



SUPREME COURT OF CANADA

CITATION: Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31
APPEAL HEARD: November 28, 2017
JUDGMENT RENDERED: June 14, 2018
DOCKET: 37208

BETWEEN:

Canadian Human Rights Commission
Appellant

and

Attorney General of Canada
Respondent

- and -

Attorney General of Quebec, Tania Zulkoskey, Income Security Advocacy Centre, Sudbury Community Legal Clinic, Chinese and Southeast Asian Legal Clinic, Community Legal Assistance Society, HIV & AIDS Legal Clinic Ontario, Canadian Muslim Lawyers Association, Council of Canadians with Disabilities, Women's Legal Education and Action Fund, Native Women's Association of Canada, Amnesty International, First Nations Child and Family Caring Society of Canada, Jeremy E. Matson, African Canadian Legal Clinic, Aboriginal Legal Services and Public Service Alliance of Canada
Interveners

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

REASONS FOR JUDGMENT: Gascon J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis and Wagner JJ. concurring)
(paras. 1 to 68)

JOINT CONCURRING REASONS: Côté and Rowe JJ.
(paras. 69 to 107)

CONCURRING REASONS: Brown J.
(paras. 108 to 115)

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CANADA (CHRC) v. CANADA (A.G.)

Canadian Human Rights Commission

Appellant

v.

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Respondent

and

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Income Security Advocacy Centre,
Sudbury Community Legal Clinic,
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Native Women’s Association of Canada,
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Jeremy E. Matson,
African Canadian Legal Clinic,
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Public Service Alliance of Canada**

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**Indexed as: Canada (Canadian Human Rights Commission) v. Canada
(Attorney General)**

2018 SCC 31

File No.: 37208.

2017: November 28; 2018: June 14.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Canadian Human Rights Tribunal dismissing complaints alleging that provisions of Indian Act precluding registration of complainants’ children as “Indians” constituted discriminatory provision of services — Tribunal finding that complaints involved direct challenge to s. 6 of Indian Act and that legislation not included in the meaning of “services” under s. 5 of Canadian Human Rights Act — Whether Tribunal’s decisions reviewable on standard of reasonableness or correctness.

Human rights — Discriminatory practices — Provision of services — Indians — Status eligibility — Registration — Human rights complaints alleging that provisions of Indian Act precluding registration of complainants’ children as “Indians” discriminated in provision of services customarily available to general public on grounds of race, national or ethnic origin, sex or family status — Whether complaints constituted direct attack on legislation or whether they concerned discrimination in provision of service — Meaning of “services” under s. 5 of Canadian Human Rights Act, R.S.C. 1985, c. H-6.

This appeal concerns 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* (“CHRA”) when it denied a form of registration under the *Indian Act* that the complainants would have been entitled to if past discriminatory policies, now repealed, had not been enacted.

In two separate decisions, the Canadian Human Rights Tribunal determined that the complaints were a direct attack on the *Indian Act*. As legislation was not a service under the CHRA, it dismissed the complaints. On judicial review, both the Federal Court and the Federal Court of Appeal found that the Tribunal decisions were reasonable and should be upheld.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.: Where an administrative body interprets its home statute, there is a well-established presumption that the reasonableness standard applies. The presumption may be rebutted and the correctness standard applied where one of the categories identified in *Dunsmuir* can be established or, exceptionally, where a contextual inquiry shows a clear legislative intent that the correctness standard be applied. In applying the standard of review analysis, there is no principled difference between a human rights tribunal and any other decision maker interpreting its home statute.

In both of its decisions, the Tribunal was called upon to characterize the complaints before it and ascertain whether a discriminatory practice had been made out under the *CHRA*. This falls squarely within the presumption of deference. The Tribunal clearly had the authority to hear a complaint about a discriminatory practice, and the question of what falls within the meaning of “services” is no more exceptional than questions previously found by the Court not to be true questions of jurisdiction. To find that the Tribunal was faced with a true question of *vires* here would only risk disinterring the jurisdiction/preliminary question doctrine that was clearly put to rest in *Dunsmuir*. Plainly, the definition of a service under the *CHRA* is not a true question of *vires*.

The category of true questions of *vires* is confined to instances where the decision maker must determine whether it has the authority to enter into the inquiry before it. Since its inclusion as a category of correctness review in *Dunsmuir*, the concept of true questions of *vires* has been as elusive as it has been controversial. In applying *Dunsmuir*, the Court has been unable to identify a single instance where this category was found to be applicable. Since *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the Court has reasserted the narrow and exceptional nature of this category. The difficult distinction between simple questions of jurisdiction (i.e., questions that determine the scope of one’s authority) and true questions of *vires* (i.e., questions that determine whether one has authority to enter into the inquiry) has, however, tempted litigants and judges alike to return to a broad understanding of jurisdiction as

justification for correctness review. The elusive search for true questions of *vires* may thus both threaten certainty for litigants and undermine legislative supremacy. While some have advocated for the conceptual necessity of correctness review for jurisdiction, reasonableness review is often more than sufficient to fulfil the courts' supervisory role with regard to the jurisdiction of the executive. Absent full submissions by the parties on this issue it will be for future litigants to establish whether or not this category remains necessary.

The category of questions of law that are both of central importance to the legal system as a whole and outside the decision maker's specialized area of expertise does not apply here. The Court has rejected a liberal application of this category. Regardless of the importance of the questions before the Tribunal, they were clearly within the Tribunal's expertise. The ability of other federal tribunals to apply the *CHRA* does not rob the Tribunal of its expertise in its home statute.

Finally, a contextual analysis would not rebut the presumption in this case either. Where the presumption of reasonableness applies, the contextual approach should be applied sparingly in order to avoid uncertainty and endless litigation concerning the standard of review analysis. Indeed, the presumption of reasonableness was intended to prevent litigants from undertaking a full standard of review analysis in every case. As such, the presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. Where a contextual analysis may be justified to rebut the presumption it

need not be a long and detailed one. Changes to “foundational legal tests” are not clear indicators of legislative intent, and do not warrant the application of the contextual approach or, by extension, correctness review. Nor do the absence of a privative clause, the fact that other administrative tribunals may consider the *CHRA*, the potential for conflicting lines of authority, or the nature of the question at issue and the purpose of the Tribunal.

The presumption of deference is not rebutted and the reasonableness standard applies to the review of the Tribunal’s decisions. In its application, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court’s preferred solution. In reasonableness review, the reviewing court is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with determining whether the outcome falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute. Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker.

Both of the Tribunal’s decisions were reasonable and should be upheld. The Tribunal provided careful and well-considered reasons explaining why the complaints had not established a discriminatory practice under the *CHRA*. In coming

to their conclusion, the adjudicators considered the complainants' evidence and submissions, the governing jurisprudence, the purpose, nature and scheme of the *CHRA*, and relevant policy considerations. The decisions meet the *Dunsmuir* standard of intelligibility, transparency and justifiability, and fall within the range of reasonable outcomes. Specifically, the adjudicators reasonably concluded that the complaints before them were properly characterized as direct attacks on legislation, and that legislation in general did not fall within the meaning of "services". Although human rights tribunals have taken various approaches to making a distinction between administrative services and legislation, this is a question of mixed fact and law squarely within their expertise, and they are best situated to develop an approach to making such distinctions.

Per Côté and Rowe JJ.: Reasonableness is the presumptive standard for the review of questions that involve the tribunal's interpretation and application of its home statute. There are, however, two situations where the presumption will not apply. First, the jurisprudence recognizes four categories of questions that will necessarily attract review on a standard of correctness: constitutional questions, questions of law that are both of central importance to the legal system and that are outside of the tribunal's specialized area of expertise, questions that involve the drawing of jurisdictional lines between two or more competing specialized tribunals and true questions of jurisdiction. Second, the presumption of reasonableness will be rebutted if the contextual factors listed in *Dunsmuir* point towards correctness as the appropriate standard. This contextual approach does not play merely a subordinate

role in the standard of review analysis. Resort to this approach is not exceptional and the framework set out in *Dunsmuir* is manifestly contextual in nature.

While any uncertainty surrounding the jurisdictional question category ought to be resolved another day, the Court has recognized that the concept of jurisdiction continues to play a crucial role in administrative law and has made clear that administrative decision makers must be correct in their determinations as to the scope of their delegated authority. This is because jurisdictional questions are fundamentally tied to both the maintenance of legislative supremacy, which requires that a given statutory body operate within the sphere in which the legislature intended that it operate, as well as the rule of law, which requires that all exercises of delegated authority find their source in law.

Since the interpretation of s. 5 of the *Canadian Human Rights Act* is at issue in this case, it is agreed that reasonableness presumptively applies. However, and without deciding on whether the nature of the question at issue falls within a category of correctness, the relevant contextual factors listed in *Dunsmuir* lead to the conclusion that the presumption of reasonableness has been rebutted in this case, such that the appropriate standard of review is correctness. Firstly, Parliament opted not to shield the Tribunal's decisions from exacting review behind a privative clause. Secondly, provisions within a given human rights statute must be interpreted consistently across courts and tribunals tasked with its application. Applying a non-deferential correctness standard allows the courts to provide meaningful

guidance as to the scope of these fundamentally important human rights protections, and ensure respect for the rule of law in such cases. Finally, the Tribunal's decision responds to a question of law with a constitutional dimension: Who gets to decide what types of challenges can be brought against legislative action? Because this question necessarily implicates the rule of law and the constitutional duty of superior courts to uphold this fundamental principle, no deference is owed to the Tribunal's decision in these circumstances.

There is no dispute that the presumption of deference is not rebutted, solely by either the omission of a privative clause or by the potential for conflicting lines of authority. But while neither factor may independently call for correctness, they are each indicia that point toward correctness as the appropriate standard.

