Court File Number:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

ROBERT ADAMSON, ROBERT DAVID ANTHONY, JACOB BAKKER, DONALD BARNES, MICHAEL BINGHAM, DOUG BOYES, KENNETH BUCHHOLZ, DANIEL BURROWS, DAVID G. CAMERON, WAYNE CASWILL, GEORGE COCKBURN, BERT COPPING, GARY DELF, JAMES E. DENOVAN, MAURICE DURRANT, COLM EGAN, ELDON ELLIOTT, LEON EVANS, ROBERT FORD, LARRY FORSETH, GRANT FOSTER, GUY GLAHN, KENWOOD GREEN, JONATHAN HARDWICKE-BROWN, TERRY HARTVIGSEN, JAMES HAWKINS, GEORGE HERMAN, JAMES RICHARD HEWSON, BROCK HIGHAM, LARRY HUMPHRIES, GEORGE DONALD IDDON, PETER JARMAN, NEIL CHARLES KEATING, GEORGE KIRBYSON, ROBIN LAMB, STEPHEN LAMBERT, LES LAVOIE, HARRY G. LESLIE, ROBERT LOWES, GEORGE LUCAS, DONALD MADEC, DON MALONEY, MICHAEL MARYNOWSKI, BRIAN MCDONALD, PETER MCHARDY, GLENN RONALD MCRAE, JAMES MILLARD, BRIAN MILSOM, HOWARD MINAKER, GEORGE MORGAN, GREG MUTCHLER, HAL OSENJAK, STEN PALBOM, MICHAEL PEARSON, DAVID POWELL-WILLIAMS, PAUL PRENTICE, MICHAEL REID, PATRICK RIESCHI, STEVEN ROSS, GARY SCOTT, PHILLIP SHAW, ANDREW SHERET, MICHAEL SHULIST, DONALD SMITH, OWEN STEWART, RAY THWAITES, DALE TRUEMAN, ANDRE VERSCHELDEN, and DOUGLAS ZEBEDEE

Applicants

- and -

AIR CANADA, AIR CANADA PILOTS ASSOCIATION, CANADIAN HUMAN RIGHTS COMMISSION, and DONALD PAXTON

Respondents

APPLICATION FOR LEAVE TO APPEAL OF THE APPLICANTS
(Filed pursuant to Section 40 of the *Supreme Court Act*, RSC 1985, c S-26)
VOLUME III of III

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S.C.C. File No.:

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B E T W E E N:

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APPLICANTS' MEMORANDUM OF ARGUMENT

(ON APPLICATION FOR LEAVE TO APPEAL)

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PART I – STATEMENT OF FACTS

A. Overview

1. This application is directed squarely at the issue of the apparent confusion in the application of the reasonableness standard of review to administrative decisions.

2. Most of the jurisprudence since *Dunsmuir* [1] has focused on determining the appropriate standard of review, be it correctness or reasonableness, not on how to apply the standard, once chosen. The vast majority of administrative decisions under review by the courts are now subject to review on the standard of reasonableness.

3. Much criticism by judges, noted academics, counsel and individual litigants of the decisions emanating from this Court and the courts below results from a perceived lack of guidance, or from what commentators refer to as "the absence of a principled approach" to establishing parameters for determining the level of judicial deference appropriate to the varying types of administrative decisions under review.

4. The Federal Court and Federal Court of Appeal review and appeal decisions in respect of the Canadian Human Rights Tribunal ("CHRT") decision in the instant Application are representative of much conflict and confusion in the means of applying the reasonableness standard of review to the decisions of statutory tribunals. This appeal, therefore, could serve as a launching point for a dedicated inquiry by this Court into issues that, when resolved, can provide guidance for ensuring that the objectives of certainty, consistency and fairness in the application of federal, provincial and territorial judicial review decisions are more easily achieved.

5. The Tribunal decision that is the subject of this Application exemplifies several common fundamental administrative tribunal errors, including failing to abide by established legal principles governing the interpretation of human rights legislation, failing to abide by binding legal precedent and failing to ensure that the resulting decision falls within a range of reasonable probable outcomes defensible on the basis of the facts and the law.

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[1] *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9, [2008] 1 S.C.R. 190 [Book of Authorities ("BoA"), Tab 4]

6. More importantly, it is the review of the CHRT's decision as well as the appeal of that review decision that raises an issue of concern for this Court. Both the Federal Court and the Federal Court of Appeal were in agreement that the appropriate standard of review was reasonableness. It was at that point that the review and appeal opinions differed in direction, and it is at that point that fundamental unanswered questions appear with respect to the proper disposition of the tribunal decision under review.

7. For example, how much deference should the tribunal's decision be accorded, given that the CHRT is presumed to be a specialized tribunal and that in this case the tribunal is interpreting a provision of its home statute? How substantively should the Federal Court or the Court of Appeal review the facts, reasons and result of the tribunal decision to determine whether the requirements set out in *Dunsmuir*, Paragraph 47, (the "*Dunsmuir* criteria") are indeed met?

