



**SUPREME COURT OF CANADA**

**CITATION:** Smith v. Alliance Pipeline Ltd., 2011 SCC 7

**DATE:** 20110211

**DOCKET:** 33203

**BETWEEN:**

**Vernon Joseph Smith**

Appellant

and

**Alliance Pipeline Ltd.**

Respondent

- and -

**Arbitration Committee, appointed pursuant to the *National Energy Board Act*,**

**R.S.C. 1985, c. N-7, Part V**

Intervener

**CORAM:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 77)

Fish J. (McLachlin C.J. and Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ. concurring)

**CONCURRING REASONS:**  
(paras. 78 to 111)

Deschamps J.

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SMITH v. ALLIANCE PIPELINE LTD.

**Vernon Joseph Smith**

*Appellant*

v.

**Alliance Pipeline Ltd.**

*Respondent*

and

**Arbitration Committee, appointed pursuant  
to the *National Energy Board Act*,  
R.S.C. 1985, c. N-7, Part V**

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**Indexed as: Smith v. Alliance Pipeline Ltd.**

**2011 SCC 7**

File No.: 33203.

2010: October 5; 2011: February 11.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Administrative law — Judicial Review — Standard of Review — Land expropriated by pipeline company pursuant to agreement — Expropriated party not fully compensated and Pipeline Arbitration Committee appointed pursuant to National Energy Board Act — Queen’s Bench action commenced by company and then discontinued — First committee aborted and a second committee appointed — Second committee awarding costs for proceedings before both committees and for court action — Whether standard of reasonableness applicable to second committee’s decision on costs — National Energy Board Act, R.S.C. 1985, c. N-7, ss. 75, 99(1).*

*Administrative law — Boards and Tribunals — Jurisdiction — Costs — Land expropriated by pipeline company pursuant to agreement — Expropriated party not fully compensated and Pipeline Arbitration Committee appointed pursuant to National Energy Board Act — Queen’s Bench action commenced by company and then discontinued — First committee aborted and a second committee appointed — Second committee awarding costs for proceedings before both committees and for court action — Whether tribunal having jurisdiction to order such costs — National Energy Board Act, R.S.C. 1985, c. N-7, ss. 75, 99(1).*

In 1998, the respondent, A obtained approval from the National Energy Board to build a pipeline that would cross the farmland of Mr. S. A completed the pipeline in 1999, but failed to perform the agreed-upon reclamation work on the easement the following spring. Mr. S proceeded to do so on his own. A offered to pay only part of the invoice submitted by Mr. S. Mr. S filed a Notice of Arbitration and a hearing took place before the first Pipeline Arbitration Committee. Before a decision was rendered, A decided to perform maintenance work on its easement and asked Mr. S for permission to use a portion of his private property that lay outside the company’s right-of-way. Mr. S asked for prior compensation before giving his approval and

in response, A instituted proceedings before the Alberta Court of Queen's Bench seeking, among other things, unhindered access to Mr. S's land and an order that the first committee not render its decision until the Queen's Bench action was resolved. A eventually discontinued its action and ultimately paid less than one quarter of the fees and disbursements Mr. S had by then incurred in defending the action. Meanwhile, the arbitration proceedings failed to get resolved because one of the members of the first arbitration committee was elevated to the bench. A second arbitration committee was appointed and in his amended notice of arbitration, Mr. S sought compensation for his reclamation work as well as his costs before the first arbitration committee and for \$16,222.57 in solicitor-client costs which was the balance of his legal expenses resulting from the discontinued Queen's Bench action. The second arbitration committee awarded him a portion of his costs from the first arbitration committee proceedings and the balance of his solicitor-client costs on the action and motion before the Court of Queen's Bench. On appeal by A, the Federal Court concluded that this decision was reasonable but on further appeal, the Federal Court of Appeal concluded that the second arbitration committee had erred.

*Held:* The appeal is allowed and the decision of the second arbitration committee is restored with costs to Mr. S throughout, on a solicitor-client basis.