The wording of s. 5 of the *Canadian Human Rights Act* focuses on the provision of services and the language suggests that it is geared towards discrimination perpetrated by service providers. The complainants sought to challenge the registration provisions of the *Indian Act* as making discriminatory distinctions on the basis of race, national or ethnic origin, sex and family status. They did not challenge the actions of the Registrar in processing their applications. Therefore, at their core, these complaints are about Parliament's decision not to extend "Indian" status to persons in similar circumstances. This was properly characterized by the Tribunal as a bare challenge to legislation. Parliament is not a service provider and was not providing a service when it enacted the registration

provisions of the *Indian Act*. Parliament can be distinguished from the administrative decision makers that operate under legislative authority. These individuals and statutory bodies, which include the Registrar, may be service providers, and if they use their statutory discretion in a manner that effectively denies access to a service or makes an adverse differentiation on the basis of a prohibited ground, s. 5 will be engaged. But, when they are engaged simply in applying valid legislation, the challenge is not to the provision of services, but to the legislation itself. The Tribunal was correct in dismissing the complaints for want of an underlying discriminatory practice.

Per Brown J.: It is agreed that the Tribunal's answers to the questions before it were both reasonable and correct. However, the majority's discussion regarding true questions of jurisdiction omits a central point that, while not determinative, is an important consideration which militates against its suggestion that this category of correctness review might be euthanized. In *Dunsmuir*, this Court wrote that "the rule of law is affirmed by assuring that the courts have the final say on jurisdictional limits of a tribunal's authority". This presupposes not only that the treatment of such questions is a matter of first importance, but that such questions continue to exist. Deciding whether and how any "euthanizing" the category of true questions of jurisdiction is to proceed will require a measure of circumspection. Abolition of that category will necessitate a concomitant shift towards a more flexible, rather than a strictly binary standard of review framework. There is also concern with the extremely narrow scope for contextual analysis that the majority

states, and which would significantly impede that necessary flexibility. Statements suggesting that contextual review should be applied sparingly or that it plays a subordinate role are not easily reconciled with the majority's acknowledgement that reviewing courts ought to examine factors that show a clear legislative intent justifying the rebuttal of the presumption. If one is considering factors which show legislative intent, one is undertaking a contextual analysis.

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By Gascon J.

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(Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal, 2004 SCC 30, [2004] 1 S.C.R. 789; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013); *ATCO Gas and Pipelines Ltd.*

v. Alberta (Utilities Commission), 2015 SCC 45, [2015] 3 S.C.R. 219; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Kanhasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Beattie v. Canada (Aboriginal Affairs and Northern Development)*, 2014 CHRT 1; *Canada (Attorney General) v. Davis*, 2013 FC 40, 425 F.T.R. 200; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, [2013] 4 F.C.R. 545; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Descheneaux v. Canada (Attorney General)*, 2015 QCCS 3555, [2016] 2 C.N.L.R. 175; *McIvor v. Canada (Indian and Northern Affairs, Registrar)*, 2009 BCCA 153, 306 D.L.R. (4th) 193.

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Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Andrews v. Canada (Indian and Northern Affairs)*, 2013 CHRT 21; *Matson v. Canada (Indian and Northern Affairs)*, 2013 CHRT 13; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488; *Canada (Attorney General) v. Watkin*, 2008 FCA 170, 378 N.R. 268; *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, [2015] 2 F.C.R. 595; *Canadian National Railway v. Seeley*, 2014 FCA 111, 458 N.R. 349; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; *Canada Employment Insurance Commission v. M. W.*, 2014 SSTAD 371; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1;

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By Brown J.

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APPEAL from a judgment of the Federal Court of Appeal (Pelletier, de Montigny and Gleason JJ.A.), 2016 FCA 200, [2017] 2 F.C.R. 211, 487 N.R. 137, [2016] 4 C.N.L.R. 1, 363 C.R.R. (2d) 130, 8 Admin. L.R. (6th) 1, 402 D.L.R. (4th) 160, [2016] F.C.J. No. 818 (QL), 2016 CarswellNat 3213 (WL Can.), affirming a decision of McVeigh J., 2015 FC 398, [2015] 3 C.N.L.R. 1, 7 Admin. L.R. (6th) 75,

477 F.T.R. 229, [2015] F.C.J. No. 400 (QL), 2015 CarswellNat 893 (WL Can.).
Appeal dismissed.

Brian Smith and Fiona Keith, for the appellant.

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Mary Eberts, Kim Stanton and K. R. Virginia Lomax, for the interveners the Women's Legal Education and Action Fund and the Native Women's Association of Canada.

Stephen Aylward, for the intervener Amnesty International.

David P. Taylor and Anne Levesque, for the intervener the First Nations Child and Family Caring Society of Canada.

Jeremy E. Matson, on his own behalf.

Faisal Mirza and Tamara Thomas, for the intervener the African Canadian Legal Clinic.

Emily Hill and Emilie Lahaie, for the intervener the Aboriginal Legal Services.

Andrew Astritis, Andrew Raven and Morgan Rowe, for the intervener the Public Service Alliance of Canada.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. was delivered by

GASCON J. —

I. Overview

[1] This appeal concerns several complaints under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“CHRA”), that were dismissed by the Canadian Human Rights Tribunal (“Tribunal”) in two decisions. The complaints alleged that the legislative entitlements to registration under the *Indian Act*, R.S.C. 1985, c. I-5, were discriminatory practices prohibited by the CHRA. At issue before this Court is, first, whether deference is owed to a human rights tribunal interpreting its home statute and, second, whether the Tribunal’s decisions dismissing the complaints as direct attacks on legislation were reasonable.

[2] All of the complaints arise from the lingering effects of “enfranchisement”, a discriminatory and damaging policy previously enshrined in the *Indian Act*. Enfranchisement stripped individuals of their *Indian Act* status and prevented their children from registering as status “Indians”. Parliament has put an end to enfranchisement and enacted remedial registration provisions. The complainants challenge the sufficiency of these remedial measures, claiming that they and their children continue to suffer discrimination as a legacy of enfranchisement.

[3] The complaints were heard by the Tribunal separately. In both decisions, the Tribunal determined that the complaints were a direct attack on the *Indian Act*. In order to establish a discriminatory practice to which the Tribunal could respond, the complainants needed to demonstrate that the legislative provisions fell within the statutory meaning of a service. After a thorough and thoughtful review of their

enabling statute, the jurisprudence and policy considerations, the adjudicators in both decisions concluded that legislation was not a service under the *CHRA* and dismissed the complaints. On judicial review, both the Federal Court and the Federal Court of Appeal found that the Tribunal decisions were reasonable and should be upheld. I agree, and I would dismiss the appeal.

II. Background

A. *Indian Act Registration*

[4] Since its enactment in 1876, the *Indian Act* has governed the recognition of an individual's status as an "Indian". In its current form, the *Indian Act* creates a registration system under which individuals qualify for status on the basis of an exhaustive list of eligibility criteria. The *Indian Act*'s registration entitlements do not necessarily correspond to the customs of Indigenous communities for determining their own membership or reflect an individual's Aboriginal identity or heritage. However, it is incontrovertible that status confers both tangible and intangible benefits.

[5] The complaints underlying this appeal are rooted in a history of deeply harmful and discriminatory aspects of the *Indian Act* that were largely removed in 1985 and 2011 reforms (*An Act to amend the Indian Act*, R.S.C. 1985, c. 32 (1st Supp.), *An Act to amend the Indian Act (death rules)*, R.S.C. 1985, c. 43 (4th Supp.), and *Gender Equity in Indian Registration Act*, S.C. 2010, c. 18). Prior to these

reforms, individuals could be “enfranchised”, a euphemism for various legislative processes that would strip them of their *Indian Act* status. In one form of enfranchisement, the government incentivized individuals to renounce their status by offering such basic rights as citizenship, the right to vote, and the right to hold land in fee simple (*Canada (Attorney General) v. Larkman*, 2012 FCA 204, [2012] 4 C.N.L.R. 87, at para. 12). In another form, a status woman who married a non-status man would be involuntarily “enfranchised” along with any of her children (*Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (1996), at p. 25). This policy reflected a discriminatory view of women as subservient to their husbands and entrenched a system of patrilineal descent unfamiliar to many Indigenous communities (*Report*, at p. 25). Parliament’s stated intention for enfranchisement was to gradually reduce the number of status “Indians” (see, e.g., *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S. Prov. C. 1857, 20 Vict., c. 26, preamble). At its root, enfranchisement was a discriminatory policy aimed at eradicating Aboriginal culture and assimilating Aboriginal peoples (*Larkman*, at para. 11).

[6] In 1985, Parliament enacted new legislation that eliminated enfranchisement as a practice and created registration provisions entitling those who had lost their status to register (*An Act to amend the Indian Act*). In 2011, further reforms granted registration eligibility to the children of women who had lost status for marrying a non-status man (*Gender Equity in Indian Registration Act*). During the course of these proceedings, new amendments to the *Indian Act* have come into force

that may impact the Matson siblings' status eligibility (*An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, S.C. 2017, c. 25). The issue of mootness was not, however, fully argued by the parties and it is not necessary to consider it for the disposition of this appeal. I will therefore not comment further on the impact, if any, of the new entitlement provisions.

[7] Underlying all of the complaints are the *Indian Act's* rules for the transmission of status eligibility. Under the current *Indian Act*, individuals may qualify for one of two forms of status. Section 6(1) status is conferred on individuals who qualify under an exhaustive list of eligibility criteria. Section 6(2) status is conferred on individuals who are ineligible under s. 6(1) but who have a single parent entitled to s. 6(1) registration. The two forms of status differ mainly in the ability to transmit eligibility to one's children: a child who has only one parent with s. 6(1) status will be eligible for s. 6(2) status, while a child who has only one parent with s. 6(2) status will not be eligible for status.

B. *The Complaints in Matson v. Canada (Indian and Northern Affairs), 2013 CHRT 13*

[8] The complaints in *Matson* involve three siblings who allege that sex-based discrimination led to their ineligibility for s. 6(1) status, and their children's ineligibility for s. 6(2) status. Their grandmother lost her status under the *Indian Act* when she married a non-status man. Following the 1985 amendments, their

grandmother was able to regain her status under s. 6(1)(c). The 2011 amendments then allowed their father to obtain status under s. 6(1)(c.1) and the siblings to obtain status under s. 6(2). Their children are, however, ineligible for status. If the siblings' status grandparent had been male, they would have been eligible for s. 6(1)(a) registration and their children would have been entitled to s. 6(2) registration.