8. Further, what type and what degree of administrative decision-making errors are sufficient for a reviewing Court to conclude that the *Dunsmuir* criteria are not met and that the decision under review is unreasonable? Are there potential guidelines that can assist the courts in their determination of these recurring questions so that differing types of review decisions achieve a greater consistency across jurisdictional domains?

B. The Facts of This Case

9. Each of the 69 Applicants was employed as a pilot with Air Canada until the first day of the month after each respectively acquired the age of 60, whereupon his employment was terminated pursuant to the provisions of the collective agreement and its coincident pension plan in force between the Respondent Air Canada and the Respondent Air Canada Pilots Association. The employment of each of the Applicants was terminated in the years 2005 to 2009.

10. The 2010 Tribunal hearing into the complaints dealt with three legal issues, two of which are not in issue in this Application. The only issue raised in this Application is the Tribunal's determination of the defence raised by the Respondents pursuant to Paragraph 15(1)(c) of the *Canadian Human Rights Act* (the "*CHRA*"), since repealed, that at the time of the hearing provided:

> **15.** (1) It is not a discriminatory practice if …

(c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

15. (1) Ne constituent pas des actes discriminatoires

(c) le fait de mettre fin à l'emploi d'une personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi;

11. The question of whether the Respondents could avail themselves of the defence provided by Paragraph 15(1)(c) thus devolved into two questions. First, which airline pilots in Canada were to be considered "employees working in position similar" [French: "ce genre d'empoi" or "this type of employment]"] to Air Canada pilots (the "comparator group'). Second, whether Air Canada pilots, roughly 3,000 in number during the relevant years and the only pilots of the over 8,000 airline pilots in Canada subjected to mandatory retirement at age 60 during that period, constituted a majority of pilots in the comparator group so as to deem age 60 the "normal age of retirement."

12. The *Adamson* hearing was the second hearing before the CHRT addressing the same question. In 2007, the Tribunal heard and decided the identical complaints of two other former Air Canada pilots, Mssrs Vilven and Kelly.[2] That Tribunal decision was judicially reviewed,[3] with the Federal Court rejecting the Tribunal's choice of comparator group pilots in that case, and describing specific characteristics of the appropriate comparator group that the Tribunal should use. The Court determined that the Tribunal should include within the chosen comparator group only Canadian pilots, not foreign pilots, and should not use impressionistic characteristics of the pilot job, such "prestige and status," as essential components of the job. Instead, the Federal Court directed the Tribunal to answer the question before it by focusing on the functional characteristics of the job in question, namely, "What is it that Air Canada pilots do?"

13. As no distinction was made in the either Tribunal or the Federal Court decision with respect to the type of work performed by individual pilots within an airline, the determination of the appropriate comparator group was necessarily based upon the characteristics of the airlines for which the various pilots worked, both in the *Vilven* / *Kelly* hearing and in this *Adamson* hearing. This distinction becomes critical when considering the Federal Court of Appeal decision in this case because both the

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2 *Vilven v. Air Canada*, 2007 CHRT 36 [BoA, Tab 7]

3 *Vilven v. Air Canada*, 2009 FC 367 [BoA, Tab 8]

Tribunal and the Federal Court identified categories of comparator group pilots only by reference to the airline with which they were employed.

14. The Federal Court, in decision 2009 FC 367, described the appropriate comparator group in the following Paragraphs:

> [111] The essence of what Air Canada pilots do is to fly aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace. …
>
> [125] To summarize my findings to this point: the essence of what Air Canada pilots do can be described as flying aircraft of varying sizes and types, transporting passengers to both domestic and international destinations, through Canadian and foreign airspace.. There are many Canadian pilots working in similar positions, including those working for other Canadian airlines. These pilots form the comparator group for the purposes of paragraph 15(1)(*c*) of the *Canadian Human Rights Act*. …
>
> [173] The statistical information before the Tribunal with respect to airline pilots working for both Air Canada and other Canadian airlines flying aircraft of various sizes to domestic and international destinations, through Canadian and foreign airspace, reveals that at the time that Messrs. Vilven and Kelly were forced to leave their positions at Air Canada, several Canadian airlines allowed their pilots to fly until they were 65, and one had no mandatory retirement policy whatsoever.

15. Air Canada's argument before the Tribunal in this case then centered on the application of the above factors to be used in the selection of the comparator group. Specifically, Air Canada argued that to be included in the comparator group, pilots must be employed by airlines that fly varying types of aircraft, and varying sizes of aircraft, to both domestic and international destinations.

16. To meet the varying types specification, Air Canada argued, pilots who were employed by airlines that operated only one type of aircraft must be excluded from the comparator group. Similarly, pilots who were employed by airlines that operated only one size of aircraft were to be excluded from the comparator group. Finally, pilots who were employed by airlines that operated only to domestic destinations, or only to international destinations, but not both, were to be excluded from the comparator group.

