

**SUPREME COURT OF CANADA**

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| **Citation:** Alberta (Information and Privacy Commissioner) *v.* Alberta Teachers’ Association, 2011 SCC 61, [2011] 3 S.C.R. 654 | **Date:** 20111214  **Docket:** 33620 |

**Between:**

**Information and Privacy Commissioner**

Appellant

and

**Alberta Teachers’ Association**

Respondent

- and -

**Attorney General of British Columbia,**

**Information and Privacy Commissioner of British Columbia and**

**B.C. Freedom of Information and Privacy Association**

Interveners

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

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| **Reasons for Judgment:**  (paras. 1 to 77)  **Concurring Reasons:**  (paras. 78 to 89)  **Concurring Reasons:**  (paras. 90 to 104) | Rothstein J. (McLachlin C.J. and LeBel, Fish, Abella and Charron JJ. concurring)  Binnie J. (Deschamps J. concurring)  Cromwell J. |

Alberta (Information and Privacy Commissioner) *v.* Alberta Teachers’ Association, 2011 SCC 61, [2011] 3 S.C.R. 654

Information and Privacy Commissioner *Appellant*

v.

Alberta Teachers’ Association *Respondent*

and

Attorney General of British Columbia, Information and

Privacy Commissioner of British Columbia and B.C.

Freedom of Information and Privacy Association *Interveners*

**Indexed as: Alberta (Information and Privacy Commissioner) *v.* Alberta Teachers’ Association**

2011 SCC 61

File No.: 33620.

2011:  February 16; 2011:  December 14.

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

on appeal from the court of appeal for alberta

*Administrative law — Judicial review — Implied decision — Decision of adjudicator quashed on judicial review on basis of the Information and Privacy Commissioner’s failure to comply with statutory time limits — Issue of time limits not raised with the Commissioner or adjudicator — Adjudicator consequently not specifically addressing issue and not issuing reasons in this regard — Whether a matter that was not raised at tribunal may be judicially reviewed — Whether reasons given by tribunal in other decisions may assist in determination of reasonableness of implied decision — Personal Information Protection Act, S.A. 2003, c. P‑6.5, s. 50(5).*

*Administrative law — Standard of review — Whether a tribunal’s decision relating to the interpretation of its home statute or statutes closely connected to its functions is reviewable on standard of correctness or reasonableness — Whether category of true questions of jurisdiction or vires should be maintained when tribunal is interpreting its home statute or statutes closely connected to its functions.*

The Information and Privacy Commissioner received complaints that the Alberta Teachers’ Association (“ATA”) disclosed private information in contravention of the Alberta *Personal Information Protection Act* (“*PIPA*”). At the time, s. 50(5) of *PIPA* provided that an inquiry must be completed within 90 days of the complaint being received unless the Commissioner notified the parties that he was extending the time period and he provided an anticipated date for completing the inquiry. The Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. Seven months later, an adjudicator delegated by the Commissioner issued an order, finding that the ATA had contravened the Act. The ATA applied for judicial review of the adjudicator’s order. In argument, it claimed for the first time that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days of the complaint being received. The chambers judge quashed the adjudicator’s decision on that basis. A majority of the Court of Appeal upheld the chambers judge’s decision.

*Held*: The appeal should be allowed.

*Per* McLachlin C.J. and LeBel, Fish, Abella, Charron and RothsteinJJ.:  Although the timelines issue was not raised before the Commissioner or the adjudicator, the adjudicator implicitly decided that providing an extension after 90 days did not automatically terminate the inquiry. The adjudicator’s decision was subject to judicial review on a reasonableness standard and her decision was reasonable. The adjudicator’s order should be reinstated and the matter should be remitted to the chambers judge to consider issues not dealt with and resolved in the judicial review.

A court has discretion not to undertake judicial review of an issue and generally will not review an issue that could have been, but was not, raised before the tribunal. However, in this case, the rationales for the general rule have limited application. The Commissioner has consistently expressed his views in other cases, so we have the benefit of his expertise. No evidence was required to consider the timelines issue and no prejudice was alleged.

In the present appeal, the letter notifying the parties of the extension was sent after the expiration of 90 days. An inquiry was conducted and the adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review could only be decided in one of two ways — either the consequence of an extension was that the inquiry was terminated or not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated.

In this case, a reasonableness standard applied on judicial review. The Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply. The timelines question does not fall into such a category: it is not a constitutional question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, nor a true question of jurisdiction or *vires*. Experience has shown that the category of true questions of jurisdiction is narrow and it may be that the time has come to reconsider whether this category exists and is necessary to identify the appropriate standard of review. Uncertainty has plagued standard of review analysis for many years. The “true questions of jurisdiction” category has caused confusion to counsel and judges alike and without a clear definition or content to the category, courts will continue to be in doubt on this question. For now, it is sufficient to say that, unless the situation is exceptional, the interpretation by a tribunal of its home statute or statutes closely connected to its function should be presumed to be a question of statutory interpretation subject to deference on judicial review. As long as the “true question of jurisdiction” category remains, a party seeking to invoke it should be required to demonstrate why the court should not review a tribunal’s interpretation of its home statute on the standard of reasonableness.

The deference due to a tribunal does not disappear because its decision was implicit. Parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons. When the decision under review concerns an issue that was not raised before the decision maker, the reviewing court can consider reasons which could have been offered in support of the decision. When a reasonable basis for an implied decision is apparent, a reviewing court should uphold the decision as reasonable. In some cases, it may be that the reviewing court cannot adequately show deference without first providing the decision maker the opportunity to give its own reasons for the decision. It will generally be inappropriate to find that there is no reasonable basis for the tribunal’s decision without first giving the tribunal an opportunity to provide one.

Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists. Other decisions by the Commissioner and the adjudicator have provided consistent analyses of the similarly worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act* (“*FOIPA*”). The Commissioner has held that a similar 90‑day time limit in s. 69(6) applies only to his duty to complete an inquiry and not to extending time to complete an inquiry. His interpretation of s. 69(6) systematically addresses the text of that provision, its purposes, and the practical realities of conducting inquiries. His interpretation of s. 69(6) satisfies the values of justification, transparency and intelligibility in administrative decision making.

It is reasonable to assume that the Commissioner’s interpretations of s. 69(6) of *FOIPA* are the reasons of the adjudicator in this case. Both s. 50(5) of *PIPA* and s. 69(6) of *FOIPA* govern inquiries conducted by the Commissioner. They are identically structured and use almost identical language. It was reasonable for the adjudicator to apply the Commissioner’s interpretation of s. 69(6) of *FOIPA* to s. 50(5) of *PIPA*. The interpretation does not render statutory requirements of notice meaningless. No principle of statutory interpretation requires a presumption that an extension must be granted before the expiry of the 90‑day time limit simply because s. 50(5) is silent as to when an extension of time can be granted. The distinction between mandatory and directory provisions does not arise in this case because this is not a case of failure by a tribunal to comply with a legislative direction. Therefore, there exists a reasonable basis for the adjudicator’s implied decision in this case.

*Per* Binnie and Deschamps JJ.: There is agreement with Cromwell J. that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and to the rule of law. Administrative tribunals operate within a legal framework dictated by the Constitution and limited by their respective statutory mandates and it is the courts that determine the outer limits of those mandates. On the other hand, the notion of a “true question of jurisdiction or *vires*” is not helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision.