*Per* McLachlin C.J. and Binnie, LeBel, **Fish**, Abella, Charron, Rothstein and Cromwell JJ.: Applying the analytical framework of *Dunsmuir*, it is clear that the governing standard of review is reasonableness. The second committee was interpreting its home statute which usually attracts a reasonableness standard of review. Moreover, the committee was interpreting s. 99(1) of the *National Energy Board Act* ("NEBA"), a provision of its home statute

regarding awards for costs. Awards for costs are invariably fact-sensitive and generally discretionary. The statutory language involved reflects a legislative intention to vest in arbitration committees sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve. In discharging that responsibility, committees must interpret s. 99(1) in order to apply it in accordance with their statutory mandate. These considerations all fall within categories which according to *Dunsmuir* generally attract the standard of reasonableness. Cumulatively considered, they point unmistakably to that standard.

The impugned decision of the second committee satisfies that standard. The second committee reasonably found that it was entitled under s. 99(1) of the *NEBA* to make the impugned awards on costs. The committee's reasoning in interpreting and applying this provision is coherent. It acknowledged that it had awarded Mr. S compensation exceeding eighty-five percent of the amount offered by A, thereby triggering the application of s. 99(1). The reasonableness of the second committee's conclusion that s. 99(1) of the *NEBA* merits a broad reading accords with the plain words of the provision, its legislative history, its evident purpose, and its statutory context. Moreover, it rests comfortably on the foundational principle of full compensation that animates both the *NEBA* and expropriation law generally.

It is not open to dispute that Mr. S, as a matter of fact, incurred all of the costs he was awarded by the committee. The committee found those costs to have been reasonably incurred. The committee concluded, again reasonably, that Mr. S's costs before both arbitration committees and in the Queen's Bench all related to a single claim for compensation in respect of a single expropriation by a single expropriating party.

In allowing the appeal and restoring the second committee's decision, Mr. S is also awarded his costs throughout, on a solicitor-client basis. In the context of modern expropriation law, where statutes authorize awards of "all legal, appraisal and other costs", Canadian jurisprudence and doctrine demonstrate that costs on a solicitor-and-client basis should generally be given. Awarding costs on a solicitor-client basis accords well with the object and purpose of the *NEBA*. Only this type of award can indemnify Mr. S as best one can for the inordinate amount of money — to say nothing of time — he has had to invest in what should have been an expeditious process. Lastly, Mr. S should not be made to bear the costs of what is clearly a test case for A.

*Per Deschamps J.*: While it is agreed that the proper standard of review in this case is reasonableness and that the decision of the second committee in making the costs award to Mr. S satisfied that standard, the same cannot be said for the proposition that an administrative decision-maker's interpretation of its home statute, absent indicia of its particular familiarity with the statute, attracts deference unless the question raised is constitutional, of central importance to the legal system or concerned with demarcating one tribunal's authority from another. On the contrary, principles of administrative law, jurisprudence and commentary support the position that according deference to an administrative decision-maker's interpretation of its home statute is anchored in the need to respect legislative intent to leave these interpretative issues to certain decision-makers when there is good reason to do so. Most of the time, the reason is that the decision-maker possesses expertise or experience that puts it in a better position to interpret its home statute relative to a court. There is no presumption of expertise or experience flowing from the mere fact that an administrative decision-maker is interpreting its enabling statute.

In *Dunsmuir*, various categories of question were articulated based on pre-existing jurisprudence in order to assist in resolving the standard of review. *Dunsmuir* does not, however, recognize a broad home statute category, but rather a category grounded in the relative expertise or experience of the decision-maker. According deference to an administrative decision-maker merely for the reason that it is interpreting its home statute and no constitutional question, centrally-important legal question, or question about the limits of its authority *vis-à-vis* another tribunal is incomplete. Such a position is purely formalistic and loses sight of the rationale for according deference to an interpretation of the home statute that has developed in the jurisprudence: namely, that the legislature has manifested an intent to draw on the relative expertise or experience of the administrative body to resolve the interpretative issues before it. Such intent cannot simply be presumed from the creation of an administrative body by the legislature. Provided that no other category of question for resolving the standard of review is engaged and absent indicia of the decision-maker's familiarity with its home statute, courts should move to the second step of *Dunsmuir* and consider the contextual factors.