17. Further, it argued that the interpretation of aircraft "size" should also be restricted—aircraft that held more that 95 passengers were all to included in a single category, "large," so that a Boeing 737 was deemed to be the same "size" as a Boeing 777,

notwithstanding the fact that the latter was physically several times larger, and that an airline that operated two different types of "large" aircraft would therefore be deemed to be operating only one "size" of aircraft.

18. The combination of these propositions would have the result of eliminating almost half of the airline pilots in Canada from the proposed comparator group, leaving Air Canada with a majority of the pilots in the group and pre-determining the outcome of the "normal age of retirement" as age 60, even though Air Canada was the only airline in Canada still terminating the employment of its pilots at age 60.

19. Acceptance of this unduly restrictive interpretation would exclude from the appropriate comparator group all of the pilots who were employed by WestJet, Skyservice, Air Transat and CanJet—pilots working for airlines that the Federal Court in the *Vilven* / *Kelly* review decision had expressly included in the comparator group.

20. In argument before the Tribunal, this "conjunctive" and strict narrow interpretation of the Federal Court description of the comparator group that was put forward by Air Canada did not escape the attention of the Tribunal, as captured in the following exchange:[4]

> THE CHAIRPERSON: But by applying this definition strictly, as it has been pointed out by the Complainants, particularly the Complainants, *you're excluding a major commercial airline operation in Canada that flies internationally, that transports passengers, that has a number of pilots*, such as Porter Airlines, and *I'm just wondering whether by applying a strict definition*, and looking at the Federal Court with (inaudible) definition, you're excluding what seemed to be sensibly or common sense should not be excluded.
>
> MS. TREMBLAY: *That might be it, sir, but her definition has that effect*, because Porter only flies a Q400, one type, one size. So, it can't be argued that it's varying size and types, it's impossible. *Maybe that's not what she meant, but that's the result. Same thing for WestJet*; whereas, Westjet clearly from '06 to '09, they only fly one type of aircraft. *Maybe she didn't think about that, but that's the result of her definition*. So, it would require that you change the definition of the court in order to get to that result, and that's obviously what the Complainants are asking you to do.
>
> [Emphasis added]

[4] Transcript of CHRT Proceedings, January 21, 2010 at 3721-3722 [Applicants' Leave Application, Vol. III, Tab G at 91-92]

21. Ironically, despite

- the illogical consequences of such an interpretation recognized by the Tribunal Chair in the above exchange;

- the tacit admission by counsel for Air Canada that the restrictive wording of the Federal Court decision *may have not been intended by the Court*;

- the unduly narrow interpretation of the parameters used to determine the scope of comparator group; and

- the inconsistency of the determination with both the immediately previous determination of the comparator group by the Federal Court and with the text, context and purpose of the statutory provision in question*;*

the Tribunal simply accepted Air Canada's argument as to the composition of the comparator group and the adverse impact that such an interpretation would have on the outcome of the Applicants' complaints. It agreed that the Respondents had satisfied the requirements of the claimed defence and dismissed the Applicants' complaints.

22. It should be noted that at no point in the Tribunal decision is there any indication that the Tribunal actually addressed the interpretation of the governing statutory exemption in question—including the provision's text, context and intended purpose, in accordance with this Court's requirements as set out in *Mowat*,[5] or any other relevant contextual factor.

23. There any indication that the Tribunal, in deliberating the resolution of these complaints, even considered its own extensive prior jurisprudence of the same statutory provision in respect of other employee groups, such as flight attendants,[6] dock workers[7] or rail employees,[8] where the Tribunal based each decision on the comparator group comprising one hundred per cent of the employees within the specified professional employment classification of the respective comparator groups.

24. Similarly, the Tribunal decision provides no indication of any consideration or understanding of the absurd consequences resulting from its decision.

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5 *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471

6 *Campbell v. Air Canada*, 1981 CanLII 7 (CHRT) [BoA, Tab 2]

7 *McAllister v. Maritime Employers Association et al.* (1999), 36 CHRR 446 (FCTD) [BoA, Tab 5]

8 *Prior v. Canadian National Railway Co.,* 1983 CanLII 4 (CHRT) [BoA, Tab 6]

25. In practical terms the Tribunal's decision meant that a pilot employed by Air Canada operating a Boeing 767 from Toronto to Miami *is not* engaged in a "position similar" to a pilot employed by SkyService operating the same aircraft to the same destination, but that that same Air Canada pilot *is* employed in a "position similar" to a pilot employed by Air Tindi operating a float plane in the Yukon—an obviously patently absurd result.

