Agreement on Internal Trade

Appeal from the Report of Article 1703 Panel Regarding the

Dispute between Saskatchewan and Quebec Concerning Dairy Blends,

Dairy Analogues and Dairy Alternatives Dated March 31, 2014

Submission of the Government of Alberta (Intervenor)

Book of Authorities

Dated August 18, 2014

LIST OF TABS

TAB 1

TAB 2

TAB 3

2011 SCC 7

Supreme Court of Canada

Alliance Pipeline Ltd. v. Smith

2011 CarswellNat 202, 2011 CarswellNat 203, 2011 SCC 7, [2011] 1 S.C.R. 160, [2011] A.C.S. No. 7, [2011] S.C.J. No. 7, 102 L.C.R. 1, 16 Admin. L.R. (5th) 157, 199 A.C.W.S. (3d) 1037, 328 D.L.R. (4th) 1, 412 N.R. 66, 56 C.E.L.R. (3d) 161, J.E. 2011-280

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

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

Heard: October 5, 2010

Judgment: February 11, 2011

Docket: 33203

Proceedings: reversing *Alliance Pipeline Ltd. v. Smith* (2009), 2009 CarswellNat 5476, 2009 FCA 110, 2009 CarswellNat 836, 389 N.R. 363, 2009 CAF 110, 42 C.E.L.R. (3d) 1 (F.C.A.); reversed *Alliance Pipeline Ltd. v. Smith* (2008), 2008 FC 12, 2008 CarswellNat 35, 318 F.T.R. 100 (Eng.), 34 C.E.L.R. (3d) 138, 2008 CF 12, 2008 CarswellNat 1427 (F.C.)

Counsel: Richard C. Secord, Meaghan M. Conroy, Yuk-Sing Cheng for Appellant

Munaf Mohamed, Jillian Strugnell for Respondent

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

Subject: Natural Resources; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Natural resources --- Oil and gas — Practice and procedure — Costs

Parties reached agreement for plaintiff to construct pipeline route across portion of defendant's farmland — Dispute arose regarding plaintiff's contention that it was necessary to apply manure to entire right-of-way on land — Despite disagreement, plaintiff began reclamation work and applied manure to right-of-way — Defendant refused to pay plaintiff's invoice for work and access to right-of-way — Plaintiff invoked arbitration clause for hearing before pipeline committee — Arbitration hearing was unable to move forward due to quorum issue — Plaintiff launched action for payment of invoice — Plaintiff eventually abandoned action and paid defendant's party and party costs of action — Matter proceeded to second arbitration — Second panel ruled in favour of defendant and awarded $16,222.57 for net

legal fees from action and first arbitration — Plaintiff unsuccessfully appealed to Federal Court — Plaintiff successfully appealed to Federal Court of Appeal — Court of Appeal found that second panel was in error in excluding only those costs pertaining to hearing correspondence which followed it — Defendant appealed to Supreme Court of Canada — Appeal allowed — Decision of second panel was subject to intervention only if it was found to be unreasonable — On contrary, decision was set out coherently and its conclusions were entirely consistent with statutory provisions it was bound to apply, notably ss. 75 and 99(1) of National Energy Board Act — In case, second panel was interpreting its home statute, and this would usually attract reasonableness as standard of review — In addition, statutory language reflected legislative intention to vest in arbitration committees sole responsibility for determining nature and amount of costs to be awarded in disputes they were bound under Act to resolve.

Ressources naturelles --- Pétrole et gaz — Procédure — Frais

Parties ont conclu un accord suivant lequel la demanderesse pouvait procéder à la construction d'un pipeline dont le tracé traversait une partie de la terre du défendeur — Litige est survenu concernant la prétention de la demanderesse à l'effet qu'il était nécessaire de répandre du fumier tout le long de la bande de terre servant au droit de passage — Malgré le désaccord, la demanderesse a procédé aux travaux de bonification et a répandu du fumier le long de la bande de terre — Défendeur a refusé de payer la facture de la demanderesse couvrant les travaux ainsi que l'accès au passage — Demanderesse a invoqué une clause d'arbitrage de l'accord en vue de la tenue d'une audience devant le comité d'arbitrage — Cette audience n'a pu procéder, faute de quorum — Demanderesse a alors déposé une action visant à obtenir le paiement de la facture — Demanderesse s'est plus tard désistée de l'action et a payé les dépens partie-partie du défendeur dans l'action — Second comité d'arbitrage a été constitué — Second comité d'arbitrage a tranché en faveur du défendeur et a octroyé 16 222,57 $ au défendeur au titre des frais de procédure encourus au cours de l'action et du premier arbitrage — Demanderesse a échoué en appel à la Cour fédérale — Elle a interjeté appel à la Cour d'appel fédérale avec succès — Cour d'appel a conclu que le second comité d'arbitrage avait commis une erreur en n'excluant que les frais qui se rapportaient aux lettres échangées par la suite — Défendeur a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Décision du second comité d'arbitrage ne pouvait être révisée dans le cadre d'un contrôle judiciaire que si elle était jugée déraisonnable — Au contraire, le comité a exposé sa décision de façon cohérente et ses conclusions étaient tout à fait compatibles avec les dispositions législatives qu'il était tenu d'appliquer, y compris les art. 75 et 99(1) de la Loi sur l'Office national de l'énergie — En l'espèce, le second comité d'abitrage interprétait sa loi constitutive et ce facteur entraîne généralement l'application de la norme de contrôle de la décision raisonnable — De plus, le texte de la loi traduisait la volonté du législateur de confier en exclusivité aux comités d'arbitrage la responsabilité de déterminer la nature et le montant des frais à accorder dans les litiges qu'ils sont tenus de trancher aux termes de la Loi.

The plaintiff pipeline company and the defendant landowner reached an agreement for the plaintiff to construct a pipeline route across a portion of the defendant's farmland. A dispute arose regarding the plaintiff's contention that it was necessary to apply manure to the entire right-of-way on the land. Despite the disagreement, the plaintiff began reclamation work and applied manure to the right-of-way. The defendant refused to pay the plaintiff's invoice for the work and for access to the right-of-way.

The plaintiff invoked an arbitration clause in the agreement for a hearing before a pipeline committee, but the arbitration hearing was unable to move forward due to a quorum issue. The plaintiff then launched an action for payment of the invoice, although the plaintiff eventually abandoned the action and paid the defendant's party and party costs for the action. The matter proceeded to a second arbitration where the committee ruled in favour of the defendant and awarded $16,222.57 to the defendant for net legal fees from the action and from the first arbitration. The plaintiff unsuccessfully made an appeal to the Federal Court regarding the costs. The plaintiff successfully appealed to the Federal Court of Appeal. The Court of Appeal found that the second panel was in error in excluding only those costs pertaining to the hearing correspondence which followed it. The defendant appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Fish J. (McLachlin C.J.C., Binnie, LeBel, Abella, Charron, Rothstein, Cromwell JJ. concurring): The decision of the second panel was subject to intervention only if it was found to be unreasonable. On the contrary, the decision was set out coherently and its conclusions were entirely consistent with the statutory provisions it was bound to apply, notably ss. 75 and 99(1) of the National Energy Board Act. In this case, the second panel was interpreting its home statute, and this would usually attract reasonableness as the standard of review. In addition, the statutory language reflected a legislative intention to vest in the arbitration committees the sole responsibility for determining the nature and amount of costs to be awarded in disputes they were bound under the Act to resolve.

Per Deschamps J. (concurring): The standard of review was reasonableness. However, there was no indication that Parliament intended the second panel, or any arbitration committee, to have particular familiarity with its home statute. Deference should be accorded to the second panel, not because it interpreted its home statute, but because it exercised its statutorily conferred discretion to make an award of costs.

La compagnie de pipeline demanderesse et le propriétaire terrien défendeur ont conclu un accord suivant lequel la demanderesse pouvait procéder à la construction d'un pipeline dont le tracé traversait une partie de la terre du défendeur. Un litige est survenu concernant la prétention de la demanderesse à l'effet qu'il était nécessaire de répandre du fumier tout le long de la bande de terre servant au droit de passage. Malgré le désaccord, la demanderesse a procédé aux travaux de bonification et a répandu du fumier le long de la bande de terre. Le défendeur a refusé de payer la facture de la demanderesse couvrant les travaux ainsi que l'accès au passage.

La demanderesse a invoqué une clause d'arbitrage de l'accord en vue de la tenue d'une audience devant le comité d'arbitrage, mais cette audience n'a pu procéder, faute de quorum. La demanderesse a alors déposé une action visant à obtenir le paiement de la facture, bien que la demanderesse se soit plus tard désistée de l'action et ait payé les dépens partie-partie du défendeur dans l'action. Un second comité d'arbitrage a été constitué, lequel a tranché en faveur du défendeur et a octroyé 16 222,57 $ au défendeur au titre des frais de procédure encourus au cours de l'action et du premier arbitrage. La demanderesse a échoué en appel à la Cour fédérale au sujet des frais. Elle a interjeté appel à la Cour d'appel fédérale avec succès. La Cour d'appel a conclu que le second comité d'arbitrage avait commis une erreur en n'excluant que les frais qui se rapportaient aux lettres échangées par la suite. Le défendeur a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Fish J. (McLachlin, J.C.C., Binnie, LeBel, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : La décision du second comité d'arbitrage ne pouvait être révisée dans le cadre d'un contrôle judiciaire que si elle était jugée déraisonnable. Au contraire, le comité a exposé sa décision de façon cohérente et ses conclusions étaient tout à fait compatibles avec les dispositions législatives qu'il était tenu d'appliquer, y compris les art. 75 et 99(1) de la Loi sur l'Office national de l'énergie. En l'espèce, le second comité d'abitrage interprétait sa loi constitutive et ce facteur entraîne généralement l'application de la norme de contrôle de la décision raisonnable. De plus, le texte de la loi traduisait la volonté du législateur de confier en exclusivité aux comités d'arbitrage la responsabilité de déterminer la nature et le montant des frais à accorder dans les litiges qu'ils sont tenus de trancher aux termes de la Loi.

Deschamps, J. (souscrivant à l'opinion des juges majoritaires) : La norme de contrôle était la norme de la décision raisonnable. Toutefois, rien n'indiquait que le législateur requérait que le second comité, ou tout comité d'arbitrage, ait une connaissance approfondie de sa loi constitutive. Il convenait de faire montre de déférence envers le second comité, non pas parce qu'il interprétait sa loi constitutive, mais parce qu'il exerçait le pouvoir discrétionnaire que lui confère la loi en matière d'adjudication de frais.

Table of Authorities

Cases considered by *Fish J.*:

Alliance Pipeline Ltd. v. Smith (2003), 2003 ABQB 843, 2003 CarswellAlta 1491 (Alta. Q.B. [In Chambers]) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140 (S.C.C.) — considered

Bayview Builder's Supply (1972) Ltd. v. British Columbia (Minister of Transportation & Highways) (1999), 1999

CarswellBC 1049, 1999 BCCA 320, 127 B.C.A.C. 225, 207 W.A.C. 225, 67 B.C.L.R. (3d) 312, 23 R.P.R. (3d) 193, 67 L.C.R. 208 (B.C. C.A.) — considered

C.U.P.E., Local 963 v. New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — considered

Campbell River Woodworkers' & Builders' Supply (1966) Ltd. v. British Columbia (Minister of Transportation & Highways) (2004), 2004 BCCA 27, 2004 CarswellBC 82, 81 L.C.R. 275, 193 B.C.A.C. 29, 316 W.A.C. 29, 22 B.C.L.R. (4th) 210 (B.C. C.A.) — considered

Celgene Corp. v. Canada (Attorney General) (2011), 2011 CarswellNat 34, 2011 CarswellNat 35, 2011 SCC 1 (S.C.C.) — considered

Christian & Missionary Alliance v. Metropolitan Toronto (Municipality) (1973), 3 O.R. (2d) 655, 6 L.C.R. 393, 1973 CarswellOnt 956 (Ont. H.C.) — referred to

Conger Lehigh Coal Co. v. Toronto (City) (1933), [1934] O.R. 35, [1934] 1 D.L.R. 476, 1933 CarswellOnt 8 (Ont. C.A.) — referred to

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — followed

Dell Holdings Ltd. v. Toronto Area Transit Operating Authority (1997), 1997 CarswellOnt 78, 1997 CarswellOnt 79, (sub nom. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.)* 31 O.R. (3d) 576 (headnote only), 7 R.P.R. (3d) 1, 36 M.P.L.R. (2d) 163, 45 Admin. L.R. (2d) 1, (sub nom. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.)* 142 D.L.R. (4th) 206, (sub nom. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.)* 206 N.R. 321, (sub nom. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.)* 60 L.C.R. 81, (sub nom. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.)* 97 O.A.C. 81, (sub nom. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.)* [1997] 1 S.C.R. 32 (S.C.C.) — considered

Diggon-Hibben Ltd. v. R. (1949), [1949] 4 D.L.R. 785, [1949] S.C.R. 712, 64 C.R.T.C. 295, 1949 CarswellNat 82 (S.C.C.) — considered

Foulis v. Robinson (1978), 1978 CarswellOnt 466, 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198 (Ont. C.A.) — considered

Hill v. Nova Scotia (Attorney General) (1997), 61 L.C.R. 241, 1997 CarswellNS 563, 155 D.L.R. (4th) 767 (S.C.C.) — referred to

Holdom v. British Columbia Transit (2006), 58 B.C.L.R. (4th) 207, 2006 CarswellBC 2643, 2006 BCCA 488, 49 R.P.R. (4th) 56, 231 B.C.A.C. 315, 381 W.A.C. 315 (B.C. C.A.) — referred to

Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc. (1987), 1987 CarswellBC 160, 14 B.C.L.R. (2d) 273, [1987] 5 W.W.R. 427, (sub nom. *P.Z. Resort Systems Inc. v. Ian MacDonald Library Services Ltd.)* 39 D.L.R. (4th) 626 (B.C. C.A.) — considered

Irving Oil Co. v. R. (1946), [1946] 4 D.L.R. 625, 1946 CarswellNat 58, [1946] S.C.R. 551, 60 C.R.T.C. 309 (S.C.C.) — considered

Lohnes v. Mahone Bay (Town) (1983), 28 L.C.R. 338, 60 N.S.R. (2d) 132, 128 A.P.R. 132, 1983 CarswellNS 387 (N.S.E.C.B.) — considered

Mahone Bay (Town) v. Lohnes (1983), 1983 CarswellNS 379, 59 N.S.R. (2d) 68, 125 A.P.R. 68 (N.S. T.D.) — considered

McKean v. Ontario (Minister of Transportation) (2008), 2008 CarswellOnt 426, (sub nom. *McKean v. Ontario (Ministry of Transportation)*) 94 L.C.R. 185 (O.M.B.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

Thoreson v. Alberta (Minister of Infrastructure) (2007), 47 C.P.C. (6th) 25, 93 L.C.R. 82, 417 A.R. 173, 410 W.A.C. 173, 2007 CarswellAlta 1135, 2007 ABCA 272, 79 Alta. L.R. (4th) 75 (Alta. C.A.) — considered

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Cases considered by *Deschamps J.*:

A.C.T.R.A. v. Canadian Broadcasting Corp. (1995), 27 Admin. L.R. (2d) 1, (sub nom. *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*) 95 C.L.L.C. 210-009, (sub nom. *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*) 177 N.R. 1, (sub nom. *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*) 121 D.L.R. (4th) 385, (sub nom. *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*) [1995] 1 S.C.R. 157, 1995 CarswellNat 265, 1995 CarswellNat 701 (S.C.C.) — considered

Barrie Public Utilities v. Canadian Cable Television Assn. (2003), 2003 CarswellNat 1268, 2003 SCC 28, 2003 CarswellNat 1226, [2003] 1 S.C.R. 476, 304 N.R. 1, 49 Admin. L.R. (3d) 161, 225 D.L.R. (4th) 206 (S.C.C.) — considered

C.U.P.E., Local 963 v. New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

Celgene Corp. v. Canada (Attorney General) (2011), 2011 CarswellNat 34, 2011 CarswellNat 35, 2011 SCC 1 (S.C.C.) — considered

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2009), 2009 CarswellOnt 4494, 2009 CarswellOnt 4495, 2009 SCC 39, (sub nom. *Nolan v. Ontario (Superintendent of Financial Services)*) 253 O.A.C. 256, 49 E.T.R. (3d) 159, 76 C.C.E.L. (3d) 55, 76 C.C.P.B. 1, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee*) 102 O.R. (3d) 319, (sub nom. *Nolan v. Kerry (Canada) Inc.*) [2009] 2 S.C.R. 678, (sub nom. *Nolan v. Ontario (Superintendent of Financial Services)*) 391 N.R. 234, 92 Admin. L.R. (4th) 203, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services)*) 309 D.L.R. (4th) 513 (S.C.C.) — considered

