SUPREME COURT OF NOVA SCOTIA

Citation: *Yates v. Nova Scotia Board of Examiners in Psychology*, 2018 NSSC 43

Date: 20180308
Docket: Hfx. No. 460070
Registry: Halifax

Between:

Pamela Yates

Applicant

v.

Nova Scotia Board of Examiners in Psychology
and the Attorney General of Nova Scotia

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	June 19, 2017, in Halifax, Nova Scotia
Final Written Submissions:	October 20, 2017
Counsel:	Dennis James, Q.C., and Grace MacCormick (A/C), for the Applicant Marjorie Hickey, Q.C., and Ryan Baxter, for the Respondent, Nova Scotia Board of Examiners in Psychology

By the Court:

Introduction

[1] Dr. Pamela Yates has applied for judicial review of the decision of the Nova Scotia Board of Examiners in Psychology and the Internal Review Committee which upheld it. They will hereinafter be collectively referred to as "the Respondents", unless there is a need to distinguish or to refer to one Respondent specifically, in which case they will be referenced individually as "the Board" and "IRC". The other Respondent, the Attorney General of Nova Scotia, is not taking part in this proceeding. Consequently, I will not be referring further to this particular Respondent in these reasons.

[2] Dr. Yates contends that the Board did not properly consider her application for registration in Nova Scotia because it failed to exercise its discretion under s. 15 of the *Psychologists Act*, 2000 SNS, c. 82, and failed to properly consider all relevant factors in conjunction with her application for registration. She contends that the Board's decision was unreasonable, and that the manner in which the Respondents considered her application was procedurally unfair. She asks this court to overturn it, with "direction to [the Board] to recognize Dr. Yates' certificate of registration for the purposes of s. 15(5), properly apply the *Act*, and to proceed in good faith in its deliberations".

[3] The Respondents' position is expressed in paras. 1 through 6 of their amended notice of participation:

> 1. The decisions by the Nova Scotia Board of Examiners in Psychology and the Internal Review Committee are reasonable decisions made within the meaning of the *Psychologists Act,* 2000 SNS, c. 32;
>
> 2. The decisions are consistent with requirements of the Agreement on Internal Trade as the Applicant was not certified to practice as a psychologist in Saskatchewan and is thereby not entitled to registration in Nova Scotia;
>
> 3. The decision to reject the Applicant's doctoral degree in psychology from Carleton University as not an acceptable doctoral degree pursuant to Section ~~15(1)(a)~~ 16(1)(a) of the *Psychologists Act* is reasonable in that the doctoral degree does not meet the criteria established by the Board as an acceptable degree.
>
> 4. The Board reasonably ~~exercised its discretion under Section 15(5) of the *Psychologists Act* to~~ refused registration given that the Applicant did not meet the criteria for registration pursuant to Section 16(1) of the *Psychologists Act* and was

not eligible to apply to transfer to Nova Scotia under the terms of the Agreement on Internal Trade;

5. The Mutual Recognition Agreement of the Regulatory Bodies for Professional Psychologists in Canada was intended to establish the conditions under which a psychologist who is licensed or registered to practice without supervision in one Canadian jurisdiction will have her qualifications recognized in another jurisdiction that is a party to the Agreement. At the time of application in Nova Scotia, Dr. Yates was not licensed or registered to practice without supervision in any Canadian jurisdiction, and accordingly her qualifications were not required to be recognized in Nova Scotia through the Mutual Recognition Agreement. In addition, Article 704 of the Agreement on Internal Trade notes that:

> In the event of an inconsistency in a particular case between a provision of the Chapter and a provision of any other agreement between two or more Parties respecting matters covered by this Chapter, the agreement that is more conducive to labour mobility in that particular case prevails to the extent of the inconsistency. It is understood that any other such agreement may prevail only as between the parties that are party to that agreement.

To the extent that the provisions in Chapter 7 of the Agreement on Internal Trade are more conducive to labour mobility than the Mutual Recognition Agreement, the terms of the Agreement on Internal Trade apply, under which the Applicant was not eligible for registration in Nova Scotia.

6. Subsection 15(5) of the *Psychologists Act* was not applicable to the decision makers' decisions, or alternatively, was applied reasonably.

[Underlining and excisions in original]

Background

[4] Dr. Yates was born and raised in Halifax, Nova Scotia. She earned her master's degree in 1990 and her doctorate in psychology in 1996, both from Carleton University.

[5] Shortly thereafter, the Applicant relocated to British Columbia with the intent that she would be registered as a psychologist in that province. She undertook in excess of one year of supervised work, completing more than 1500 hours in the process. She had not yet completed her registration in British Columbia when she became employed with Correctional Services Canada ("CSC") and was transferred to Saskatchewan in the course of that employment.

[6] In her new locale, she worked under supervision for a further year, and, at the completion of same, she successfully undertook the standardized written examination and the required oral examination for professionals practicing in the

field of psychology in that province. Dr. Yates was issued a practicing certificate by the Saskatchewan College of Psychologists on October 19, 1998. She has maintained her certificate of registration with what is now known as the Saskatchewan College of Psychologists ("SKCP"), but was earlier known as the Saskatchewan Psychological Association.

[7] In conjunction with her employment with CSC, the Applicant eventually attained the highest level, that being "Level 5", which made her a national psychology manager. Over the period from 1998 to 2000, she was also an adjunct professor with the Department of Psychology at the University of Saskatchewan. She had continued her employment with CSC in Saskatchewan until she was promoted to a management position (in 2000) by that institution. This, as well as later executive positions, took her out of the province of Saskatchewan. She worked in Ontario thereafter.

[8] For the next fourteen years Dr. Yates did not treat individual patients. During this period, however, she was involved in the practice of examining many facets of the behaviour of children and adults. She did this at the group level through research and work with practitioners in the field (including psychologists). At times she dealt with individual cases, although she did not diagnose individual psychological and emotional disorders. She did advise, however, "more globally on the impact of various disorders in working with the offenders" (Applicant's brief, pp. 4 – 5). She states that she did not perform any individual therapy, but consulted with practising psychologists. She referred to "significant knowledge and applied practice in this area" in her application (Record, Tab 3, pp. 9 – 10):

> My experience since 2000 as a program developer and manager of rehabilitation programs within the Correctional Service of Canada has allowed me to maintain my knowledge in this area for example, by the active adherence to the risk/need/responsivity model (D.A. Andres & J. Bonta) in this program development and implementation. Interventions also take into account individual personality and psychopathology in order to ensure the maximum possible effectiveness of the rehabilitation programs offered within the Correction Service of Canada.
>
> In general, via my forensics speciality as well as my work, publishing, and research activities that continue to the present time, I have significant knowledge and applied practice in this area. For example, I am certified in the use of various risk and personality assessment measures (e.g. the Psychopathy Checklist Revised). Which exclusively measure individual risk, psychopathology, and individual differences. I am also a certified trainer in several of risk assessment measures. As can be seen above as well as in my Curriculum Vita [sic], I have continued to attend

> conferences, engage in ongoing continuing education and professional development, and conduct research in the area of psychopathology and individual differences.
>
> Current examples of my extensive knowledge base is this area can be found in the following publications and training video, copies of which can be made available upon request. Please note this is not an exhaustive list (refer to Curriculum Vita [sic] for additional information).
>
> Yates. P.M. & Kingston, D.A. (2007). *A Companion Text to the Casebook of Sexual Offending for Use in Scoring the Risk of Sexual Violence Protocol* (RSVP). Victoria, BC: Pacific Psychological Assessment Corporation. www.pacific-psych.com.
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> Yates, P.M. Kingston, D.A. & Ward, T. (2009). *The Self-Regulation Model of the Offence and Relapse Process:* Volume 3: *A Guide to Assessment and Treatment Planning Using the Integrated Good Lives/Self-Regulation Model to Sexual Offending.* Victoria, BC: Pacific Psychological Assessment Corporation. www.pacific-psych.com.
>
> Yates, P.M. & Prescott, D.S. (2011). *Building a Better Life*: *A Good lives and Self-Regulation Workbook.* Brandon. VT: Safer Society Press. http://www.safersociety.org/safer-society-press/.
>
> Yates, P.M. Prescott, D.S., & Ward, T. (2010). *Applying the Good Lives and Self-Regulation Models to Sex Offender Treatment*: *A Practical Guide for Clinicians.* Brandon, VT: Safer Society Press. http://www.safersociety.org/safer-society-press/.
>
> Willis, G.M. & Yates, P.M. & Prescott, D.P. (2013). *Making a Better Life Happen: Integrating the Good Lives Model into Sexual Offender Treatment.* Presented at the 32nd Annual conference of the Association for the Treatment of Sexual Abusers, Chicago, IL, October 2013. Training video: https:www.safersociety.org/press/store/making-a-better-life-happen/.

[9] During this period her duties extended to "teaching and applying psychological theory and principles regarding behaviour and mental processes such as learning, memory, perception and human development, as well as designing, conducting and communicating the results of psychological research" (Applicant's brief, p. 5).

[10] Dr. Yates has published numerous articles in many scholarly journals in the field, is the author or co-author of a number of text books, and has made collaborative contributions to other texts relating to the treatment of sexual offenders, aggression, violent behaviour, cognition and emotion, substance abuse and its treatment to name only some (Record, Tab 1(E), pp. 10 – 15). She has made myriad presentations (Record, Tab 1(E), pp. 15 – 20), and she has provided training

and consultation to clients as diverse as Coalinga State Hospital, California; Carleton University (guest lecturer), Indiana Sex Offender Management & Monitoring Program, Prison & Probation Services (Sweden), Nebraska Department of Correctional Services, New York State Office of Mental Health, United States Department of the Army (U.S. Disciplinary Barracks), U.S. Federal Bureau of Prisons (Dept. of Justice), University of Ottawa (guest lecturer) and a host of others (Record, Tab 1(E), p. 21).

[11] Dr. Yates has also provided student supervision, including oversight with respect to Doctoral Dissertation and Honours Theses, at the University of Ottawa and Carleton University.

[12] Maintenance of a practising status was not required in any of her positions with CSC, so her registration with SKCP was changed. Between 2002 and 2007 her status was "out of province".

[13] Subsequently, in 2007, the SKCP changed her status to "non-practising" and advised her that if she wished to regain her practising status, Dr. Yates would have to complete 1500 hours of supervised work.

[14] In 2014, for a number of reasons, the Applicant returned to live and work in Nova Scotia. In so doing, she applied (and was the successful candidate) for the position of clinical lead for Youth Forensic Services within the mental health and addictions program at the IWK Health Centre in Halifax.

[15] This position required that she hold a practising status with the Board. The Applicant accepted her new position and began work at the IWK in October 2014. She filed her application for registration with the Board on December 17, 2014. The Board denied what was, in effect, her first application, concluding *inter alia* that a doctoral degree from Carleton University did not meet the Board's requirements for "an acceptable degree".

[16] Having sought judicial review on January 26, 2016, her motion was dismissed by this court in *Pamela Yates v. Nova Scotia Board of Examiners in Psychology*, 2016 NSSC 152, as having been filed out of time.

[17] Dr. Yates filed a second application for registration in this province on September 29, 2016 (Record, Tab 1B). The Board released a decision on December 7, 2016, (Record, Tab 6) denying this (her present) application, advising her (in the process) that her registration in Saskatchewan, as a non-practising psychologist,

could not be transferred pursuant to the "Agreement with respect to Interprovincial Trade" (the "AIT"), as Nova Scotia does not have an equivalent registration category.

[18] The second reason cited by the Board was that Dr. Yates' doctoral degree in psychology (in their view) did not meet the criteria for an "acceptable degree" under s. 16(1) of the *Act*, as it did not meet two of the stated guidelines previously published by the Board in that regard. In the course of the Board's explanation, it stated: "…the doctoral transcript does not include the typical psychology content and course work expected in someone preparing for work in an area of applied psychology…finally, the program did not require any supervised practica or a pre-doctoral internship". The Board also indicated that it was cognizant of the internship experiences that the Applicant had acquired outside of the Carleton degree programs, but reasoned that "one cannot augment an insufficient degree by completing course work or supervision that is not a requirement of the doctoral program…" (Record, Tab 6, p. 4).

[19] This decision was reviewed, as previously indicated, at the Applicant's request. The IRC released its decision on January 18, 2017 (Record, Tab 8). In doing so, it indicated that it concurred with the Board and stated that the Applicant's doctoral degree did not meet the established criteria. It also agreed with the other basis of the Board's decision, namely, that the Applicant's membership in the SKCP as "non-practising" was not acceptable given that it did not translate into an equivalent category of registration in Nova Scotia for the purposes of the AIT.

[20] It has been noted earlier that the Applicant contends that procedural unfairness existed in relation to the manner in which the Board considered her application, and in which the IRC conducted the review. This argument is premised mainly upon the basis that the Registrar did not forward some of her materials to the Board and the IRC before they considered her case. I will refer more extensively to this particular factual basis when this (the last) issue is considered.

Issues

[21] Broadly speaking, I prefer the manner in which the Respondents have framed the issues to be considered in this application. I have rearranged the order in which they appear in the Respondents' brief, and reformulated issue (iv). The issues (restated) are as follows:

i. What is the appropriate standard of review?

ii. Was the decision to deny registration on the basis of the mobility requirements of the AIT reasonable?

iii. Was it reasonable for the Respondents to deny registration on the basis of the Applicant's failure to meet the requirements of an acceptable degree program?

iv. (a) Did the Respondents consider s. 15(5) of the *Psychologists Act*?

(b) If yes, was their decision not to apply it reasonable? If no, did the Respondents fetter their discretion?

v. Did the Respondents' failure to consider all materials provided by the Applicant amount to procedural unfairness?

Analysis

i. Standard of Review

Position of the Parties

[22] The Applicant is of the position that the appropriate standard of review with respect to all issues, except the last, is one of reasonableness, given that the Respondents were engaged throughout this exercise in either interpreting their home statute, the *Psychologists Act*, (hereinafter referred to as "the *Act*") or the Agreement on Internal Trade ("the AIT") with which they have great familiarity.

