EB-2020-0156

ONTARIO ENERGY BOARD

Enbridge Gas Inc. (EGI)

Application for natural gas distribution rates and other charges effective January 1, 2020

Industrial Gas Users Association (IGUA)

SUBMISSIONS ON MOTION

for review of Panhandle Cost Allocation Determination

INTRODUCTION

1. IGUA's motion asks that the Board review and vary that part of the *Decision and Order* in EB-2019-0194 (2020 Rates Application) which found that changes to the methodology and implementation of EGI's cost allocation in respect of Panhandle System costs shall be deferred for examination as part of EGI's 2024 rebasing application (Panhandle Cost Allocation Ruling).

2. Phase 2 of EGI's 2020 Rates Application was dedicated to 4 topics, one of which was EGI's response to a cost allocation directive (Cost Allocation Directive) from the Board in its August, 2018 decision (Merger Decision) on EGI's amalgamation and rate setting plan application (EB-2017-0306/0307, the Merger Case). In response to the Cost Allocation Directive EGI filed 79 pages of cost allocation evidence, and responded to 49 interrogatories on the topic, in most cases with detailed multi-page responses. Fourteen parties filed argument on the issue, most in some detail.

3. Driving the Cost Allocation Directive were concerns raised by IGUA and APPrO regarding the allocation of the costs of (then) Union Gas' Panhandle System Reinforcement Project. The issue of the allocation of these costs has been before the Board since June 2016, and was twice deferred pending imminent rate rebasing which did not ultimately occur,

following which the Board directed in August, 2018 that the issue be *"addressed"* in the 2020 Rates Application.

4. The Hearing Panel in the 2020 Rates Application (Decision Panel) proceeded to dismiss the issue, further deferring its resolution until 2024. In doing so the Decision Panel provided one page of perfunctory reasons. These reasons dealt neither with the previous expressly stated expectations of the Board that the matter would be imminently "addressed" and why that was no longer appropriate, nor with the acknowledged inequities of the current allocation of Panhandle System costs and the evidence that these functionally discrete costs could, and should, be more equitably allocated without disruption of the current basis of allocation of EGI costs to rate classes. Nor did those reasons address the position argued by IGUA that those parties arguing against addressing the matter now were simply rearguing positions previously argued and rejected by the Board in the Merger Decision.

5. Rather the Decision Panel's reasons for dismissing the issue and deferring its resolution for another 3 years until 2024, for a total of 5 years beyond the 2019 rate year by which the Board initially (in 3 determinations) expected that the inequity would be addressed, consisted of perfunctory statements of broad principle without any substantive analysis of the application of those principles in light of previous Board decisions and the record placed before it in the instant case.

6. In the words of the Supreme Court of Canada in its comprehensive December, 2019 Judgement in the case of *Minister of Citizenship and Immigration v. Alexander Vavilov*[1] (Vavilov):

> *Reasoned decision-making is the lynchpin of institutional legitimacy.*[2]
>
> *Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power.*[3]

[1] 2019 SCC 65
[2] Vavilov, para. 74.
[3] Vavilov, para. 79.

> *The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process.*[4]
>
> *[T]he decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies.*[5]
>
> *The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. …reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.*[6]

7. The reasons provided by the Decision Panel deferring correction of the acknowledged Panhandle System cost allocation inequity fall short of these legal standards. In receiving and considering the Decision Panel's reasons, IGUA and its affected members have been unable to conclude that they have actually been listened to. That is why IGUA has brought this motion.

8. The Decision Panel's reasons in support of its Panhandle Cost Allocation Ruling belie a *"failure to meaningfully grapple with key issues [and] central arguments raised by the parties"*[7], *"call into question whether the decision maker was actually alert and sensitive to the matter before it"*[8], and fail to meet the legal requirement to *"demonstrate 'justification, transparency and intelligibility'"*[9]. As such, they are, as a matter of law, unreasonable and in error.

9. It is on the basis of this law that IGUA respectfully submits that the Hearing Panel on this application for review (Review Panel) should determine that IGUA's motion has demonstrated a question as to the correctness of the Panhandle Cost Allocation Ruling, and has thus satisfied the "threshold question" for review under Rule 43 of the Board's *Rules of Practice and Procedure* (*Rules*).

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[4] Vavilov, para. 80.
[5] Vavilov, para. 86.
[6] Vavilov, para. 127, emphasis in original.
[7] Vavilov, para. 128.
[8] Vavilov, para. 128.
[9] Vavilov, para. 81.

10. Having so determined, and considering for itself the record in the EGI 2020 Rates Application in respect of the allocation of Panhandle System expansion costs and this Board's previous rulings in respect of rectification of that allocation, this Review Panel should:

    (a) vacate the Panhandle Cost Allocation Ruling; and

    (b) direct EGI to file, within 3 months, a rate design proposal for adjustment of rates either in accord with the cost allocation study filed by EGI in the 2020 Rates Application or, in the alternative, in accord with the methodology for allocation of incremental Panhandle System reinforcement costs proposed by (then) Union Gas in its application for leave to construct the Panhandle Reinforcement[10], but in either case for implementation in 2021 rates.

FACTS

11. In the Merger Decision the Board provided the following Cost Allocation Directive (our emphasis)[11]:

> *… the OEB is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair Systems. The OEB therefore requires Amalco to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation to take into account the following projects: Panhandle Reinforcement, Dawn-Parkway expansion including Parkway West, Brantford-Kirkwall/Parkway D and the Hagar Liquefaction Plant. This should also include a proposal for addressing TransCanada's C1 Dawn to Dawn TCPL service. The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.*

12. The Cost Allocation Directive was the culmination of a significant history of rulings by this Board on the issue of the allocation of Panhandle System reinforcement costs. IGUA's 19 page Argument in the 2020 Rates Application [attached to these submissions at Tab A] was focussed exclusively on this issue, and traced that history in detail, which history can be summarized as follows:

[10] EB-2017-0306/0307.
[11] EB-2017-0306/0307, *Decision and Order*, page 41, bottom.

2016 Panhandle Reinforcement LTC & Cost Allocation Proposal

(a) In June, 2016 (then) Union Gas Limited applied to the OEB for leave to construct (LTC) a reinforcement of its Panhandle System.[12] The map of the Panhandle system filed in the EGI 2020 Rates Application[13] illustrates the Dawn Parkway Transmission System's western terminus at Dawn, from where the EGI system splits off into;

(i) the Panhandle System serving the Panhandle Market; and

(ii) the Sarnia Industrial Transmission System serving Union rate zone customers in the Sarnia area and connecting to the St. Clair Transmission Line (the St. Clair System).

(b) Union's 2016 LTC application was driven by firm demand growth in the Panhandle Market, particularly from the greenhouse sector.[14]

(c) In response to this growth in demand, Union proposed, and ultimately built, approximately 40 km of NPS 36 pipeline to replace an existing NPS 16 pipe running from Union's Dawn Compressor Station to its Dover Transmission Station, and invested in related modifications at several stations along the balance of the Panhandle System. The project had an OEB approved capital budget of $264.5 million and was put into service in November, 2017.

(d) As part of its 2016 LTC application, Union proposed a departure from its previously approved methodology for allocating Panhandle System costs.[15] The Panhandle System and the St. Clair System had been combined for cost allocation since Union's Rate C1 was first included in Union's cost allocation in 1999. The primary reason for combining the two systems was that both systems provide transportation service between the river crossings west of Dawn and the Dawn Compressor Station.[16] In its 2016 LTC filing Union explained[17] why that legacy cost allocation approach was no longer appropriate;

> *Union is proposing a cost allocation for the Project that is different than the Board-approved cost allocation methodology because the existing methodology allocates costs based on the combined Panhandle System and St. Clair System. With the addition of the significant Project costs related only to the Panhandle System and no change to the cost of the St. Clair System, the use of the combined system for cost allocation purposes no longer reflects the costs to serve the customers on each respective transmission system.*

(e) The estimated 2019 revenue requirement of the St. Clair System was $2.250 million. The estimated 2019 revenue requirement of the Panhandle System was

[12] EB-2016-0186.
[13] ExI.APPrO.1, Attachment.
[14] EB-2016-0186, ExA/T3/p2/lines 11-14; p3, line 4; ExA/T4/S1; ExA/T5/p10, line 11 – p11, line 8; ExA/T5/p18, line 12 – p.19, line 13; ExA/T5/S2/pp2, 4, 5, 12, 19.
[15] EB-2016-0186, ExA/T8.
[16] EB-2016-0186, ExJ1.2/Att2 (included as Tab A1 hereto), p1, paragraph 1.
[17] EB-2016-0186, ExA/T8/p7, lines 1-7.

$38.195 million. The evidence in the 2020 Rates Application (see Tab B hereto) was that as a result of the Panhandle Reinforcement Project investment, *the 2019 revenue requirement for the Panhandle System was almost 17 times that of the St. Clair System*.[18]

(f) Attachment A to IGUA's 2020 Rates Application argument [attached to these submissions as Tab A1] is Union's response to a transcript undertaking provided to the Hearing Panel in Union's 2016 Panhandle Reinforcement Project LTC application following questions asked by that Hearing Panel on Union's proposal in that proceeding for allocation of Panhandle Reinforcement Project costs. The undertaking response explains the historical basis for allocation of Panhandle System costs and St. Clair System costs on a combined basis, and why Union was proposing an alternative approach on the basis that allocating Panhandle System costs - which now exceed St. Clair System costs by a factor of 17 - based on combined St. Clair and Panhandle System demands to customers with only St. Clair and no Panhandle System demands would not be fair and is no longer reasonable.[19]

(g) In 2016, Union proposed to address this inequity by allocating the incremental Panhandle Reinforcement Project costs to customers based on Panhandle System design day demands, and thus *"allocating costs to rate classes that use the Panhandle System and are driving the need for the [Panhandle Reinforcement] Project"*. [20]

(h) As part of its 2016 Panhandle Reinforcement Project LTC application Union also requested approval to calculate the revenue requirement and resulting rates of the Panhandle Reinforcement Project using a 20-year depreciation term rather than the conventional 50 year depreciation term.[21] The basis for this request was a posited *"significant risk to the return of any capital invested in natural gas infrastructure"* as a result of the (then) Ontario government's 5-year (2016-2020) Climate Change Action Plan and related government statements regarding transitioning off of natural gas.[22]

(i) The Board's findings on Union's 2016 Panhandle Reinforcement Project LTC application in respect of Union's proposed recovery of Panhandle Reinforcement Project costs [excerpted at Tab C hereto] were combined with its findings on Union's proposal to use a 20 year depreciation term for the investment, and were as follows (our emphasis):

> *Union proposed two changes to the cost allocation methodology approved by the OEB when rates were established in 2013. The proposed cost allocation would determine how Project costs would be recovered <u>until 2019</u>, the end of Union's current IRM term.* [23]

[18] ExI.IGUA.4, included as Tab B hereto.
[19] EB-2016-0186, ExJ1.2/Att2.
[20] EB-2016-0186, ExJ1.2/Att2, page 3, bottom paragraph; ExI.IGUA.1, part c.
[21] EB-2016-0186, ExA/T3/p7/lines 9-18.
[22] EB-2016-0186; ExA/T3/p5, lines 18-21, *et seq.*
[23] EB-2016-0186 *Decision with Reasons* February 23, 2017, page 9, 3rd full paragraph.

…

The OEB will not approve Union's proposals for a 20-year depreciation period and a revised cost allocation methodology. The OEB finds that both proposals should be deferred to Union's next cost of service or custom IR application. It would be inconsistent to change the depreciation term and cost recovery for one project while Union's other assets are depreciated and recovered on a different bases [sic]. A comprehensive review is required for parties to test, and the OEB to assess, the merits and implications of these two proposals and this should be at Union's next cost of service or custom IR application.

While these proposals may have merit, they cannot be adequately considered during the IRM term, for one project in isolation. A leave-to-construct application requesting a capital pass-through mechanism for cost recovery over 14 months is not the appropriate forum to consider deviations from principles embedded in current OEB-approved rates. [24]

Union's 2018 Rate Case

(j) The costs of the Panhandle Reinforcement Project were first incorporated into rates in 2018. In Union's 2018 rate case (EB-2017-0087) IGUA sought to file evidence intended to provide the Board and interested parties with information on the impact on IGUA's Sarnia area members of the allocation of Panhandle Reinforcement Project costs using the 2013 Board-approved cost allocation methodology rather than the methodology for allocation of incremental Panhandle Reinforcement Project costs proposed by Union in its 2016 LTC application. A copy of that evidence was attached to IGUA's argument in the 2020 Rates Application [and is included at Tab A2 hereto] as indicative of IGUA's ongoing concerns on this topic. (IGUA's evidence was rejected by the Hearing Panel in Union's 2018 rate application, as explained below, and was never attested to or tested.) That evidence articulates the circumstances of 4 IGUA member companies served primarily under Rate T2 whose collective daily contract demand is over 5 million cubic meters and who collectively consume almost 2 billion cubic meters of gas per year, almost all of which is delivered via Union's St. Clair System and almost none of which contributes to the design day demand on the Panhandle System. The evidence presented the aggregate impact on these 4 IGUA members, as confirmed by Union, of using the historical rather than the proposed cost allocation methodology for incremental Panhandle Expansion Project costs. In 2018 that impact was just under $1 million.

(k) The Hearing Panel seized of Union's 2018 rate application rejected IGUA's proposed 2017 evidence [the applicable procedural order is included at Tab D hereto], and in so doing stated[25] (our emphasis):

The OEB is of the opinion that cost allocation issues can be better addressed prior to Union entering another price cap rate mechanism framework. It would not be appropriate to address cost allocation changes

[24] EB-2016-0186 *Decision with Reasons* February 23, 2017, page 10, bottom.
[25] EB-2017-0087, Procedural Order No. 3, page 2, last paragraph.

> *in the last year of the current IRM framework where rate changes are supposed be mechanistic. Furthermore, the merger Application of Union and Enbridge has not yet been approved, and it is possible that Union and Enbridge could be required to file evidence dealing with some components of rebasing applications. The OEB is of the opinion that any cost allocation changes are appropriate to be considered for the setting of 2019 rates.*

(l) Despite its proposed 2018 rate case evidence being rejected by the Board, IGUA was permitted to, and did, advance argument based on the record already compiled in Union's 2018 rates proceeding for alternative remedies to the existing inequity for customers served by the St. Clair System resulting from the legacy Panhandle System/St. Clair System cost allocation methodology. While the Board declined to grant relief as advocated by IGUA in that case (IGUA argued that the Board should declare Union's 2018 rates interim pending resolution of the Panhandle expansion cost allocation issue), the Board in its decision [relevant excerpts of which are included at Tab E hereto] reiterated its expectation that[26] (our emphasis):

> *The issue of the allocation of these costs on a going-forward basis to Union rate classes will be dealt with in Union's 2019 rates proceeding.*

Merger Case

(m) Union was not required to address Panhandle Reinforcement Project costs in the merger application as the 2018 Rates Case Hearing Panel had conjectured might be the case. Union did, however, indicate in the Merger Case case that[27] (our emphasis):

> *The Board-approved cost allocation methodology causes significant impacts to certain rate classes, and in response to concerns raised by customers, Amalco intends to address the cost allocation of the Panhandle System and St. Clair System in its 2019 Rates Application.*

(n) Mr. Kitchen's testimony on behalf of Amalco (now EGI) in the merger case was that Amalco would be able to propose adjustment to the allocation of Panhandle System costs for 2019 absent a full cost allocation study because the costs in issue are *"isolated to one functional classification"*.[28]

(o) In its argument in the Merger Case IGUA urged that, regardless of the determination in that case of when EGI would be required to file a cost of service application, the Hearing Panel should clearly direct EGI to file sufficient cost allocation information in its 2019 rate application to finally address a more equitable allocation of Panhandle Reinforcement Project costs.[29]

(p) In its *Reply Argument* in the Merger Case, in response to arguments filed, including a request from IGUA that EGI definitively address in reply how an update to cost

[26] EB-2017-0087, *Decision and Rate Order*, page 8.
[27] EB-2017-0307, ExB/T1/p31, lines 16-19.
[28] EB-2017-0306/0307, Transcript Volume 5, p58, lines 14-16.
[29] EB-2017-0306/0307, IGUA Argument, paragraph 62.

allocation for Panhandle Reinforcement Project costs would be effected, EGI stated[30] (our emphasis):

> *The Applicants have fully met submissions and concerns about a cost allocation study from Amalco by making a commitment, as described above, that Amalco will complete two cost allocation studies during the [proposed 10 year] deferred rebasing period and will consult with OEB Staff and Intervenors on rates derived from each study.*
>
> *Notwithstanding the proposal that Amalco will file cost allocation studies, it is important to be clear that the Applicants consider existing cost allocation methodologies to be appropriate. Union's 2013 cost allocation study allocated costs in an appropriate manner and was approved by the OEB at that time. Subsequent to the 2013 cost allocation study, Union included incremental costs in rates using Board-approved methodologies. The existing methodologies appropriately allocated incremental costs with the exception of the Panhandle revenue requirement.*
>
> *The Panhandle project is unique as it involved incremental costs not considered in the 2013 cost allocation study. If Union had known about the project at the time of the 2013 cost allocation study, it would have proposed an alternative allocation methodology at that time. In the pre-filed evidence for the Price Cap Application, the Applicants stated unequivocally that Amalco will address the cost allocation of the Panhandle system and the St. Clair system in the 2019 rate application.*
>
> *The Applicants have also made clear their expectation that cost allocation for the Panhandle system and the St. Clair system can be addressed as a discrete cost element within one functional classification. OEB Staff submit that the review of Panhandle and St. Clair cost allocation should not be completed until a comprehensive cost study is filed. However, the Applicants submit that the Board should not pre-judge whether cost allocation for Panhandle and St. Clair can be assessed as a discrete cost element before the Board has even seen and considered Amalco's 2019 filing.*

(q) In the Merger Case decision, starting at page 40 [excerpted at Tab F hereto] the Board summarizes the positions of EGI and parties on the Panhandle System and St. Clair System cost allocation issue. Those positions were advanced in the context of EGI's proposal for a 10 year rebasing deferral, and various positions by other parties for rebasing deferrals of different (shorter) lengths. In that case, some parties (APPrO, Kitchener and IGUA) argued for a new Panhandle cost allocation in order to correct *"significant cost allocation inequities"*. Others (OEB Staff, OGVG, LMPA and CCC) argued that *"discrete cost allocation changes were not appropriate in the absence of a comprehensive cost allocation study"*. TransCanada argued its own cost allocation issue in that case (the Rate C1 Dawn to Dawn-TCPL transportation rate based on Dawn transmission compression related costs for facilities already fully depreciated). These arguments led to the

[30] EB-2017-0306/0307, Reply Argument, paragraph 229 – 233.

Cost Allocation Directive for EGI to file, for consideration in the 2020 Rates Application, an update to cost allocation for the Panhandle/St. Clair System and other recently constructed facilities. The salient passage merits repeating (our emphasis)[31]:

> *… the OEB is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair Systems. The OEB therefore requires Amalco to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation to take into account the following projects: Panhandle Reinforcement, Dawn-Parkway expansion including Parkway West, Brantford-Kirkwall/Parkway D and the Hagar Liquefaction Plant. This should also include a proposal for addressing TransCanada's C1 Dawn to Dawn TCPL service. The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.*

13. In its 2020 Rates Application, in response to the Cost Allocation Directive EGI filed a cost allocation study which addressed, *inter alia*, a proposal for reallocation of Panhandle System costs.[32]

14. To address the current inequity in the allocation of Panhandle System costs, EGI proposed to separate the classification of revenues related to the applicable pipeline systems into those attributable to St. Clair System assets and those attributable to Panhandle System assets.[33] In particular, the evidence filed;

    (a) examines each major asset category on the Panhandle System and allocates revenues attributable to capital and O&M costs for each major asset between ex-franchise (C1) and in-franchise customers, and in respect of in-franchise customers allocates costs to rate classes based on design day demands on the Panhandle System; and

    (b) as the St. Clair System assets are currently used to transport NEXUS supply for Union North and Union South sales service customers and revenues attributable to these assets are recovered under Rate C1 from both sales service and direct purchase customers, the revenues associated with these assets are directly assigned to Rate C1.

15. EGI's 2020 Rates Application evidence was that the proposed approach to reallocation of Panhandle System costs *"better represents the principles of cost causation by allocating*

[31] EB-2017-0306/0307, *Decision and Order*, page 41, bottom.
[32] ExB/T1/S1/AppC.
[33] ExB/T1/S1/S1/AppC/p12, paragraphs 24 *et seq.*

the costs based on each rate class' use of the Panhandle System and St. Clair System".[34] No party has disputed this.

16. IGUA filed an 18 page detailed 2020 Rates Application argument focussed exclusively on the Panhandle System cost allocation issue and the evidence relevant thereto. IGUA's 2020 Rates Application argument underscored that:

> *The result of this proposed allocation would be to remove from rates T2, M16 and C1 $12.6 million dollars of revenue requirement that is being inappropriately and inequitably recovered from these customers for the Panhandle System in 2019, and reallocate that revenue requirement to those customers who are relying on the Panhandle System, including the 2017 $264.5 million reinforcement of that system (i.e. Rates M1, M2, M4, M7, T1 and, to a small extent, M5, including 676 greenhouse customers[35]).[36] The impact on EGI's 23 Rate T2 customers[37] is a reduction in rates of $4.9 million.*

Pending a full cost allocation study, IGUA supported this approach and its result.

17. In the Cost Allocation Directive the Board directed EGI to consider additional significant projects put into service during Union's previous IRM rate plan period. Incorporating the allocation study impacts of those additional projects into rates would provide offsetting impacts to rates M1, M2, M4, M7, T1 and, to a small extent, M5, as well as further reductions to rate T2, primarily through shifting revenue requirement to rate M12.[38]

18. IGUA's 2020 Rate Application argument addressed this broader proposal as follows (emphasis in original):

> *The Board might conclude that this broader reallocation better balances the interests of various customer groups, and IGUA would support that outcome as well. We note, however, the distinction between the costs associated with these projects and those associated with the Panhandle Reinforcement Project, as addressed by EGI in its Reply Submissions in the merger proceeding[39] (our emphasis):*
>
> > *Notwithstanding the proposal that Amalco will file cost allocation studies, it is important to be clear that the Applicants consider existing cost allocation methodologies to be appropriate. Union's 2013 cost allocation study allocated costs in an appropriate manner and was approved by the OEB at*

[34] ExB/T1/S1/AppC/p15, paragraph 31.
[35] ExI.OGVG.1, page 2.
[36] ExB/T1/S1/AppC/p9, Table 2.
[37] ExI.OGVG.1, page 2.
[38] ExB/T1/S1/AppC/p9, Table 2 and with additional details at ExB/T1/AppC Working Papers, Schedule 3.
[39] EB-2017-0306/0307, Reply Argument, paragraph 229 – 233.

that time. Subsequent to the 2013 cost allocation study, Union included incremental costs in rates using Board-approved methodologies. The existing methodologies appropriately allocated incremental costs with the exception of the Panhandle revenue requirement.