C. *The Complaints in Andrews v. Canada (Indian and Northern Affairs), 2013 CHRT 21*

[9] The Andrews' complaints concern the impact of the enfranchisement provisions and the scope of subsequent remedial legislation. Mr. Andrews' father lost his status through an enfranchisement order. Consequently, his first wife and their daughter also lost their status. Mr. Andrews was born after the enfranchisement order was issued and his mother was a non-status woman unaffected by the order. Following the 1985 legislation, Mr. Andrews' father and his half-sister became eligible for s. 6(1)(d) status. However, as Mr. Andrews' mother was never eligible for status, Mr. Andrews is eligible only for s. 6(2) status and his daughter is ineligible for status. If Mr. Andrews had been born before the enfranchisement order, or if no order had been made, he would qualify for s. 6(1) status and his daughter would be eligible for s. 6(2) status. Mr. Andrews' complaints allege that this result constitutes prohibited discrimination on the grounds of race, national or ethnic origin and family status.

D. *Canadian Human Rights Act*

[10] Under the *CHRA*, individuals can file a complaint regarding an enumerated discriminatory practice, and anyone found to have engaged in such a practice may be made subject to an order by the Tribunal (*CHRA*, s. 4). The complaints allege that Indian and Northern Affairs Canada (“INAC”) engaged in a discriminatory practice in the provision of services contrary to s. 5 of the *CHRA* when it denied a form of registration that would permit the complainants to pass on entitlements to their children. Section 5 reads as follows:

5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

III. Decisions Below

A. *Canadian Human Rights Tribunal Decisions*

(1) The *Matson* Decision

[11] In response to the request of the Canadian Human Rights Commission (“Commission”), the Tribunal launched an inquiry into the Matson siblings’ complaints pursuant to s. 49 of the *CHRA*. In its decision, the Tribunal addressed

three issues: (1) whether the complaints involved a direct challenge to the *Indian Act*; (2) whether the Tribunal was bound by the Federal Court of Appeal's decision in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7, 428 N.R. 240 ("*Murphy*"); and (3) whether the complaints, properly characterized, concerned a discriminatory practice.

[12] In the Tribunal decision, the adjudicator, Member Lustig, began the task of characterizing the complaints by referring, first, to the test for determining what constituted a service stated in *Canada (Attorney General) v. Watkin*, 2008 FCA 170, 378 N.R. 268, and, second, to the holding in *Murphy* that the *CHRA* did not permit complaints that directly targeted legislation. The adjudicator reviewed the Matson siblings' submissions and concluded that their complaints, in substance, challenged the eligibility criteria under s. 6 of the *Indian Act*. It was noted that INAC did not have any involvement in determining the eligibility criteria under s. 6 of the *Indian Act*, nor did it have any discretion in applying the criteria. While the act of processing applications and registering individuals could be characterized as a service customarily held out to the public, the underlying statutory entitlement to registration was not a service held out by INAC to the public. Rather, it was a benefit offered by an Act of Parliament.

[13] The adjudicator considered whether he was bound by the Federal Court of Appeal decision in *Murphy*, which held that the Tribunal was unable to consider direct challenges to legislation. In *Murphy*, the complainant had received a settlement

payment for wage discrimination that had occurred over a number of years. Under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the settlement was deemed to be employment income accrued in the year the payment was made. The Canada Revenue Agency did not apply the qualifying retroactive lump-sum payment analysis, which would have spread the income over previous tax years. This was because the compound interest on the notional tax the complainant would have owed outweighed the benefits of being taxed at a lower rate. The complainant challenged the assessment as a discriminatory practice under the *CHRA*. The Tribunal dismissed the complaint on the basis that it targeted the statutory provisions establishing the impugned assessment calculations (2010 CHRT 9, [2011] 1 C.T.C. 215). Writing for the Federal Court of Appeal, Noël J.A. (as he then was) upheld the Tribunal's decision. Despite applying a reasonableness standard, Noël J.A. endorsed as "correct" the view that the *CHRA* did not permit direct challenges to legislation (para. 6). He distinguished the prior Federal Court of Appeal decision in *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24, which had endorsed a direct attack on legislation, on the basis that the Attorney General in that case had conceded that s. 5 of the *CHRA* applied to the impugned provisions of the *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48 (*Murphy*, at para. 7).

[14] The adjudicator rejected arguments that *Murphy* was superseded by binding authority from this Court in *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, *Canadian National Railway Co. v. Canada (Canadian Human Rights*

Commission), [1987] 1 S.C.R. 1114 (“*Action Travail des Femmes*”), *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789 (“*Larocque*”), and *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513. After careful consideration of this authority, the adjudicator concluded that, while this Court had recognized the primacy of human rights legislation and the power of human rights tribunals to render conflicting legislation inoperative, none of these decisions stood for the premise that an order could be issued without first impugning a discriminatory practice.

[15] The adjudicator also considered whether there was conflicting Federal Court jurisprudence or analogous provincial human rights jurisprudence that supported the proposition that the Tribunal could consider direct challenges to legislation, and he came to the same result. He recognized that in some circumstances a human rights complaint could challenge the conduct of an administrator carrying out mandatory aspects of a statutory provision, but he held that the complaint still needed to identify a discriminatory practice that engaged the Tribunal’s remedial authority.

[16] The adjudicator rejected arguments that ss. 2, 49(5) and 62(1) of the *CHRA* supported an expansive interpretation of the term “services” to encompass legislative provisions. Instead, in keeping with the jurisprudence, these provisions

pointed to the Tribunal's remedial power to render conflicting legislation inoperative, but they did not indicate that legislation itself constituted a service under the *CHRA*. He similarly rejected the argument that s. 67 of the *CHRA* had been enacted primarily to shield the *Indian Act* registration provisions, and he held that s. 67 had the broader purpose of insulating actions and decisions made pursuant to the *Indian Act*.

[17] The adjudicator thus concluded that, absent a discriminatory practice enumerated under the *CHRA*, the complainants could not challenge the provisions of the *Indian Act*. The adjudicator stated that an application under s. 15 of the *Canadian Charter of Rights and Freedoms* would be more appropriate, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, in support of the position that the *Charter* framework was a better analytical fit for challenges to legislation than the *bona fide* justification analysis under the *CHRA*. He then dismissed the complaints.

(2) The Andrews Decision

[18] The Tribunal also commenced an inquiry into the *Andrews* complaints at the request of the Commission. The adjudicator, Member Marchildon, started her analysis from the proposition that the historical enfranchisement provisions were contrary to human rights values. However, the adjudicator then identified the determinative issues in *Andrews* as being whether the complaints involved the discriminatory provision of services and, if not, whether the *CHRA* allowed for complaints that were solely a challenge to legislation.

[19] As in *Matson*, the adjudicator considered the jurisprudence on what constituted a service along with the complainant's submissions and concluded that she was faced with a direct attack on s. 6 of the *Indian Act*. The adjudicator recognized that, while status registration may be a service, the underlying entitlement provisions were the product of Parliament's *sui generis* legislative power, which could not be construed as a service under s. 5 of the *CHRA*. The adjudicator adopted the *Matson* finding that *Murphy* had not been superseded by decisions of this Court and rejected the submission that other authority submitted to her by the Commission amounted to a conflicting line of authority. She further stated that the justification framework set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, was the more appropriate approach for determining whether rules of general application should be upheld.

B. *Federal Court (2015 FC 398, 477 F.T.R. 229)*

[20] The Federal Court dismissed the Commission's application for judicial review of the *Matson* and *Andrews* decisions.

[21] McVeigh J. held that the Tribunal had reasonably relied on *Murphy* to exclude legislation from the definition of a service. She rejected the Commission's argument that *Murphy* was not binding and had been wrongly decided. The Tribunal was, in her view, obliged to follow the vertical convention of precedent. Regardless, she did not view *Murphy* as wrongly decided and thus there was no reason for the Tribunal to depart from it. Further, McVeigh J. found that the Tribunal had reasonably concluded that, while it had the power to render conflicting legislation

inoperable, it did not have the power to grant a remedy unless a discriminatory practice was established under the *CHRA*. Lastly, after reviewing the legislative history behind s. 67 of the *CHRA*, McVeigh J. concluded that the Tribunal had reasonably held that this was insufficient to ground an expansive interpretation of the registration provisions as constituting a service.

C. *Federal Court of Appeal (2016 FCA 200, [2017] 2 F.C.R. 211)*

[22] A unanimous Federal Court of Appeal dismissed the Commission's appeal from the Federal Court's decision.

[23] Writing for the Federal Court of Appeal, Gleason J.A. first considered the application of the standard of review to human rights tribunal decisions following *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. She held that the reasonableness standard presumptively applied to a tribunal's interpretation of its home statute except where a recognized exception applied or where certain contextual factors indicated that correctness should apply.

[24] While recognizing that the correctness standard had on occasion been applied to the review of human rights tribunal decisions, Gleason J.A. found that the applicable standard of review could be determined by applying general principles of administrative law. The interpretation of human rights legislation did not rise to the standard of a constitutional question warranting correctness review. While the questions determined by human rights tribunals could be of such broad import as to

be of central importance to the legal system as a whole, they generally did not fall outside the Tribunal's expertise. Gleason J.A. considered the possibility that the correctness standard could be applied where other tribunals had jurisdiction to interpret the same provisions of the *CHRA*, but no such overlap existed in the present case. Therefore, the reasonableness standard applied to the Tribunal's interpretation of s. 5, as well as its interpretation of the facts of the *Matson* and *Andrews* decisions.

[25] Gleason J.A. went on to find that the results reached by the Tribunal, and the reasons given, were reasonable. She accepted the Tribunal's characterization of the complaints as challenges to the act of legislating, agreed that legislatures do not provide "services" when passing laws, and confirmed that the principle of the primacy of human rights law applied only where conflicts between the *CHRA* and other legislation arose in cases addressing a discriminatory practice. Gleason J.A. also held that the Tribunal's inability to grant an effective remedy supported the conclusion that s. 5 was not engaged. She considered the Tribunal's approach to have an unassailable policy rationale, finding that there was no reason why the Tribunal should be an alternate forum for adjudicating issues regarding the alleged discriminatory nature of legislation when a *Charter* application was a more appropriate vehicle. Finally, on the issue of access to justice, Gleason J.A. disagreed with the Commission's view that the Tribunal was a more accessible forum than the courts.

[26] For all of the foregoing reasons, Gleason J.A. concluded that there was no basis upon which to declare that *Murphy* was no longer good law or that the Tribunal's decisions were otherwise unreasonable.