[23] The Respondents, while acknowledging in oral submissions that their position may, in effect, create (for themselves) "a steeper hill to climb", quite fairly point out that the issue may not be so "cut and dried" in relation to the second issue, which concerns the decision to deny registration pursuant to the AIT.

Analysis

[24] Any analysis of a "standard of review question" begins with *Dunsmuir v. New Brunswick*, 2008 SCC 9. *Dunsmuir, supra*, established that there are only two potential standards of review with which we need concern ourselves. One standard is "correctness". The other is the more deferential standard of "reasonableness".

[25] At para. 62 of *Dunsmuir, supra*, the court stated:

> 62 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 defence [sic] 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.

[26] Further elaboration was provided in *Edmonton v. Edmonton East (Capilano) Shopping Centre Ltd.*, 2016 SCC 47, where in paras. 22 – 23, it was noted:

> 22 Unless the jurisprudence has already settled the applicable standard of review…, the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.
>
> 23 The Dunsmuir framework provides a clear answer in this case. The substantive issue here -- whether the Board had the power to increase the assessment -- turns on the interpretation of s. 467(1) of the MGA, the Board's home statute. The standard of review is presumed to be reasonableness.
>
> [Emphasis added]

[27] At first blush, then, when dealing with issue (ii), it is tempting to treat the fact that the Board, in this instance, was engaged in the interpretation of the *Psychologists Act* and the AIT, (which latter has been given legislative effect in this province by virtue of the *Internal Trade Agreement Implementation Act)*, as determinative of the issue. Such would constitute both a statute and legislatively implemented agreement in relation to which the Respondents are closely connected by virtue of their function. If these were the only considerations, they would invite the application of a reasonableness standard of review.

[28] That said, the Respondent has referenced the decision of *Lum v. Council of Alberta Dental Assn. and College, Review Panel*, 2015 ABQB 12, aff'd 2016 ABCA 154, which involved a British Columbia dentist who sought licensure in Alberta. His application was refused, the regulator having decided that he did not meet the "good character" provisions of the Alberta legislation. An internal appeal process confirmed the denial of his application.

[29] Dr. Lum applied for judicial review. He disputed the good character finding (or lack thereof), and also contended that the particular mobility agreement in issue in that case required reciprocal licensure.

[30] The reviewing judge determined that the standard of review with respect to the manner in which the regulator had applied the good character requirements was that of reasonableness. The court also determined, at para. 18, that:

> 18 …the interpretation of the Act and the Regulation as they related to the Mobility Agreement was an extricable question of law subject to a correctness standard…

[31] At the appellate level, the court in *Lum, supra,* upheld the application of the correctness standard in these circumstances, distinguishing (in the process) between the standard of review applicable to the internal appeal review panel's decision, and that applicable upon "external" judicial review.

[32] The Court of Appeal concluded at paras. 98 - 99:

> IV. Judicial Review of Decision
>
> 98 There are two aspects of the Review Panel's decision to review. First is their conclusion on the Registrar's decision as to Dr. Lum's character and reputation. I have determined that the Review Panel's decision is to be reviewed on the reasonableness standard with respect to that aspect of their decision.
>
> 99 With respect to the *TILMA* aspects of the Review Panel's decision, I have concluded that those issues are to be reviewed on the correctness standard.
>
> [Emphasis added]

[33] To the extent that the decision of the internal review panel was dealing with questions involving the "good character" of the Applicant, the court reasoned at paras. 38 – 40 that:

> 38 As the review panel appropriately observed, the registrar, as the first line gate-keeper for the profession, has particular expertise in considering applications for registration. In our view, the review panel has similar expertise; what makes a dentist of good character is something the review panel is well-positioned to recognize.
>
> 39 When interpreting their home legislation, "professional discipline tribunals are the preeminent example of expert tribunals": *Zakhary v College of Physicians and Surgeons of Alberta,* 2013 ABCA 336 at para 9, 561 AR 87. Although not a

> disciplinary tribunal per se, the review panel's powers are identical, see section 32(2).
>
> 40 The appellant has not demonstrated any reviewable error in the review panel's decision. The decision demonstrates "the existence of justification, transparency and intelligibility within the decision-making process [and] falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47, 2008 SCC 9.

[34] This was distinguished from the TILMA (the specific Mobility Agreement with which the court was dealing in *Lum, supra)*. The Court of Appeal noted that TILMA was an agreement between the Government of Alberta and another province and that it had not been enacted by a statute passed by the legislature.

[35] The court discussed the implications of this fact. First, at para. 46, it observed that the task at hand was to adjudicate an appeal between Dr. Lum and the Dental Association, two private entities. Any disputes individuals might have in relation to a Mobility Agreement enacted between two provinces, however, are to be sorted out between the individual provinces themselves because:

> "…only States can enforce States rights…if one State wrongs an individual, it is within the discretion of another State to 'espouse' his or her claim and proceed to seek reparations on behalf of the individual" (*Lum, supra*, appellate decision, para. 49).

[36] Two other points of note were mentioned. Although a treaty is not a "law *per se*, unless enacted by legislation…it can be used as an interpretative guide for domestic legislation…[which] should be interpreted in a way that does not violate the Mobility Agreement". (*Lum,* appeal, paras. 48 and 50).

[37] The Respondents have also referred to the earlier decision of *Barbosa v. Ontario (Health Professions Appeal and Review Board)*, 2012 ONSC 1761, which (again, at first blush) appears to have reached a different conclusion.

[38] *Barbosa, supra,* dealt with a medical doctor who had obtained his degree in Brazil. The court noted at paras. 26 – 30:

> 26 The appellant argues that the standard of review applicable to the Board's decision in this appeal is correctness because the Board has no special expertise in interpreting the labour mobility provisions of the Code or the AIT, and the case raises novel issues of law that are of general importance (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 60).

> 27 I disagree. A number of cases have held that deference should be given to decisions of the Board, given its specialized knowledge and experience in dealing with the matters before it, such as review of decisions of Complaints Committees of the various colleges, as well as registration decisions (see, for example, *Ahmed v. Ontario (Health Professions Appeal and Review Board)*, 2011 ONSC 4217 (Div.Ct.) at para. 4; *McKee v. Health Professions Appeal and Review Board*, [2009] O.J. No. 4112 (Div. Ct.) at para. 4).
>
> 28 In the present case, the Board was reviewing a decision of the Registration Committee determining whether an out-of-province certificate was "equivalent" to a certificate issued by the CPSO. That is a question of mixed fact and law.
>
> 29 The Board was not interpreting the AIT, as the appellant suggests. Rather, the Board and the Registration Committee were required to interpret the Code provisions relating to labour mobility and regulations respecting registration requirements. Thus, in carrying out their task, they were not determining a question of law of central importance to the legal system as a whole or a matter of general importance, but were applying legislation with which they have familiarity. Recently, the Supreme Court of Canada has stated that there is a presumption that the standard of review is reasonableness where a tribunal is administering its home statute (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Federation*, 2011 SCC 61 at para. 39).
>
> 30 Issues of medical licensing, including the classification of licences and their scope, are matters within the expertise of the College's Registration Committee, and they are also matters with which members of the Board have familiarity. Therefore, the standard of review is reasonableness.
>
> [Emphasis added]

[39] In *Lum, supra,* the province of Alberta had passed no enabling legislation, whereas in *Barbosa, supra,* this had been done, as we see from para. 7 of the latter:

> 7 Individuals with an out-of-province certificate may also apply to the College for a certificate of registration pursuant to the interprovincial mobility provisions of the *Health Professions Procedural Code* ("the Code"), being Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. Sections 22.15 through 22.23 of the Code were enacted to fulfill Ontario's obligations under the 1994 Agreement on Internal Trade ("AIT"). The purpose of the provisions is found in s. 22.16, which states:
>
> > The purposes of sections 22.15 to 22.23 are,
> >
> > > (a) to eliminate or reduce measures established or implemented by the College that restrict or impair the ability of an individual to obtain a certificate of registration when the individual holds an equivalent out-of-province certificate; and

> (b) to support the Government of Ontario in fulfilling its obligations under Chapter Seven of the Agreement on Internal Trade.
>
> [Emphasis added]

[40] Dr. Barbosa's application was considered pursuant to Section 22.8 of "the Code" hence the court's comment in para. 29 that the Board was not engaged in the interpretation of the AIT – rather it was interpreting domestic legislation which had given effect to Ontario's obligations pursuant to the AIT. The Code is legislation with which it would have acquired some experience or "familiarity" – as noted in *Barbosa, supra,* at para. 29, or which was "closely connected to its function", per *Edmonton East, supra,* at para. 22.

[41] "Familiarity" relates to the language used by the Supreme Court of Canada both in *Dunsmuir, supra*, (para. 54), and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. For example, in the latter case at paras. 30 – 33, Rothstein J. stated:

> 30 The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) PIPA, a provision of the Commissioner's home statute. There is authority that "[d]eference 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" (*Dunsmuir*, at para. 54; Smith v. Alliance Pipeline Ltd., 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, per Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... questions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or vires" *(Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, at para. 18, per LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).
>
> 31 The timelines question is not a constitutional question; nor is it a question regarding the jurisdictional lines between two or more competing specialized tribunals.
>
> [Emphasis added]

[42] As was the case in *Barbosa, supra*, this present application relates (in part) to the Agreement on International Trade ("AIT"), which in turn had resulted from a 1995 accord between the Federal Government and the provinces to regulate and

promote the free-flow of goods and services between all of the various jurisdictions. An important distinction between this case and *Lum, supra,* is that the AIT has been given legislative effect in Nova Scotia through the *Internal Trade Agreement Implementation Act,* ("*ITAIA*") to which earlier reference has been made.

[43] Sections 2 to 6 thereof read as follows:

> Purpose of Act
>
> 2 The purpose of this Act is to implement the Agreement on Internal Trade between the Government of Canada and the governments of all the provinces and territories of Canada and thereby reduce or eliminate barriers to the free movement of persons, goods, services and investments and promote an open, efficient and stable domestic market to enhance the competitiveness of Nova Scotia and Canadian businesses and sustainable development. 1995-96, c. 8, s. 2.
>
> Interpretation
>
> 3 In this Act,
>
> (a) "Agreement" means the Agreement on Internal Trade between the Government of Canada and the governments of all the provinces and territories of Canada signed in 1994, as amended from time to time by the written agreement of all the parties to the Agreement;
>
> (b) "Minister", in respect of any provision of this Act, means the member of the Executive Council designated as the minister for the purpose of that provision pursuant to Section 7. 1995-96, c. 8, s. 3; 2010, c. 19, s. 1.
>
> Application of Act to Crown
>
> 4 This Act binds Her Majesty in right of the Province. 1995-96, c. 8, s. 4.
>
> Protection of right to legislate
>
> 5 For greater certainty, for the purpose of fulfilling any of the obligations of the Province under the Agreement, nothing in this Act, by specific mention or omission, limits in any manner the right of the Legislature to enact legislation to implement any provision of the Agreement. 1995-96, c. 8, s. 5.
>
> IMPLEMENTATION OF AGREEMENT
>
> Ratification of Agreement
>
> 6 The Agreement is hereby ratified. 1995-96, c. 8, s. 6.
>
> [Emphasis added]

[44] As we have seen, the Respondents have also made reference to the Mutual Recognition Agreement of the Regulatory Bodies for Professional Psychologists in

Canada ("the MRA"). The signatories to this agreement, which include the Nova Scotia Board of Examiners in Psychology, as well their counterparts in every other Province, entered into it:

> …in order to comply with any obligations under the …(AIT), chapter 7 (labour mobility). The purpose of this MRA is to establish conditions under which a psychologist who is licensed/registered to practice without supervision in the Canadian jurisdiction will have his/her qualifications recognized in another jurisdiction that is a party to this agreement". (MRA, s. 10)

[45] Section 2.0 goes on to define the scope of the MRA:

> 2.1 Psychologist means a person who is fully licensed for the independent practice of psychology as a member of a provincial or territorial body authorized in legislation to regulate the profession of psychology and who has been granted use of the title "psychologist" by that body.
>
> 2.2 Psychological Associate means a person who is fully licensed for the independent practice of psychology as a member of a provincial or territorial regulatory body authorized in legislation to regulate the profession of psychology and who has been granted use of the title "psychological associate" by that body.
>
> 2.3 Fully licensed means that the applicant has no current restrictions or limitations to a license, has no outstanding fees or dues, and has met competency requirements in the jurisdiction of licensure.
>
> 2.4 Licensed/registered in this document refers to licensed, certified, registered, chartered, or any other term describing statutory regulation of psychology practice.
>
> 2.5 The parties means the regulatory bodies authorized in legislation to regulate the profession of psychology.
>
> 2.6 Disciplinary Sanction means revocation, suspension or restriction of a license in any jurisdiction.
>
> 2.7 Recognized institution means an institution of higher education that is regionally accredited by an accrediting body authorized by provincial or territorial legislation to grant graduate degrees.
>
> 2.8 Graduate degree means a degree obtained in a recognized institution following a bachelor degree.
>
> [Emphasis added]

[46] For present purposes, the MRA culminates in the requirement of a party to "…license a psychologist registered in the jurisdiction of signatory prior to July 1, 2002, who has five years of licensed practice in psychology immediately preceding the date of application". [Emphasis added]

[47] Post "implementation" and "ratification" of the AIT by *ITAIA*, the MRA is an attempt by the Board, and its counterparts in the other Canadian jurisdictions, to identify some common ground as to how they will go about satisfying their obligations pursuant to it.

[48] As is apparent from the definition of "psychologist" in 2.1, the MRA could not be of any assistance to the Applicant in this case. The Board therefore reverted to the AIT, under whose auspices the MRA was constructed, and specifically section 704 thereof, which would have application "In the event of an inconsistency...between a provision of [this] chapter and a provision of any other agreement between two or more parties…". Section 704 goes on to provide, in such an instance, that:

> "… the agreement that is more conducive to the free movement of workers in that particular case prevails …"

[49] The Board (therefore) turned from the MRA, which could not apply to the Applicant, to the AIT, which became the proper milieu within which to initially consider Dr. Yates' application.

