. Ganea Uyanze, pour le demandeur (pour son propre compte).

Me Janan Arafa, pour le défendeur.

JUGEMENT ET MOTIFS

LE JUGE Y. ROY

1 M. Ganea Uyanze, le demandeur, a obtenu l'autorisation de se pouvoir en contrôle judiciaire d'une décision rendue par la Section d'appel de l'immigration [SAI]. L'autorisation est obtenue en vertu de l'article 72 de la *Loi sur l'immigration et la protection des réfugiés*, *LC 2001, c 27* [LIPR]. Le demandeur ne bénéficie pas des services d'un avocat. M. Uyanze avance, entre autres, que la décision ne rencontre pas les critères d'une décision raisonnable.

2 Pour les motifs qui suivent, cette affaire doit être retournée à la SAI pour qu'une formation différente rende une décision transparente et intelligible. Celle dont contrôle judiciaire est demandé ne rencontre pas les conditions minimales d'une décision justifiée. Ceci dit avec égards, je ne partage pas l'avis du défendeur qui avance que les «motifs de la décision expliquent bien et clairement comment la SAI est parvenue à ces conclusions» (mémoire des faits et du droit, para 26).

3 C'est qu'une décision administrative qui a un impact majeur chez le justiciable doit être motivée pour expliquer le processus décisionnel et la raison pour rendre une décision donnée. Comme le dit la Cour suprême du Canada dans l'arrêt phare *Canada (Ministre de la Citoyenneté et de l'Immigration) c Vavilov*, *2019 CSC 65*, [2019] 4 RCS 653 [*Vavilov*], les motifs «permettent de montrer aux parties concernées que leurs arguments ont été pris en compte et démontrent que la décision a été rendue de manière équitable et licite. Les motifs servent de bouclier contre l'arbitraire et la perception d'arbitraire dans l'exercice d'un pouvoir public» (*Vavilov*, au para 79). L'absence de motivation adéquate rend la décision déraisonnable.

4 La cour de révision adopte le principe de la retenue judiciaire et fait preuve de respect à l'égard de la décision administrative, ne cherchant pas à substituer son avis à celui du décideur administratif. Mais la Cour suprême

insiste dans *Vavilov* à ce que les décideurs administratifs adhèrent à une culture de la justification où l'exercice du pouvoir public est justifié aux yeux du justiciable qui y recherche rationalité et équité. Or, les motifs dans notre cas d'espèce font défaut (*Vavilov*, au para 14).

5 Étant donné que la cour de révision ne s'intéresse pas seulement au résultat mais aussi aux motifs de la décision sous étude, elle doit tenter de comprendre le raisonnement ayant mené à la décision pour en trouver la cohérence et la rationalité face aux contraintes juridiques et factuelles. On en recherche la justification. Il faut que la décision soit justifiée :

> [86] L'attention accordée aux motifs formulés par le décideur est une manifestation de l'attitude de respect dont font preuve les cours de justice envers le processus décisionnel : voir *Dunsmuir*, par. 47?49. Il ressort explicitement de l'arrêt *Dunsmuir* que la cour de justice qui procède à un contrôle selon la norme de la décision raisonnable «se demande dès lors si la décision et sa justification possèdent les attributs de la raisonnabilité» : par. 47. Selon l'arrêt *Dunsmuir*, le caractère raisonnable «tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit& raquo; : *ibid*. En somme, il ne suffit pas que la décision soit *justifiable*. Dans les cas où des motifs s'imposent, le décideur doit également, au moyen de ceux?ci, justifier sa décision auprès des personnes auxquelles elle s'applique. Si certains résultats peuvent se détacher du contexte juridique et factuel au point de ne jamais s'appuyer sur un raisonnement intelligible et rationnel, un résultat par ailleurs raisonnable ne saurait être non plus tenu pour valide s'il repose sur un fondement erroné.
>
> [Je souligne.]

6 Ainsi, une tentative de l'avocat d'améliorer les motifs d'une décision administrative ne peut réussir car c'est au décideur de justifier. Autrement, ce serait transformer la justification requise du décideur administratif en justification *ex post facto* offerte par le plaideur. Il en est de même pour la cour de révision (*Vavilov*, au para 96). Elle ne peut chercher à combler les lacunes identifiées dans une décision dont contrôle judiciaire est demandé.