The Panhandle project is unique as it involved incremental costs not considered in the 2013 cost allocation study. If Union had known about the project at the time of the 2013 cost allocation study, it would have proposed an alternative allocation methodology at that time. In the pre-filed evidence for the Price Cap Application, the Applicants stated unequivocally that Amalco will address the cost allocation of the Panhandle system and the St. Clair system in the 2019 rate application.

The Applicants have also made clear their expectation that cost allocation for the Panhandle system and the St. Clair system can be addressed as a discrete cost element within one functional classification. …

Unlike the issue of allocation of costs of the Panhandle System, the other cost allocation changes addressed by EGI in its response to the Board's merger decision direction entail what many might argue is a more fundamental re-examination of the allocation of costs of assets serving a broader, less discrete, range of customers. In contrast, as emphasized by EGI, the Panhandle Reinforcement Project was unique as it involved incremental costs not considered in the 2013 cost allocation study and which are amenable to unique functional classification.

Even if the Board has reservations in this case regarding the range of cost allocation changes proposed by EGI in response to the merger decision directive, rectification of the discrete inequity resulting from the legacy approach to allocating Panhandle System costs can and should be addressed in this proceeding and should not be further delayed.

We note that the approach to allocation of Panhandle System costs now proposed by EGI is a different approach than initially proposed by Union in its 2016 LTC application.[40] Union's initial proposal was to allocate only the incremental costs of the Panhandle Reinforcement Project to rate classes based on Panhandle System design day demands. Under the 2016 proposal the allocation of pre-existing costs of the Panhandle System remained unchanged. While IGUA supports EGI's current proposal as appropriate in the circumstances, to the extent that the Board remains concerned with implementing cost allocation changes during a rate plan term and considers Union's 2016 proposal to be less disruptive of current cost allocation models than EGI's current proposal, the initial approach is also equitable and thus, as an interim measure, reasonable and appropriate. ***It might be of assistance to the Board for EGI to address in its reply argument the impacts of the 2016 proposal relative to those of the current proposal in respect of the allocation of Panhandle System costs.***

In any event, regardless of the Board's determination in this proceeding in respect of the balance of the Dawn-Parkway system costs/revenue requirements

[40] Exl.IGUA.1, part c); Exl.SCC.9.

considered, the current misallocation of Panhandle System costs should now be addressed, one way or another.

19. IGUA's 2020 Rates Application Argument also asserted that;

    (a) while EGI asserted that there will be additional changes to cost allocation and rate design at rebasing;

        (i) no such additional changes would alter the fact, apparent since 2016, that the current misallocation of Panhandle System costs has been, and continues to be, unjustified and inequitable;

        (ii) any such additional changes would also provide additional mechanisms for addressing the consequences to rates;

        (iii) EGI's list of potential rate design and other adjustments which could be brought forward in the future were either irrelevant to the matter of proper allocation of Panhandle System costs or could be addressed now; and

        (iv) none of these theoretical future adjustments were articulated as being in fact (rather than in theory) of concern in relation to rectification now of the Panhandle System cost allocation circumstance;

    (b) Customer expectations in respect of rate stability and predictability as argued by many parties as a basis to reject correction of the current Panhandle System cost allocation at this time was not of concern when costs for the expansion were first added to rates and Rate T2 (and other) customers were negatively impacted;

    (c) rates have already changed to provide EGI with recovery of the costs of the Panhandle Reinforcement Project, and the arguments that no further changes should be made and advanced by those who benefit from the Panhandle Reinforcement Project but do not bear the costs of that project are not fair; and

    (d) those arguing against implementation of the results of the cost allocation work directed by the Board in the merger decision are rearguing the positions that the Board already rejected in that decision, and the board should reject these arguments again.

20. Despite IGUA's suggestion in its 2020 Rates Application argument, EGI did not address in its reply argument the impacts of the more discrete 2016 Panhandle System Reinforcement project cost allocation proposal relative to those of the proposal advanced in the 2020 Rates Application.

21. In its 2020 Rates Application argument APPrO took similar positions to those of IGUA on the issue of allocation of Panhandle System costs and filed an 11 page argument focussed exclusively on the issue.

22. The 2020 Rates Application Hearing Panel disposed of this topic, argued in depth by IGUA and APPrO, in perfunctory "findings" which;

(a) acknowledged;

(i) the existing cost allocation methodology has over time resulted in changes to the costs and benefits to certain parties, and the current allocations are outdated;

(ii) EGI's position that the Panhandle Reinforcement Project was unique as it involved incremental costs not considered in the 2013 cost allocation study; and

(iii) APPrO and IGUA had argued for changes to particular rates; and

(b) without further addressing any of these facts or positions, disposed of the topic by way of stating conclusions that;

(i) consistent with the approved rate setting mechanism, the rates for 2020 continue to be decoupled from costs;

(ii) rate stability and predictability offered through incentive regulation rely on the decoupling of rates from allocating utilities' costs among different customer classes; and

(iii) at the next rebasing, potential changes to the 2013 approved comprehensive cost allocation[41] are anticipated.

LAW & APPLICATION TO THE FACTS

23. In December, 2019 the Supreme Court of Canada issued its decision in Vavilov [included at Tab G hereto]. That decision provides a comprehensive survey and restatement of the law on review of administrative decisions for reasonableness. In the analysis which follows we reference the salient findings from Vavilov, though it should be recognized that these findings themselves echo, and comprehensively cite, earlier applicable judicial authorities.

24. Alexander Vavilov was born in Canada to Russian parents whom he later found, when he was 16 years old, came to Canada as espionage agents for the Russian government. The issue with which the court was seized was whether the administrative decision of the Canadian Registrar of Citizenship to cancel Vavilov's certificate of Canadian citizenship

[41] The wording of the 2020 Rates Application decision uses the word "allowance" here, but we assume that the intended word was "allocation".

was reasonable. The Court found that it was not, and substituted its own decision reinstating Vavilov's citizenship.

25. Vavilov's was one of two cases which the Court accepted for hearing with the express purpose of clarifying the law on standards for administrative decision making and review thereof.[42] In so doing, the Court affirmed *"the need to develop and strengthen a culture of justification in administrative decision making"*[43], directing that *"administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness' "*[44] The premise of the Supreme Court of Canada's directions was that *"reasoned decision-making is the lynchpin of institutional legitimacy"*[45].

26. In addressing a framework to accommodate all types of administrative decision making, expressly including in the area of energy policy, the Court stated that it was responding to concerns regarding a *"two tiered justice system, in which those subject to administrative decisions are entitled only to an outcome somewhere between 'good enough' and 'not quite wrong'"*.[46]

27. It is respectfully submitted that this Board, as an established, in fact leading, administrative decision maker, has a legal obligation to render decisions that are better than *"good enough"* or *"not quite wrong"*, and that, with respect, the Panhandle Allocation Determination falls short of the appropriate standard of decision making.

The Importance of Reasons

28. The Court in Vavilov reiterated that in the administrative context:

> *Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against*

[42] Vavilov, paragraph 1.
[43] Vaivlov, paragraph 2.
[44] Vavilov, paragraph 14.
[45] Vavilov, paragraph 74.
[46] Vavilov, paragraph 11.

> *arbitrariness as well as the perception of arbitrariness in the exercise of public power.* [47]
>
> *…*
>
> *The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process…[t]his is what Justice Sharpe describes - albeit in the judicial context – as the "discipline of reasons"*:[48]

29. The Court in Vavilov went on to characterize the purpose of reasons as being *"to demonstrate 'justification, transparency and intelligibility"*[49], and stated that;

> *…the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.*[50]

30. *"[A] reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts..."*.[51] *"[T]he decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies."*[52]

31. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility[53], which are the *"hallmarks of reasonableness"*[54].

32. Reasons that simply summarize arguments made and then state a peremptory conclusion will rarely assist in understanding the rationale underlying a decision, and are no substitute for analysis.[55]

33. If the reasons, though read in conjunction with the record, do not make it possible to understand the decision maker's reasoning on a critical point[56], or if they are circular,

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[47] Vavilov, paragraph 79.
[48] Vavilov, paragraph 80.
[49] Vavilov, paragraph 81.
[50] Vavilov, paragraph 81.
[51] Vavilov, paragraph 85.
[52] Vavilov, paragraph 86.
[53] Vavilov, paragraph 98.
[54] Vavilov, paragraph 99.
[55] Vavilov, paragraph 102.
[56] Vavilov, paragraph 103.

premised on false dilemmas or unfounded generalizations[57], they are deficient and, as a matter of law, unreasonable.

34. The reasonableness of a decision may be jeopardized where the decision maker has failed to account for the evidence before it.[58]

35. The process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning.[59]

36. We pause here to set out the actual reasons offered by the 2020 Rates Application hearing Panel for its Panhandle Allocation Determination to defer changes to the allocation of Panhandle System costs for another 3 years, being in total 5 years beyond the date that the Board initially anticipated this issue would be addressed. Those reasons, ***in their totality***, are as follows:

    (a) *"Consistent with the approved rate setting mechanism, the rates for 2020 continue to be decoupled from costs. Rate stability and predictability offered through incentive regulation also rely on the decoupling of rates from the allocating utilities' costs among different customer classes. At the next rebasing, potential changes to the comprehensive cost allocation are anticipated including other adjustments to rate base, possible rate harmonization proposals and rate design changes."*

    (b) *"Attempting to make selected changes at this time will be disruptive to the predictability of rates and result in more changes in 2024. The OEB reiterates that rate stability and predictability offered through incentive regulation rely on the decoupling of rates from the allocating utilities' costs among different customer classes."*

37. When these two paragraphs are considered against the legal standards for administrative decision making articulated in Vavilov and in light of the significant record on the topic placed before the Board, the deficiency of the reasons in the decision under review is clear:

    (a) There is no discussion or consideration of the 3 previous findings of this Board which accepted deferral of the Panhandle System cost allocation issue in express anticipation that it would be addressed for 2019, and the third of which expressly directed that since it had not been addressed for 2019 it needs to now be addressed for 2020.

[57] Vavilov, paragraph 104.
[58] Vavilov, paragraph 126.
[59] Vavilov, paragraph 128.

(b) There is no consideration of the findings of the Merger Case Hearing Panel that, though perforce imperfectly, the cost allocation issues for the Panhandle System were to be addressed for 2020.

(c) There is no acknowledgement or consideration of the arguments by IGUA that principles of rate stability and predictability and decoupling of rates from costs previously relied on by parties resisting Panhandle System cost reallocation were not determinative when the Panhandle System Reinforcement costs were first passed through into material rate changes during the rate plan period for T2 and other customers.

(d) The relevance of the conclusion that potential changes to cost allocation are anticipated at rebasing to the Board's previous determination to address, though imperfectly, Panhandle System cost allocation concerns now is not provided.

(e) The conclusion that implementing select cost allocation changes now will result in more changes in 2024 is not explained or referenced to any evidence. In fact, there is no such evidence that adopting the changes advocated by EGI would result in any more changes at rebasing than would otherwise be the case.

38. Contrary to the legal expectations for administrative decision making articulated in Vavilov, the reasons provided by the 2020 Rates Application Hearing Panel for deferring for another 3 years, being in total 5 years beyond the date that the Board initially anticipated this issue would be addressed, the acknowledged and undisputed inequities in the current allocation of material Panhandle System costs;

(a) do not explain how or why the decision was made;

(b) do not show IGUA or its members that their arguments have been considered;

(c) do not demonstrate that the decision was made in a fair and lawful manner;

(d) do not shield against the perception of arbitrariness;

(e) do not demonstrate substantive reasonableness;

(f) do not provide a rationale chain of analysis that is justified (or even referenced) in relation to the facts; and

(g) do not address the essential elements demonstrated in the record and in respect of which there is no dispute that;

(i) the Panhandle System costs are currently inequitably allocated; and

(ii) these costs are functionally discrete and capable of reallocation without re-examination of the 2013 cost allocation model which still applies to EGI's rate making.

39. Rather, the perfunctory reasons provided in support of the Panhandle Cost Allocation Ruling simply and summarily;

(a) summarize arguments made and then state peremptory conclusions; and

(b) refer, in passing, to unfounded generalizations regarding the potential for future, and or additional, broad cost allocation changes.

40. In short, and with all due respect, what the courts have referred to as *"the discipline of reasons"* is nowhere apparent in the Panhandle Allocation Determination.

Previous Decisions

41. The Panhandle Allocation Determination also completely ignores a line of previous Board decisions on this very issue.

42. The Court in Vavilov addressed the importance in lawful administrative decision making of the history of the proceedings[60], including the evidence before the decision maker, the submissions of the parties, and past decisions.[61]

43. While acknowledging that administrative decision makers are not bound by their previous decisions in the manner in which courts are, the Supreme Court in Vavilov held[62]:

> *Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike…*

44. The law, as enunciated by the Supreme Court, further expects that (our emphasis)[63]:

> *Where a decision maker does depart from …established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision <u>will be unreasonable</u>. In this sense, <u>the legitimate expectations of the parties help to determine…what those reasons must explain</u>. … a decision that departs from … established internal decisions will be reasonable if that departure is justified, thereby reducing the risk*

[60] Vavilov, paragraph 91.
[61] Vavilov, paragraph 94.
[62] Vavilov, paragraph 129.
[63] Vavilov, paragraph 131.

> *of arbitrariness, which would undermine public confidence in administrative decision makers…*

45. As stated by the Federal Court in a recent decision[64]:

> *… if an administrative judge rules "X" on one occasion and then rules "Not X" shortly thereafter on identical material facts, with no explanation for the difference, once cannot but conclude that the decision is arbitrary – it lacks "justification, transparency and intelligibility within the decision-making process".*

46. This Board itself, in the very context of consideration of the Panhandle System cost allocation issue in Union Gas' 2018 rates application (in accepting the 2016 Panhandle Expansion LTC Hearing Panel's deferral of the issue for determination for 2019 rates), found[65]:

> *Consistency in OEB decisions is important to regulatory clarity and predictability.*

47. The 2020 Rates Application Hearing Panel did not, despite the legitimate expectations of IGUA and its affected members based on 4 Board rulings over the prior 3 years, address the current and continuing misallocation of Panhandle System costs as expected by the Cost Allocation Directive, or reasonably explain why it was not now prepared to do so and thus why it effectively reversed the Board's recent Cost Allocation Directive despite no material change in circumstances.

Addressing the Concerns of the Parties

48. The Supreme Court has further emphasized that the exercise of public power by an administrative decision maker *"must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it"*.[66] The Court found that the administrative decision maker has a *"responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrives at a particular conclusion"*.[67]

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[64] *Honey Fashions Ltd. v. Canada (Border Services Agency)* 2018 FC 1118, paragraph 53, included as Tab H hereto.
[65] EB-2017-0087 Decision and Rate Order, Union Gas Limited 2018 Rates, page 8, bottom, as excerpted at Tab E hereto.
[66] Vavilov, paragraph 95.
[67] Vavilov, paragraph 96.

49. The Court explained (our emphasis)[68]:

> *The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. … The concept of responsive reasons is inherently bound up with this principle [of procedural fairness], because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.*

50. The Court then elaborated:

> *… a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.*

51. In Vavilov the court found that though Mr. Vavilov raised many considerations in his submissions to the Registrar, the Registrar *"failed to address those submissions in her reasons and did not…do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text…"*.[69] Crucial to the court's decision was[70];

> *… the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history."*

52. The analogy with the decision at hand is striking. In its argument in the 2020 Rates Application IGUA;

    (a) traced the evidence of an acknowledged inequity to the allocation of the now significant costs of the Panhandle System to those customers who do not benefit from the system, rather than to those who do;

    (b) argued that principles of "rate stability and predictability" and "decoupling of costs from rates" that animated those opposed to the proper reallocation of these costs in the past were not relied on when the substantial costs of the Panhandle Reinforcement Project were first passed through to the rates of IGUA's members and those similarly situated;

[68] Vavilov, paragraph 127.
[69] Vavilov, paragraph 172.
[70] Vavilov, paragraph 195.

(c) traced previous Board decisions which countenanced inequitable allocation of these costs at first only for a brief defined period (14 months, which have long since passed) and ultimately not at all (directing that the matter be addressed, now); and

(d) highlighted the evidence of EGI itself that the Panhandle System costs were functionally discrete and could be allocated appropriately without re-examining the entire 2013 Board Approved cost allocation framework, and that it was appropriate to do so.

53. The 2020 Rates Application hearing panel;

(a) failed on the face of its determination to meaningfully consider any of IGUA's arguments or the similar arguments made by APPrO (or to reflect that it had considered them at all);

(b) seemingly relied only on abstract principles in support of its reversal of the Cost Allocation Directive from the Merger Case without any analysis of the application of those principles in the face of the record before it; and

(c) failed to even mention the alternative approach argued by IGUA that (then) Union Gas' initial proposal to address allocation of only the incremental costs of the functionally discrete Panhandle Expansion Project in accord with the benefits accorded by that project would address the current inequity without necessitating reconsideration of the cost allocation parameters currently applicable.

54. From the perspective of IGUA and its directly affected members, the *2020 Rates Application* Hearing Panel's decision to defer, for another 3 years, being in total 5 years beyond the date that the Board initially anticipated this issue would be addressed, rectification of the undisputed inequity in the allocation of Panhandle System costs is neither justified, intelligible nor transparent.

55. It is respectfully submitted that the Hearing Panel's failure to *"grapple with key issues or central arguments raised by the parties"* indeed calls into question *"whether the decision maker was actually alert and sensitive to the matter before it"*.

Legal Conclusion

56. On the basis articulated above, it is submitted that:

(a) the "reasons" provided by the 2020 Rates Application Hearing Panel for deferring, for another 3 years, being in total 5 years beyond the date that the Board initially

anticipated this issue would be addressed, a more equitable allocation of Panhandle System costs are deficient;

(b) they fail to address the Board's previous decisions on the issue;

(c) they fail to address the detailed concerns and arguments raised by IGUA and APPrO;

and, in the result and as a matter of law, the Panhandle Allocation Decision is unreasonable and can, and should, be set aside.

THRESHOLD QUESTION UNDER RULE 43

57. In Procedural Order No.1 herein the Board indicated that it would consider the threshold question for IGUA's motion pursuant to Rule 43 of its *Rules* at the same time that it considers submissions on the merits of the motion.

58. In respect of the threshold question this Board has previously determined that it has broad discretion to determine when it will review a decision, that the four delineated grounds for review under Rule 42.01 of its *Rules* are not exhaustive, and that the Board may, where it chooses to do so, review a decision for other reasons.[71]

59. While IGUA has argued above that the Hearing Panel erred in concluding that making selected changes to Panhandle System cost allocations now will result in more changes when a comprehensive cost allocation is considered at rebasing despite there being no evidence to substantiate that conclusion (i.e. an error of fact as contemplated in paragraph 42.01(a)(i) of the *Rules*), the basis for IGUA's request for review of the Panhandle Cost Allocation Ruling is broader than that.

[71] EB-2016-0248 *Decision and Order* on Industrial Gas Users Association Motion to Review OEB Decision and Order on Cost Awards (EB-2016-0122); EB-2006-0322/0338/0340 *Decision with Reasons* Motions to Review the Natural Gas Electricity Interface Review Decision, pages 14-15.

60. In considering the appropriate threshold test for review to apply pursuant to Rule 43 (previously Rule 45.01), the Board has held that[72] the grounds advanced by a party seeking the review must demonstrate that;

(a) there is an identifiable error in the decision, in that;

(i) the findings are contrary to the evidence that was before the panel;

(ii) the panel failed to address a material issue;

(iii) the panel made inconsistent findings; or

(iv) something of a similar nature;

(b) the alleged error is material and relevant to the outcome of the decision; and

(c) if the error is corrected, the reviewing panel would change the outcome of the decision.

61. In the instant case, IGUA relies on the Supreme Court of Canada's comprehensive delineation of the law of the reasonableness of administrative decision making in seeking review of the Panhandle Cost Allocation Determination. In our submission the stark shortcomings of that determination, as reviewed above, fall into the *"something of a similar nature"* category of the foregoing enumerations of what constitutes an identifiable error in the decision review of which is sought.

62. In addition, as articulated above;

(a) the findings in respect of the Cost Allocation Determination fail altogether to consider the evidence before the Hearing Panel, and in this respect are contrary to that evidence;

(b) the Hearing Panel failed to address in any substantive manner several material issues raised by IGUA and APPrO in their comprehensive arguments in the case, and in this respect failed to address material issues; and

(c) the Hearing Panel departed from previous decisions of the Board in respect of the same issue, including the Cost Allocation Directive, and though having cited it failed to explain the basis for that departure in any substantive way, which is an inconsistency both as between Board decisions and within the 2020 Rates Application decision itself.

[72] EB-2006-0322/0338/0340 *Decision with Reasons* Motions to Review the Natural Gas Electricity Interface Review Decision, page 18.

63. These failures by the Hearing Panel are material and relevant to the outcome as they relate to evidence and arguments that go to the heart of one of the main issues before the Board in the case; "addressing" the allocation of Panhandle System costs.

64. It is IGUA's belief that correction of these errors would bring *"the discipline of reasons"* to bear and thus change the outcome in the matter, given the undisputed evidence in the case that;

(a) as acknowledged by the 2020 Rates Application Hearing Panel itself, the current cost allocations are outdated and, as found by the Merger Case Hearing Panel, are of concern;

(b) the Panhandle System costs, and in particular the costs of the Panhandle System Reinforcement Project, are functionally discrete and readily subject to reallocation without disruption of broader current cost allocation parameters;

(c) rectification of the current inequity has been deferred in the past expressly on the basis that such deferral would be brief (14 months or less at first instance); and

(d) the Board has previously determined in the Cost Allocation Directive that the inequity should be addressed for 2020 rates.

65. In the result, we submit that the threshold test for review by the Board of the Panhandle Allocation Determination has been met.

RELIEF SOUGHT

66. We further submit that the Panhandle Allocation Determination was unreasonable by any measure articulated by the Supreme Court of Canada in Vavilov, and the law underpinning that articulation, and thus does not merit deference by the Review Panel.

67. For the reasons argued above, the Hearing Panel erred in its Panhandle Allocation Determination and that ruling should be vacated.

68. IGUA requests that the Review Panel then proceed to properly consider and determine the matter based on the record as summarized above and more extensively argued in IGUA's and APPrO's arguments, and those of the other parties, in the 2020 Rate Application.

69. We will not repeat IGUA's arguments here, but IGUA continues to rely on them in respect of the merits of the matter in issue. In summary, and as set out earlier in these submissions, it is not legitimately in dispute that:

(a) The result of allocation of Panhandle System costs proposed by EGI in its 2020 Rates Application cost allocation evidence would be to remove from rates T2, M16 and C1 $12.6 million dollars of revenue requirement that is being inappropriately and inequitably recovered from these customers for the Panhandle System in 2019, and reallocate that revenue requirement to those customers who are relying on the Panhandle System, including the 2017 $264.5 million reinforcement of that system (i.e. Rates M1, M2, M4, M7, T1 and, to a small extent, M5, including 676 greenhouse customers[73]).[74] The impact on EGI's 23 Rate T2 customers[75] would be a reduction in rates of $4.9 million.