In the case at bar, there is no indication that Parliament intended the arbitration committee to have particular familiarity with its home statute, the *NEBA*. Arbitration committees are appointed *ad hoc* under the *NEBA* and while they may include practising lawyers, there is nothing to suggest — in the legislative scheme or otherwise — that they hold any sort of expertise or experience relative to a court when it comes to interpreting the *NEBA*. Though decisions of arbitration committees are subject to review on questions of law or jurisdiction, it is notable that Parliament grants a right of appeal from a committee decision to the Federal Court. In this appeal, deference should be accorded to the second committee, not because it interpreted its home statute, but because it exercised its statutorily-conferred discretion to make an award of

costs. *Dunsmuir* recognized that for matters of discretion, “deference will usually apply automatically”. This, and not the mere fact that the second committee was interpreting its home statute, militates in favour of according deference.

### Cases Cited

By Fish J.

**Applied:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Alliance Pipeline Ltd. v. Smith*, 2003 ABQB 843 (CanLII); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Re Conger Lehigh Coal Co. Ltd. and the City of Toronto*, [1934] O.R. 35; *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712; *Irving Oil Co. Ltd. v. The King*, [1946] S.C.R. 551; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; *Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc.* (1987), 14 B.C.L.R. (2d) 273; *Christian & Missionary Alliance v. Municipality of Metropolitan Toronto* (1973), 3 O.R. (2d) 655; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Campbell River Woodworkers’ & Builders’ Supply (1966) Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2004 BCCA 27, 22 B.C.L.R. (4th) 210; *Thoreson v. Alberta (Minister of Infrastructure)*, 2007 ABCA 272, 79 Alta. L.R. (4th) 75; *Town of Mahone Bay v. Lohnes* (1983), 59 N.S.R. (2d) 68, aff’d (1983), 59 N.S.R. (2d) 65; *Lohnes v. Town of Mahone Bay* (1983), 28 L.C.R. 338; *McKean v. Ontario (Ministry of Transportation)* (2008), 94 L.C.R. 185; *Bayview Builder’s Supply (1972) Ltd. v. British Columbia (Minister of Transportation &*



*Highways*), 1999 BCCA 320, 67 B.C.L.R. (3d) 312; *Holdom v. British Columbia Transit*, 2006 BCCA 488, 58 B.C.L.R. (4th) 207; *Hill v. Nova Scotia (Attorney General)(No. 2)* (1997), 155 D.L.R. (4th) 767 (S.C.C.); *Foulis v. Robinson* (1978), 92 D.L.R. (3d) 134.

By Deschamps J.

**Referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195; *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; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1.

### **Statutes and Regulations Cited**

*Alberta Rules of Court*, Alta. Reg. 390/68, r. 601(2)(d)(ii).

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

*Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28, ss. 6(4), 7(2).

*National Energy Board Act*, R.S.C. 1970, c. N-6, s. 75.

*National Energy Board Act*, R.S.C. 1985, c. N-7, ss. 3, 22(1), 23, 75, 99(1), 101.

*Railway Act*, R.S.C. 1970, c. R-2, ss. 145 to 184, 186.

*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 47.

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APPEAL from a judgment of the Federal Court of Appeal (Noël, Nadon and Pelletier J.J.A.), 2009 FCA 110, 389 N.R. 363, 42 C.E.L.R. (3d) 1, [2009] F.C.J. No. 407 (QL),

2009 CarswellNat 836, reversing a decision of O’Keefe J., 2008 FC 12, 34 C.E.L.R. (3d) 138, 318 F.T.R. 100, [2008] F.C.J. No. 28 (QL), 2008 CarswellNat 35, which upheld a decision of the second Pipeline Arbitration Committee. Appeal allowed.

*Richard C. Secord, Meaghan M. Conroy and Yuk-Sing Cheng*, for the appellant.

*Munaf Mohamed and Jillian Strugnell*, for the respondent.

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

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

FISH J. —

I

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

[2] Pursuant to an expropriation agreement, the respondent had obtained a right-of-way over the land in question. The respondent failed to reclaim the land in a timely manner, as required by the agreement, and refused to fully compensate the appellant for having done so in

its stead. The appellant turned to statutorily mandated arbitration for what was meant to assure an expeditious resolution of the dispute.