The middle ground lies in the more nuanced approach adopted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*,2011 SCC 53, [2011] 3 S.C.R. 471, that if the issue relates to the interpretation and application of a tribunal’s own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply. The expression “issues of general legal importance” means issues whose resolution has significance outside the operation of the statutory scheme under consideration. “Reasonableness” is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense. The calibration will be challenging enough for reviewing judges without superadding an elusive search for something that can be labelled a true question of *vires* or jurisdiction.

On the other hand, Rothstein J.’s creation of a “presumption” based on insufficient criteria simply adds a further step to what should be a straightforward analysis. A simplified approach would be that if the issue before the reviewing court relates to the interpretation or application of a tribunal’s “home statute” and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness. Otherwise, the last word on questions of law should be left with the courts.

*Per* Cromwell J.: In this case the applicable standard of review is reasonableness. The Commissioner’s power to extend time is granted in broad terms in the context of a detailed and highly specialized statutory scheme which it is the Commissioner’s duty to administer and under which he is required to exercise many broadly granted discretions. The adjudicator’s decision on the timeliness issue should be reinstated and the matter should be remitted to the chambers judge to consider the issues not dealt with and resolved in the judicial review proceedings. Courts have a constitutional responsibility to ensure that administrative action does not exceed its jurisdiction, but they must also give effect to legislative intent when determining the applicable standard of judicial review. The standard of review analysis identifies the limits of the legality of a tribunal’s actions and defines the limits of the role of the reviewing court. When existing jurisprudence has not already satisfactorily determined the standard of review applicable to the case at hand, the courts apply several relevant factors. These factors allow the courts to identify questions that are reviewable on a standard of correctness. Elevating to a virtually irrefutable presumption the general guideline that a tribunal’s interpretation of its home statute will not often raise a jurisdictional question goes well beyond saying that deference will usually result where a tribunal’s interpretation of its home statute is in issue. The terms “jurisdictional” and “*vires*” are unhelpful to the standard of review analysis but true questions of jurisdiction and *vires* do exist. There are legal questions in “home” statutes whose resolution legislatures do not intend to leave to the tribunal.  As this Court’s recent jurisprudence confirms, as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues. The fact that s. 50(5) of *PIPA* is in the Commissioner’s home statute did not relieve the reviewing court of its duty to consider the argument that the provision was one whose interpretation the legislator intended to be reviewed for correctness, by examining the provision and other relevant factors.

**Cases Cited**

By Rothstein J.

**Discussed:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **distinguished:***Kellogg Brown and Root Canada v. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499, 434 A.R. 311; **referred to:***Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396; *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*,2002 ABCA 246, 317 A.R. 385; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84; *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, rev’g 2009 FCA 110, 389 N.R. 363, rev’g 2008 FC 12, 34 C.E.L.R. (3d) 138; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Syndicat des professeurs du collège de Lévis‑Lauzon v. CEGEP de Lévis‑Lauzon*, [1985] 1 S.C.R. 596; *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, aff’g 2009 FCA 378, 315 D.L.R. (4th) 270, rev’g 2009 FC 271, 344 F.T.R. 45; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, aff’g *sub nom. Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1, rev’g *sub nom. Nolan v. Superintendent of Financial Services* (2006), 209 O.A.C. 21; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; *Nor‑Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Petro‑Canada v. Workers’ Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Order P2008‑005; College of Alberta Psychologists*, December 17, 2008, O.I.P.C.; *Order F2006‑031; Edmonton Police Service*, September 22, 2008, O.I.P.C.; *Order F2008‑013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); *Order F2007‑014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); *Order F2008‑003; Edmonton Police Service*, December 12, 2008, O.I.P.C.; *Order F2008‑016; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 82 (QL); *Order F2008‑017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 79 (QL); *Order F2008‑005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); *Order F2008‑018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); *Order F2008‑027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); *Order F2007‑031; Grande Yellowhead Regional Division No. 35*, November 27, 2008, O.I.P.C.; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.

By Binnie J.

**Discussed:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; **referred to:**  *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

By Cromwell J.

**Discussed:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:**  *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309.

**Statutes and Regulations Cited**

*Constitution Act, 1867*, s. 96.

*Federal Courts Act*, R.S.C. 1985, c. F‑7, s. 18.1(4)(*a*).

*Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F‑25, ss. 2(b), 69(6).

*Personal Information Protection Act*, S.A. 2003, c. P‑6.5, ss. 3, 7, 19, 43, 47, 50(5), 54(5) [rep. S.A. 2009, c. 50, s. 38].

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Sopinka, John, and Mark A. Gelowitz. *The Conduct of an Appeal*, 2nd ed. Toronto: Butterworths, 2000.

APPEAL from a judgment of the Alberta Court of Appeal (Berger, Watson and Slatter JJ.A.), 2010 ABCA 26, 21 Alta. L.R. (5th) 30, 474 A.R. 169, 479 W.A.C. 169, 316 D.L.R. (4th) 117, [2010] 8 W.W.R. 457, 1 Admin. L.R. (5th) 60, [2010] A.J. No. 51 (QL), 2010 CarswellAlta 94, affirming a decision of Marshall J. (2008), 21 Alta. L.R. (5th) 24, 1 Admin. L.R. (5th) 85, [2008] A.J. No. 1592 (QL), 2008 CarswellAlta 2300. Appeal allowed.

*Glenn Solomon*, *Q.C.*, and *Rob W. Armstrong*, for the appellant.

*Sandra M. Anderson* and *Anne L. G. Côté*, for the respondent.

Written submissions only by *David Loukidelis*, *Q.C.*, *Veronica Jackson* and *Deanna Billo*, for the intervener the Attorney General of British Columbia.

Written submissions only by *T. Murray Rankin*, *Q.C.*, and *Nitya Iyer*, for the intervener the Information and Privacy Commissioner of British Columbia.

*Brent B. Olthuis* and *Tam C. Boyar*, for the intervener the B.C. Freedom of Information and Privacy Association.

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

1. Rothstein J. — Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals. This appeal provides an opportunity for this Court to address the question of how a court may give adequate deference to a tribunal when a party raises an issue before the court on judicial review, which was never raised before the tribunal and where, as a consequence, the tribunal provided no express reasons with respect to the disposition of that issue.
2. The context in which this issue arises is the judicial review of a decision of an adjudicator delegated by the appellant, the Information and Privacy Commissioner (“Commissioner”), finding that the respondent, the Alberta Teachers’ Association (“ATA”), had disclosed certain private information in contravention of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 (“*PIPA*”). In response to a number of complaints about an ATA publication of private information, the Commissioner started an investigation. At the time, the Commissioner’s enabling statute provided that an inquiry “must” be completed within 90 days of the complaint being received by the Commissioner, unless the Commissioner notifies the parties concerned that he is extending the period and provides an anticipated date for completing the inquiry (s. 50(5) *PIPA*). In dealing with the complaints against the ATA, the Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. The adjudicator delegated by the Commissioner subsequently issued an order against the ATA before the anticipated date for completion and 29 months after the initial complaint was made.
3. The issue of compliance with statutory timelines was not raised before the Commissioner or the adjudicator. The ATA applied for judicial review of the adjudicator’s order, arguing *inter alia* that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days. The chambers judge granted the ATA’s application on this basis, quashing the adjudicator’s decision ((2008), 21 Alta. L.R. (5th) 24). This decision was upheld by a majority of the Court of Appeal (2010 ABCA 26, 21 Alta. L.R. (5th) 30).
4. The Commissioner now appeals to this Court. There are three questions at issue: First, should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator? Second, if the timelines issue should be considered, what is the applicable standard of review? Third, on the applicable standard of review, does the adjudicator’s continuation and conclusion of the inquiry, despite the Commissioner having provided an extension after 90 days, survive judicial review?
5. For the reasons that follow, I would find that the timelines issue was subject to judicial review. Although the issue was not raised before the Commissioner or the adjudicator, it was implicitly decided by both the Commissioner and the adjudicator, and there was no evidentiary inadequacy or prejudice to the parties in this case. The implied decision of the Commissioner to extend the time after 90 days as implicitly adopted by the delegated adjudicator was reviewable on a reasonableness standard and I conclude that the adjudicator’s decision was reasonable. Accordingly, the Commissioner’s appeal should be allowed and the adjudicator’s order against the ATA reinstated.