(b) Incorporating the balance of EGI's proposed reallocation of the costs of the additional significant projects put into service during Union's previous IRM rate plan period and which are included in the Cost Allocation Directive would provide offsetting impacts to rates M1, M2, M4, M7, T1 and, to a small extent, M5, as well as further reductions to rate T2, primarily through shifting revenue requirement to rate M12.[76]

(c) In the alternative, and for the reasons argued by IGUA in its 2020 Rates Application argument, if the Review Panel, after considering the evidence, has reservations regarding the range of cost allocation changes proposed by EGI in response to the Cost Allocation Directive, rectification of the discrete inequity resulting from the legacy approach to allocating Panhandle System costs can and should be addressed now, using the approach to allocation of Panhandle System costs initially proposed by Union in its 2016 LTC application.[77]

(d) Union's initial proposal was to allocate only the incremental costs of the Panhandle Reinforcement Project to rate classes based on Panhandle System design day demands. Under the 2016 proposal the allocation of pre-existing costs of the Panhandle System remained unchanged. This initial approach is also equitable and less disruptive of pre-existing cost allocations, and thus, as an interim measure, reasonable and appropriate.

70. Any of the foregoing measures would address the undisputed evidence cited above and IGUA's longstanding concerns not addressed (one way or the other) by the Panhandle Allocation Determination that there are gas consumers, including the 4 large volume Rate T2 contract customers referenced in IGUA's evidence intended for Union's 2018 rate case;

[73] ExI.OGVG.1, page 2.
[74] ExB/T1/S1/AppC/p9, Table 2.
[75] ExI.OGVG.1, page 2.
[76] ExB/T1/S1/AppC/p9, Table 2 and with additional details at ExB/T1/AppC Working Papers, Schedule 3.
[77] ExI.IGUA.1, part c); ExI.SCC.9.

(a) whose significant gas demands are for all intents and purposes served by the St. Clair System and who do not in any way rely on or utilize the Panhandle System; but

(b) whose rates have since 2018 included, and continue today to include, an allocation of the costs of the Panhandle System which are now 17 times higher than the costs of the St. Clair System on which these customers actually rely for gas service.

71. Either the interim allocation proposed by Union Gas in 2016 or the updated allocation now proposed by EGI would rectify a negative, undue, and unfair rate impact that has existed in the rates of T2 customers, including IGUA's 4 Sarnia area members, and other customers since 2018, and continues to exist today.

72. These Panhandle Reinforcement Project costs should never have been allocated to these customers, and should always have been recovered from customers who actually rely on, and benefit from, the Panhandle System and the expansion of that system approved by the Board in 2017.

73. Principles of "rate stability and predictability" and "decoupling of costs from rates" didn't preclude the addition to rates, in an inequitable fashion, of the Panhandle Reinforcement Project costs in the first place. They should not now be relied on to preclude rectification of that inequity. That would be both inconsistent and arbitrary, and thus an unlawful exercise of delegated public power decision making by this tribunal.

74. It is time for this Board to direct that those costs be put back where they belong, in the rates of those customers who are deriving benefit from those costs, and out of the rates of those customers who are not.

75. This Review Panel should find that the Panhandle Allocation Determination would result in rates in 2021 and beyond (through at least 2023) that are no longer just and reasonable, and should direct EGI to file a rate design proposal for adjustment of rates either in accord with the cost allocation study filed in the 2020 Rates Application or, in the alternative, in accord with the methodology for allocation of incremental Panhandle System Reinforcement Project costs proposed by (then) Union Gas in its application for leave to

construct the Panhandle Reinforcement[78], but in either case for implementation in 2021 rates. EGI has indicated that it can do this within 3 months.[79]

76. IGUA also requests that it be awarded its costs reasonably incurred in respect of this motion for review, in accord with the Board's *Practice Direction on Cost Awards*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:

GOWLING WLG (CANADA) LLP, per:
Ian A. Mondrow
Counsel to IGUA

June 30, 2020

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[78] EB-2017-0306/0307.
[79] ExI.IGUA.6, p.2, last paragraph.

TAB A

EB-2019-0194

ONTARIO ENERGY BOARD

Enbridge Gas Inc.

Application for natural gas distribution rates and other charges effective January 1, 2020

Industrial Gas Users Association (IGUA)

ARGUMENT

Ongoing Inequity

1. In June, 2016 (then) Union Gas applied to the OEB for leave to construct (LTC) a reinforcement of its Panhandle System.[1]

2. The Panhandle system is the primary pipeline transporting natural gas between Dawn and the Ojibway Valve Site in Windsor in order to serve customers in Southwestern Ontario; in particular Chatham-Kent, Windsor, Lakeshore, Leamington, Kingsville, Essex, Amherstburg, LaSalle and Tecumseh (Panhandle Market).[2]

3. In response to interrogatories in the current proceeding Enbridge Gas Inc. (EGI) filed a map of the Panhandle system.[3] That map illustrates the Dawn Parkway Transmission System's western terminus at Dawn, from where the EGI system splits off into;

   (a) the Panhandle System serving the Panhandle Market; and

   (b) the Sarnia Industrial Transmission System serving Union rate zone customers in the Sarnia area and connecting to the St. Clair Transmission Line (together referred to as in this argument as the St. Clair System).

[1] EB-2016-0186.
[2] EB-2016-0186, ExA/T3.
[3] ExI.APPrO.1, Attachment.

4. The Panhandle System and the St. Clair System also provide ex-franchise transportation services (under Rate C1) to and from Dawn between Ojibway to the south and the St Clair River Crossing and Bluewater River Crossing to the north. In addition, the Panhandle System provides transportation services to and from storage facilities west of Dawn under Rate M16. [4]

5. Union's 2016 LTC application was driven by firm demand growth in the Panhandle Market, particularly from the greenhouse sector,[5] but also from commercial and small industrial customers and some anticipated residential growth. The prominence of the Southwestern Ontario greenhouse sector growth in driving the Panhandle Reinforcement Project was highlighted by letters of support provided to Union and filed by Union in support of its 2016 Panhandle Reinforcement LTC application.

6. A letter dated April 6, 2016 from the Ontario Greenhouse Vegetable Growers (OGVG) and filed by Union in support of its 2016 LTC application[6] emphasized;

   (a) the Ontario greenhouse sectors' 5.8% record of expansion over the preceeding 8 years, and the expectation that growth would continue;

   (b) the importance to continued growth of the sector of sufficient access to natural gas;

   (c) the concern that the then current gas infrastructure in the Essex and Chatham-Kent regions was at capacity and expansion of service was necessary to support further economic development in the region;

   (d) that many growers in the region were on interruptible gas service as firm service was not available; and

   (e) that the proposed Panhandle System expansion would *"greatly add to the stability of production economics"* in support of continued growth and wellbeing of the greenhouse sector, and the regional economy in general.

7. Other letters of support for the project which specifically emphasized the driver of greenhouse sector growth for the Panhandle Expansion Project were provided by South-Western Ontario municipalities, counties and townships, the Ontario Federation of Agriculture, and local Chambers of Commerce. (Additional letters of support included a

[4] ExI.APPrO.1, Attachment; ExI.OGVG.5 and ExB/T1/S1/AppC/p10, paragraph 20.
[5] EB-2016-0186, ExA/T3/p2/lines 11-14; p3, line 4; ExA/T4/S1; ExA/T5/p10, line 11 – p11, line 8; ExA/T5/p18, line 12 – p.19, line 13; ExA/T5/S2/pp2, 4, 5, 12, 19.
[6] EB-2016-0186, ExA/T5/S2/p5.

health care facility, Fiat Chrysler Automobiles, a small industrial Aluminum Extrusion facility and the Windsor Regional Hospital.)[7]

8. In response to this growth in demand, Union proposed, and ultimately built, approximately 40 km of NPS 36 pipeline to replace an existing NPS 16 pipe running from Union's Dawn Compressor Station to its Dover Transmission Station, and invested in related modifications at several stations along the balance of the Panhandle System. The project had an OEB approved capital budget of $264.5 million and was put into service in November, 2017.

9. As part of its 2016 LTC application, Union proposed a departure from its previously approved methodology for allocating Panhandle System costs.[8] The Panhandle System and the St. Clair System had been combined for cost allocation since Union's Rate C1 was first included in Union's cost allocation in 1999. The primary reason for combining the two systems was because both systems provide transportation service between the river crossings west of Dawn and the Dawn Compressor Station.[9] In its 2016 LTC filing Union explained[10] why that legacy cost allocation approach was no longer appropriate;

> *Union is proposing a cost allocation for the Project that is different than the Board-approved cost allocation methodology because the existing methodology allocates costs based on the combined Panhandle System and St. Clair System. With the addition of the significant Project costs related only to the Panhandle System and no change to the cost of the St. Clair System, the use of the combined system for cost allocation purposes no longer reflects the costs to serve the customers on each respective transmission system.*

10. The estimated 2019 revenue requirement of the St. Clair System is $2.250 million. The estimated 2019 revenue requirement of the Panhandle System is $38.195 million. ***In 2019 the revenue requirement for the Panhandle System is almost 17 times that of the St. Clair System.***[11]

11. Attachment A to this argument is Union's response to a transcript undertaking provided to the Hearing Panel in Union's 2016 Panhandle Reinforcement Project LTC application following questions asked by the Hearing Panel on Union's proposal in that proceeding

[7] EB-2016-0186, ExA/T5/S2/
[8] EB-2016-0186, ExA/T8.
[9] EB-2016-0186, ExJ1.2/Att2 (included as Attachment A to this argument), p1, paragraph 1.
[10] EB-2016-0186, ExA/T8/p7, lines 1-7.
[11] ExI.IGUA.4.

for allocation of Panhandle Reinforcement Project costs. The undertaking response explains the historical basis for allocation of Panhandle System cost and St. Clair System costs on a combined basis, and why Union was proposing an alternative approach.

12. Since its 2016 LTC application it had been Union's position, and we assume that it remains EGI's position, that allocating Panhandle System costs - which now exceed St. Clair System costs by a factor of 17 - based on combined St. Clair and Panhandle System demands to customers with only St. Clair and no Panhandle System demands would not be fair and is no longer reasonable.[12]

13. In 2016, Union proposed to address this inequity by allocating the incremental Panhandle Expansion Project costs to customers based on Panhandle System design day demands, and thus *"allocating costs to rate classes that use the Panhandle System and are driving the need for the [Panhandle Reinforcement] Project"*. [13]

14. As part of its 2016 Panhandle Expansion Project LTC application Union also requested approval to calculate the revenue requirement and resulting rates of the Panhandle Expansion Project using a 20-year depreciation term rather than a 50 year depreciation term.[14] The basis for this request was a posited *"significant risk to the return of any capital invested in natural gas infrastructure"* as a result of the (then) Ontario government's 5-year (2016-2020) Climate Change Action Plan and related government statements regarding transitioning off of natural gas.[15]

15. The Board's findings on Union's proposed recovery of Panhandle Reinforcement Project costs were as follows[16] (our emphasis):

> *The OEB will not approve Union's proposals for a 20-year depreciation period and a revised cost allocation methodology. The OEB finds that both proposals should be deferred to Union's next cost of service or custom IR application. It would be inconsistent to change the depreciation term and cost recovery for one project while Union's other assets are depreciated and recovered on a different bases. A comprehensive review is required for parties to test, and the OEB to assess, the merits and implications of these two proposals and this should be at Union's next cost of service or custom IR application.*

[12] EB-2016-0186, ExJ1.2/Att2 (included as Attachment A to this argument).
[13] EB-2016-0186, ExJ1.2/Att2 (included as Attachment A to this argument), page 3, bottom paragraph.
[14] EB-2016-0186, ExA/T3/p7/lines 9-18.
[15] EB-2016-0186; ExA/T3/p5, lines 18-21, *et seq.*
[16] EB-2016-0186 *Decision with Reasons* February 23, 2017, page 10, bottom.

> *While these proposals may have merit, they cannot be adequately considered during the IRM term, for one project in isolation. A leave-to-construct application requesting a capital pass-through mechanism for cost recovery over 14 months is not the appropriate forum to consider deviations from principles embedded in current OEB-approved rates.*

16. The Board's reference in this passage from its determination of the issue to *"14 months"* is important. Earlier in its discussion of this issue the Board noted[17] (our emphasis):

> *Union proposed two changes to the cost allocation methodology approved by the OEB when rates were established in 2013. The proposed cost allocation would determine how Project costs would be recovered until 2019, the end of Union's current IRM term.*

17. ***The LTC decision deferring issues regarding the equity of allocating Panhandle Expansion Project costs based on combined Panhandle System and St. Clair System demands was made on the expectation that Union would be rebasing its rates, including addressing Panhandle System and any other cost allocation issues, for January 1, 2019.***

18. The St. Clair System has a large Rate T2 customer base, and using design day demands on the Panhandle System to allocate costs results in an allocation to Rate T2 that is not representative of their use of the Panhandle System.[18]

19. In Union's 2018 rate case (EB-2017-0087) IGUA sought to file evidence intended to provide the Board and interested parties with information on the impact on IGUA's Sarnia area members of the allocation of Panhandle Reinforcement Project costs using the 2013 Board-approved cost allocation methodology rather than methodology for allocation of incremental Panhandle Reinforcement Project costs proposed by Union in its 2016 LTC application. That evidence articulated the circumstances of 4 IGUA member companies served primarily under Rate T2 whose collective daily contract demand is over 5 million cubic meters and who collectively consume almost 2 billion cubic meters of gas per year, almost all of which is delivered via Union's St. Clair System and almost none of which contributes to the design day demand on the Panhandle System. The evidence presented the aggregate impact on these 4 IGUA members, as confirmed by Union, of using the

[17] EB-2016-0186 *Decision with Reasons* February 23, 2017, page 9, 3rd full paragraph.
[18] EB-2016-0186, ExJ1.2/Att2 (included as Attachment A to this argument), page 1, paragraph 4.

historical vs. proposed cost allocation methodology for incremental Panhandle Expansion Project costs. In 2018 that impact was just under $1 million.

20. ***IGUA's 2017 evidence was rejected by the Hearing Panel in Union's 2018 rate application and was never attested to or tested.*** Accordingly, and having referred to it above, while we have filed a copy of that evidence with this argument (as Attachment 2), we do not (because as a matter of procedure we cannot) rely on it as demonstrative of the truth of its contents. Rather we reference that filing in this argument as illustrative IGUA's longstanding engagement on this issue and its concern at the time, which remains IGUA's concern today, that there are gas consumers, including the 4 large volume Rate T2 contract customers referenced in that 2017 evidence;

    (a) whose significant gas demands are for all intents and purposes served by the St. Clair System and who do not in any way rely on or utilize the Panhandle System; but

    (b) whose rates have since 2018 included, and continue today to include, an allocation of the costs of the Panhandle System which are now 17 times higher than the costs of the St. Clair System on which these customers actually rely for gas service.

21. The Hearing Panel seized of Union's 2018 rate application, in rejecting IGUA's proposed 2017 evidence, stated[19] (our emphasis):

> *The OEB is of the opinion that cost allocation issues can be better addressed prior to Union entering another price cap rate mechanism framework. It would not be appropriate to address cost allocation changes in the last year of the current IRM framework where rate changes are supposed be mechanistic. Furthermore, the merger Application of Union and Enbridge has not yet been approved, and it is possible that Union and Enbridge could be required to file evidence dealing with some components of rebasing applications. The OEB is of the opinion that any cost allocation changes are appropriate to be considered for the setting of 2019 rates.*

22. When other stakeholders refer to negative impacts of changing the way that Panhandle System costs are allocated, they are, with respect, missing the point entirely. The interim allocation proposed by Union Gas in 2016 and referenced by IGUA in 2018, and the updated allocation since argued for by IGUA and now proposed (in a way) by EGI, would rectify a negative, undue, and unfair rate impact that has existed in the rates of T2 customers, including IGUA's 4 Sarnia area members, and other customers since 2018,

[19] EB-2017-0087, Procedural Order No. 3, page 2, last paragraph.

and continues to exist today. ***These Panhandle Reinforcement Project costs should never have been allocated to these customers, and should always have been recovered from customers who actually rely on, and benefit from, the Panhandle System and the expansion of that system approved by the Board in 2017.***

23. Despite its proposed 2017 evidence being rejected by the Board, IGUA was permitted to, and did, advance argument based on the record already compiled in Union's 2018 rates proceeding for alternative remedies to the existing inequity for customers served by the St. Clair System resulting from the legacy Panhandle System/St. Clair System cost allocation methodology. While the Board declined to grant relief as advocated by IGUA in that case (IGUA argued that the Board should declare Union's 2018 rates interim pending resolution of the Panhandle expansion cost allocation issue), the Board in its decision on Union's 2018 rates reiterated its expectation that[20] (our emphasis):

> *The issue of the allocation of these costs on a going-forward basis to Union rate classes will be dealt with in Union's 2019 rates proceeding.*

24. Union did not address Panhandle Reinforcement Project costs in the merger application as the 2018 Hearing Panel indicated might be the case. Union did, however, indicate in that case that[21] (our emphasis):

> *The Board-approved cost allocation methodology causes significant impacts to certain rate classes, and in response to concerns raised by customers, Amalco intends to address the cost allocation of the Panhandle System and St. Clair System in its 2019 Rates Application.*

25. Mr. Kitchen's testimony in the merger application was that Amalco (now EGI) would be able to propose adjustment to the allocation of Panhandle System costs for 2019 absent a full cost allocation study because the costs in issue are *"isolated to one functional classification"*.[22]

26. Mr. Kitchen had in earlier testimony in that case responded to a question from the Hearing Panel and indicated that, subject to a number of necessary assumptions (given the lack

[20] EB-2017-0087, *Decision and Rate Order*, page 8.
[21] EB-2017-0307, ExB/T1/p31, lines 16-19.
[22] EB-2017-0306/0307, Transcript Volume 5, p58, lines 14-16.

of a combined entity cost allocation study), it would be possible for Union to run a cost allocation study during the proposed rebasing deferral period.[23]

27. In its argument in the merger application IGUA urged that, regardless of the determination in that case of when EGI would be required to file a cost of service application, the Hearing Panel clearly direct EGI to file sufficient cost allocation information in its 2019 rate application to finally address a more equitable allocation of Panhandle Expansion Project costs.[24]

28. In its *Reply Argument* in the merger case, in response to arguments filed, including a request from IGUA that EGI definitively address in reply how an update to cost allocation for Panhandle Expansion Project costs would be effected, EGI stated[25] (our emphasis):

> *The Applicants have fully met submissions and concerns about a cost allocation study from Amalco by making a commitment, as described above, that Amalco will complete two cost allocation studies during the [proposed 10 year] deferred rebasing period and will consult with OEB Staff and Intervenors on rates derived from each study.*
>
> *Notwithstanding the proposal that Amalco will file cost allocation studies, it is important to be clear that the Applicants consider existing cost allocation methodologies to be appropriate. Union's 2013 cost allocation study allocated costs in an appropriate manner and was approved by the OEB at that time. Subsequent to the 2013 cost allocation study, Union included incremental costs in rates using Board-approved methodologies. The existing methodologies appropriately allocated incremental costs with the exception of the Panhandle revenue requirement.*
>
> *The Panhandle project is unique as it involved incremental costs not considered in the 2013 cost allocation study. If Union had known about the project at the time of the 2013 cost allocation study, it would have proposed an alternative allocation methodology at that time. In the pre-filed evidence for the Price Cap Application, the Applicants stated unequivocally that Amalco will address the cost allocation of the Panhandle system and the St. Clair system in the 2019 rate application.*
>
> *The Applicants have also made clear their expectation that cost allocation for the Panhandle system and the St. Clair system can be addressed as a discrete cost element within one functional classification. OEB Staff submit that the review of Panhandle and St. Clair cost allocation should not be completed until a comprehensive cost study is filed. However, the Applicants submit that the Board should not pre-judge whether cost allocation for Panhandle and St. Clair can be*

[23] EB-2017-0306/0307, Transcript Volume 5, p48, line 23 – p49, line 7.
[24] EB-2017-0306/0307, IGUA Argument, paragraph 62.
[25] EB-2017-0306/0307, Reply Argument, paragraph 229 – 233.

assessed as a discrete cost element before the Board has even seen and considered Amalco's 2019 filing.

29. It is the Board's decision in the merger case that has given rise to the cost allocation issue in the instant proceeding. Starting at page 40 of its decision in the merger case the Board summarizes the positions of EGI and parties on the Panhandle System and St. Clair System cost allocation issue. Those positions were advanced in the context of EGI's proposal for a 10 year rebasing deferral, and various positions by other parties for rebasing deferrals of different (shorter) lengths. In that case, some parties (APPrO, Kitchener and IGUA) argued for a new cost allocation determination in order to correct *"significant cost allocation inequities"*. Others (OEB Staff, OGVG, LMPA and CCC) argued that *"discrete cost allocation changes were not appropriate in the absence of a comprehensive cost allocation study"*. TransCanada argued its own cost allocation issue in that case (the Rate C1 Dawn to Dawn-TCPL transportation rate based on Dawn transmission compression related costs for facilities already fully depreciated). These arguments led the Board to direct EGI to file, for consideration in this 2020 rates proceeding, an update to cost allocation. The salient passage merits repeating (our emphasis)[26]:

> *… the OEB is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair Systems. The OEB therefore requires Amalco to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation to take into account the following projects: Panhandle Reinforcement, Dawn-Parkway expansion including Parkway West, Brantford-Kirkwall /Parkway D and the Hagar Liquefaction Plant. This should also include a proposal for addressing TransCanada's C1 Dawn to Dawn TCPL service. The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.*

Current Proposal

30. As we understand it, in order to address the Board's merger case directive in the context of its current rate plan (which decouples rates and attendant revenues from costs), EGI has used its 2019 revenues for the Union rate zones as a proxy for "costs" in these rate

[26] EB-2017-0306/0307, *Decision and Order*, page 41, bottom.

zones. EGI explains that *"[t]he objective of the cost allocation process is to allocate the utility test year revenue requirement to customer rate classes"*[27]. As EGI has explained[28]:

> *Preparing the cost allocation study using a revenue requirement that is equal to the forecast of revenue under the rate setting mechanism allows for the cost allocation study results to demonstrate the impact of shift of allocated costs by rate class without the impact of a sufficiency or deficiency.*

31. In the context of a cost/revenue decoupling rate plan, EGI has used revenues for allocation. This seems a logical approach in the circumstances. While *"not… perfect"*, through this approach EGI has addressed the cost allocation implications of the Panhandle Expansion Project and has proposed a cost allocation update for this project that reflects a more equitable recovery of the Panhandle System attributable revenues from the various rate classes as directed by the Board in its decision on the merger application.

32. As we understand it, to address the current inequity EGI has proposed to separate the classification of revenues related to the applicable pipeline systems into those attributable to St. Clair System assets and those attributable to Panhandle System assets.[29] In particular, the evidence filed;

    (a) examines each major asset category on the Panhandle System and allocates revenues attributable to capital and O&M costs for each major asset between ex-franchise (C1) and in-franchise customers, and in respect of in-franchise customers allocates costs to rate classes based on design day demands on the Panhandle System; and

    (b) as the St. Clair System assets are currently used to transport NEXUS supply for Union North and Union South sales service customers and revenues attributable to these assets are recovered under Rate C1 from both sales service and direct purchase, the revenues associated with these assets are directly assigned to Rate C1.