7 Qui plus est, les motifs doivent avoir une qualité qui dépasse l'abstrait : les motifs doivent justifier la décision prise.

I. Décision de l'agent d'immigration

8 L'affaire qui nous importe n'est pas particulièrement complexe. M. Uyanze cherche à parrainer une jeune fille qu'il prétend être sa fille. Si elle est sa fille, elle pourrait donc tomber dans la catégorie du regroupement familial. La LIPR, à son article 12, établit bien que le regroupement familial a lieu en fonction de la relation entre un citoyen canadien ou un résident permanent et un étranger à titre d'enfant ou de père ou mère. La demande de résidence permanente de la personne se présentant comme étant la fille du demandeur a été refusée par l'agent d'immigration canadien à Dakar, au Sénégal.

9 C'est l'article 117 du *Règlement sur l'immigration et la protection des réfugiés*, *DORS/2002-227* [Règlement], qui définit plus avant qui appartient à la catégorie du regroupement familial. Ainsi, ce sera «l'enfant à charge» qui se qualifiera (alinéa 117(1)b)). Mais encore faut-il que l'enfant soit à charge. Le terme est défini à l'article 2 du Règlement :

> 2 Les définitions qui suivent s'appliquent au présent règlement.
>
> ***enfant à charge*** L'enfant qui :
>
> a) d'une part, par rapport à l'un de ses parents :
>
> (i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,
>
> (ii) soit en est l'enfant adoptif;
>
> b) d'autre part, remplit l'une des conditions suivantes :

(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,

(ii) il est âgé de vingt-deux ans ou plus et n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents depuis le moment où il a atteint l'âge de vingt-deux ans, et ne peut subvenir à ses besoins du fait de son état physique ou mental. (*dependent child*)

* * *

2 The definitions in this section apply in these Regulations.

dependent child, in respect of a parent, means a child who

(a) has one of the following relationships with the parent, namely,

(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or

(ii) is the adopted child of the parent; and

(b) is in one of the following situations of dependency, namely,

(i) is less than 22 years of age and is not a spouse or common-law partner, or

(ii) is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition. (*enfant à charge*)

10 La lettre de décision de l'agent d'immigration indique qu'un test d'ADN a révélé en mars 2022 que la probabilité que M. Uyanze soit le père de la jeune fille est 0 %. D'ailleurs, une demande antérieure de parrainage avait été refusée parce que le test d'ADN demandé n'avait pas été complété. Face au test d'ADN négatif, M. Uynanze aurait répondu être «le père officiel et reconnu»; il aurait indiqué croire à une erreur relativement au test d'ADN.

11 L'agent note aussi au sujet de la jeune fille que «vous n'avez pas été déclaré et examiné dans le demande de résidence permanente de votre répondant. Vous êtes donc exclus selon le R117(9)d) du Règlement expliqué ci-haut» (reproduit tel que rédigé). Le texte de l'alinéa 117(9)d) se lit :

(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

[...]

d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

* * *

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

...

(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

12 Enfin, l'agent disait au sujet de la jeune fille «croire qu'il y a une présentation erronée qui aurait pu entrainer une erreur dans l'application de la Loi» (reproduit tel que rédigé). Étant ainsi reconnue coupable d'avoir fait une fausse déclaration relativement à la qualité d'enfant à charge, la jeune fille prétendant être la fille du demandeur devient interdite de territoire.

II. La décision dont contrôle judiciaire est demandé

13 Comme je l'ai expliqué à l'audience, la décision de l'agent n'est pas celle qui se retrouve devant la cour en révision judiciaire. La seule demande de contrôle judiciaire est relative à la décision de la SAI. C'est ainsi qu'une partie du mémoire des faits et du droit du demandeur est inutile. Le regard ne doit porter que sur la décision de la SAI, même si la décision de l'agent fait partie, dans une certaine mesure, du contexte dans lequel la décision, dont contrôle judiciaire a été demandé, a été rendue.