I. Facts

1. Between October 13 and December 2, 2005, ten individuals complained to the Office of the Information and Privacy Commissioner that the ATA disclosed their personal information, in contravention of *PIPA*. They alleged that the ATA did so by publishing their names together with a statement that they were no longer required to adhere to the ATA’s Code of Professional Conduct in a publication called the “ATA News”. The Commissioner’s office informed the ATA on October 27, 2005, that it was conducting an investigation. On July 25, 2006, the investigation was concluded and a report was given to the complainants. Although the record is not clear, from their subsequent action, it would appear that the report was not satisfactory to the complainants.
2. In September 2006, the complainants requested that an inquiry under *PIPA* be conducted. On February 7, 2007, the complainants were notified that their request was being processed. On May 17, 2007, the Commissioner issued a Notice of Inquiry setting out a deadline of June 11, 2007, for written submissions (subsequently extended to July 25, 2007), and of August 8, 2007, for rebuttals. Although the timing is not disclosed in the record, the Commissioner did delegate an adjudicator to conduct the inquiry and issue a decision.
3. On *August 1, 2007*, the Commissioner wrote to the parties informing them that he was *extending the 90-day period* set out in s. 50(5) *PIPA* and provided an anticipated date for completion of February 1, 2009. On March 13, 2008, an order was issued by the Commissioner’s delegated adjudicator. The adjudicator found that the ATA had disclosed the complainants’ personal information contrary to ss. 7 and 19 *PIPA*. The issue of compliance with the timelines set out in s. 50(5) *PIPA* was not raised before the adjudicator and the adjudicator’s reasons did not expressly address this issue.
4. On April 25, 2008, the ATA filed an originating notice for judicial review of the adjudicator’s order. On judicial review, the adjudicator’s decision was quashed on the basis that the Commissioner lost jurisdiction for failing to comply with the timelines set out in s. 50(5) *PIPA*. By majority, the Court of Appeal upheld that decision.

II. Relevant Statutory Provisions

1. The relevant statutory provisions, as they were worded at the relevant time, are:

*Personal Information Protection Act*, S.A. 2003, c. P-6.5

**3** The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

**43(1)** The Commissioner may delegate to any person any duty, power or function of the Commissioner under this Act except the power to delegate.

**(2)** A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the Commissioner considers appropriate.

**47(1)** To ask for a review or to initiate a complaint under this Part, an individual must, as soon as reasonable, deliver a written request to the Commissioner.

**(2)** A written request to the Commissioner for a review of a decision of an organization must be delivered within

(a) 30 days from the day that the individual asking for the review is notified of the decision, or

(b) a longer period allowed by the Commissioner.

**(3)** A written request to the Commissioner initiating a complaint must be delivered within a reasonable time.

**(4)** The time limit in subsection (2)(a) does not apply to delivering a written request for a review concerning an organization’s failure to respond within a required time period.

**50** . . .

**(5)** An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

III. Judicial History

A. *Court of Queen’s Bench of Alberta, (2008), 21 Alta. L.R. (5th) 24*

1. In reasons delivered orally, Marshall J. noted that a preliminary question raised by the ATA was whether the Commissioner had lost jurisdiction over the inquiry as a result of his failure to complete the inquiry within the timelines set out in s. 50(5) *PIPA*. Relying on *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, for the principle that “the standard of correctness still applies to matters of jurisdiction and some other matters of law” (at para. 10), he held that this question was reviewable on a standard of correctness.
2. According to Marshall J., the reasons of Belzil J. in *Kellogg Brown and Root Canada v. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499, 434 A.R. 311, were compelling and entirely applicable in this case. Following that decision, he held that the timelines for completing a review set out in s. 50(5) are mandatory, employing the word “must” (at para. 7) and not directory. He also held that it was not necessary for him “to determine whether an extension of time must be given within the 90-day period. The time period is substantially breached in any event” (para. 12).
3. Marshall J. then addressed the issue of unfairness raised by the Commissioner. He noted that various authorities had held that the court should not consider an issue which was not raised before a tribunal. He rejected as speculation the Commissioner’s submission that, since the individual complainants were not before the court, the court would not have the benefit of additional facts available from them. He further held that “[t]he legislature has clearly stated that timely disposition of complaints is essential in a proceeding under the Act” (at para. 11) and that the “matter was not conducted in a manner required by the legislature, so it can be said that the proceedings must be found to be invalid” (para. 11).
4. Marshall J. granted the ATA’s application and quashed the Commissioner’s decision. However, he declined to order costs against the Commission, partly because a tribunal is rarely required to pay costs and partly because the timelines issue could have been raised before the Commissioner (para. 18).

B. *Alberta Court of Appeal, 2010 ABCA 26, 21 Alta. L.R. (5th) 30 (Watson J.A. (Slatter J.A. Concurring) and Berger J.A. Dissenting)*

(1) The Majority — Watson J.A.

1. Watson J.A. was of the view that since the adjudicator never got a chance to say anything on the question being considered on judicial review, it was not necessary to determine the appropriate standard of review. Rather, he appears to have determined the issue of timeliness *de novo*.
2. Watson J.A. affirmed that the timelines issue ought to have been raised before the Commissioner. Objections to a tribunal’s ability to make a lawful decision should be made first to the challenged tribunal. The failure to raise the issue before the adjudicator was a defect in process that should not be encouraged and should not generally occur. He nonetheless did not reverse the judicial review decision on this ground and was of the opinion that the Court of Appeal was in a position to consider the matter.
3. Watson J.A. found that the language of the section spoke to “extending that period” in a manner that connoted doing the “extending” while the 90 days was still running. Since the Commissioner had not extended the period within 90 days, the adjudicator’s decision was not rendered within the statutory timelines. He held that the time rules specified in s. 50(5) *PIPA* were mandatory and that the consequence of breaching them was the presumptive termination of the inquiry process. Contrary to the decision of the chambers judge that the consequence of non-compliance with s. 50(5) was the automatic and incurable termination of the proceedings, the reasons of the Commissioner might justify the breach and overcome the presumption of termination. However, the chambers judge had concluded that “[t]he time period is substantially breached in any event” (para. 12). Under those circumstances, the presumption of termination was not overcome. Watson J.A. therefore upheld the trial judge’s decision to quash the adjudicator’s decision.

(2) The Dissent — Berger J.A.