33. The proposed approach;

    (a) is logical;

[27] ExB/T1/S1/AppC/p7, paragraph 14.
[28] ExI.OGVG.4.
[29] ExB/T1/S1/S1/AppC/p12, paragraphs 24 *et seq.*

(b) precludes allocation of Panhandle System costs to St. Clair System demands - the flaw in the legacy methodology in light of the significant 2016 shift in relative costs of the two systems as discussed above; and

(c) as demonstrated by EGI's undisputed evidence, *"better represents the principles of cost causation by allocating the costs based on each rate class' use of the Panhandle System and St. Clair System"*.[30]

34. The result of this proposed allocation is to remove from rates T2, M16 and C1 $12.6 million dollars of revenue requirement that is being inappropriately and inequitably recovered from these customers for the Panhandle System in 2019, and reallocate that revenue requirement to those customers who are relying on the Panhandle System, including the 2017 $264.5 million reinforcement of that system (i.e. Rates M1, M2, M4, M7, T1 and, to a small extent, M5, including 676 greenhouse customers[31]).[32] The impact on EGI's 23 Rate T2 customers[33] is a reduction in rates of $4.9 million.

35. Pending a full cost of service and associated cost allocation study, IGUA supports this approach and its result.

36. IGUA has focussed its attention in this matter (and, indeed, since 2016) on the allocation of Panhandle Reinforcement Project costs, as the costs primarily impacting the T2 rate class under which IGUA's Union rate zone members take the bulk of their gas delivery services.

37. In the merger decision the Board directed EGI to consider additional significant projects put into service during Union's previous IRM rate plan period. Incorporating the allocation study impacts of those additional projects[34] into rates would provide offsetting impacts to rates M1, M2, M4, M7, T1 and, to a small extent, M5, as well as further reductions to rate T2, primarily through shifting revenue requirement to rate M12.

38. The Board might conclude that this broader reallocation better balances the interests of various customer groups, and IGUA would support that outcome as well. We note, however, the distinction between the costs associated with these projects and those

[30] ExB/T1/S1/AppC/p15, paragraph 31.
[31] ExI.OGVG.1, page 2.
[32] ExB/T1/S1/AppC/p9, Table 2.
[33] ExI.OGVG.1, page 2.
[34] ExB/T1/S1/AppC/p9, Table 2 and with additional details at ExB/T1/AppC Working Papers, Schedule 3.

associated with the Panhandle Reinforcement Project, as addressed by EGI in its *Reply Submissions* in the merger proceeding[35] (our emphasis):

> *Notwithstanding the proposal that Amalco will file cost allocation studies, it is important to be clear that the Applicants consider existing cost allocation methodologies to be appropriate. Union's 2013 cost allocation study allocated costs in an appropriate manner and was approved by the OEB at that time. Subsequent to the 2013 cost allocation study, Union included incremental costs in rates using Board-approved methodologies. The existing methodologies appropriately allocated incremental costs with the exception of the Panhandle revenue requirement.*
>
> *The Panhandle project is unique as it involved incremental costs not considered in the 2013 cost allocation study. If Union had known about the project at the time of the 2013 cost allocation study, it would have proposed an alternative allocation methodology at that time. In the pre-filed evidence for the Price Cap Application, the Applicants stated unequivocally that Amalco will address the cost allocation of the Panhandle system and the St. Clair system in the 2019 rate application.*
>
> *The Applicants have also made clear their expectation that cost allocation for the Panhandle system and the St. Clair system can be addressed as a discrete cost element within one functional classification. …*

39. Unlike the issue of allocation of costs of the Panhandle System, the other cost allocation changes addressed by EGI in its response to the Board's merger decision direction entail what many might argue is a more fundamental re-examination of the allocation of costs of assets serving a broader, less discrete, range of customers. In contrast, as emphasized by EGI, the Panhandle Reinforcement Project was unique as it involved incremental costs not considered in the 2013 cost allocation study and which are amenable to unique functional classification.

40. Even if the Board has reservations in this case regarding the range of cost allocation changes proposed by EGI in response to the merger decision directive, rectification of the discrete inequity resulting from the legacy approach to allocating Panhandle System costs can and should be addressed in this proceeding and should not be further delayed.

41. We note that the approach to allocation of Panhandle System costs now proposed by EGI is a different approach than initially proposed by Union in its 2016 LTC application.[36] Union's initial proposal was to allocate only the incremental costs of the Panhandle

[35] EB-2017-0306/0307, Reply Argument, paragraph 229 – 233.
[36] ExI.IGUA.1, part c); ExI.SCC.9.

Reinforcement Project to rate classes based on Panhandle System design day demands. Under the 2016 proposal the allocation of pre-existing costs of the Panhandle System remained unchanged. While IGUA supports EGI's current proposal as appropriate in the circumstances, to extent that the Board remains concerned with implementing cost allocation changes during an rate plan term and considers Union's 2016 proposal to be less disruptive of current cost allocation models than EGI's current proposal, the initial approach is also equitable and thus, as an interim measure, reasonable and appropriate. ***It might be of assistance to the Board for EGI to address in its reply argument the impacts of the 2016 proposal relative to those of the current proposal in respect of the allocation of Panhandle System costs.***

42. In any event, regardless of the Board's determination in this proceeding in respect of the balance of the Dawn-Parkway system costs/revenue requirements considered, the current misallocation of Panhandle System costs should now be addressed, one way or another.

Implementation

43. EGI has proposed that the Board approve EGI's proposal for allocation of Panhandle and Dawn-Parkway facilities costs now, but defer implementation until 2024.

44. This proposal makes no sense.

45. It is not really a proposal at all. EGI has indicated its view that any cost allocation changes accepted in this proceeding could be revisited in setting rebased rates in 2024.[37]

46. In the result the only impact of approval of proposed cost allocation changes now might, in EGI's view, be to reverse the onus of challenging the "approved" cost allocation change later. Frankly, from an intervenor perspective, this is no real impact at all. We understand the practice on onus in regulatory applications, but practically speaking intervenors are always put to challenging utility proposals.

47. EGI's rationale for effectively deferring any real relief for customers already inappropriately and inequitably paying costs for assets from which they do not derive proportional benefit

[37] ExI.CME.1, part b; ExI.LPMA.2.

(and in the case of the Panhandle System costs and many Rate T2 customers no benefit at all) is that[38];

> *"… there will be additional changes at rebasing in 2024 when Enbridge Gas introduces rate harmonization, integration of the cost allocation studies for the combined utility and the pass-through of synergy cost savings into rates. The cost allocation study results, on their own, do not represent the final rate adjustment that may occur as part of a cost of service proceeding. The final rate adjustment of a cost of service proceeding would include rate design and other adjustments that may be required to manage revenue to cost ratios, maintain rate class continuity and address bill impacts.*

48. In respect of the potential for additional changes to the impacted rates at rebasing;

    (a) no such additional changes would alter the fact, apparent since 2016, that the current misallocation of Panhandle System costs has been, and continues to be, unjustified and inequitable; and

    (b) any such additional changes would also provide additional mechanisms for addressing the consequences of such additional changes *vis a vis* rates going into 2024 that are adjusted now to properly reflect costs to serve and ensure that those who benefit from the Panhandle System pay the cost of the Panhandle System (and those who do not rely in any measure on the Panhandle System do not continue to subsidize those who do).

49. In respect of *"rate design and other adjustments that may be required to manage revenue to cost ratios, maintain rate class continuity and address bill impacts"*, these are further articulated in an interrogatory response[39]. In that response EGI states that *"while allocated cost of service is the primary driver of setting rates"* (our emphasis), other considerations that impact proposed rates are;

    (a) the level of current rates and the magnitude of the proposed change;

    (b) the revenue deficiency/sufficiency for the company as a whole;

    (c) the relative rate changes of other rate classes;

    (d) the potential impact on customers;

    (e) the level of contribution to fixed cost recovery;

    (f) customer expectations with respect to rate stability and predictability; and

[38] ExB/T1/S1/AppC/p3, paragraph 7, paragraph 11.
[39] ExI.TCPL.1, part d).

(g) equivalency of comparable service options.

50. Just a few minutes of consideration of EGI's list of rate design and other adjustments indicates that they are either irrelevant or can be addressed now. In particular;

(a) ***the level of current rates*** for those customers, including in particular Rate T2 customers, is inflated relative to the costs to serve them, and the magnitude of the proposed change is no greater than the magnitude that they have shouldered, in the opposite direction, since the Panhandle Reinforcement Project costs were first passed through to them in 2018.

(b) There would be no ***revenue sufficiency/deficiency for the company as a whole***. EGI's evidence shifts costs between rate classes, but nets out to 0 impact on EGI revenue. EGI has repeatedly stated its expectation that any rate changes arising from this proceeding would be revenue neutral to EGI.

(c) The ***relative rate changes of other rate classes*** is clearly addressed in EGI's evidence already;

(d) The ***potential impact on customers*** is essentially the same point as points (a) and (c) above.

(e) In respect of ***the level of contribution to fixed cost recovery***, despite ample opportunity in pre-filed evidence and IRRs EGI has not indicated any issue on this point beyond identifying it in the interrogatory response.

(f) ***Customer expectations in respect of rate stability***, while embraced by those interests resisting allocation of Panhandle System costs to those who rely on the Panhandle System, did not seem to trouble these parties when these costs were first added to rates for T2 and other customers in 2018. Rate T2 customers and other negatively impacted customers also have expectations regarding rate stability, though in most cases those are likely secondary to concerns about rate fairness.

(g) We have no idea what ***"equivalency of comparable service options"*** has to do with the fairer and more appropriate allocation of Panhandle System costs or the Dawn Parkway Costs at issue in this application.

51. In any event, to the extent that any of these *"rate design and other adjustments"* are in fact (rather than in theory) a concern in respect of the particular allocations in issue in this matter, they could have, and should have, been particularly and clearly addressed by EGI. No such issues have been articulated. There is absolutely no evidence that any of these present real or material concerns.

52. EGI was directed to review these allocations and to make a proposal. No particulars of any concerns with adjusting rates have been offered in the pre-filed evidence or the

interrogatory responses. If EGI were legitimately concerned about any of these factors one would think those concerns would have been articulated with some specificity and quantification in EGI's evidence.

53. The Board in the merger decision was very clear in its expectations[40] (our emphasis);

> *The Board is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair Systems. The OEB therefore requires Amalco to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation… The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects...*

54. Proposing a change to the methodology for allocating Panhandle System costs but deferring implementation of any change to rates for another 3.5 years does not address cost allocation implications as intended by the Hearing Panel in the merger decision. Proposing changes without implementation of those changes does not address anything.

55. In its reply argument in the Panhandle Reinforcement Project LTC in 2016, under the heading *"Merit of proposed interim allocation changes"*[41], Union justified its proposed interim allocation of Panhandle Reinforcement Project costs to Panhandle System users based on their design day demands on that system on the basis that such allocation *"would be in effect only for a 14-month period"*[42] and was *"designed to ensure that the allocation of Project costs and the resulting rate impacts reflect the principle of cost causality"*[43].

56. Despite the position that Union then took on passing through the Panhandle Reinforcement Project costs to rates, the 2016 LTC Hearing Panel was nonetheless persuaded that given only 14-months until full rebasing it was preferable to wait. While that may have been a reasonable approach for a 14 month period, it is, with respect, not just and reasonable for a further 3 years, on top of the 3 years (including 2020) during which the initially intended 14 month situation has already been in place.

[40] EB-2017-0306/0307, *Decision and Order*, page 41, bottom.
[41] EB-2017-0306/0307, *Reply Argument*, page 49.
[42] EB-2017-0306/0307, *Reply Argument*, paragraph 134.
[43] EB-2017-0306/0307, *Reply Argument*, paragraphs 138.

57. Rate changes introduced now (in 2021) will be in effect for a 3 year period, and will *"ensure that the allocation of Project costs and the resulting rate impacts reflect the principle of cost causality"*.

58. The rate review and harmonization contemplated for the 2024 test year can, and should, take any interim cost allocation and attendant rate changes into account, and additional changes suggested by a broader cost allocation review will provide EGI and the Board with ample tools to *"manage revenue to cost ratios, maintain rate class continuity and address bill impacts"* should such be determined at the time based on clear and quantified evidence to be appropriate. Any actual *"additional rate impacts as a result of synergy cost savings of the combined utility and proposed changes to cost allocation and rate design in the 2024 rebasing proceeding"* can then be assessed and, as required, addressed on a more equitable base rate which better reflects cost causality.

Conclusion

59. Rates have already changed to provide EGI with recovery of the costs of the Panhandle Reinforcement Project.

60. In 2019 $12.6 million is being disproportionately and inequitably recovered from customers as a result of a reinforcement undertaken to serve other customers. IGUA's members served primarily on the St. Clair System have been paying hundreds of thousands of dollars a year in their rates since 2018 on account of costs of the Panhandle System which they don't use, while customers for whom the $264.5 million Panhandle System Expansion was undertaken have been subsidized.

61. Those who have benefitted from the previous change in rates to provide EGI with recovery of the costs of the Panhandle Reinforcement Project, because these costs are being paid by those who don't benefit, argue that no further change – even if demonstrably and unarguably proportionate and appropriate – should be made. That is not fair.

62. It is time to put these costs back where they belong.

63. Six years of overpayment and cross-subsidy to the tune of tens of millions of dollars from St. Clair System customers to Panhandle System customers is neither just nor reasonable.

64. In any event of future modification of the allocation of other EGI costs, correction of the current misallocation of Panhandle System costs is, and will remain, completely appropriate. The fact that there may be other changes in the other direction 3 years from now does not alter the appropriateness of these current changes.

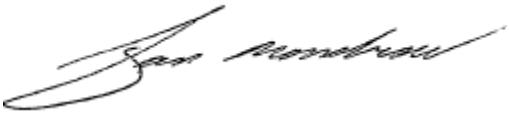
65. It is time to correct the previous misallocation of Panhandle System costs, and the Hearing Panel should so find.

66. To find otherwise would result in the continuation of rates for another 3 years that are demonstrably unjust and unreasonable. There is no legitimate dispute on this point.

67. Those arguing against implementation of the results of the cost allocation work directed by the Board in the merger decision are rearguing the position that the Board already rejected in that decision. The Board should reject these arguments again.

68. EGI has indicated that it can correct the previous misallocation in 2021 rates[44], and it should be instructed to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



GOWLING WLG (CANADA) LLP, per:
Ian A. Mondrow
Counsel to IGUA

April 10, 2020

[44] ExI.IGUA.6.

TAB A1

Filed: 2016-11-28
EB-2016-0186
Exhibit J1.2
Page 1 of 1

UNION GAS LIMITED

Undertaking Response
To Mr. Aiken

FOR M4 LARGE, TO PROVIDE A SCHEDULE WHERE THERE IS NO CHANGE IN EITHER DEPRECIATION OR THE COST ALLOCATION

Please see Attachment 1 for the delivery bill impacts of typical small and large in-franchise customers.

The bill impact for a large Rate M4 customer using Board-approved depreciation rates and cost allocation methodology is approximately $15,991.

Please see Attachment 2 for a detailed summary of Union's cost allocation proposal, per Board Panel Chair Duff's request at Day 1 of the transcripts page 171, lines 9-15, following questions on cost allocation beginning on page 169 line 15 through page 171.

Filed: 2016-11-28
EB-2016-0186
Exhibit J1.2
Attachment 1

UNION GAS LIMITED
Delivery Charges and Impacts for Typical Small and Large Customers
Based on Board-Approved Cost Allocation Updated for the Project and
Board-Approved Depreciation Rates of Approximately 50 Years

Line No.	Particulars	Delivery Charges EB-2016-0040 Approved 01-Apr-16 (1) ($) (a)	Delivery Charges EB-2016-0186 Proposed 01-Jan-18 ($) (b)	Delivery Charge Impact ($) (c) = (b - a)	Delivery Charge Impact (%) (d) = (c / a)
	Union North				
1	Rate 01 - Small	435	433	(2.03)	-0.5%
2	Rate 10 - Small	4,232	4,205	(27.23)	-0.6%
3	Rate 10 - Large	13,579	13,504	(74.43)	-0.5%
4	Rate 20 - Small	73,272	72,659	(612.86)	-0.8%
5	Rate 20 - Large	281,495	279,512	(1,983.10)	-0.7%
6	Rate 25 - Average	62,814	62,409	(405.28)	-0.6%
7	Rate 100 - Small	260,184	258,790	(1,394.52)	-0.5%
8	Rate 100 - Large	2,106,720	2,096,428	(10,292.52)	-0.5%
	Union South				
9	Rate M1 - Small	346	347	1.93	0.6%
10	Rate M2 - Small	3,297	3,363	65.87	2.0%
11	Rate M2 - Large	10,642	10,916	274.24	2.6%
12	Rate M4 - Small	37,374	39,333	1,959.03	5.2%
13	Rate M4 - Large	277,378	293,369	15,990.80	5.8%
14	Rate M5 - Small	30,596	30,440	(155.83)	-0.5%
15	Rate M5 - Large	169,794	169,031	(763.06)	-0.4%
16	Rate M7 - Small	656,550	671,835	15,285.60	2.3%
17	Rate M7 - Large	2,513,626	2,580,327	66,700.80	2.7%
18	Rate M9 - Large	384,526	383,685	(841.18)	-0.2%
19	Rate M10 - Average	5,570	5,490	(79.29)	-1.4%
20	Rate T1 - Small	132,068	147,962	15,893.51	12.0%
21	Rate T1 - Average	201,822	228,048	26,226.39	13.0%
22	Rate T1 - Large	445,903	508,291	62,387.84	14.0%
23	Rate T2 - Small	511,030	637,897	126,867.35	24.8%
24	Rate T2 - Average	1,186,197	1,507,146	320,948.57	27.1%
25	Rate T2 - Large	1,936,196	2,472,295	536,099.15	27.7%
26	Rate T3 - Large	3,552,739	3,555,805	3,066.36	0.1%

Notes:
(1) Reflects Board-approved rates per Appendix A in Union's April 2016 QRAM filing (EB-2016-0040).

Panhandle Reinforcement Project – Cost Allocation Summary

The current Board-approved cost allocation methodology combines the costs of the Panhandle System and the St. Clair System. The Panhandle System consists of two transmission pipelines between Dawn and the Ojibway Valve Site, associated compressor and transmission stations and measuring and regulating equipment. The St. Clair System includes the St. Clair transmission line and Union's contracted transportation capacity on the St. Clair Pipelines L.P. system, including the St. Clair River Crossing and Bluewater Pipeline. These two systems have been combined for cost allocation since Rate C1 was first included in the cost allocation study in 1999. The primary reason for combining the two systems was because both systems provide transportation service between the river crossings west of Dawn and the Dawn Compressor Station.

The Board-approved cost allocation first allocates costs to ex-franchise Rate C1 and Rate M16 rate classes based on the firm contracted demands on both systems and the average unit cost of the combined system. The next step in the cost allocation is to allocate the remaining costs to in-franchise rate classes based on the Design Day demands of the combined system.

However, the use of the combined system for allocating the Project costs is no longer appropriate because it is no longer representative of cost causation principles. The addition of the Project's net revenue requirement of $25.6 million, which relates only to the Panhandle System, is a significant increase relative to the 2013 Board-approved revenue requirement of the combined system of $7.1 million. The Board-approved cost allocation, when applied to the cost of the Project, is no longer representative of cost causation principles because of the significantly larger cost per unit of demand for the Project (relative to existing) which relates only to the Panhandle System.

The result of using the Board-approved cost allocation for the Project allocates significant costs to ex-franchise Rate C1 and Rate M16 that would require a rate increase in excess of 300% in order to recover the costs. Using the Board-approved cost allocation also disproportionately allocates significant costs to in-franchise Rate T2. The St. Clair System has a large Rate T2 customer base and using the Design Day demands of the combined system to allocate costs to in-franchise rate classes results in an allocation to Rate T2 that is not representative of their use of the Panhandle System.

The Board-approved cost allocation was reasonable when the Panhandle System and St. Clair System had similar costs per unit of demand. With the addition of the Project costs that related only to the Panhandle System and no change to the cost of the St. Clair System, the use of the combined system no longer reflects the costs to serve the customers on each respective transmission system.

Union has therefore proposed an interim cost allocation methodology for the Panhandle Reinforcement Project ("the Project") that is representative of cost causality by allocating costs based on the Design Day demands of the Panhandle System only.

Union's proposal for the cost allocation of the Project is different than the current Board-approved cost allocation in two ways:

- Allocation of the Project costs in proportion to the 2013 Board-approved in-franchise Panhandle System Design Day demands updated for the Project. Union's proposed allocation does not consider the Design Day demands of the St. Clair System because the incremental costs created by the Project relate only to the Panhandle System and does not allocate costs to ex-franchise rate classes because they do not utilize Design Day capacity of the Panhandle System; and
- No update to ex-franchise Rate C1 and Rate M16 demand rates for the Project.

Union's cost allocation proposal for the Project is more representative of cost causation principles and addresses the following concerns with the current Board-approved cost allocation.

Loss of Ex-franchise Market

The Board-approved cost allocation allocates costs to ex-franchise Rate C1 and Rate M16 rate classes based on the firm contracted ex-franchise demands and the average unit cost of the combined system. The addition of the Project costs to the combined system results in a significant increase in the average unit cost. Basing the allocation of costs to ex-franchise rate classes in this manner would result in a significant rate increase in excess of 300% in order for Union to recover the allocated costs.

The current use of an average unit cost of the combined system to allocate costs to ex-franchise rate classes recognizes a contribution to the costs in-franchise customers would otherwise bear for the Panhandle System. In the past, the use of an average unit cost of the combined system has resulted in a demand rate that has attracted ex-franchise interest in the transportation service. If the rate is derived from the average unit cost and is no longer attractive to ex-franchise customers, it could jeopardize the demand for the ex-franchise service.

Rate C1 ex-franchise customers utilize the Panhandle System for transportation service from Ojibway to Dawn. Customers who utilize the Rate C1 transportation service are typically marketers, producers or other pipeline companies that want to move gas to Dawn. These customers largely utilize the Rate C1 service based on market opportunities at Dawn relative to the cost to purchase or produce the gas upstream of Dawn and use the Rate C1 service to get the gas to Dawn. A rate increase of this magnitude would likely reduce or eliminate the demand for the Rate C1 transportation service from Ojibway to Dawn because the market opportunities would be reduced with such a high transportation cost.

Maintaining the Rate C1 transportation service benefits in-franchise customers. At rebasing, any costs allocated to ex-franchise rate classes based on the demand forecast for the service reduces the costs allocated to in-franchise rate classes. In addition, all forecasted revenue in excess of the allocated costs also reduces in-franchise rates.

The Panhandle System is designed to meet in-franchise demands on Design Day and the Project is required to meet the increase in in-franchise Design Day demands. Ex-franchise has no impact on the need for the Project and do not use any Design Day capacity. The Rate C1 and Rate M16 customers that use the Panhandle System actually flow counterflow to the direction of the Design Day demand (i.e. ex-franchise activity flows from Ojibway to Dawn, Panhandle Design Day demands flow Dawn to Ojibway). Although Rate C1 is not obligated on Design Day, any ex-franchise counterflow activity on Design Day

actually benefits Panhandle System as the gas arriving at Ojibway reduces the gas that needs to come from Dawn.

