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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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Reconsidering the *Doré* framework and *Charter* values: *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32

FACTS: Trinity Western University is a private, evangelical Christian university that applied to the provincial law societies for accreditation of its proposed faculty of law. The law societies of three provinces – British Columbia, Ontario[1] and Nova Scotia[2] – declined to accredit the law school for reasons related to TWU's "Community Covenant", which forbids sexual intimacy except between married, heterosexual couples.

The Benchers (*i.e.* Board of Directors) of the Law Society British Columbia initially voted to approve TWU's law school. This decision sparked a backlash from the Law Society's members. A Special General Meeting was requisitioned by members across the province and a resolution was passed directing the Benchers not to approve the law school. In light of this resolution, the Benchers decided to hold a binding referendum, which would allow

[1] The Law Society of Ontario's decision was the subject of a companion case, heard and decided by the Supreme Court at the same time as this appeal: see *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.

[2] The decision of the Nova Scotia Barristers' Society was overturned by the Nova Scotia Supreme Court. That decision was subsequently affirmed by the Nova Scotia Court of Appeal on jurisdictional grounds and the Barristers' Society has chosen not to appeal that decision: see *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59.

members to vote on a resolution that TWU's law school is not an approved faculty of law. In deciding to hold the referendum, the Benchers resolved that regardless of the results of the referendum, the implementation of the results would be consistent with their statutory duties.

In the referendum, a majority of lawyers voted not to approve the proposed law school, following which the Benchers passed a resolution that TWU's law school is not an approved faculty of law.

DECISION: Appeal allowed (McLachlin CJ and Rowe J concurring; Côté and Brown JJ dissenting).

The five-judge majority (Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ) began by dispensing with the arguments that the LSBC improperly fettered its discretion or was required to provide formal reasons. The Benchers were entitled to hold a referendum on the TWU approval issue, as it was consistent with the statutory scheme for the Benchers to decide that certain decisions would benefit from the guidance or support of the membership as a whole. Similar to a municipality passing by-laws, the contextual approach to reasonableness does not impose a duty on the LSBC to provide reasons in support of its majority vote to refuse approval of TWU. The Benchers' speeches make it clear they were alive to the need to balance freedom of religion and their statutory duties. The proper approach to reasonableness review in these circumstances requires respectful attention to reasons offered *or which could be offered* in support of a decision.

The majority decided the appeal under the *Doré* framework[3], where the preliminary question is whether the discretionary administrative decision engages *Charter* protections – either *Charter* rights or the values that underpin each right. If so, the next question is whether the extent of the impact on *Charter* protections is proportionate in light of the statutory objectives.

In the course of judicial review, administrative bodies will be afforded deference in balancing *Charter* protections against broader statutory objectives. However, a decision that has a disproportionate impact on *Charter* protections is not reasonable. Administrative bodies are not required to choose the option that limits the *Charter* protection least, but where there is an option *reasonably* available that would reduce the impact on the protected right while still furthering the relevant statutory objectives, any other decision would be unreasonable. Proportionality also requires considering the degree of negative impact on *Charter* protections as compared to the benefits achieved in furtherance of the statutory objectives.

In this case, the LSBC's overarching statutory mandate is to uphold and protect the public interest in the administration of justice. Where legislatures delegate regulation of the legal profession to a law society, the law society's interpretation of a broad public interest is owed deference. Here, the LSBC determined that promoting equality ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ students were means by which the LSBC could pursue its overarching statutory duty. That determination was reasonable.

Under the first stage of the *Doré* framework, the LSBC's decision not to approve TWU limits the religious freedom of members of the TWU community. However, the decision is proportionate in light of the LSBC's statutory mandate.

Here, the LSBC had only two choices: to approve or reject TWU's proposed law school. Given the LSBC's interpretation of its statutory mandate, approval would not have advanced the relevant statutory objectives and was therefore not a reasonable possibility. The LSBC's decision also reasonably balances the severity of the interference with *Charter*

[3] *Doré v Barreau du Québec*, 2012 SCC 12

protections against the benefits to its statutory objectives. The LSBC's decision does not limit religious freedom to a significant extent; it prevents TWU community members only from attending an approved law school at TWU governed by a mandatory covenant, which is not absolutely required for the religious practice at issue (to study law in a Christian law environment). On the other side of the ledger, the LSBC decision advances statutory objectives by maintaining equal access to and diversity in the legal profession, and protects the public interest in the administration of justice by preventing the risk of significant harm to LGBTQ people who attend TWU's proposed law school.