1. In dissent, Berger J.A. concluded that *PIPA* authorized the Commissioner to extend the 90-day period either before or after the expiry of that period. When a provision is silent as to when an extension of time can be granted, there is no presumption that the extension must be granted before expiry. An interpretation of s. 50(5) that allows the Commissioner to extend the 90-day period after it expires is consistent with legislative intent because it maintains the protection of the individuals’ rights to privacy which *PIPA* strives to ensure. In the present case, by the time the 90-day period had expired, the inquiry process was engaged and had progressed with the parties’ participation. Because they were involved, the parties were aware that the process would continue beyond 90 days. The goals of timely resolution and keeping parties informed would not have been enhanced by requiring the Commissioner to formally communicate with the parties within 90 days.
2. Berger J.A. found that quashing the adjudicator’s order without the benefit of reasons compromised judicial review. The court generally will not decide on judicial review a question which was not put to the administrative tribunal. Without the benefit of the Commissioner’s expertise and analysis relative to the questions of mixed law and fact in this case, the curial deference normally accorded to the Commissioner was rendered nugatory, thereby fettering a thorough and meaningful judicial review.
3. Berger J.A. would have allowed the appeal and restored the adjudicator’s order.

IV. Analysis

1. This appeal raises three issues, which I shall consider in turn. First, should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator? Second, if the timelines issue should be considered, what is the applicable standard of review? Third, on the applicable standard of review, does the continuation and conclusion of the inquiry, despite providing an extension after 90 days, survive judicial review?

A. *Judicial Review of an Issue That Was Not Raised Before the Tribunal*

1. The ATA sought judicial review of the adjudicator’s decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: “[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies.”
2. Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*,2002 ABCA 246, 317 A.R. 385, at para. 4).
3. There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, “[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures” (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
4. This is particularly true where the issue raised for the first time on judicial review relates to the tribunal’s specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal’s views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)
5. Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).
6. Watson J.A., for the majority of the Court of Appeal, acknowledged that “[t]he judicial review was adversely affected by the fact that the adjudicator did not hear and consider the objection”, under s. 50(5) *PIPA*, to the Commissioner’s authority to proceed. It was a “defect in the process” that should “not . . . be encouraged and should not generally occur” (para. 18). He nevertheless did not interfere with the chambers judge’s judicial review on this ground. He observed that no additional evidence or submissions were available beyond the statements of law and policy contained in the Commissioner’s prior decisions. Moreover, the Commissioner conceded that the adjudicator would have said the same as the Commissioner, had the issue been raised (para. 18). For its part, the ATA stressed in its factum before this Court that the Commissioner has consistently decided the timelines issue in other decisions and that there was nothing further for the Commissioner to decide (paras. 6, 42, 49 and 51).
7. In these circumstances, I do not think the Court of Appeal erred in refusing to disturb the exercise of the reviewing judge’s discretion to consider the timeliness issue. In this case, the rationales for the general rule have limited application. Both parties agreed that the Commissioner has expressed his views in several other decisions. Therefore, the Commissioner has had the opportunity to decide the issue at first instance and we have the benefit of his expertise, albeit without reasons in this case. No evidence was required to consider the timelines issue and no prejudice was alleged. Rather, it involved a straightforward determination of law, the basis of which was able to be addressed on judicial review, irrespective of what is the appropriate standard of review.
8. In the present appeal, a decision on the timelines issue is necessarily implied. By his letter of August 1, 2007, the Commissioner notified the parties that he was extending the 90-day period for completion of an inquiry and provided them with an anticipated date for completion of February 1, 2009. This was done after the expiry of the 90-day period. An inquiry was conducted and the Commissioner’s delegated adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review, but not before the Commissioner or the adjudicator, was whether the result of the Commissioner not extending the completion date of the inquiry before the 90-day period expired resulted in the automatic termination of the inquiry. This issue could only be decided in one of two ways: either the consequence of an extension after 90 days was that the inquiry was automatically terminated or that it was not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated. The Commissioner’s decision was implicit in his giving notice of an extension and an anticipated date for completion after 90 days. The adjudicator’s decision was implicit in her proceeding with the inquiry and rendering an order. In this appeal, this Court is reviewing the adjudicator’s implied decision because hers is the decision under judicial review.

B. *What Is the Applicable Standard of Review and How Is It Applied to Implicit Decisions on Issues Not Raised Before the Administrative Tribunal?*

1. 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, . . . ‘[q]uestions 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, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*,at paras. 58, 60-61).
2. The timelines question is not a constitutional question; nor is it a question regarding the jurisdictional lines between two or more competing specialized tribunals.
3. And it is not a question of central importance to the legal system as a whole, but is one that is specific to the administrative regime for the protection of personal information. The timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner’s specialized expertise. The question deals with the Commissioner’s procedures when conducting an inquiry, a matter with which the Commissioner has significant familiarity and which is specific to *PIPA*. Also, in terms of interpreting s. 50(5) *PIPA* consistently with the purposes of the Act, the relevant considerations include the interests of all parties in the timely completion of inquiries, the importance of keeping the parties informed of the progression of the process and the effect of automatic termination of an inquiry on individual privacy interests. These considerations fall within the Commissioner’s expertise, which centres upon balancing the rights of individuals to have their personal information protected against the need of organizations to collect, use or disclose personal information for purposes that are reasonable (s. 3 *PIPA*).
4. Finally, the timelines question does not fall within the category of a “true question of jurisdiction or *vires*”. I reiterate Dickson J.’s oft-cited warning in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, that courts “should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so” (p. 233, cited in *Dunsmuir*, at para. 35). See also *Syndicat des professeurs du collège de Lévis-Lauzon v. CEGEP de Lévis-Lauzon*, [1985] 1 S.C.R. 596, at p. 606, *per* Beetz J., adopting the reasons of Owen J.A. in *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394. As this Court explained in *Canada (Canadian Human Rights Commission)*, “*Dunsmuir* expressly distanced itself from the extended definition of jurisdiction” (para. 18, citing *Dunsmuir*,at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Smith v. Alliance Pipeline Ltd.*, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).
5. The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of “its own statute or statutes closely connected to its function, with which it will have particular familiarity” should be presumed to be a question of statutory interpretation subject to deference on judicial review.
6. Justice Cromwell takes issue with my querying whether the category of true question of jurisdiction exists and is necessary. He says that this proposition “undermine[s] the foundation of judicial review of administrative action” (para. 92).
7. Judges and administrative law counsel well know of the uncertainty and confusion that has plagued standard of review analysis for many years. That was the animating reason for this Court’s decision in *Dunsmuir*. At para. 32 of *Dunsmuir*, Bastarache and LeBel JJ. wrote:

Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

At para. 158, Deschamps J. wrote:

The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes.

At para. 145, Binnie J. wrote:

The present incarnation of the “standard of review” analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the “real” nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere preparation for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn’t be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [Emphasis deleted.]

Although these passages in *Dunsmuir* pertain to the approach to standard of review prior to *Dunsmuir*, I believe they are relevant in response to Justice Cromwell’s expressed opinion.