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

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

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

[6] I believe, on the contrary, that the Committee's decision is set out coherently and that its conclusions are entirely consistent with the statutory provisions it was bound to apply, notably ss. 75 and 99(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7 ("*NEBA*"). Section 75 expresses in statutory form the well-established principle that expropriating parties

should be made economically whole “for all damage sustained by them by reason of [the expropriation]”. In the same vein, s. 99(1) vests in Arbitration Committees a broad discretion in determining the incidental components of full compensation, which include “all legal, appraisal and other costs determined by the Committee to have been reasonably incurred [by the expropriated party] in asserting that person’s claim for compensation”.

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

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

## II

[9] In 1998, the respondent, Alliance Pipeline Ltd. (“Alliance”), obtained approval from the National Energy Board to build a pipeline that would cross the farmland of the appellant. As directed by the *NEBA*, the parties concluded easement agreements, which provided compensation for the expropriated land. They also signed releases which are not in issue before us.

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

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

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

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

[14] On August 7, 2003, Alliance filed a notice of motion seeking two interim injunctions: one to stay the First Committee proceedings, and another to compel Mr. Smith to give Alliance access to the easement. Madam Justice Nason dismissed Alliance’s motion in

October 2003 (2003 ABQB 843 (CanLII)) and awarded Mr. Smith party and party costs, which Alliance paid (A.R., vol. III, at pp. 59-62).

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

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

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

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

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

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

[21] In short concurring reasons, Justice Pelletier reprimanded Alliance for its delaying tactics. He explained disapprovingly that it was Alliance who asked the First Committee "to refrain from deciding Mr. Smith's claim until the [action was] completed" (para. 70) and who "effectively stonewall[ed] Mr. Smith by renegeing on its earlier position and commencing [an



action before the Court of Queen’s Bench]” (para. 72). In his opinion, Alliance could and should have left the issue of the releases to be determined by the First Committee.

#### IV

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

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

[24] Pursuant to *Dunsmuir*:

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

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

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

[26] Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of “general law ‘that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise’” (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a “true question of jurisdiction or *vires*” (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal’s enabling (or “home”) statute or “statutes closely connected to its function, with which it will have particular familiarity” (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[42] Section 99(1) reads:

[Costs]

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

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

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

[45] Second, the Committee decided that the first panel's loss of a quorum resulted in the nullification of some but not all of the original proceedings. On the one hand, it reasoned that the

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

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

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

[48] It is not open to dispute that Mr. Smith, as a matter of fact, incurred all of the costs he was awarded by the Committee. The Committee found those costs to have been reasonably incurred. As mentioned earlier, the Committee concluded, again reasonably, that Mr. Smith's costs before both Arbitration Committees and in the Queen's Bench all related to *a single claim for compensation* in respect of *a single expropriation by a single expropriating party*. On a plain

reading of s. 99(1), it was therefore open to the Committee to find that Mr. Smith was entitled to recover “all [of his] legal, appraisal and other costs” in asserting that claim.

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

[50] The goal of complete indemnification first appeared in the *NEBA* in 1981, when Parliament amended the statute to introduce most of what now constitutes Part V (*An Act to amend the National Energy Board Act*, S.C. 1980-81-82-83, c. 80). Prior to these amendments, ss. 145 to 184 and 186 of the *Railway Act*, R.S.C. 1970, c. R-2, were imported directly into the *NEBA* (R.S.C. 1970, c. N-6, s. 75). Under those provisions, “the costs of the arbitration” were in the discretion of the arbitrator and could be ordered against either party (*Railway Act*, s. 164(1); see *Re Conger Lehigh Coal Co. Ltd. and the City of Toronto*, [1934] O.R. 35 (H.C.J.), at pp. 43-44).