Khosa v. Canada (Minister of Citizenship & Immigration) (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, (sub nom. *Canada (Citizenship & Immigration) v. Khosa*) [2009] 1 S.C.R. 339 (S.C.C.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65 (S.C.C.) — followed

Proprio Direct inc. c. Pigeon (2008), 2008 CarswellQue 4419, 2008 CarswellQue 4420, (sub nom. *Proprio Direct Inc. v. Association des courtiers & agents immobiliers du Québec)* 375 N.R. 1, (sub nom. *Association des Courtiers & Agents Immobiliers du Québec v. Proprio Direct Inc.)* [2008] 2 S.C.R. 195, 68 R.P.R. (4th) 1, 70 Admin. L.R. (4th) 157, (sub nom. *Assoc. des Courtiers et Agents Immobiliers du Québec v. Proprio Direct Inc.)* 293 D.L.R. (4th) 578, 2008 SCC 32 (S.C.C.) — considered

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 43 Imm. L.R. (2d) 117, 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36, 1998 CarswellNat 830, 1998 CarswellNat 831 (S.C.C.) — considered

Q. v. College of Physicians & Surgeons (British Columbia) (2003), 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re)* 302 N.R. 34, [2003] 5 W.W.R. 1, (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia)* [2003] 1 S.C.R. 226, (sub nom. *Dr. Q., Re)* 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re)* 295 W.A.C. 170 (S.C.C.) — considered

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298 (1988), 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault)* [1988] 2 S.C.R. 1048, 1988 CarswellQue 125, 1988 CarswellQue 148, 35 Admin. L.R. 153 (S.C.C.) — considered

Toronto (City) Board of Education v. O.S.S.T.F., District 15 (1997), D.T.E. 97T-306, (sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 98 O.A.C. 241, [1997] 1 S.C.R. 487, 44 Admin. L.R. (2d) 1, 97 C.L.L.C. 220-018, (sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 208 N.R. 245, [1997] L.V.I. 2831-1, 25 C.C.E.L. (2d) 153, 144 D.L.R. (4th) 385, 1997 CarswellOnt 244, 1997 CarswellOnt 245 (S.C.C.) — considered

Statutes considered by *Fish J.*:

Expropriations Act, R.S.O. 1990, c. E.26

Generally — referred to

National Energy Board Act, R.S.C. 1970, c. N-6

s. 75 — referred to

National Energy Board Act, R.S.C. 1985, c. N-7

Generally — referred to

Pt. V — referred to

s. 75 — considered

s. 99(1) — considered

s. 101 — referred to

National Energy Board Act, Act to amend the, S.C. 1980-81-82-83, c. 80

Generally — referred to

Railway Act, R.S.C. 1970, c. R-2

Generally — referred to

ss. 145-184 — referred to

s. 164(1) — referred to

s. 186 — referred to

Supreme Court Act, R.S.C. 1985, c. S-26

s. 47 — referred to

Statutes considered by *Deschamps J.*:

Civil Service Act, S.N.B. 1984, c. C-5.1

Generally — referred to

Education Act, R.S.O. 1990, c. E.2

Generally — referred to

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28

Generally — referred to

s. 6(4) — considered

s. 7(2) — considered

National Energy Board Act, R.S.C. 1985, c. N-7

Generally — referred to

s. 3 — referred to

s. 22(1) — referred to

s. 23 — considered

s. 99(1) — considered

s. 101 — referred to

Patent Act, R.S.C. 1985, c. P-4

Generally — referred to

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

Generally — referred to

Rules considered by *Fish J.*:

Alberta Rules of Court, Alta. Reg. 390/68

R. 601(2)(d)(ii) — referred to

APPEAL by defendant from judgment reported at *Alliance Pipeline Ltd. v. Smith* (2009), 2009 CarswellNat 5476, 2009 FCA 110, 2009 CarswellNat 836, 389 N.R. 363, 2009 CAF 110, 42 C.E.L.R. (3d) 1 (F.C.A.).

POURVOI du défendeur à l'encontre d'un jugement publié à *Alliance Pipeline Ltd. v. Smith* (2009), 2009 CarswellNat 5476, 2009 FCA 110, 2009 CarswellNat 836, 389 N.R. 363, 2009 CAF 110, 42 C.E.L.R. (3d) 1 (F.C.A.).

***Fish J.*:**

I

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

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

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

4 Proceedings before the first Arbitration Committee were aborted and a second Committee was appointed. The second Committee awarded the appellant the costs he had incurred in asserting his claim before it. In addition, it awarded the appellant most of his costs on the proceedings before the first arbitration Committee and the costs he had incurred in defending related proceedings instituted by the respondent in the Court of Queen's Bench. These awards were upheld by the Federal Court on judicial review, but set aside by the Federal Court of Appeal.

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

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

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

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

II

9 In 1998, the respondent, Alliance Pipeline Ltd. ("Alliance"), obtained approval from the National Energy Board to build a pipeline that would cross the farmland of the appellant. As directed by the *NEBA*, the parties concluded easement

agreements, which provided compensation for the expropriated land. They also signed releases which are not in issue before us.

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

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

12 In early June 2003, Alliance decided to perform maintenance work on its easement, pursuant to urgent recommendations of an assessment the company had commissioned a year earlier (but whose conclusions it had previously ignored). In order to access its easement, Alliance asked Mr. Smith for permission to use a 100-foot portion of his private property that lay outside the company's right-of-way. Frustrated by the respondent's unwillingness to pay his previous claim, Mr. Smith asked for prior compensation before giving his approval. During the ensuing disagreement, Mr. Smith expressed his exasperation with Alliance employees in angry and threatening terms. A company land agent notified the RCMP, but after speaking with Mr. Smith, the police refused to lay charges.

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

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

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

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

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

III

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

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

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

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

IV

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

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

24 Pursuant to *Dunsmuir*:

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

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

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

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

(paras. 51 and 53-54).

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

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

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

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

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

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

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

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

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

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

37 Characterizing the issue before the reviewing judge as a question of law is of no greater assistance to Alliance, since a tribunal's interpretation of its home statute, the issue here, normally attracts the standard of reasonableness (*Dunsmuir*, at para. 54), except where the question raised is constitutional, of central importance to the legal system, or where it demarcates

the tribunal's authority from that of another specialized tribunal — which in this instance was clearly not the case.

38 Finally, on this branch of the matter, Alliance argues that adoption of the reasonableness standard would offend the rule of law by insulating from review contradictory decisions by Arbitration Committees as to the proper interpretation of s. 99(1) of the *NEBA*. I am unable to share the respondent's concern. In *Dunsmuir*, the Court stated that questions of law that are not of central importance to the legal system "may be compatible with a reasonableness standard" (para. 55), and added that "[t]here is nothing unprincipled in the fact that some questions of law will be decided on [this] basis" (para. 56; see also *Toronto (City) v. C.U.P.E.*, at para. 71).

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

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

V

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

42 Section 99(1) reads:

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

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

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

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

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

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

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

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

50 The goal of complete indemnification first appeared in the *NEBA* in 1981, when Parliament amended the statute to introduce most of what now constitutes Part V (*An Act to amend the National Energy Board Act*, S.C. 1980-81-82-83, c. 80). Prior to these amendments, ss. 145 to 184 and 186 of the *Railway Act*, R.S.C. 1970, c. R-2, were imported directly into the *NEBA* (R.S.C. 1970, c. N-6, s. 75). Under those provisions, "the costs of the arbitration" were in the discretion of the arbitrator and could be ordered against either party (*Railway Act*, s. 164(1); see *Conger Lehigh Coal Co. v. Toronto (City)* (1933), [1934] O.R. 35 (Ont. C.A.), at pp. 4344).

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

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

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

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

55 Moreover, the *NEBA* operates within the broader context of expropriation law, both federal and provincial. As early as 1949, this Court acknowledged the vulnerable position of expropriated owners. In *Diggon-Hibben Ltd. v. R.*, [1949] S.C.R. 712 (S.C.C.), at p. 715, Rand J. (Taschereau J. concurring) stated that no one should be "victimized in loss because of the accident that his land [is] required for public purposes". In the same case, Estey J., citing with approval the earlier reasons of

Rand J. in *Irving Oil Co. v. R.*, [1946] S.C.R. 551 (S.C.C.), affirmed the right of an expropriated person under the relevant clause "to be made economically whole" (p. 717; see K. J. Boyd, *Expropriation in Canada: A Practitioner's Guide*, (1988), at pp. 144-45).

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

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

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

VI

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

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

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

62 Third, the respondent submits that the Committee's decision is unreasonable because it amounts to "legislative gap filling". In my view, this submission fails as well. The *NEBA* is not under inclusive on the issue of costs. Section 99(1) is broadly framed because provisions of this sort cannot enumerate exhaustively every cost they are meant to cover. It is therefore sufficient that the costs be found by the Committee, on a justifiable, transparent and intelligible basis (*Dunsmuir*, at para. 47), to have been reasonably incurred in asserting the claims for compensation that it was required to adjudicate. In discharging that duty here, the Second Committee did not "cros[s] the line between judicial interpretation and legislative drafting" (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 51).

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

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

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

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

66 The Second Committee had to assess the reasonableness of costs — legal, appraisal, or other — incurred by Mr. Smith in asserting his claim for compensation. As we have seen, in enacting s. 99(1) of the *NEBA*, Parliament, like provincial legislatures, has expanded the traditional, limited notion of legal costs to encompass "appraisal and other" costs. It is well established that "[a]n owner whose land has been taken involuntarily is entitled to indemnification for the necessary expenses of pursuing his or her statutory rights to compensation", the only limitation being that "these expenses be reasonable" (*Campbell River Woodworkers' & Builders' Supply (1966) Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2004 BCCA 27, 22 B.C.L.R. (4th) 210 (B.C. C.A.), at para. 11).

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

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

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

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

An appeal of this decision was dismissed with costs.

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

(N.S.E.C.B.), at p. 343).

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

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

71 Although in that case the Superior Court had not awarded costs to the McKeans, the reasoning remains persuasive. The questions that a Superior Court answers regarding matters incidental but necessary to expropriation proceedings differ from those that a Board or Committee resolves pursuant to the expropriation statutes by which it is governed (see E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at pp. 505-06). Consequently, the doctrine of *res judicata* does not apply, and there is, *a fortiori*, no merit to the respondent's claim that Mr. Smith committed an abuse of process by asking for his costs on the action.

VII

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

73 This award is justified for four reasons.

74 First, in the context of modern expropriation law, where statutes authorize awards of "*all* legal, appraisal *and other* costs", Canadian jurisprudence and doctrine demonstrate that "costs on a solicitor-and-client basis should generally be given" (*Bayview Builder's Supply (1972) Ltd. v. British Columbia (Minister of Transportation & Highways)*, 1999 BCCA 320, 67 B.C.L.R. (3d) 312 (B.C. C.A.), at para. 3, citing Todd, *Law of Expropriation and Compensation in Canada*, at p. 526; see also *Holdom v. British Columbia Transit*, 2006 BCCA 488, 58 B.C.L.R. (4th) 207 (B.C. C.A.)), at para. 11 and *Hill v. Nova Scotia (Attorney General)* (1997), 155 D.L.R. (4th) 767 (S.C.C.)).

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

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

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

***Deschamps J.*:**

78 Deference towards administrative bodies raises important issues, both of a political and legal theoretical nature. This Court has not dealt with this topic lightly, sometimes struggling to find a balance between deferring to the expertise or experience of many of these administrative bodies and reviewing the limits to their decision-making authority under the rule

of law. A consistent holding of this Court has been, and continues to be, that legislative intent should, within the confines of constitutional principles, ultimately prevail. In the case at bar, the issue of deference is shaped narrowly: should an administrative decision-maker's interpretation of its "home" statute usually result in a court deferring to that interpretation — through the adoption of a standard of review of reasonableness — based on a presumption that the decision-maker has particular familiarity with its home statute?

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

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

I. Back to Dunsmuir

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

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

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

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

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

> Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations*

Board), [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39.

85 Textually, this language is capable of differing interpretations. On the one hand, the language could be read broadly to capture any instance when the administrative decision-maker is interpreting its home statute: however, this interpretation does not sit well with any of the previous grounds that this Court has advanced for according deference.

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

87 Indeed, the two examples cited by the *Dunsmuir* majority following its reference to the home statute category at para. 54 clearly indicate that the administrative decision-maker actually needs to have particular expertise or experience in interpreting its home statute or statutes closely connected to its function. Importantly, both cases referred to, *A.C.T.R.A. v. Canadian Broadcasting Corp.* [1995 CarswellNat 265 (S.C.C.)] and *Toronto (City) Board of Education v. O.S.S.T.F., District 15* [1997 CarswellOnt 244 (S.C.C.)], involved labour boards with specialized expertise or experience.

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

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

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

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

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

91 But beyond these two examples, neither of which resulted in deference being accorded to the administrative decision-maker for the mere reason that it was interpreting its home statute or a statute closely connected to its function, the

result in *Dunsmuir* itself stands against the recognition of a broad "home" statute category of question that the reasons of my colleague would create, one that would not require the relative expertise or experience of the decision-maker. In *Dunsmuir*, the majority noted that the adjudicator, empowered by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P.25, was called upon to interpret provisions of its home statute and a related statute, the *Civil Service Act*, S.N.B. 1984, c. C-5.1. Reasonableness was not selected by the majority as the standard of review on the basis of the first-level category of question stemming from the decision-maker's interpretation of its home statute or a statute closely connected to its function; rather, this standard was selected after a contextual standard of review analysis that included a discussion about the significance of the adjudicator's appointment on an *ad hoc* basis by mutual agreement of the parties (paras. 66-71). In the end, the long-standing recognition of "the relative expertise of labour arbitrators" was only one contextual factor that suggested the application of the standard of review of reasonableness (para. 68); deference was not accorded merely because the home statute was being interpreted.

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

II. Judicial Review and Deference to Administrative Decision-Makers

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

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

95 However, Dickson J.'s (as he then was) admonition in *C.U.P.E.* that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233), ushered in an era of judicial deference to administrative decision-making. In *C.U.P.E.*, this meant that the Public Service Labour Relations Board was entitled to deference in interpreting its home statute not only because it was protected by a broad privative clause, but because

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

96 Judicial review of administrative action in the years following *C.U.P.E.* was characterized by the movement away from formalistic notions of jurisdiction and towards a "pragmatic and functional approach" to the standard of review, which involved consideration of a number of contextual factors (see, e.g., *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.)). The goal of this approach was to better focus the concept of deference around legislative intent, namely, "whether the legislator intended the tribunal's decision on these matters to be binding on the parties to the dispute" (*Bibeault*, at p. 1090) or, put another way, to determine which body Parliament intended to be "best-situated to answer [the] question conclusively — the court or the tribunal?" (McLachlin, at pp. 180-81).

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

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

> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" ... In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [Emphasis added; citations omitted; para. 49.]

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

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

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

102 In *Proprio Direct inc. c. Pigeon*, 2008 SCC 32, [2008] 2 S.C.R. 195 (S.C.C.), at para. 21, the majority observed that "[w]hat is at issue here is the interpretation by the discipline committee, a *body of experts*, of its home statute .... The legislature assigned authority to the Association, through the *experience and expertise of its discipline committee*, to apply —

and necessarily interpret — the statutory mandate" (citations omitted; emphasis added). Notably, the dissenting reasons in *Proprio Direct* engage the majority on the very question of the discipline committee's relative expertise: "Although the Act the discipline committee had to apply was its constituting statute, the committee's particular expertise is limited to disciplinary matters. *It has not been shown to have general expertise in statutory interpretation*" (para. 66, *per* Deschamps J., dissenting (emphasis added)).

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

104 In *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), the majority of the Court stated that "[t]he inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority" (para. 34). While there is no express mention of the particular familiarity of the decision-maker (the Financial Services Tribunal) with its home statute in this passage, the presence of such familiarity can be readily inferred from the home statute itself, the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. Subsection 6(4) of that Act indicates that the Lieutenant Governor in Council is to appoint members to be a part of the tribunal "who have experience and expertise in the regulated sectors" and when assigning particular tribunal members to a panel to hear a dispute, s. 7(2) directs that the chair of the tribunal "shall take into consideration the requirements, if any, for experience and expertise to enable the panel to decide the issues raised in any matter before the Tribunal". Moreover, the majority reasons in *Nolan* also cite the exact language from para. 54 of *Dunsmuir*, including the portion of that paragraph referring to "particular familiarity" (para. 31).

105 Most recently, in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (S.C.C.), the Court commented on an interpretation by the Patented Medicine Prices Review Board of the phrase "sold in any market in Canada" found in its home statute, the *Patent Act*. While noting that the parties did not present any argument on the standard of review and proceeded on the basis of a correctness standard, Abella J. questioned that premise and observed at para. 34 that "[t]his *specialized tribunal* is interpreting its enabling legislation. Deference will usually be accorded in these circumstances: see *Dunsmuir*, at paras. 54 and 59" (emphasis added).