IV. Analysis

A. *Applicable Standard of Review*

[27] This Court has for years attempted to simplify the standard of review analysis in order to “get the parties away from arguing about the tests and back to arguing about the substantive merits of their case” (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J.). To this end, there is a well-established presumption that, where an administrative body interprets its home statute, the reasonableness standard applies (*Dunsmuir*, at para. 54; *Alberta Teachers*, at para. 39; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 15; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at paras. 33-34; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, at para. 8).

[28] The presumption may be rebutted and the correctness standard applied where one of the following categories can be established: (1) issues relating to the constitutional division of powers; (2) true questions of *vires*; (3) issues of competing

jurisdiction between tribunals; and (4) questions that are of central importance to the legal system *and* outside the expertise of the decision maker (*Capilano*, at para. 24; *Dunsmuir*, at paras. 58-61). Exceptionally, the presumption may also be rebutted where a contextual inquiry shows a clear legislative intent that the correctness standard be applied (*Capilano*, at para. 34; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-36 and 38-39; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 15).

[29] In applying the standard of review analysis, there is no principled difference between a human rights tribunal and any other decision maker interpreting its home statute (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (“*Mowat*”), at paras. 22-24; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 167-168; *Saguenay*, at para. 50; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591, at para. 22). Human rights tribunals are equally entitled to deference where they apply their home statute.

[30] In both of its decisions, the Tribunal was called upon to characterize the complaints before it and ascertain whether a discriminatory practice had been made

out under the *CHRA*. This falls squarely within the presumption of deference. Still, the Commission has submitted that the presumption can be rebutted on the basis that the Tribunal's decisions raise a question of central importance outside its expertise or on the basis that a contextual analysis shows deference is unwarranted. While not urged by the Commission, continued uncertainty as to the applicability of the category of true questions of *vires* necessitates also addressing it briefly.

(1) True Questions of Jurisdiction

[31] True questions of *vires* have been described as a narrow and exceptional category of correctness review (*Alberta Teachers*, at para. 39), confined to instances where the decision maker must determine whether it has the authority to enter into the inquiry before it (*Dunsmuir*, at para. 59; *Guérin*, at para. 32). In this sense, “true” questions of jurisdiction involve a far narrower meaning of “jurisdiction” than the one ordinarily employed. This narrow sense of jurisdiction was emphasized by Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (“*CUPE*”), where he warned that courts “should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so” (p. 233). This Court reaffirmed the narrow approach to jurisdiction in *Dunsmuir* when it explicitly rejected a return to the jurisdiction/preliminary question doctrine that had “plagued the jurisprudence” (para. 59; see also *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at para. 34). A departure from this

constrained understanding of jurisdiction would only risk resurrecting long-buried debates.

[32] Neither the Commission nor any lower court has suggested that this case involves the enigmatic category of true questions of *vires*. But the issue on appeal has, at times, been characterized by the parties and the courts below as being whether the Tribunal has the “jurisdiction” to consider direct attacks to legislation or whether the courts are the better forum to ascertain the validity of legislation. However, distilled to its essentials, the question before the Tribunal was whether legislative entitlements under the *Indian Act* fell within the definition of a service under the *CHRA*. As such, the Tribunal was determining whether the complaints concerned a discriminatory practice as defined by the *CHRA*.

[33] There is no question that the Tribunal had the authority to hear a complaint about a discriminatory practice. To that end, the question of what falls within the meaning of “services” is no more exceptional than those found in other cases where a majority of this Court has repeatedly declined to recognize a true question of jurisdiction (*Guérin*, at paras. 33-36; *Capilano*, at para. 26; *Alberta Teachers*, at para. 33; *CUPE*, at pp. 233-34; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 39; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 35; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 36; *Mowat*, at paras. 24-25). To find that the Tribunal was faced with a true question of *vires* would only risk

disinterring the jurisdiction/preliminary question doctrine that was clearly put to rest in *Dunsmuir*. Plainly, the definition of a service under the *CHRA* is not a true question of *vires*.

[34] That being said, the persistent uncertainty over this category’s scope requires further comments. Since its inclusion as a category of correctness review in *Dunsmuir*, the concept of true questions of *vires* has been as elusive as it has been controversial. In *Alberta Teachers*, a majority of this Court considered eliminating *vires* review, remarking that it served little purpose but “has caused confusion to counsel and judges alike” (para. 38; see also paras. 34-42). The majority stressed that it was “unable to provide a definition of . . . a true question of jurisdiction” (para. 42).

[35] I pause here to note that it is indeed a challenge to identify a true question of jurisdiction in a coherent manner without returning to the jurisdiction/preliminary question doctrine that this Court clearly rejected in both *CUPE* (p. 233) and *Dunsmuir* (para. 35). In the view of some, most questions that might be identified as “jurisdictional” involve nothing more than an interpretation of a decision maker’s home statute or a closely related statute (P. Daly, *The hopeless search for “true” questions of jurisdiction* (August 15, 2013) (online)). In *McLean*, Moldaver J. observed that the U.S. Supreme Court has rejected the distinction between jurisdictional and non-jurisdictional interpretations of a home statute as a “mirage” (note 3, citing *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013), at p. 1868).

[36] Nonetheless, in *Alberta Teachers*, the majority stayed its hand and instead emphasized that, if they exist, “[t]rue questions of jurisdiction are narrow and will be exceptional” (para. 39). It was left to future litigants to overcome the heavy burden of establishing that they have indeed discovered a true question of *vires* (para. 42). Yet, to date, no litigant has met this challenge before us.

[37] Since *Alberta Teachers*, the search for true questions of *vires* has, in fact, been fruitless. When the existence of such a question has been argued by litigants, this Court has reasserted the narrow and exceptional nature of this category (*Guérin*, at para. 32; *Capilano*, at para. 26; *SODRAC*, at para. 39; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219, at para. 27; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 61). In 2013, an academic commentator characterized the search for a true question of jurisdiction as “hopeless”, noting that this Court had yet to identify one five years after *Dunsmuir* (Daly). It is now 10 years from *Dunsmuir* and the search remains just as hopeless. In applying *Dunsmuir*, our Court has been unable to identify a single instance where this category was found to be applicable.

[38] No more would need to be said on this matter if true questions of *vires* had simply faded into obscurity. However, that has not happened. The difficulty with true questions of *vires* is that jurisdiction is a slippery concept. Where decision makers interpret and apply their home statutes, they inevitably determine the scope of

their statutory power (*Alberta Teachers*, at para. 34). There are no clear markers to distinguish between simple questions of jurisdiction (i.e., questions that determine the scope of one's authority) and true questions of *vires* (i.e., questions that determine whether one has authority to enter into the inquiry). Such imprecision tempts litigants and judges alike to return to a broad understanding of jurisdiction as justification for correctness review contrary to this Court's jurisprudence. As a result, the elusive search for true questions of *vires* may both threaten certainty for litigants and undermine legislative supremacy.

[39] For some, the continued existence of the category of true questions of *vires* may seem to provide conceptual value, at most. In his concurrence in *Alberta Teachers*, Cromwell J. wrote a spirited defence of the conceptual necessity of correctness review for jurisdiction given the courts' supervisory power over the bounds of jurisdiction, but even he conceded that the category of true questions of *vires* has little analytical value in the standard of review analysis (para. 94). It remains an open question whether conceptual necessity can justify the resources that courts and parties devote to the attempt to define an inherently nebulous concept.

[40] Our jurisprudence has held that the constitutional guarantee of judicial review is premised on the courts' duty to ensure that public authorities do not overreach their lawful powers (*Dunsmuir*, at para. 29; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 234-38). However, the jurisprudence has also affirmed that judicial review is based on respect for the choices of the legislature's

delegated decision makers and recognizes the legitimacy of multiple reasonable interpretations of a statute (*Dunsmuir*, at para. 35; *McLean*, at para. 33). In matters of statutory interpretation where there is only one reasonable answer, this Court has shown that the reasonableness standard still allows the reviewing court to properly deal with the principles of the rule of law and legislative supremacy that remain at the core of the judicial review analysis (*McLean*, at para. 38; *Mowat*, at para. 34; *Dunsmuir*, at para. 75). In this regard, reasonableness review is often more than sufficient to fulfil the courts' supervisory role with regard to the jurisdiction of the executive.

[41] The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted. Absent full submissions by the parties on this issue and on the potential impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88).

(2) Questions of Central Importance

[42] The Commission argues that the Tribunal's decisions raise a question of central importance in which it lacks expertise because other federal tribunals with the power to determine general questions of law have concurrent jurisdiction to interpret

the scope of s. 5 of the *CHRA*. *Dunsmuir* recognized that the correctness standard of review can apply to questions of law that are both of central importance to the legal system as a whole *and* outside the decision maker's specialized area of expertise (paras. 55 and 60). Since *Dunsmuir*, this category of correctness review has been applied only twice by this Court — first in *Saguenay*, at paras. 49-51, and then in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 21-22 and 26. Indeed, this Court has repeatedly rejected a liberal application of this category (see, e.g., *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 38; *Whatcott*, at para. 168; *Kanthisamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at para. 44; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 34; *Alberta Teachers*, at para. 32; *Barreau du Québec v. Québec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18; *Canadian National Railway*, at paras. 60 and 62; *McLean*, at para. 28).

[43] Here, the Tribunal has extensive expertise in determining what is meant by a discriminatory practice. The ability of other federal tribunals to apply the *CHRA* does not rob the Tribunal of its expertise in its home statute. Regardless of whether the questions before the Tribunal rose to the requisite level of importance, they were clearly within the Tribunal's expertise. This category does not apply.

(3) Contextual Approach

[44] The Commission also urged that a contextual analysis rebuts the presumption of reasonableness review. It argued that this shows clear legislative intent that the correctness standard applies, largely on the ground that the Tribunal changed the “foundational legal test” for what constitutes a service under the *CHRA*. On the basis of their contextual analysis, my colleagues Côté and Rowe JJ. would also apply a correctness standard of review. Respectfully, I disagree with both positions.