14 C'est cette décision qui, à mon avis, n'est pas raisonnable en raison de la qualité des motifs. C'est que «la prise de décisions motivées constitue la pierre angulaire de la légitimité des institutions» (tel que reproduit au para 74 de *Vavilov* : tiré du mémoire des *amici curiae* dans cette affaire, au para 12).

15 À mon avis, et ceci dit avec égards, la décision de la SAI pêche par défaut de transparence et d'intelligibilité, deux caractéristiques nécessaires à une décision raisonnable. Essentiellement, un justiciable doit savoir pourquoi on lui refuse le remède recherché. C'est pourquoi nous sommes à la recherche de la décision intrinsèquement cohérente et rationnelle qui est intelligible et transparente, non pas dans l'abstrait, mais bien pour l'individu qui en fait l'objet.

III. Analyse

16 Le refus de délivrer le visa de résident permanent dans le cadre d'une demande de parrainage au titre du regroupement familial peut faire l'objet d'un appel auprès de la SAI (art 63 de la LIPR). Mais la décision de la SAI, qui compte à peine deux petites pages, n'explique pas : elle déclare.

17 D'emblée, et pour une raison inconnue, la SAI choisit de tenir «pour acquis que la demandeure est l'enfant à charge de l'appelant» (décision, para 5), malgré que le test d'ADN avait établi la probabilité de filiation père-fille comme étant de zéro.

18 Il en résulte évidemment que la SAI a dû s'en reporter à d'autres raisons. On comprend que c'est du fait que le demandeur n'aurait pas déclaré sa «fille» lorsqu'il a obtenu la résidence permanente que le visa est refusé; mais le demandeur conteste vertement cette affirmation puisqu'il dit avoir déclaré la possibilité d'être le père d'un enfant, possibilité qui serait aux notes consignées par l'agent d'immigration. Pourtant on ne retrouve aucune discussion à cet égard. On ne retrouve pas plus en quoi il n'y aurait pas eu «contrôle» (en anglais «examined»). De fait, on ne sait pas en quoi consiste cette notion. Cette notion de «contrôle», que l'on retrouve au paragraphe 7 de la décision, ne peut que référer à l'alinéa 117(9)d) du Règlement qui exclut de la catégorie du regroupement familial un membre de la famille du répondant (M. Uyanze) qui n'a pas fait l'objet d'un contrôle. La décision déclare, elle n'explique pas. On ne trouve pas le raisonnement intrinsèquement cohérent qui permet de comprendre ce qui mène à la décision.

19 Mais il y a plus encore. Le demandeur prétendait à l'existence d'une politique d'intérêt public dont l'effet serait de suspendre l'application de l'alinéa 117(9)d) du Règlement. Or, la SAI se déclare ne pas avoir «la compétence législative requise pour se pencher sur la politique d'intérêt public» (décision, para 7). On ne sait pas de quelle «compétence législative» le décideur administratif aurait besoin. On ne sait pas davantage de ce en quoi cette politique d'intérêt public consiste, quand et à qui elle s'applique, et en quoi elle ne serait pas contraignante à l'égard du décideur administratif, comme le prétend le demandeur. De fait, la SAI se déclare compétente pour disposer d'un appel en fonction de la législation, non en fonction de politiques publiques car elles ne seraient pas du ressort de la SAI. On ne sait pas pourquoi alors même que l'article de la LIPR permettrait l'adoption d'une telle politique, selon la SAI (art 25.2). Si la politique ne s'applique pas à la SAI, encore faudrait-il le dire et pourquoi elle viserait d'autres acteurs mais pas la SAI.

20 Le propos n'est pas d'opiner sur caractère raisonnable du résultat. Cela n'est pas possible à la lecture de la décision. Que le décideur ait tort ou raison n'est pas pertinent. C'est l'absence de motifs qui permettent de comprendre le raisonnement outre que dans l'abstrait qui fait en sorte que la décision n'est ni transparente, ni intelligible. Il se peut que le décideur administratif n'ait pas tort. Mais là n'est pas la question.