1. The continuing uncertainty about standard of review when the issue is the tribunal’s interpretation of its home statute is well exemplified in the cases that have come before this Court subsequent to *Dunsmuir*. In *Nolan v. Superintendent of Financial Services* (2006), 209 O.A.C. 21, the Ontario Divisional Court thought the appropriate standard of review was correctness. The Court of Appeal applied a reasonableness standard (*sub nom. Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1), as did this Court (*sub nom. Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678). In *Alliance Pipeline Ltd. v. Smith*, 2008 FC 12, 34 C.E.L.R. (3d) 138, the judicial review judge applied a reasonableness standard, but the Court of Appeal (2009 FCA 110, 389 N.R. 363) found it unnecessary to decide whether reasonableness or correctness was the appropriate standard of review. This Court applied a reasonableness standard (2011 SCC 7, [2011] 1 S.C.R. 160). In *Celgene Corp. v. Canada (Attorney General)*, 2009 FC 271, 344 F.T.R. 45, the judicial review judge applied a correctness standard. The Federal Court of Appeal (2009 FCA 378, 315 D.L.R. (4th) 270) and this Court (2011 SCC 1, [2011] 1 S.C.R. 3) doubted that this was the proper standard. Without engaging in a standard of review analysis and for reasons of practicality, in *Northrop Grumman*, this Court applied a standard of correctness based on precedent. In the present appeal, both the judicial review court and the Court of Appeal applied a correctness standard of review.
2. These examples demonstrate that the “true questions of jurisdiction” category has caused confusion to counsel and judges alike and has unnecessarily increased costs to clients before getting to the actual substance of the case. Avoiding using the label “jurisdictional” only to engage in a search for the legislators’ intent, as my colleague suggests at paras. 96-97, simply leads to the same debate about what constitutes a jurisdictional question. As Binnie J. directly put it in *Dunsmuir*, our objective should be to get the parties away from arguing about standard of review to arguing about the substantive merits of the case.
3. What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal’s interpretation of its home statute on the deferential standard of reasonableness.
4. In Justice Cromwell’s view, saying that jurisdictional questions are exceptional is not an answer to a plausible argument that a particular provision falls outside the presumption of reasonableness review and into the exceptional category of correctness review. Nor does it assist, he says, in determining by what means the presumption may be rebutted.
5. Both Binnie J. and Cromwell J. object to the *creation of a presumption* of reasonableness review of the home statute of the tribunal. With respect, I find the objection perplexing in view of judicial and academic opinion that the presumption was implicitly already established in *Dunsmuir*. Professor D. J. Mullan writes in “The McLachlin Court and the Public Law Standard of Review: A Major Irritant Soothed or a Significant Ongoing Problem?”, in D. A. Wright and A. M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 79, at p. 108:

Justice John Evans of the Federal Court of Appeal has argued in his 2009 10th Heald Lecture delivered at the College of Law at the University of Saskatchewan that in *Dunsmuir* (reinforced by *Khosa*), the Court had now established (re-established?) a very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive, statute, or any other frequently encountered statute, or even common or civil law principle. I too accept that . . . .

Both Justice Evans and Professor Mullan are recognized as leading scholars in the field of administrative law in Canada.

1. As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary.
2. With respect, Justice Cromwell’s reasons fail to appreciate that an invitation to consider whether a true question of jurisdiction or *vires* exists in a future case does not raise the specter of the constitutional guarantee of judicial review being an “empty shell” (para. 103). All decisions of tribunals are subject to judicial review, including decisions dealing with the scope of their statutory mandate, even if this Court were to eliminate true questions of jurisdiction as a separate category attracting a correctness review. This change would simply end the need for debate around whether the issue in any given case can be properly characterized as jurisdictional. It would not preclude judicial review on a reasonableness standard when interpretation of the home statute of the tribunal is at issue. Nor would it eliminate correctness review of decisions of tribunals interpreting their home statute where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator’s expertise, or a question regarding the jurisdictional lines between competing specialized tribunals. See *Alliance*, at para. 26, citing *Dunsmuir*,at paras. 58-61, and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 35, *per* Fish J.
3. *Dunsmuir* provided guidance as to how a standard of review might be determined summarily without requiring a full standard of review analysis. One method was to identify the nature of the question at issue, which would normally or, I say, presumptively determine the standard of review. Contrary to the view of my colleague in para. 97, I would not wish to retreat to the application of a full standard of review analysis where it can be determined summarily.
4. At para. 89, Binnie J. suggests that “[i]f the issue before the reviewing court relates to the interpretation and application of a tribunal’s ‘home statute’ and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness.” With respect, I think Binnie J.’s isolating matters of general legal importance as a stand-alone basis for correctness review is not consistent with what this Court has said in *Dunsmuir*, *Alliance*, *Canada (Canadian Human Rights Commission)* and *Nor-Man*.
5. At para. 22 of *Canada (Canadian Human Rights Commission)*, LeBel and Cromwell JJ. state:

On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. [Emphasis added.]

In other words, since *Dunsmuir*, for the correctness standard to apply, the question has to not only be one of central *importance to the legal system* but also outside the *adjudicator’s specialized area* of expertise.

1. At paras. 85-87, Binnie J. reintroduces from his concurring reasons in *Dunsmuir* the concept of variable degrees of deference. The majority reasons in *Dunsmuir* do not recognize variable degrees of deference within the reasonableness standard of review and with respect neither do the reasons in *Canada (Canadian Human Rights Commission)*. Once it is determined that a review is to be conducted on a reasonableness standard, there is no second assessment of how intensely the review is to be conducted. The judicial review is simply concerned with the question at issue. A review of a question of statutory interpretation is different from a review of the exercise of discretion. Each will be governed by the context. But there is no determination of the intensity of the review with some reviews closer to a correctness review and others not.
2. The Commissioner’s interpretation of s. 50(5) *PIPA* relates to the interpretation of his own statute, is within his expertise and does not raise issues of general legal importance or true jurisdiction. His decision that an inquiry does not automatically terminate as a result of his extending the 90-day period only after the expiry of that period is therefore reviewable on the reasonableness standard.
3. The oral reasons given by the chambers judge did not involve an extended discussion of the appropriate standard of review. Marshall J. assumed that *Dunsmuir* stood for the principle that “the standard of correctness still applies to matters of jurisdiction and some other matters of law” (at para. 10), and then held that the timelines question was reviewable on a standardof correctness. As I have explained, the timelines question is neither a true jurisdictional question nor any other type of question of law that attracts a correctness standard*.*
4. For its part, the majority of the Alberta Court of Appeal appears to have held that, since the adjudicator provided no reasons for the decision, it was not necessary to determine the appropriate standard of review in the administrative law sense. The reasons of the majority suggest that, in these circumstances, the Court of Appeal could simply apply the standard of appellate review for questions of law, i.e., correctness. With respect, this approach cannot be maintained. Had the issue been raised before the adjudicator, it would have been subject to review on a reasonableness standard. Where the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear because the issue was not raised before the tribunal.
5. In the present case, the adjudicator, by completing the inquiry, implicitly decided that extending the 90-day period for completion of an inquiry after the expiry of that period did not result in the automatic termination of the inquiry. However, as the issue was never raised and the decision was merely implicit, the adjudicator provided no reasons for her decision. It is therefore necessary to address how a reviewing court is to apply the reasonableness standard in such circumstances.
6. In *Dunsmuir*, the majority explained (at paras. 47-48):

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.

. . . We agree with David Dyzenhaus where he states that the concept of “deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”: “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 . . . .

Obviously, where the tribunal’s decision is implicit, the reviewing court cannot refer to the tribunal’s process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal’s decision-making process. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons.

1. However, the direction that a reviewing court should give respectful attention to the reasons “which could be offered in support of a decision” is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.
2. I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons “which could be offered in support of a decision” is not a “carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result” (*Petro-Canada v. Workers’ Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not “be taken as diluting the importance of giving proper reasons for an administrative decision” (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place. When there is no duty to give reasons (e.g., *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.
3. In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. However, remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place. Accordingly, remitting the issue to the tribunal is not necessarily the appropriate option available to a court when it is asked to review a tribunal’s implied decision on an issue that was not raised before the tribunal. Indeed, when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable. On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. It will generally be inappropriate to find that there is no reasonable basis for the tribunal’s decision without first giving the tribunal an opportunity to provide one. This, of course, assumes that the Court has thought it appropriate in the particular circumstances to allow the issue to be raised for the first time on judicial review. Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.