106 Taken together, these cases reflect the imperative that if the standard of review is to be resolved in favour of reasonableness on the basis of a category of question without the need for a contextual standard of review analysis, the category must be firmly grounded in a clear rationale for deference. In the case of an administrative body interpreting its home statute, that rationale must be based upon clear legislative intent revealed by a privative clause (*Dunsmuir*, at para. 55, first factor), or by the discrete regime or question of law in which the decision-maker has specialized expertise (*Dunsmuir*, at para. 55, second and third factors). A broad category of question that accords deference solely because the decision-maker is interpreting its home statute, without reference to the particular familiarity of the decision-maker with it pays lip service to legislative intent and creates what Professor Jacobs calls a "detrimental risk of sweeping a wide variety of issues into a single standard, without analysis of the expertise of the decision-maker" (L. Jacobs, "Developments in Administrative Law: The 2007-2008 Term — The Impact of *Dunsmuir*" (2008), 43 *S.C.L.R.* (2d) 1, at p. 31).

III. Application to This Appeal

107 Here, there is no indication that Parliament intended the Second Committee — or any Arbitration Committee — to have particular familiarity with its home statute, the *NEBA*. Indeed, there is no legislative requirement to that effect. Counsel at the hearing before our Court were questioned regarding the appointment of Arbitration Committees, and conflicting answers were given regarding the existence of a list of appointees and their particular expertise on matters subject to arbitration under the *NEBA*.

108 At best, what can be said is that Arbitration Committees are appointed *ad hoc* under the *NEBA* by the Minister of Natural Resources and while they may include practising lawyers, there is nothing to suggest — in the legislative scheme or otherwise — that they hold any sort of expertise or experience relative to a court when it comes to interpreting the *NEBA*.

This *ad hoc* arrangement is quite unlike that of the National Energy Board, also established under the *NEBA*, which the Act requires to consist of not more than nine permanent members who serve renewable terms of seven years (see *NEBA*, s. 3). Though decisions of Arbitration Committees and the National Energy Board are both subject to review on questions of law or jurisdiction, it is notable that Parliament grants a right of appeal from a Committee decision to the Federal Court, whereas an appeal from a decision of the Board lies to the Federal Court of Appeal, upon leave being granted (see *NEBA*, ss. 101 and 22(1)). Given the broad statutory right to appeal the decision of an Arbitration Committee, even using the concurring approach advocated by Binnie in *Dunsmuir* (at para. 146), there would be no deference presumptively owed to decisions of Arbitration Committees because of the mere fact that the legislature designated them — and not the courts — as the decision-makers of first instance. Moreover, in respect of the Board, s. 23 of the *NEBA* states that "[e]xcept as provided in this Act, every decision or order of the Board is final and conclusive." No similar provision exists with respect to Arbitration Committees.

109 The difference in the appointment processes for these two administrative bodies created under the same statute would logically result in the National Energy Board, as an institution, possessing greater expertise and experience under the *NEBA* regarding the matters it is directed to decide, as compared to Arbitration Committees. The different avenues by which the decisions of these two bodies may be reviewed also make it evident that Parliament intended decisions of the National Energy Board be shown greater deference than those of Arbitration Committees. This counsels against creating the broad category of question adopted by Fish J. that would accord deference to any administrative decision-maker's interpretation of its home statute except in a closed category of circumstances. I also reiterate that in *Dunsmuir*, where the adjudicator was selected *ad hoc* by mutual agreement of the parties, the majority did not rely solely on either a presumed or institutional expertise to interpret the home statute as the basis for reasonableness.

110 In this appeal, deference should be accorded to the Second Committee, not because it interpreted its home statute, but because it exercised its statutorily conferred discretion to make an award of costs. This should be considered along with this Court's observation in *Nolan* that costs awards are "quintessentially discretionary" (para. 126) and the recognition in *Dunsmuir* that for matters involving discretion, "deference will usually apply automatically" (para. 53). Thus, in the context of s. 99(1) of the *NEBA*, which directs an Arbitration Committee to award to an expropriated party "all legal, appraisal and other costs *determined by the Committee to have been reasonably incurred* ... in asserting that person's claim for compensation", deference should be paid to the Second Committee's finding regarding the costs that it determined were reasonably incurred by Mr. Smith in asserting his claim for compensation. Such deference is warranted because of the clear and unequivocal language of s. 99(1). In this respect, I agree with my colleague Fish J. when he notes, at para. 31 of his reasons, that this language "reflects a legislative intention to vest in Arbitration Committees sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve". This, and not the mere fact that the Second Committee was interpreting its home statute, militates in favour of according deference.

111 For these reasons, I would allow the appeal, with costs to Mr. Smith throughout on a solicitor-and-client basis.

Appeal allowed.

Pourvoi accueilli.

TAB 4

2011 SCC 61

Supreme Court of Canada

A.T.A. v. Alberta (Information & Privacy Commissioner)

2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 2011 SCC 61, [2011] 3 S.C.R. 654, [2011] S.C.J. No. 61, [2012] 2 W.W.R. 434, [2012] A.W.L.D. 107, [2012] A.W.L.D. 109, [2012] A.W.L.D. 111, [2012] A.W.L.D. 174, 208 A.C.W.S. (3d) 434, 28 Admin. L.R. (5th) 177, 339 D.L.R. (4th) 428, 424 N.R. 70, 519 A.R. 1, 52 Alta. L.R. (5th) 1, 539 W.A.C. 1, J.E. 2011-2083

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

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

Heard: February 16, 2011

Judgment: December 14, 2011*

Docket: 33620

Proceedings: reversing *A.T.A. v. Alberta (Information & Privacy Commissioner)* (2010), [2010] 8 W.W.R. 457, 1 Admin. L.R. (5th) 60, 474 A.R. 169, 479 W.A.C. 169, 316 D.L.R. (4th) 117, 2010 CarswellAlta 94, 2010 ABCA 26, 21 Alta. L.R. (5th) 30 (Alta. C.A.); affirming *A.T.A. v. Alberta (Information & Privacy Commissioner)* (2008), 1 Admin. L.R. (5th) 85, 2008 CarswellAlta 2300, 21 Alta. L.R. (5th) 24 (Alta. Q.B.)

Counsel: Glenn Solomon, Q.C., Rob W. Armstrong, for Appellant

Sandra M. Anderson, Anne L. G. Côté, for Respondent

David Loukidelis, Q.C. (written), Veronica Jackson (written), Deanna Billo (written), for Intervener, Attorney General of British Columbia

Murray Rankin, Q.C. (written), Nitya Iyer (written), for Intervener, Information and Privacy Commissioner of British Columbia

Brent B. Olthuis, Tam C. Boyar, for Intervener, B.C. Freedom of Information and Privacy Association

Subject: Public; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Administrative law --- Prerequisites to judicial review — Jurisdiction of court to review — Miscellaneous

Adjudicator made decision on behalf of Information and Privacy Commissioner finding that respondent association breached complainants' privacy rights — Issue of Commissioner's alleged loss of jurisdiction due to his failure to comply with timelines in s. 50(5) of Personal Information Protection Act ("timelines issue") was not raised by respondent before Commissioner or adjudicator — Timelines issue was raised for first time on judicial review — Respondent's application for review was granted on basis of timelines issue — Majority of Court of Appeal affirmed decision — Commissioner appealed to Supreme Court of Canada — Appeal allowed — Court has discretion not to undertake judicial review of issue and generally will not review issue that could have been, but was not, raised before tribunal — In present case, rationales for general rule had limited application — In circumstances, Court of Appeal did not err in refusing to disturb exercise of reviewing judge's discretion to consider timelines issue — Commissioner had consistently expressed his views on timelines issue in other cases, so parties had benefit of his expertise — No evidence was required to consider timelines issue and no prejudice was alleged — Commissioner and adjudicator implicitly decided timelines issue.

Administrative law --- Standard of review — General principles

Adjudicator made decision on behalf of Information and Privacy Commissioner, finding that respondent association breached complainants' privacy rights — Issue of Commissioner's alleged failure to comply with timelines in s. 50(5) of Personal Information Protection Act ("timelines issue") was not raised before Commissioner or adjudicator — Timelines issue was raised for first time on judicial review — Chambers judge applied correctness standard of review and granted application on basis of timelines issue — Court of Appeal applied correctness standard of review and affirmed chambers judge's decision — Commissioner appealed to Supreme Court of Canada — Appeal allowed — Reasonableness standard of review was applicable — Commissioner was interpreting his own statute and question was within his specialized expertise — Deference will usually result where tribunal is interpreting its home statutes, unless question falls into category of question to which correctness standard applies — Timelines question did not fall into such category: it was not constitutional question, question regarding jurisdictional lines between competing specialized tribunals, question of central importance to legal system as whole, nor true question of jurisdiction or vires — Category of true questions of jurisdiction is narrow and it might be time to reconsider whether this category exists and is necessary to identify appropriate standard of review — True questions of jurisdiction will be exceptional — Unless situation is exceptional, interpretation by tribunal of its home statute or statutes closely connected to its function should be presumed to be question of statutory interpretation subject to deference on judicial review — As long as "true question of jurisdiction" category remains, party seeking to invoke it should be required to demonstrate why court should not review tribunal's interpretation of its home statute on standard of reasonableness.

Administrative law --- Review for lack or excess of jurisdiction — General principles

Adjudicator made decision on behalf of Information and Privacy Commissioner finding that respondent association had breached complainants' privacy rights — Issue of Commissioner's alleged loss of jurisdiction due to his failure to comply with timelines in s. 50(5) of Personal Information Protection Act ("timelines issue") was not raised by respondent before Commissioner or adjudicator — Timelines issue was raised for first time on judicial review — Chambers judge applied correctness standard of review and granted application for review on basis of timelines issue — Majority of Court of Appeal affirmed decision — Commissioner appealed to Supreme Court of Canada — Appeal allowed — Timelines question was not true question of jurisdiction or vires — Category of true questions of jurisdiction is narrow and time may have come to reconsider whether this category exists and is necessary to identify appropriate standard of review — Unless situation is exceptional, interpretation by tribunal of its home statute or statutes closely connected to its function should be presumed to be question of statutory interpretation subject to deference on judicial review — As long as "true question of jurisdiction" category remains, party seeking to invoke it should be required to demonstrate why court should not review tribunal's interpretation of its home statute on standard of reasonableness.

Privacy and freedom of information --- Provincial privacy legislation — Miscellaneous

Adjudicator made decision on behalf of Information and Privacy Commissioner finding that respondent association had breached complainants' privacy rights — Issue of Commissioner's alleged failure to comply with timelines in s. 50(5) of Personal Information Protection Act ("PIPA") ("timelines issue") was not raised before Commissioner or adjudicator — Timelines issue was raised for first time on judicial review — Association's application for review was granted on basis of timelines issue — Majority of Court of Appeal affirmed decision — Commissioner appealed to Supreme Court of Canada — Appeal allowed — Although timelines issue was not raised before her, adjudicator implicitly decided that providing extension after 90 days did not automatically terminate inquiry — There was reasonable basis for adjudicator's implied decision — Other decisions by Commissioner and adjudicator regarding timelines provided consistent analyses of similarly-worded s. 69(6) of Freedom of Information and Protection of Privacy Act ("FOIPPA") — It was reasonable for adjudicator to apply Commissioner's interpretation of s. 69(6) of FOIPPA to s. 50(5) of PIPA — Both subsections govern inquiries conducted by Commissioner, are identically structured, and use almost identical

language — It was reasonable to assume that Commissioner's interpretations of s. 69(6) of FOIPPA were reasons of adjudicator in present case.

Droit administratif --- Conditions préalables au contrôle judiciaire — Compétence du tribunal pour effectuer la révision — Divers

Déléguée a rendu une décision au nom du commissaire à l'information et à la protection de la vie privée selon laquelle l'association intimée avait contrevenu au droit à la vie privée des plaignants — Intimée n'a pas plaidé devant le commissaire ou sa déléguée que le commissaire avait perdu compétence en raison de son défaut de respecter le délai prévu à l'art. 50(5) de la Personal Information Protection Act (la « question de l'observation du délai ») — Question de l'observation du délai a été soulevée pour la première fois lors du contrôle judiciaire — Demande de contrôle judiciaire de l'intimée a été accordée sur la base de la question de l'observation du délai — Juges majoritaires de la Cour d'appel ont confirmé la décision — Commissaire a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Cour de justice jouit du pouvoir discrétionnaire d'entreprendre ou non un contrôle judiciaire et, en règle générale, elle s'en abstient lorsque la question aurait pu être soulevée devant le tribunal administratif mais qu'elle ne l'a pas été — En l'espèce, les considérations justifiant la règle générale avaient une application limitée — Dans les circonstances, la Cour d'appel n'a pas eu tort de refuser de s'immiscer dans l'exercice du pouvoir discrétionnaire du juge siégeant en révision de considérer la question de l'observation du délai — Commissaire a exprimé son opinion concernant la question de l'observation du délai dans d'autres décisions, ce qui donnait accès à son expertise — Nul élément de preuve n'était requis pour trancher la question de l'observation du délai, et nul préjudice n'était allégué — Commissaire et déléguée se sont implicitement prononcés quant à l'observation du délai.

Droit administratif --- Norme de contrôle — Principes généraux

Déléguée a rendu une décision au nom du commissaire à l'information et à la protection de la vie privée selon laquelle l'association intimée avait contrevenu au droit à la vie privée des plaignants — Intimée n'a pas plaidé devant le commissaire ou sa déléguée que le commissaire avait perdu compétence en raison de son défaut de respecter le délai prévu à l'art. 50(5) de la Personal Information Protection Act (la « question de l'observation du délai ») — Question de l'observation du délai a été soulevée pour la première fois lors du contrôle judiciaire — Juge siégeant en cabinet a appliqué la norme de contrôle de la décision correcte et a accordé la demande en contrôle judiciaire sur la base de la question de l'observation du délai — Cour d'appel a appliqué la norme de contrôle de la décision correcte et a confirmé la décision du juge siégeant en cabinet — Commissaire a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Norme de contrôle applicable était celle de la décision raisonnable — Commissaire interprétait sa propre loi constitutive et la question relevait de son expertise — Lorsqu'un tribunal administratif interprète sa propre loi constitutive, la déférence est habituellement de mise, sauf si la question relève d'une catégorie de questions à laquelle la norme de la décision correcte demeure applicable — Question de l'observation du délai n'appartenait pas à une telle catégorie : elle n'était pas de nature constitutionnelle, elle n'avait pas trait à la délimitation des compétences respectives de tribunaux spécialisés concurrents, elle ne revêtait pas une importance capitale pour le système juridique dans son ensemble et elle ne touchait pas véritablement à la compétence — Peu de questions appartiennent à la catégorie des véritables questions de compétence et le temps était sans doute venu de se demander si cette catégorie existe et s'il est nécessaire d'identifier la norme de contrôle appropriée — Questions touchant véritablement à la compétence sont rarement soulevées — Sauf situation exceptionnelle, il faudrait présumer que l'interprétation par un tribunal administratif de sa loi propre constitutive ou d'une loi étroitement liée à son mandat est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire — Tant que subsiste la catégorie des « véritables questions de compétence », la partie qui prétend soulever une question qui y appartient devrait établir les raisons pour lesquelles le contrôle visant l'interprétation de sa loi constitutive par un tribunal administratif ne devrait pas s'effectuer au regard de la norme de la décision raisonnable.

Droit administratif --- Pouvoir discrétionnaire du tribunal faisant l'objet d'une révision — Principes généraux

Déléguée a rendu une décision au nom du commissaire à l'information et à la protection de la vie privée selon laquelle l'association intimée avait contrevenu au droit à la vie privée des plaignants — Intimée n'a pas plaidé devant le commissaire ou sa déléguée que le commissaire avait perdu compétence en raison de son défaut de respecter le délai prévu à l'art. 50(5) de la Personal Information Protection Act (la « question de l'observation du délai ») — Question de l'observation du délai a été soulevée pour la première fois lors du contrôle judiciaire — Juge siégeant en cabinet a appliqué la norme de contrôle de la décision correcte et a accordé la demande en contrôle judiciaire sur la base de la question de l'observation du délai — Juges majoritaires de la Cour d'appel ont confirmé la décision — Commissaire a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Question de l'observation du délai n'était pas une question touchant véritablement à la compétence — Peu de questions appartiennent à la catégorie des véritables questions de compétence et le temps était sans doute venu de se demander si cette catégorie existe et s'il est nécessaire d'identifier la norme de contrôle appropriée — Sauf situation exceptionnelle, il faudrait présumer que l'interprétation

par un tribunal administratif de sa loi propre constitutive ou d'une loi étroitement liée à son mandat est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire — Tant que subsiste la catégorie des « véritables questions de compétence », la partie qui prétend soulever une question qui y appartient devrait établir les raisons pour lesquelles le contrôle visant l'interprétation de sa loi constitutive par un tribunal administratif ne devrait pas s'effectuer au regard de la norme de la décision raisonnable.