Union's proposal to not allocate any Project costs to the ex-franchise rate classes and to not update the rate recognizes that the facilities are designed for in-franchise Design Day and the loss of the ex-franchise firm demands based on a significant increase in the rate would increase the in-franchise burden of costs upon rebasing.

Allocation to In-franchise Rate Classes

The Board-approved cost allocation allocates costs not allocated to ex-franchise rate classes to in-franchise rate classes based on the combined Design Day demands of both the Panhandle System and St. Clair System. The Panhandle System and St. Clair System have significantly different proportions of Design Day demands by rate class as compared below:

		Design Day Demands		Project Cost Allocation Factors	
Line No.	Rate Class	St. Clair System (1) (%)	Panhandle System (2) (%)	Board-Approved Allocation (3) (%)	Proposed Allocation (3) (%)
		(a)	(b)	(c)	(d)
1	Rate M1	7%	40%	21%	40%
2	Rate M2	2%	14%	7%	14%
3	Rate M4	0%	14%	7%	14%
4	Rate M5	-	0%	0%	0%
5	Rate M7	-	4%	2%	4%
6	Rate T1	9%	5%	6%	5%
7	Rate T2	82%	23%	42%	23%
8	Total In-franchise	100%	100%	85%	100%
9	Rate C1	-	-	13%	-
10	Rate M16	-	-	3%	-
11	Total Ex-franchise	0%	0%	15%	0%
12	Total	100%	100%	100%	100%

Notes:
(1) Percentages by rate class derived from Exhibit A, Tab 8, Schedule 2, line 6.
(2) Exhibit A, Tab 8, Table 8-1.
(3) Exhibit A, Tab 8, Table 8-3.

The allocation of costs to Rate T2 is much higher using the combined system allocator than the proportion of Rate T2 Design Day demands of the Panhandle System only. The Design Day demands of the St. Clair System are not driving the Project costs and it would not be fair to allocate to Rate T2 a proportion of the Project costs based on their proportion of demands of the combined system which includes the St. Clair System. As well, the proportionate use of the Panhandle System by Rate M1 is much greater than the combined system allocator. The use of the Panhandle System Design Day demands only to allocate the Project's costs more appropriately reflects cost causation principles by allocating the costs to rate classes that use the Panhandle System and are driving the need for the Project. The combined allocation was reasonable when the two systems had similar costs per unit of demand. With the addition of the revenue

requirement of the Project to the existing revenue requirement and incremental Panhandle System Design Day demands, the combined allocation is no longer reasonable.
Union's proposal to allocate the Project costs to in-franchise rate classes using Panhandle System Design Day demands updated for the Design Day demands of the Project recognizes that an allocation using the combined system is not representative of the use of the Panhandle System only. The proposed allocation reflects each rate classes' use of the Panhandle System and appropriately reflects cost causation and addresses the concerns with the current Board-approved methodology.

Union will review the cost allocation and rate design for all Panhandle System and St. Clair System costs as part of its 2019 rebasing. During the interim period, Union has proposed a cost allocation that is representative of cost causality and provides a transition to 2019 which avoids potential rate volatility upon Union's rebasing if the costs change significantly when Union proposes a cost allocation that represents cost causality for all Panhandle System costs.

TAB A2

EB-2017-0087

ONTARIO ENERGY BOARD

UNION GAS LIMITED

Application for natural gas distribution, transmission and storage rates commencing January 1, 2018.

EVIDENCE

of

INDUSTRIAL GAS USERS ASSOCIATION (IGUA)

Introduction

1. This evidence is intended to provide the Ontario Energy Board (OEB) and interested parties with information on the impact on IGUA's members of the allocation of Panhandle Reinforcement costs to rate classes as proposed by Union in this 2018 rate application (Status Quo Allocation) compared to the impact that would result from adoption of the allocation methodology proposed by Union in the application for leave to construct the Panhandle Reinforcement [EB-2016-0186] (Union Proposed Allocation).

2. This evidence is informed by the circumstances of 4 IGUA member companies, all of whom have significant gas consuming facilities served via Union's St. Clair System. The companies are:

   (a) ArcelorMittal Dofasco (Dofasco)

   (b) ARLANXEO Canada Inc. (ARLANXEO)

   (c) INEOS Styrolution Canada Limited (Styrolution)

   (d) Suncor Energy Inc. (Suncor)

3. In aggregate, these companies have a daily contract gas demand of 5.172 million cubic metres, and consume almost 2 billion cubic metres of gas per year, almost all of which is

delivered via Union's St. Clair system and almost none of which contributes to the design day demand on the Panhandle system.

4. In the Panhandle Reinforcement leave to construct proceeding, Union proposed to allocate the costs of the Panhandle Expansion to rate classes based on Panhandle System design day demands of each rate class. Union's position in the Panhandle Reinforcement leave to construct proceeding was that allocation of Panhandle Expansion costs to rate classes based on Panhandle System design day demands *"better reflects the principles of cost causality during the remainder of the IRM term than the current Board-approved methodology"*.[1]

5. The Status Quo Allocation methodology allocates costs to rate classes based on combined Panhandle System and St. Clair System design day demand of each rate class. With the addition of the significant Panhandle Reinforcement costs, which are related only to the Panhandle System, and no change to the cost of the St. Clair System, Union's position was that the use of the combined system for cost allocation purposes *"no longer reflects the costs to serve the customer on each respective transmission system"*.[2]

6. Union went on in its Panhandle Reinforcement application evidence to note that:

> *The 2018 [Panhandle Reinforcement] Project costs of approximately $27.2 million represents a significant increase over the 2013 Board-approved total combined [Panhandle and St. Clair] system costs of $7.1 million.*[3]

ARLANXEO

7. ARLANXEO is a leading specialty chemicals company. The core business of ARLANXEO is the development, manufacturing and marketing of plastics, rubber, intermediates and specialty chemicals.

[1] EB-2016-0186, Exhibit A, Tab 8, page 7, lines 9-11.
[2] EB-2016-0186, Exhibit A, Tab 8, page 7, lines 1-6.
[3] EB-2016-0186, Exhibit A, Tab 8, page 7, lines 6-7.

8. ARLANXEO has a manufacturing facility in Sarnia. The facility produces synthetic rubber; mainly butyl rubber and halogenated rubber. The facility also manufactures fossil resources.

9. ARLANXEO employs about 400 people at the facility.

10. ARLANXEO is also a partner in the Sarnia Regional Co-Generation Project (SRCP). The SRCP is owned and operated by TransAlta. Suncor, ARLANXEO and Nova Chemicals are partners in the project and deliver natural gas to the facility and purchase steam and power from it.

11. None of ARLANXEO's gas demand contributes to design day demand on the Panhandle System.

Dofasco

12. Dofasco plays a key role in North America's advanced manufacturing supply chain working with the top automotive, energy, packaging and construction brands to develop lighter, stronger and more sustainable products – from cans to cars.

13. Founded in 1912, Dofasco's main facility is located in Hamilton, and is Hamilton's largest private sector employer with more than 5,000 employees. Dofasco's Hamilton facility ships 4.5 million net tons of high quality flat carbon steel annually.

14. Dofasco also has a small galvanizing facility in Windsor Ontario, the gas demand for which does contribute to design day demand on the Panhandle System. The gas volume consumed at Dofasco's Windsor facility is approximately 1.5% of its total Ontario gas demand.

INEOS Styrolution

15. INEOS Styrolution is the global leader in styrenics, operating 4 world scale styrene monomer facilities; one of which is located is located in Sarnia, Ontario. Styrene is a raw material used to manufacture styrenics based polymers used in the manufacturing of

automotive, electronics, household, construction, healthcare, packaging and toys/sports/leisure products. It is also used as an ingredient in many other applications like tires, coatings (paint), toner, fiberglass, structural foams, etc.

16. INEOS Styrolution employs approximately 120 people directly or by contract in its Sarnia operations.

17. INEOS Styrolution is an indirect partner in the Sarnia Regional Cogeneration Project (SRCP) and delivers gas to that facility.

18. None of INEOS Styrolution's gas demand contributes to design day demand on the Panhandle System.

Suncor

19. Suncor is an integrated energy company whose Sarnia refining and marketing operations provide a vital link between the Canadian resource base and the North American energy market.

20. Suncor has 5 facilities located in Union's delivery franchise area that use gas as an input.

    (a) Suncor's 85,000 barrel per day Sarnia refinery produces gasoline, kerosene, jet and diesel fuels.

    (b) As noted above, Suncor is also a partner in the SRCP, and delivers gas to that facility.

    (c) Suncor has a long term natural gas supply agreement with Air Products Canada Limited for the production of hydrogen at Air Products' 150 St. Clair Parkway, Corunna facility.

    (d) Suncor has an ethanol plant in St. Clair Township, which is Canada's largest ethanol facility. The facility opened in June, 2006 and has a current production capacity of 400 million litres per year.

    (e) Suncor also has a terminal in Oakville, which provides a vital link between western crude and eastern markets. With its vast storage capability, refined products are gathered and re-distributed to eastern customers via rail, truck and pipeline networks.

21. Together these 5 facilities employ approximately 1,200 people.

22. None of Suncor's gas demand contributes to design day demand on the Panhandle System.

Panhandle Expansion Cost Impacts

23. Each of the 4 Sarnia area industrials described above are served under Union's T2 rate class, and each will experience a major cost impact as a result of inclusion in 2018 rates of the costs of the Panhandle Reinforcement. This is true regardless of whether Panhandle Reinforcement costs are allocated using the Status Quo Allocation or the Union Proposed Allocation.

24. Each of these 4 companies made inquiries of Union in order to determine the impact on their annual Union related costs of one Panhandle Reinforcement cost allocation approach compared to the other.

25. In deference to the commercial sensitivity to each of these companies of information on their annual gas costs, this evidence provides the aggregated impact of the Status Quo Allocation compared to the Union Proposed Allocation.

26. Based on the information provided by Union, in each case consistent with the expectations and information of the subject IGUA member:

    (a) Using the Status Quo Allocation, the aggregate total 2018 gas delivery costs forecast for these 4 T2 customers would be approximately $11.769 million.

    (b) Using the Union Proposed Allocation, the aggregate total 2018 gas delivery costs forecast for these 4 T2 customers would be approximately $10.843 million.

    (c) The aggregate difference between the two allocation methodologies, for these 4 large T2 gas customers who do not contribute to the design day demand which the Panhandle Reinforcement was built to address, is approximately $926,200 in 2018 (8.54% of the gas delivery costs of these 4 customers based on the Union Proposed Allocation[4]).

[4] ($926,200 from paragraph 26(c)/$10.843 million from paragraph 26(b)) x 100 = 8.54%.

Conclusion

27. Even under the Union Proposed Methodology, and taking into account all capital pass-throughs for 2018, T2 customers would receive a 2018 capital pass-through allocation of more than $7.8 million and would see a rate increase in 2018 of more than 9%.[5]

28. If the Status Quo Allocation of Panhandle Reinforcement costs is maintained in 2018, T2 customers will receive a 2018 capital pass-through allocation of approximately $11.4 million and see a rate increase of 16.2%.[6]

29. If the Status Quo Allocation of Panhandle Reinforcement costs is maintained in 2018, Dofasco, ARLANXEO, Styrolution and Suncor, who (with one immaterial exception) do not utilize the Panhandle System for gas delivery, will face an additional 8.5% increase, worth almost $1 million to them in aggregate, in gas delivery costs in 2018.

30. This is a very material impact for, and a significant concern of, IGUA's Sarnia area members.

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[5] Exhibit B.IGUA.2, Attachment 1, page 1, line 15.
[6] Exhibit B.IGUA.2, Attachment 1, page 1, line 15.

TAB B

ENBRIDGE GAS INC.

Answer to Interrogatory from
Industrial Gas Users Association ("IGUA")

Interrogatory

Reference:

ExB/T1/S1/AppC/p12/para. 23. The evidence explains that with the inclusion of significant costs to the Panhandle System only as a result of the Panhandle Reinforcement Project, the use of the Ojibway/St. Clair demand allocation methodology no longer reflects the costs to serve customers on each of the respective systems.

Question:

Please provide the costs (as of 2019) for each of the Panhandle and St. Clair systems.

Response

The estimated 2019 revenue requirement of the Panhandle System is $38.195 million.[1]

The estimated 2019 revenue requirement of the St. Clair System is $2.250 million.[2]

[1] Exhibit B, Tab 1, Appendix C, Working Papers, Schedule 2, p. 1, column (k).
[2] Exhibit B, Tab 1, Appendix C, Working Papers, Schedule 2, p. 1, column (j).

TAB C

Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2016-0186

UNION GAS LIMITED

Application for approval to construct a natural gas pipeline in the Township of Dawn Euphemia, the Township of St. Clair and the Municipality of Chatham-Kent and approval to recover the costs of the pipeline.

BEFORE: **Allison Duff**
Presiding Member

Cathy Spoel
Member

Paul Pastirik
Member

February 23, 2017

LPMA submitted that the Project met the OEB's economic test in Stage 2. Although LPMA did not agree with all the assumptions used to calculate the NPV of the stage 2 benefits, LMPA agreed that the NPV is well in excess of the $212 shortfall in the Stage 1 NPV calculation.

Findings

The OEB finds that the Project meets the OEB's economic tests. The OEB finds that the Stage 2 benefits sufficiently exceed the Stage 1 net cost, and result in a positive NPV.

Union's Stage 1 NPV was negative $212 based on a 5-year forecast and 20-year term. The NPV changed slightly to negative $207 based on a 40-year term. With a 40-year term, the NPV for Alternative 2 changed from negative $207 to negative $201. The OEB finds the Stage 1 NPVs for the Project to be similar to Union's Alternative 2, despite a change in term.

The OEB agrees with LPMA that not all of Union's assumptions in its Stage 2 analysis may be adequately justified, but the OEB finds the $805 M in estimated benefits so large that even with some adjustments the benefits will exceed the net cost estimate in Stage 1.

Based on Union's forecast five-year demand, the OEB finds that Union has demonstrated that the economic tests required by the OEB's filing guidelines have been met.

3.3 Potential rate impacts to customers

Based on Union's proposed costs and rate recovery, the average total bill impact for Union South customers ranged from 1.2% for residential rate M1 to 5.8% for small rate M4[4].

Union's cost estimate included depreciation expense based on a 20-year depreciation period, which is shorter than the 50 years in the OEB's approved depreciation rates for these assets. The depreciation expense to be recovered from customers would be lower by $3.5 M in 2017 and $7.4 M in 2018 if depreciated over 50 years.[5]

Union submitted that a shorter amortization period was warranted given the uncertainties with Ontario's Cap and Trade program and the introduction of the government's Climate Change Action Plan (CCAP). Union submitted that these new

[4] Exhibit A, Tab 8, Schedule 6, p.2
[5] Exhibit J1.3

initiatives add significant risk to the return of any capital invested in natural gas infrastructure over the medium to long term. Union submitted that a 20-year period better aligns the recovery of the asset costs with the timing of government restrictions and potential elimination of natural gas heating of homes and businesses.

All but one of the intervenors disagreed with Union's proposal for a 20-year amortization period. They noted that the settlement agreement entered into at Union's most recent cost of service proceeding refers to OEB-approved 2013 depreciation rates. These intervenors argued that the terms of the settlement proposal prohibit the use of different depreciation rates, and that depreciation was not identified as a Y-factor in the settlement proposal. These intervenors also argued that if a change was to be considered by the OEB it should be during a rebasing year, not during the IRM term, based on a comprehensive review of all assets.

LPMA supported Union's proposal, submitting that a 20-year period reduced the risk for Union resulting from Cap and Trade and CCAP, and reduced the total net present cost to customers.

Union proposed two changes to the cost allocation methodology approved by the OEB when rates were established in 2013. The proposed cost allocation would determine how the Project costs would be recovered until 2019, the end of Union's current IRM term.

First, Union proposed to base the allocation on the Panhandle System's design day demand plus incremental design day demands of the Project. In 2013, the OEB had approved a cost allocation methodology based on design day demands from the combined Panhandle and St. Clair Systems.

Second, Union proposed to exclude ex-franchise Rate C1 and M16 firm contracted demands from the cost allocation. In 2013, the OEB had approved a cost allocation methodology that included in-franchise and ex-franchise rate classes.

Union's position is that using the combined Panhandle and St. Clair Systems to allocate costs no longer reflects the costs to serve customers on their respective parts of these Systems. In addition, Union submitted that C1 and M16 ex-franchise customers are not driving the need for the Project because their gas flows counter to the flow of design day volumes. Union's proposed allocation would result in a re-allocation of 15% of the Project costs to in-franchise customers, rather than allocating them to C1 and M16

customers. A full comparison of the current OEB-approved and the proposed allocation follows.[6]

Line No.	Rate Class	Design Day Demands St. Clair System (%) (a)	Design Day Demands Panhandle System (%) (b)	Project Cost Allocation Factors OEB-Approved Allocation (%) (c)	Project Cost Allocation Factors Proposed Allocation (%) (d)
1	Rate M1	7%	40%	21%	40%
2	Rate M2	2%	14%	7%	14%
3	Rate M4	0%	14%	7%	14%
4	Rate M5	-	0%	0%	0%
5	Rate M7	-	4%	2%	4%
6	Rate T1	9%	5%	6%	5%
7	Rate T2	82%	23%	42%	23%
8	Total In-franchise	100%	100%	85%	100%
9	Rate C1	-	-	13%	-
10	Rate M16	-	-	3%	-
11	Total Ex-franchise	0%	0%	5%	0%
12	Total	100%	100%	100%	100%

All Intervenors except two disagreed with Union's proposal to change the cost allocation methodology for the Project. These intervenors submitted that a change to cost allocation should only be considered in a rebasing year, not during an IRM term, as changes to one part of cost allocation affect all other customers. LPMA, VECC and OEB staff indicated that they were not opposed to Union's proposal, but suggested further review of the impacts are required.

APPrO and IGUA supported Union, arguing that Union's cost allocation proposals were in line with the principle of cost causality and consistent with how the Panhandle System is used.

Findings

The OEB will not approve Union's proposals for a 20-year depreciation period and a revised cost allocation methodology. The OEB finds that both proposals should be deferred to Union's next cost of service or custom IR application. It would be inconsistent to change the depreciation term and cost recovery for one project, while Union's other assets are depreciated and recovered on different bases. A comprehensive review is required for parties to test, and the OEB to assess, the merits

[6] Exhibit J1.2 Attachment 2, page 3

and implications of these two proposals and this should be at Union's next cost of service or custom IR application.

While these proposals may have merit, they cannot be adequately considered during the IRM term, for one project in isolation. A leave-to-construct application requesting a capital pass-through mechanism for cost recovery over 14 months is not the appropriate forum to consider deviations from principles embedded in current OEB-approved rates.

A proper review of these issues will need to include the full range of possible amortization periods, and the impacts on all customer classes of a change to the cost allocation methodology

Given these findings, it is not necessary for the OEB to comment on whether Union's proposal is consistent with the settlement agreement.

3.4 Facilities and non-facilities alternatives to the Project

Exhibit A, Tab 6 of Union's evidence describes the alternatives to the Project that were considered by Union. Union defined an acceptable alternative as one which allows Union to maintain minimum inlet pressures on a design day and meet design day requirements to supply its downstream distribution systems. The alternatives considered by Union are intended to serve the five-year forecasted demand growth from 565 TJ/d to 671TJ/d by 2021, and further consideration for expected future growth beyond 2021.

Union's Alternative 1

This alternative involves construction of a new 30 or 36 inch pipeline from Dawn alongside the existing Panhandle pipeline which would continue to be used.

Union forecast the cost of this alternative at an NPV of negative $224 M which is $12M more expensive than the Project's estimate of negative $212 M. The Project also has the advantage of eliminating the need for additional land and easements and ongoing maintenance costs to preserve the integrity of the existing pipeline.

Union's Alternative 2

This alternative involves contracting for an additional 34 TJ/d of gas supply at Ojibway and installing incremental pipeline and station facilities along the Panhandle System to serve the remainder of the demand from Dawn.

Union's forecast of the NPV for this alternative was negative $207 M. When comparing this to the Project's NPV of negative $212 M, Union did not consider this small differential to be worth the added risk of this alternative. Union's evidence is that

TAB D

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2017-0087

Union Gas Limited

Application for natural gas distribution, transmission and storage rates effective January 1, 2018

PROCEDURAL ORDER NO. 3

November 29, 2017

Union Gas Limited (Union Gas) filed an application dated September 26, 2017 with the Ontario Energy Board (OEB) pursuant to section 36 of the *Ontario Energy Board Act, 1998* (Act), for an order or orders approving rates for the distribution, transmission and storage of natural gas, effective January 1, 2018. The Industrial Gas Users Association (IGUA) filed evidence requesting a change to the current cost allocation methodology used to allocate Panhandle Reinforcement project costs.

The OEB has previously directed that IRM rate changes are supposed to be mechanistic in the current IRM framework. Cost allocation changes are outside of the scope of this proceeding accordingly the evidence of IGUA will not be considered.as part of the evidentiary record.

The Union Gas 2013 application for a multi-year Incentive Ratemaking (IRM) framework, EB-2013-0202, established the IRM framework for Union Gas' current application for 2018 rates. The framework sets rates on an annual basis using a price cap and other adjustments. With respect to cost allocation, the OEB- approved settlement stated:

> Subject to direction otherwise from the Board, Union will allocate the net revenue requirement using 2013 Board-approved cost allocation methodologies. Any party, including Union, may take any position with respect to the proposed allocation for any particular capital project during review of the project, or its rate impacts, by the Board[1];

[1] EB-2013-0202 Settlement Agreement, Union Gas Limited, Page 21, July 31, 2013

In the Panhandle Reinforcement Leave to Construct application, EB-2016-0186, Union proposed to allocate the Panhandle System demand costs in proportion to the firm Union South in-franchise Panhandle System Design Day demands. The OEB-approved cost allocation methodology allocates costs based on the combined Panhandle and St. Clair System. With the addition of significant Panhandle System project costs, Union submitted that the use of the combined system for cost allocation purposes no longer reflected the costs to serve the customers. The OEB Decision determined that a change in cost allocation cannot be adequately considered during the IRM term and such changes should be reviewed in Union's next rebasing proceeding. Neither IGUA nor any other party requested a review of this decision.

Union's IRM term is ending in 2018 and it was expected to file a rebasing proceeding for 2019 rates. The Union and Enbridge Gas Distribution Inc. (Enbridge) merger application proposed a 10-year adjustment to rates using a price cap index[2]. In response to an interrogatory[3], Union has indicated that it intends to address concerns with the cost allocation of all Panhandle System and St. Clair System costs in its 2019 price cap index rates application.

As an approved intervenor in the current proceeding, the Industrial Gas Users Association (IGUA) filed evidence providing an overview of the rate impact on IGUA members as a result of the current cost allocation methodology. IGUA noted that a number of its members were T2 customers who would have a rate increase of 16.2% in 2018. The aggregate difference between using the existing allocation methodology and Union's proposed allocation methodology in the Panhandle Reinforcement leave to construct application will be approximately $926,000 in 2018 for the four specifically identified IGUA members. IGUA submitted that this was a material impact for, and a significant concern of IGUA's Sarnia area members.