[45] The presumption of reasonableness was intended to prevent litigants from undertaking a full standard of review analysis in every case. Where the presumption applies, such simplicity requires that the contextual approach play a subordinate role in the standard of review analysis. Certainly, this Court has indicated that, occasionally, such a contextual inquiry can rebut the presumption of deference (*Saguenay*, at para. 46; *Capilano*, at para. 32; *Tervita*, at para. 35; *McLean*, at para. 22; *Barreau du Québec*, at para. 23). However, the Court has also noted that this will occur in the “exceptional *other* case” (*Rogers*, at para. 16 (emphasis in original)).

[46] This contextual approach should be applied sparingly. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to “retreat to the application of a full standard of review analysis where it can be determined summarily” (para. 44). After all, the “contextual approach can generate uncertainty and endless litigation concerning the standard of review” (*Capilano*, at para. 35). The presumption of reasonableness review and the identified categories will generally be

sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano*, at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51).

[47] In this regard, I cannot agree with my colleagues Côté and Rowe JJ.’s characterization of the current standard of review framework as requiring correctness review wherever the “contextual factors listed in *Dunsmuir* point towards correctness as the appropriate standard” (para. 73). Where the presumption of reasonableness review applies, as it does here, this suggestion is contrary to the contextual approach’s ancillary role in our current jurisprudence and would undermine the certainty this Court has sought to establish in the past decade. While this Court may eventually find it necessary to revisit the standard of review framework, dissatisfaction with the current state of the law is no reason to ignore our precedents following *Dunsmuir*. To do so only adds confusion to an already challenging area of law.

[48] Turning to the specifics of this case with this guidance in mind, there are no factors present in this appeal that would necessitate a long and detailed contextual analysis to rebut the presumption. The Commission’s submission that changes to “foundational legal tests” require the application of a correctness standard must be

rejected. It has no basis in the jurisprudence, is not a clear indicator of legislative intent, and would risk adding only more uncertainty to the standard of review analysis. Moreover, I would be cautious not to expand the appropriate factors beyond those enumerated in *Dunsmuir* without a principled basis for doing so, as this would invite unprincipled interference with the legislature's delegates.

[49] I also consider it necessary to address my colleagues Côté and Rowe JJ.'s own application of the contextual analysis in this case. None of the factors they raise, in my opinion, warrants the application of the contextual approach or, by extension, correctness review. With respect, I am of the view that their treatment of the contextual analysis is unsupported by, and at points contrary to, this Court's jurisprudence.

[50] With regard to the absence of a privative clause, this Court has long since established that such an omission does not rebut the presumption of deference (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Mowat*, at para. 17). To the contrary, the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review (*Khosa*, at para. 25).

[51] This Court's jurisprudence also does not support correctness review on the basis that other administrative tribunals may consider the *CHRA*. Certainly, this Court has recognized that correctness review may be applied where a tribunal is not part of a "discrete and special administrative regime" because it shares jurisdiction

with the courts or because there is clear language indicating that it is to be treated as if it were a court (*Rogers*, at para. 15 (emphasis deleted), citing *Dunsmuir*, at para. 55; see also *Tervita*, at para. 38). This is distinguishable, however, from the situation where a tribunal applies its home statute, the courts have no concurrent jurisdiction and there is no explicit appeal clause. Indeed, in my view, the approach taken by Côté and Rowe JJ. would create a new category of correctness review for alleged questions of central importance regardless of the tribunal's expertise.

[52] The potential for conflicting lines of authority does not warrant correctness review either. This Court has recognized that conflicting lines of authority do not, on their own, justify judicial review and it has applied a deferential standard where they have been raised (*Wilson*, at para. 17; *Barreau du Québec*, at para. 19; *Smith*, at para. 38; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 800-801). I also doubt that there is a conflicting line of authority in this case. The approach to s. 5 of the *CHRA* taken in *Druken* in 1998 was set aside in *Murphy* in 2012, and this guidance has since been followed. Tellingly, the most recent conflicting authority Côté and Rowe JJ. have identified dates back 17 years.

[53] Lastly, I take issue with the treatment Côté and Rowe JJ. give to the nature of the question at issue and the purpose of the Tribunal. Interpreting the scope of the term "services" does not have a constitutional dimension. No interpretation of s. 5 of the *CHRA* could prevent superior courts from hearing challenges under s. 15 of

the *Charter* or give the Tribunal the power to hear *Charter* applications. Indeed, framing these factors as a question of whether certain questions are better suited for courts effectively applies the jurisdiction/preliminary question doctrine. As discussed, this doctrine was long ago put to rest (*CUPE*, at p. 233; *Dunsmuir*, at para. 59; *Halifax*, at para. 34).

[54] As the presumption that reasonableness review applies is not rebutted, the Tribunal’s decisions will be reviewed on a reasonableness standard, as it was at the Federal Court and the Federal Court of Appeal.

B. *Review of the Decisions*

(1) The Reasonableness Standard

[55] In reasonableness review, the reviewing court is concerned mostly with “the existence of justification, transparency and intelligibility within the decision-making process” and with determining “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence

considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

(2) Application

[56] In both decisions, the Tribunal provided careful and well-considered reasons explaining why the complaints had not established a discriminatory practice under the *CHRA*. The adjudicators first characterized the complaints as direct attacks on legislation. They then found that, while the *CHRA* conferred remedial authority to render conflicting legislation inoperable, the Tribunal could not grant a remedy unless a discriminatory practice had first been established. They then concluded that legislation *per se* was not a service under the s. 5 prohibition of discriminatory practices in the provision of services. In coming to this conclusion, the adjudicators considered the complainants' evidence and submissions, the governing jurisprudence, the purpose, nature and scheme of the *CHRA*, and relevant policy considerations. The decisions meet the *Dunsmuir* standard of intelligibility, transparency and justifiability, and fall within the range of reasonable outcomes (para. 47).

[57] The critical issue for the adjudicators to decide was whether the complaints constituted a direct attack on legislation or whether they concerned discrimination in the provision of a service. It is uncontroversial that actions of the executive in providing services primarily available to the public are reviewable under human rights legislation (see, e.g., *Tranchemontagne*; *Beattie v. Canada (Aboriginal*

Affairs and Northern Development), 2014 CHRT 1; *Canada (Attorney General) v. Davis*, 2013 FC 40, 425 F.T.R. 200; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, [2013] 4 F.C.R. 545). What is controversial is consideration of complaints that, in substance, solely target legislation. In reviewing such complaints, human rights tribunals are faced with the challenging task of distinguishing between administrative services and legislation. Human rights tribunals in federal and provincial jurisdictions have taken various approaches to making such a distinction (C. Mummé, “At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases” (2012), 9 *J.L. & Equality* 103, at pp. 116-17). Since this raises a question of mixed fact and law squarely within their expertise, human rights tribunals are best situated to develop an approach to making such distinctions. Under reasonableness review, the reviewing court’s task is to supervise the tribunal’s approach in the context of the decision as a whole. Its role is not to impose an approach of its own choosing.

[58] The adjudicators approached the characterization of the complaints by looking at the jurisprudence for determining what constitutes a service under s. 5 of the *CHRA* and by considering the nature of the allegations, the wording of the complainants’ submissions and the relationship between the Registrar and the s. 6 entitlement provisions of the *Indian Act*. Both adjudicators placed weight on the complainants’ submissions that framed their complaints as targeting the *Indian Act* entitlement provisions. The adjudicators found that the complaints did not impugn the

means by which the Registrar had processed their applications, but substantively targeted the eligibility criteria that the Registrar was required to apply. On this basis, the adjudicators reasonably concluded that the complaints before them were properly characterized as direct attacks on legislation.

[59] After concluding that the complaints impugned legislative criteria rather than the process of registration, the adjudicators turned to consider whether the complainants were capable of making out a discriminatory practice under the *CHRA*. All of the complaints alleged that INAC had engaged in a discriminatory practice by denying a service, or by subjecting the complainants to adverse differentiation with respect to a service, on prohibited grounds. The adjudicators therefore sought to determine whether legislation fell within the statutory definition of a service.

[60] The Tribunal reasonably considered the guidance provided by the Federal Court of Appeal in *Murphy* and the underlying Tribunal decision that the Federal Court of Appeal had endorsed in that judgment. It is unnecessary for the disposition of this appeal to determine the degree to which *Murphy* constituted binding authority or how such a decision could be overturned by this Court on reasonableness review. While the adjudicators considered themselves bound by *Murphy*, they still conducted a thorough analysis to determine whether or not *Murphy* had been superseded either by binding authority or by the *CHRA*. Both decisions can stand on their own merits.

[61] In considering the authorities from both this Court and provincial jurisdictions, the adjudicators distinguished the primacy of human rights legislation

and the statutory prohibition against discriminatory practices. They recognized that decisions such as *Heerspink*, *Craton*, *Action Travail des Femmes*, *Andrews v. Law Society of British Columbia*, *Larocque*, and *Tranchemontagne* considered that human rights legislation could render conflicting legislation inoperable. Hence, where a discriminatory practice without *bona fide* justification is established, the Tribunal has the power to order administrators to stop applying conflicting provisions. However, as the Tribunal indicated, in all such cases the human rights tribunals were responding to an established discriminatory practice. None of these cases stood for the proposition that legislation in general fell within the meaning of “services”. The Tribunal reasonably did not take the jurisprudence on its remedial authority as overturning *Murphy* or as necessitating an expansive interpretation of the meaning of “services”.

[62] The adjudicators also reasonably considered whether legislation could fall under the definition of a service based on *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, and *Watkin*. The adjudicator in *Andrews* noted that the *sui generis* nature of Parliament’s power to legislate is inconsistent with the characterization of law-making as a public service and that law-making does not have the transitive connotation necessary to identify a service customarily offered to the public.

[63] There is also no issue with the Tribunal’s review of the scheme of the *CHRA*. Both adjudicators found that the provisions raised by the Commission were

entirely consistent with the distinction made between the primacy of human rights legislation and the scope of the *CHRA*'s prohibition of discriminatory practices. Section 49(5), which requires that the adjudicator assigned to cases where legislation may be rendered inoperable be a lawyer, and s. 62(1), which immunizes pension legislation from review, are consistent with the distinction between the primacy of the *CHRA* and the scope of its prohibition of discriminatory practices. Neither provision supports the interpretation that all legislation could be subject to review by the Tribunal. The now repealed s. 67 of the *CHRA*, which immunized the *Indian Act* from human rights complaints, was consistent with Parliament's intent to shield services rendered pursuant to the *Indian Act* from challenge. In any event, on its own, s. 67 was insufficient to infer that Parliament intended to allow direct challenges to all other legislation.