Vie privée et accès à l'information --- Législation provinciale sur la vie privée — Divers

Déléguée a rendu une décision au nom du commissaire à l'information et à la protection de la vie privée selon laquelle l'association intimée avait contrevenu au droit à la vie privée des plaignants — Intimée n'a pas plaidé devant le commissaire ou sa déléguée que le commissaire avait perdu compétence en raison de son défaut de respecter le délai prévu à l'art. 50(5) de la Personal Information Protection Act (« PIPA ») (la « question de l'observation du délai ») — Question de l'observation du délai a été soulevée pour la première fois lors du contrôle judiciaire — Demande de contrôle judiciaire de l'association a été accordée sur la base de la question de l'observation du délai — Juges majoritaires de la Cour d'appel ont confirmé la décision — Commissaire a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Bien que la question de l'observation du délai n'ait pas été soulevée devant la déléguée, celle-ci a implicitement décidé que la prorogation du délai après les 90 jours impartis n'a pas automatiquement mis fin à l'enquête — Décision implicite de la déléguée avait un fondement raisonnable — Dans d'autres décisions sur la question de l'observation du délai, le commissaire et la déléguée ont interprété de manière constante l'art. 69(6) de la Freedom of Information and Protection of Privacy Act (« FOIPPA »), dont le libellé est semblable — Déléguée pouvait légitimement appliquer à l'art. 50(5) de la PIPA l'interprétation de l'art. 69(6) de la FOIPPA par le commissaire — Les deux sous-sections s'appliquent aux enquêtes du commissaire, ont été conçues de la même manière et leurs libellés sont presque identiques — On pouvait certes présumer que les motifs du commissaire interprétant l'art. 69(6) de la FOIPPA ont été repris par la déléguée en l'espèce.

The complainants alleged that the respondent teachers' association breached their privacy, and complained to the Information and Privacy Commissioner. Section 50(5) of the Personal Information Protection Act ("PIPA") provided that an inquiry "must" be completed within 90 days of the complaint being received by the Commissioner, unless the Commissioner notifies the parties that he is extending the period and provides an anticipated date for completing the inquiry. The Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. The adjudicator delegated by the Commissioner issued an order against the respondent before the anticipated date for completion and 29 months after the initial complaint was made. The issue of the Commissioner's compliance with the timelines in s. 50(5) of PIPA ("timelines issue") was not raised before the Commissioner or the adjudicator.

The timelines issue was raised by the respondent for the first time on judicial review. Applying a correctness standard of review, the chambers judge granted the judicial review application on the basis that the Commissioner had lost jurisdiction for failing to comply with the timelines in s. 50(5) of PIPA.

A majority of the Court of Appeal applied a correctness standard of review and upheld the chambers judge's decision. The Commissioner appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

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

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

A reasonableness standard of review was applicable. The Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference usually results where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply. The timelines question did not fall into such a category: it was not a constitutional question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, nor a true question of jurisdiction or vires.

The category of true questions of jurisdiction is narrow. The "true question of jurisdiction" category had caused confusion and without a clear definition or content to the category, courts would continue to be in doubt. Unless the situation is exceptional, the interpretation by a tribunal of its home statute or statutes closely connected to its function should be presumed to be a question of statutory interpretation subject to deference on judicial review. As long as the "true question of jurisdiction" category remains, a party seeking to invoke it should be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the standard of reasonableness.

Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated. The Commissioner's decision was implicit in his giving notice of an extension and an anticipated date for completion after 90 days. The adjudicator's decision was implicit in her proceeding with the inquiry and rendering an order. There was a reasonable basis for the implied decision.

Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists. Other decisions by the Commissioner and the adjudicator provided consistent analyses of the similarly-worded s. 69(6) of the Freedom of Information and Protection of Privacy Act ("FOIPPA").

It was reasonable to assume that the Commissioner's interpretations of s. 69(6) of FOIPPA were the reasons of the adjudicator in the present case. Both s. 50(5) of PIPA and s. 69(6) of FOIPPA govern inquiries conducted by the Commissioner. They were identically structured and used almost identical language. It was reasonable for the adjudicator to apply the Commissioner's interpretation of s. 69(6) of FOIPPA to s. 50(5) of PIPA. No principle of statutory interpretation required a presumption that an extension must be granted before the expiry of the 90-day time limit simply because s. 50(5) of PIPA was silent on when an extension could be granted.

Per Binnie J. (concurring) (Deschamps J. concurring): It was agreed with Cromwell J. that the concept of jurisdiction is fundamental to judicial review and to the rule of law. The Supreme Court of Canada stated, in a 2011 decision, that if the issue relates to the interpretation and application of a tribunal's own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the tribunal will be entitled to deference. The reference in the 2011 decision to "issues of general legal importance" referred to issues whose resolution has significance outside the operation of the statutory scheme under consideration. "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny.

Rothstein J.'s effort to euthanize the issue of searching for the "true" question of vires or jurisdiction was supported, but his effort to dilute the significance of expertise and general legal importance as conditions precedent to any deference to an administrative tribunal on matters of law, including the interpretation of its "home statute", was not.

Rothstein J.'s creation of a "presumption" based on insufficient criteria just added another step to what should be a straightforward analysis. If the issue before the reviewing court relates to the interpretation or application of a tribunal's home statute and related statutes also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond the statutory scheme under review, the court should afford a measure of deference under the standard of reasonableness. Otherwise, the last word on questions of law should be left with the courts.

Per Cromwell J. (concurring): It was agreed with the majority that the appeal should be allowed and that the adjudicator's decision on the timelines issue should be reinstated. The standard of review was reasonableness.

The majority elevated the general guideline that a tribunal's interpretation of its home statute will not often raise a jurisdictional question to a virtually irrefutable presumption. This went well beyond saying that deference usually results with respect to such questions. There was no indication of how, if at all, this presumption could be rebutted.

The majority's suggestion that jurisdictional questions might not exist at all undermined the foundation of judicial review of administrative action. As a matter of constitutional law or legislative intent, a tribunal must be correct on certain issues. True questions of jurisdiction or vires exist. However, as analytical tools, labels of "jurisdiction" and "vires" did not need to play a part in the courts' everyday work of reviewing administrative action.

Though deference will usually result where a tribunal is interpreting its home statute, there are legal questions in home statutes whose resolution legislatures do not intend to leave to the tribunal. The fact that s. 50(5) of PIPA was in the Commissioner's home statute did not relieve the reviewing court of examining the provision and other relevant factors to determine the legislature's intent.

It was the legislature's intent to leave to the Commissioner the question of whether s. 50(5) allowed him to extend the time limit after the 90 days had expired. It was therefore agreed with the majority that the applicable standard of review was reasonableness.

Correctness review exists, both as a matter of constitutional law and statutory interpretation. Parliament and the legislatures, as a matter of constitutional law, cannot oust judicial review for correctness of a tribunal's interpretation of jurisdiction limiting provisions.

Les plaignants ont allégué que l'association de professeurs intimée avait atteint à leur vie privée et ont déposé une plainte auprès du commissaire à l'information et à la protection de la vie privée. L'article 50(5) de la Personal Information Protection Act (« PIPA ») prévoit qu'une enquête « doit » prendre fin au plus tard 90 jours après la réception de la plainte, à moins que le commissaire informe les parties qu'il proroge ce délai et précise la date prévue d'achèvement de l'enquête. Il a fallu 22 mois, après qu'il eut reçu la plainte initiale, pour que le commissaire proroge l'enquête et fixe la date à laquelle il prévoyait compléter celle-ci. La personne déléguée par le commissaire a rendu une ordonnance à l'encontre de l'intimée avant la date prévue pour l'achèvement de l'enquête mais 29 mois après que la plainte initiale eut été déposée. La question de l'observation du délai prévu à l'art. 50(5) de la PIPA par le commissaire (la « question de l'observation du délai ») n'a pas été soulevée devant le commissaire ou sa déléguée.

La question de l'observation du délai a été soulevée par l'intimée pour la première fois lors du contrôle judiciaire. En faisant l'examen de la décision selon la norme de contrôle de la décision correcte, le juge siégeant en cabinet a fait droit à la demande en contrôle judiciaire au motif que le commissaire a perdu compétence parce qu'il n'a pas mené l'enquête à terme dans le délai prescrit à l'art. 50(5) de la PIPA.

Les juges majoritaires de la Cour d'appel ont procédé à l'examen selon la norme de contrôle de la décision correcte et ont confirmé la décision du juge siégeant en cabinet. Le commissaire a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Rothstein, J. (McLachlin, J.C.C., LeBel, Fish, Abella, Charron, JJ., souscrivant à son opinion) : Bien que la question de l'observation du délai n'ait pas été soulevée devant le commissaire ou la déléguée, celle-ci a implicitement décidé que la prorogation du délai après les 90 jours impartis n'a pas automatiquement mis fin à l'enquête. La décision de la déléguée était assujettie à la norme de contrôle de la décision raisonnable et sa décision était raisonnable. L'ordonnance de la déléguée devrait être rétablie.

Une cour de justice jouit du pouvoir discrétionnaire d'entreprendre ou non un contrôle judiciaire et, en règle générale, elle s'en abstient lorsque la question aurait pu être soulevée devant le tribunal administratif mais qu'elle ne l'a pas été. En l'espèce, les considérations justifiant la règle générale avaient une application limitée. Le commissaire a exprimé son opinion concernant la question de l'observation du délai dans d'autres décisions, ce qui donnait accès à son expertise. Nul élément de preuve n'était requis pour trancher la question de l'observation du délai, et nul préjudice n'était allégué.

La norme de contrôle de la décision raisonnable était la norme applicable. Le commissaire interprétait sa propre loi constitutive et la question relevait de son expertise. Lorsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat, la déférence est habituellement de mise, sauf si la question relève d'une catégorie de questions à laquelle la norme de la décision correcte demeure applicable. La question de l'observation du délai n'appartenait pas à une telle catégorie : elle n'était pas de nature constitutionnelle, elle n'avait pas trait à la délimitation des compétences respectives de tribunaux spécialisés concurrents, elle ne revêtait pas une importance capitale pour le système juridique dans son ensemble et elle ne touchait pas véritablement à la compétence.

Peu de questions appartiennent à la catégorie des véritables questions de compétence. La catégorie des « questions touchant véritablement à la compétence » a semé la confusion et, sans une définition claire ni de précision quant à sa teneur, les cours de justice demeureront dans l'incertitude à ce sujet. Sauf situation exceptionnelle, il faudrait présumer que l'interprétation par un tribunal administratif de sa loi propre constitutive ou d'une loi étroitement liée à son mandat est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire. Tant que subsiste la catégorie des « véritables questions de compétence », la partie qui prétend soulever une question qui y appartient devrait établir les raisons pour lesquelles le contrôle visant l'interprétation de sa loi constitutive par un tribunal administratif ne devrait pas s'effectuer au regard de la norme de la décision raisonnable.

Le commissaire et sa déléguée ont implicitement décidé que la prorogation du délai après les 90 jours impartis n'avait pas automatiquement mis fin à l'enquête. Le commissaire, en informant les parties de la prorogation et en leur précisant

la date prévue d'achèvement après les 90 jours impartis, et la déléguée, en effectuant l'enquête et en rendant une ordonnance, se sont implicitement prononcés sur la question. La décision implicite avait un fondement raisonnable.

La juridiction de révision peut s'en remettre aux motifs d'autres décisions du tribunal administratif sur le même point pour décider si une décision implicite a un fondement raisonnable ou non. Dans d'autres décisions, le commissaire et la déléguée ont interprété de manière constante l'art. 69(6) de la Freedom of Information and Protection of Privacy Act (« FOIPPA »), dont le libellé est semblable.

On pouvait certes présumer que les motifs du commissaire interprétant l'art. 69(6) de la FOIPPA ont été repris par la déléguée en l'espèce. L'article 50(5) de la PIPA et l'art. 69(6) de la FOIPPA s'appliquent aux enquêtes du commissaire. Ils ont été conçus de la même manière et leurs libellés sont presque identiques. La déléguée pouvait légitimement appliquer à l'art. 50(5) de la PIPA l'interprétation de l'art. 69(6) de la FOIPPA par le commissaire. Aucun principe d'interprétation législative n'établissait de présomption voulant que la prorogation doive intervenir avant l'expiration du délai de 90 jours seulement parce que l'art. 50(5) de la PIPA ne précisait pas la période pendant laquelle le délai pouvait être prorogé.

Binnie, J. (souscrivant à l'opinion des juges majoritaires) (Deschamps, J., souscrivant à son opinion) : On convenait avec le juge Cromwell que la notion de compétence est fondamentale dans le processus du contrôle judiciaire et pour la primauté du droit. Selon la Cour suprême du Canada, dans une décision rendue en 2011, lorsqu'il s'agit d'interpréter et d'appliquer sa propre loi, dans son domaine d'expertise et sans que soit soulevée une question de droit générale, la norme de la décision raisonnable s'applique habituellement et le tribunal a droit à la déférence. La référence, dans la décision de 2011, à une « question de droit générale » s'entendait d'une question dont le règlement n'importait pas seulement pour le régime législatif considéré. La « raisonnabilité » est une notion générale d'apparence trompeusement simple qui confère à la juridiction de révision le pouvoir discrétionnaire étendu de choisir entre divers degrés d'examen.

On convenait avec le juge Rothstein de la nécessité d'en finir avec les questions touchant véritablement à la compétence. Toutefois, il y avait désaccord avec la volonté du juge Rothstein de diminuer l'importance de l'expertise et de la question de droit générale comme conditions préalables à la manifestation de déférence envers la décision d'un tribunal administratif sur une question de droit, y compris l'interprétation de sa loi constitutive.

La création par le juge Rothstein d'une « présomption » fondée sur des critères insuffisants ne faisait qu'ajouter une étape à une analyse qui devrait être simple. Si la décision visée par le contrôle judiciaire a trait à l'interprétation et à l'application de la loi constitutive du tribunal administratif ou d'une loi connexe qui relève elle aussi essentiellement du mandat et de l'expertise du décideur, et qu'elle ne soulève pas de questions de droit générales au-delà des aspects administratifs du régime législatif en cause, la juridiction de révision devrait se montrer déférente en appliquant la norme de la décision raisonnable. Sinon, il appartenait à la juridiction de révision de statuer en dernier ressort sur les questions de droit.

Cromwell, J. (souscrivant à l'opinion des juges majoritaires) : On convenait avec les juges majoritaires que le pourvoi devrait être accueilli et que la décision de la déléguée concernant l'observation du délai devrait être rétablie. La norme de contrôle applicable était celle de la décision raisonnable.

Les juges majoritaires ont élevé au rang de présomption pour ainsi dire irréfutable l'énoncé général voulant que l'interprétation par un tribunal administratif de sa loi constitutive soulève rarement une question de compétence. Cela allait beaucoup plus loin qu'affirmer que la déférence est habituellement de mise relativement à ces questions. Nulle précision n'était donnée quant à la manière dont cette présomption pouvait être réfutée, si toutefois elle pouvait l'être.

Suggérer, comme l'ont fait les juges majoritaires, que les questions de compétence pourraient ne pas exister du tout minait l'assise du contrôle judiciaire des actes de l'administration. Suivant le droit constitutionnel ou l'intention du législateur, la décision du tribunal administratif sur certaines questions doit être correcte. Les questions touchant véritablement à la compétence existent. En revanche, l'appellation « question de compétence » n'a aucun rôle à jouer au quotidien dans le contrôle judiciaire de l'action administrative.

Bien que la déférence soit habituellement de mise envers un tribunal administratif qui interprète sa loi constitutive, une loi constitutive renferme des dispositions qui soulèvent des questions de droit sur lesquelles le législateur n'a pas voulu que le tribunal administratif ait le dernier mot. La présence de l'art. 50(5) de la PIPA dans la loi constitutive du commissaire ne soustrayait pas la cour de justice siégeant en révision à son obligation de se pencher, par l'examen de la disposition et de toute autre considération pertinente, sur l'intention du législateur.

Le législateur a voulu laisser au commissaire le soin de décider si l'art. 50(5) l'autorisait à proroger le délai après les 90

jours impartis. Par conséquent, on convenait avec les juges majoritaires que la norme de contrôle applicable était celle de la décision raisonnable.

Il existe des questions soumises à la norme de la décision correcte sur le fondement tant du droit constitutionnel que de l'interprétation législative. Les législateurs fédéral et provinciaux ne peuvent, sur le plan constitutionnel, soustraire au contrôle judiciaire selon la norme de la décision correcte l'interprétation par un tribunal administratif d'une disposition qui limite sa compétence.