[51] The 1981 amendments to the *NEBA* were inspired by the Law Reform Commission of Canada’s review, in 1975, of expropriation in the federal context in its Working Paper 9, *Expropriation*. This was expressly acknowledged by the Minister who introduced the amendments. The proposed legislation, he told Parliament, “substantially incorporates all the major recommendations of the Law Reform Commission of Canada expressed in its 1975



working paper” (*House of Commons Debates*, vol. VII, (1st Sess., 32nd Parl., March 6, 1981, at p. 8006).

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

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

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

[55] Moreover, the *NEBA* operates within the broader context of expropriation law, both federal and provincial. As early as 1949, this Court acknowledged the vulnerable position of expropriated owners. In *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712, at p. 715, Rand J.

(Taschereau J. concurring) stated that no one should be “victimized in loss because of the accident that his land [is] required for public purposes”. In the same case, Estey J., citing with approval the earlier reasons of Rand J. in *Irving Oil Co. Ltd. v. The King*, [1946] S.C.R. 551, affirmed the right of an expropriated person under the relevant clause “to be made economically whole” (p. 717; see K. J. Boyd, *Expropriation in Canada: A Practitioner’s Guide*, (1988), at pp. 144-45).

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

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

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

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

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

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

[62] Third, the respondent submits that the Committee’s decision is unreasonable because it amounts to “legislative gap filling”. In my view, this submission fails as well. The *NEBA* is not under inclusive on the issue of costs. Section 99(1) is broadly framed because provisions of this

sort cannot enumerate exhaustively every cost they are meant to cover. It is therefore sufficient that the costs be found by the Committee, on a justifiable, transparent and intelligible basis (*Dunsmuir*, at para. 47), to have been reasonably incurred in asserting the claims for compensation that it was required to adjudicate. In discharging that duty here, the Second Committee did not “cros[s] the line between judicial interpretation and legislative drafting” (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51).

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

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

The preconditions to the operation of issue estoppel [are]:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

...

. . . If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied . . . [References omitted; emphasis in original.]:

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

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

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

Thus, a trial judge determining reasonable costs under section 39 [of the *Expropriation Act*, R.S.A. 2000, c. E-13] is not dealing simply with the usual order of civil costs that flow from litigation, nor does the judge have the same discretion with respect to those costs. A statutory right to legal, appraisal and other costs is something quite different from a determination of discretionary litigation costs by a trial judge, and while the judge must address the issue of reasonableness and special

circumstances, these issues are addressed within the context of a recognition that the costs are part of the expropriation award. [Emphasis added; para. 23.]

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

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

An appeal of this decision was dismissed with costs.

[69] When it later heard Mr. Lohnes' claim, the Nova Scotia Expropriations Compensation Board adopted the Chief Justice's reasoning, concluding that the costs incurred to determine title "were necessary for the determination of compensation payable as envisaged by the *Expropriation Act, 1973*" (*Lohnes v. Mahone Bay (Town)* (1983), 28 L.C.R. 338 (N.S.E.C.B.), at p. 343).

[70] Similarly, in *McKean v. Ontario (Ministry of Transportation)* (2008), 94 L.C.R. 185 (O.M.B.), the Municipal Board awarded the McKears the costs they had incurred on a

preliminary court action regarding title to land expropriated by the Ministry of Transportation of Ontario. The Board rejected the Ministry's claim of issue estoppel and explained:

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

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

## VII

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

[73] This award is justified for four reasons.

[74] First, in the context of modern expropriation law, where statutes authorize awards of “all legal, appraisal and other costs”, Canadian jurisprudence and doctrine demonstrate that “costs on a solicitor-and-client basis should generally be given” (*Bayview Builder’s Supply (1972) Ltd. v. British Columbia (Minister of Transportation & Highways)*, 1999 BCCA 320, 67 B.C.L.R. (3d) 312, at para. 3, citing Todd, *Law of Expropriation and Compensation in Canada*, at p. 526; see also *Holdom v. British Columbia Transit*, 2006 BCCA 488, 58 B.C.L.R. (4th) 207), at para. 11 and *Hill v. Nova Scotia (Attorney General) (No. 2)* (1997), 155 D.L.R. (4th) 767 (S.C.C.)).