[50] The *ITAIA* does not limit "the right of the Legislature to enact legislation to implement any provision of [the AIT]" s 5. In Nova Scotia, this has been done with the enactment of the *Fair Registration Practices Act*, SNS 2008, c 38 (FRPA), which "recognizes the commitments" of the Province under the AIT "to facilitate the free movement of persons, goods, service and investments throughout Canada, as implemented by the Province under the [*ITAIA*]" s 3.

[51] The Board of Examiners in Psychology is a "regulating body" for purposes of the FRPA: FRPA, s 2(i) and Schedule A. It is therefore bound by the *Fair Registration Practices Code* (ss 5-12 of the FRPA), which broadly requires a regulating body to "carry out registration practices that are transparent, objective, impartial and procedurally fair": s 6. Section 7 sets out the obligations of a regulating body in respect of qualifications:

> 7. A regulating body shall provide information in a clear and understandable form to individuals, including individuals who received their qualifications outside of Canada, applying or intending to apply for registration by the regulating body, and shall provide
>
> (a) information about its registration practices and internal review processes;
>
> (b) information about the length of time that the registration process for that regulating body usually takes;
>
> (c) the requirements for registration by the regulating body;
>
> (d) a description of the criteria used to assess whether the requirements for registration have been met;
>
> (e) information about any support the regulating body provides to applicants during the registration process; and
>
> (f) information setting out any fees for registrations.

[52] Where registration is not granted, a regulating body is required to "provide written decisions that include reasons to applicants within a reasonable time respecting registration decisions" (FRPA, s 8(c)) and to "provide, where practical, information respecting measures or programs that may be available to assist unsuccessful applicants in obtaining registration at a later date" (FRPA, s 8(d)). Further, s 10 of the FRPA sets standards for internal review of a denial of registration:

> 10(1) Where a regulating body does not grant registration to an applicant, the regulating body shall provide an internal review process within a reasonable time and shall inform the applicant of the internal review process and of the procedures and time frames for the internal review.
>
> 10(2) A regulating body shall provide an applicant for registration an opportunity to provide new information and to make submissions with respect to an internal review in such manner as determined by the internal review decision-maker.
>
> 10(3) An internal review decision-maker shall provide an applicant with a written decision that includes reasons within a reasonable time.
>
> 10(4) A regulating body may specify how submissions in respect of an internal review are to be submitted.

> 10(5) No one who acted as a decision-maker in respect of a registration decision may act as a decision-maker in an internal review in respect of that registration decision.

[53] Finally, s 11 requires a regulating body to "ensure that individuals acting as decision-makers in internal reviews receive training on conducting an internal review."

[54] The FRPA is framed as a code of procedure. The substantive requirements for psychologists' registration are found in the *Psychologists Act*, SNS 2000, c 32, whose general provisions (specifically, ss 15-16) are designed to encompass new applicants within Nova Scotia, as well as applicants from other provinces. The Board of Examiners is identified as a regulating body under the FRPA, from which it follows that registration procedures under the *Psychologists Act* must not conflict with the principles of the AIT, by way of the two implementing acts, the FRPA and the *ITAIA*.

[55] By comparison with the enactment at issue in *Barbosa, supra.*, the AIT implementation language is not found in a subject-specific statute, but in two statutes of more general application. In *Barbosa, supra*, para. 7, we have previously noted the determination that:

> The purposes of sections 22.15 to 22.23 [of the Health Professions Procedural Code] are,
>
> (a) to eliminate or reduce measures established or implemented by the College that restrict or impair the ability of an individual to obtain a certificate of registration when the individual holds an equivalent out-of-province certificate; and
>
> (b) to support the Government of Ontario in fulfilling its obligations under Chapter Seven of the Agreement on Internal Trade.

[56] These purposes are not substantially different from those of the *ITAIA* and FRPA described above; it is also worth noting that the Ontario provisions are framed as a procedural code, like the FRPA – in service of the substantive purposes set out, for instance, in ss 22.16 of the Ontario Code, in s. 2 of the *ITAIA*, and in s. 3 of the FRPA. The Ontario Code contained various context-specific stipulations, as the court in *Barbosa* went on to observe:

> 8. Section 22.17 prohibits an Ontario residency requirement. Section 22.18, which is key in this appeal, applies if the applicant "already holds an out-of-province

certificate that is equivalent to the certificate of registration being applied for" (s. 22.18(1)). The term "equivalent" is not defined in the Code.

9. Subsections 22.18(2) through (8) set out limits on the registration requirements that the CPSO can impose on an applicant with an equivalent certificate. For example, ss. 22.18(2) prohibits any registration requirement that would require the applicant to undergo any material additional training, experience, examinations or assessments.

10. Nevertheless, the College can impose registration requirements, such as an insurance requirement, if the conditions set out in subsection 22.18(6) are met. That subsection provides:

> (6) The conditions referred to in subsections (4) and (5) are:
>
> 1. Subject to subsection (9), the requirement imposed by the College on applicants who hold an out-of-province certificate must be the same as, or substantially similar to but no more onerous than, the requirement imposed by the College on applicants who do not hold an out-of-province certificate.
>
> 2. The requirement imposed by the College must not be a disguised restriction on labour mobility.
>
> (7) This section does not prohibit the College from carrying out the following measures in respect of the applicant if the conditions set out in subsection (8) are met:
>
> 1. Refusing to issue a certificate of registration to the applicant or imposing terms, conditions or limitations on the applicant's certificate of registration if, in the opinion of the Registration Committee, such action is necessary to protect the public interest as a result of complaints, or criminal, disciplinary or other proceedings, against the applicant in any jurisdiction whether in or outside Canada, relating to the applicant's competency, conduct or character.
>
> 2. If the out-of-province certificate held by the applicant is subject to a term, condition or limitation,
>
> i. imposing an equivalent term, condition or limitation on the certificate of registration to be issued to the applicant, or

> ii. refusing to register the applicant, if the College does not impose an equivalent term, condition or limitation on the certificate of registration being applied for.
>
> (8) The conditions referred to in subsection (7) are:
>
> 1. Subject to subsection (9), the measure carried out by the College with respect to applicants who hold an out-of-province certificate must be the same as, or substantially similar to but no more onerous than, the measure carried out by the College with respect to applicants who do not hold an out-of-province certificate.
>
> 2. The measure carried out by the College must not be a disguised restriction on labour mobility.

[57] The *Psychologists Act* (2000) postdates the *ITAIA* (1995-96), though it predates the FRPA (2008). Pursuant to *ITAIA*, Nova Scotia had implemented the present AIT before the present version of the *Act* was drafted. Given that both statutes deal (expressly or implicitly) with the transfer of professional qualifications between provinces, it would be reasonable to regard them as related (although not identical) statutes. In addition, the FRPA, though passed later than the *Psychologists Act*, is clearly related as well, and it identifies the Board of Examiners in Psychology as a regulatory body subject to the procedural requirements of the FRPA.

[58] The AIT (as a whole) has been implemented (s. 2 *ITAIA*) and "ratified" (s. 6 *ITAIA*) in Nova Scotia. It was amended in 2007 to deal specifically with labour mobility (c. 7 thereof). As a result, the Board was (and is) required to interpret the provisions of its home statute (the *Psychologists Act)* and is also required to apply the AIT directly by virtue of the *ITAIA* in a manner consistent with the FRPA. Clearly, there is a requirement on the part of the Respondents to be aware of, and sensitive to, their obligations under all of the related legislation when they consider an individual application. The considerations under each piece of legislation must be weighed by the Board in every case. This is a nuanced exercise, and, in carrying it out, the Respondents wield an expertise based upon their familiarity with these myriad considerations.

[59] Therefore, the overall situation here is much more akin to that of *Barbosa* than in *Lum.* The clear presumption in these circumstances is that this type of expertise is entitled to deference. I conclude that my review of the Board's decision with respect to issue (ii) (as well as with respect to iii) shall be conducted on the basis of the deferential standard of reasonableness.

[60] Of course, my review of issue (v) will be conducted, as both parties have properly agreed, on the basis of correctness. I will reserve my comments on the nuances associated with such an analysis, as well as with respect to the standard(s) of review "in play" with respect to issue (iv) until I deal with those issues.

What does "reasonableness" mean?

[61] Without purporting to enter into an exhaustive review of the authorities, it is usual to begin to answer this question with recourse (once again) to *Dunsmuir, supra*, where at para. 47, the following guidance was provided:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[62] *Egg Films v. Nova Scotia Labour Board*, 2014 NSCA 33, was referenced by both parties in their oral and written submissions. Therein, further elaboration was provided by the Court of Appeal:

> 26 Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't -- What does the judge think is correct or preferable? The question is -- Was the tribunal's conclusion reasonable? If there are several reasonably permissible outcomes the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 11-17. *McLean v. British Columbia (Securities Commission)*, 2013 SCC

> 67, paras 20, 31-41. *Coates v. Nova Scotia (Labour Board),* 2013 NSCA 52, para 46.

[63] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, at para. 16, we find the following:

> 16 …In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[64] More recently, Justice Fichaud in *Canadian Union of Public Employees, Local 3912 v. Nickerson*, 2017 NSCA 70, pointed out at para. 35:

> 35 The reviewing judge's perspective is wide-angled, not microscopic. The judge appraises the reasonableness of the "outcome", with reference to the tribunal's overall reasoning path in the context of the entire record. The judge does not isolate and parse each phrase of the tribunal's reasons, and then overturn because the judge would articulate one extract differently.
>
> [Emphasis added]

ii. Was the decision to deny registration on the basis of the mobility requirements of the AIT reasonable?

How do the AIT and the *Psychologists' Act* interrelate?

[65] I start, then, with a more specific consideration of the *Psychologists Act*, SNS 2000, c. 32 ('the *Act"*), and its relationship with the AIT. Although the *Internal Trade Agreement Implementation Act*, SNS 1995 – 96, c. 8, pre-dates the *Psychologists Act*, and provides (in s.2) for the implementation and (in s. 6) for the ratification of the AIT, there is no mention of the AIT in the *Psychologists Act*. This may be because those sections of the AIT dealing with labour and mobility (c. 7) were only added in 2007, as previously mentioned.

What the AIT says about mobility between the provinces.

[66] The *ITAIA* in s. 3, expressly recognizes any subsequent amendments to the AIT and essentially places them on a status equivalent to the antecedent portions of the latter.

[67] Chapter 7 of the AIT deals with labour and mobility. In Article 701, the purpose of that section is expressed as such:

…to eliminate or reduce measures adopted or maintained by the parties that restrict or impair labour mobility in Canada and, in particular, to enable any workers certified for an occupation by a regulatory authority of one party to be recognized as qualified for that occupation by all other parties.

[68] The thrust of c. 7 may be gathered from the following further extracts:

Article 702: Scope and Coverage

1. This Chapter applied to measures adopted or maintained by a Party relating to:

(a) residency requirements for workers as a condition of access to employment opportunities or as a condition of certification relating to a worker's occupation.

(b) certification requirements, other than residency requirements, for workers in order to practice an occupation or use a particular occupational title, and

(c) occupational standards

…

Article 703: Extent of Obligations

1. For the purposes of Article 102(1)(b) and (c) (Extent of Obligations), each Party shall, through appropriate measures, ensure compliance with this Chapter by

(a) its regional, local, district and other forms of municipal government, and

(b) its other governmental bodies and by non-governmental bodies that exercise authority delegated by law.

2. Each Party shall, through appropriate measures, seek compliance with this Chapter by non-governmental bodies other than those that exercise authority delegated by law

….

Article 705: Residency Requirements

1. Subject to Article 708, no Party shall require a worker of a Party to be resident in its territory as a condition of:

(a) eligibility for employment; or

(b) certification relating to the worker's occupation.

Article 706: Certification of Workers

1. Subject to paragraphs 2, 3, 4 and 6 and Article 708, any worker certified for an occupation by a regulatory authority of a Party shall, upon

application, be certified for that occupation by each other Party which regulates that occupation without any requirement for any material additional training, experience, examinations or assessments as part of that certification procedure.

…

3. It is understood that a regulatory authority of a Party may, as a condition of certification for any worker referred to in paragraph 1 or 2, impose requirements on that worker (other than requirements for material additional training, experience, examinations or assessments), including requirements to:

(a) pay an application or processing fee;

(b) obtain insurance, malpractice coverage or similar protection;

(c) post a bond;

(d) undergo a criminal background check;

(e) provide evidence of good character;

(f) demonstrate knowledge of the measures maintained by that Party applicable to the practice of the occupation in its territory;

(g) provide a certificate, letter or other evidence from the regulatory authority in each territory in which they are currently certified confirming that their certification in that territory is in good standing; provided that:

(h) subject to paragraph (5)(c), any requirements referred to in paragraphs (a) to (f) are the same as, or substantially similar to but no more onerous than, those imposed by the regulatory authority on its own workers as part of the normal certification process; and

(i) the requirement does not create a disguised restriction on labour mobility.