26. The Federal Court in the decision below, in reviewing the Tribunal's decision on this issue, identified numerous flaws in the reasoning used to determine the comparator group, including:

- "It is unreasonable to eliminate Air Canada's main competitors from a list of airlines in Canada whose pilots actually do the same thing as Air Canada pilots." [Para. 101]
- "…there was no suggestion by the parties that the functions and duties of the pilots of, for instance, Air Transat differed from those of Air Canada when flying to foreign destinations…" [Para. 106]
- "…there does not appear to have been any basis to have eliminated WestJet as a comparator airline on the functionally irrelevant consideration that its pilots flew only one type of aircraft." [Para. 107] "The actual duties and functions of a pilot at any given time relate to only one type of aircraft. [Para. 108] "…No pilot at any time is accomplishing functions which simultaneously have all the attributes in the *Vilven* test." [Para. 113]
- "Thus, while Air Transat, Skyservice and CanJet were included in the list before Justice MacTavish and were used as comparators to count employees in similar working positions to those of the Air Canada pilots in *Vilven*, the were rejected as comparator airlines by the Tribunal in this matter." [Para. 117]; and
- "Given the concern about Air Canada's dominance of the industry skewing the results of any survey of the normal age of retirement of Air Canada pilots, it is unlikely that the Court intended to propose a test which would greatly narrow the comparator airlines, as opposed to one which would tend to be more inclusive." [Para. 122]

27. In consequence, it set aside the Tribunal's decision on this issue.

28. The Federal Court of Appeal, in reviewing the Federal Court decision on this issue, fastened on the Federal Court's unfortunate use of the word "competitor" to describe the set of airlines other than Air Canada from which the comparator pilots were derived, then stated, "There was no evidence presented to the Tribunal with regard to the identity of Air Canada's major domestic competitors." Then at Paragraph [69]

it described the factors referred to in the previous Federal Court test as being "identified on the actual requirements of a pilot's position, not on any of the commercial attributes of airlines." [9]

29. It would appear that the Federal Court of Appeal failed to conduct a substantive reasonableness review of the Tribunal decision. If it had done so, it would not have conflated the commercial aspect of airlines' operations with the reasoning that the lower court used to refer to Air Canada's competitors. The Tribunal's identification of the various airlines that employed the pool of comparator pilots was the sole basis used for identification of the appropriate comparator group. The airline-based description of the comparator pilots was similarly the focus of the Federal Court's review of the Tribunal decision. Neither the Tribunal nor the Federal Court decision reviewing the Tribunal decision engaged any consideration of any of the commercial attributes of the airlines that employed those pilots.

30. In conducting its reasonableness review of the Tribunal decision, the Federal Court recognized that both the Tribunal's reasoning in arriving at its decision and the outcome of its decision failed to accord with any reasonable interpretation of the statutory exemption provision on which the Respondents' claimed defence was based. The Federal Court's decision to set aside the Tribunal decision was entirely in accordance with the parameters of review dictated by *Dunsmuir*, both in terms of transparency, intelligibility and justification and in terms of the outcome of the Tribunal's decision, failing as it did, to fall within a reasonable range of possible acceptable outcomes defensible in terms of the facts and the law.

C. The Issues of National Importance

31. The judicial history of this particular set of complaints and of the complaints of Mssrs. Vilven and Kelly decided earlier, both dealing with the similar factual and legal issues, are not atypical of highly contested administrative tribunal decisions. Judicial review and appeal of judicial review decisions are common, particularly where those decisions have significant personal consequences for individuals (as here, with termination of employment of the Applicants) and/or significant economic consequences for both individuals and corporate Respondents.

32. The instant case is not the only one presently addressing this identical issue. There are almost 200 additional similar complaints in adjournment before the CHRT by

[9] *Vilven v. Canada*, 2009 FC 367 at paras 67-68 [BoA, Tab 8]

former Air Canada pilots whose employment was similarly terminated in accordance with the same collective agreement provision as was the employment of the instant Applicants. The hearing of those complaints was adjourned by the Tribunal in 2012 pending the determination of the *Adamson* case, initially before the Federal Court, later before the Federal Court of Appeal, and now pending the outcome of the instant Application with this Court.

33. Many decisions of the courts of appeal conflict with the decisions of the superior courts with respect to the selection of the appropriate parameters to be used in a reasonableness review. This conflict results at least partially from a degree confusion between the various courts, the parties and their counsel as to the proper interpretation and application of the *Dunsmuir* reasonableness requirements.

34. The Applicants submit that there is presently insufficient guidance from the courts, including this Court, as to how the standard of reasonableness ought to be applied across the broad spectrum of Canadian administrative tribunal adjudication. The Applicants are not alone in this observation. Several distinguished academics have expressed similar opinions, as noted below.

35. One issue on which the courts and academics appear to differ in opinion is the issue of curial deference to tribunal expertise. By way of example, the CHRT is presumed by the courts to be a specialized tribunal with particular expertise in the interpretation and application of its home statute and therefore entitled to a large degree of deference in the review of its decisions, particularly when it is interpreting a provision of its home statute.

36. A question arises as to whether, under some circumstances, that presumption could be rebutted, and if so, under what circumstances? For example, given the present Tribunal decision, should the courts accord the Tribunal's decision a considerable degree of deference given that its decision appears to:

(a) fail to address the primary question posed by the statutory defence claimed by the Respondent and instead focuses exclusively on a question only incidental to the question required to be answered?