In her concurring opinion, McLachlin CJC (as she then was) offered four refinements to the *Doré* framework. First, it should be limited to whether a claimant's *Charter* rights (not values) have been infringed – a view shared by Rowe, Côté and Brown JJ in their respective opinions. Second, where an administrative-decision maker bases its decision on an erroneous interpretation of a *Charter* right, that decision will be unreasonable. Third, the onus is on the state actor that made the rights-infringing decision (here, the LSBC) to demonstrate that it is reasonable – a point also emphasized by Rowe, Côté and Brown JJ. Finally, where an administrative decision-maker renders a decision that has a disproportionate impact on a *Charter* right, it will always be unreasonable. For McLachlin CJ, the negative impacts of the LSBC decision on the TWU community's religious, expressive and associational rights are not of minor significance, but the LSBC's decision is ultimately reasonable in light of its contention that it cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of their sexual orientation.

In a separate concurrence, Rowe J emphasized the need for the *Doré* framework to ensure that all the elements of the *Oakes* test have a role to play – from establishing an infringement of a *Charter* right, to identifying a sufficiently important objective that could make the infringement reasonable, and ensuring any infringement was proportionate through an analysis of rational connection, minimal impairment and a balancing between beneficial and deleterious effects. Once an infringement has been established, the onus for satisfying all other steps in the framework falls to the state actor. On the facts, Rowe J found that there was no infringement of section 2(a) of the *Charter* in this case, making resort to the rest of the *Doré* framework unnecessary.

In a lengthy dissent, Côté and Brown JJ concluded that the LSBC exercised its discretion for an improper purpose. The LSBC's broad statutory "public interest" mandate must be interpreted in light of its home statute, which limits approval discretion to ensuring that individual applicants are fit for licensing. The LSBC's decision was not based on this consideration. The dissenting judges also concluded that the Benchers' decision-making process was unreasonable: a referendum could never engage in the balancing process required by *Doré* and, on the facts, any balancing exercise engaged in by the LSBC was merely a rubber stamping of the referendum outcome. The majority's suggestion that reviewing courts should "look to the record for the purpose of assessing the reasonableness of the outcome" does not conform to this Court's recent direction in *Delta Air Lines Inc v Lukács*[4] – plus, there is no record in this case.

The dissenting judges expressed fundamental concerns with the *Doré* framework, including their view that the *Oakes* test should apply to justify state infringements, regardless of the context in which they occur. Nevertheless, the dissenting judges applied a modified version of the *Doré* framework, with an emphasis on ensuring that the objectives put forward by the state actor find their source in the grant of statutory authority. Under this framework, the

[4] 2018 SCC 2 at para 27 ("reviewing courts must look at both the reasons *and the* outcome"; "[i]f we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole consideration")

LSBC approval decision is disproportionate and unreasonable: it represents a profound interference with religious freedom and does not further the LSBC's statutory public interest objective.

COMMENTARY: This decision clarifies certain parts of the *Doré* framework, raises questions about others, and suggests that without significant changes the framework may not survive for long.

The Court affirms that the *Doré* framework (like *Oakes*) does not impose a strict minimal impairment standard. The Court's prior decisions arguably send mixed messages on this point[5] and so this clarity is welcome. Perhaps even more significant is the Court's recognition that the *Doré* framework includes a balancing stage akin to the final stage of *Oakes* (proportionality *strictu sensu*) – a proposition that was never explicitly articulated in *Doré* and an exercise that most reviewing courts have, thus far, failed to undertake.

With these points clarified, the number of meaningful distinctions between *Doré* and *Oakes* can be reduced to three key points.

First, at least for the time being, *Doré* is still engaged by an administrative decision that limits a *Charter* "value" – an amorphous concept – whereas *Oakes* comes into play only where a *Charter* right has been infringed. This formulation of *Doré* finds support only by a narrow margin: Justices Rowe, Côté and Brown would clearly limit the framework to conduct that infringes *Charter* rights. (It is not yet known how the newest appointee to the Court, Martin J, would vote on this issue.) The majority's view reflects the language of *Doré*, but represents a departure from the Court's more recent jurisprudence. Only a few months ago, in *Ktunaxa Nation v British Columbia*,[6] a seven-judge majority of the Court framed the first stage of *Doré* as requiring an infringement of the section 2(a) right – with no discussion at all about *Charter* values.

Quite apart from the doctrinal problems of relying exclusively on purported infringements of *Charter* values to overturn state conduct (problems which are significant, as the dissenting judges note), the majority's approach raises a host of practical questions. Since *Charter* values had little role to play on the facts of this case – all judges approached the question on the basis of an actual section 2(a) infringement (or, for Rowe J., a lack thereof) – the precise nature and extent of how *Charter* values influence the *Doré* analysis remains an open question. Taken together, the majority's statement that the limitation of *Charter* values will engage the *Doré* framework, and the lack of any real guidance as to how to identify *Charter* values, or to delineate or differentiate between *Charter* rights and *Charter* values, will surely spawn a new wave of complexities in the lower courts. Enterprising lawyers, undeterred by the inability to establish an infringement of a *Charter* right, will instead argue that their clients have experienced a limitation of their *Charter* values. Confusion is sure to ensue.