[64] The Commission and interveners have raised numerous policy grounds upon which direct challenges to legislation should be considered by the Tribunal. However, it is not for a reviewing court to reweigh policy considerations. The adjudicators clearly considered the practical difficulties and challenges to democratic legitimacy involved in evaluating challenges to legislation under the *bona fide* justification requirement. There is nothing unreasonable about this determination.

[65] I would conclude by noting that the analysis of s. 5 of the *CHRA* in Côté and Rowe JJ.'s reasons does not differ significantly from that of the Tribunal. Indeed, I fail to see where their analysis adds to the Tribunal's interpretation of its own

statute, which engaged substantially with the human rights jurisprudence and addressed the difficult question of when a complaint is properly characterized as an attack on legislation. Given this, I would question whether this Court, or any reviewing court, is necessarily better situated to interpret this decision maker's home statute.

V. Conclusion

[66] The Tribunal reviewed all of the complaints in carefully considered, thorough and logical decisions that fell within the range of possible, acceptable outcomes. Both decisions were reasonable and should be upheld.

[67] In closing, I would emphasize that the disposition of this appeal says nothing as to whether the *Indian Act* infringes the rights of the complainants under s. 15 of the *Charter*. In this regard, I would simply note that in recent years, there have been two successful challenges to the *Indian Act* registration provisions, both of which have prompted legislative reform (*Descheneaux v. Canada (Attorney General)*, 2015 QCCS 3555, [2016] 2 C.N.L.R. 175; *McIvor v. Canada (Indian and Northern Affairs, Registrar)*, 2009 BCCA 153, 306 D.L.R. (4th) 193).

[68] I would accordingly dismiss the appeal. Costs were not sought by either party and will not be awarded.

The following are the reasons delivered by

CÔTÉ AND ROWE JJ. —

I. Overview

[69] At issue in this case is whether the Canadian Human Rights Tribunal (“Tribunal”) erred in finding that legislative enactments cannot be challenged pursuant to s. 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (“CHRA”). Section 5 of the CHRA prohibits (among other things) the making of discriminatory distinctions in the provision of services customarily available to the general public. In both *Andrews v. Canada (Indian and Northern Affairs)*, 2013 CHRT 21, and *Matson v. Canada (Indian and Northern Affairs)*, 2013 CHRT 13, the Tribunal dismissed several complaints brought against the registration provisions of the *Indian Act*, R.S.C. 1985, c. I-5, on the basis that they did not impugn discrimination “in the provision of . . . services” (s. 5 of the CHRA). Applying a deferential standard of review, both the Federal Court (2015 FC 398, 477 F.T.R. 229) and the Federal Court of Appeal (2016 FCA 200, [2017] 2 F.C.R. 211) held that the Tribunal’s decisions in *Matson* and *Andrews* were reasonable. A majority of this Court would do the same.

[70] We agree with our colleague Gascon J. as to the disposition of this appeal, as well as with his summary of the facts and judicial history. However, we part ways with respect to the selection of the appropriate standard of review. In our view, a contextual analysis leads to the conclusion that the Tribunal’s decisions

should be reviewed for correctness. Applying this standard, we would hold that the Tribunal correctly decided the issue, and dismiss the appeal accordingly.

II. Analysis

A. *What Is the Applicable Standard of Review?*

[71] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 62, this Court established a two-stage framework for determining the degree of deference owed to an administrative body's decision on judicial review. First, the reviewing court is to survey the jurisprudence to ascertain whether the applicable standard of review has already been settled. If so, the inquiry ends there and the court applies that standard in reviewing the merits of the impugned decision. If the appropriate standard has not been settled in the jurisprudence, however, the second stage of the analysis directs the court to undertake a more rigorous analysis to determine whether the statutory body's decision ought to be reviewed for reasonableness or for correctness.

[72] The standard of review analysis set out in *Dunsmuir* requires the court to consider several contextual factors, which include the nature of the question at issue, the presence or absence of a privative clause, the tribunal's statutory purpose, and the expertise of the tribunal (para. 64). These factors help to determine the standard that strikes the appropriate balance between respect for the rule of law on one hand, and legislative supremacy on the other.

[73] In the jurisprudence that followed *Dunsmuir*, this Court has placed significant emphasis on the nature of the question at issue when determining the applicable standard of review. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39, this Court affirmed that reasonableness will be the presumptive standard for the review of questions that involve the tribunal's interpretation and application of its home statute or of a statute closely related to its function. There are, however, two situations where the presumption will not apply. First, the jurisprudence recognizes four "categories" of questions that will necessarily attract review on a standard of correctness: constitutional questions, questions of law that are both of central importance to the legal system and that are outside of the tribunal's specialized area of expertise, questions that involve the drawing of jurisdictional lines between two or more competing specialized tribunals, and true questions of jurisdiction. Second, the presumption of reasonableness will be rebutted if the contextual factors listed in *Dunsmuir* point towards correctness as the appropriate standard.

[74] Turning to the present case, we agree with the Canadian Human Rights Commission ("Commission") that the jurisprudence is unclear as to which standard applies to the review of the particular question before us. This was the conclusion reached by the unanimous Federal Court of Appeal panel; after undertaking a careful review of the relevant case law, Gleason J.A. observed the difficulty in "draw[ing] a bright line as to when the reasonableness or the correctness standard will apply to decisions of human rights tribunals interpreting the scope of the protections afforded

in their constituent legislation” (para. 69). And while this Court in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (“*Mowat*”), applied a reasonableness standard when reviewing a decision of the Tribunal finding that it had the statutory authority to order costs in favour of a successful complainant, it nevertheless recognized that the *Dunsmuir* framework may direct that certain decisions of the Tribunal be reviewed for correctness (para. 23).

[75] The parties frame the issue in the present case around the Tribunal’s interpretation of s. 5 of the *CHRA*, and neither disputes that this is a question to which the presumption of reasonableness applies. The respondent, the Attorney General of Canada, submits that this presumption is not rebutted on either a categorical or a contextual basis. By contrast, the appellant, Commission, submits that a contextual analysis leads to the conclusion that the standard of correctness ought to apply in these circumstances.

[76] Since the interpretation of s. 5 of the *CHRA* is at issue in this case, we agree that reasonableness *presumptively* applies. Gascon J. is of the view that the issue before us does not fall within any of the recognized categories that attract correctness review — but has much more to say in this regard. Without it having been raised as an issue before this Court, he goes to great lengths to point out the perceived difficulties associated with the category of jurisdictional questions, and expresses significant doubt as to whether this category even remains an analytically useful component of the standard of review analysis (paras. 31-41).

[77] We would strongly distance ourselves from these *obiter* comments. Recognizing that the concept of jurisdiction has and continues to play a crucial role in administrative law, this Court has made clear on several occasions that administrative decision makers *must* be correct in their determinations as to the scope of their delegated authority (*Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5; *Dunsmuir*, at para. 29). This is because jurisdictional questions are fundamentally tied to both the maintenance of legislative supremacy, which requires that a given statutory body operate within the sphere in which the legislature intended that it operate, as well as the rule of law, which requires that all exercises of delegated authority find their source in law (*Dunsmuir*, at para. 28). Nothing in our reasons should be read as undermining these longstanding principles of judicial review. We agree with our colleague Gascon J., however, that any uncertainty surrounding the jurisdictional question category ought to be resolved another day, when this issue is squarely raised by the parties.

[78] We also disagree with the proposition that the contextual approach plays merely a subordinate role in the standard of review analysis (reasons of Gascon J., at para. 45). On our reading of the applicable case law, resort to the contextual approach is not exceptional at all; the framework set out by this Court in *Dunsmuir* is manifestly contextual in nature. The “correctness categories”, as they have become known, are simply instances where the jurisprudence has already settled the appropriate standard, such that a more extensive analysis of the relevant contextual

factors needs not be performed (*Dunsmuir*, at paras. 57-61; Hon. M. Bastarache, *Dunsmuir 10 Years Later* (March 9, 2018) (online)). In this regard, we can only repeat what this Court said regarding the determination of the appropriate standard of review 10 years ago in *Dunsmuir*:

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

The existing approach to determining the appropriate standard of review has commonly been referred to as “pragmatic and functional”. That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase “pragmatic and functional approach” may have misguided courts in the past, we prefer to refer simply to the “standard of review analysis” in the future.

The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case. [Emphasis added; paras. 62-64.]

[79] With this in mind, we simply cannot agree with the suggestion that the contextual analysis “should be applied sparingly”, or that “[t]he presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard” (reasons of Gascon J., at para. 46). *Dunsmuir* provides that such an analysis *must* be undertaken where the categories identified in

the jurisprudence do not apply. And we observe that a number of post-*Dunsmuir* decisions from this Court have done just that: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Barreau du Québec v. Québec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488. The importance of context within the *Dunsmuir* framework cannot be downplayed.

[80] For this reason, we dispute Gascon J.’s qualification of our standard of review analysis as being “unsupported by, and at points contrary to, this Court’s jurisprudence” (para. 49).

[81] Returning to the present case, and without deciding whether or not this question falls within any category of questions calling for correctness review, the relevant contextual factors listed in *Dunsmuir* lead us to conclude that the presumption has been rebutted in this case, and that the appropriate standard of review is therefore correctness. In this respect, we would also note that correctness review for questions that involve the scope of human rights protections under the *CHRA* — on the basis of either categories or context — is not at all unprecedented (see, for example, *Mowat*, at para. 23; *Canada (Attorney General) v. Watkin*, 2008 FCA 170, 378 N.R. 268, at para. 23; *Canada (Attorney General) v. Johnstone*, 2014

FCA 110, [2015] 2 F.C.R. 595, at paras. 44-52; *Canadian National Railway v. Seeley*, 2014 FCA 111, 458 N.R. 349, at paras. 35-36).

(1) Absence of a Privative Clause

[82] First is the absence of a privative clause. This Court in *Dunsmuir* noted that the existence of “a privative clause is evidence of Parliament or a legislature’s intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized” (para. 52). Put differently, while these statutory provisions do not oust the superior courts’ inherent and constitutional authority to judicially review administrative action, they nevertheless provide a strong indication that deference is to be shown to that particular decision maker.