(b) violate fundamental principles of quasi-constitutional human rights precedent established by this Court mandating that human rights are to be interpreted liberally and that claimed defences are to be narrowly construed? Instead, at almost each instance, the Tribunal decision discloses that the Tribunal appeared to do just the opposite. In each

exercise of discretion it elected to choose the more liberal interpretation of the proposed defence.

(c) involve the determination of a question that does not engage the specific expertise of the Tribunal; namely determining the varying types and sizes of aircraft operated by airlines by whom the comparator pilots are employed?

(d) result in an outcome that does not accord with judicial precedent involving the identical statutory question decided in respect of other employee groups?[10] and/or

(e) in the view of an average person deciding the very straighforward question in issue, is patently absurd and does not accord with common sense?

37. What parameters or guidelines, if any, should be applied by the courts in the review of the decisions of administrative tribunals such as the CHRT to ensure that the resulting review decisions meet the *Dunsmuir* criteria of being justified, transparent and intelligible, fall within a reasonable range of possible acceptable outcomes defensible in respect of the facts and the law, and are consistent in their application of those criteria from decision to decision and from tribunal to tribunal?

38. These are practical, pertinent questions that can only be answered with finality by this Court.

PART II – QUESTIONS IN ISSUE

39. The issues in this appeal are:

Question 1: Can the decision of a tribunal interpreting a provision of its own statute be reasonable if:

(a) the decision does not accord with established legal principles governing the interpretation of the quasi-constitutional statute?

(b) the decision fails to accord with a specific direction of a superior court in respect of the factors appropriate to the interpretation of that statutory provision?

[10] *Ibid*, footnotes 6, 7, 8.

(c) the result of the tribunal's decision is plainly absurd, both from a common law perspective and from a common sense perspective?

and

Question 2: What parameters govern the assessment of the reasonability of an administrative tribunal decision and the degree of deference to be accorded to a statutory tribunal by a court reviewing the decision for reasonableness?

PART III – ARGUMENT

Question 1: Can the decision of a tribunal interpreting a provision of its own statute be reasonable if:

(a) the decision does not accord with established legal principles governing the interpretation of the quasi-constitutional statute?

(b) the decision fails to accord with a specific direction of a superior court in respect of the factors appropriate to the interpretation of that statutory provision?

(c) if the result of the tribunal's decision is plainly absurd both from a common law perspective and from a common sense perspective?

40. The standard of reasonability by which any administrative decision is to be measured is specified by *Dunsmuir*, in particular at Paragraph 47 of that decision. The assessment of reasonableness must consider two factors, the process of the tribunal's articulation of the its reasons for its decision (transparency, intelligibility and justification) and the outcome of the decision, namely whether the decision falls within a range of reasonable possible outcomes defensible in terms of the facts and the law (the *Dunsmuir* criteria).

41. Necessarily, in conducting a review of an administrative decision, even in circumstances where the tribunal is owed a large degree of deference, a reviewing court is obligated to undertake at least a minimum threshold level of investigation of

the tribunal's reasons for arriving at its decision and at the outcome of its decision to assess whether the decision meets the *Dunsmuir criteria*, otherwise the constitutional purpose of judicial review is frustrated.

42. Because administrative decisions are made across the broad dimension of Canadian jurisdiction and statutory function, obviously no "one size" review assessment can be applied to all of the decisions. As this Court has pointed out, reasonability "takes its colour from its context." The use of the word "colour" suggests not only that reasonability reviews should consider the hues of the colours present, but also that administrative decisions should not be monochromatic—either black or white. Reviewing courts should not engage in "blind deference" to tribunals nor should they engage in unwarranted intervention in the administrative decision-making processes.

43. Because reasonability is a "single standard," the reasonability of the tribunal's decision must be determined in the context of all of the relevant appropriate factors, not simply in consideration of one or more factors alone to the exclusion of all others.

44. Hence, the most probable answer to the posed question is necessarily, "it depends on the entire set of contextual factors appropriate to the specific decision under review." The factors appropriate to enable a more specific answer to the question are more completely described in answer to the second question, below.

Question 2: What parameters govern the assessment of the reasonability of an administrative tribunal decision and the degree of deference to be accorded to a statutory tribunal by a court reviewing the decision for reasonableness?