The second major difference between *Doré* and *Oakes* is that *Doré* provides far more room for a state actor to retroactively define and articulate specific means by which their impugned conduct served particular goals, within an overarching statutory "public interest" mandate. This all stands in contrast to *Oakes*, where courts are hostile to the notion that vague and symbolic objectives (such as the "public interest") can qualify as "pressing and substantial",[7] and where courts will more carefully scrutinize the original and current basis for state action to assess whether it has

[5] See, for example, *Doré* at para. 7 (the review framework "centres on… ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives"); *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 39 ("A proportionate balancing is one that gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate").

[6] 2017 SCC 54

[7] See *Sauvé v Chief Electoral Officer*, 2002 SCC 68

impermissibly shifted.[8] Given the leniency afforded by the majority on the facts in this case, there is some force to the dissenting judges' concern that the *Doré* framework creates the "danger that objectives said to advance a statutory mandate might be invented holus-bolus after an infringement is claimed" (at para. 322).

Finally, *Oakes* puts the onus for justification firmly on the shoulders of the state actor, whereas the onus issue under *Doré* remains muddled. The majority appears to have intentionally avoided tackling the question, leading all four concurring and dissenting judges to call both for the onus to be clearly placed on the state actor. The majority's silence on this point is puzzling: the repeated analogies and ties the majority seeks to draw between *Doré* and *Oakes* can be meaningful only if both frameworks deal with the critical question of onus in the same way. One possible explanation for the majority's failure to deal with the onus issue could be that the purported difficulty in assigning the onus was cited as a key rationale for why the *Doré* approach was needed at all. (In *Doré*, the Court characterized *Oakes* as an "awkward fit" for adjudicated administrative decisions, rhetorically asking: "On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it…"[9]) If the majority concedes that the onus *can* be assigned, then it is hard to see why *Doré* is even necessary, or what (if anything) it adds beyond *Oakes*.

Indeed, this seems to be exactly what the concurring and dissenting judges are saying: why do we even need the *Doré* framework? Or, at least, why do we need a version of *Doré* that is, in any meaningful sense, different from *Oakes*? The majority fails to offer a compelling answer to this fundamental question. In a future case, the answer may well be that no such rationale exists at all.

[8] See *R v Zundel*, [1992] 2 SCR 731
[9] 2012 SCC 12 at para 4

Judicial review of law society findings of incivility: *Groia v Law Society of Upper Canada*, 2018 SCC 27

FACTS: G is a lawyer regulated by the Law Society of Ontario, who represented a Bre-X mining executive facing charges under the Ontario *Securities Act* arising from the Bre-X scandal. G's client was acquitted after "complex, protracted and exceptionally acrimonious" proceedings. During the first half of the trial, G believed prosecutors were acting wrongly and, repeatedly and in harsh language, accused them of abuse of process. G's beliefs of prosecutorial misconduct were wrong in law, but the trial judge did not correct him.

After the proceedings concluded, the Law Society, acting of its own motion, commenced disciplinary proceedings against G, charging that he had acted uncivilly. At first instance, the Hearing Panel of the Law Society Tribunal found G guilty of professional misconduct and ordered a two-month suspension and costs.

The Law Society Tribunal Appeal Panel upheld the finding of misconduct but reduced the suspension to one month and decreased the costs award. The Appeal Panel held that a lawyer's duty of civility required that allegations of prosecutorial misconduct should be made only by a lawyer who is acting in good faith and has a reasonable basis for making the allegation.

G appealed to the Divisional Court, which dismissed the appeal. A 2-1 majority of the Court of Appeal upheld the Divisional Court's decision. G further appealed to the Supreme Court of Canada.

DECISION: Appeal allowed (Côté J concurring; Karakatsanis, Gascon, and Rowe JJ dissenting).

Justice Moldaver, writing for the majority, held that the standard of review is reasonableness but that the Law Society Appeal Panel's decision was unreasonable. The majority relied on earlier jurisprudence from the Court to conclude that

law society misconduct findings and sanctions are reviewed for reasonableness. Setting criteria for a finding of misconduct and assessing whether a lawyer's conduct meets those criteria involve the interpretation of the Law Society's home statute and the exercise of discretion, both of which are presumptively entitled to deference. That presumption is not rebutted here. Assessing whether incivility by a lawyer amounts to professional misconduct lies within the Law Society's expertise and the fact that the conduct here took place in a courtroom is irrelevant to the standard of review. Courts and law societies enjoy concurring jurisdiction to regulate and enforce standards of courtroom behaviour, and deferential review of the Law Society's decision does not threaten the independence of the judiciary or a judge's control over the courtroom.