Table of Authorities

Cases considered by *Rothstein J.*:

A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto (2009), (sub nom. *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Association of Metropolitan Toronto & Vicinity)* 306 D.L.R. (4th) 251, 2009 CarswellOnt 2303, 2009 ONCA 292 (Ont. C.A.) — referred to

Alberta (Minister of Public Works, Supply & Services) v. Nilsson (2002), 2002 CarswellAlta 1491, 2002 ABCA 283, 14 C.C.L.T. (3d) 163, 320 A.R. 88, 288 W.A.C. 88, 8 Alta. L.R. (4th) 83, 220 D.L.R. (4th) 474, 77 L.C.R. 241, [2003] 2 W.W.R. 215, 5 R.P.R. (4th) 159 (Alta. C.A.) — referred to

Alliance Pipeline Ltd. v. Smith (2008), 2008 FC 12, 2008 CarswellNat 35, 318 F.T.R. 100 (Eng.), 34 C.E.L.R. (3d) 138, 2008 CF 12, 2008 CarswellNat 1427 (F.C.) — considered

Alliance Pipeline Ltd. v. Smith (2009), 2009 CarswellNat 5476, 2009 FCA 110, 2009 CarswellNat 836, 389 N.R. 363, 2009 CAF 110, 42 C.E.L.R. (3d) 1 (F.C.A.) — referred to

Alliance Pipeline Ltd. v. Smith (2011), 328 D.L.R. (4th) 1, 56 C.E.L.R. (3d) 161, 16 Admin. L.R. (5th) 157, [2011] 1 S.C.R. 160, 2011 SCC 7, 2011 CarswellNat 202, 2011 CarswellNat 203, 102 L.C.R. 1, 412 N.R. 66 (S.C.C.) — considered

C.U.P.E., Local 963 v. New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — considered

Canada (Attorney General) v. Mowat (2011), 93 C.C.E.L. (3d) 1, D.T.E. 2011T-708, 337 D.L.R. (4th) 385, 26 Admin. L.R. (5th) 1, 2011 CarswellNat 4190, 2011 CarswellNat 4191, 2011 SCC 53 (S.C.C.) — considered

Canadian Pacific Ltd. v. Matsqui Indian Band (1995), 1995 CarswellNat 264, 1995 CarswellNat 700, 26 Admin. L.R. (2d) 1, (sub nom. *Matsqui Indian Band v. Canadian Pacific Ltd.)* [1995] 2 C.N.L.R. 92, 122 D.L.R. (4th) 129, 85 F.T.R. 79 (note), [1995] 1 S.C.R. 3, 177 N.R. 325 (S.C.C.) — considered

Celgene Corp. v. Canada (Attorney General) (2009), 81 C.P.R. (4th) 79, 2009 CarswellNat 1499, 344 F.T.R. 45 (Eng.), 2009 FC 271 (F.C.) — considered

Celgene Corp. v. Canada (Attorney General) (2009), 2009 CarswellNat 5494, 81 C.P.R. (4th) 93, [2011] 1 F.C.R. 78, (sub nom. *Canada (Attorney General) v. Celgene Corp.)* 315 D.L.R. (4th) 270, 2009 FCA 378, 2009 CarswellNat 4439, 100 Admin. L.R. (4th) 244, 398 N.R. 233, 2009 CAF 378 (F.C.A.) — referred to

Celgene Corp. v. Canada (Attorney General) (2011), 2011 CarswellNat 34, 2011 CarswellNat 35, 2011 SCC 1, 327 D.L.R. (4th) 513, 410 N.R. 127, 14 Admin. L.R. (5th) 1, [2011] 1 S.C.R. 3, 89 C.P.R. (4th) 1 (S.C.C.) — referred to

Edmonton Police Service, Re (October 9, 2008), Doc. 890 (Alta. I.P.C.) — referred to

Edmonton Police Service, Re (October 10, 2008), Doc. 632 (Alta. I.P.C.) — referred to

Edmonton Police Service, Re (December 23, 2008), Doc. F3918 (Alta. I.P.C.) — referred to

Edmonton Police Service, Re (December 23, 2008), Doc. F3998 (Alta. I.P.C.) — referred to

Edmonton Police Service, Re (December 23, 2008), Doc. F4070 (Alta. I.P.C.) — referred to

Edmonton Police Service, Re (January 12, 2009), Doc. F3801 (Alta. I.P.C.) — referred to

Edmonton Police Service, Re (June 9, 2009), Doc. F3855 (Alta. I.P.C.) — referred to

Kellogg Brown & Root Canada v. Alberta (Information & Privacy Commissioner) (2007), 434 A.R. 311, 2007 CarswellAlta 1047, 2007 ABQB 499, 67 Admin. L.R. (4th) 166 (Alta. Q.B.) — distinguished

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2006), 2006 CarswellOnt 1503, 52 C.C.P.B. 1, (sub nom. *Nolan v. Superintendent of Financial Services & Kerry (Canada) Inc.)* 2006 C.E.B. & P.G.R. 8190, (sub nom. *Nolan v. Superintendent of Financial Services (Ontario))* 209 O.A.C. 21 (Ont. Div. Ct.) — considered

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2007), (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 2007 C.E.B. & P.G.R. 8249, 60 C.C.P.B. 67, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services))* 282 D.L.R. (4th) 227, (sub nom. *Nolan v. Superintendent of Financial Services (Ont.))* 225 O.A.C. 163, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 86 O.R. (3d) 1, 76 C.C.E.L. (3d) 1, 2007 CarswellOnt 3493, 2007 ONCA 416, 32 E.T.R. (3d) 161 (Ont. C.A.) — considered

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2009), 2009 CarswellOnt 4494, 2009 CarswellOnt 4495, 2009 SCC 39, (sub nom. *Nolan v. Ontario (Superintendent of Financial Services))* 253 O.A.C. 256, 49 E.T.R. (3d) 159, 76 C.C.E.L. (3d) 55, 76 C.C.P.B. 1, (sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 102 O.R. (3d) 319, (sub nom. *Nolan v. Kerry (Canada) Inc.)* [2009] 2 S.C.R. 678, (sub nom. *Nolan v. Ontario (Superintendent of Financial Services))* 391 N.R. 234, 92 Admin. L.R. (4th) 203, (sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services))* 309 D.L.R. (4th) 513 (S.C.C.) — referred to

Khosa v. Canada (Minister of Citizenship & Immigration) (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, (sub nom. *Canada (Citizenship & Immigration) v. Khosa)* [2009] 1 S.C.R. 339 (S.C.C.) — considered

Legal Oil & Gas Ltd. v. Alberta (Surface Rights Board) (2001), 2001 CarswellAlta 862, 2001 ABCA 160, 303 A.R. 8, 273 W.A.C. 8 (Alta. C.A.) — referred to

M.A.H.C.P. v. Nor-Man Regional Health Authority Inc. (2011), 2011 CarswellMan 606, 2011 CarswellMan 607, 2011 SCC 59 (S.C.C.) — referred to

MacNutt v. Shubenacadie Indian Band (1997), (sub nom. *Shubenacadie Indian Band v. Canada (Human Rights Commission))* [1998] 2 F.C. 198, (sub nom. *Shubenacadie Band Council v. Canada (Human Rights Commission))* 31 C.H.R.R. D/347, 1997 CarswellNat 2760, (sub nom. *Shubenacadie Indian Band v. Canada (Human Rights Commission))* 47 C.R.R. (2d) 189, (sub nom. *Shubenacadie Indian Band v. Canada (Human Rights Commission))* 154 D.L.R. (4th) 344, (sub nom. *Shubenacadie Indian Band v. Canadian Human Rights Commission)* [1998] 2 C.N.L.R. 212, (sub nom. *Shubenacadie Indian Band v. Canadian Human Rights Commission)* 138 F.T.R. 275, 1997 CarswellNat 2092 (Fed. T.D.) — referred to

Mavi v. Canada (Attorney General) (2011), 2011 CarswellOnt 4429, 2011 CarswellOnt 4430, 2011 SCC 30, 332 D.L.R. (4th) 577, 417 N.R. 126, 97 Imm. L.R. (3d) 173, (sub nom. *Canada (Attorney General) v. Mavi)* [2011] 2 S.C.R. 504, 19 Admin. L.R. (5th) 1 (S.C.C.) — referred to

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65 (S.C.C.) — followed

Northrop Grumman Overseas Services Corp. v. Canada (Department of Public Works & Government Services) (2009), (sub nom. *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*) [2009] 3 S.C.R. 309, (sub nom. *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.)* 395 N.R. 78, (sub nom. *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.)* 313 D.L.R. (4th) 605, 2009 CarswellNat 3420, 2009 CarswellNat 3421, 2009 SCC 50 (S.C.C.) — referred to

Petro-Canada v. British Columbia (Workers' Compensation Board) (2009), 2009 CarswellBC 2416, 2009 BCCA 396, 98 B.C.L.R. (4th) 1, 276 B.C.A.C. 135, 468 W.A.C. 135 (B.C. C.A.) — referred to

Poirier v. Canada (Minister of Veterans Affairs) (1989), [1989] 3 F.C. 233, 58 D.L.R. (4th) 475, 96 N.R. 34, 37 Admin. L.R. 59, 1989 CarswellNat 635, 1989 CarswellNat 584 (Fed. C.A.) — referred to

Syndicat des professeurs du Collège de Lévis-Lauzon v. Cégep de Lévis-Lauzon (1985), 1985 CarswellQue 108, [1985] 1 S.C.R. 596, 1985 CarswellQue 86, 59 N.R. 194, [1985] R.D.J. 235, 14 Admin. L.R. 180, 85 C.L.L.C. 14,028 (S.C.C.) — referred to

Toussaint v. Canada (Labour Relations Board) (1993), (sub nom. *Toussaint v. Conseil canadien des relations du travail)* 160 N.R. 396, 1993 CarswellNat 304 (Fed. C.A.) — referred to

U.N.A., Local 160 v. Chinook Regional Health Authority (2002), 2002 ABCA 246, 2002 CarswellAlta 1309, 47 Admin. L.R. (3d) 111, 317 A.R. 385, 284 W.A.C. 385 (Alta. C.A.) — referred to

Union des employés de commerce, local 503 c. Roy (1980), [1980] C.A. 394, 1980 CarswellQue 470 (Que. C.A.) — referred to

Vancouver Island Railway, An Act Respecting, Re (1994), [1994] 6 W.W.R. 1, (sub nom. *British Columbia (Attorney General) v. Canada (Attorney General))* 91 B.C.L.R. (2d) 1, 166 N.R. 81, 21 Admin. L.R. (2d) 1, 114 D.L.R. (4th) 193, 44 B.C.A.C. 1, 71 W.A.C. 1, [1994] 2 S.C.R. 41, 1994 CarswellBC 188, 1994 CarswellBC 1239 (S.C.C.) — referred to

VIA Rail Canada Inc. v. Canadian Transportation Agency (2007), 2007 SCC 15, 2007 CarswellNat 608, 2007 CarswellNat 609, 360 N.R. 1, 279 D.L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. Via Rail Canada Inc.)* 59 C.H.R.R. D/276, 59 Admin. L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.)* [2007] 1 S.C.R. 650 (S.C.C.) — referred to

Waters v. British Columbia (Director of Employment Standards) (2004), 2004 CarswellBC 2800, 2004 BCSC 1570, 40 C.L.R. (3d) 84 (B.C. S.C.) — referred to

Cases considered by *Binnie J.*:

Bell v. Ontario (Human Rights Commission) (1971), 18 D.L.R. (3d) 1, 1971 CarswellOnt 156, [1971] S.C.R. 756, 1971 CarswellOnt 156F (S.C.C.) — referred to

Canada (Attorney General) v. Mowat (2011), 93 C.C.E.L. (3d) 1, D.T.E. 2011T-708, 337 D.L.R. (4th) 385, 26 Admin. L.R. (5th) 1, 2011 CarswellNat 4190, 2011 CarswellNat 4191, 2011 SCC 53 (S.C.C.) — considered

Khosa v. Canada (Minister of Citizenship & Immigration) (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, (sub nom. *Canada (Citizenship & Immigration) v. Khosa)* [2009] 1 S.C.R. 339 (S.C.C.) — considered

Metropolitan Life Insurance Co. v. I.U.O.E., Local 796 (1970), [1970] S.C.R. 425, 1970 CarswellOnt 191F, 11 D.L.R. (3d) 336, 70 C.L.L.C. 14,008, 1970 CarswellOnt 191 (S.C.C.) — referred to

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65 (S.C.C.) — followed

Pezim v. British Columbia (Superintendent of Brokers) (1994), (sub nom. *Pezim v. British Columbia (Securities*

Commission)) 46 B.C.A.C. 1, *(*sub nom. *Pezim v. British Columbia (Securities Commission))* 75 W.A.C. 1, 1994 CarswellBC 1242, 4 C.C.L.S. 117, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, *(*sub nom. *Pezim v. British Columbia (Securities Commission))* 168 N.R. 321, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, 1994 CarswellBC 232, [1994] 24 B.C.S.C.W.S. 23 (S.C.C.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 43 Imm. L.R. (2d) 117, 226 N.R. 201, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36, 1998 CarswellNat 830, 1998 CarswellNat 831 (S.C.C.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — referred to

Cases considered by *Cromwell J.*:

Bell v. Ontario (Human Rights Commission) (1971), 18 D.L.R. (3d) 1, 1971 CarswellOnt 156, [1971] S.C.R. 756, 1971 CarswellOnt 156F (S.C.C.) — considered

C.U.P.E., Local 963 v. New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — considered

Crevier v. Quebec (Attorney General) (1981), [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1, 38 N.R. 541, 1981 CarswellQue 109, 1981 CarswellQue 109F (S.C.C.) — referred to

Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services) (2009), 2009 CarswellOnt 4494, 2009 CarswellOnt 4495, 2009 SCC 39, *(*sub nom. *Nolan v. Ontario (Superintendent of Financial Services))* 253 O.A.C. 256, 49 E.T.R. (3d) 159, 76 C.C.E.L. (3d) 55, 76 C.C.P.B. 1, *(*sub nom. *Kerry (Canada) Inc. v. DCA Employees Pension Committee)* 102 O.R. (3d) 319, *(*sub nom. *Nolan v. Kerry (Canada) Inc.)* [2009] 2 S.C.R. 678, *(*sub nom. *Nolan v. Ontario (Superintendent of Financial Services))* 391 N.R. 234, 92 Admin. L.R. (4th) 203, *(*sub nom. *DCA Employees Pension Committee v. Ontario (Superintendent of Financial Services))* 309 D.L.R. (4th) 513 (S.C.C.) — referred to

Metropolitan Life Insurance Co. v. I.U.O.E., Local 796 (1970), [1970] S.C.R. 425, 1970 CarswellOnt 191F, 11 D.L.R. (3d) 336, 70 C.L.L.C. 14,008, 1970 CarswellOnt 191 (S.C.C.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, *(*sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65 (S.C.C.) — followed

Northrop Grumman Overseas Services Corp. v. Canada (Department of Public Works & Government Services) (2009), *(*sub nom. *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General))* [2009] 3 S.C.R. 309, *(*sub nom. *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.)* 395 N.R. 78, *(*sub nom. *Canada (Attorney General) v. Northrop Grumman Overseas Services Corp.)* 313 D.L.R. (4th) 605, 2009 CarswellNat 3420, 2009 CarswellNat 3421, 2009 SCC 50 (S.C.C.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 43 Imm. L.R. (2d) 117, 226 N.R. 201, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* 160 D.L.R. (4th) 193, *(*sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration))* [1998] 1 S.C.R. 982, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36, 1998 CarswellNat 830, 1998 CarswellNat 831 (S.C.C.) — referred to

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City) (2004), 46 M.P.L.R. (3d) 1, 236 D.L.R. (4th) 385, [2004] 7 W.W.R. 603, 346 A.R. 4, 320 W.A.C. 4, 318 N.R. 170, 18 R.P.R. (4th) 1, [2004] 1 S.C.R. 485, 2004 CarswellAlta 355, 2004 CarswellAlta 356, 2004 SCC 19, 26 Alta. L.R. (4th) 1, 12 Admin. L.R. (4th) 1, 50 M.V.R. (4th) 1 (S.C.C.) — referred to

Statutes considered by *Rothstein J.*:

Credit Union Act, R.S.A. 2000, c. C-32

s. 13 — referred to

Expropriation Act, R.S.A. 2000, c. E-13

s. 23 — referred to

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

s. 2(b) — considered

s. 68 — considered

s. 69(6) — considered

s. 69(6)(b) — considered

Garage Keepers' Lien Act, R.S.A. 2000, c. G-2

s. 6(3) — referred to

Insurance Act, R.S.A. 2000, c. I-3

s. 796 — referred to

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

Generally — referred to

s. 3 — considered

s. 7 — referred to

s. 19 — referred to

s. 43 — considered

s. 47 — considered

s. 50(5) — considered

s. 54(5) — considered

Land Titles Act, R.S.A. 2000, c. L-4

s. 140 — referred to

Legal Profession Act, R.S.A. 2000, c. L-8

s. 80(3) — referred to

Loan and Trust Corporations Act, R.S.A. 2000, c. L-20

s. 257 — referred to

Statutes considered by *Binnie J.*:

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 96 — considered

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

s. 18.1(4)(a) [en. 1990, c. 8, s. 5] — referred to

Statutes considered by *Cromwell J.*:

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

s. 50(5) — considered

APPEAL by Information and Privacy Commissioner from judgment reported at *A.T.A. v. Alberta (Information & Privacy Commissioner)* (2010), [2010] 8 W.W.R. 457, 1 Admin. L.R. (5th) 60, 474 A.R. 169, 479 W.A.C. 169, 316 D.L.R. (4th) 117, 2010 CarswellAlta 94, 2010 ABCA 26, 21 Alta. L.R. (5th) 30 (Alta. C.A.), affirming chambers judge's decision to grant respondent's application for judicial review of decision of Privacy Commission adjudicator.