The OEB is of the opinion that cost allocation issues can be better addressed prior to Union entering another price cap rate mechanism framework. It would not be appropriate to address cost allocation changes in the last year of the current IRM framework where rate changes are supposed to be mechanistic. Furthermore, the merger Application of Union and Enbridge has not yet been approved, and it is possible that Union and Enbridge could be required to file evidence dealing with some components of rebasing applications. The OEB is of the opinion that any cost allocation changes are appropriate to be considered for the setting of 2019 rates. In addition, the Notice in the current proceeding did not include any specific reference to cost allocation as an issue.

[2] Union and Enbridge MAADs and Rate Framework Applications, EB-2017-0306 and EB-2017-0307
[3] Union response to interrogatory, Exhibit B.IGUA.4, part c, November 21, 2017

The OEB has reviewed the evidence of IGUA and has determined that the issue raised by IGUA in its evidence is thus out of scope and will not be addressed in this proceeding. Accordingly, further examination of the evidence submitted by IGUA through interrogatories is not required for the determination of the application. The OEB reminds all parties that it will not provide for costs related to review of IGUA's evidence or for preparing interrogatories on that evidence.

All filings to the Board must quote the file number, **EB-2017-0087** and be made electronically in searchable/unrestricted PDF format through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.oeb.ca/OEB/Industry. If the web portal is not available, parties may email their documents to the address below.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Khalil Viraney at Khalil.Viraney@oeb.ca and Board Counsel, Michael Millar at Michael.Millar@oeb.ca.

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DATED at Toronto, November 29, 2017

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

TAB E

Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND RATE ORDER

EB-2017-0087

UNION GAS LIMITED

Application for 2018 Rates for the Distribution, Transmission and Storage of Natural Gas Effective January 1, 2018

BEFORE: Michael Janigan
Presiding Member

Susan Frank
Member

January 18, 2018

3 OEB DECISIONS

Treatment of 2018 Panhandle Reinforcement Project Costs

Background

The allocation of the Panhandle Reinforcement Project costs for 2018 was an unsettled issue in the settlement agreement. By Procedural Order 3, the OEB had ruled that changes to the existing cost allocation methodology would not be considered in this hearing that concerns the last year of the IRM. Parties and the applicant made oral and written submissions as to the appropriate treatment of Panhandle Reinforcement Project costs in rates for 2018.

IGUA urged that the OEB consider mechanisms other than changes to the cost allocation methodology to address what it maintained was an inequitable result of the existing cost allocation methodology approved by the OEB in 2013. According to IGUA, this inequitable result is shown in Table 1 in Exhibit B IGUA 4 that shows the Design Day Demands by rate classes T2, C1 and M16 upon the Panhandle System compared to the OEB Approved cost allocation to those rate classes.

Table 1
Comparison of the St. Clair and Panhandle System Design Day Demands

Line No.	Rate Class	Design Day Demands St. Clair System (%) (a)	Design Day Demands Panhandle System (%) (b)	OEB-Approved Cost Allocation As-Filed (%) (c)	Difference (%) (d) = (c-b)
1	Rate M1	7%	40%	21%	-19%
2	Rate M2	2%	14%	7%	-7%
3	Rate M4	0%	14%	7%	-7%
4	Rate M5	-	0%	0%	0%
5	Rate M7	-	4%	2%	-2%
6	Rate T1	9%	5%	6%	1%
7	Rate T2	82%	23%	42%	19%
8	Total In-franchise	100%	100%	85%	-15%
9	Rate C1	-	-	13%	13%
10	Rate M16	-	-	3%	3%
11	Total Ex-franchise	-	-	15%	15%
12	Total	100%	100%	100%	-

In EB-2016-0186 (‘the Panhandle leave to construct decision”), Union proposed a change to the existing cost allocation methodology to allocate Panhandle Reinforcement Project costs with Panhandle System Day demands. The OEB rejected the Union proposal finding it inappropriate to consider a change to one project in isolation during the last 14 months of an IRM period.

IGUA noted that Union planned to prepare a new cost allocation model for Panhandle – Ojibway costs for the purpose of setting 2019 rates. IGUA proposed that until this new model was considered, the rates associated with the recovery of 2018 Panhandle costs in the final IRM year should be interim.

In support of this request for interim rates, IGUA submitted that this is a rate proceeding, and fairness in rate setting requires that a sound cost allocation exists. A fair apportionment of costs must be in accordance with the use of the system, avoiding subsidies and intra-customer burdens. As the current cost allocation methodology yields what IGUA described as a fundamentally inequitable result for the recovery of these costs, IGUA maintained that the 2018 rates should be made interim in respect of the 2018 Panhandle Reinforcement project costs. The final allocation of such costs would then be dependent upon a proper review of the methodology for allocating costs by the OEB in its setting of 2019 rates.

LPMA, in its written submission, maintained that IGUA’s requested relief would be inconsistent with the Panhandle leave to construct decision and good regulatory practice by using a “back-door approach” to alter the previously approved cost allocation methodology. As cost allocation is a zero sum exercise, it is first required that a comprehensive review of all projects undertaken and changes in allocations of costs on other Union transmission pipeline systems. A change based on usage shifts for one project, in LPMA’s submission, would be unfair.

VECC stated that the IGUA position was essentially a re-argument of the issue that was before the OEB in the Panhandle Project decision and the relief sought by IGUA was a reversal of the OEB’s decision in that proceeding not to alter 2018 results that are based on the application of existing cost allocation methodology. This requested relief is thus retrospective in nature. VECC warned that making rates interim and adjusting them retrospectively, as IGUA has suggested, may be contrary to accepted ratemaking principles that provide stability and predictability of rates as desirable outcomes.

SEC also viewed the IGUA request as an attempt to revisit the same issues dealt with in the Panhandle Project decision despite the fact that IGUA had taken no steps to have the OEB’s decision reviewed through the various mechanisms that might have been available. SEC submitted that the issue of the appropriate cost allocation methodology should be resolved by a full review. This review was envisioned by the OEB’s rejection

of the Union proposal for an interim change to that methodology in the 2016 Panhandle Project decision.

CCC supported the positions advanced by LPMA, VECC and SEC noting that in its view nothing had changed since the Panhandle Project leave to construct decision. CCC further submitted that there were significant changes to the Union system and fuel sources since the last cost allocation. Accordingly, other changes to the OEB's 2013 cost allocation methodology will likely have to be made, and to focus on one item for ultimate correction in 2018 rates would be unfair.

OEB Staff was opposed to the relief sought by IGUA. While regulatory practice is to try to avoid undue subsidies where practical, even in an annual cost of service environment cross subsidies can arise that are unavoidable. This is particularly the case in an IRM regime where rates are decoupled from costs. Those costs and their cost drivers may change within the IRM term without triggering a change in rates, other than a mechanistic update. OEB Staff submitted that while interim rates are permissible, the OEB does try to avoid retrospective rate adjustments where possible.

Energy Probe and CME took no position on the proper cost allocation of the Panhandle Reinforcement Project.

BOMA opposed IGUA's proposal. It noted that changes to the cost allocation methodology during the term of an IRM goes against the integrity of the IRM regime. Further, the adoption of interim rates will provide a retrospective adjustments that BOMA's constituents and their customers will have difficulty accommodating in the course of their business relationships. BOMA also argued that any change to the cost allocation methodology must look at all the changes to the system and not just the incremental costs of this project.

Union submitted that for large volume T2, C1, and M16 customers the existing cost allocation methodology does not reflect their usage of the system, and they are being burdened with costs associated with a project whose need they did not drive. Union indicated that it intended to bring forward a proposal to address the allocation of Panhandle project costs in its 2019 rates application but did not propose to do a full cost allocation study, examining the allocation of costs to rate classes across the entire Union system. Union characterized the IGUA proposal as an indirect attack upon the EB-2016-0186 decision, and the OEB has been clear that the cost allocation issue should be put off until 2019. Union also opposed the use of the Panhandle Deferral Account to deal with allocation issues.

IGUA, in its reply, reiterated that this is a 2018 rates case and the terms of the settlement agreement contemplated that the parties could present argument on this issue. IGUA now seeks relief notwithstanding that the term of the IRM has a year to run.

IGUA argued that the only prejudice to the opposing parties associated with the interim rate remedy it sought was the fact that their constituents might actually have to pay the costs for the facilities built to serve them. IGUA submitted that there was an inequity pending in the determination of 2018 rates in that the application of existing cost allocation methodology would result in an additional $4.142 million paid by certain classes of customers for benefits enjoyed by other customer rate classes

Findings

The OEB will not provide for interim rates associated with Panhandle Project costs. The issue of the allocation of these costs on a going-forward basis to Union rate classes will be dealt with in Union's 2019 rates proceeding as provided by the OEB decision in the Panhandle leave to construct decision.

As IGUA emphasizes, this is a rates proceeding, albeit one that is setting rates for the final year of an IRM term. IGUA is not proposing a change to the cost allocation model for the rates collected for Panhandle Reinforcement Project costs for the 2018 IRM term at this time. IGUA instead urged that the use of the existing cost allocation methodology to devise 2018 rates to collect for the Panhandle Reinforcement Project costs presents an inequity that must be corrected retrospectively when the allocation of those costs are made in Union's proposed 2019 rates proceeding.

The OEB is of the view that any change to the existing cost allocation model should be done with the assistance of a comprehensive system-wide full cost allocation study. Cost allocation is a zero sum exercise. A full study ensures that all changes to facilities, operations and use in the transmission system since the development of the previous cost allocation model are recognized across all customer classes. This form of study provides that positive and negative changes in costs throughout the system are accounted for. A finding that current rates are inequitable because of the underlying allocation of costs for one project could introduce other inequalities by an incomplete analysis of the changing cost impacts on customers. Equitable cost causality is only possible with a full study. The OEB will not vary the Panhandle leave to construct decision that declined to change the cost allocation methodology for Panhandle Project costs and directed that any change should be considered in the next Union rates proceeding. Consistency in OEB decisions is important to regulatory clarity and predictability.

TAB F

Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2017-0306 AND EB-2017-0307

UNION GAS LIMITED
AND
ENBRIDGE GAS DISTRIBUTION INC.

Enbridge Gas Distribution Inc. and Union Gas Limited Application for Amalgamation and Rate-Setting Mechanism

BEFORE: **Lynne Anderson**
Presiding Member

Christine Long
Vice-Chair and Member

Cathy Spoel
Member

August 30, 2018

Amended on September 17, 2018

drivers of the over-earnings are and whether they will be sustainable during the deferred rebasing period. Furthermore, a requirement to rebase certain elements upon an amalgamation would be contrary to the purpose of a deferred rebasing period.

5.9 Cost Allocation and Rate Design

Cost Allocation

The applicants have not proposed any changes to cost allocation as part of this application. However, at the hearing, the applicants noted that they intend to propose cost allocation changes to the Panhandle and St. Clair system in the next rate application.

OEB staff argued that discrete cost allocation changes were not appropriate in the absence of a comprehensive cost allocation study. Intervenors such as OGVG, LPMA and CCC agreed. OGVG noted that the OEB has repeatedly rejected requests to consider cost allocation changes for isolated projects outside of a comprehensive system-wide cost allocation study.[60]

APPrO, Kitchener and IGUA submitted that Union Gas should be directed to undertake a new cost allocation study immediately to resolve known issues including transportation rates and the over-allocation of costs to power generators and other large customers as a result of the Panhandle Reinforcement project. These intervenors argued that it was unacceptable that significant cost allocation inequities be allowed to continue for another ten years. They noted that the OEB has stated its expectation that these costs would be addressed prior to Union Gas entering into another Price Cap IR in 2019.

SEC argued that cost allocation and rate design issues warrant the applicants filing for early rebasing.

In reply, the applicants reiterated the commitment to complete a cost allocation study for each of the years 2022 and 2026 using OEB-approved methodologies. Each of the cost allocation studies would be subject to a consultative process with intervenors. The applicants noted that it expects Amalco to be kept whole with respect to its revenue forecast for any prospective shifting of costs between rate classes as a result of the cost allocation study.[61]

[60] OGVG submission, page 13, Decision in EB-2016-0186 and EB-2017-0087.
[61] Reply submission, page 23.

TransCanada raised a cost allocation/rate design issue that impacts its C1 rate. In the Union Gas proceeding to modify the C1 rate schedule, the OEB approved the C1 Dawn to Dawn-TCPL transportation rate based on Dawn transmission compression related costs and recovery of costs associated with the capital investment.[62] The OEB approved the two-part rate design outlined above as well as Union Gas' request to recover the entire capital costs over a five-year term matching TransCanada's initial underlying contract. The contract is up for renewal at the end of October 2018 and TransCanada submitted that the specific assets are fully depreciated and the rate should be significantly lower than currently charged. TransCanada noted that Union Gas is currently recovering $547,000 of capital-related costs in rates that is already recovered. TransCanada submitted that the remedy to the situation is simple and does not require a change in cost allocation. TransCanada submitted that the OEB could reduce the revenue requirement of the C1 Dawn to Dawn TCPL service and this would not have any consequences for other shippers as the asset is fully depreciated. Union Gas' two-part rate design further facilitates the removal of costs from the Amalco revenue requirement.[63]

OEB Findings

Amalco is expected to prepare and file a comprehensive cost allocation proposal to be filed with its next rebasing application following the five year deferred rebasing period.

However, the OEB is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair systems. The OEB therefore requires Amalco to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation to take into account the following projects: Panhandle Reinforcement, Dawn-Parkway expansion including Parkway West, Brantford-Kirkwall/Parkway D and the Hagar Liquefaction Plant. This should also include a proposal for addressing TransCanada's C1 Dawn to Dawn TCPL service. The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.

[62] EB-2010-0207
[63] TCPL submission, pages 1 and 2.

TAB G

SUPREME COURT OF CANADA

CITATION: Canada (Minister of Citizenship and Immigration) *v.* Vavilov, 2019 SCC 65

APPEAL HEARD: December 4, 5, 6, 2018
JUDGMENT RENDERED: December 19, 2019
DOCKET: 37748

BETWEEN:

Minister of Citizenship and Immigration
Appellant

and

Alexander Vavilov
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 197)	Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.
JOINT CONCURRING REASONS: (paras. 198 to 343)	Abella and Karakatsanis JJ.

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Canadian Bar Association,

Canadian Association of Refugee Lawyers,
Community & Legal Aid Services Programme,
Association québécoise des avocats et avocates en droit de l'immigration and
First Nations Child & Family Caring Society of Canada *Interveners*

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was

representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. 29, s. 3(2)(a).

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

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

dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

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

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

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

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

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

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the

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

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's

jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance

to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

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

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

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

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would

have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

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

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and

legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and

elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

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

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

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized

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

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for

applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of

judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and

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

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and

immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

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

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for

deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to

administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

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

de novo review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional

circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling.

The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision. Structuring reasonableness review in this fashion

effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court

evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may

legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

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

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

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

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Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

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Laura Bowman and *Bronwyn Roe*, for the intervener Ecojustice Canada Society.

David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

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Adam Goldenberg, for the intervener Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

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The following is the judgment delivered by

THE CHIEF JUSTICE AND MOLDAVER, GASCON, CÔTÉ, BROWN, ROWE AND MARTIN JJ. —

[1] This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to

maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

[3] We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

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

[4] Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision

making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

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

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

[7] The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Dunsmuir*, at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean*, at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping*

Centres Ltd., 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 32; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 ("*CHRC*"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527.

[8] In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

[9] The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v.*

Atomic Energy of Canada Ltd., 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

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

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

administration and social security entitlements to labour relations, securities regulation and energy policy.

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

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

[14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a

culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

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

II. Determining the Applicable Standard of Review

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

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

[18] Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to

carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 24-27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57 and 129-31, 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 43-44; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 849-50.

[19] On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), which this Court endorsed in *Craig*, at para. 26:

> No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[20] Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig*, at paras. 28-30; *Henry*, at paras. 45-47; *Fraser*, at para. 135 (per Rothstein J., concurring in the result); *Bernard*, at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty

and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 528; *Bernard*, at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law": *Bernard*, at p. 858. These considerations apply here.

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

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

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach

can generate uncertainty and endless litigation concerning the standard of review." While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

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

A. *Presumption That Reasonableness Is the Applicable Standard*

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

[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now

appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

[26] Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.*, at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

[27] In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.*, at p. 236; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92; *Canada (Director of Investigation and Research) v.*

Southam Inc., [1997] 1 S.C.R. 748, at paras. 50-53; *Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Dunsmuir*, at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach, which was first set out in *Bibeault*, a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 28-29; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at paras. 28-32; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 50.

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

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

[30] While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in

order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

[31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This

consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

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

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

[33] This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker.

Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

(1) Legislated Standards of Review

[34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C.

Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

(2) Statutory Appeal Mechanisms

[36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court.

This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[38] We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful

consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig*, at para. 27. Our conclusion is based on the following considerations.

[39] First, there has been significant judicial and academic criticism of this Court's recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 244; the Hon. J.T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27, at p. 33; Daly, at pp. 541-42; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, at paras. 36-46; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311, at paras. 190-92, per Nadon J.A., concurring, and at 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, at paras. 250, 255-64 and 274-302 (CanLII), per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paras. 9-14 (CanLII). These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-

dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

[40] This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig*, at para. 29; *R. v. Robinson*, [1996] 1 S.C.R. 683, at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa*, at para. 87, per Rothstein J., concurring in the result.

[41] Second, there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former "pragmatic and functional" approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal

was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., *Pezim*, at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan*, at paras. 30-31; *Dr. Q*, at para. 27; *Mattel*, at paras. 26-27; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 7.

[42] The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim*. In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities*, at paras. 9-19; *Monsanto*, at paras. 6-16.

[43] Yet as, in *Dunsmuir*, *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

[44] More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further

support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.

[45] That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[46] Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative

expertise — what it called the "specialization of duties" principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

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

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

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

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

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

[51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and

determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

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

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

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

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

(1) Constitutional Questions

[55] Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in

reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

[56] The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

[57] Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that

an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

(2) General Questions of Law of Central Importance to the Legal System as a Whole

[58] In *Dunsmuir*, a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

[59] As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, para. 60. In these cases, correctness

review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 20; *Canadian National Railway*, at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 17; *Saguenay*, at para. 51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary*, at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

[60] This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an

administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)*, at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

[61] We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 66; *McLean*, at para. 28; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per

Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean*, at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*, at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*, at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

[62] In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies

[63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a

comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

[64] Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

D. *A Note Regarding Jurisdictional Questions*

[65] We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or

vires). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

[66] As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated

power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, **[2017] 1 S.C.R. 360**; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

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

or "narrowly" jurisdictional issue and without having to apply the correctness standard.

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

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

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

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

[70] However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be

understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

[71] The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the

identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level — such that a statute comes to mean, simultaneously, both "yes" and "no" — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

[72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and require a court to step in is not obvious. Given these practical

difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

III. Performing Reasonableness Review

[73] This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

[74] In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": *amici curiae* factum, at para. 12.

[75] We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness

review considers all relevant circumstances in order to determine whether the applicant has met their onus.

A. *Procedural Fairness and Substantive Review*

[76] Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review.

[77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74‑75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the

process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

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

[79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate

that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

[80] The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment*: *Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.

[81] Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3

S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

B. *Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*

[82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning

process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

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

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

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

[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

C. *Reasonableness Is a Single Standard That Accounts for Context*

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy"

on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, **[2012] 1 S.C.R. 364,** at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, **[2018] 2 S.C.R. 293,** at para. 53.

[90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one

decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

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

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

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

not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

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

[94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency.

Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

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

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

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

[97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn . . . .

[98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a

decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

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

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

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

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

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

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis,

inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation

to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

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

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

[106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context.

They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

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

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins*

de Jéhovah de St-Jérôme-Lafontaine, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

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

identifies one of the obvious and necessary constraints imposed on administrative decision makers.

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

(b) *Other Statutory or Common Law*

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the

same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without

adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[114] We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with . . . the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

(c) *Principles of Statutory Interpretation*

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

or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

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

[117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading

the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision

maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

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

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their

reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

[123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision

maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

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

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must

be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

(e) *Submissions of the Parties*

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

[128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however

subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

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

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

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this

sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

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

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

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

[135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable

among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. *Review in the Absence of Reasons*

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

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the

record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

[139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of

elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

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

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

[142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada*

(Fisheries and Oceans), 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

IV. Role of Prior Jurisprudence

[143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases —including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

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

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

V. Mr. Vavilov's Application for Judicial Review

[146] The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of

the *Citizenship Act* and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

A. *Facts*

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

[148] Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and

worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

[149] Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

[150] Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his

surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

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

B. *Procedural History*

(1) Registrar's Decision

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

a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.

b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.

c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".

d) Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent

residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

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

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

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

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

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

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

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

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

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

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

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

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

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

[162] The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children

of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

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

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

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

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

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

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

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

C. *Analysis*

(1) Standard of Review

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

[170] When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the

Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

(2) Review for Reasonableness

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

[172] In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government

representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

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

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

[174] The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*. Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14,

1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

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

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

> certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

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

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

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

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

> The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.
>
> Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in

> mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.
>
> (A.R., vol. IV, at pp. 449-50)

[179] In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L. R. (3d) 67, a case which was referred to in the analyst's report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

> Of particular interest are the special rules relating to the jus soli, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reasons of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'
>
> In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'.

> Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Emphasis deleted.]
>
> (Brownlie, at pp. 392-93).

[180] Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the *Citizenship Act* was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as "conform[ing] to international custom" and as having been drafted with the intention of "exclud[ing] children born in Canada to diplomats from becoming Canadian citizens": Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, "a number of other people would be affected such as those working for large foreign corporations": *ibid*. Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

[181] In attempting to distinguish the meaning of the phrase "other representative or employee in Canada of a foreign government" from that of the term "diplomatic or consular officer", the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov's submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

[182] It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at para. 70; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53- 54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of

compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

(c) *Jurisprudence Interpreting Section 3(2) of the Citizenship Act*

[183] Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the *Citizenship Act* in a footnote, she dismissed them as being irrelevant on the basis that they related only to "individuals whose parents maintained diplomatic status in Canada at the time of their birth". But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov's case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi*; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; and *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 169 — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

[184] In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which

Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

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

[185] The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi*, at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an "extraordinary array of privileges under the *Foreign Missions and International Organizations Act*": *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of the

Charter, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

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

[187] *Hitti*, the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the

applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation Act*, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

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

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

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

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

[190] In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged . . . to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

[191] Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court

Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, in which Iacobucci J., writing for this Court, stated: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship": para. 68. This was reiterated in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

[192] It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of

citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

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

D. *Conclusion*

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

[195] As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted

diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

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

E. *Disposition*

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

The following are the reasons delivered by

ABELLA AND KARAKATSANIS JJ. —

[198] Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

[199] Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to

provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation's evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

[200] We support the majority's decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of "true questions of jurisdiction". These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

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

The Evolution of Canadian Administrative Law

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

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

[204] The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal

backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts — but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 *Can. Bar Rev.* 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour/Le Travail* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

[205] Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around "reasonableness" and "correctness", and determining when each standard applies. On the one hand, "reasonableness" review expects courts to defer to decisions by specialized decision-makers that "are defensible in respect of the facts and law"; on the other, "correctness" review allows courts to substitute their own

opinions for those of the initial decision-maker (*Dunsmuir*, at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

[206] The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute "law" (Kevin M. Stack, "Overcoming Dicey in Administrative Law" (2018), 68 *U.T.L.J.* 293, at p. 294).