The majority accepted as reasonable the Appeal Panel's context-specific approach to assessing whether a lawyer's behaviour crosses the line into professional misconduct on the basis of incivility. However, they concluded that the Appeal Panel unreasonably applied that test to G's conduct. Contrary to its own approach, the Appeal Panel used G's sincerely held but erroneous legal beliefs to conclude that his allegations lacked a reasonable basis. That approach cannot be reasonable. Based on his honest but mistaken understanding of the law, G had a reasonable basis to accuse the prosecutors of misconduct. The prosecutors' conduct, the fact that the judge did not correct G, and the legal uncertainty that existed at the time about how to raise the issue of abuse of process all led G to act as he did.

Justice Côté in concurring reasons agreed with the majority that the Law Society erred in finding that G had committed misconduct. But in her view the correctness standard of review applied. The Court's existing jurisprudence does not dictate the standard of review in this case. Although past Supreme Court cases have applied the reasonableness standard to review of professional misconduct decisions of law societies, a critical and dispositive difference in this case is that G's conduct occurred before a judge in open court. That fact implicates constitutional imperatives about the judiciary's independence and capacity to control its own process. An inquiry by a law society into a lawyer's in-court conduct risks intruding on the judge's role of managing the trial process and therefore the judiciary should have the final say over the appropriateness of a lawyer's conduct in that sphere. Reasonableness review is inconsistent with that prerogative. Assuming (without deciding) that the Appeal Panel adopted the correct test for professional misconduct, its application of that test to G's conduct was incorrect.

The three dissenting judges agreed with the majority that reasonableness is the applicable standard of review and that the Law Society Appeal Panel reasonably set out a contextual approach to determine whether a lawyer's courtroom conduct constitutes professional misconduct. However, those judges disagreed with the majority on the outcome. In their view it was open to the Law Society to adopt the approach it did and find G guilty of misconduct. They found that the Appeal Panel's reasoning was nuanced and flexible, and responsive to the particular factual matrix in which it is applied – an approach that flowed directly from the Appeal Panel's thorough consideration of the rules, related commentary, and the jurisprudence. In their view, the Appeal Panel's conclusion that there was no foundation for G's allegations against the prosecutors was open to it and flowed directly from the Panel's thorough consideration of the evidence. The dissenting judges accused the majority of effectively reformulating the Appeal Panel's approach in a manner that is inappropriate on reasonableness review. The majority's approach effectively creates a mistake of law defence: a lawyer will have a "reasonable basis" for allegations of misconduct anytime his beliefs as to the law — if they were correct — would create such a basis. But the Appeal Panel explicitly rejected the idea that whenever a lawyer's accusations are based on an honestly held belief in the law, they necessarily have a "reasonable basis". It is

not a respectful reading of the Appeal Panel's reasons to articulate a novel test for professional misconduct, then fault the Panel for failing to apply it.

The dissenting judges expressed several concerns with the potential impacts of allowing G's appeal, including undermining the administration of justice. Through their enabling legislation, law societies are given authority to sanction lawyers who commit professional misconduct and, in turn, promote efficiency in the justice system. They should be empowered to do that, not undermined through second-guessing by the courts. Their decisions respecting professional misconduct should be approached with deference.

COMMENTARY: The Supreme Court's decision in this appeal finally concludes a lengthy saga that was closely watch by the legal community due to its implications for lawyer regulation and the point at which lawyers' courtroom conduct could constitute grounds for professional misconduct findings.

For the broader administrative and regulatory law community, the case is of interest as yet another chapter in the Supreme Court's fractured substantive review jurisprudence, with the judges dividing on both the applicable standard of review and the application of the reasonableness standard.

There can be no doubt that the *Groia* case was a challenging one for the Court; the sheer number and nature of the various interveners speak to the passionate views and debates within the legal community about whether Mr Groia's conduct ought to have been disciplined as professional misconduct, or whether that regulatory response will have a detrimental chilling effect on fearless advocacy. In addition to the reasonable disagreement on those questions within the litigation community, the Court had to grapple with its own jurisprudence calling for deferential review of professional misconduct decisions by law societies.

In that context, the majority's application of reasonableness review is somewhat contorted. They appear not to have wanted to depart from *Law Society of New Brunswick v Ryan*[10] and *Doré*[11] in accepting that the reasonableness standard is appropriate, yet their application of the standard reads as disguised correctness. As the dissenting judges point out, the majority essentially reformulates the Appeal Panel's test and then finds the Appeal Panel's decision unreasonable for failing to meet that test. One is always tempted to question the conclusion that a decision is unreasonable after it has been upheld by two courts (in this case a unanimous three-judge panel of the Divisional Court and two Court of Appeal judges) and three fellow Supreme Court judges.

We suggest that the more transparent approach if the majority was uncomfortable upholding the Appeal Panel's decision is that followed by Brown JA at the Court of Appeal and Côté J – to apply the correctness standard and overturn the decision on the basis that it was incorrect. Justice Côté's reasons articulate compelling reasons why the correctness standard ought to apply. The correctness standard could have been adopted by distinguishing misconduct decisions relating to in-court conduct, as Justice Côté did, or by reconsidering *Ryan*. There is reason to question whether the reasonableness standard is appropriate in respect of law society decisions where there is a statutory right of appeal – can it really be said that law societies have greater expertise than courts regarding issues of lawyer conduct?