POURVOI formé par le commissaire à l'information et à la protection de la vie privée à l'encontre d'un jugement publié à *A.T.A. v. Alberta (Information & Privacy Commissioner)* (2010), [2010] 8 W.W.R. 457, 1 Admin. L.R. (5th) 60, 474 A.R. 169, 479 W.A.C. 169, 316 D.L.R. (4th) 117, 2010 CarswellAlta 94, 2010 ABCA 26, 21 Alta. L.R. (5th) 30 (Alta. C.A.), ayant confirmé la décision du juge siégeant en cabinet de faire droit à la requête de l'intimée demandant le contrôle judiciaire de la décision de la déléguée du commissaire.

***Rothstein J.*:**

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

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

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

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

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

I. Facts

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

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

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

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

II. Relevant Statutory Provisions

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

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

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

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

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

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

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

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

(b) a longer period allowed by the Commissioner.

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

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

50 . . .

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

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

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

III. Judicial History

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

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

12 According to Marshall J., the reasons of Belzil J. in *Kellogg Brown & Root Canada v. Alberta (Information & Privacy Commissioner)*, 2007 ABQB 499, 434 A.R. 311 (Alta. Q.B.), were compelling and entirely applicable in this case. Following that decision, he held that the timelines for completing a review set out in s. 50(5) are mandatory, employing the word "must" (at para. 7) and not directory. He also held that it was not necessary for him "to determine whether an extension of time must be given within the 90-day period. The time period is substantially breached in any event" (para. 12).

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

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

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

(1) The Majority — Watson J.A.

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

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

17 Watson J.A. found that the language of the section spoke to "extending that period" in a manner that connoted doing the "extending" while the 90 days was still running. Since the Commissioner had not extended the period within 90 days, the

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

(2) The Dissent — Berger J.A.

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

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

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

IV. Analysis

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

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

22 The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where

it would be inappropriate to do so: see, for example, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.), *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies" (para. 30).

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

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

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

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

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

28 In these circumstances, I do not think the Court of Appeal erred in refusing to disturb the exercise of the reviewing

judge's discretion to consider the timeliness issue. In this case, the rationales for the general rule have limited application. Both parties agreed that the Commissioner has expressed his views in several other decisions. Therefore, the Commissioner has had the opportunity to decide the issue at first instance and we have the benefit of his expertise, albeit without reasons in this case. No evidence was required to consider the timelines issue and no prejudice was alleged. Rather, it involved a straightforward determination of law, the basis of which was able to be addressed on judicial review, irrespective of what is the appropriate standard of review.

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

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

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

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

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

33 Finally, the timelines question does not fall within the category of a "true question of jurisdiction or *vires*". I reiterate Dickson J.'s oft-cited warning in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233, cited in *Dunsmuir*, at para. 35). See also *Syndicat des professeurs du Collège de Lévis-Lauzon v. Cégep de Lévis-Lauzon*, [1985] 1 S.C.R. 596 (S.C.C.), at p. 606, *per* Beetz J., adopting the reasons of Owen J.A. in *Union des employés de commerce, local 503 c. Roy*, [1980] C.A. 394 (Que. C.A.). As this Court explained in *Canada (Canadian Human Rights Commission)*, "*Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 (S.C.C.), at paras 33-34; *Alliance Pipeline Ltd. v. Smith*, at paras. 27-32; *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678 (S.C.C.), at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Department of Public Works & Government Services)*, 2009 SCC 50, [2009] 3 S.C.R. 309 (S.C.C.), that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).

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

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

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

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

At paragraph 158, Deschamps J. wrote:

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

At paragraph 145, Binnie J. wrote:

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

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

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

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

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

40 In Justice Cromwell's view, saying that jurisdictional questions are exceptional is not an answer to a plausible

argument that a particular provision falls outside the presumption of reasonableness review and into the exceptional category of correctness review. Nor does it assist, he says, in determining by what means the presumption may be rebutted.

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

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

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

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

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

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

45 At paragraph 89, Binnie J. suggests that "[i]f the issue before the reviewing court relates to the interpretation and application of a tribunal's 'home statute' and related statutes that are also within the core function and expertise of the

decision maker, and the issue does not raise matters of legal importance beyond administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness." With respect, I think Binnie J.'s isolating matters of general legal importance as a stand-alone basis for correctness review is not consistent with what this Court has said in *Dunsmuir*, *Alliance*, *Canada (Canadian Human Rights Commission)* and *Nor-Man*.

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

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

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

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

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

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

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

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

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

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

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

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

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

55 In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. However, remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place. Accordingly, remitting the issue

to the tribunal is not necessarily the appropriate option available to a court when it is asked to review a tribunal's implied decision on an issue that was not raised before the tribunal. Indeed, when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable. On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one. This, of course, assumes that the Court has thought it appropriate in the particular circumstances to allow the issue to be raised for the first time on judicial review. Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.

C. Application of the Reasonableness Standard in This Case

56 In the present case, the Court need not look far to discover a reasonable basis for the adjudicator's decision. The Commissioner and his delegated adjudicators have considered the issue, as it relates to s. 50(5) *PIPA* and to the similarly worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("*FOIPA*"), on numerous occasions and have provided a consistent analysis. The existence of other decisions of a tribunal on the same issue can be of assistance to a reviewing court in determining whether a reasonable basis for the tribunal's decision exists. In this case, a review of the reasons of the Commissioner and the adjudicators in other cases allows this Court to determine without difficulty that a reasonable basis exists for the adjudicator's implied decision in this case. Indeed, in the circumstances here, it is safe to assume that the numerous and consistent reasons in these decisions would have been the reasons of the adjudicator in this case.

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

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

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

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

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

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

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

60 Section 69(6) *FOIPA* provides:

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

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

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

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

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

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

In my view, the placement of the phrase "within 90 days" indicates that the 90 days refers only to my duty to complete the inquiry, and does not refer to my power to extend the 90-day period in section 69(6)(a) and section 69(6)(b). [paras. 53-54]

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

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

65 The ATA argues that the principle of statutory interpretation, *expressio unius est exclusio alterius*, leads to the conclusion that an extension must be made before the expiry of 90 days: when the legislature intended to allow an extension to be made either before or after the expiry of a time period; it said so expressly. The now repealed s. 54(5) *PIPA* authorized a court to "on application made *either before or after the expiry of the period* referred to in subsection (3) [i.e., 45 days], extend that period if the court considers it appropriate to do so". According to the ATA, absence of such language in s. 50(5) *PIPA* necessarily implies that the legislature did not intend for the Commissioner to be able to extend the period for completion of an inquiry "before or after" the 90-day period has expired (Factum, at para. 76).

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

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

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

68 Referring to s. 2(b) *FOIPA*, the Commissioner affirmed that the purpose of *FOIPA* was "to provide a mechanism for controlling the collection, use and disclosure of personal information by public bodies", which *FOIPA* achieves "by giving [the Commissioner] the power to review the collection, use and disclosure of personal information" (para. 57). In his view, the specific purpose of s. 69(6) *FOIPA* was "to ensure that such reviews are conducted in a timely way, and also that parties

are kept aware of the timing of the process so they may participate and plan their affairs accordingly" (para. 57). The purpose of *FOIPA* is uncontroversial, as it is expressly articulated at s. 2(b). I consider the Commissioner's view of the purpose of s. 69(6) *FOIPA* to be reasonable. It is similarly reasonable to determine that the purpose of s. 50(5) *PIPA* is to ensure timely completion of reviews and to keep the parties informed about the process.

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

70 The Commissioner then addressed the practical difficulty of satisfying the s. 69(6)(b) *FOIPA* requirement to provide an anticipated date of completion with the extension if the extension must necessarily be made within 90 days. He pointed out that s. 68 *FOIPA* empowers him to authorize a mediation upon receipt of a request for review. The mediation itself could take up some or all of the 90 days. If the mediation is unsuccessful or mediation is not authorized, the matter would move to inquiry. An inquiry must accord the parties procedural fairness, which can mean accommodating requests for adjournments, to adduce further evidence and to adjourn to review and make submissions on the new evidence. In short, the Commissioner explained that "the parties, as much as [he], have carriage of the matter" and that "[t]he time within which the matter will be completed is largely determined by their actions, schedules and the issues they raise" (para. 62). For this reason, it may not be feasible for the Commissioner to provide an anticipated date for completion within 90 days and the parties are well aware of how the matter is progressing in any event (paras. 59-62).

71 The Commissioner therefore concluded that

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

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

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

73 The parties, the trial judge and the Court of Appeal all approached the timelines issue as though it engaged the

distinction between mandatory and directory legislative provisions. R. W. Macaulay and J. L. H. Sprague succinctly explain the mandatory/directory distinction as follows:

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

74 This Court has previously expressed doubt as to the usefulness of the mandatory/directory distinction. In *Vancouver Island Railway, An Act Respecting, Re*, [1994] 2 S.C.R. 41 (S.C.C.), Iacobucci J. affirmed that

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

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

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

V. Conclusion

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

***Binnie J.*:**

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

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

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

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

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

82 It may be recalled that the willingness of the courts to defer to administrative tribunals on questions of the interpretation of their "home statutes" originated in the context of elaborate statutory schemes such as labour relations legislation. In such cases, the tribunal members were not only better versed in the practicalities of how the scheme could and

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

83 The middle ground between Cromwell J. and Rothstein J., it seems to me, lies in the more nuanced approach recently adopted by the Court in *Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.) ("*CHRC*"), where it was said that "if the issue relates to the interpretation and application of its own statute, *is within its expertise and does not raise issues of general legal importance*, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference" (para. 24 (emphasis added)). Rothstein J. puts aside the limiting qualifications in this passage when he comes to formulating his presumption, which is triggered entirely by the location of the controversy in the "home statute".

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

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

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

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

86 In matters of general policy or broad discretion, on the other hand, the courts also apply "reasonableness" but with a much less aggressive attitude. In *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), for example, the question was pure policy, namely whether Mr. Khosa had shown "sufficient humanitarian and compassionate considerations" to warrant, in the opinion of the immigration appeal board, discretionary relief from a removal

order whose validity Mr. Khosa did not contest.

87 In this case, the reasons of both Rothstein J. and Cromwell J. show a much more intense level of scrutiny of the issue before the Information and Privacy Commissioner than was the case in *Khosa*, and for good reason. "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense (or, as the *Dunsmuir* majority put it, assessing the "degree of deference" (para. 62)). Predictability is important to litigants and those who try to advise them on whether or not to initiate proceedings. It remains to be seen in future cases how the discretion of reviewing judges will be supervised at the appellate level to achieve such predictability. The *Dunsmuir* majority noted that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the [administrative] decision-making process" (para. 47). Such values are no less important in the process of judicial review.

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

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

***Cromwell J.*:**

I. Introduction

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

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

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

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

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

II. Legislative Intent

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

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

97 Where the existing jurisprudence has not already determined in a satisfactory manner the degree of deference to be accorded to an administrative decision-maker operating in a particular statutory scheme, the courts are to apply a number of relevant factors to the case at hand, factors which include the presence or absence of a privative clause, the purpose of the tribunal as determined by interpretation of its enabling legislation, the nature of the question at issue and the expertise of the tribunal. These are the concrete criteria, clearly established by the Court's jurisprudence, which are used to identify questions that are reviewable for correctness because the legislature intended the courts to have the last word on what constitutes a "correct" answer. These questions may be called "jurisdictional": see *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 28. However, labelling them as such does nothing to assist the analysis. I therefore agree with Rothstein J. to the extent that he considers that, as analytical tools, the labels of "jurisdiction" and "*vires*" need play no part in the courts' everyday work of reviewing administrative action.

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

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

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

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

III. Jurisdictional Review

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

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

IV. Conclusion

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

Appeal allowed.

Pourvoi accueilli.

Footnotes

* A corrigendum issued by the Court on December 19, 2011 has been incorporated herein.

TAB 5

TAB 6

2010 ABCA 126

Alberta Court of Appeal

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.

2010 CarswellAlta 746, 2010 ABCA 126, [2010] A.W.L.D. 2082, [2010] A.W.L.D. 2083, [2010] A.J. No. 432, 25 Alta. L.R. (5th) 221, 477 A.R. 112, 483 W.A.C. 112

Dow Chemical Canada Inc. (Respondent) and Shell Chemicals Canada Ltd. and Shell Chemicals Americas Inc. (Appellants)

Jack Watson, Frans Slatter, Colleen Kenny JJ.A.

Heard: April 8, 2010

Judgment: April 22, 2010

Docket: Calgary Appeal 1001-0006-AC

Proceedings: reversing *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2009), 2009 ABQB 706, 2009 CarswellAlta 2049 (Alta. Q.B.); affirming *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2009), 467 A.R. 144, 2009 CarswellAlta 242, 2009 ABQB 108 (Alta. Master)

Counsel: E.P. Groody, D.H. de Vlieger for Respondent

C.D. Simard, Z. Abbas for Appellant

Subject: Corporate and Commercial; Civil Practice and Procedure; Contracts; Property; Natural Resources

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Commercial law --- Sale of goods — Buyer's remedies — Contractual limitations on remedies — Miscellaneous issues

Plaintiff signed agreement to purchase styrene from defendant, with price to be determined by formula that included price reported by trade publication — Publication changed explanatory description of its reported price, and plaintiff

claimed information on which formula was based had ceased to exist in form contemplated by contract, triggering dispute resolution — Defendant took position that information required to determine price remained available — Plaintiff brought action for breach of contract — Defendant's application for summary dismissal of action was granted — Plaintiff successfully appealed — Defendant appealed — Appeal allowed — Chambers judge concluded that defendant did not satisfy test for summary dismissal — However, plaintiff did not identify any admissible evidence that could be produced at trial, and that would result in finding of fact that would affect outcome — On proper interpretation, re-negotiation and dispute resolution provisions were not triggered.

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiff signed agreement to purchase styrene from defendant, with price to be determined by formula that included price reported by trade publication — Publication changed explanatory description of its reported price, and plaintiff claimed information on which formula was based had ceased to exist in form contemplated by contract, triggering dispute resolution — Defendant took position that information required to determine price remained available — Plaintiff brought action for breach of contract — Defendant's application for summary dismissal of action was granted — Plaintiff successfully appealed — Defendant appealed — Appeal allowed — Chambers judge concluded that defendant did not satisfy test for summary dismissal — However, plaintiff did not identify any admissible evidence that could be produced at trial, and that would result in finding of fact that would affect outcome — On proper interpretation, re-negotiation and dispute resolution provisions were not triggered.