45. It would be fair to say that there presently exists no consensus within the courts as to how to answer this question. Mathew Lewans, Assistant Professor, Faculty of Law, University of Alberta, succinctly stated the issue in these words:

> While the Court has made some modest strides toward simplifying the standard of review, the methodological and substantive issues associated with reasonableness review remain in dire need of attention. ...[11]

[11] Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012) 38 Queen's L.J. 59 at 92 [BoA, Tab 11]

46. Earlier in the same article he commented:

> "While there is an identifiable trend in the Supreme Court's analysis of the standard of review, its judgments over the past year are likely to exacerbate confusion by continuing to project conflicting approaches to reasonableness review." [12]

47. The solution that he proposed is as follows:

> "The best way to address the problems associated with reasonableness review is to take up Binnie J's suggestion in *Dunsmuir* that the practice of reasonableness review needs to be contextualized. To date, contextual analysis has focussed on the threshold question of when deference is appropriate instead of on assessing the reasons that underpin an administrative decision. If we accept the proposition that the vast majority of administrative decisions are to be reviewed on a reasonableness standard, the main question is why this standard demands more cogent reasons in some contexts than others. ...
>
> "Instead of resorting to abstract conceptual definitions of what is "reasonable", review for reasonableness should be reconceived as a tool for reconciling judicial respect for administrative decisions with a judicial concern for ensuring that administrative decisions are legally acceptable in a particular regulatory setting."[13]

48. Professor David Mullan highlights unanticipated consequences of moving to a single, reasonableness standard:

> "One of the perennial issues in Canadian judicial review law is how to reconcile deferential, reasonableness review with claims based on various nominate grounds of judicial review, most of which are traditionally associated with review for abuse of discretion. How do challenges based on acting for an improper purpose, failing to take account of relevant factors, taking account of irrelevant factors, improper delegation, acting under dictation, wrongful fettering, and bad faith fit within the scheme of standard of review and the place of reasonableness as the default standard of review especially in the case of discretionary powers?" [14]

49. Later in the same article, referring a concept that he referred to as "'disguised correctness' or a partial correctness review" that he suggested was apparent by this Court's decision in *Alberta (Education)*,[15] he expanded his comments further:

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12 *Ibid.* at 85 [BoA, Tab 11]
13 *Ibid.* at 94 [BoA, Tab 11]
14 David Mullan, "Unresolved Issue on the Standard of Review in Canadian Judicial Review of Administrative Action" (2013) 42:1 The Advocates Quarterly 1 at 42 [BoA, Tab 12]
15 *Ibid.*, citing *Alberta (Education) v. Canadian Copyright Licensing Agency,* 2012 SCC 37, [2012] 2 S.C.R. 345, 347 D.L.R. (4th) 287 (S.C.C.)

> "These cases also raise the perennial question, discussed earlier, of whether there still are freestanding grounds of judicial review divorced from the standard of review analysis involving, for example, acting for a purpose not contemplated by the Act or incorrectly discerning the policy foundation of the relevant Act. More importantly, they call into question whether the Rothstein presumption of reasonableness review or deference to decision-makers in the interpretation of the home or related statutes applies to all decision-makers or is confined to tribunals or similar agencies, an issue also discussed earlier. In particular, does it have any purchase in the case of Ministers of the Crown, public servants, and municipalities?
>
> "At the level of high theory, the Court has gone well down the road to a regime where the standard of review is generally that of reasonableness. However, at the level of practical application of reasonableness review to particular situations, there remains considerable confusion. In particular, the tasks ahead are, first, to provide greater clarity as to what constitutes "unreasonableness" across the various grounds of judicial review, and, secondly, to identify more precisely the kinds of situation which will attract "disguised correctness" review, or, less rhetorically, will involve the resolution of certain subsets of a decision-making process by reference to a standard of correctness or a surrogate for that in the form of more intense reasonableness scrutiny.[16]

50. Paul Daly, Assistant Professor, Faculté de Droit, Université de Montréal, suggests that only this Court can provide the answer to the question posed:

> "Judicial review aims to ensure that administrative action is lawful, reasonable, and procedurally fair. Achieving these goals requires the development and application of doctrine, which is often complex in its design. Complexity results from the inherently technical nature of the discipline, which involves the application of general principles to substantive areas of law that differ greatly in their contours and content, combined with the need for doctrine to conform to normative commitments (such as. the principles of good administration and the rule of law). *Sitting atop the Canadian judicial hierarchy, the Supreme Court of Canada bears the additional responsibility of developing clear and coherent doctrine, thus providing a set of tools that lower courts can confidently apply to the complex (and not-so-complex) cases that come before them."* [17] [Emphasis added]

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16 *Ibid.* footnote 14 at 81 [BoA, Tab 12]

17 Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58 McGill L.J. 483 [BoA, Tab 9]

51. This Court in *Alberta Teachers' Association*, stated:

> "…the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review." [18]

52. This prescription, however, leaves a number of questions unanswered, particularly with respect to the scope and degree of deference to be afforded to tribunals. Considerable controversy in that regard exists among both judges and academics. For example, as Professor Mullan points out:

> "Stratas J.A. read the word 'tribunal' in the critical paragraph of the Rothstein judgment to be a generic term for all statutory and prerogative decision-makers. Nonetheless, Stratas J.A. went on to emphasize that the presumption was rebuttable…".[19]

53. In contradistinction, the Federal Court of Appeal stated in *Georgia Straight Alliance v. Canada (Minister of Health)*:

> "..though the Minister - acting on advice of the officials of the Department of Fisheries and Oceans - can certainly claim expertise in the management of the fisheries and fish habitat, this does not confer on the Minister expertise in the interpretation of statutes. Expertise in fisheries does not necessarily confer special expertise to interpret the statutory provisions of the [relevant legislation]." [20]

54. Similarly, Professor Paul Daly makes reference to Justice Deschamps' concurring reasons in *Alliance Pipeline*: [21]

> "Such a position is purely formalistic and loses sight of the <u>rationale</u> for according deference to an interpretation of the home statute that has developed in the jurisprudence including *Dunsmuir*, namely, that the legislature has manifested an intent to draw on the relative expertise or experience of the administrative body to resolve the interpretative issues before it. <u>Such intent cannot simply be presumed from the creation of an administrative body by the legislature.</u> Rather, *courts should look to the jurisprudence or to the enabling statute to determine whether it is established in a satisfactory manner that <u>the decision-maker actually has a particular</u>*

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18 *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654, 2011 SCC 61 at para. 34 [BoA, Tab 1]

19 David Mullan, "Unresolved Issue on the Standard of Review in Canadian Judicial Review of Administrative Action" (2013) 42:1 The Advocates Quarterly 1 at 33 [BoA, Tab 12]

20 *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40 at para. 104 [BoA, Tab 3]

21 *Smith v. Alliance Pipeline Ltd.*, [2011] 1 SCR 160, 2011 SCC 7

familiarity--or put another way, *particular expertise or experience relative to a court--with respect to interpreting its home statute.*"[22]

55. Professor Daly then takes the analysis one step further:

> "To develop a formal category of decisions to which reasonableness review applies is to disregard the substance of the individual decisions said to fall within the category. Moreover, one might observe, *just because a decision maker has expertise, it does not follow that the expertise was actually applied to the decision in question*; if it was, a more deferential standard of review will be appropriate. A reviewing court following a holistic approach, such as the standard of review analysis, can be alive to the possibility that expertise was not applied in a particular case. A reviewing court conducting a formalistic analysis of whether a decision falls into a particular category cannot be so alive. Justice Deschamps's concerns are well-founded." [23] [Emphasis added]

56. The tribunal decision giving rise to this application is apposite.

57. Finally, there are a large number of factors that might allow the court to determine that, aside from the presumed expertise of the tribunal and the question of whether that question is engaged in the determination by the Tribunal of the issue before it, the specific tribunal's decision should not be accorded deference in the circumstances. Included in this list of factors may be fundamental errors of procedure, failure to accord sufficient weight to binding jurisprudence and similar errors of law articulated above by Professor Mullan, as well as the earlier alleged errors described in relation to the instant tribunal decision.

58. The Applicants submit that the degree of intensity of substantive analysis employed by the reviewing court is another factor germane to the process of assessing the reasonability of administrative tribunal decisions.

59. This issue arises by reason of the finality of almost all review decisions, either because there is no practical means to further appeal the decision (applicable to all Court of Appeal decisions, given that this Court is not a court of error), or because it is prohibitively expensive or outside the capacity of individual litigants to appeal an apparently wrongly decided review decision (i.e. an issue of access to justice).

60. The issue of "Who is supervising the supervisors" was referred to minimally by Binnie J. in *Alberta Teachers Association*, albeit in a different context:

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[22] Paul Daly, "The Unfortunate of Triumph of Form Over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall L.J. 317 at 343 [BoA, Tab 10]

[23] *Ibid.* at 329 [BoA, Tab 10]

> "Predictability is important to litigants and those who try to advise them on whether or not to initiate proceeding. It remains to be seen in future cases how the discretion of reviewing judges [in choosing from a variety of levels of scrutiny] will be supervised at the appellate level to achieve such predictability."[24]

61. Arguably, given the overwhelming finality of review decisions, it is necessarily incumbent on the courts conducting reviews to ensure that adequate attention is paid to the substantive aspects of the decisions under review in order to ensure not only consistency, but to ensure that the litigants achieve an adequate realization of their legitimate expectations of the review process. In that regard, the courts must ensure that the "pendulum" of review does not inappropriately swing too far in either direction, either to blind deference to administrative tribunals' decisions, nor to unjustified intervention in the delegated legislative process.

62. Only this Court is in a position to monitor the achievement of these objectives and to ensure that the application of the appropriate balance of deference versus intervention by the superior courts, based on the contextual circumstances of the particular administrative decisions, is effected.

Concluding Submission

63. There may be a set of primary, secondary and perhaps even tertiary contextual factors that influence the hues of any reasonability assessment. Just as there is a "range of reasonable outcomes" that determines the reasonability of a decision, there is likely a "range of recurring contextual factors" that variably but consistently are germane to each decision's context.

64. Obviously, no suggested list of contextual factors can be exhaustive. Nevertheless there are a number of factors that not only recur, but that ought to considered by the reviewing court, from which to frame the context of the reasonability review.