The Supreme Court has indicated that it will reconsider the framework for substantive review in a trilogy of cases set to be heard in late 2018.[12] One can hope that the next era of substantive review will be marked by the consistency and coherence that has thus far been elusive.

[10] 2003 SCC 20
[11] 2012 SCC 12
[12] The Court made these rare comments made as part of its judgment granting leave to appeal.

SCC casts doubt on the contextual approach and true questions of jurisdiction: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31

FACTS: In two separate decisions, the Canadian Human Rights Tribunal dismissed several complaints alleging that Indian and Northern Affairs Canada engaged in a discriminatory practice in the provision of services contrary to s 5 of the *Canadian Human Rights Act*. Specifically, the complaints were based on the denial of registration entitlements under certain provisions of the *Indian Act*. The Tribunal determined that the complaints were a direct attack on provisions of the *Indian Act* and that legislation is not a "service" under the *CHRA*. The Commission sought judicial review. Its application was dismissed by the Federal Court and that decision was upheld by the Federal Court of Appeal. The Commission appealed to the Supreme Court of Canada.

DECISION: Appeal dismissed (Côté, Rowe and Brown JJ concurring).

In reasons authored by Gascon J, the majority held that the reasonableness standard of review applied. The Tribunal was required to characterise the complaints before it and ascertain whether a discriminatory practice under the *CHRA* had been proven. That exercise falls squarely within the presumption of deferential review. The presumption arises where an administrative body interprets its home statute, but may be rebutted, and the correctness standard applied, where the issue under review falls within one of the established categories of correctness review or where a contextual inquiry shows a clear legislative intent that the correctness standard be applied.

The majority went on to comment at length, in *obiter*, about three bases for correctness review: true questions of *vires*, questions of central importance outside the Tribunal's expertise, and contextual analysis. Regarding true questions of jurisdiction, the majority rejected the suggestion that the Tribunal was faced with such a question in determining what falls within the meaning of "services" in the *CHRA*. They commented that it is a challenge to identify a true question of jurisdiction in a coherent manner without returning to the jurisdiction/ preliminary question doctrine that was rejected in *CUPE v New Brunswick Liquor Corp*[13] and *Dunsmuir v New Brunswick*.[14] Since *Dunsmuir* a majority of the Court has not found a single instance where the category applied. Nonetheless, litigants and judges return to a broad understanding of jurisdiction as justification for correctness review, contrary to the Court's jurisprudence. While the category may have conceptual value for some, it is questionable whether that value justifies the resources devoted to clarifying such an "inherently nebulous concept". Indeed, the reasonableness standard allows a reviewing court to deal with the principles of rule of law and legislative supremacy that lie at the core of judicial review, and thus is sufficient to fulfill the courts' role in supervising statutory power.

As for questions of central importance, the majority noted that the Court has repeatedly rejected a liberal application of that category and that the Tribunal has expertise in determining what is meant by a discriminatory practice.

With respect to the contextual approach, Gascon J opined that in the interests of simplicity, where the presumption of reasonableness applies the contextual approach should play a subordinate role in the standard of review analysis. The contextual approach should be applied sparingly. The presumption of reasonableness review and the identified categories will generally be sufficient to determine the standard of review. In exceptional cases where a contextual analysis may be justified to rebut the presumption, the analysis need not be long or detailed. The analysis has generally been limited to determinative factors that show a clear

[13] [1979] 2 SCR 277
[14] 2008 SCC 9

legislative intent justifying the rebuttal of the presumption. The majority disagreed with the application of the contextual analysis in this case by Côté and Rowe JJ.

Applying the reasonableness standard, the majority found that the Tribunal provided careful and well-considered reasons explaining why the complaints had not established a discriminatory practice under the *CHRA*. In coming to its conclusions, the Tribunal considered the complainants' evidence, and submissions, the governing jurisdiction, and the purpose, nature and scheme of the *CHRA*, and relevant policy considerations. The decisions meet the standard of intelligibility, transparency and justifiability, and fall within the range of reasonable outcomes.

Justices Côté and Rowe agreed that the appeal should be dismissed, but they would have applied the correctness standard of review. They accepted that reasonableness presumptively applied since the interpretation of s 5 of the *CHRA* was at issue, but in their view the presumption was rebutted. The concurring judges distanced themselves from the majority's comments on the category of jurisdictional questions – a concept tied to fundamental principles underlying judicial review. They also disagreed that a contextual analysis should play a subordinate role in determining the appropriate standard of review. In their view, the absence of a privative clause, the need for consistent interpretations of human rights protections across jurisdictions, and the fact that the primacy of human rights law has constitutional dimensions all indicate that deference is not appropriate. In their view, challenges to legislation cannot be brought under s 5 of the *CHRA*.