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

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

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



The following are the reasons delivered by

DESCHAMPS J. —

[78] Deference towards administrative bodies raises important issues, both of a political and legal theoretical nature. This Court has not dealt with this topic lightly, sometimes struggling to find a balance between deferring to the expertise or experience of many of these administrative bodies and reviewing the limits to their decision-making authority under the rule of law. A consistent holding of this Court has been, and continues to be, that legislative intent should, within the confines of constitutional principles, ultimately prevail. In the case at bar, the issue of deference is shaped narrowly: should an administrative decision-maker’s interpretation of its “home” statute usually result in a court deferring to that interpretation — through the adoption of a standard of review of reasonableness — based on a presumption that the decision-maker has particular familiarity with its home statute?

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

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

#### I. Back to *Dunsmuir*

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

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

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

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

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

Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39.

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

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

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

[88] In *Canadian Broadcasting Corp.*, the majority noted that “[t]he labour relations tribunal, in its federal and provincial manifestations, is a classic example of an administrative body which is both highly specialized and highly insulated from review” (para. 31). In that case,

in addition to noting the existence of a broad privative clause, the majority comments that by virtue of the Canada Labour Relations Board's "specialized expertise, the Board is uniquely suited" (emphasis added) to determine the particular question before it (in that case, whether there had been interference with a trade union) and that this was "a question of law that Parliament intended to be answered by the Board, and not by the courts" (paras. 42-43). As such, the majority's remark in *Dunsmuir* emanates from a context where the administrative decision-maker was recognized as having specialized expertise in interpreting its home statute.

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

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

external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result.” The Court observed that

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

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

[91] But beyond these two examples, neither of which resulted in deference being accorded to the administrative decision-maker for the mere reason that it was interpreting its home statute or a statute closely connected to its function, the result in *Dunsmuir* itself stands against the recognition of a broad “home” statute category of question that the reasons of my colleague would create, one that would not require the relative expertise or experience of the decision-maker. In *Dunsmuir*, the majority noted that the adjudicator, empowered by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P.25, was called upon to interpret provisions of its home statute and a related statute, the *Civil Service Act*, S.N.B. 1984, c. C-5.1. Reasonableness was not selected by the majority as the standard of review on the basis of the first-level category of question stemming from the decision-maker’s interpretation of its home statute or a statute closely connected to its function; rather, this standard was selected after a contextual standard of review analysis that included a discussion about the significance of the adjudicator’s appointment on an *ad hoc* basis by mutual agreement of the parties (paras. 66-71).

In the end, the long-standing recognition of “the relative expertise of labour arbitrators” was only one contextual factor that suggested the application of the standard of review of reasonableness (para. 68); deference was not accorded merely because the home statute was being interpreted.

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

## II. Judicial Review and Deference to Administrative Decision-Makers

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

[94] Prior to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (“*C.U.P.E.*”), courts frequently relied on the broad and somewhat technical notion of jurisdiction to resolve this tension in a manner that gave short shrift to

indicators of legislative intent — such as privative clauses — which otherwise would seem to indicate that administrative decision-makers should enjoy some degree of deference (see the Honourable Madam Justice Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998), 12 *C.J.A.L.P.* 171, at pp. 178-79 and the cases cited at fn. 9).

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

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

[96] Judicial review of administrative action in the years following *C.U.P.E.* was characterized by the movement away from formalistic notions of jurisdiction and towards a “pragmatic and functional approach” to the standard of review, which involved consideration of a number of contextual factors (see, e.g., *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048). The goal of this approach was to better focus the concept of deference around legislative intent, namely, “whether the legislator intended the tribunal’s decision on these matters to be binding on the parties to the dispute” (*Bibeault*, at p. 1090) or, put another way, to determine which body



Parliament intended to be “best-situated to answer [the] question conclusively — the court or the tribunal?” (McLachlin, at pp. 180-81).

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

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

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” . . . In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the

courts and administrative bodies within the Canadian constitutional system. [Emphasis added; citations omitted; para. 49.]