4. Nothing in paragraphs 1 or 2 limits the ability of a regulatory authority of a Party to:

(a) refuse to certify a worker or impose terms, conditions or restrictions on his or her ability to practice where such action is considered necessary to protect the public interest as a result of complaints or disciplinary or criminal proceedings in any other jurisdiction relating to the competency, conduct or character of that worker;

(b) <u>impose additional training, experience, examinations or assessments as a condition of certification where the person has not practiced the occupation within a specified period of time;</u>

(c) require the worker to demonstrate proficiency in either English or French as a condition of certification in cases where there was no

> equivalent language proficiency requirement imposed upon, and satisfied by, the worker as a condition of the worker's certification in his or her current certifying jurisdiction;
>
> (d) assess the equivalency of a practice limitation, restriction or condition imposed on a worker in his or her current certifying jurisdiction to any practice limitation, restriction or condition that may be applied by the regulatory authority to a worker in its territory, and apply an equivalent practice limitation, restriction or condition to the worker's certification, or, where the regulatory authority has no provision for applying an equivalent limited, restricted or conditional certification, refuse to certify the worker;
>
> provided that:
>
> (e) any such measure is the same as, or substantially similar to but no more onerous than, that imposed by the regulatory authority on its own workers; and
>
> (f) the measure does not create a disguised restriction on labour mobility.
>
> [Emphasis added]

Application to Current Facts

[69] By letter to the Applicant dated December 7, 2016 (Tab 6 – Record), the Board explained its refusal of her application for registration. The outline of its rationale begins with para. 3 thereof:

> The Board first considered your application within the context of the Agreement on Internal Trade. The starting premise of the AIT is that a worker who is certified for an occupation by a regulatory authority in one province or territory is to be certified for that occupation by another province or territory. The term "certified" is defined in Chapter 7 of the AIT to mean a worker who "holds a certificate, licence, registration or other form of official recognition issued by a regulatory authority of a Party which attests to the worker being qualified and, where applicable, authorized to practice a particular occupation or to use a particular occupation title in the territory of that Party…"

[70] The Board then went on to consider Article 706 of the AIT and quoted 706(4)d, specifically (for full text, see *supra*):

> (d) Nothing in paragraph 1 or 2 limits the ability of a regulatory authority of a Party to assess the equivalency of a practice limitation, restriction or condition imposed on a worker in his or her current certifying jurisdiction to any practice limitation …

> or where the regulatory authority has no provision for an equivalent limited, restricted certification, to refuse to certify the worker.

[71] The Board reasoned that although the Applicant held registration with the Saskatchewan College of Psychiatrists, her status had been categorized as "non-practicing" since 2002. Because of this (as the Board continued) she was not authorized to practice psychology in Saskatchewan without fulfilling the requirements to return to full practice status in that province.

[72] The Board pointed out that there was no registration category in Nova Scotia equivalent to the "non-practising status" of its Saskatchewan counterpart, and, because of this, determined that her registration could not be transferred under the AIT (Record, Tab 6, p. 2, para. 2).

[73] The Board concluded its analysis of the Applicant's eligibility for a transfer of registration to this province pursuant to the AIT by observing:

> The Board understands that in order to become fully licensed in Saskatchewan to return to practice there, you would require a 1500 hour period of supervision. The Board is open to revisit an application if you were to obtain full practice registration in Saskatchewan as per our obligations under the AIT.

[74] Section 12 of the Saskatchewan College's Regulatory By-laws spells out the entitlements and restrictions that accompany a non-practising designation in that province. Specifically, in sub-sections 2, 3 and 4 we find:

> (2) Non-practising membership entitles a person to the following privileges:
>
> (a) to have a voice, but no vote at annual and special meetings of the college;
>
> (b) to be appointed to committees of the college;
>
> (c) to receive a copy of college documents appropriate for distribution; and
>
> (d) to receive the publications of the college.
>
> (3) Non-practising members are required to renew their non-practising stats annually.
>
> (4) Persons who are registered as non-practising members may not practise as psychologists or hold themselves out as being entitled to practise as psychologists.

[75] As the Respondent Board pointed out in its reasons (Record, Tab 6) there does not appear to be anything comparable to "non-practising" status to be found in either the *Act* or the Regulations thereunder.

[76] The Respondents have cited *Bugwandin v. College of Physicians and Surgeons of Ontario*, 2012 CanLII 60641, as an example comparable to the case at bar. Very broadly speaking, *Bugwandin* dealt with a physician who was possessed of an inactive license with the College of Physicians and Surgeons of Saskatchewan. He would not be able to practice in that province without satisfying further conditions precedent to becoming a active practitioner. He applied for licensure in Ontario, which had no ability to issue certificates other than those which enabled active practice. The College of Physicians and Surgeons of Ontario found that it could not apply the AIT and register the Applicant in that province as a result.

[77] As we have seen, *Barbosa, supra*, although not totally analogous to the case at bar (because it also dealt with the Board's assessment of a candidate under the "good character" requirements of its own statute) is nonetheless of some relevance. Therein, the Applicant was possessed of a "defined license" in New Brunswick which had been issued on the basis that there was a "demonstrated need" within that province for his services as a anaesthesiologist, and was also conditional upon his maintaining ongoing clinical activity within New Brunswick.

[78] Upon his application for licensure in Ontario, one of the bases for the failure of his application was that the province did not possess the categorical equivalent of a "defined license". As a consequence, his application for transfer was denied under the AIT (or, to put it more accurately, under the applicable portion of the Code, which was passed in Ontario to give effect to its obligations under the AIT).

[79] Dr. Yates acknowledges her non-practising status in Saskatchewan, and that she would require 1500 hours of supervision to qualify for a practising certificate in that province. I observe that there has been no reference by the Applicant to a comparable category in Nova Scotia into which her non-practicing certificate could be "imported" under the AIT.

[80] The Board reciprocally acknowledged that if the Applicant were to complete 1500 hours of supervision in Saskatchewan, this would enable her to acquire a "practicing" certificate in that Province, which would entitle her to reciprocal recognition (once attained) in Nova Scotia. Why then, asks the Applicant, could the Board not simply let her complete the required supervision in Nova Scotia, and then confer practicing status upon her after she has done so? Article 706(4)b seems to

admit this very possibility. Why tell her, in effect, that she must move back to Saskatchewan in order to do so? Presumably, Dr. Yates would argue that this consideration would acquire even more force if the Board had been permitted to see all of the materials that she submitted with her application (with respect to which much more will be said further on).

[81] Yet, the fact remains: what is the registration category into which she would be placed while she completed her 1500 hours of supervision, if she were permitted to do so in Nova Scotia? There is nothing in the AIT which requires the Respondents to create a new category for her. In fact, pursuant to the Respondents' (reasonable) interpretation of Article 706(4)d, the case is exactly the opposite.

[82] Despite what I have concluded with respect to issues (iv) and (v) (see *infra*), I am unable to see any other reasonable conclusion at which the Board could have arrived (in its analysis of Dr. Yates' application under the AIT). This is the case even if, for example, all of the materials submitted by her had been made available to it for consideration.

[83] The Board (and later the IRC) made a decision for which provision is expressly made in the AIT (Article 706(4)d). It was "their call". Their reasons are logical and transparent.

[84] The "AIT decision" is therefore defensible. It meets the deferential standard of reasonableness which I have concluded is applicable. It was an outcome available to the decision maker on the basis of the reasons expressed by both the Board and the IRC. The Applicant's contentions with respect to this issue are without merit.

iii. Was it reasonable for the Respondents to deny registration on the basis of the Applicant's failure to meet the requirements of an acceptable degree program?

[85] I reach the same conclusion with respect to this issue. The decision of the Respondents was reasonable. Indeed, after setting out the criteria established pursuant to the guidelines under the *Psychologists Act* 1980, the Board noted that the Applicant's doctoral program:

> …does not meet criteria 1(v) or 1 (vii) in that the doctoral transcript does not include the typical psychology content and coursework expected of someone preparing for work in an area of applied psychology. Moreover, course titles do not match the standard Core Competencies of psychology. There is very little doctoral coursework in the areas of assessment of children and/or adults, assessment of personality and diagnosis, courses in intervention or psychotherapy

> with children and/or adults, and coursework in Ethics with a focus on the Canadian Code of Ethics for program in psychology from Carleton University. In fact, the applicant does not cite any doctoral level courses in the Core Competencies section of the application. The course descriptions included in the application includes undergraduate courses completed at St. Mary's University. Undergraduate courses are not considered as part of the assessment of Core Competencies, as it is the doctoral program that is being assessed. Finally, the program did not require any supervised practica or a pre-doctoral internship.
>
> With respect to criterion 2, the Board noted that the Ph.D. Program in Psychology at Carleton University is not accredited by the Canadian Psychological Association or the American Psychological Association. This is not an absolute bar to program approval, but is another factor considered by the Board in its overall assessment of the program.
>
> It should be noted that failure to meet any one criterion can be sufficient for the Board to conclude that the program is not acceptable.
>
> (Record, Tab 6)
>
> [Emphasis added]

[86] Section 16(1)a of the *Act* (which deals with the Register of Candidates) reads as follows:

> 16 (1) The Board shall register an applicant on the Register of Candidates where the Board is satisfied that the applicant
>
> > (a) possesses a doctoral, masters or equivalent degree in psychology that is acceptable to the Board from an educational institution approved by the Board; …
> >
> > [Emphasis added]

[87] Section 15(1)a (which governs an applicant seeking to be placed on the Register of Psychologists) is almost identical:

> 15 (1) The Board shall register an applicant on the Register of Psychologists where the Board is satisfied that the applicant
>
> > (a) possesses a doctoral or equivalent degree in psychology that is acceptable to the Board from an educational institution approved by the Board; …
> >
> > [Emphasis added]

[88] The phrases "acceptable to the Board" and "approved by the Board" are commensurate with the importance of the self-governing regulation of the professions. No extensive elaboration of this importance is necessary. The majority

decision in the recent case of *Green v. Law Society of Manitoba,* 2017 SCC 20, states:

> 25 Additionally, the Law Society has expertise in regulating the legal profession "at an institutional level": *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.,* 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 33. This Court has previously recognized that self-governing professional bodies have particular expertise when it comes to deciding on the policies and procedures that govern the practice of their professions: *Pearlman v. Manitoba Law Society Judicial Committee,* [1991] 2 S.C.R. 869, at p. 887.

[89] The Board, in its decision, noted that the doctoral program in Psychology at Carleton University is not accredited by the Canadian Psychological Program or the American Psychological Association. After (correctly) pointing out that this did not necessarily act as a bar to program approval, the Respondent then compared the objective criteria to both of the Applicant's degrees, and her considerable "after acquired" experience and concluded that:

> …The Board does not have the authority to remediate a degree of that has been determined "unacceptable". One cannot augment an insufficient degree by [subsequently] completing coursework ...
>
> (Record, Tab 6, p. 4)

[90] The Respondents have noted in their brief at para. 106:

> 106 The question of whether the Applicant possessed a doctoral degree in psychology acceptable to the Board did not lend itself to one particular result. Rather, the inquiry gave rise to a number of possible, reasonable conclusions, one of which was that the Applicant's doctoral degree did not satisfy the requirements of the Guidelines. It is not open to the Court to substitute its own view of a preferable outcome. The words of *Egg Films* are applicable here in that where there may be several reasonably permissible outcomes the tribunal, not the court, chooses among them.

[91] I agree. There is no merit to the Applicant's submissions with respect to this issue.

iv. (a) Did the Respondents consider s. 15(5) of the Psychologists Act at all?

[92] The Board's view, as articulated during oral submissions, is that there are two "paths" which could lead an out-of-province applicant, such as Dr. Yates, to licensure in this province. The first is pursuant to the AIT, which has just been

considered. The second is pursuant to the *Act.* This is a reasonable approach when one considers that the concern of the former is to set the minimum threshold requirements for transfers to the provinces from other jurisdictions. It does not concern itself with measures in an individual province unless they fall below this minimum threshold. Similarly, legislated paths in an individual province that are more generous to such applicants would not conflict with the AIT. An analysis which provides an applicant with an opportunity for licensure under each of these "paths" by the Board is therefore a reasonable manner in which to proceed.

[93] The "AIT path" having just been considered, we turn to the second of these "paths", the *Act.* I begin by observing that s. 15 of the *Act,* as a whole, reads as follows:

> 15 (1) The Board shall register an applicant on the Register of Psychologists where the Board is satisfied that the applicant
>
> > (a) possesses a doctoral or equivalent degree in psychology that is acceptable to the Board from an educational institution approved by the Board;
> >
> > (b) has two years of professional experience in the field of psychology acceptable to the Board, at least one year of which was obtained after being granted the doctoral or equivalent degree referred to in clause (a) and all of which were adequately and responsibly supervised in a manner satisfactory to the Board;
> >
> > (c) has passed the examinations required by the Board;
> >
> > (d) has paid the prescribed registration fee; and
> >
> > (e) has not been removed by the Board from the Register of Psychologists or the Register of Candidates.
>
> (2) The Board shall register the name of an applicant on the Register of Psychologists where the Board is satisfied that the applicant
>
> > (a) possesses a masters or equivalent degree in psychology that is acceptable to the Board from an educational institution approved by the Board;
> >
> > (b) possesses at least four years of professional experience in the field of psychology acceptable to the Board, all of which were obtained after the granting of the degree referred to in clause (a) and all of which were adequately and responsibly supervised in a manner satisfactory to the Board;
> >
> > (c) has passed the examinations required by the Board;
> >
> > (d) has paid the prescribed registration fee; and

(e) has not been removed by the Board from the Register of Psychologists or Register of Candidates.

(3) The Board may, in its discretion, set conditions to be met before the name of a person who has been removed from either register shall be placed on the Register of Psychologists.

(4) Notwithstanding subsections (1) and (2), the Board may, in its discretion, decline to register the name of an applicant on the Register of Psychologists where the applicant

(a) has been convicted of a criminal offence or of an offence related to the regulation of the practice of psychology;

(b) has been found guilty of professional misconduct, incompetency or incapacity in the Province or in another jurisdiction in relation to psychology or another profession;

(c) is currently involved in a proceeding for professional misconduct, incompetency or incapacity in the Province or in another jurisdiction in relation to psychology or another profession; or

(d) is not able to speak and write either English or French with reasonable fluency.

(5) The Board may, in its discretion, waive all or part of the requirements of this Section where an applicant holds a certificate of registration as a psychologist from another province, state or country the standards of which are deemed by the Board to be at least equivalent to the standards required by subsection (1) or (2).