Justice Brown wrote separate reasons to express his own concerns about the majority's statements on jurisdictional questions and the contextual analysis.

COMMENTARY: Although overshadowed by some of the more newsworthy administrative law decisions discussed in this issue, the *Canadian Human Rights Commission* case reveals the depth of the rift on the Court regarding the approach to standard of review. The case demonstrates the seismic challenge that faces the Court in finding a clear, coherent, unanimous approach to standard of review when it revisits *Dunsmuir* later this year.

As with other cases, Côté, Rowe and Brown JJ show in *Canadian Human Rights Commission* that they are much more comfortable with correctness review than the other members of the Court. And there are the recurring debates around the continued existence and value of the "true questions of jurisdiction" category, and the scope of the "questions of central importance" category. Wisely, all judges agreed that those debates will need to be resolved in future cases where they are squarely before the Court and have the benefit of full argument by counsel.

What is new in this case is the strong disagreement among members of the Court as to the proper role of the contextual analysis. Granted, *Dunsmuir* has long been criticized by some for its lack of clarity on the proper interaction between the categories of review identified in *Dunsmuir*, and the contextual analysis. But *Canadian Human Rights Commission* makes the first time that a majority has suggested that the contextual factors play only a "subordinate" and "ancillary" role, and should be applied "sparingly". Indeed, the majority expressly disagreed with their colleagues that the standard of review framework requires correctness review whenever the contextual factors point towards correctness as the appropriate standard. This statement may come as a surprise to those who read *Dunsmuir* as requiring exactly that: correctness review where the context analysis points to correctness as the appropriate standard. Regrettably, the majority provides no alternative explanation of how the contextual analysis should work, or in what circumstances contextual factors pointing to correctness review *will* require the correctness standard.

The majority's comments reducing the contextual analysis to an unclear but clearly subordinate role suggest that litigants in any case will face an uphill battle relying on the contextual factors to rebut the presumption of reasonableness review of a tribunal's interpretation of its home statute (or a statute with which it has special familiarity). And since nearly any issue raised on judicial review can be characterized as a tribunal's interpretation of its home statute, the majority's approach in *Canadian Human Rights Commission* portends a situation of virtually universal and unrebuttable reasonableness review, not dissimilar from the single standard of review approach for which Abella J advocated in *Wilson v Atomic Energy of Canada Ltd*.[15]

The concurring judges seem prepared to make a last stand in favour of correctness review, but continue to be outnumbered on the Court. Until the Court's complement changes, the narrowing of correctness review likely will continue. However, the practice of so-called "disguised correctness" is not necessarily decreasing despite the number of decisions clearly signaling that correctness review should have a very limited role. Instead of reduced interference with administrative decisions, we may be seeing more cases in which decisions are set aside as unreasonable – instead of merely incorrect – in order to preserve the Supreme Court majority's apparent conceptual preference for the reasonableness standard.

Judicial review of regulations: *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22

FACTS: A tree faller was fatally injured when a rotting tree fell on him. The BC Workers' Compensation Board assessed an administrative monetary penalty against West Fraser Mills. West Fraser Mills held the license for the work site and so was an "owner" under the BC *Workers' Compensation Act*. The deceased was employed by a third party contractor (and not by West Fraser Mills).

The Board found that West Fraser Mills had breached s. 26.2(1) of the *Occupational Health and Safety Regulation* made under the *WCA*. That provision requires the owner of a forestry operation to ensure that all activities of the forestry operation are "planned and conducted" safely. The Regulation was made pursuant to s. 225 of the *WCA*, which authorizes the Board to "make regulations [it] considers necessary or advisable in relation to occupational health and safety and occupational environment".

West Fraser challenged this regulation as *ultra vires* on the basis that the *WCA* authorized the making of regulations with respect to only "employers" and not "owners." It also challenged the administrative penalty on the grounds that s. 196 of the *WCA* authorized penalties only against "employers" who breach their duties under the *WCA.* West Fraser contended that it was patently unreasonable to interpret s. 196 as extending liability to an "owner" who did not directly employ an injured worker.

This challenge was rejected by the Workers' Compensation Appeal Tribunal. The Tribunal's decision was upheld by the BC Supreme Court and the BC Court of Appeal. West Fraser Mills appealed to the Supreme Court of Canada.

DECISION: Appeal dismissed (Côté, Brown and Rowe JJ. dissenting).

Chief Justice McLachlin wrote the reasons of the majority. She held that s. 26.2(1) of the Regulation was valid and that the assessment of a penalty was reasonable.

On standard of review, she followed *Catalyst Paper Corp. v. North Cowichan (District),*[16] in its

[15] 2016 SCC 29

[16] [2012] 1 SCR 5

holding that a flexible standard of reasonableness review applies to the judicial review of delegated legislation. In other words, the question is not whether the regulation is *intra vires* in the traditional sense but rather whether it represents a reasonable exercise of delegated authority. The Chief Justice relied on a number of contextual factors to support a reasonableness standard of review, including the expertise of the Board, the breadth of the powers delegated ("the delegation of powers to the Board could not be broader") and the fact that the Regulation was adopted in response to an increase in workplace fatalities in the forestry sector.