Table of Authorities

Cases considered:

Alberta Importers & Distributors (1993) Inc. v. Phoenix Marble Ltd. (2008), 62 C.C.L.I. (4th) 175, 2008 CarswellAlta 619, 2008 ABCA 177, [2008] 7 W.W.R. 102, 88 Alta. L.R. (4th) 225, 67 R.P.R. (4th) 17, 432 A.R. 173, 424 W.A.C. 173 (Alta. C.A.) — referred to

Andrews v. Coxe (2003), 320 A.R. 258, 288 W.A.C. 258, 2003 ABCA 52, 2003 CarswellAlta 230 (Alta. C.A.) — followed

Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd. (1996), 25 B.C.L.R. (3d) 285, 78 B.C.A.C. 193, 128 W.A.C. 193, [1997] 1 W.W.R. 605, 1996 CarswellBC 1445 (B.C. C.A.) — referred to

Canadian National Railway v. Volker Stevin Contracting Ltd. (1991), 48 C.L.R. 134, 120 A.R. 39, 8 W.A.C. 39, 1 Alta. L.R. (3d) 167, 1991 CarswellAlta 8 (Alta. C.A.) — referred to

Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co. (1979), (sub nom. *Exportations Consolidated-Bathurst Ltée c. Mutual Boiler & Machinery Insurance Co.)* [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 1979 CarswellQue 157, 1979 CarswellQue 157F, 32 N.R. 488, [1980] I.L.R. 1-1176 (S.C.C.) — referred to

Diegel v. Diegel (2008), 2008 ABCA 389, 2008 CarswellAlta 1763, 100 Alta. L.R. (4th) 1, 60 R.F.L. (6th) 18, 303 D.L.R. (4th) 704 (Alta. C.A.) — referred to

Double N Earthmovers Ltd. v. Edmonton (City) (2005), 6 M.P.L.R. (4th) 25, 41 Alta. L.R. (4th) 205, 2005 ABCA 104, 2005 CarswellAlta 276, 363 A.R. 201, 343 W.A.C. 201, [2005] 10 W.W.R. 1 (Alta. C.A.) — referred to

Double N Earthmovers Ltd. v. Edmonton (City) (2007), 2007 CarswellAlta 36, 2007 CarswellAlta 37, 2007 SCC 3, 391 W.A.C. 329, 401 A.R. 329, 275 D.L.R. (4th) 577, 28 B.L.R. (4th) 169, [2007] 1 S.C.R. 116, 29 M.P.L.R. (4th) 1, 68 Alta. L.R. (4th) 1, 58 C.L.R. (3d) 4, [2007] 3 W.W.R. 1, 356 N.R. 211 (S.C.C.) — referred to

Dumbrell v. Regional Group of Cos. (2007), 55 C.C.E.L. (3d) 155, 220 O.A.C. 64, 85 O.R. (3d) 616, 2007

CarswellOnt 407, 25 B.L.R. (4th) 171, 279 D.L.R. (4th) 201, 2007 ONCA 59 (Ont. C.A.) — referred to

Eli Lilly & Co. v. Novopharm Ltd. (1998), 227 N.R. 201, 152 F.T.R. 160 (note), 1998 CarswellNat 1061, 1998 CarswellNat 1062, 161 D.L.R. (4th) 1, [1998] 2 S.C.R. 129, 80 C.P.R. (3d) 321 (S.C.C.) — referred to

Fenrich v. Wawanesa Mutual Insurance Co. (2005), 46 Alta. L.R. (4th) 207, 27 C.C.L.I. (4th) 204, 371 A.R. 53, 354 W.A.C. 53, 2005 ABCA 199, 2005 CarswellAlta 887, [2005] I.L.R. I-4424, 256 D.L.R. (4th) 395, [2006] 2 W.W.R. 17 (Alta. C.A.) — referred to

Gainers Inc. v. Pocklington Holdings Inc. (2000), 81 Alta. L.R. (3d) 17, 255 A.R. 373, 220 W.A.C. 373, 2000 ABCA 151, 2000 CarswellAlta 508 (Alta. C.A.) — referred to

Gilchrist v. Western Star Trucks Inc. (2000), 2000 BCCA 70, 2000 CarswellBC 176, 24 C.C.P.B. 62, 2000 C.L.L.C. 210-030, 73 B.C.L.R. (3d) 102, 133 B.C.A.C. 144, 217 W.A.C. 144 (B.C. C.A.) — referred to

Gorgichuk Estate v. American Home Assurance Co. (1985), 5 C.P.C. (2d) 166, 1985 CarswellOnt 594, 14 C.C.L.I. 32, [1985] I.L.R. 1-1984 (Ont. H.C.) — referred to

Harris v. Nugent (1996), 141 D.L.R. (4th) 410, 193 A.R. 113, 135 W.A.C. 113, 46 Alta. L.R. (3d) 264, 1996 CarswellAlta 990 (Alta. C.A.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Jiro Enterprises Ltd. v. Spencer (2008), 2008 ABCA 87, 2008 CarswellAlta 322 (Alta. C.A.) — referred to

LHS Holdings Ltd. v. Laporte PLC (2001), [2001] 2 All E.R. (Comm) 563 (Eng. C.A.) — referred to

Lunenburg Industrial Foundry & Engineering Ltd. v. Commercial Union Assurance Co. of Canada (2004), 10 C.P.C. (6th) 376, 21 C.C.L.I. (4th) 140, 2005 NSSC 62, 2004 CarswellNS 574, 231 N.S.R. (2d) 378, 733 A.P.R. 378 (N.S. S.C.) — referred to

Marthaller v. Lansdowne Equity Venture Ltd. (1997), 200 A.R. 226, 146 W.A.C. 226, [1998] 1 W.W.R. 428, 1997 CarswellAlta 553, 52 Alta. L.R. (3d) 329 (Alta. C.A.) — referred to

McDonald Crawford v. Morrow (2004), 2004 ABCA 150, 2004 CarswellAlta 546, 348 A.R. 118, 321 W.A.C. 118, 28 Alta. L.R. (4th) 62, 244 D.L.R. (4th) 144, [2004] 11 W.W.R. 335 (Alta. C.A.) — referred to

Michael Santarsieri Inc. v. Unicity Mall Ltd. (2000), 38 R.P.R. (3d) 105, 2000 CarswellMan 630, 2000 MBQB 202, 152 Man. R. (2d) 215 (Man. Q.B.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2008), (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, [2008] 5 W.W.R. 195, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 2008 SCC 14, [2008] 2 C.N.L.R. 295, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, (sub nom. *Canada (Attorney General) v. Lameman)* [2008] 1 S.C.R. 372, (sub nom. *Lameman v. Canada (Attorney General)*) 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General)*) 421 W.A.C. 26, 86 Alta. L.R. (4th) 1 (S.C.C.) — followed

Tottrup v. Clearwater (Municipal District) No. 99 (2006), 68 Alta. L.R. (4th) 237, 391 W.A.C. 88, 401 A.R. 88, 2006 ABCA 380, 2006 CarswellAlta 1627 (Alta. C.A.) — followed

APPEAL by defendant from judgment reported at *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.* (2009), 2009 ABQB 706, 2009 CarswellAlta 2049 (Alta. Q.B.).

***Per Curiam*:**

1 This appeal arises out of a long-term contract under which the appellant agreed to supply styrene monomer to the respondent at a price set by a formula in the contract. The respondent argues that the formula is no longer workable (under the terms of the contract) and seeks the negotiation or arbitration of a new price. The appellant argues that the formula still works and is applicable, and applied for summary dismissal of the claim. A Master in Chambers granted summary dismissal, but that decision was reversed on appeal: *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2009 ABQB 706 (Alta. Q.B.), rev'g 2009 ABQB 108, 467 A.R. 144 (Alta. Master). This appeal followed.

Facts

2 The contract in question has a term of 10 years commencing on January 1, 1999. It contains a formula for setting and adjusting the quantity of styrene to be delivered in each year, and a further formula for setting the price. The Product Price for the styrene to be bought and sold is set in Article 5.2 by this formula:

> **5.2 Product Price**
>
> The "Product Price" (expressed in cpp [cents per pound]) shall be determined for each Billing Month using the following formula:

Product Price= (.8 × Benzene) Price + (.3 × Ethylene)Price + Fee Over Feedstocks + Supplemental Fee

3 The various components of the formula are also defined. Article 5.4 sets the Ethylene Price:

> **5.4 Ethelyne Price**
>
> The "Ethylene Price" means the Ethylene Net Transaction Contract price (expressed in cpp) for ethylene (or the midpoint if a range is given), as reported in the last issue of the M & M Report for the month immediately preceding the Billing Month, in the table entitled "North America Product Price for [DATE]" under the column "Cents/Pound", where,
>
> "M & M Report" means the bimonthly publication entitled "DMAI Monomers Market Report" published by Chemical Market Associates, Inc.

4 The Benzene Price is set by Article 5.3:

> **5.3 Benzene Price**
>
> The "Benzene Price" means an amount (expressed in cpp) determined using the following formula:
>
> Benzene Price = U.S. Gulf Contract Benzene Price - Rebate (if any) 7.3650

The U.S. Gulf Contract Benzene Price is set by reference to a weekly newsletter published by Dewitt & Company Inc. The Rebate is related to the Typical Large Buyer Rebate, defined as follows:

> "Typical Large Buyer Rebate" means an amount determined as follows:
>
> (a) The parties shall agree by the end of September of each Contract Year on the typical rebate (expressed in cents per gallon) off the U.S. Gulf Contract Benzene Price being provided to large buyers of benzene in North America (the "Typical Large Buyer Rebate") in such Contract Year and such amount shall be used to calculate the Benzene Price for the succeeding Contract Year.
>
> (b) If the parties have not agreed on the Typical Large Buyer Rebate by September 30 of a Contract Year, then the parties shall each immediately appoint a senior officer or a senior officer of an Affiliate to resolve the matter at issue. If such senior officers are unable to resolve the matter at issue within 30 days of their appointment, then the parties shall immediately refer the matter at issue to Dewitt & Company Inc. (or if Dewitt & Company Inc. no

longer exists, to another qualified consultant agreeable to both parties) whose determination of the Typical Large Buyer Rebate for the Contract Year shall be final and binding on both parties.

5 Many of the definitions in the contract rely on data published by third parties. The contract contains a clause that anticipates that some of that data might cease to be available:

> **5.8 Information**
>
> (a) If the information required to determine the AECO Price, the Ethylene Price, the Ethylene Spot Price, U.S. Gulf Contract Benzene Price, the RCAF-U Adjustment, or any other amount required by this agreement ceases to be available in the form, manner or time frame contemplated in this Agreement, and SCCL and DCCI are unable to agree upon an alternative method of determining or obtaining that amount, then the parties shall each appoint a senior officer or a senior officer of an Affiliate to resolve the matter at issue. If such senior officers are unable to resolve the matter at issue within 45 days of their appointment, then the parties shall immediately refer the dispute to binding arbitration pursuant to the *Arbitration Act* (Alberta).
>
> (b) If any information contemplated by this Article 5 cannot be obtained in a timely manner, SCCL will provide DCCI with its best estimate of such information and will provide corrected information as soon as it becomes available. If required, corrected invoices will be prepared by SCCL and submitted to DCCI in a timely manner, as necessary, to reflect actual information.

The essential issue in this appeal is whether Article 5.8 can be interpreted summarily, or whether a trial is required.

6 Whether any genuine issue for trial bars summary disposition depends to some extent on whether additional evidence could be called at any trial that was held. There are several Articles in the agreement that address the extent to which the parties can look outside the four corners of the agreement to find its meaning:

> **1.5 Undefined Terms**
>
> In this Agreement, terms, phrases or expressions which are not specifically defined and which have an accepted meaning in the custom and usage of the business of rail transportation or the production, transportation or sale of SM, ethylene, natural gas or benzene in North America, shall have that meaning.
>
> . . . . .
>
> **22.3 Entire Agreement**
>
> This Agreement constitutes the entire agreement between the parties relating to the subject matter of this Agreement.
>
> **22.4 Representations and Warranties**
>
> There are no representations, warranties, conditions or collateral agreements, express or implied, statutory or otherwise, between the parties relating to the subject matter of this Agreement, other than as contained in this Agreement. SCCL makes no representations or warranties (whether statutory or otherwise) as to merchantability or fitness of the SM for a particular purpose.

To a considerable extent these clauses merely reflect the common law.

7 The respondent alleges that about one-half way through the term of the contract Chemical Market Associates, Inc. changed the way that it calculates the Ethylene Net Transaction Contract price. The respondent argues that when the contract was signed, there were 10 large buyers that dominated the market. It argues that evidence would show that through amalgamations and consolidation the market has changed, such that there are no longer 10 large customers. It also argues that the price originally published in the M & M Report was a discounted price, but that Chemical Market Associates, Inc. no longer uses a discounted price. It argues that this change in methodology triggered Article 5.8 because the Ethylene Net Transaction Contract price is no longer available in the "form, manner or time frame" contemplated in the agreement, and that the parties are required to negotiate or arbitrate a new price. The appellant argues that there has been no change in the methodology used to calculate the Ethylene Net Transaction Contract price, but that in any event the "form, manner or time frame" of publication of that price has not changed. The appellant denies that any renegotiation of the price is called for.

8 The Master agreed with the appellant that a change in Chemical Market Associates, Inc.'s approach to setting the price did not trigger Articles 5.4 or 5.8 when read in the context of the entire agreement. He did not find that what was before him, notably disputed extrinsic evidence about the understandings of the parties at any time, would prevail over the clear wording of the contract. Effectively, his view was that "contemplated by the agreement" did not mean "contemplated by parties individually", especially in retrospect. He therefore found no trial of facts was required in order to dismiss the respondent's claim that Article 5.8 was triggered.

9 The chambers judge reversed and set aside the summary judgment. In his view, the Master did not give correct effect to all the terms of the agreement, and, in particular, too narrowly construed the word "manner". The chambers judge opined that the term "manner" had a more substantive meaning, which had to be determined at trial. What the trial would decide is what the parties "understood" the "manner" of calculation of the Ethylene Net Transaction Contract price to involve. The chambers judge also opined that there was a triable issue as to whether the "form" of the Chemical Market Associates, Inc. information had also been altered enough to trigger Article 5.8 of the agreement.

Standard of Review

10 The standard of review for questions of law is correctness. The findings of fact of the trial judge, and inferences drawn from the facts, will only be reversed on appeal if they disclose palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.). The standard of review for findings of fact and of inferences drawn from the facts is the same, even when the chambers judge heard no oral evidence: *Housen v. Nikolaisen* at paras. 19, 24-5; *Andrews v. Coxe*, 2003 ABCA 52, 320 A.R. 258 (Alta. C.A.) at para. 16.

11 The interpretation of a contract may invoke several standards of review. Some findings of fact may be required. In some cases the trial judge may have to determine which documents, promises, and consideration constitute the contract. There is a limited ability to introduce evidence regarding the circumstances surrounding the formation of the contract. Findings of fact on such issues will only be disturbed on appeal if they disclose palpable and overriding error: *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 (Alta. C.A.) at para. 16, aff'd, [2007] 1 S.C.R. 116, 2007 SCC 3 (S.C.C.); *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) at para. 10. A trial judge's determination of the factual matrix surrounding the contract in light of the evidence as a whole (including if appropriate extrinsic evidence) is a matter of fact, although the determination may be influenced by legal concepts: *Diegel v. Diegel*, 2008 ABCA 389, 100 Alta. L.R. (4th) 1 (Alta. C.A.) at para. 20; *Jiro Enterprises* at para.10; *Double N Earthmovers* at para. 16.

12 Once the exact terms and nature of the contract, and the surrounding facts, have been established, the interpretation of the words of the contract is a matter of law. The interpretation and application of contract principles to a settled set of facts is a question of law reviewed for correctness: *Diegel v. Diegel* at para. 20; *Alberta Importers & Distributors (1993) Inc. v. Phoenix Marble Ltd.*, 2008 ABCA 177, 88 Alta. L.R. (4th) 225, 432 A.R. 173 (Alta. C.A.) at para. 9; *Fenrich v. Wawanesa Mutual Insurance Co.*, 2005 ABCA 199, 46 Alta. L.R. (4th) 207, 371 A.R. 53 (Alta. C.A.) at para. 6; *McDonald Crawford v. Morrow*, 2004 ABCA 150, 348 A.R. 118 (Alta. C.A.) at paras. 5 and 43.

The Test for Summary Judgment

13 The test for summary judgment was summarized in *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380, 68 Alta. L.R. (4th) 237, 401 A.R. 88 (Alta. C.A.):

> 9 Rule 15(3) states that summary judgment cannot be granted if "there is a genuine issue for trial". The case law provides that before a litigant can be deprived of his or her day in court, it must be shown that there is no genuine issue of material fact requiring a trial: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 247 N.R. 97, at para. 27.
>
> 10 Applications for summary judgment or summary dismissal can take many forms. In some cases the application is simply based on the factual merits of the case. In other words, the applicant argues that it can prove its case on the facts without a trial. In this type of summary judgment application, the approach is as stated in *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, 339 A.R. 165, 27 Alta. L.R. (4th) 62:
>
> > [18] First, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven: *Bank of Montreal v.*

Kalin (1992), 131 A.R. 397 (C.A.).

> [19] After the plaintiff has proved its case on a balance of probabilities, the evidentiary burden shifts to the defendant but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by proving that there is a genuine issue for trial. If the defendant meets this evidentiary burden, the plaintiff fails to meet its ultimate burden. It must be beyond doubt that no genuine issue for trial exists.

An analogous approach is used where the defendant applies for summary dismissal. It is in the context of this type of summary judgment application that the cases sometimes say it must be "plain and obvious", or "clear" or "beyond real doubt" that the action should be summarily disposed of: see *Murphy Oil Company Ltd. v. Predator Corporation Ltd.*, 2006 ABCA 69, 55 Alta. L.R. (4th) 1, 384 A.R. 251, [2006] 5 W.W.R. 385 at paras. 24-8; *German v. Major* (1985), 39 Alta. L.R. (2d) 270 at 276, 20 D.L.R. (4th) 703, 62 A.R. 2 (C.A.); *Zebroski v. Jehovah's Witnesses* (1988), 87 A.R. 229, 30 C.P.C. (2d) 197 (C.A.). The Supreme Court has stated that it must be shown that there is a "real chance of success" to avoid summary dismissal of the action: *Gordon Capital Corp., supra*, at para. 27, discussed in *Murphy Oil, supra*, at paras. 26-8. If the record raises genuine factual or credibility issues, for example if there is conflicting evidence, then summary judgment generally cannot be granted: *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 111 O.A.C. 201, 164 D.L.R. (4th) 257, at paras. 13-20 (C.A.).