[Emphasis added]

[94] Section 16, in its entirety, is reproduced below:

16 (1) The Board shall register an applicant on the Register of Candidates where the Board is satisfied that the applicant

(a) possesses a doctoral, masters or equivalent degree in psychology that is acceptable to the Board from an educational institution approved by the Board;

(b) has paid the prescribed fee to the Board; and

(c) has not been removed by the Board from the Register of Candidates or the Register of Psychologists.

(2) The Board may, in its discretion, set conditions to be met
before the name of a person who has been removed from either register shall be placed on the Register of Candidates.

> (3) Notwithstanding subsection (1), the Board may, in its discretion, decline to register the name of an applicant on the Register of Candidates where the applicant
>
> > (a) has been convicted of a criminal offence or an offence related to the regulation of the practice of psychology;
> >
> > (b) has been found guilty of professional misconduct, incompetency or incapacity in the Province or in another jurisdiction in relation to psychology or another profession;
> >
> > (c) is currently involved in a proceeding for professional misconduct, incompetency or incapacity in the Province or in another jurisdiction in relation to psychology or another profession; or
> >
> > (d) is not able to speak and write either English or French with reasonable fluency. 2000, c. 32, s. 16.

[95] The Respondents' opening contention with respect to 15(5) is contained at para. 64 of their brief:

> 64. The point to be made about the first bolded section of this subsection is that the ability to apply discretion relates only to applications under section 15 of the *Act.* As previously noted, the application advanced by the Applicant was brought pursuant to clause 16(1)(a), and not section 15. The references requested of the referees similarly refer to the application for the Candidates' Register, which is a section 16 matter. As a result, subsection 15(5) has no application to the matters under review, and the argument on this issue should simply end there. It cannot be unreasonable for decision makers to ignore an inapplicable section of the legislation.

[96] It is certainly correct to note that the letter from the Applicant's counsel to the Board, dated September 9, 2016, which accompanied her application, began with the words:

> This is Dr. Pamela Yates' second application for licensure as a Psychologist pursuant to Section 16(1) of the *Psychologists Act.* (Record, Tab 1).

[97] That said, both the letter and Dr. Yates' actual application refer to it as an "application for licensure as a psychologist" (in the former) and an application to "practice as a psychologist and/or seek employment as a psychologist" in Nova Scotia (Record, Tab 1(b), p.1), in the latter.

[98] The process under s. 16(1) merely relates to an application for placement on the Register of Candidates. This Register is what is applicable when one graduates

from a university program with either a "Doctoral, Masters or equivalent degree" that is acceptable to the Board (*Act,* s. 16(1)(a)).

[99] If placed on the list, the Nova Scotia Board of Examiners will require the candidate to complete a period of supervision (applicant with Master's Degree – four years, applicant with Doctoral Degree – two years). After that, the candidate must successfully complete the North American Standardized exam (EPPP) and also an oral exam conducted by the Board itself. Applicants are placed on the "Candidate Register" until they have completed these requirements. There is no "section 16 equivalent" of s. 15(5), which would confer upon the Board a discretion to "waive" all or part of the requirements of s. 16 in certain circumstances.

[100] As noted by counsel for the Applicant in his letter of September 29, 2016, (Tab 1) to the Board, this was Dr. Yates' second application for licensure. Her first application generated a written decision. It is reported in *Yates v. Nova Scotia Board of Examiners in Psychology*, 2016 NSSC 152. Therein, at paras. 2 – 7, Justice LeBlanc outlined the factual background to this application:

> 2 Dr. Yates submitted her application on December 17, 2014. Her application included a completed registration form, transcripts, a curriculum vitae, references, and letters of support.
>
> 3 The Board considered Dr. Yates' application during its meeting on January 9, 2015. The Board decided to reject the application because, as they explained to Dr. Yates in a letter dated January 15, 2015 (the "January Letter"):
>
> > * They did not consider her to be eligible for a transfer registration pursuant to s. 15(5) of the *Psychologists Act*, S.N.S. 2000, c. 32; and
> >
> > * She does not hold "a doctoral or equivalent degree in psychology that is acceptable to the Board" as required under s. 15(1)(a) of *the Psychologists Act*.
>
> 4 In the January Letter, Registrar Allan Wilson further explained that Dr. Yates' application, and the Board's decision to reject the application, would be automatically forwarded to the Internal Review Committee for review. This process is designed to meet the requirements of s. 10(1) of the *Fair Registration Practices Act*, S.N.S. 2008, c. 38. Registrar Wilson indicated that Dr. Yates could submit additional materials for the Committee's consideration. Further to that invitation, Dr. Yates submitted a letter dated February 17, 2015, wherein she provided additional information and explanation about her education and experience.
>
> 5 The Internal Review Committee met on March 23, 2015. It reviewed Dr. Yates' original application materials, as well as the additional information provided by Dr. Yates. The Committee wrote to the Board on March 24, 2015, indicating its

> agreement with the Board's decision to reject Dr. Yates' application. The Committee agreed that Dr. Yates is ineligible for a transfer registration, and that her degree is not satisfactory.
>
> 6 By letter dated April 1, 2015, the Board communicated the Committee's decision to Dr. Yates (the "April Letter"). "Consequently," Registrar Wilson explained, "your file with NSBEP will now be closed."
>
> 7 Dr. Yates filed a notice for judicial review of the Board's decision on January 26, 2016, asking this Court to overturn the Board's decision and to order the Board to recognize her degree as acceptable.
>
> [Emphasis added]

[101] The above decision was generated as result of the Respondent's motion to set aside Dr. Yates' first application for judicial review of the Board's decision as having been filed outside of the timelines. Justice LeBlanc clearly treated her application as having been brought (at that time) pursuant to s. 15, and in the process dismissed her application for an extension with the observation at para. 31:

> 31 However, Dr. Yates has not established that she will suffer significant prejudice if I do not grant the extension. She has not argued that there are no other avenues available to her to challenge the Board's decision. She has not argued that she will be prevented from re-applying for registration. Of course, being prevented from pursuing this application for judicial review of the Board's 2015 decision will cause some measure of prejudice to Dr. Yates. She will continue to be prohibited from practicing in Nova Scotia. This must be balanced against the Board's interest in certainty and finality in the application decision-making process.
>
> [Emphasis added]

[102] The Respondents have argued in paras. 6 and 7 of their brief's:

> 6. It should be noted at this early point in the Board's submission that the Notice for Judicial Review references violations of section 15 of the *Act*, and seeks relief under section 15. The issues for review outlined in the Applicant's brief also reference failures by the decision makers to interpret and apply section 15. However, the application for registration was brought by the Applicant under clause 16(1)(a) of the *Act* [Record, Tab 1, page 1], and the Decision was rendered under clause 16(1)(a) of the *Act* [Record, Tab 6, page 2, Tab 8]. The application for registration does not reference section 15 of the *Act.*
>
> 7. The Notice of Participation filed by the Board is responsive to the sections referenced by the Applicant in the Notice for Judicial Review, and accordingly references section 15 of the *Act*. It was only during the preparation of this written submission that this error was recognized, and at the time of filing this brief of the

> Board has provided the Applicant with an Amended Notice of Participation to reflect the appropriate sections of the *Act*…

[103] Nonetheless, and regardless of the manner in which her application was referenced in her Counsel's accompanying letter, I am satisfied that the Board (a) was aware that Dr. Yates' (stated) intention was to apply for licensure in Nova Scotia and (b) that its customary approach is to process all applications, whether for Candidate Register (s. 16) or for licensure as a practicing psychologist (s. 15) in exactly the same way.

[104] I am also satisfied that, because of this approach, the Board failed to consider whether its discretion under s. 15(5) was (a) applicable in this case, and (b) if so, whether to exercise it. I will explain.

How did the Board actually go about its consideration of Dr. Yates' application?

[105] To segue momentarily, an application for judicial review would ordinarily proceed on the basis of the Record itself. Given, however, that procedural fairness (which will be dealt with in (v)) is in issue, two affidavits outlining the procedure followed by the Respondents were permitted, and were filed in this case by the Respondents. That of Matthew Wagner, who has served as Assistant Registrar of the Board since 2004, was one. That of Allan R. Wilson, Registrar, of the same date, was the other.

[106] Those portions of Mr. Wagner's affidavit dated June 15, 2017, which relate to issue (iv) are as follows:

> 6. When individuals contact the Board for information about registration I first ascertain whether they hold current practising registration in another Canadian jurisdiction. If so, I direct them to our website and the application that is identified for that purpose. Different considerations apply to such individuals as they must be considered in the context of the Agreement on Internal Trade (the "AIT") (now supplanted by the Canadian Free Trade Agreement). This process for handling such enquiries is consistent with the application for registration pathways and information that is transparent on the Board's website.
>
> 7. If the applicant meets the AIT criteria, the applicant is considered a transfer applicant, generally entitled to reciprocal registration. The Board verifies this when considering the application, and if the Board agrees with the conclusion that the applicant is a transfer applicant, the Board does not separately perform an assessment of the applicant's educational credentials.

8. If the applicant does not hold practising registration in another Canadian jurisdiction, I direct them to the separate application for this purpose, found on our website. Upon receipt of the application, I forward it to the Board.

9. The Board next considers whether the applicant's educational credentials meet the Board's registration requirements pursuant to section 16(1)(a) of the *Psychologists Act* ("*Act").* This function includes an assessment of whether the applicant possesses a masters or doctoral degree in psychology acceptable to the Board from an institution approved by the Board. The degree requirements are outlined in the *Requirements and Criteria for Assessing Regular Applicants* ("Guidelines"), which are available on the Board's website.

10. If the applicant's educational degree satisfies the Guidelines, and the applicant meets the remaining requirements of subsection 16(1), the applicant is then approved for entry on the Candidate's Register. However, because the assessment of educational credentials under subsection 16(1) is the same exercise as that performed for registration under subsection 15(1) or (2), the Board then considers whether the applicant meets the remaining criteria under subsection 15(1) or (2) to qualify for registration on the Register of Psychologists. There is no separate application for registration under section 15. If the applicant meets the remaining criteria under subsection 15(1) or (2), the applicant is then registered on the Register of Psychologists.

11. For greater clarity, there are two application forms: one intended for transfers of registration, where the individual already holds practicing registration in another jurisdiction, and the other application for regular applications is intended for all other scenarios. A regular application is processed initially under section 16, and if the criteria under section 16 have been met, the Board then, and only then, advances to consider the section 15 registration requirements.

12. Subsection 15(5) of the *Act* grants the Board discretion to waive all or part of the regular registration requirements for registration on the Register of Psychologists where the applicant holds a certificate of registration as a psychologist from another jurisdiction the standards of which are deemed by the Board to be at least equivalent to the standards required by section 15(1) and (2). In my experience with the Board, the Board has always viewed a certification of registration under this subsection to be a certificate that grants practicing status to the applicant in the other jurisdiction.

In the case of the application from Pamela Yates, I attended the Board meeting together with Dr. Allan Wilson where her application was considered. Because Dr. Yates did not hold current practising registration status in any Canadian jurisdiction, the Board determined that her application did not qualify as a transfer under the AIT. Her application was then considered under section 16 and a decision was made by the Board that her educational credentials did not meet the Guidelines approved by the Board.

[Emphasis added]

[107] It is clear, therefore, that the Board considers all applications, whether for Candidate Register or licensure, as a single procedure by asking a series of questions:

i. is the transfer possible under the AIT;

ii. if not, does the applicant qualify as a candidate under s. 16(1) of the Act; and, only if so,

iii. does the applicant qualify as a psychologist under s. 15(1) of the *Act*?

[108] Counsel for the Board goes on to submit that this process does not fetter its discretion in any way because:

> 84. Unlike the situation in *Kanthasamy*, the board did not treat the guidelines in question – Article 706, paragraph 4(d) of the AIT – as mandatory or as displacing its discretion pursuant to the *Act*. Such an argument would be persuasive if the Board ended its inquiry after determining that a transfer of registration under the AIT was not an option for the Applicant. However, the Board proceeded to consider all of the Applicant's circumstances before ultimately refusing her application for registration.
>
> 85. The Board's December 7, 2016 Decision demonstrates that the Board did not deem the AIT as binding or conclusive without the need to consider the Applicant's individual circumstances. The first page of the letter confirms that consideration of the AIT was only the Board's first step:
>
> > The Board first considered your application with the context of the Agreement on Internal Trade. [Emphasis added]
>
> On the next page, the Board stated:
>
> > Given that it was determined that a transfer of registration under the AIT was not an option, the next option for the Board was to assess your application using our regular requirements for registration. [Emphasis added] [record, Tab 6, pp. 1-2]
>
> 86. The Board in the present case did not fail to entertain the Applicant's other submissions. The analysis under the AIT, without more, is insufficient to infer that the Board fettered its discretion.
>
> [Emphasis added]

[109] With great respect, I do not agree. Under the Board's method of analysis, an applicant without a practicing certificate of registration in the other Province (hence, ineligible for transfer under the AIT) and without an acceptable degree never makes it past s. 16, despite the fact that it is s. 15 which purports to deal with applicants

seeking licensure in the province. Lack of an "acceptable" degree from an institution "approved by the Board" (s. 15(1)) are things which the s. 15(5) discretion could potentially remedy. But since no applicant lacking same makes it past a s. 16 analysis, there is never an opportunity for the Board to consider s. 15 at all (let alone the applicability of the discretion conferred by s. 15(5)) in favour of such applicants.

[110] In my view, the Board's approach is one which finds no support in the legislation. Sections 15 and 16 set up parallel application and registration requirements. Applications for candidate register may only succeed by meeting the specific criteria of s. 16(1). The only discretion that s.16 allows the Board is to refuse to register candidates who otherwise meet the established criteria in certain circumstances.

[111] Meanwhile, s. 15(1) and (2) set out the corresponding requirements for psychologists. There is no stipulation that an applicant for registration as a psychologist first must qualify as a candidate. Indeed, while s. 16(1) provides a complete code for registration as a candidate, s. 15(1) and (2) are not a comprehensive code for psychologist registration. This is because the prerequisites are subject to a discretion vested in the Board. Pursuant to s. 15(5) the Board has a discretionary power to waive some or all of the requirements of s. 15(1) or (2) and register an applicant as a psychologist anyway.