[207] The canonical example of Dicey's approach at work is the House of Lords' decision in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, the judicial progenitor of "jurisdictional error". *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors"

capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

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

[208] The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. These cases "took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal", and in each case, "th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life*, for example, this

Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell*, this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the *Ontario Human Rights Code, 1961-62*, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

[209] As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service Alliance*, at p. 650; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R.A. MacDonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

[210] In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the "jurisdictional error" model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir*, at para. 35; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 45; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, at para. 31). The Court instead endorsed an approach that respected the legislature's decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could "bristl[e] with ambiguities" and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.*, the decision was protected by a privative clause (pp. 230 and 234-36).

[211] By championing "curial deference" to administrative bodies, *C.U.P.E.* embraced "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 800). As one scholar has observed:

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

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

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

[214] In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *U.E.S.*,

Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, the Court introduced the "pragmatic and functional" approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal's existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator "intend[ed] the question to be within the jurisdiction conferred on the tribunal" (p. 1087; see also p. 1088). If so, the tribunal's decision could only be set aside if it was "patently unreasonable" (p. 1086).

[215] Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers*, Wilson J. noted that part of the process of moving away from Dicey's framework and towards a more sophisticated understanding of the role of administrative tribunals:

> . . . has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

[216] By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision . . . [e]ven where the tribunal's enabling statute provides explicitly for appellate review" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be "the most important" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50).

[217] Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise" (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591; see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46). Critically, the Court's willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

[218] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

[219] Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paras. 21 and 29-34; *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, at para. 45; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at paras. 88-92 and 100).

[220] Next came *Dunsmuir*, which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court's administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its "home" statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

[221] Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that "deference requires respect for the legislative

choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para. 49). They noted that "in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (para. 49, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93).

[222] Post-*Dunsmuir*, this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see *Khosa*, at para. 25; *R. v. Conway*, [2010] 1 S.C.R. 765, at para. 53; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, at paras. 30-33). Drawing on the concept of specialized expertise, the Court's post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker's interpretation of its home or closely-related statutes (see *Alberta Teachers' Association*, at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise . . . (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy*

> *Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

[223] And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, the majority recognized:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer . . . . [E]xpertise is something that inheres in a tribunal itself as an institution: ". . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions". [Citation omitted; para. 33.]

[224] The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

[225] As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v.*

Bell Aliant Regional Communications, [2009] 2 S.C.R. 764, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219, and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80, the Court applied the reasonableness standard without even *referring* to the presence of an appeal clause. When appeal clauses *were* discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

[226] In *Khosa*, Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language . . . a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

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

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

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

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

> clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

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

The Majority's Reasons

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

[231] In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

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

[232] Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, at para. 53). Specialization and

expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan*, at para. 36; *Dr. Q* at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

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

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-

> trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.
>
> ("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

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

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

[235] Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to

legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, at para. 13; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 35; *Mouvement laïque*, at para. 46; *Khosa*, at para. 25; *Edmonton East*, at para. 33).

[236] Although the majority's approach extolls respect for the legislature's "institutional design choices", it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

[237] Nor are we persuaded by the majority's claim that "if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not". Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

[238] We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The

theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on "the reality that . . . those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Khosa*, at para. 25; see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, at para. 53; *Edmonton East*, at para. 33).

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

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

[241] The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law"

had to be "reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, at para. 31, per Abella J.).

[242] Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

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

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

[244] The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room . . . for

both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 *U.B.C. L. Rev.* 443, at p. 483). We would leave *Dunsmuir*'s description of this category undisturbed.[1]

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

[1] Other than one of the two *amici*, no one asked us to modify this category.

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

[247] The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

[248] In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no

principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect.[2]

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

[250] Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done.[3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, that, absent exceptional circumstances, the existence of a

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[2] The "constitutional concerns" cited by the majority are no answer to this dilemma — nothing in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 *Rev. Const. Stud.* 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

[3] See *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

statutory right of appeal does not displace the presumption that the standard of reasonableness applies.[4] The majority, however, has inexplicably chosen the template proposed by the *amici*,[5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

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

[4] The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

[5] Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

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

[253] The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa*, at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

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

[255] *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Canada v. Craig*, [2012] 2 S.C.R. 489, the case about horizontal *stare decisis* on which the majority relies:

> The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).
>
> Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled . . . .*
>
> Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:
>
> > No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

[256] Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a "special justification", which must be over and above the belief that a prior case was wrongly decided (*Kimble v. Marvel Entertainment, LLC.*, 135 S. Ct. 2401 (2015), at p. 2409; see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), at p. 266; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

[257] Similarly, the House of Lords "require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it" (*Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708, at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617, at para. 19; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, at para. 7; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897, at paras. 22-23).

[258] New Zealand's Supreme Court views "caution, often considerable caution" as the "touchstone" of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent "merely because, if the matter were being decided afresh, the Court might take a different view" (*Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

[259] Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (*Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

[260] The virtues of horizontal *stare decisis* are widely recognized. The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Kimble*, at p. 2409, citing *Payne v. Tennessee*, 501 U.S. 808 (1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 38; *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), at p. 798; *Kimble*, at p. 2409; *Kisor*, at p. 2422; see also *Camps Bay*, at pp. 55-56; Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1, at p. 28; Lewis F. Powell, Jr., "Stare Decisis and Judicial Restraint" (1990), 47 *Wash. & Lee L. Rev.* 281, at p. 288).

[261] Respect for precedent also safeguards this Court's institutional legitimacy. The precedential value of a judgment of this Court does not "expire with the tenure of the particular panel of judges that decided it" (*Plourde v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465, at para. 13). American cases have stressed similar themes:

> There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.
>
> (*Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992), at p. 866; see also *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981), at p. 153, per Stevens J., concurring.)

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

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

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

[264] The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

[265] The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court

in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa*, at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque*, at para. 38; *Edmonton East*, at paras. 27-31; see also *McLean*, at para. 21).

[266] Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer*, at para. 22; *Casey*, at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance" (*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble*:

> . . . an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." [Citation omitted; p. 2409.]

[267] But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim*; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents*

immobiliers du Québec v. Proprio Direct inc., [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678; *McLean*; *Bell Canada (2009)*; *ATCO Gas*; *Mouvement laïque*; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis and to "home statute" deference (*C.U.P.E.*; *National Corn Growers*; *Domtar Inc.*; *Bradco Construction*; *Southam*; *Pushpanathan*; *Alberta Teachers' Association*; *Canadian Human Rights Commission*, among many others).

[268] Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court's strong reluctance to overturn precedents that "represen[t] the considered views of firm majorities" (*Craig*, at para. 24; *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 57; see also *Nishi v. Rascal Trucking Ltd.*, [2013] 2 S.C.R. 438, at paras. 23-24), or to overrule decisions of a "recent vintage" (*Fraser*, at para. 57; see also *Nishi*, at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a 34-year-old precedent; *R. v. Henry*, [2005] 3 S.C.R. 609, overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

[269] The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an

administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean*, for example, this Court acknowledged that a limitations period in British Columbia's *Securities Act*[6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

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

[271] Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally

[6] R.S.B.C. 1996, c. 418, s. 159

directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our past decisions is even less compelling (*Binus v. The Queen*, [1967] S.C.R. 594, at p. 601; see also *Kimble*, at p. 2409; *Kisor*, at pp. 2422-23; *Bilski v. Kappos, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010), at pp. 601-2).

[272] Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor*. There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (*Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by lower courts thousands of times (p. 2422).

She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

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

[273] In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew

Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 *U.N.B.L.J.* 87; The Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67, at p. 79; The Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67).

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

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.

> Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]
>
> (paras. 65-66, citing *Baker v. Campbell*, [1983] HCA 39, 153 C.L.R. 52, at pp. 102-3)

[275] This Court, in fact, has been clear that "criticism of a judgment is not sufficient to justify overruling it" (*Fraser*, at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, [2016] 1 S.C.R. 631, or even *Housen*, which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at para. 76; see also Paul M. Perell, "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 *Can. Bus. L.J.* 434, at p. 436).

[276] To justify circumventing this Court's jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect,

is wrong. Ever since *Bell Canada (1989)* and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at paras. 27-33; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

[277] For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

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

Going Forward

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

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

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

> . . . it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]
>
> (See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, at paras. 14-16, per Lebel J., and 73-74, per Binnie J., concurring.)

[281] Lord Bingham's comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

[282] So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and

explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir*. These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures' court to modify the standards of review if they wish.

[283] To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

[284] We also acknowledge that this Court should offer additional direction on conducting reasonableness review.[7] We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

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

[286] We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart

[7] Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer"[8] to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

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

[288] First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay

[8] Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

"respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

[289] Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

[290] This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

> . . . When deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been . . . . The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]
>
> (See also *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251, at para. 22 (CanLII), per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in

Administrative Law" (2017), 68 *U.N.B.L.J.* 68, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

[291] Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

[292] Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir*, at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18). Administrative

law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 158 (dissenting in part, but not on this point):

> . . . not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate . . . .

[293] Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association*, at para. 47; *Wilson*, at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive

— but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

[294] Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail.

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

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

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[9] Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43.

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

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

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

[300] When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it

affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

[301] Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405, at para. 3; *Newfoundland Nurses*, at para. 16, citing *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake*, at para. 37; *Delta Air Lines Inc. v. Lukács*, [2018] 1 S.C.R. 6, at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association*, at paras. 53 and 56).

[302] The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan,

at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker*, at para. 44), which may not be conducive to the production of "archival" reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123).

[303] Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71, at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history (*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are

"consistent with the process of reasoning" applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" (*Lukács*, at para. 24).

[304] The "adequacy" of reasons, in other words, is not "a stand-alone basis for quashing a decision" (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, at para. 44; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

[305] In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative

decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

[306] We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

[307] We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason*, at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at

pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

[308] Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

[309] Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are

statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

[310] Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff,* S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

[311] Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by

Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

[312] We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293, at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

[313] In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

Application to Mr. Vavilov

[314] Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[315] The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

[316] The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

[317] Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

[318] In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's

passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

[319] From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

[320] On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

[321] The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other

representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

[322] The Federal Court ([2016] 2 F.C.R. 39) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

[323] The Federal Court of Appeal ([2018] 3 F.C.R. 75) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

[324] As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's

interpretation of the Act in this case. As such, the standard of review is reasonableness.

[325] The following provisions of the *Citizenship Act* are relevant to this appeal:

> **Persons who are citizens**
>
> **3 (1)** Subject to this Act, a person is a citizen if
>
> > **(a)** the person was born in Canada after February 14, 1977;
> >
> > . . .
>
> **Not applicable to children of foreign diplomats, etc.**
>
> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> > **(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
> >
> > **(b)** an employee in the service of a person referred to in paragraph (a); or
> >
> > **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

[326] The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

[327] In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

[328] The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

[329] The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19:

Not applicable to children of foreign diplomats, etc.

(3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent

(*a*) is an alien who has not been lawfully admitted to Canada for permanent residence; and

(*b*) is

(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,

(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or

(iii) an employee in the service of a person referred to in subparagraph (i).

[330] The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic mission, the analyst determined "it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

[331] Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

[332] In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

[333] In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

[334] First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA"*). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, Sched. I to the *FMIOA*, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the *FMIOA*, which deal with diplomatic privileges and immunities. He submitted

that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

[335] Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

[336] Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Town) v. Quebec Commission des droits de la personne*, [1988] 2 S.C.R. 279, at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL) (S.C.J.); *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. C.J.); *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)* (2007), 64 Imm. L.R. (3d) 67 (F.C.)).

[337] The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote

that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

[338] The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

[339] The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

[340] In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

[341] By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2)

that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

[342] Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

[343] We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

Appeal dismissed with costs throughout.

Solicitor for the appellant: Attorney General of Canada, Toronto.

Solicitors for the respondent: Jackman Nazami & Associates, Toronto; University of Windsor — Faculty of Law, Windsor.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

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

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Canadian Council for Refugees: The Law Office of Jamie Liew, Ottawa.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission: Ontario Securities Commission, Toronto.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Canada Society, Toronto.

Solicitor for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest

Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick): Workplace Safety and Insurance Appeals Tribunal, Toronto.

Solicitors for the intervener the British Columbia International Commercial Arbitration Centre Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Council of Canadian Administrative Tribunals: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec: Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto; Rae Christen Jeffries, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

Solicitors for the intervener Queen's Prison Law Clinic: Stockwoods, Toronto.

Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Parkdale Community Legal Services: Parkdale Community Legal Services, Toronto.

Solicitors for the intervener the Cambridge Comparative Administrative Law Forum: Cambridge University — The Faculty of Law, Cambridge, U.K.; White & Case, Washington, D.C.

Solicitors for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Caza Saikaley, Ottawa.

Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Centre for Criminology & Sociolegal Studies — University of Toronto, Toronto; Legal Aid Ontario, Toronto.

Solicitor for the intervener the Community & Legal Aid Services Programme: Community & Legal Aid Services Programme, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Nguyen, Tutunjian & Cliche-Rivard, Montréal; Hadekel Shams, Montréal.

Solicitors for the intervener the First Nations Child & Family Caring Society of Canada: Stikeman Elliott, Ottawa.

TAB H

2018 FC 1118, 2018 CF 1118
Federal Court

Honey Fashions Ltd. v. Canada (Border Services Agency)

2018 CarswellNat 6957, 2018 CarswellNat 8641, 2018 FC 1118, 2018 CF 1118, 299 A.C.W.S. (3d) 95

HONEY FASHIONS LTD (Applicant) and PRESIDENT CANADA BORDER SERVICES AGENCY AND THE ATTORNEY GENERAL OF CANADA (Respondents)

HONEY FASHIONS LTD (Applicant) and PRESIDENT CANADA BORDER SERVICES AGENCY AND THE ATTORNEY GENERAL OF CANADA (Respondents)

Russel W. Zinn J.

Heard: September 12, 2018
Judgment: November 7, 2018
Docket: T-1577-17, T-1763-17

Counsel: Peter Kirby, Alexandra Logvin, for Applicant
Stéphanie Lauriault, for Respondents

Subject: Customs; International; Public

Related Abridgment Classifications

International trade and customs
V Payment of duty
V.4 Recovery of duty by payor
V.4.a Drawback of customs duty

Headnote

International trade and customs --- Payment of duty — Recovery of duty by payor — Drawback of customs duty
Federal government established Textile and Apparel Remission Program that provided for reduced customs duties for textile and apparel manufacturing businesses — Eligible manufacturers were essentially entitled to drawback of portion of customs duties paid, though practice evolved that allowed program to be used by partnered importers and non-importers in manner not initially intended — Canadian Border Services Agency decided to review its administration of program and suspended processing of all refund claims pending review — Importer was eligible manufacturer who sometimes claimed, pursuant to accepted practice, to be importer of goods imported by others and whose drawback claims were held in abeyance — Governor-in-Council enacted Textiles and Apparel Remission Order, 2014 to clarify program, which led to importer's prior claims being allowed but two subsequent claims relating to 2011 and 2012 being rejected — Importer brought applications for judicial review — Applications granted; matters remitted for redetermination — Agency had jurisdiction to make decisions as to identity of importer of goods into Canada in accordance with s. 5(1)(a) of Canada Border Services Agency Act — Nonetheless, agency's decisions were both unfair and unreasonable — Decisions were unfair as administrative process followed was contrary to legitimate expectations of importer based on past clear and consistent approach of agency until order was enacted — Importer had not even had notice during review process that practice was considered to be unacceptable — Decisions were unreasonable as they were arbitrary, being contrary to long-standing past practice of agency, being made without any explanation for change in position, and being made without reference to agency's prior practice or offering explanation why that prior practice and interpretation of relevant orders was being changed.

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Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817, 1999 SCC 699 (S.C.C.) — considered

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Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles) (1993), 15 Admin. L.R. (2d) 1, 49 C.C.E.L. 1, 154 N.R. 104, (sub nom. *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles))* [1993] 2 S.C.R. 756, (sub nom. *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles))* 55 Q.A.C. 241, (sub nom. *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionnelles))* 105 D.L.R. (4th) 385, 1993 CarswellQue 145, 1993 CarswellQue 159, [1993] C.A.L.P. 613 (S.C.C.) — referred to

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Statutes considered:

Canada Border Services Agency Act, S.C. 2005, c. 38
s. 2 “program legislation” — considered

s. 5(1)(a) — considered

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Generally — referred to

s. 164(1)(e) — considered

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Textiles and Apparel Remission Order, 2014, SOR/2014-278

Generally — referred to

APPLICATIONS by importer for judicial review of two decisions of Canadian Border Services Agency rejecting claims for drawback of duties under Textile and Apparel Remission Program.

***Russel W. Zinn J.*:**

1 These are applications by Honey Fashions Ltd. [Honey Fashions] for judicial review of two decisions of the Canadian Border Services Agency [the CBSA] Trade Operations Division Manager, Gilles Cormier, rejecting claims for remission of duties under the *Textiles and Apparel Remission Order, 2014*, SOR/2014-278 [TARO 2014].

2 I find that the decisions under review are unfair and unreasonable and they must be set aside. They are unfair as the administrative process followed was contrary to the legitimate expectations of Honey Fashions based on the past clear and consistent approach of the CBSA. They are unreasonable as they are arbitrary, being contrary to the long-standing past practice of the CBSA, being made without any explanation for the change in position, and being made without reference to its prior practice, or offering an explanation why that prior practice and interpretation of the relevant orders was being changed.

3 The following sections dealing with the background to Canada’s Textile and Apparel Remission Program [TARO Program], and the background facts directly relevant to the two decisions under review are taken from the affidavits sworn by Bernie Tevel and Stephen Yanow filed by Honey Fashions, and the affidavit of Bradley Jablonski filed by the respondents.

4 Mr. Tevel is the President of Honey Fashions and has held that position since 1999. He provided evidence of the participation of Honey Fashions in the TARO Program, and the results of its various claims for remission prior to the decisions under review. Mr. Yanow is the President of Piccolo Mondo Ltd. which was a blouse manufacturer in Montréal, Québec. It was one of the first Canadian manufacturers to use the TARO Program. Mr. Yanow attests that he “quickly became an expert in the rules and requirements of the program” and as his company’s manufacturing business declined, he began “to focus on assisting other Canadian manufacturers to earn the benefits of the program.” He states that between 1998 and 2012, the main business of his company (using the business name Global Remissions), “was matching Canadian manufacturers who were eligible to participate in various textile and apparel remission orders with Canadian importers who imported qualifying goods.” Mr. Jablonski has been the manager of the Trade Incentives Unit, within the Trade and Anti-dumping Programs Directorate of the CBSA, since 2015. He states that he is responsible for “overall program management, national policy functional guidance and coordination relating to remission orders that the CBSA administers”.

The TARO Program

5 Goods imported into Canada are subject to customs duties and taxes; however, the Governor in Council may, by remission order, remit all or a portion of the customs duties. When a remission order is in effect goods will be imported subject to lower or no duties. When importers have paid duties on imported goods that are subject to a remission order they may subsequently claim a drawback or refund of duties paid. The claims under consideration relate to claims for drawback of duties paid.

6 In 1988, in an effort to assist Canada’s textile and apparel manufacturing businesses that were being negatively affected by low-priced imports, Canada established the TARO Program putting in place a series of remission orders. The various remission orders were recommended to the Governor in Council by the Minister of Finance whose department drafted the remission orders and is responsible for the policy underlying them. The administration of the remission orders put in place under the TARO Program is the responsibility of the CBSA.

7 Each of the remission orders contains a Schedule 1 listing the companies that are eligible manufacturers entitled to the benefit of the remission [Schedule 1 Manufacturer]. Initially, the remission orders provided that each of the Schedule 1 Manufacturer’s eligibility for remission was conditional on it producing a certain volume of goods in Canada. The *North American Free Trade Agreement* obligated Canada to eliminate performance-based measures and so Canada changed the remission orders by removing that performance-based condition. The remission orders were accordingly amended to establish a maximum remission amount based on the total amount of remission that had been received in 1995 by each company. Under these orders each qualified company had five years to claim remission after the goods were imported.

8 In 2010 the CBSA decided to review its administration of the TARO Program, and suspended the processing of all remission claims pending its Quality Assurance Review [QAR]. As a consequence, the claims of Honey Fashions for remission of duty on goods imported in 2006, 2007, 2008 and 2009 were held in abeyance.

9 Mr. Yanow described the impact of the TARO Program on Canadian textile and apparel manufacturers in the years prior to the QAR. He attests that an “unintended consequence of the design of the program was that it encouraged manufacturers to become importers” in order to take the benefit of the remission orders. Those that had no interest in becoming importers “began looking for ways to earn the benefits of the program as Canadian manufacturers without being obliged to start or expand an importing business.” In short, they looked for ways to obtain the remission of duties on goods that they had not imported or were not going to import.