On the issue of whether the Board had authority to order an administrative penalty against an "owner" who did not directly employ the deceased worker, the Chief Justice concluded that there were competing plausible interpretations of the meaning of the word "employer" under s. 196 and whether it could extend to an "owner" of the site. She held that the decision of the Tribunal on this point was not patently unreasonable (the applicable standard of review by legislation) and should be upheld.

Justices Côté, Brown, and Rowe each wrote separate dissenting opinions. Justice Côté would have applied a correctness standard of review and held s. 26.2(1) of the Regulation to be *ultra vires*. She further held that administrative penalties under the *WCA* were available only as against "employers" in a narrow sense and not against "owners".

Justices Brown and Rowe each agreed with the majority that s. 26.2(1) was *intra vires*; however, they each agreed with Côté J that administrative penalties were not available against "owners" under the *WCA.* Each employed a distinct line of reasoning to reach this result.

COMMENTARY: The most important aspect of this decision for administrative lawyers is the discussion of the standard of review on judicial review of a regulation, an issue that has been plagued by uncertainty for years.

Under the traditional approach, a correctness standard applies to *vires* questions (which *Dunsmuir* calls "true questions of jurisdiction"). This approach was implicitly followed in the post-*Dunsmuir* case of *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*.[17]

But subsequent decisions of the Supreme Court have diminished the role of "true questions of jurisdiction". This in turn has left open the question of whether the traditional approach to *vires* review remains valid. In *Catalyst* (which concerned judicial review of a municipal by-law), the Court applied a heightened form of reasonableness review in light of the legislature's delegation of authority to another democratic institution. The Court held that a municipal by-law may be invalidated only where it is "'aberrant', 'overwhelming'...or if 'no reasonable body' could have adopted it". The decision in *Green v. Law Society of Manitoba*, 2017 SCC 20 followed *Catalyst* on this point in a challenge to a rule adopted by a Law Society.

The reasons of the Chief Justice in *West Fraser Mills* do not explicitly overrule the traditional approach to *vires* review, but that is the implication of her analysis. In her view, a challenge to a regulation should turn on whether the regulation was a "reasonable exercise of delegated authority" (at least where the legislature has granted broad or plenary rule-making powers to a delegate). Indeed, both Côté and Brown JJ in their respective dissents highlight this result (see paras. 67-71, 117-118).

Catalyst involved a frontal challenge to the reasonableness of a by-law rather than a challenge that it was *ultra vires* the empowering legislation. Prior to *West Fraser Mills*, *Catalyst* could have been distinguished on that basis. But the narrowing of the category of "true questions of jurisdiction" has made that line-drawing exercise very difficult. Though the Chief

[17] 2013 SCC 64

Justice appears to leave room for the traditional rule to operate for "true questions of jurisdiction", it is clear from the facts of this case that this category will be very narrowly constrained. For all intents and purposes, *West Fraser Mills* means that a standard of reasonableness review now applies to virtually all judicial reviews of by-laws, rules, and regulations.

No judicial review of decisions of private associations: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26

FACTS: The Highwood Congregation of Jehovah's Witnesses is a voluntary association comprised of approximately one hundred Jehovah's Witnesses in Calgary. The Congregation is not incorporated, has no statutory foundation and owns no property.

When a member of the Congregation persists in behaviour that deviates from scriptural standards, the member is asked to appear before a committee of at least three elders of the Congregation (the Judicial Committee). If the elders determine that the member does not exhibit genuine repentance for their sins, the member is "disfellowshipped" from the Congregation, meaning that they may still attend congregational meetings but can only speak to immediate family and those discussions must be limited to non-spiritual matters.

W was disfellowshipped in 2014. He appealed the Judicial Committee's decision to elders of neighbouring congregations (the Appeal Committee), which confirmed the decision.

W then brought an application for judicial review, seeking to set aside the Judicial Committee's decision on procedural fairness grounds. A bifurcated proceeding was held, with the first stage examining whether the Court of Queen's Bench had the jurisdiction to hear the application. The chambers judge concluded that the Court did have jurisdiction, as did a majority of the Alberta Court of Appeal. The Committee appealed.

DECISION: Appeal allowed.

Writing for a unanimous court, Rowe J. held that the decision of Judicial Committee was not subject to judicial review, for three reasons.

First, judicial review is available only where there is an exercise of state authority *and* where that exercise is of a sufficiently public character. A decision is "public" in the requisite sense where it involves questions about the rule of law and the limits of an administrative decision maker's exercise of power. Judicial review is not available for private bodies. It is not enough for the decision-maker to be incorporated under a statute, or for the decision at hand to have a broad public impact. The fact that private law remedies may be sought in an application for judicial review (*e.g.* declaration or injunction) does not mean that public law remedies (*e.g. certiorari*) can be granted in private law litigation involving contractual or property rights.