C. *Application of the Reasonableness Standard in This Case*

1. In the present case, the Court need not look far to discover a reasonable basis for the adjudicator’s decision. The Commissioner and his delegated adjudicators have considered the issue, as it relates to s. 50(5) *PIPA* and to the similarly worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25(“*FOIPA*”), on numerous occasions and have provided a consistent analysis. The existence of other decisions of a tribunal on the same issue can be of assistance to a reviewing court in determining whether a reasonable basis for the tribunal’s decision exists. In this case, a review of the reasons of the Commissioner and the adjudicators in other cases allows this Court to determine without difficulty that a reasonable basis exists for the adjudicator’s implied decision in this case. Indeed, in the circumstances here, it is safe to assume that the numerous and consistent reasons in these decisions would have been the reasons of the adjudicator in this case.
2. In *Order P2008-005; College of Alberta Psychologists*, December 17, 2008, O.I.P.C., the Commissioner’s delegated adjudicator considered the issue of whether there could be an extension after the expiry of the 90-day period under s. 50(5) *PIPA*. Adopting the Commissioner’s analysis of s. 69(6) *FOIPA* in *Order F2006-031; Edmonton Police Service*, September 22, 2008, O.I.P.C., as applicable to s. 50(5) *PIPA*, she decided that “time extensions under section 50(5) can be done after expiry of the 90-day period” (para. 27). She looked at the text of s. 50(5) *PIPA* and reasoned that “[t]he placing of the phrase ‘within 90 days’ is such that this modifier refers only to the time within which the inquiry must be completed, rather than to a time within which the extension must be done” (para. 27). She went on to explain that, if “there is ambiguity, a purposive interpretation of section 50, in the context of the entire Act, leads to the conclusion that the purpose of the Act would be best served if the provision were interpreted as permitting an extension after 90 days” (para. 27).
3. Finally, her interpretation of s. 50(5) was informed by practical realities of procedures under *PIPA*, which could make it impossible for adequate notice, including an anticipated date of completion, to be provided before the expiry of 90 days. In the case before her,

at the time the 90 days expired, the interviews with the parties had not yet been completed. Indeed, because the mediator was not appointed until after further information had been sought and obtained from the Applicant, the mediation process was only commencing. At that time, it was impossible to know whether there would be a need for an inquiry. It makes no sense to speak of anticipating a date for completion of an inquiry until the inquiry itself can be anticipated in the sense of being expected. . . . It was only after it became clear that the mediation had failed and the matter would go to inquiry that it became necessary to undertake the next phase. [para. 36]

1. In my view, it was reasonable to interpret s. 50(5) *PIPA* in a manner consistent with s. 69(6) *FOIPA*. Both provisions govern inquiries conducted by the Commissioner. The two provisions are identically structured and use almost identical language. For ease of reference, I repeat that s. 50(5) *PIPA* then provided:

**50** . . .

**(5)** An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

1. Section 69(6) *FOIPA* provides:

**69** . . .

**(6)** An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner

(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

1. Given that the reasons in *Order P2008-005* adopted the Commissioner’s reasoning in *Order F2006-031*, the analysis in *Order F2006-031* can provide further assistance in determining the existence of a reasonable basis for the adjudicator’s implied decision in this case. Indeed, the Commissioner and his delegated adjudicators have repeatedly relied upon the detailed reasoning in *Order F2006-031* when deciding whether there can be an extension after 90 days under s. 69(6) *FOIPA* (see *Order F2008-013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); *Order F2007-014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); *Order F2008-003; Edmonton Police Service*, December 12, 2008, O.I.P.C.; *Order F2008-016; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 82 (QL); *Order F2008-017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 79 (QL); *Order F2008-005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); *Order F2008-018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); *Order F2008-027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); *Order F2007-031; Grande Yellowhead Regional Division No. 35*, November 27, 2008, O.I.P.C.).
2. In *Order F2006-031*, the Commissioner considered the text of the provision, finding that

[s]ection 69(6) does not expressly state whether I must notify the parties that I am extending the 90 days and provide an anticipated date for completion of the review before the 90-day period expires. Placing the phrase “within 90 days” at the beginning of the provision makes it unclear whether the phrase is meant to refer to (i) the duty to complete the inquiry, as set out in the beginning of the provision, or (ii) the power in section 69(6)(a) and section 69(6)(b) to extend the 90-day period.

In my view, the placement of the phrase “within 90 days” indicates that the 90 days refers only to my duty to complete the inquiry, and does not refer to my power to extend the 90-day period in section 69(6)(a) and section 69(6)(b). [paras. 53-54]

1. In my view, this is a reasonable interpretation of the text of s. 69(6) *FOIPA* and of s. 50(5) *PIPA*. The placement of “within 90 days” suggests that it may refer to the completion of the inquiry and not to providing an extension.
2. The ATA submits that interpreting s. 50(5) *PIPA* to allow an extension after the expiry of 90 days would render the requirements of notice nugatory (Factum, at para. 75). I do not agree. The mere fact that an extension and an anticipated date for completion is given after the expiry of 90 days does not eliminate its value in keeping the parties informed of the progression of the process. As the Commissioner noted, in most cases that progress to an inquiry, the parties will be involved in the process and will know that it will not be completed within 90 days (*Order F2006-031*, at para. 58). Even if provided after 90 days, the notice of extension, which includes an anticipated date for completion, still provides information to the parties about how the matter is progressing and when the parties can expect it to be completed.
3. The ATA argues that the principle of statutory interpretation, *expressio unius est exclusio alterius*,leads to the conclusion that an extension must be made before the expiry of 90 days: when the legislature intended to allow an extension to be made either before or after the expiry of a time period; it said so expressly. The now repealed s. 54(5) *PIPA* authorized a court to, “on application made either before or after the expiry of the period referred to in subsection (3) [i.e., 45 days], extend that period if the court considers it appropriate to do so”. According to the ATA, absence of such language in s. 50(5) *PIPA* necessarily implies that the legislature did not intend for the Commissioner to be able to extend the period for completion of an inquiry “before or after” the 90-day period has expired (Factum, at para. 76).
4. This argument, while having some merit, is far from determinative. As Justice Berger pointed out, there are also many statutory provisions in Alberta that expressly restrict extensions to those granted before expiry of a time period (at para. 57, citing *Credit Union Act*, R.S.A. 2000, c. C-32, s. 13; *Expropriation Act*, R.S.A. 2000, c. E-13, s. 23, *Garage Keepers’ Lien Act*, R.S.A. 2000, c. G-2, s. 6(3); *Insurance Act*, R.S.A. 2000, c. I-3, s. 796; *Land Titles Act*, R.S.A. 2000, c. L-4, s. 140; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80(3); and *Loan and Trust Corporations Act*, R.S.A. 2000, c. L-20, s. 257). I agree with Justice Berger that, “when . . . the provision is silent as to when an extension of time can be granted, there is no presumption that silence means that the extension must be granted before expiry” (para. 58). I am therefore unable to conclude that the *expressio unius* principle renders the adjudicator’s interpretation unreasonable.
5. The Commissioner developed his analysis by relying on established principles of statutory interpretation to resolve any potential ambiguity through a purposive interpretation of the provision. He explained:

To the extent that there is any ambiguity, by interpreting section 69(6) purposively as I will do below, the provision allows me to extend the time after the 90-day period expires.

In Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, (Markham, Ontario: Butterworths Canada Ltd., 2002), the author quotes DuffC.J. in *McBratney v. McBratney* (1919), 59 S.C.R. 550. Duff, C.J. set out the principlesthat govern judicial reliance on purpose in interpretation, in order to resolve ambiguity.The first of these principles set out by Ruth Sullivan at page 219 is:

If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted. [paras. 54-55]

1. Referring to s. 2(b) *FOIPA*, the Commissioner affirmed that the purpose of *FOIPA* was “to provide a mechanism for controlling the collection, use and disclosure of personal information by public bodies”, which *FOIPA* achieves “by giving [the Commissioner] the power to review the collection, use and disclosure of personal information” (para. 57). In his view, the specific purpose of s. 69(6) *FOIPA* was “to ensure that such reviews are conducted in a timely way, and also that parties are kept aware of the timing of the process so they may participate and plan their affairs accordingly” (para. 57). The purpose of *FOIPA* is uncontroversial, as it is expressly articulated at s. 2(b). I consider the Commissioner’s view of the purpose of s. 69(6) *FOIPA* to be reasonable. It is similarly reasonable to determine that the purpose of s. 50(5) *PIPA* is to ensure timely completion of reviews and to keep the parties informed about the process.
2. According to the Commissioner, “[i]n most cases that advance to inquiry . . . at the time the 90-day period expires, the inquiry process has been fully engaged and is progressing with the participation of the parties. Because they are involved, the parties are fully aware that the process will continue beyond 90 days” (para. 58). For this reason, the Commissioner did “not believe that the goal of a timely resolution of issues, and of keeping the parties informed, would be advanced by requiring [him] to formally communicate to the parties within 90 days something they already know: that the matter will not be completed within 90 days” (para. 58).
3. The Commissioner then addressed the practical difficulty of satisfying the s. 69(6)(b) *FOIPA* requirement to provide an anticipated date of completion with the extension if the extension must necessarily be made within 90 days. He pointed out that s. 68 *FOIPA* empowers him to authorize a mediation upon receipt of a request for review. The mediation itself could take up some or all of the 90 days. If the mediation is unsuccessful or mediation is not authorized, the matter would move to inquiry. An inquiry must accord the parties procedural fairness, which can mean accommodating requests for adjournments, to adduce further evidence and to adjourn to review and make submissions on the new evidence. In short, the Commissioner explained that “the parties, as much as [he], have carriage of the matter” and that “[t]he time within which the matter will be completed is largely determined by their actions, schedules and the issues they raise” (para. 62). For this reason, it may not be feasible for the Commissioner to provide an anticipated date for completion within 90 days and the parties are well aware of how the matter is progressing in any event (paras. 59-62).
4. The Commissioner therefore concluded that

neither the purpose of the [*FOIPA*] in general nor section 69(6) in particular is advanced by interpreting the provision as creating an absolute “deadline”, beyond which a proceeding that is underway cannot continue unless I have, before the 90 days expires, expressly stated that the matter will continue beyond 90 days, and projected a new final date for completion. [para. 63]

1. In my view, the Commissioner’s reasoning in support of his conclusion that extending the period for completion of an inquiry after the expiry of 90 days does not result in the automatic termination of the inquiry under s. 69(6) *FOIPA* satisfies the values of justification, transparency and intelligibility in administrative decision making. The decision is carefully reasoned, systematically addressing: (i) the text of the provision, (ii) the purposes of *FOIPA* in general and of s. 69(6), in particular, and (iii) the practical realities of conducting inquiries drawn from the Commissioner’s experience administering *FOIPA*. It was reasonable for the Commissioner’s delegated adjudicator, in *Order P2008-005*, to adopt this detailed reasoning and apply it to s. 50(5) *PIPA*. I therefore have no difficulty concluding that there exists a reasonable basis for the adjudicator’s implied decision in this case that extending the 90-day period after the expiry of that period did not terminate the process.

D. *The Mandatory/Directory Distinction Does Not Arise in This Case*

1. The parties, the trial judge and the Court of Appeal all approached the timelines issue as though it engaged the distinction between mandatory and directory legislative provisions. R. W. Macaulay and J. L. H. Sprague succinctly explain the mandatory/directory distinction as follows:

Where a provision is imperative it must be complied with. The consequence of failing to comply with an imperative provision will vary depending on whether the imperative direction is mandatory or directory. Failing to comply with a mandatory direction will render any subsequent proceedings void while failing to comply with [a] directory command will not result in such invalidation (although the person to whom the command was directed will not be relieved from the duty of complying with it . . . .

(*Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, pp. 22-126 to 22-126.1)

1. This Court has previously expressed doubt as to the usefulness of the mandatory/directory distinction. In *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, Iacobucci J. affirmed that

[t]he “mandatory” and “directory” labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result-oriented. . . . Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from *Reference re Manitoba Language Rights*, [[1985] 1 S.C.R. 721], the principle is “vague and expedient” (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. [p. 123]

1. In any event, the mandatory/directory distinction does not arise in this case. This distinction is concerned with the consequences of *failing to comply* with a legislative direction. Here, we are not dealing with the consequences of the Commissioner’s failure to comply with s. 50(5) *PIPA*. Instead, we are concerned with interpreting the statute to determine when s. 50(5) *PIPA* requires the Commissioner to extend the period for completion of an inquiry. The issue was not “what is the consequence of non-compliance with the provision?”, but “did the adjudicator comply with the provision?”.
2. Therefore, I do not agree with Marshall J. that the finding in *Kellogg Brown and Root Canada* that the requirements of s. 50(5) *PIPA* are mandatory is “entirely applicable here” (para. 12). Rather, I would adopt the adjudicator’s analysis in *Order P2008-005* in which she explains that *Kellogg Brown and Root Canada* has no application to a case such as this one where the Commissioner provides an extension after 90 days. The decision in that case was premised on the fact that *no time extension was ever* issued (at para. 27, citing para. 14 of *Kellogg Brown and Root Canada*). For that reason, the consequences of non-compliance with s. 50(5) *PIPA* arose in *Kellogg Brown and Root Canada*, but they do not arise here. As the matter is not before this Court, it is not necessary to comment on the conclusion in *Kellogg Brown and Root Canada* that s. 50(5) *PIPA* imposes a mandatory direction.

V. Conclusion

1. I would allow the appeal with costs in this Court and in the Court of Appeal and reinstate the adjudicator’s decision on the timelines issue. In accordance with the recommendation of the Commissioner, the matter is remitted to the chambers judge to consider the issues not previously dealt with and resolved in the judicial review.

The reasons of Binnie and Deschamps JJ. were delivered by

1. Binnie J. — My colleagues Rothstein J. and Cromwell J. have staked out compelling positions on both sides of the argument about the role, function and even the existence of “true questions of jurisdiction or *vires*”. While I agree with much that is said by both colleagues, I find myself occupying a middle ground which, given the importance of the issue, I believe is worth defending. I therefore append these brief reasons concurring in the result.
2. I agree with Cromwell J. that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and, more generally, to the rule of law. Administrative tribunals operate within a legal framework which is both dictated by s. 96 of the *Constitution Act, 1867*, and limited by their respective statutory mandates. The courts, not the tribunals, determine the outer limits of those mandates. Cromwell J. puts the point succinctly, at para. 98, when he writes that within the limits imposed by the Constitution,

[t]he fact that a provision is in the tribunal’s own statute or statutes closely connected to its function with which it will have particular familiarity thus may well be an important indicator that the legislature intended to leave its interpretation to the tribunal. But there are legal questions in “home” statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal’s delegated power are more likely to be set out.