10 Mr. Yanow, other manufacturers, and their association representatives met with officials of the Department of Finance to discuss how Schedule 1 Manufacturers in

Canada with no desire to become importers could take advantage of the TARO Program. He attests that together they agreed to a work-around. “Officials of the Department of Finance ruled that, under the various remission orders, eligible Canadian manufacturers could contract with Canadian importers to ensure that the benefits of the remission program would flow to the Canadian manufacturers.” Under this arrangement, what was required for a Canadian manufacturer listed on Schedule 1 to claim the benefit of the duty remission was that its name appear as the *importer of record* on the customs forms — it was not required that it be the actual purchaser of the goods. This, he says, is confirmed in an internal memo of April 26, 1993, authored by Dr. Patricia Close, Director of International Trade and Tariffs at the Department of Finance. This memo is significant to the issues in dispute and so is reproduced here in its entirety:

> **Issue**
>
> To review the extent of the practice known as “selling of entitlement” within the textile and apparel duty remission programs.
>
> **Background**
>
> The six textile and apparel remission Orders allow qualified manufacturers to import either fabric or apparel under remission based on the production and/or sourcing of either fabrics or apparel in Canada. The Orders were negotiated with industry after the FTA was announced and they address the consensus of the apparel industry at that time. The intent of the Orders was to allow Canadian textile and apparel manufacturers to rationalize their production by specializing in only a few lines while earning remission credits to import complimentary goods. This would allow Canadian apparel manufacturers to market a complete fashion line.
>
> The Orders allow manufacturers to import qualifying goods up to the amount of the remission entitlement earned; however, the Orders do not specify that the manufacturer has to own the goods imported [emphasis on the word “own” in original]. Nor does Customs legislation specify that the importer of record must be the owner of the imported goods.
>
> When the programs were implemented, Customs officials met with industry representatives to explain the benefits of the programs. One of the concerns that industry mentioned was that many of the manufacturers have never been importers of finished products and in order to receive the intended benefits they were being forced to import. Some industry representatives suggested that they could make deals with importers (in many cases, their customers) to import goods under the manufacturer’s entitlement. This suggestion was discussed with Finance and it was decided that manufacturers could do business in any manner they chose as long as the manufacturers had accumulated the eligible entitlement and that the manufacturer was the importer of record — any requirement beyond this would be administratively difficult to enforce. However, it was stressed to the manufacturers that they would still be responsible for any implications of goods they did not own (i.e. must repay duties on imports over entitlement).
>
> **Status**
>
> At a recent apparel and footwear SAGIT [Sectoral Advisory Group on International Trade], the Chairman, Jack Kivenko, brought up the issue. He was surprised when he was approached by a consultant who was offering services to broker his entitlements. Other members of the SAGIT noted to him that the selling of their remission entitlements was common practice and one which allowed them to benefit from the program when they didn’t need the import benefits. They asked that Kivenko’s derogatory comments be struck from the record.
>
> As a result of the SAGIT meeting, Customs has contacted their regional offices concerning the pervasiveness of the selling of remission entitlements. While the information they received was not complete or detailed, it appears that the practice is widespread throughout the industry sector. In Winnipeg, it seems that almost all participants (90%) in the program are either buying or selling entitlements. Originally the companies were only buying and selling entitlement locally but recently the companies involved are selling nationally. In Montréal, it is estimated that about 60% of the companies are engaging in this practice.
>
> The “remission broker” is a recent phenomenon. These are customs brokers or consultants who identify manufacturers who have not used all of their import entitlement. For a fee, they locate importers who are interested in buying the entitlement. Depending on how you look at it, they essentially provide a service to manufacturers to locate importers willing to purchase excess entitlement. In this way, the manufacturers will receive some of the remission benefit (in the form of cash) that they have earned but otherwise would not have used.
>
> **Assessment**
>
> Finance was apprised at the inception of the program about the possibility of selling of entitlement and, as it is currently taking place, the practice is in compliance with the conditions set out in the remission Orders and the Customs Act. (There is no requirement in the Orders that the importer of record be the owner of the goods imported. Manufacturers are simply acting as agents for third-party owners and paying a remitted duty - the benefit of which is passed on to the owner.) In fact, it could be argued that it is the marketplace at work.
>
> In the course of the NAFTA, we tried to negotiate some flexibility to make changes affecting the administration of the Orders, but ran up against a brick wall. The U.S. could react negatively to the Canadian producers selling the entitlements and the development of the “remission broker” makes it more likely that the U.S. could find out about the practices — given the fact that consultants are now involved in brokering the entitlements. On the other hand, the U.S. may already be aware of the practice and, because of benefits to their industry when Canadian companies import U.S. goods under the programs, may already be willing to turn a blind eye.
>
> It is important to note that the sale of remission entitlement directly benefits Canadian apparel producers who are currently unable to benefit from the Orders to the extent intended. (Program take-up is currently only about 50% due to, inter alia, technical difficulties with the Orders created, in large part, by unforeseen changes in the industry.) To prohibit this practice could, to a large extent, counteract our efforts to provide additional assistance to the apparel sector via the temporary waiver of the penalties in the Orders. It would also be vociferously opposed by almost all apparel producers. (In any event, the programs end by 1998.) Moreover, market practices would likely make it possible for manufacturers and prospective buyers of entitlement to work around any changes to the programs that would be designed to prevent the practice.
>
> In the circumstances, and since the U.S. has tied our hands at making even the most modest technical changes to the Orders (in case the proposed changes would increase the benefits to the producers), I would recommend that we instruct Customs to continue to monitor the situation, but otherwise lie low.
>
> If you’d like to discuss a more proactive role, please let me know.
>
> [additional emphasis added]

11 As was noted by counsel, these arrangements were so notorious that the CBSA gave them a name: “Partnering Agreements.”

12 Memorandum D8-11-7 *CBSA Policy on the Transfer of Entitlement Pursuant to the Textile and Apparel Remission Orders* outlines and explains how Schedule 1

Manufacturers may use Partnering Agreements to take full advantage of the remission entitlement. The relevant provisions of Memorandum D8-11-7 are as follows:

> **Partnering Agreements**
>
> 5. Subject to conditions, an eligible apparel manufacturer or eligible fabric producer (one who is named in the Schedule to the Order), may enter into a partnering agreement with another company in order to realize its full remission allocation in a given year. In this way the eligible company is the importer of record for the goods and the other company is the owner or consignee of the goods.
>
> **Accounting and Adjustment Requirements**
>
> 6. If goods that are subject to a partnering agreement and for which remission is or will be claimed have already been imported and accounted for in the name of the other company (i.e., the owner or purchaser), it will be necessary to amend the importer name before remission will be approved. In such cases, a name change request must be submitted in accordance with instructions set out in CBSA Memorandum D-17-2-3, *Importer Name/Account Number or Business Number Changes*.

13 Paragraph 5 makes it clear that a Schedule 1 Manufacturer need not be the owner of the goods and paragraph 6 makes it clear that it need not have been the importer. Under that paragraph, a party that has imported goods and paid the duty on the goods may subsequently be replaced as the importer of record by a Schedule 1 Manufacturer, by way of name change request, which will then be entitled to claim the remission under the TARO Program.

14 CBSA also accepted that a Schedule 1 Manufacturer's remission entitlement under the remission orders could be transferred on cessation of its business to another Schedule 1 Manufacturer. In this manner Honey Fashions, among others, increased its remission entitlement from that which was specifically given to it in the remission orders. In the QAR, CBSA determined that it ought not to have permitted manufacturers to increase their original entitlements in this manner and it proposed to restrict manufacturers to their original entitlement.

15 After consultation, and having determined that manufacturers had been acting in good faith in transferring remission entitlements, CBSA decided that it would not restrict Schedule 1 Manufacturers to their original entitlement. To address the situation the Department of Finance recommended to the Governor in Council that it enact TARO 2014. The Regulatory Impact Analysis Statement that accompanied TARO 2014 explained the error in accepting transfers was that of CBSA alone, and described the effect of TARO 2014 as follows: "Remission is available for goods for which an authorization for remission was issued before December 31, 2012, and which were imported into Canada during the period beginning January 1, 2008, and ending December 31, 2012."

16 The QAR also disclosed two other errors in the administration of the TARO Program by the CBSA. It is important when judging these applications to note that the practice of manufacturers and importers entering into contractual agreements whereby the manufacturer became the importer of record but not the owner of the goods, as described by Mr. Yanow and Dr. Close, was not identified as an error or something that the CBSA was required to address.

17 Mr. Tevel attests that Honey Fashions has always participated in the TARO Program and "ensured it received the full remission benefit it was entitled to" by becoming "the importer of record of goods that were previously imported by others." He attests that this was done in the following manner:

> Honey Fashions became the importer of record by filing a name change notification with the Canada Border Agency ("CBSA") confirming that, with the agreement of the original importer, it was becoming the importer of record of apparel that qualified for remission. Until our 2011 and 2012 applications, CBSA officials consistently accepted such name change notification to change the importer of record, and processed Honey Fashions' remission applications on the basis that Honey Fashions was the importer of record.
>
> [emphasis added]

18 As noted above, as a consequence of the QAR, the unprocessed claims of Honey Fashions were held in abeyance. Following that review and the passing of TARO 2014, these claims were processed.

19 One of the claims held in abeyance was the claim of Honey Fashions filed November 11, 2010, for $216,305.30 [the 2009 Claim]. That claim was accompanied with the request of Honey Fashions that it become the importer of record for the goods that had previously been imported by another. A number of letters accompanied the claim relating to the transactions listed in it. Each letter contained similar language, as follows:

> In compliance with Memorandum D 17-2-3, paragraph 10, kindly forward our letter to regional records room, for filing with accounting documents.

Importer name entered as:	863453767 RM 0001
	Reitmans Distribution Inc.
	250 Sauve Street West
	Montreal, Quebec
	H3L 1Z2
Should be:	102391109RM0001
	Honey Fashions Ltd
	1615 Louvain St. Quest
	Montreal, Quebec
	H4N 1G6

> Incorrect party has been named as importer of record and true importer is not [*sic*] entitled to conditions, exemptions, privileges, remission orders or licences, and both parties in this transaction consent to the change as per aforementioned Memorandum and formal notification by copy of this letter.

It appears to the Court that the inclusion of the word "not" is in error as it is not included in later submissions which track the language in section 13 of Memorandum D 17-2-3.

20 Paragraph 10 of Memorandum D17-2-3 referenced in the request letter provides as follows:

> Should an importer/broker/agent wish to notify the CBSA of an error in the importer name/account number or business number, a letter should be sent to the CBSA Trade Operations office in the region where the goods were released, explaining the reason for the change. When this letter is presented by a broker or an agent, it must indicate that a copy has been sent to the original importer of record. CBSA Trade Operations will forward the letter to the regional records room for filing with the accounting document. Note that the CBSA's automated system will not be updated to reflect the information contained in the letter.

21 After the QAR had been completed, by letter dated April 30, 2015, Gilles Cormier "approved and finalized" the 2009 Claim (as well as the others held in abeyance), and a payment in the amount claimed was sent to Honey Fashions.

22 The CBSA on July 16, 2015 advised Honey Fashions that in accordance with the *Outerwear Apparel Remission Order*, Honey Fashions was entitled to a refund of duties under the TARO Program for goods imported in 2011 and 2012, not exceeding a total of $137,025.00. Honey Fashions filed a claim for a drawback of duties for goods imported in 2011 in the amount of $66,427.17 [Claim 269503]. Gilles Cormier refused that claim, writing:

> This letter is to inform you that drawback claim no. 269503, in the requested amount of $66,427.17 and received in this office on May 13, 2016 has been refused.
>
> A request for a name change must be the result of an error of the importer or the Canadian Border Services Agency (CBSA) as described in Memorandum D17-2-3, Importer Name/Account Number or Business Number Change.
>
> The documents you have provided do not clearly establish that the name change is the result of an error of the importer or the Canada Border Services Agency or that the terms of Memorandum D17-2-3 have been met.

23 Honey Fashions submitted a revised claim for outerwear remission for 2011, asking that the claim be considered in light of additional submissions it was advancing. The revised claim was in the amount of $68,512.48 [Claim 270228]. The refusal decision dated September 6, 2017 was in language identical to that refusing Claim 269503. The decision refusing Claim 270228 is that under review in Docket T-1763-17.

24 The CBSA on July 18, 2015, advised Honey Fashions that in accordance with the *Blouses, Shirts and co-ordinates Remission Order*, Honey Fashions was entitled to a refund of duties under the TARO Program for goods imported in 2011 and 2012, not exceeding a total of $3,143,139.32. Honey Fashions filed six separate drawback claims with respect to goods imported in 2011 and 2012. These claims were consolidated into one [Claim 268618] totalling $3,002,642.79.

25 Included with Claim 268618 were letters identical to that reproduced at paragraph 18 above, save that the first line of the last paragraph omitted the word "not" and thus reads as follows:

> Incorrect party has been named as importer of record and true importer is entitled to conditions, exemptions, privileges, remission orders or licences, and both parties in this transaction consent to the change as per aforementioned Memorandum and formal notification by copy of this letter.

26 By letter dated August 12, 2015, from Mr. Gilles Cormier, Honey Fashions was informed that its claim was under review:

> This letter is to inform you that drawback claim no. 268618, in the requested amount of $3,002,642.79 and received in this office on July 14, 2015, is currently under review.
>
> Some of the goods claimed are not imported or duty paid by your company.
>
> Furthermore, a request for a name change must be the result of an error of the importer or the Canadian Border Services Agency (CBSA) as described in Memorandum D17-2-3, *Importer Name/Account Number or Business Number Change*.
>
> In order for the CBSA to conduct a further review for consideration of the name change, the following documentation is required:
>
> a. Documents (e.g. purchase orders, commercial invoices, cancelled cheques, fax transmissions, written correspondence, etc.) which clearly indicate the claimant's interest and the part played by the claimant in the import transaction;
>
> b. A letter from the importer of record, declaring involvement in the importation;
>
> c. A clear and complete explanation of why the party named as the importer on the original accounting document was so named, and why the importer/agent now believes that a second party is the true importer.

27 By letter dated February 4, 2016, Mr. Gilles Cormier advised Honey Fashions that Claim 268618 was refused for reasons identical to those provided when he refused Claim 269503, namely:

> The documents you have provided do not clearly establish that the name change is the result of an error of the importer or the Canada Border Services Agency or that the terms of Memorandum D17-2-3 have been met.

28 On December 23, 2016, Honey Fashions resubmitted the entire claim for $3,071,133.83 [Claim 270217] accompanied by submissions identical to those which it had provided previously in regard to Claim 269503. CBSA responded in a manner similar to that involving the other claim. By decision dated September 6, 2017, and in language identical to that relating to the rejection of claim 270228, Mr. Gilles Cormier refused Claim 270217. The decision rejecting Claim 270217 is the decision under review in Docket T-1577-17.

29 Mr. Tevel attests that the claims made for 2011 and 2012 (by way of change of importer of record name after importation) were done in the same manner as all previous claims that had been approved by CBSA:

> The name change procedure that Honey Fashions followed for 2011 and 2012 was precisely the same name change procedure we had followed, and CBSA had accepted, in previous remission claims, including those of 2007, 2008, and 2009. The claims for 2007 were processed under the previous orders, but the claims for 2008 and 2009 were processed under Taro 2014. Mr. Cormier's letter was the first indication that CBSA was about to reverse its previous position on name changes.
>
> [emphasis added]

Issues in Dispute

30 There are two issues that must be addressed:

1. What is the standard of review of the decision under review; and

2. On the basis of that standard, do the decisions withstand review?

Standard of Review

31 Honey Fashions submits the standard of review is correctness.

32 It points to *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) [*Dunsmuir*], wherein the Supreme Court of Canada at para 55 stated that questions of law of central importance to the legal system and outside the specialized area of expertise of the administrative decision-maker attract a correctness standard. The Supreme Court at para 59 of *Dunsmuir* also noted that "administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*."

33 Honey Fashions notes that while the *Customs Act* is within the CBSA's jurisdiction, it has no jurisdiction to determine who may or may not be the importer of goods. It says that Parliament has not given any jurisdiction to the CBSA in this regard and that the only limited jurisdiction it has assigned is to the Governor in Council through paragraph 164(1)(e) of the *Customs Act*, and this is only in regards to non-resident importers. Honey Fashions submits that in purporting to exercise an authority that has not been delegated to it, CBSA has made an error of law that is reviewable for correctness.

34 I agree with Honey Fashions that if the CBSA has no authority to decide whether or not one is an importer under the *Customs Act* and the remission orders, then the decisions under review cannot stand. However, for the reasons that follow, I find that it does have such authority and jurisdiction and its decision is subject to review on the standard of reasonableness.

35 Paragraph 5(1)(a) of the *Canada Border Services Agency Act*, SC 2005, c 38 stipulates that CBSA "is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation, by supporting the administration or enforcement, or both, as the case may be, of the program legislation." "Program legislation" pursuant to section 2, includes and any Act or instrument made under any Act or part thereof "under which duties or taxes collected and paid pursuant to the *Customs Act* are imposed."

36 On a plain reading, CBSA is responsible for the administration and enforcement of duties and tariffs arising under the *Customs Act* and remission orders. I agree with the respondents that in order for CBSA to carry out its "mandate to conduct a compliance verification, it inevitably needs to identify the importer who is subject to the *Customs Act*." As the Supreme Court of Canada observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.); at para 51: "[T]he powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislation."

37 Therefore, I find that the CBSA does have jurisdiction to make decisions as to the identity of the importer of goods into Canada, and it is required to do so as a part of its implied powers. As it is interpreting its home statute, it does so subject to a reasonableness review.

The CBSA Interpretation

38 Determination of the importer is relevant to the decisions under review which were made pursuant to TARO 2014, which provides as follows:

> 1. (1) Remission is granted to the companies set out in Schedule 1 of customs duties paid or payable under the *Customs Tariff* in respect of goods for which the Canada Border Services Agency, in error, issued authorizations for remission of customs duties in the course of its administration of the initial remission orders set out in column 1 of Schedule 2.
>
> (2) The amount of the remission granted to each company is calculated in accordance with the initial remission order under which the authorization for remission was issued.
>
> 2. The remission is granted to each company on the following conditions:
>
> (a) the goods were imported into Canada during the period beginning on January 1, 2008 and ending on December 31, 2012;
>
> (b) the authorization for remission was issued to the company on or before December 31, 2012; and
>
> (c) an application for the remission is received by the Canada Border Services Agency on or before the deadline set out in column 2 of Schedule 2 in respect of the initial remission order under which the authorization for remission was issued.

39 The initial remission orders relevant to the decisions under review are the *Outerwear Apparel Remission Order, 1998*, SOR/98-88 (regarding Claim 270228) and *Blouses, Shirts and Co-Ordinates Remission Order, 1998*, SOR/98-89 (regarding Claim 270217). Each order contains identical language relating to remission, as follows:

> • Re Claim 270228: "remission is hereby granted of the customs duties paid or payable under the *Customs Tariff*, to a manufacturer of outerwear apparel set out in the schedule in respect of outerwear apparel *imported into Canada by the manufacturer* ... [emphasis added]."
>
> • Re Claim 270217: "remission is hereby granted of the customs duties paid or payable under the *Customs Tariff* to a women's blouse, shirt or co-ordinated apparel manufacturer, set out in the schedule in respect of blouses, shirts or co-ordinated apparel *imported into Canada by the manufacturer* ... [emphasis added]."

40 It appears to the Court, and there is no suggestion to the contrary, that the claims for remission leading to the decisions under review meet all of the conditions for acceptance so long as the goods were "imported into Canada by the manufacturer." It is evident that had the name change request been positively acted upon by the CBSA, Honey Fashions would have become the importer of record, and thus would have "imported into Canada" the goods in question.

41 Therefore, the decision to deny Honey Fashions the remissions under the TARO Program stands or falls with the decision not to accept the name change to list

Honey Fashions as the importer of record.

42 I find that the decision not to accept the name change cannot stand for two reasons: first, it was made in breach of CBSA's duty of fairness, and second, it was arbitrary and thus unreasonable.

Legitimate Expectations

43 In its memoranda Honey Fashions submits that the decision of the CBSA not to accept it as the importer of record was contrary to many years of practice and was unfair:

> Mr. Cormier's decision to reject Honey Fashions' application for duty remission was founded on his refusal to permit a name change from the original importer to Honey Fashions.
>
> In refusing to act on the proposed name change, Mr. Cormier decided (contrary to twenty years of CBSA's consistent practice) that Honey Fashions cold not be listed as the importer of record of imported goods. No CBSA official has such authority.
>
> . . .
>
> CBSA's radical departure from its consistent practice, under the TARO Program, including its prior decision under Honey Fashions" application under TARO 2014, was arbitrary, unfair, and not based on any express or implied condition of any remission order.

44 The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para 26, observed that if one has a legitimate expectation that a certain procedure will be followed, then that procedure will be required by the duty of fairness:

> Our Court has held that, in Canada, this doctrine [of **legitimate expectations**] is part of the doctrine of fairness or natural justice, and that it does not create substantive rights. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded. Nevertheless, the doctrine of **legitimate expectations** cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or **regular practices** of **administrative** decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
>
> [emphasis added and authorities omitted]

45 In *Mavi v. Canada (Attorney General)*, [2011] 2 S.C.R. 504 (S.C.C.) at para 68, Justice Binnie observed that "representations" that create **legitimate expectations** must be "clear, unambiguous and unqualified." The same may be said of **regular practices** of **administrative** decision-makers that ground a legitimate expectation.

46 I find that in the circumstances at hand that there is a clear, unambiguous and unqualified regular administrative practice of the CBSA that the name change submitted to name a Schedule 1 Manufacturer post importation would be accepted and subsequent remission of duties to it would follow.

47 The uncontradicted evidence before the Court is that Honey Fashions has participated in the TARO Program since its inception, that it was not a major importer of apparel but took full advantage of its entitlements under the program by becoming the importer of record of goods previously imported by others. It did so by filing a name change with the CBSA to record it as the importer of record, with the agreement of the initial importer. This procedure was accepted and arguably endorsed by the CBSA. Until the decisions under review were made, "CBSA officials consistently accepted the name change notification to change the importer of record, and processed Honey Fashions' remission applications on the basis that Honey Fashion was the importer of record." The change in the procedure for changing the importer of record had dramatic consequences to Honey Fashions.

48 Not only was this administrative process consistently accepted by the CBSA, it was not flagged during the QAR as an unacceptable, suspect or illegitimate practice. Nor did it raise any concern during any of the three audits of Honey Fashions done by the CBSA. I am satisfied that the evidence discloses a clear, unambiguous and unqualified regular practice of administrative decision-makers that ground a legitimate expectation. Moreover, as submitted by Honey Fashions, "[t]he arbitrary and unfair nature of CBSA's change of policy was exacerbated by the fact that it occurred long after Honey Fashions could even consider complying with it."

Unreasonable Decision

49 I also find that the decisions under review made by Mr. Gilles Cormier are unreasonable.

50 The respondent accepts that these decisions were contrary to, and in fact the exact opposite of, the decision he made regarding the 2009 Claim. The respondents submit that previous CBSA decisions and the 2009 Claim decision in particular are irrelevant. They say that administrative decision-makers are not bound by their previous decisions (citing *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.) [*Domtar*]) and because the doctrine of *stare decisis* does not apply in the context of administrative tribunals (Citing *Canada Post Corp. v. CUPW*, 2015 FC 682 (F.C.) [*Canada Post*]).

51 In *Domtar* the Supreme Court of Canada overturned a decision of the Québec Court of Appeal that had overturned an interpretation of a section of the Act respecting Industrial Accidents and Occupational Diseases given by the Commission d'appel en matière de lésions professionnelles. The Court of Appeal did so, not because the interpretation was patently unreasonable, but because it conflicted with an earlier interpretation given by the Labour Court: an interpretation it preferred. The inconsistency in interpretation was therefore between two different administrative tribunals, and not within the same tribunal. In fact the evidence was that each tribunal had consistently adhered to its own interpretation.

52 The decisions here under review were made by the same person who made two decisions only a few months apart on identical material facts, but reached a different result. While the doctrine of *stare decisis* does not apply to administrative decision-makers, they remain subject to the requirement described by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (S.C.C.) at para 47 that their decisions be justified, transparent and intelligible.

53 Here Mr. Gilles Cormier, the decision-maker, makes no reference to his earlier decision or the long-standing departmental practice. He offers no explanation why

the practice followed by Honey Fashions in the applications for remission results in the opposite result from that reached many times over 20 years. In my view, if an administrative judge rules "X" on one occasion and then rules "Not X" shortly thereafter on *identical* material facts, with no explanation for the difference, one cannot but conclude that the decision is arbitrary — it lacks "justification, transparency and intelligibility within the decision-making process."

Conclusion

54 For these reasons the decisions under review must be set aside and the remission claims of Honey Fashions be remitted back to the CBSA to be determined afresh by a different decision-maker, if possible, but in any event in keeping with the legitimate expectations of Honey Fashions based on the consistent and long-standing practice of the CBSA.

55 Honey Fashions is entitled to its costs which the parties agreed should be set for both applications at $6,719.40.

JUDGMENT IN T-1577-17 AND T-1763-17

THIS COURT'S JUDGMENT is that these applications are allowed, the decisions under review are set aside and the remission claims of Honey Fashions are to be determined afresh by a different decision-maker, if possible, but in any event in keeping with the legitimate expectations of Honey Fashions based on the consistent and long-standing practice of the CBSA; and Honey Fashions is entitled to its costs fixed at $6,719.40 for both applications.

Applications granted; matters remitted for redetermination.