65. Those contextual factors should include one or more of the following, among others:

(a) an assessment of the legislative scheme imbuing the tribunal with authority, including the nature of the statute (such as quasi-constitutional human rights legislation) and the degree of deference intended by the legislature, including whether the statute contains a privative clause;

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[24] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 SCR 654 at para. 87 [BoA, Tab 1]

(b) the degree of expertise of the specific administrative tribunal and whether the presumed expertise of the tribunal is actually engaged in the decision under consideration;

(c) the range of factual versus legal considerations engaged by the question before the tribunal;

(d) judicial precedent, both binding precedent and tribunal precedent, and the application of principles of *stare decisis* and administrative comity;

(e) the importance of the decision to both the persons affected by the decision and to the legal system, generally;

(f) the conformity of the decision to established principles of statutory interpretation and established principles of administrative law; and finally

(g) the "smell test," – whether, in the entire context of the decision, the result comports with both the common law and common sense.

66. Eight years after *Dunsmuir*, the jurisprudence with respect to establishing the appropriate standard of review of administrative tribunal decisions is now well settled. As the above-quoted authors clearly point out, the same cannot be said for the application of the reasonability standard to the review of the majority of administrative decisions rendered throughout the various jurisdictions.

67. The present application for leave, if granted, would give this Court an excellent opportunity to visit the consequential issues raised by the apparent shortcomings in the application of the now well-established reasonability standard of judicial review by hearing argument not only from these parties, but also from highly regarded interveners with a view to establishing a clear set of guidelines to simplify, streamline and ensure consistency in the application of the reasonability standard henceforward.

PART IV: SUBMISSION AS TO COSTS

68. The Applicant requests costs on this application and ultimately on this appeal and throughout the courts below.

PART V: ORDER SOUGHT

69. The Applicant seeks an Order granting leave to appeal, with costs in any event of the cause.

All of which is respectfully submitted.

Dated at Winnipeg, Manitoba this 22nd day of September, 2015.

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PART VI: TABLE OF AUTHORITIES

Jurisprudence

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61, [2011] 3 SCR 654

Campbell v Air Canada, 1981 CanLII 7 (CHRT)

Canada (Fisheries and Oceans) v David Suzuki Foundation, 2012 FCA 40

Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190

McAllister v Maritime Employers Association et al. (1999), 36 CHRR D/446 (FCTD)

Prior v Canadian National Railway Company, 1983 CanLII 4 (CHRT)

Vilven v Air Canada, 2007 CHRT 36

Vilven v Air Canada, 2009 FC 367

Commentary

Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58 McGill LJ 483

Paul Daly, "The Unfortunate Triumph of Form Over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall LJ 317

Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012) 38 Queen's LJ 59

David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013) 42:1 The Advocates' Quarterly 1

PART VII: STATUTES

Canadian Human Rights Act, RSC 1985, c.H-6

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

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

7. It is a discriminatory practice, directly or indirectly,

7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

(a) to refuse to employ or continue to employ any individual, or

a) de refuser d'employer ou de continuer d'employer un individu;

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

b) de le défavoriser en cours d'emploi.

9. (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination

9. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour une organisation syndicale :

(a) to exclude an individual from full membership in the organization;

a) d'empêcher l'adhésion pleine et entière d'un individu;

(b) to expel or suspend a member of the organization; or

b) d'expulser ou de suspendre un adhérent;

(c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective

c) d'établir, à l'endroit d'un adhérent ou d'un individu à l'égard de qui elle a des obligations aux termes d'une convention collective, que celui-ci fasse ou non partie de l'organisation, des restrictions, des différences ou des catégories ou de prendre toutes autres mesures susceptibles soit de le priver de ses chances d'emploi ou d'avancement, soit de limiter ses

agreement relate to the individual.

chances d'emploi ou d'avancement, ou, d'une façon générale, de nuire à sa situation.

(2) Notwithstanding subsection (1), it is not a discriminatory practice for an employee organization to exclude, expel or suspend an individual from membership in the organization because that individual has reached the normal age of retirement for individuals working in positions similar to the position of that individual.

(2) Ne constitue pas un acte discriminatoire au sens du paragraphe (1) le fait pour une organisation syndicale d'empêcher une adhésion ou d'expulser ou de suspendre un adhérent en appliquant la règle de l'âge normal de la retraite en vigueur pour le genre de poste occupé par l'individu concerné.

10. It is a discriminatory practice for an employer, employee organization or employer organization

10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

(a) to establish or pursue a policy or practice, or

a) de fixer ou d'appliquer des lignes de conduite;

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

15. (1) It is not a discriminatory practice if

15. (1) Ne constituent pas des actes discriminatoires :

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

[…]

[…]

(c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual;

[…]

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

c) le fait de mettre fin à l'emploi d'une personne en appliquant la règle de l'âge de la retraite en vigueur pour ce genre d'emploi;

[…]

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.