[83] Although the *CHRA* confers onto the Tribunal the power to “decide all questions of law or fact necessary to determining the matter” before it (s. 50(2)), Parliament opted not to shield these decisions from exacting review behind a privative clause. We appreciate that the absence of a privative clause does not, on its own, rebut the presumption of deference, though we would nevertheless note that it does not support reasonableness review either.

(2) Expertise of the Tribunal: Section 5 of the CHRA Is Not Interpreted Exclusively Within a Discrete and Special Administrative Regime

[84] The second factor militating in favour of correctness review is the desirability of a uniform interpretation of the term “services” as it appears in s. 5 of

the *CHRA* across federal statutory bodies. On several occasions, this Court has affirmed that human rights protections must be interpreted consistently across jurisdictions, unless the legislative intent clearly indicates otherwise (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, at p. 373; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at para. 47; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45, [2008] 2 S.C.R. 604, at para. 68, per McLachlin C.J., concurring in part). In our view, it is even more imperative that provisions within a given human rights statute be interpreted consistently among courts and tribunals tasked with its application. The rule of law is undermined where the same anti-discrimination protection is interpreted and applied a certain way by one administrative decision maker, and altogether differently by another.

[85] The Tribunal is not the only administrative decision maker at the federal level that is tasked with enforcing the anti-discrimination protections of the *CHRA*. This Court has found that administrative decision makers other than human rights tribunals may also have the authority to interpret and apply human rights legislation in connection with matters properly before them (*Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513; see, for example, *Canada Employment Insurance Commission v. M. W.*, 2014 SSTAD 371, at paras. 51-69 (CanLII)). We are therefore of the view that the particular question at issue — whether legislation can be challenged as discrimination in the provision of a service — does not arise within a particularly discrete administrative regime over

which the Tribunal has exclusive jurisdiction (*Dunsmuir*, at para. 55; *Rogers Communications*, at para. 18; *Johnstone*, at paras. 47-48). Various other decision makers — including the Commission, the Social Security Tribunal, and labour arbitrators — have been and will continue to be asked that very same question. To borrow the words of Slatter J.A. in *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at para. 95:

. . . it cannot be the legislative intent that public statutes mean different things in different parts of the [country]. In a related but analogous context, the Supreme Court accepted in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 9-10, [2002] 2 S.C.R. 235 (S.C.C.) that appellate courts perform legitimate law-settling and law-making roles. It is part of the legitimate role of appellate courts to ensure that the same legal rules are applied in similar situations. For that same reason, the standard of review of correctness should be applied when many tribunals have to interpret the same statute.

[86] The principal concern regarding this concurrent jurisdiction is therefore that these decision makers will arrive at competing conclusions as to the scope of the very same human rights protection — or, to put it more generally, that the answer to a given legal question will depend on the decision maker considering it. This concern is fundamentally tied to the rule of law. And in our view, it matters not that jurisdiction is shared between a statutory body and a court, or instead among several statutory bodies; the fact that an administrative decision may have ramifications beyond a single, discrete tribunal underscores this rule of law concern, and supports review of that decision on a standard of correctness.

[87] This rule of law concern is more than just theoretical. As was highlighted in both *Andrews* and in *Matson*, there exists diverging lines of authority as to whether the human rights protection in s. 5 of the *CHRA* permits challenges aimed at legislation and nothing else. In *Druken*, both the Tribunal and the Federal Court of Appeal accepted that unemployment insurance, which was available pursuant to the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, and its regulations, was a “service” for the purpose of s. 5 of the *CHRA* (*Druken v. Canada (Employment and Immigration Commission)*, 1987 CanLII 99; *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24). This reasoning was followed by the Federal Court in *Gonzalez v. Canada (Employment and Immigration Commission)*, [1997] 3 F.C. 646 (T.D.), and by the Tribunal in *McAllister-Windsor v. Canada (Human Resources Development)*, 2001 CanLII 20691. By contrast, other decision makers interpreting that very same provision of the *CHRA* reached the opposite conclusion. For example, the Federal Court of Appeal in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7, 428 N.R. 240 (“*Murphy*”), held that “the CHRA does not provide for the filing of a complaint directed against an act of Parliament” (para. 6). This echoed the holding of the Tribunal in *Forward v. Canada (Citizenship and Immigration)*, 2008 CHRT 5, and of the Federal Court in *Canada (Human Rights Commission) v. M.N.R.*, 2003 FC 1280, [2004] 1 F.C.R. 679, at para. 30, as well as the comments made by Robertson J.A. of the Federal Court of Appeal in *Canada (Attorney General) v. McKenna*, [1999] 1 F.C. 401, at paras. 78-80.

[88] Can both of these ostensibly reasonable interpretations of the same human rights protection co-exist side-by-side? Should the scope of s. 5 of the *CHRA* be contingent on the view of the Tribunal member or judge before whom the litigants find themselves? We would say no. Given the foregoing, and bearing in mind the quasi-constitutional status of human rights legislation, the question arising in the present case is precisely one that calls for uniform and consistent answers across Canadian courts and statutory bodies. This cannot be achieved, however, if superior courts require only that these decisions fall within a range of reasonable outcomes. Rather, applying a non-deferential correctness standard allows the courts to provide meaningful guidance as to the scope of these fundamentally important human rights protections, and ensure respect for the rule of law in such cases.

(3) The Purpose of the Tribunal and the Nature of the Question at Issue

[89] Finally, the issue before this Court touches on the very purpose for which the Tribunal exists. In deciding whether or not challenges to legislation are caught within the meaning of a “discriminatory practice” under the *CHRA*, the Tribunal’s decision responds to a question of law with a constitutional dimension: Who gets to decide what types of challenges can be brought against legislative action? The Commission argued that a determination that legislative challenges are not caught within the scope of s. 5 undermines the primacy of human rights law by barring claimants from bringing certain types of challenges before the Tribunal. While this appeal is not constitutional in the narrow sense — in that it does not directly engage

rights protected under the *Canadian Charter of Rights and Freedoms*, for example — it necessarily implicates the rule of law and the duty of superior courts under s. 96 of the *Constitution Act, 1867* to uphold this fundamental constitutional principle (*Dunsmuir*, at paras. 29 and 31). No deference is owed to the decision of an administrative decision maker in these circumstances.

(4) Conclusion

[90] We accept that the analysis in the present case begins with the presumption of reasonableness, but it cannot be disputed that this presumption is rebuttable through a contextual analysis. We also agree with our colleague Gascon J. that the omission of a privative clause “does not rebut the presumption of deference” (para. 50). Indeed, this Court has recognized that “their presence or absence is no longer determinative about whether deference is owed to the tribunal or not” (*Mowat*, at para. 17). Furthermore, there is no dispute that the potential for conflicting lines of authority does not, *on its own*, warrant a less deferential standard of review (reasons of Gascon J., at para. 52). In our view, however, they are each indicia that point toward correctness. While neither factor may *independently* call for correctness, we repeat that “[t]he analysis must be contextual” (*Dunsmuir*, at para. 64). And when this Court stated that “[i]n many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case” (*Dunsmuir*, at para. 64), it did so, recognizing that, in other cases, the whole context would be determinative. This is such a case. For this reason, a contextual analysis leads us to the conclusion that the

presumption is rebutted in this case, and that the impugned decision ought to be reviewed for correctness.

B. *Does Section 5 of the CHRA Permit Bare Challenges to Legislation?*

[91] Any complainant making a claim of discrimination before the Tribunal must ensure that his or her claim falls within the scope of the *CHRA*. Section 40 of the *CHRA* permits individuals and groups to bring complaints that allege “discriminatory practices”. Under s. 39, a “discriminatory practice” is defined to include all the human rights prohibitions listed in ss. 5 to 14.1 of the *CHRA*.

[92] This case is about the scope of s. 5 of the *CHRA*, which reads as follows:

5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

[93] Do the present complaints allege a discriminatory practice in the provision of a service customarily available to the general public? Before the Tribunal, the complainants sought to challenge the registration provisions of the *Indian Act* as making discriminatory distinctions on the basis of race, national or ethnic origin, sex and family status (*Matson*, at para. 2 (CanLII); *Andrews*, at para. 11

(CanLII)). They did not challenge the actions of the Registrar in processing their applications. At their core, these complaints are about Parliament's decision not to extend "Indian" status to persons in similar circumstances. This was properly characterized by the Tribunal as a bare challenge to legislation.

[94] The remedy resulting from a successful challenge on this basis would be to render the impugned provisions inoperable. However, granting this remedy — or indeed, any other remedy — is contingent upon the Tribunal being validly seized of the matter in the first place. The Federal Court of Appeal correctly noted that one must not conflate the scope of s. 5 with the extent of the Tribunal's remedial authority (C.A. reasons, at para. 99). Moreover, the notion that human rights statutes take primacy where they are inconsistent with another statute does not inform this Court's interpretation of the scope of s. 5. The meaning of this provision must be determined on its own as a matter of statutory interpretation.

[95] What, then, is encompassed in s. 5? The wording of this section focuses on the *provision* of services. The French version of the *CHRA* says that it is a discriminatory practice for the *service provider* ("le fournisseur . . . de services") to deny or differentiate adversely in relation to an individual. The use of this language suggests that s. 5 is geared towards discrimination perpetrated by service providers.

[96] In our view, Parliament is not a service provider, and was not providing a service when it enacted the registration provisions of the *Indian Act*. Moreover, law-making is unlike any of the other terms listed in s. 5; it does not resemble a good,

facility or accommodation (see *Forward*, at para. 42 (CanLII)). As observed by the Tribunal in *Andrews*, the legislative process is unique:

Law-making is one of Parliament’s most fundamental and significant functions and *sui generis* in its nature. This is confirmed by the powers, privileges and immunities that Parliament and the Legislatures possess to ensure their proper functioning, which are rooted in the Constitution, by virtue of the preamble and section 18 of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3, [*Constitution Act*] and in statute law, in sections 4 and 5 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1: *Telezone Inc. v. Canada (Attorney General)*, (2004), 235 D.L.R. (4th) 719 at paras. 13-17. Indeed, the dignity, integrity and efficient functioning of the Legislature is preserved through parliamentary privilege which, once established, is afforded constitutional status and is immune from review: *Harvey v. New Brunswick (Attorney General)*, (1996), 137 D.L.R. (4th) 142, [1996] 2 S.C.R. 876; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 33 [*Vaid*]. To consider the act of legislating along the same lines as that of delivering Householders as in *Pankiw* or to processing a citizenship application as in *Forward* is fundamentally problematic and emblematic of an approach which ignores the special role law-making possesses in our society. In legislating, Parliament is not a service provider and there is no “transitive connotation” to this function. Rather, it is fulfilling a constitutionally mandated role, at the very core of our democracy. As such, while law-making is an activity that could be said to take place “in the context of a public relationship” (*Gould* at para. 16) or “creates a public relationship” (*Gould* at para. 68, cited above) as per the second part of the *Gould* test, to characterize it as a service would ignore this *sui generis* quality. [Text in brackets in original; para. 57.]