[112] This discretion is further referenced in s. 3(3) and (4) of the Regulations passed pursuant to the *Act*, NS Reg 70/2002, which state, in part:

> (3) Subject to subsection (4), an applicant for registration shall
>
> …
>
> (b) make arrangements for the educational institutions from which the applicant's relevant degrees were obtained to send transcripts to the Registrar;
>
> (c) where the applicant is seeking registration on the Register of Psychologists, provide proof to the satisfaction of the Board that the applicant has fulfilled the requirements of subsection 15(1) or 15(2) of the *Act*; and
>
> …
>
> (4) Clauses (3)(b) and (c) do not apply to an applicant for whom the Board has waived requirements in accordance with subsection 15(5) of the *Act*.
>
> [Emphasis added]

[113] We have seen from the affidavit of Matthew Wagner that "a regular application [i.e. one which does not qualify under the "AIT route"] is processed

initially under section 16, and if the criteria under section 16 have been met, the Board then, and only then, advances to consider the section 15 registration requirements". (Wagner affidavit, para. 11). [Emphasis added]

[114] According to this approach, it is not clear under what circumstances the discretion available to the Board pursuant to s. 15(5) could or would ever be exercised. An applicant with a current practicing registration in another Canadian jurisdiction will be registered in Nova Scotia under the AIT, even if she does not hold an acceptable degree from an approved institution. That same person, without a current practicing certificate, fails under AIT, and then automatically fails under s. 16(1) of the *Act*. As a consequence, she never makes it to a s. 15 analysis at all.

iv(b) Did the Respondents fetter their discretion?

[115] It is beyond doubt that a statutory decision-maker may adopt policies and guidelines related to the exercise of its discretionary powers. However, as *Guy Régimbald,* in *Canadian Administrative Law* (second edition "Markham Ontario: Lexis Nexis, 2015), said at p. 238:

> …A decision maker may improperly fetter his or her discretion by following them (policies and guidelines) without proper consideration of the individual facts of the situation…

[116] Sara Blake notes in her text, *Administrative Law in Canada*, Sixth Edition (Toronto: Lexis Nexis, 2017) at p. 109:

> …Discretion, once conferred, may not be restricted or fettered in scope. If discretion is too tightly circumscribed by guidelines, the flexibility and judgment that are an integral part of discretion may be lost… (ibid, p. 109)

[117] She adds that:

> …The tribunal may not fetter its discretion by treating the guidelines as a binding rules and refusing to consider other valid and relevant criteria…A policy may not contain mandatory rules that must be followed in all cases, nor may it contradict the statute of regulation…

[118] Other authors have considered the concept as well. For example, *Brown and Evans* in *Judicial Review of Administrative Action in Canada*, Volume 3 (Toronto: Thomson Reuters, Looseleaf , at s. 12: 4410 describe it thus:

> …in particular, an agency may not fetter the exercise of its statutory discretion, or its duty to interpret and apply the provisions of its enabling statute, by mechanically applying a rule that had previously formulated, other than where it is properly enacted pursuant to a statutory power to make subordinate legislation…

[119] Noting that a decision-maker is free to consider informal rules and policies, as well as prior decisions in similar circumstances, the authors go on to say:

> …apart from whether the guideline itself has correctly applied the law, where fettering of judgement is alleged, the issue is not whether the rule, guideline, precedent, policy or contract was a factor, or even the determining factor, in the making of the decision, but whether the decision-maker treated it as binding or conclusive, without the need to consider any other factors, including whether it should apply to the unique circumstances of the particular case…
>
> [Emphasis added]

[120] The Board's policy "Review of Degrees vis-à-vis Board's Criteria re: Degrees in Psychology Acceptable to the Board" (Record, Tab 11, p. 1 of 3) is illustrative of its views with respect to s. 15(5):

> POLICY: As per the *Psychologists Act* (2000), applicants for registration as psychologists are required to show they have obtained a master's, doctoral or equivalent degree in psychology that is acceptable to the Board from an educational institution approved the Board. (emphasis in original)
>
> The above criteria are required by legislation. The Board does not have discretion to waive these requirements. Furthermore, augmenting an insufficient degree by completing coursework or supervision after one has completed his/her academic degree does not convert an unacceptable degree to one that is acceptable to the Board. This is because the post degree coursework and training was not part of the formal graduate degree.
>
> [Emphasis added]

[121] As the Supreme Court of Canada said in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 SCR 2, where discretion is given by statute, "the formulation and adoption of general policy guidelines cannot confine it".

[122] In *Ainsley Financial Corp. v. Ontario (Securities Commission)*, [1994] O.J. No. 2966, 121 D.L.R. (4th) 79 (Ontario Court of Appeal), where securities dealers had successfully challenged a policy statement issued by the Securities Commission, Doherty, JA, recognized the right of a regulator "to issue non-binding statements of

guidelines intended to inform and guide those subject to legislation". However, he added:

> Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation… Nor can a non-statutory instrument pre-empt the exercise of a regulator's discretion in a particular case… Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue *de facto* laws disguised as guidelines…

[123] In *Burge v. Newfoundland (Board of Examiners in Psychology)*, 2005 NLTD 115, the Applicant was provisionally registered as a psychologist in Alberta, where she had received a Masters Degree in Marital and Family Therapy. The *Newfoundland Psychologists Act* permitted the Board of Examiners to register an applicant who held a Masters Degree or an acceptable equivalent, and had acceptable training. The regulations allowed the Board to waive requirements for an applicant registered in another province provided that the Province's standards for registration were considered equivalent. The Board refused the Applicant provisional registration in Newfoundland. The court allowed her appeal, remitting the matter back to the Board. In doing so, it noted that:

> 21 The Board is entitled to employ guidelines for determining the acceptability of graduate degrees, provided these do not improperly fetter the discretion granted the Board by s. 9(1) of the Act to approve content and training. Counsel for Ms. Burge questions Guideline 2(b) of the Board, which reads:
>
> > The programme, wherever it may be administratively housed, must be clearly identified and labeled as a psychology programme. Such a programme must specify in pertinent institutional catalogs and brochures its intent to educate and train psychologists.
>
> Counsel argues that the language of s. 9(1) of the Act, which refers to a Master's Degree in Psychology or "the equivalent in content and training" implies that the "equivalent" may be something other than a Master's Degree in Psychology. Counsel asks how the Board can comply with s. 9(1) and determine "the equivalent in content and training" if Guideline 2(b) recognizes only Master's Degrees labelled as in psychology. Perhaps the Board can answer this. But it has not to this point.
>
> 22 From the brief conclusory statement of the Board to Ms. Burge that her degree is not equivalent to a Master's Degree in Psychology, I am unable to conclude that the Board has acted reasonably.

[Emphasis added]

[124] In *Woods v. Law Society (Alberta)*, 2006 ABQB 610, the Applicant sought admission as student at law under the *Alberta Legal Profession Act* and Law Society Rules. He sought a waiver of the requirement under s. 50(2) of the Rules that applicants must have received their law degree within the previous three years. The benchers of the law society had statutory authority over academic qualifications for admittance, and had the power (under s. 37(4) of the *Act*) to waive the qualifications in special circumstances. Additionally, s. 50(5) of the Rules permitted the Credentials and Education Committee to waive the three year time limit. The Applicant was unsuccessful under both forms of waiver.

[125] The court held that the committee's rejection of the waiver sought under s. 50(5) was not unreasonable and was a proper exercise of the discretion. However, the rejection of the s. 37(4) waiver was a nullity, in the court's view, because the committee did not have properly delegated authority to deal with that section. Additionally, the court concluded that there had been a fettering of discretion:

> 47 In my view, the Committee improperly fettered the discretion given to the Benchers by section 37(4) of the *Act* when they considered the Woods' application. The reasons for the decision ruling against the application of Woods' states as follows:
>
> > ....
> >
> > The Committee did not agree that Mr. Woods had established special circumstances as required by section 37(4) of the *Act*. Furthermore, the Committee was concerned about the length of time since Mr. Wood's graduation from law school and the retention of substantive law knowledge. While Mr. Woods provided information regarding the numerous statutes, regulations and guidelines he applies in his regulatory affairs work, the Committee did not view this experience sufficient to retain the substantive law he would have acquired in law school. Nor was the Committee satisfied that NCA examinations or CPLED would be sufficient to ensure adequate updating of general substantive law.
> >
> > Motion: Deny the application to waive academic requirements under s. 37(4) of the *Legal Profession Act*.
>
> Motion carried.
>
> 48 I conclude that in considering this application the Committee was applying virtually the same standard as they applied to the earlier 50(5) waiver application, that is, that the applicant must demonstrate current substantive law knowledge at the time of the application or else present special circumstances which would justify any deficit in the current substantive knowledge of the applicant.

> 49 In my opinion that cannot be the correct test. To apply the same threshold consideration to the section 37(4) application as that in Rule 50(5) improperly limits the scope of a consideration as to what may constitute "special circumstances".
>
> 50 In exercising that discretion the Benchers or a properly authorized Committee is no longer exercising its role as a regulator to ensure the basic standard of admission as a student under section 34 of the *Act*. The Court would expect the Benchers to exercise an equitable discretion in considering what might constitute special circumstances… [Emphasis added]

[126] I conclude that a statutory discretion must be exercised in accordance with the *Act.* A decision-maker cannot nullify or displace statutory discretion by adopting policies or procedures which have that effect. The cases establish that decision-makers will have a degree of leeway in designing such policies. In the case at bar, the policy and procedures adopted by the Board of Examiners in Psychology, were counter to the Board's statutory obligations under s. 15 of the *Act.* Under the policy applied by the Board, a candidate who holds practicing status in another jurisdiction may be admitted as a transfer applicant under the AIT. Failing that, the next step is consideration as a candidate under the *Act*. An applicant whose educational credentials are not acceptable for entry on the candidate's register (s. 16) will not be considered further. In other words, only an applicant with acceptable educational credentials will be further considered for the psychologist's register under s. 15.

[127] The effect of the Board's adopted process is to eliminate any extra-provincial applicant for licensure in the province who lacks current practicing registration, as well as those whose educational credentials are not considered acceptable, from consideration under s. 15. The discretion under s. 15(5) is bounded by reference to s. 15(1) or (2), yet neither of these subsections require current practicing status. They do, however, speak of post-degree professional experience.

[128] Moreover, s. 15(5) contemplates registration of applicants who lack educational credentials that are acceptable to the Board. The result, in my view, is that candidates who (the statutory scheme indicates) should be eligible for consideration under s. 15(5) are eliminated earlier in the process (under s.16) on grounds that are not supported by the statute.

[129] It is clear from Mr. Wagner's affidavit that the Board considers ss. 15 and 16 as a continuum and every application as a "generic" registration application. This approach does not appear to be consistent with the intention apparent in the *Act*, which treats them as distinct categories. The fact that only one section incorporates a discretion to register an applicant, despite technical short-falls in their

qualifications, underscore this. Within the type of process that the Board has adopted, the *raison d'etre* of s. 15(5) of the *Act* disappears (or at the very least, the subsection becomes marginalized almost to the point of non-existence).

[130] The Board was aware that Dr. Yates had applied to be registered as a practicing psychologist in Nova Scotia. This is covered by s. 15. It therefore makes little sense, in my respectful view, for the Board to have commenced its analysis of her application (after she was considered unsuitable for a transfer under the AIT) under 16, which deals with applicants for "candidate register" status. I say this despite the Board's claim that such accords with their standard practice or policy. In doing so, the Board fettered the discretion conferred upon it by s. 15(5).

[131] Neither the Board, nor the IRC which upheld its decision, considered s. 15 at all. Mr. Wagner's affidavit, as well as the minutes of the Board's meeting of November 18, 2016 (Supplementary Record, Tab 1), make this abundantly clear.

The Board's discretion under s. 15(5)

[132] The Respondents contend (alternatively) that s. 15(5) would have been inapplicable by the Board in any event. In so doing, they argue that the principles of statutory interpretation:

> …when read in the context of the scheme of the *Act* and the objectives of self-regulation, lead to one reasonable interpretation, that the Certificate of Registration referenced in s. 15(5) refers to a comparable certificate that enables the Applicant to practice in the other jurisdiction. (Respondent's brief, para. 78)

[133] The Respondents stress the importance of the responsibility vested in the "gatekeepers" to what are often referred to as "the learned professions". Certainly, it is difficult to overstate this importance. For example, the majority decision in *Pharmascience Inc. v. Binet*, [2006] 2 SCR 513, at para. 36 states:

> 36 This Court has on many occasions noted the crucial role that professional orders play in protecting [page535] the public interest. As McLachlin J. stated in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, "[i]t is difficult to overstate the importance in our society of the proper regulation of our learned professions" (p. 249). The importance of monitoring competence and supervising the conduct of professionals stems from the extent to which the public places trust in them. Also, it should not be forgotten that in the client-professional relationship, the client is often in a vulnerable position. The Court has already had occasion to address this point in respect of litigants who entrust their rights to lawyers (*Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 SCC 45, at para. 17). The

> general public's lack of knowledge of the pharmaceutical field and high level of dependence on the advice of competent professionals means that pharmacists are another profession in which the public places great trust. I have no hesitation in applying the comments I wrote for this Court in *Finney*, at para. 16, generally to the health field to emphasize the importance of the obligations imposed by the state on the professional orders that are responsible for overseeing the competence and honesty of their members:
>
> The primary objective of those orders is not to provide services to their members or represent their collective interests. They are created to protect the public, as s. 23 of the Professional Code makes clear...
>
> The privilege of professional self-regulation therefore places the individuals responsible for enforcing professional discipline under an onerous obligation. The delegation of powers by the state comes with the responsibility for providing adequate protection for the public. Finney confirms the importance of properly discharging this obligation and the seriousness of the consequences of failing to do so.
>
> [Emphasis added]

[134] I certainly agree with the respondent's proposition that a "regulatory body must possess the appropriate tools to carry out its statutory authority", and that "narrow interpretations of legislative powers should be rejected in favour of interpretation that provide the regulator with authority to carry out its responsibilities" (respondent's brief, para. 77).