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

[100] According deference to an administrative decision-maker merely for the reason that it is interpreting its home statute and no constitutional question, centrally important legal question, or question about the limits of its authority *vis-à-vis* another tribunal is incomplete. Such a position is purely formalistic and loses sight of the rationale for according deference to an interpretation of the home statute that has developed in the jurisprudence including *Dunsmuir*, namely, that the legislature has manifested an intent to draw on the relative expertise or experience of the administrative body to resolve the interpretative issues before it. Such intent cannot simply be presumed from the creation of an administrative body by the legislature. Rather, courts should look to the jurisprudence or to the enabling statute to determine whether it is established in a satisfactory manner that the decision-maker actually has a particular

familiarity — or put another way, particular expertise or experience relative to a court — with respect to interpreting its home statute. If it is so established, as it typically is with labour boards, then deference should be accorded on the basis of this category of question. But if there is an absence of indicia of a given decision-maker’s particular familiarity with its home statute, then, provided that no other category of question for resolving the standard of review is engaged, courts should move to the second step of *Dunsmuir* and consider the contextual factors.

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

[102] In *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195, at para. 21, the majority observed that “[w]hat is at issue here is the interpretation by the discipline committee, a body of experts, of its home statute . . . . The legislature assigned authority to the Association, through the experience and expertise of its discipline committee, to apply — and necessarily interpret — the statutory mandate” (citations omitted; emphasis added). Notably, the dissenting reasons in *Proprio Direct* engage the majority on the very question of the discipline committee’s relative expertise: “Although the Act the discipline committee had to apply was its constituting statute, the committee’s particular expertise is limited to disciplinary matters. It has not been shown to have general expertise in statutory interpretation” (para. 66, *per* Deschamps J., dissenting (emphasis added)).

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

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

[105] Most recently, in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, the Court commented on an interpretation by the Patented Medicine Prices Review Board of the phrase “sold in any market in Canada” found in its home statute, the *Patent Act*. While noting

that the parties did not present any argument on the standard of review and proceeded on the basis of a correctness standard, Abella J. questioned that premise and observed at para. 34 that “[t]his specialized tribunal is interpreting its enabling legislation. Deference will usually be accorded in these circumstances: see *Dunsmuir*, at paras. 54 and 59”.

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

### III. Application to This Appeal

[107] Here, there is no indication that Parliament intended the Second Committee — or any Arbitration Committee — to have particular familiarity with its home statute, the *NEBA*. Indeed, there is no legislative requirement to that effect. Counsel at the hearing before our Court

were questioned regarding the appointment of Arbitration Committees, and conflicting answers were given regarding the existence of a list of appointees and their particular expertise on matters subject to arbitration under the *NEBA*.

[108] At best, what can be said is that Arbitration Committees are appointed *ad hoc* under the *NEBA* by the Minister of Natural Resources and while they may include practising lawyers, there is nothing to suggest — in the legislative scheme or otherwise — that they hold any sort of expertise or experience relative to a court when it comes to interpreting the *NEBA*. This *ad hoc* arrangement is quite unlike that of the National Energy Board, also established under the *NEBA*, which the Act requires to consist of not more than nine permanent members who serve renewable terms of seven years (see *NEBA*, s. 3). Though decisions of Arbitration Committees and the National Energy Board are both subject to review on questions of law or jurisdiction, it is notable that Parliament grants a right of appeal from a Committee decision to the Federal Court, whereas an appeal from a decision of the Board lies to the Federal Court of Appeal, upon leave being granted (see *NEBA*, ss. 101 and 22(1)). Given the broad statutory right to appeal the decision of an Arbitration Committee, even using the concurring approach advocated by Binnie J. in *Dunsmuir* (at para. 146), there would be no deference presumptively owed to decisions of Arbitration Committees because of the mere fact that the legislature designated them — and not the courts — as the decision-makers of first instance. Moreover, in respect of the Board, s. 23 of the *NEBA* states that “[e]xcept as provided in this Act, every decision or order of the Board is final and conclusive.” No similar provision exists with respect to Arbitration Committees.

[109] The difference in the appointment processes for these two administrative bodies created under the same statute would logically result in the National Energy Board, as an

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

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

nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve”. This, and not the mere fact that the Second Committee was interpreting its home statute, militates in favour of according deference.

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

*Appeal allowed with costs.*

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*Solicitors for the respondent: Bennett Jones, Calgary.*