Second, even in a standard action commenced by way of statement of claim, there is no free standing right to procedural fairness with respect to decisions taken by voluntary associations. Courts can only consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures where there is a legal right a party seeks to have vindicated, such as a property or contractual right. Mere membership in a religious organization, where no civil or property right is formally granted by virtue of membership, is not subject to review by the courts.

Third, the merits of a religious tenet are not justiciable, and sometimes even the procedural rules of a particular religious group may involve the interpretation of religious doctrine (which is not justiciable). Courts may still review procedural rules where they are based on a contract between two parties, even where the

contract is meant to give effect to doctrinal religious principles. But W has not shown his legal rights were at stake in this case.

COMMENTARY: This case has significant implications in terms of constraining the law of judicial review in Canada. *Wall* effectively closes the door to using the law of judicial review to challenge the decisions of clearly "private", voluntary associations – whether they be sporting leagues or religious organizations – and instead limits judicial review to exercises of "state authority" (and, even then, only when making sufficiently "public" decisions). In this regard, *Wall* follows a pair of recent Ontario decisions reflecting a similar view on the proper scope of judicial review.[18]

Some may hail these developments as imposing a welcome and principled restraint on the scope of judicial review. Indeed, it is difficult to quibble with the Court's formulation of the scope of judicial review as being the exercise of state authority and decisions with a sufficiently public character. But the decision fails to grapple with *how to assess* whether a particular decision-maker, in making a particular decision, meets those conditions to be subject to judicial review. That issue is precisely what Stratas JA of the Federal Court of Appeal tried to address in *Air Canada v Toronto Port Authority*, where he reviewed the jurisprudence and articulated eight factors that help shed light on "whether a matter is coloured with a public element, favour or character sufficient to bring it within the purview of public law."[19]

The Supreme Court interprets the *Toronto Port Authority* factors as relating only to the question of whether an exercise of state authority is of a sufficiently public character – and not whether, absent formal state action, an entity's decision nonetheless can be sufficiently "public" to attract judicial review.[20] But that reading of *Toronto Port Authority* appears to be contradicted by how Stratas JA described the work of the factors in that case – namely, as helping to determine "the public-private issue" and what "makes a matter public".[21] And many of the factors are aimed at evaluating whether a decision amounts to an exercise of "state authority", including the "nature of the decision-maker" and "the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity".[22] If the analysis were solely about the nature of the *decision*, as opposed to the decision-maker, these factors would have little role to play.

In other words, it seems clear that the *Toronto Port Authority* factors were meant to examine whether a matter is subject to judicial review, full stop. *Toronto Port Authority* does not contemplate a threshold step or requirement that a matter involve an exercise of "state authority". The factors are meant to help shed light on precisely that question, together with the issue of whether the nature of the decision is sufficiently public to attract judicial review. Moreover, while confining the *Toronto Port Authority* factors to a narrower scope than they were intended to have, the Supreme Court offers no alternative test or framework to assist counsel and courts in assessing the apparent threshold of issue of whether a decision is an exercise of state authority.

Not surprisingly given the narrow role it assigns to the *Toronto Port Authority* factors, the Court does not bother addressing or relying on them to decide the case. The matter is instead decided by way of the Court's conclusion that the Judicial Committee's decision does not amount to an exercise of "state authority".

[18] See *Trost v Conservative Party of Canada*, 2018 ONSC 2733 (Div Ct) and *Milberg v North York Hockey League*, 2018 ONSC 496. Stockwoods LLP was counsel of record to the applicant in *Trost*.
[19] 2011 FCA 347 at para 60.
[20] *Wall* at para. 21.
[21] 2011 FCA 347 at para 60.
[22] *Ibid.*

That conclusion may be clear enough on the facts of this particular case, given the private and religious nature of the organization in question. But the relationship between an entity and the state will not always be so clear. One need look no further than the complex jurisprudence under s. 32 of the *Charter* to see that issues around when an entity amounts to the "state" (or "government") can raise difficult, complicated and nuanced questions of fact and law, relating to the degree of state control, funding, oversight and other factors.

In the end, *Wall* is a missed opportunity for the Court to provide clarity and consistency across the country on the important question of when a decision will be subject to judicial review. The *Toronto Port Authority* factors provide a useful framework for addressing this issue, and the Court could have relied on them to reach the same ultimate conclusion regarding the reviewability of the Judicial Committee's decision. This would have provided guidance to courts across the country for how to examine whether a decision falls within the purview of public law. Instead, the Court's restrictive view of how the *Toronto Port Authority* factors apply all but ensures confusion and debate amongst lower courts on whether, and in what circumstances, particular entities amount to "state authorities" so as to potentially attract judicial review.

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