21 Il en est de même du rejet par la SAI de l'invocation par le demandeur de motifs d'ordre humanitaire. La SAI déclare ne pas avoir compétence pour entendre une telle demande. Pour seule explication, on ne trouve qu'une note de bas de page, la note 11, qui réfère à la note 1 qui elle-même n'est qu'une référence à la compétence d'appel de la SAI du refus de délivrer le visa de résident permanent dans le cadre d'une demande de parrainage au titre du regroupement familial. Cela ne peut être adéquat. En fait, plus tôt dans cette courte décision, la SAI indiquait ne pas avoir la «compétence juridictionnelle pour trancher l'affaire en fonction de l'existence de motifs d'ordre humanitaire» (décision, para 3). La note de bas de page référait à l'article 65 de la LIPR. Cette confusion ne favorise évidemment pas une compréhension de la raison pour laquelle les motifs d'ordre humanitaire ne pourraient être retenus puisqu'il aurait fallu expliquer en quoi l'article 65 ne peut s'appliquer au cas d'espèce. En quoi consiste une absence de «compétence juridictionnelle» reste tout aussi inexpliqué.

IV. Conclusion

22 La Cour en vient donc à la conclusion que la décision rendue par la SAI n'a pas les apanages de la décision raisonnable en ce qu'elle n'est ni justifiée, ni transparente, ni intelligible. Les auteurs R.A. MacDonald et D. Lametti ont écrit que des motifs qui «ne font que reprendre le libellé de la loi, résumer les arguments avancés et formuler ensuite une conclusion péremptoire» ne fournissent pas ce qui est nécessaire pour comprendre le raisonnement («Reasons for Decision in Administrative Law» (1990), 3 RCDAP 123, à la p 139, et cité dans *Vavilov*, au para 102). Dans notre cas d'espèce, nous n'avons même pas le libellé de la loi et les arguments avancés. Il ne s'agit pas, bien sûr, de requérir une réponse à tous les arguments présentés. Mais le droit requiert de s'attaquer aux questions clés ou aux arguments principaux. Cela n'a pas été fait. Comme le disait la Cour suprême dans *Vavilov*, «[l]orsque la décision a des répercussions sévères sur les droits et intérêts de l'individu visé, les motifs fournis à ce dernier doivent refléter ces enjeux» (para 133). La Cour écrivait au paragraphe 135 :

> [135] Bon nombre de décideurs administratifs se voient confier des pouvoirs extraordinaires sur la vie de gens ordinaires, dont beaucoup sont parmi les plus vulnérables de notre société. Le corollaire de ce pouvoir est la responsabilité accrue qui échoit aux décideurs administratifs de s'assurer que leurs motifs démontrent qu'ils ont tenu compte des conséquences d'une décision et que ces conséquences sont justifiées au regard des faits et du droit.

23 En conséquence, la demande de contrôle judiciaire doit être accordée. L'affaire doit être retournée à la SAI pour qu'une formation différente fasse une nouvelle détermination.

24 La nouvelle formation devrait s'assurer d'avoir un dossier certifié du tribunal complet avant de chercher à disposer de l'appel. En effet, le demandeur prétendait à l'existence de notes au dossier produites par l'agent d'immigration (voir le mémoire du demandeur aux para 24 et 25). Dans une affaire dont c'est la décision d'un agent d'immigration de refuser de délivrer un visa de résident permanent qui fait l'objet d'un appel, on devrait s'assurer que les notes préparées par l'agent fassent partie du dossier devant le tribunal administratif. En effet, les notes, s'il en est, font partie de la décision rendue (*Baker c Canada (Ministre de la Citoyenneté et de l'Immigration)*, *[1999] 2 RCS 817*, au para 44) et dont un appel est permis en vertu de l'article 63 de la LIPR. Si les notes étaient au dossier de la SAI, elles auraient dû être au dossier certifié du tribunal. Elles n'y étaient pas. Il y aurait lieu de s'assurer qu'un dossier complet soit présenté à la SAI pour traiter de la nouvelle détermination de l'appel.

JUGEMENT au dossier IMM-6210-23

LA COUR STATUE que :

1. La demande de contrôle judiciaire est accordée.
2. Le dossier est retourné à la Section d'appel de l'immigration. Une nouvelle formation devra procéder à une nouvelle détermination
3. Il n'y a pas de question à certifier en vertu de l'article 74 de la *Loi sur l'immigration et la protection des réfugiés*.
4. Aucune question n'est certifiée.

LE JUGE Y. ROY

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