[135] However, and with respect, it is the Respondents' submissions which, if accepted, would circumscribe their powers. The protection of the public is not solely achieved by powers of exclusion. It is also served by the permissive power to consider the inclusion of individuals, where appropriate, whom the authority feels may be able to assist in protecting the public by the delivery of competent, professional services, notwithstanding their technical inability to meet all of the requirements of s. 15.

It is not to be presumed that a proper analysis by the Board under s. 15 would have precluded an exercise of its discretion under s. 15(5) of the *Act*.

[136] There are analyses which might have led the Board to apply s. 15(5) in this case. One such route (and I include this merely to indicate that there are paths which could lead to this result - not to say that this is the correct interpretation or the only reasonable one) may be readily sketched. It would begin with the observation that Section 15(5) simply lists one precondition to the exercise of the discretion conferred

therein: "…where an applicant holds a certificate of registration as a psychologist from another province…". "Certificate of Registration" is not defined in the *Act*, but "psychology" is in s. 2(l) thereof:

> (l) "psychology" includes"
>
> (i) the practice of examining the behaviour of children and adults,
>
> (ii) diagnosing psychological and emotional disorders,
>
> (iii) providing consultation and therapy,
>
> (iv) counselling individuals, groups and organizations to enhance physical and mental health and to achieve more effective personal, social and vocational development and adjustment.
>
> (v) teaching and applying psychological theory and principles regarding behaviour and mental processes such as learning, memory, perception and human development, and
>
> (vi) designing, conducting and communicating the results of psychological research;
>
> [Emphasis added]

[137] In Saskatchewan, Dr. Yates' category was non-practising. However, the *Saskatchewan Psychologist Act*, SS 1997 CP – 36.01, does not define what is included in the term of "psychology". What it does (instead) is speak in terms of "authorized practices":

> Authorized practices
>
> 23(1) An authorized practice is the communication of a diagnosis identifying, as the cause of a person's symptoms, a neuropsychological disorder or a psychologically-based psychotic, neurotic or personality disorder.
>
> (2) No person shall perform an authorized practice described in subsection (1) in the course of providing services to an individual unless the person is a practising member authorized by council pursuant to his or her licence or by the bylaws to perform that authorized practice.
>
> (3) Prior to authorizing a member to perform an authorized practice, the council may require that member to successfully complete any examinations as may be prescribed in the bylaws.
>
> (4) This section does not apply to a duly qualified medical practitioner.
>
> [Emphasis added]

[138] What s. 23 of the Saskatchewan legislation does is restrict the performance of an "authorized practice" to the category of membership designated as "practicing". As we have seen, the by-laws pursuant to this legislation go on to note that Dr. Yates' non-practicing status in Saskatchewan means that she is "eligible for registration as a full practicing member and is not currently practicing as a Psychologist in Saskatchewan", or as a "provisional member on a parental or medical leave…" among other things (*Saskatchewan's Psychologists Act*, S.R. 1).

[139] The Applicant formerly held practicing status in Saskatchewan. Her registration status is as a non-practising member of the Saskatchewan College of Psychiatrists and it has been this way since 2007. Her registration has been renewed annually, each year since 1998.

[140] Her current registration category (since 2007) confirms, *inter alia*, that she is prohibited from engaging in "authorized practices" and, as such, "is not currently practicing as a psychologist". What the latter prohibition means, in Saskatchewan, is that she may not communicate a diagnosis "…identifying as the cause of a person's symptoms, a neuropsychological disorder or psychologically based psychotic, neurotic or personality disorder." None of the other practices included under the definition of "psychology" (as defined by the Nova Scotia legislation) are precluded.

[141] To put a finer point upon it, such a designation would not, and has not, for example, prevented her from, among other things, "designing, conducting and communicating the results of psychological research" or "teaching and applying psychological theory and principles regarding behavior and mental processes such as learning, memory, perception and human development", all of which activities are clearly encompassed within the practice of "psychology" as defined in Nova Scotia in the *Act* (ss. 2(l) v and vi).

[142] The analysis would further proceed to the observation that to define "certificate of registration as a psychologist" in s. 15(5) as meaning "a practicing certificate of registration as a psychologist" is to import a word into the legislation which the legislature could have inserted but did not. Moreover, this must be taken in conjunction with the Board's interpretation of its obligation under Article 706(4)d AIT, which is to deny reciprocal registration in Nova Scotia to an out of province applicant unless that applicant has a practicing certificate, upon the basis that the Province has no equivalent to a non-practicing certificate. If the Board's contention is that s. 15(5) is also only available to applicants for licensure who are the holders

of a "practicing" certificate in the other jurisdiction, when can that discretion ever be available for the benefit of an out of province applicant? Once again I note that those with practicing certificates are generally admitted under the AIT anyway.

[143] The Board acknowledged (during submissions) that the AIT and the *Act* provide separate "paths" which can lead to licensure in Nova Scotia for an out of province applicant. The manner in which they go about consideration of the applications such as that of the Applicant (see Wagner affidavit, *infra*) is consistent with this. The effect, however, of the Board's suggested interpretation of the phrase in s. 15(5) "certificate of registration as a psychologist" to mean a "practicing certificate of registration as a psychologist" means that an applicant for licensure in Nova Scotia who is unsuccessful under the AIT must (necessarily) fail under the *Act* as well. Such applicants, in reality only have one path available to them.

[144] We have seen the Court remark in *Woods* (*supra*):

> 48 I conclude that in considering this application the Committee was applying virtually the same standard as they applied to the earlier 50(5) waiver application…
>
> 49 In my opinion that cannot be the correct test. To apply the same threshold consideration to the section 37(4) application as that in Rule 50(5) improperly limits the scope of a consideration as to what may constitute "special circumstances".
>
> [Emphasis added]

[145] The Respondents could have adopted the above reasoning (or some other) and concluded that their discretion under s. 15(5) was available to them in this case. Had they arrived at this conclusion, it was for the Respondents to then decide whether the combination of Dr. Yates' expertise in most of the components of "psychology" as the term is defined in the Nova Scotia legislation constitutes a sufficient basis upon which they may waive the educational requirements of s. 15(1) and/or any of the requirements of 15(2). This expertise would be assessed, in part, through a consideration of her references, her many publications, and some of the other factors which she noted in her communications with the Board.

[146] Alternatively, the Respondents may (had they considered the issue) have decided that the discretion was not available to them or (if available) was one that they should not exercise in the circumstances of Dr. Yates' case. But the opening presumption cannot be that the discretion is non-existent in this (or any other) case.

[147] In sum, the Respondents were required to consider a) whether (upon their interpretation of s. 15(5)) the discretion conferred therein was available to the Board in this case, and b) if so, whether it was appropriate to exercise that discretion. Either way, it was their decision to make. The Respondents' obligation was to make a reasonable decision on the topic in a procedurally fair manner.

The Decision must be set aside.

[148] Instead, the Board did not engage in consideration of these issues at all. The Board began its consideration of Dr. Yates' application for licensure in Nova Scotia under the AIT and ended it under s. 16 of the *Act* after determining that she did not possess educational credentials "acceptable to the Board" from an "educational institution approved by the Board". The IRC agreed with this approach.

[149] There is authority for a review on the issue of fettering to be conducted to a "correctness standard". For example, *Brown and Evans (supra)* opine thus:

> An allegation that a tribunal has "fettered its judgement" is similar to a charge of "prejudgment", in that complaint is that the decision-maker has decided the matter without regard to the particular circumstances, and accordingly it is reviewable for correctness. (p. 12-40)
>
> [Emphasis added]

[150] In *Vitol Refining S.A. v. Canada (Attorney General)*, 2011 FC 446, Hughes J reviewed the authorities and stated:

> 23 The question as to fettering of discretion has been considered in cases such as *Gandy v Canada (Customs and Revenue Agency)*, [2006] 5 C.T.C. 109, 2006 FC 862 at paragraph 28 and 3500772 *Canada Inc. v Canada (MNR)*, [2008] 4 C.T.C. 1, 2008 FC 554 at paragraph 43 without an express discussion as to whether that issue is to be considered on a "correctness" or a "reasonableness" standard. No consideration of the Supreme Court of Canada decision in *Dunsmuir v New Brunswick* [2008] 1 S.C.R. 190 was made.
>
> 24 In *Waycobah First Nation v Canada (Attorney General*), 2010 FC 1188, Justice de Montigny of this Court considered that a matter that was not of central importance and not outside the expertise of the administrative decision maker should be reviewed on a standard of reasonableness. He wrote at paragraph 23:
>
> > 23 The argument revolving around the fettering of discretion, on the other hand, raises a question of law. In essence, the Applicant argues that the CRA Assistant Commissioner did not properly apply the test for remission set out in the *Financial Administration Act* and failed to take the public interest into

> account, and rather chose to elevate the CRA guidelines to the level of law. Such a fettering of discretion, if it is established, would clearly amount to a reviewable error of law: see, for ex., *CBC v. Canada (Copyright Appeal Board*); 30 C.P.R.(3d) 269, [1990] F.C.J. No. 500 (F.C.A.). That being said, it is not a question of law that is of "central importance to the legal system...and outside the ...specialized area of expertise" of the administrative decision maker: *Dunsmuir*, above, at para. 55. As such, it must therefore be reviewed against a reasonableness standard.
>
> [Emphasis added]

[151] Some synthesis is provided in *Homburg Canada v. NS (Utility & Review Board)*, 2010 NSCA 24, where MacDonald CJNS notes:

> 35 I begin with the standard of review question which is best addressed by first providing more detail about the issue itself and, specifically, the law that prohibits decision makers from fettering their discretion.
>
> 36 This is a common sense rule of common law, which, in my view, is based on the simple premise that with authority comes responsibility. Specifically when government officials (in this case the Commission) are given the discretion to decide an issue, they must give it fair consideration and cannot hide behind a policy that predetermines the outcome. In other words, a decision maker's discretion involves an obligation that cannot be fettered or abdicated by slavishly following a policy. In the context of this case, it was the Board's task to decide if the Commission improperly fettered its discretion by, without exception, forcing all customers within the targeted ICI category to install BFP devices.
>
> 37 Thus, in this context, the Board had a two-fold task. Firstly, it had to properly articulate the law in this area. Secondly, it had to apply this law to the facts in order to determine whether or not the Commission fettered its discretion. Each task triggers a separate standard of review analysis. The first task involves a legal question which, depending upon the context, can attract either standard. For example, constitutional issues, legal issues of central importance, true jurisdictional issues, and legal issues outside the tribunal's specialized expertise attract the correctness standard. However, legal issues not in those categories, again depending upon the context, may attract reasonableness. See: *Dunsmuir*, *supra*, para. 41, 53-56, 58-60; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 25-26, 44, 49; *Canada Post Corp. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 41, para. 13 and 15; *Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 35, para. 29; *Pelley v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 46, para. 8; *Police Assn. of Nova Scotia Pension Plan (Trustees of) v. Amherst (Town)*, 2008 NSCA 74, para. 42(c); *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, para. 25. Here the law involving the fettering of discretion

> falls outside the Board's expertise and I would therefore apply the correctness standard.
>
> 38 The second task, however, involves an exercise of mixed law and fact to which the Board, in my view, is entitled to deference. Let me briefly explain why.
>
> 39 When questions of mixed fact and law cannot be readily separated, the majority in *Dunsmuir, supra*, as a general rule, calls for deference.
>
> > [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically *(Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; Dr. Q, at para. 29; Suresh, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
>
> 40 Furthermore, Binnie, J., concurring with the result in *Dunsmuir*, suggests that deference is the "going-in presumption" when it comes to the review of administrative decisions such as these:
>
> > [146] The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is no single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review is reasonable until the applicant shows otherwise.
> >
> > …
>
> 44 Therefore, the reasonableness standard applies. Consequently, we would defer to the Board's finding unless, as per *Dunsmuir, sup*ra, it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law".
>
> [Emphasis added]

[152] In this case, the Respondents neither articulated nor considered the discretion available to them pursuant to s. 15(5) of the legislation. They proceeded as though they did not have one. Indeed, the Board's policy (Record, Tab 1, p. 1 of 3) says that they do not have one. This was incorrect.

[153] Even if I am in error in applying a "correctness standard" to this context, the Respondent's approach was not a reasonable one, either. It cannot be reasonable for the Respondent Board to have considered Dr. Yates' application for licensure under

s. 16, an approach unsupported by the legislation, particularly when the result of that approach is to render absolutely inaccessible to it the discretion conferred by s. 15(5).

[154] Either way, the Board fettered its discretion, and the IRC was in error to approve it. This alone suffices to set the decision aside and remit the matter back to the Board so that Dr. Yates' application may be considered pursuant to s. 15 in its entirety. This view is reinforced when the final issue is considered.

v. Did the respondents' failure to consider all materials provided by the Applicant amount to procedural unfairness?

[155] As previously referenced, the Registrar of the Nova Scotia Board of Examiners in Psychology, Dr. Allan R. Wilson, Ph.D., filed an affidavit with the court dated May 26, 2017, to offer clarification with respect to the procedure followed in Dr. Yates' case. The essentials to be gleaned from his affidavit are as follows:

(i.) The Applicant's first application for registration (which Registrar Wilson refers to as "the initial application") came to the Board via letter dated December 17, 2014 (affidavit, para. 4).

(ii.) Around the same time, three separate letters of reference on Dr. Yates' behalf were provided directly to the Board. These were from Dr. Philip Firestone, Dr. Drew Kingston and Michael Bettman. The Board reviewed these letters when it considered the first application.