[97] Parliament can be distinguished from the administrative decision makers that operate under legislative authority. These individuals and statutory bodies, which include the Registrar, may be “service providers”, or entities that “provi[de] . . . services . . . customarily available to the general public”. If they use their statutory discretion in a manner that effectively denies access to a service or makes an adverse differentiation on the basis of a prohibited ground, s. 5 will be engaged. But, when

their job is simply to apply legislated criteria, the challenge is not to the provision of services, but to the legislation itself (*Murphy*, at para. 6).

[98] Furthermore, the relevant jurisprudence suggests that the enactment of legislation is not a service. This Court has defined a service as (1) something of benefit (2) that is held out or offered to the public (*Gould*; see also *Watkin*, at para. 31). In *Gould*, La Forest J. (concurring) said, at para. 55:

There is a transitive connotation from the language employed by the various provisions; it is not until the service, accommodation, facility, etc., passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition.

Again, La Forest J.’s definition in *Gould* focuses on the service provider. When Parliament crafts statutory eligibility criteria, there is no “transitive connotation”. Nothing is being held out by Parliament to the public. It is only when the service provider itself discriminates that s. 5 is engaged.

[99] The Federal Court of Appeal took a similar view in *Murphy*. In that case, the Commission argued that income tax assessments by the Canada Revenue Agency pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), were “services” within the meaning of the *CHRA*. Finding that the mandatory duty to assess taxes in conformity with the law flowing from the *ITA* was at the heart of the allegation, the Court of Appeal characterized the complaint as a direct attack on the applicable *ITA* provisions. In dismissing the appeal, the Court of Appeal was

unequivocal that s. 5 of the *CHRA* “does not provide for the filing of a complaint directed against an act of Parliament” (para. 6).

[100] We also note that the equivalent of s. 5 of the *CHRA* in provincial human rights statutes may be worded in broader terms, and without reference to “the provision of services” or the “service provider”. For instance, s. 1 of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, states that “[e]very person has a right to equal treatment with respect to services, goods and facilities, without discrimination”. Whether challenges to legislation would be permissible under this statute or other provincial human rights statutes is not before this Court, and should be left for another day.

[101] Two additional contextual arguments were put to the Court by the Commission in support of the proposition that challenges to legislation may be brought under the *CHRA*. First, it is argued that the repeal of s. 67 of the *CHRA* (S.C. 2008, c. 30, s. 1) indicates that direct challenges to legislation were contemplated by Parliament. Section 67 stated that “[n]othing in [the *CHRA*] affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.” The Commission submits that through the repeal of this statutory exception to the primacy of the *CHRA*, Parliament brought the *Indian Act* in its *entirety* under the ambit of the *CHRA*, including the impugned registration provisions. To go further, the Commission argues that s. 67 was enacted (and subsequently repealed) specifically because of the concern that the registration provisions of the *Indian Act* might be considered discriminatory.

[102] Second, the Commission argues that s. 49(5) of the *CHRA* also indicates that Parliament contemplated direct challenges to legislation. This provision requires a member of the bar of a province or the Chambre des notaires du Québec to form part of the Tribunal panel if the complaint raises the potential inconsistency between the *CHRA* and another legislative enactment.

[103] With respect, neither of these provisions sheds much light on the actual question at issue: Can the act of legislating be qualified as a service such that discriminatory legislation can be challenged directly under s. 5 of the *CHRA*? These arguments conflate the ability of the Tribunal to hear a complaint with the extent of its remedial power. Again, the possibility of inoperability as a remedy provides no guidance to determining the scope of what actually constitutes a discriminatory practice pursuant to s. 5. These two inquiries are distinct and must remain as such.

III. Conclusion

[104] In sum, we agree with the Tribunal and the courts below that bare challenges to legislation cannot be brought under s. 5 of the *CHRA*. The act of legislating is not a service. Accordingly, the Tribunal was correct in dismissing the complaints for want of an underlying discriminatory practice.

[105] Gascon J. suggests that the correctness review we undertake does not differ significantly from the analysis undertaken by the Tribunal at first instance, and on this basis, questions whether this Court is any better situated to interpret the

decision maker's home statute (para. 65). With respect, this misses the purpose of the courts' role on judicial review. That the above analysis largely tracks what was said by the Tribunal itself does not undermine our earlier conclusion as to the standard of review. In any instance of correctness review, it is open to the court to find that the tribunal arrived at the correct decision. From this conclusion one cannot draw the inference that the Tribunal is necessarily "better situated" to make decisions than the courts, or that legislative supremacy must always prevail over concerns as to the rule of law.

[106] Superior courts have the constitutional *obligation* to oversee the exercise of administrative decision making (s. 96 of the *Constitution Act, 1867*; *Crevier*, at p. 234; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 21; *Dunsmuir*, at para. 29). The standard of review analysis is what assists courts in determining the degree of deference they ought to afford to the administrative decision maker for the purpose of striking the appropriate balance between the rule of law and the maintenance of legislative supremacy — not to identify who is best situated to decide what. Moreover, the outcome of the judicial review analysis should play no role in determining the appropriate standard. The correctness standard is integral to the law of judicial review, insofar as it “promotes just decisions and avoids inconsistent and unauthorized application of law” (*Dunsmuir*, at para. 50).

[107] Like our colleagues in the majority, we would therefore dismiss the appeal. We also agree that this disposition says nothing about the complainants' ability to bring a claim under s. 15 of the *Charter* with respect to the impugned *Indian Act* provisions.

The following are the reasons delivered by

BROWN J. —

[108] I agree with my colleague Gascon J. that the Canadian Human Rights Tribunal's answers to the questions before it — that the act of legislating is not a “service” within the meaning of s. 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and that there was therefore no underlying discriminatory practice — were reasonable. I also agree with my colleagues Côté and Rowe JJ. that the Tribunal's answers were correct. Indeed, paras. 56 to 66 of Gascon J.'s reasons also support the conclusion that the Tribunal reached the correct result.

[109] In view of the unassailability of the Tribunal's decisions on either standard of review, nothing more needs to be said on that subject, at least as it applies to this appeal. I write briefly, to highlight my more general concern regarding my colleague Gascon J.'s *obiter dicta* regarding true questions of jurisdiction, and to highlight some difficulties that may well arise from his statements regarding contextual analysis.

[110] Justice Gascon’s discussion regarding true questions of jurisdiction omits a central point that, while not determinative, is in my respectful view an important consideration which militates against his suggestion that this category of correctness review might be “euthanized”. I refer to the Court’s expression, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, of the continued recognition of this category as being fundamental to judicial review. My colleague observes that “dissatisfaction with the current state of the law is no reason to ignore our precedents following *Dunsmuir*” (para. 47). But this observation applies with equal force to *Dunsmuir* itself. And, in *Dunsmuir*, this Court, citing the Honourable Thomas Cromwell, wrote that “the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal’s authority” (para. 30, citing T. Cromwell, “Appellate Review: Policy and Pragmatism”, in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). This presupposes not only that the treatment of such questions is a matter of first importance, but that such questions continue to exist. While, therefore, one might “euthanize” *the category* of true jurisdictional questions, it would not follow that *such questions themselves* will disappear.

[111] Deciding whether and how any “euthanizing” of true questions of jurisdiction is to proceed will, therefore, require a measure of circumspection. The exercise of public power, including delegated public power, must always be authorized by law. Judicial review guarantees fidelity to that principle. As I indicated in *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal*

Tribunal), 2018 SCC 22, at para. 124, I accept that it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute. But there will remain questions that tend more to the former, including matters which are still widely regarded as jurisdictional by lower courts (for example, a decision to enact subordinate legislation: *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, at para. 80 (CanLII)), and which raise squarely the same concerns for the rule of law identified by this Court in *Dunsmuir* as demanding a more exacting standard of review. To consign such questions to the same, one-size-fits-all “reasonableness” standard of review that all other questions receive would render that standard far less useful, since it would furnish a reviewing court with no basis for distinguishing matters warranting deference from those which do not.

[112] It follows that abolition of the category of true questions of jurisdiction will necessitate a concomitant shift towards more flexible, rather than a strictly binary (or strictly reasonableness) standard of review framework.

[113] This brings me to my second concern, which is the extremely narrow scope for contextual analysis that my colleague Gascon J. states, and which would significantly impede that necessary flexibility. Contextual analysis is, he says, “exceptional”, should be undertaken “sparingly”, and plays a “subordinate role” in deciding the standard of review (paras. 45-46).

[114] Descriptors like “exceptional” and “sparingly” are, of course, the same sort of cautions which this Court has from time to time stated in respect of true questions of jurisdiction, which suggests that contextual analysis may be next in line for “euthanizing”. That aside, and with respect, and accepting that my colleague can draw from past statements of this Court for support, such statements give little if any meaningful guidance to lower courts. Indeed, statements suggesting that contextual review should be applied “sparingly” or that it plays a “subordinate role” are not easily reconciled with my colleague’s acknowledgment (at para. 46) that reviewing courts ought to examine “factors that sho[w] a clear legislative intent justifying the rebuttal of the presumption”. If one is considering factors which show legislative intent, one *is* undertaking a contextual analysis.

[115] My concerns with these aspects of my colleague’s reasons do not, however, affect the result. I agree that the appeal should be dismissed.

Appeal dismissed.

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Solicitors for the intervener the Canadian Muslim Lawyers Association: Karimjee Greene, Toronto.

Solicitor for the intervener the Council of Canadians with Disabilities: ARCH Disability Law Centre, Toronto.

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