> 11 There are, however, other types of summary judgment applications. In some cases the facts are clear and undisputed. The ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue of law is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full trial to provide a proper foundation for the decision. In other cases it is possible to decide the question of law summarily: see for example *Olson v. Bieganek* (1997), 56 Alta. L.R. (3d) 322, 211 A.R. 313, 44 M.P.L.R. (2d) 104; *Medicine Hat (City) v. Wilson*, 2000 ABCA 247, 191 D.L.R. (4th) 684, [2001] 2 W.W.R. 601, 87 Alta. L.R. (3d) 25, 271 A.R. 96; *Bumper Development Corp. Ltd. v. Home Insurance Co.* (1989), 101 A.R. 264, 43 C.C.L.I. 195 (M.); *Dial Mortgage Corp. v. R.J.C. Investments Ltd.*, [1981] A.J. No. 172 (M.).

The parties disagree on whether there are controverted facts on this record which have to be resolved at a trial, or whether the litigation is capable of being resolved summarily.

14 The important role of summary judgment in our system of civil procedure was emphasized in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372, 2008 SCC 14 (S.C.C.) at para. 10:

> This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

Neither party disagreed with this statement of principle.

Evidence on the Meaning of the Contract

15 Trials are held to make findings of fact: *Tottrup* at para. 12. In order to establish that there is a "genuine issue for trial" the party resisting summary judgment should be able to articulate what facts are in dispute that could be resolved at a trial. Those could be the background facts of the case, or facts that are needed to provide context to the issues of law: *Tottrup* at para. 11. Are there any unproven facts needed to resolve this case, and if so what admissible evidence would be available?

16 The respondent acknowledges that the parties to the contract are not entitled to provide evidence on what they think the contract means. Neither contracting party is entitled to call evidence that "I think it means X": *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.) at p. 166; *Gainers Inc. v. Pocklington Holdings Inc.*, 2000 ABCA 151, 81 Alta. L.R. (3d) 17, 255 A.R. 373 (Alta. C.A.) at para. 20; *Marthaller v. Lansdowne Equity Venture Ltd.* (1997), [1998] 1 W.W.R. 428, 52 Alta. L.R. (3d) 329, 200 A.R. 226 (Alta. C.A.).

17 It is also clear that the parties cannot call expert evidence on the meaning of the contract: *Lunenburg Industrial*

Foundry & Engineering Ltd. v. Commercial Union Assurance Co. of Canada (2004), 2005 NSSC 62, 231 N.S.R. (2d) 378, 21 C.C.L.I. (4th) 140, 10 C.P.C. (6th) 376 (N.S. S.C.) at paras. 24-5; *Michael Santarsieri Inc. v. Unicity Mall Ltd.*, 2000 MBQB 202, 152 Man. R. (2d) 215 (Man. Q.B.); *LHS Holdings Ltd. v. Laporte PLC*, [2001] EWCA Civ 278 (Eng. C.A.) at paras. 20, 36. For example, neither party could retain a professor of law or English to prepare an expert report on the meaning of the terms of the contract: *Gorgichuk Estate v. American Home Assurance Co.* (1985), 5 C.P.C. (2d) 166 (Ont. H.C.).

18 It follows that no third party can provide an opinion on what the contract means. That is the case even if the third party is a knowledgeable member of the same industry; his or her opinion on what the contract means is not admissible: *Harris v. Nugent* (1996), 46 Alta. L.R. (3d) 264, 193 A.R. 113 (Alta. C.A.). It is also clear that the opinions of third parties about the commercial context *after* the contract was signed are inadmissible. If any evidence about the contract was admissible, it would have to be evidence about the situation prior to and at the date of signing of the contract, in this case 1999: *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.) at para. 53; *McDonald Crawford v. Morrow*, 2004 ABCA 150, 28 Alta. L.R. (4th) 62, 348 A.R. 118 (Alta. C.A.) at para. 72.

19 There is a narrow exception for technical terms of art, which can be proven by extrinsic evidence: *Canadian National Railway v. Volker Stevin Contracting Ltd.* (1991), 120 A.R. 39, 1 Alta. L.R. (3d) 167, 48 C.L.R. 134 (Alta. C.A.). This exception is contemplated and narrowed by Article 1.5 of the agreement. Any technical terms specifically defined in the agreement cannot be given another meaning, even if the industry would use those words in a different sense. But there is no evidence that the key terms "information", "manner" or "contemplated" have any special meaning in the styrene business.

20 Where a contract is ambiguous, there is a limited ability to call evidence on the circumstances surrounding the formation of the contract and the commercial context in which it was made. But where the contact is clear, the parties' intention is to be derived primarily from the words they have used in the contract: *Eli Lilly & Co.* at paras. 52-6, explaining *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.); *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70, 73 B.C.L.R. (3d) 102 (B.C. C.A.) at paras. 17-8. This is especially so when the contract contains a "whole agreement" clause. Evidence of context cannot in any case be allowed to overwhelm the words of the contract, or to contradict those words: *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 25 B.C.L.R. (3d) 285 (B.C. C.A.) at para. 19.

21 The parties, to different degrees, reach beyond the wording of the contract to propose the meanings of Articles 5.4 and 5.8. For example, the appellant does so by referring to a contemporaneous agreement between the parties that it calls the "Sarnia agreement", contending that the respondent's argument does not just interpret but actually amends the present agreement in order to bring its practical application closer to the terms of the Sarnia agreement as to ethylene pricing. The respondent does so more comprehensively, by suggesting that the language of Articles 5.4 and 5.8 is technical and industry-sensitive, and that it can only be properly understood by reference to a body of evidence about industry realities at the time the contract was entered into and since that time.

22 The respondent outlines the type of evidence it would propose to introduce if the summary judgment application were dismissed and the matter went to trial. The proposed evidence would be inadmissible. There are no ambiguities in the wording of the contract that would warrant extrinsic evidence about the context in which it was entered into.

23 For example, the respondent proposes to tender evidence to demonstrate that the industry would expect that if the methodology in the M & M Report changed, the price marker would change. This is an attempt to provide direct evidence on what the parties intended Article 5.8 to mean, in the guise of "context". What the industry would have intended to contract for is an attempt to have the court draw an inference of subjective intent from external evidence. It goes one step further, because it suggests that the expectations of the industry as a whole could override the intentions of these two parties as expressed in the wording of this particular contract.

24 In its factum the respondent argues:

> 90. Contrary to the appellant's assertions, Dow does not seek to adduce evidence of subjective intent. Nor does Dow rely on extrinsic evidence to vary or contradict the agreement. To the contrary, Dow seeks to ascribe meaning to the words of the agreement.

Unless the agreement contains technical terms of art (as contemplated by Article 1.5) the respondent is not entitled to call evidence to explain the "meaning of words".

25 Since the proposed evidence would be inadmissible, it is of no consequence that some of the evidence provided on the summary judgment application conflicted. There is also no need to determine whether some of the deponents' evidence was

undermined on cross-examination.

26 The factual context in which the parties negotiated and signed this agreement is clear from the undisputed portions of this record and the agreement itself. The appellant and the respondent are both very large and sophisticated petrochemical companies. The appellant wanted a long term market for its styrene, and the respondent wanted a long term supply of styrene. The parties realized that many things could change over the ten-year term of the agreement, particularly the market price for styrene. Rather than engage in repeated negotiations about price, the parties decided to use external objective market prices. They put the setting of those prices in the hands of expert third parties, like Chemical Market Associates, Inc. and Dewitt & Company Inc. No other evidence of context is necessary or admissible to interpret the words used by the parties in their agreement. No resort may be had to the subjective intentions or expectations of the parties beyond the words used.

27 This case turns primarily on the grammatical and ordinary interpretation of the words of the agreement on its face, giving meaning to all the relevant language in the context of the agreement as a whole. The respondent has not been able to postulate any admissible evidence that it might introduce to explain the meaning of the contract, which is necessary to justify a trial. Reading the agreement as worded enables the court to provide a complete answer to the dispute. This contract does not use specialized industry terminology requiring explanation by extrinsic evidence. It follows that the dispute is capable of summary disposition.

Interpretation of the Contract

28 On its proper interpretation, Article 5.8 has not been triggered. Chemical Market Associates, Inc. continues to publish the Ethylene Net Transaction Contract price in the same form, manner and time frame. Whether Chemical Market Associates, Inc. has adjusted the assumptions it uses does not change the fact that "the information" continues to be available. On the proper interpretation of the contract, the intention of the parties was that the price would be set by a neutral, knowledgeable third party, and the selected neutral third party has continued to publish the benchmark price required.

29 Article 5.8 is, on its face, a generic provision. It applies specifically to four "Prices", and one "Adjustment", and then goes on to encompass "any other amount required by this Agreement". It is worded generally to accommodate the wide scope of its application. It refers to all of the complex defined components in the Agreement that are utilized in the formula that generates the contract price for styrene. Several of those defined components refer to external markers or benchmarks established and published by third parties that are used to set the price for styrene. Article 5.8 provides an alternative dispute resolution mechanism to use if any of the third party information becomes unavailable during the 10 year term of the Agreement. Article 5.8 should be interpreted accordingly.

30 The respondent argues that "manner" relates to the underlying methodology or assumption used by the third party in calculating the formula component. The appellant argues that it relates merely to the method and format of presentation of the information. The appellant's position is supported by the other parts of the Article. As noted, the opening phrase refers to "the information", which is more properly a reference to the availability of the information, rather than the assumptions underlying its calculation. The Article goes on to describe the potential dispute as "an alternative method of determining or obtaining such amount". This too should properly be read as a reference to finding an alternative source of publication of the original amount, not of recalculating the formula or its components.

31 The parties were clearly aware that prices and amounts would change during the time period of the contract, so adjustment of prices and amounts was provided for by reference in the relevant Article to information available to the parties. Accordingly, Article 5.8 refers back to various other Articles which provide for a means to determine needed information on an ongoing basis. The distinct reference set out in Article 5.4 to determine the Ethylene Price defines the form, manner and time frame for the information required in order to determine that Ethylene Price. In other words, the "manner" of acquiring the information needed to determine the Ethylene Price is set out in Article 5.4. The "manner" is a reference to the M & M Report. The "manner" of making the information available is not the same thing as the "methodology" used to set the price. The methodology to be used was put in the hands of an independent third party, Chemical Market Associates, Inc.

32 Article 5.8 provides that "if any of the information required to determine" any of the amounts referred to in the Agreement is "no longer available in the form, manner or time frame contemplated in this Agreement", then the dispute resolution mechanism will be triggered. The reference to "any of the information" is properly read as a generic reference to the third party sources that generate the components of the various definitions. In the case of ethylene, it refers to the M & M Report.

33 The chambers judge concluded that the appellant's interpretation of Article 5.8(a) gave no meaning to the phrase "any of the information required". That phrase is a compendious and generic reference to all of the separate sources of data found

in the benchmarks underlying the various definitions that are combined together to create the formula price. The opening phrase of Article 5.8(a) is grammatically necessary to encompass the components of the four Prices, the Adjustment, and the "other amounts" then referred to. The very general nature of the term "information" can be seen by its use in Article 5.8(b). The appellant's interpretation of the phrase "form, manner or time frame" is entirely consistent with the opening words "information required" being concerned with the necessary third party data being available and published in the same format. That phrase is not designed to address the assumptions underlying the objective third party data.

34 The respondent argues that the phrase "contemplated in this Agreement" was a reference to the subjective intent or contemplation of the two parties, and thereby allows the introduction of evidence of subjective intent about the meaning of the contract. When read with the "whole agreement" clauses (Articles 22.3 and 22.4), "contemplated" means as defined and specified in the words used in the agreement. "Contemplated" is not intended to substitute a subjective exercise of determining the intentions of the parties for the objective price markers in the agreement. That would undermine the whole philosophy of the agreement, which was to provide a formula that would operate with some certainty throughout the entire 10 year term of the agreement. In any event, the word "contemplated" relates only to the "form, manner and time frame" of the information, not to its substantive content.

35 The appellant also pointed to the definition of Benzene Price by way of comparison. While the definition of Ethylene Price is based on purely objective criteria, the definition of Benzene Price contains a subjective element. The Typical Large Buyer Rebate is to be set by agreement of the parties or, failing that, arbitration. The appellant argues that where the parties recognized that sophisticated buyers might negotiate away from the published prices, and the parties wished to use that subjectively negotiated price, they expressly so provided. The Ethylene Price, on the other hand, is to be purely set by the posted price, without regard to any exceptions or discounts. Thus the appellants argue that the plain wording of the contract does not support the argument that the parties were entitled to look behind the published Ethylene Price, depending on the assumptions on which it was allegedly set.

36 The parties had been dealing in chemicals for some time prior to the contract which is now in dispute. On January 9, 1996 the respondent wrote to Chemical Market Associates, Inc. as follows:

> RE: Confidential Gulf Coast Ethylene Price
>
> As a follow-up to our discussions on December 1, 1995 we would like you to begin to provide to us monthly data which is representative of what the ten largest U.S. Gulf Coast ethylene buyers are paying, including discounts.
>
> The parameters should include:
>
> 1. The monthly weighted average contract price should be on a delivered basis excluding Superfund, and including contractual discounts applicable for domestic consumption.
>
> 2. Joint venture, base load, or take or pay pricing should not be considered a straight contract purchase.
>
> 3. Distressed purchases, "fire sales", wide spec purchases or derivative export allowances should not be included in these calculations.
>
> 4. We would also like a separate spot price including the spot to contract sales ratio.
>
> 5. The data should be received by Dow within the month following the month in question.
>
> 6. The first report should be for December 1995.
>
> We plan to use this data to administer third party ethylene supply contracts and expect to require this data for an extended period. The data will be kept confidential to people who need to know.

The respondent agreed to pay a fee for this information. The letter of January 9, 1996 became Schedule "A" to a previous contract between the parties, which itself became Schedule "I" to the contract now in dispute. Since the letter is incorporated into the contract, it can be used to provide context for the interpretation of its provisions.

37 The Schedule I agreement is referred to in the definition of Ethylene Cost Amount in Article 5.5(b):

"Ethylene Cost Amount" means an amount, agreed between SCCL and DCCI, equal to the Alberta market value for ethylene at the time, if any, the parties are exchanging ethylene in accordance with an ethylene exchange agreement. An example of the Alberta market value for ethylene is the "Price" (expressed in cpp), as described and determined in the Letter Agreement dated January 14, 1998 between SCCL and DCCI, a copy of which is attached hereto as Schedule I.

In the letter of January 9, 1996 the respondent specifically dealt with issues like the "ten largest buyers", "contractual discounts", "distressed purchases" and other assumptions that might underlie the Chemical Market Associates, Inc. published prices. No similar provisions are to be found in the contract now in dispute, which supports the interpretation of the appellant. If it had been intended that changes to the assumptions underlying the formula were to trigger the right to renegotiate the price of Ethylene, one would expect to find similar provisions in the contract.

38 The contract is lengthy and detailed. It contains a "whole agreement" clause. It anticipates and provides for a great many contingencies. For example, it allows for a price adjustment if legislation requires capital expenditures at the Styrene Facility in excess of $5 million. It has a detailed force majeure clause that contemplates a number of changes beyond the control of the parties. It ties the quality of the delivered product to recognized industry specifications, and has a mechanism that allows those specifications to evolve. It contemplates that a named carrier would transport the styrene, but provided a mechanism for changing to another carrier. It is significant that there is no provision dealing with changes in the assumptions underlying the third-party information that is relied on in the formula.

39 There is nothing in the word "manner" which includes the reasoning method used by Chemical Market Associates, Inc. (independently of the parties) to report on what it considers to be the relevant Ethylene Net Transaction Contract price. In effect, by Article 5.4 the parties expressed confidence that Chemical Market Associates, Inc. would objectively provide a fair, arms length marker Ethylene Net Transaction Contract price, howsoever Chemical Market Associates, Inc. reasoned its way to developing that price. It may be that the respondent assumed from the start that Chemical Market Associates, Inc. would always include discounting, but the agreement did not require a discounted version of the Ethylene Net Transaction Contract price. An objective observer of the agreement and of Articles 5.4 and 5.8 would not find that the M & M Report of the Ethylene Net Transaction Contract price has become unavailable. The M & M Report continues in actuality to make available an Ethylene Net Transaction Contract price in the form, manner and time frame contemplated by the agreement

Conclusion

40 In conclusion, there is no reason why the present dispute cannot be decided summarily. The respondent has not identified any admissible evidence that could be produced at trial, and that would result in a finding of fact that would affect the outcome of this case. On its proper interpretation the re-negotiation and dispute resolution provisions of Article 5.8 have not been triggered.

41 The appeal is allowed, and the action is summarily dismissed.

Appeal allowed.