(iii.) By decision dated January 15, 2015 the Applicant was advised that her initial application had not been accepted by the Board. *Inter alia,* she was told (Exhibit D, Wilson affidavit) that:

(a) she did not qualify for a transfer under the AIT because Nova Scotia does not have a registration category equivalent to the "non practicing" status in Saskatchewan;

(b) therefore, the Board assessed her application for registration using its "normal requirements for registration", (which is to say her application was considered under s. 16(1)(a) of the *Psychologists Act*), and the Board concluded that her doctoral program did not meet "criteria iv" in that "the doctoral transcript does

not include the typical psychology content in your coursework expected of someone preparing for work in an area of applied psychology", and

(c) her doctoral program did not meet the criteria and did not meet criteria 1(vii), in that her course titles do not match the standard core competencies of psychology. The Board noted that there is very little course work in the area of "assessment and evaluation, the area of intervention or the area of ethics and standards." Moreover, the Board had concluded that with respect to criteria II, "the Ph.D. program in psychology at Carleton University is not accredited by CPA or APA". And that "it should be noted that failure to meet any one of the criteria can be sufficient for the Board to conclude that the program is not acceptable".

(iv.) As has been previously noted, the first application generated the decision in *Yates (supra)*, and the conclusion that Dr. Yates would not be granted an extension of time within which to file her notice of appeal, given her ability to simply reapply for registration with the Board.

(v.) The Applicant applied a second time ("the present application") on September 30, 2016. Before receipt of the present application, the respondent Board also received (separately) three letters of reference from the same referees who had provided references in 2014. These were received on July 28, 2016 (Dr. Firestone), August 5, 2016 (Michael Bettman) and August 17, 2016 (Dr. Kingston).

(vi.) Registrar Wilson says that these letters were received "without the context of receipt of the second application" and [because of that] "they were put aside at our office". (Wilson affidavit – para. 6).

(vii.) When the present application was received and given to the Board, "these letters were overlooked and not provided to the Board". (Wilson affidavit, para. 6)

(viii.) However, at some point Registrar Wilson had to have recognized the oversight because he adds (again at para. 6) "during the meeting of the Board when the present application was being considered, I advised the Board that references were received from the same referees who had supplied references during the initial application, and these references were positive and supportive of the application for the registration". He still did not, however, actually provide these references to the Board.

[156] On October 6, 2016, a letter was sent by Registrar Wilson to the Applicant (Record, Tab 4). It stated the Board declined to process Dr. Yates' present application because:

> The educational qualifications included in your current application have not changed from those previously submitted to the Board. Therefore, the Board cannot process your current application. The Board relies on its prior decision and will not be rendering a new decision as the matter has already been determined.
>
> [Emphasis added]

[157] By letter dated October 13, 2016, (Tab 5 – Record) Dr. Yates requested a reconsideration of the Board's decision not to process her second application. In that letter, she noted, *inter alia*:

> In addition to providing additional information in order to address issues previously communicated by the Nova Scotia Board of Examiners in Psychology, I requested that my application of September 29, 2016, be considered in the context of the Agreement on Internal Trade (AIT) and the Mutual Recognition Agreement given that I am presently registered in the province of Saskatchewan, rather than being evaluated as a new graduate from the masters or doctoral program.
>
> In summary I have provided additional information in my application of September 29, 2016 in an attempt to address the Board's stated concerns with respect to my educational qualifications. I have also requested that my application be reviewed in the context of my current status as a psychologist holding a certificate of registration from another province, which was not the case during the January 2015 review when the Board was of the assumption that I was not, nor had ever been, a psychologist registered in a Canadian jurisdiction. While the Internal Review committee superficially acknowledged the error, there is no record that it analysed my application on the basis of an applicant with a certificate of registration. With respect to the latter, I request that the Board consider availing itself of its discretionary option to waive all or part of its requirements for registration per Section 15(5) of the *Psychologist Act of Nova Scotia*…in light of the information provided in my application of September 29, 2016.
>
> …I am requesting that my application of September 29, 2016 be processed for consideration for licensure in the Province of Nova Scotia, as well as requesting internal review of the decision communicated in your October 6, 2016 letter.
>
> [Emphasis added]

[158] The Board, as a consequence, reconsidered its decision not to process the present application and informed the Applicant by letter dated November 4, 2016 that it would do so. Registrar Wilson stated in that letter: (Affidavit, Exhibit "J")

> It is the Board that has the statutory authority to make decisions regarding applications for registration and, it is the entire Board that reviews these applications. Consequently, it is not possible that somehow different Board members would be involved with a review of your current application.

[159] Under cover of a responding letter dated November 8, 2016, Dr. Yates enclosed an updated curriculum vitae. In so doing she stated:

> Thank-you for your letter of November 4, 2016 communicating reconsideration of the decision not to advance my application for registration with the Nova Scotia Board of Examiners in Psychology and indicating that my application will be reviewed on November 18, 2016.
>
> In preparation for this review, please find enclosed an updated copy of my Curriculum Vita [sic] to reflect changes since my submission of September 30, 2016. Specifically, a conference presentation has now been completed and this has been updated to reflect that this has occurred. In addition, on November 4, 2016, I was awarded Fellow status with the Association for the Treatment of Sexual Abusers (ATSA) in recognition of my significant contribution to sexual abuse prevention and to the ATSA organisation. The criteria for consideration for receipt of this award may be found at: http://www.atsa.com/atsa-fellow-application. (Wilson affidavit, Exhibit K)

[160] When the Board convened to consider Dr. Yates' application for registration with the Board on November 18, 2016, only the first paragraph of Dr. Yates' letter of November 8, 2016 was (verbally) conveyed by Registrar Wilson.

[161] Registrar Wilson explained his rationale for conveying only the first paragraph of the Applicant's November 8, 2016 letter (verbally), and neither the remainder of the letter's contents or the enclosures, to the Board, in the following manner:

> The second and final paragraph of the letter, as well as the updated CV, dealt only with recent activities involving Dr. Yates. Because this information did not relate to issues involving a possible transfer under the Agreement on Internal Trade or the Board's criteria for acceptable degrees in psychology, which I understood to be the principal issues under review by the Board, I did not provide a copy of Exhibit "K" to the Board.
>
> [Emphasis added]

[162] The Board made a decision with respect to the present application and denied it, advising the Applicant by letter dated December 7, 2016, (Record - Tab 6) that

the present application had also been denied. Previous reference to this correspondence has been made.

[163] Upon receipt, the Applicant wrote to a letter to Registrar Wilson dated December 22, 2016, and the contents of that correspondence are reproduced below (Wilson Affidavit, Exhibit "M"):

> December 22, 2016
>
> Dr. A. Wilson, Registrar
> Nova Scotia Board of Examiners in Psychology
> 455-5991 Spring Garden Road
> Halifax, NS B3H 1Y6
>
> Dear Dr. Wilson:
>
> Further to my letter of December 19, 2016, requesting an internal review of the NSBEP's recent decision to deny my application for registration as a psychologist in Nova Scotia, I am writing to advise that I will be submitting additional information for review to the review committee.
>
> Specifically, in her letter, Dr. Bartlett, Chair, communicates that the Board has concerned itself with the title of coursework as listed on academic transcripts, specifically "assessment" and "intervention".
>
> As I have indicated to the Board, in addition to my academic qualifications that led me to become a psychologist licensed for independent practice in 1996, I have approximately 30 years' experience and continuing education in the areas of assessment and intervention.
>
> Given Dr. Bartlett's communication, I have sent, via registered mail, additional information in these areas, as follows:
>
> Yates, P.M. & Kingston, D.A. (2007). A Companion Text to the Casebook of Sexual Offending for Use in Scoring the Risk for Sexual Violence Protocol (RSVP). Victoria, BC: Pacific Psychological Assessment Corporation. www.pacific-psych.com.
>
> Yates, P.U. & Prescot, D.S. (2011). Building a Better Life: A Good Lives and Self-Regulation Workbook. Brandon, VT: Safer Society Press. http://www.safersociety.org/safersociety-press/.
>
> Yates, P.M., Prescott, D.S. & Ward, T. (2010). Applying the Good Lives and Self-Regulation Models to Sex Offender Treatment: A Practical Guide for Clinician.

> Brandon, VT: Safer Society Press. http://www.safersociety.org/safer-society-press/.
>
> Sincerely,
> Pamela M. Yates, Ph.D., R.D. Psych (Non-practicing), ATSAF
>
> cc. Mr. D. James, QC

[164] Registrar Wilson then, in the concluding paragraph of his affidavit states as follows :

> 13. Because the [above] material referenced in paragraph 12 had not been previously provided to the Board when it made its decision, and because I determined that these texts were not relevant to the principal issues before the internal Review Committee (criteria for an acceptable degree, and potential transfer under the Agreement on Internal Trade), I did not provide them to the Committee.
>
> [Emphasis added]

What is the standard of review when considering the procedure adopted by the Board/Review Committee?

[165] This is uncontroversial. Caselaw has firmly established that the standard of review with respect to the procedure adopted by the Respondents is one of correctness. This is to say, either the procedure followed by the Board/Internal Review Committee was fair to Dr. Yates or it was not.

[166] Consideration of *Baker v. Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817, is required in this context. *Baker* sets out five non-exhaustive factors that are relevant to a determination of the content of the duty of fairness in any given case. They consist of:

i. the nature of the decision;

ii. the nature of the statutory scheme;

iii. the importance to the individual affected;

iv. the legitimate expectations of the person challenging the decision; and

v. the choices of procedure made by the decisionmaker.

[167] A helpful summary of the role of this court (in reviewing for procedural fairness) is found *Burt v. Kelly,* 2006 NSCA 27 wherein, at paras. 19 -21, Justice Cromwell noted as follows:

> 19 The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: see *C.U.P.E. v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness - in other words, that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: *C.U.P.E.* at para. 102.
>
> 20 Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
>
> 21 The first step - determining the content of the tribunal's duty of fairness - must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step - assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
>
> [Emphasis added]

[168] I accept that the nature of the decision that the respondent was called upon to make involved the application of statutory criteria to the assessment of the Applicant's application for registration. As discussed earlier, it was clear that the respondents were being asked to consider the application of Dr. Yates to practice as a psychologist within the province of Nova Scotia.

[169] The second *Baker* criterion, involving a consideration of the provisions of the relevant statutory scheme, has already been largely accomplished by virtue of the

significant discussion of the legislation and related regulations within the context of some of the earlier issues that have been commented upon.

[170] As to the third *Baker, supra,* criterion, I note that, although the legislative scheme is different than in *Burt, supra*, one cannot overstate the importance of the decision to be rendered by the respondents in this particular case to affected individuals such as Dr. Yates. In my view, the observation of Justice Cromwell at para. 27 of *Burt, supra,* remains applicable:

> 27 … From the point of view of the officer who is the subject of the complaint, his or her career is on the line… [Emphasis added]

[171] The same is generally true in applications before the Board, and it was certainly true in Dr. Yates' case. She was known to the Board to have relocated to Nova Scotia and to have accepted employment in this province contingent upon her ability to obtain a practicing certificate. (Supplementary Record, Tab 1, p. 3)

[172] The importance of decisions rendered by the Respondents, in circumstances such as these, is very high. This factor (in concert with the others) suggests that the process to be followed by the respondents in their determinations of the related issues must be commensurate with this level of importance.

[173] Under the fourth criterion, the "legitimate expectations of the party challenging the decision", I conclude that it had been made known to Dr. Yates that she was entitled to and could submit materials to assist the respondents in their consideration of her application. For example, her experience with the first application was that her references would be before the Board when they decided on the merits of her application. How this comes about is set forth in Regulation 3(5) which specifies that: "an applicant shall request referees and supervisors to send documentation directly to the registrar".

[174] It therefore cannot have been a "new thing" for the references to have arrived at Registrar Wilson's office "without the context of an application" in this case. Moreover, it would have been relatively easy for him to have provided the references to the Board prior to the rendering of its decision in relation to the present application. His decision to merely advert to them verbally as having been "favourable" significantly blunted their potential effect.

[175] Moreover, the Applicant's prior experience had reinforced the expectation that the information and publications which she submitted after the Board's decision,

but before the matter went to the IRC, would be considered by that respondent prior to its review of the Board's decision (*Yates, supra*, para. 4). While the Board and IRC have considerable flexibility with respect to their procedures, any process developed "…must be defined and applied, bearing in mind that a very high level of procedural fairness is owed…" (per *Burt, supra*, para. 31).

[176] Registrar Wilson made a unilateral decision not to allow the IRC to see this material and (prior to that) not to allow the Board to see Dr. Yates' letter of November 8, 2016, and the materials included therewith. (Wilson Affidavit, Exhibit "K"). His rationale was that he did not consider either to be relevant to a transfer under the AIT, or to the Board's criteria as to an acceptable degree in psychology. In doing so, he effectively predetermined that these are the only issues that should or would be of interest to the Board (or IRC), and that (for example) there could be no question of the Board's discretion under s. 15(5) ever arising in the context of Dr. Yates' application. This is despite the fact that she had specifically raised s. 15(5) in her prior letter to him dated October 13, 2016. (Record, Tab 5).

[177] Cumulatively, the effect of Registrar Wilson's decisions meant that the standard of procedural fairness which was owed to the Applicant in these circumstances was not achieved. The process was unfair to her.

Conclusion

[178] I concluded my analysis of the previous issue iv(a) and (b) with the determination that the decision must be set aside and remitted back to the Board for reconsideration of Dr. Yates' application under s. 15 of the *Act* in its entirety.

[179] I conclude my analysis of issue (v) (the final issue) by observing that, because the decision by the respondent(s) to exercise the discretion conferred by the *Act* under s. 15(5) is one possible outcome of that reconsideration, all materials previously submitted by the Applicant for consideration by the respondent(s) must also be made available beforehand to the respondent Board and (if applicable) the IRC, since (among other things) they would be very relevant to a s. 15(5) analysis if undertaken.

[180] The Applicant shall receive her costs of this application. If the parties are unable to agree with respect to same, I will accept written submissions within thirty days.

Gabriel, J.