1. On the other hand, just because the notion of a “true question of jurisdiction or *vires*” works well at the conceptual level does not mean that it is helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision. On this point, Cromwell J. adopts, at para. 95, the deeply problematic statement by the *Dunsmuir* majority that jurisdiction should be understood in the “narrow sense of whether or not the tribunal had the authority to . . . decide a particular matter” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59). As Professor D. Mullan pointed out in “*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!” (2008), 21 *C.J.A.L.P.* 117, at pp. 126-30, this formulation was not narrow but so broad as to risk bringing back from the dead the preliminary question jurisprudence from which Cromwell J. endeavours to dissociate himself, which reached its unfortunate zenith in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425,and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756.
2. In response to this controversy about *vires* and jurisdiction, Rothstein J. lays down the sweeping proposition that “it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of ‘its own statute or statutes closely connected to its function, with which it will have particular familiarity’ should be presumed to be a question of statutory interpretation subject to deference on judicial review” (para. 34). Cromwell J. says, disapprovingly, that in the absence of further guidance, such a presumption is unlikely to be of “any assistance to reviewing courts” (para. 92). His solution, on the other hand, would be to return us to a “more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly” (para. 99). This “thorough examination” is to be based on a variation of the pragmatic and functional test associated with *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, as repositioned in *Dunsmuir*. I do not think, with respect, that generalities about “legislative intent” are any more likely to provide quick and straightforward “assistance to reviewing courts” than Rothstein J.’s offer of a presumption.
3. It may be recalled that the willingness of the courts to defer to administrative tribunals on questions of the interpretation of their “home statutes” originated in the context of elaborate statutory schemes such as labour relations legislation. In such cases, the tribunal members were not only better versed in the practicalities of how the scheme could and did operate, but in many cases, the legislature tried to curb the enthusiasm of the courts to intervene by inserting explicit privative clauses. Over the years, acceptance of judicial deference grew even on questions of law (see, e.g., *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557), but never to the point of presuming, as Rothstein J. does, that whenever the tribunal is interpreting its “home statute” or statutes, it is entitled to deference. It is not enough, it seems to me, to say that the tribunal has selected one from a number of interpretations of a particular provision that the provisions can reasonably bear, no matter how fundamentally the tribunal’s legal opinion affects the rights of the parties who appear before it. On issues of procedural fairness or natural justice, for example, the courts should not defer to a tribunal’s view of the extent to which its “home statute” permits it to proceed in what the courts conclude is an unfair manner.
4. The middle ground between Cromwell J. and Rothstein J., it seems to me, lies in the more nuanced approach recently adopted by the Court in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (“*CHRC*”), where it was said that “if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference” (para. 24 (emphasis added)). Rothstein J. puts aside the limiting qualifications in this passage when he comes to formulating his presumption, which is triggered entirely by the location of the controversy in the “home statute”.
5. *CHRC* is also helpful in emphasizing the expression “issues of general legal importance” and downplaying (while citing) the *Dunsmuir* majority’s more extravagant requirement of a question of law “of central importance to the legal system as a whole” (para. 60). While judicial self-citation is generally to be avoided, I feel encouraged by *CHRC* to resuscitate what I said on this point in my concurring reasons in *Dunsmuir*:

It is, with respect, a distraction to unleash a debate in the reviewing judge’s courtroom about whether or not a particular question of law is “of central importance to the legal system as a whole”. It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges. [para. 128]

I would interpret the reference in *CHRC* to “issues of general legal importance” as being to issues whose resolution has significance outside the operation of the statutory scheme under consideration. After all, some administrative decision makers have considerable legal expertise and resources. Others have little or none.

1. What then is involved in a “reasonableness” review of a tribunal’s interpretation of its home statute? The *Dunsmuir* majority said that “[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions” (para. 47). It is clear that “the range of acceptable and rational solutions” is context specific and varies with the circumstances including the nature of the issue under review. In *CHRC*, the reviewing court was called on to judicially review a tribunal’s decision that its home statute gave it the statutory power to award costs. On appeal, the Court applied a “reasonableness” standard (referring at several points to the issue being within the “core function and expertise of the Tribunal”, e.g., at para. 25). The reasonableness analysis nevertheless followed the well-worn path of Driedger’s golden rule and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983)). In other words, the intensity of scrutiny was not far removed from a correctness analysis, in my respectful opinion, just as was the case in *Dunsmuir* itself.
2. In matters of general policy or broad discretion, on the other hand, the courts also apply “reasonableness” but with a much less aggressive attitude. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, for example, the question was pure policy, namely whether Mr. Khosa had shown “sufficient humanitarian and compassionate considerations” to warrant, in the opinion of the immigration appeal board, discretionary relief from a removal order whose validity Mr. Khosa did not contest.
3. In this case, the reasons of both Rothstein J. and Cromwell J. show a much more intense level of scrutiny of the issue before the Information and Privacy Commissioner than was the case in *Khosa*, and for good reason. “Reasonableness” is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense (or, as the *Dunsmuir* majority put it, assessing the “degree of deference” (para. 62)). Predictability is important to litigants and those who try to advise them on whether or not to initiate proceedings. It remains to be seen in future cases how the discretion of reviewing judges will be supervised at the appellate level to achieve such predictability. The *Dunsmuir* majority noted that “reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the [administrative] decision-making process” (para. 47). Such values are no less important in the process of judicial review.
4. All of this is challenging enough for the reviewing judge without superadding to the debate at the working level Cromwell J.’s search for the elusive “true” question of *vires* or jurisdiction. Accordingly, I support Rothstein J.’s effort to euthanize the issue (apart from legislative provisions which guarantee its survival, as in s. 18.1(4)(*a*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7). I would nevertheless respectfully part company with Rothstein J. in his effort to dilute the significance of expertise and general legal importance as conditions precedent to any deference to an administrative tribunal on matters of law, including the interpretation of its “home statute”.
5. The creation of a “presumption” based on insufficient criteria simply adds a further step to what should be a straightforward analysis. If the issue before the reviewing court relates to the interpretation and application of a tribunal’s “home statute” and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness. Otherwise, in my respectful opinion, the last word on questions of law should be left with the courts.

The following are the reasons delivered by

Cromwell J. —

I. Introduction

1. I agree with the disposition of this appeal proposed by my colleague Rothstein J. and, for the most part, with his lucid and persuasive reasons. I respectfully do not agree, however, with some of my colleague’s views set out, either expressly or by implication, in paras. 33-46.
2. My colleague suggests that true questions of jurisdiction or *vires* arise so rarely when a tribunal is interpreting its home statute that it may be asked whether “the category of true questions of jurisdiction exists” and further that “the interpretation by the tribunal of ‘its own statute or statutes closely connected to its function, with which it will have particular familiarity’ should be presumed to be a question of statutory interpretation subject to deference on judicial review” (para. 34). There is no indication of how, if at all, this *presumption* could be rebutted. I have two difficulties with this position.
3. The first difficulty concerns elevating to a virtually irrefutable presumption the general guideline that a tribunal’s interpretation of its “home” statute will not often raise a jurisdictional question. This goes well beyond saying that “[d]eference will usually result” with respect to such questions (as in *Dunsmuir* *v.* *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54) or that “courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal’s authority” (as in *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 34). In my view this is no “natural extension” of the approach set out by the majority of the Court in *Dunsmuir*,as is made plain by the fact that my colleague does not cite a word from the majority judgment which supports his position. Creating a presumption without providing guidance on how one could tell whether it has been rebutted does not, in my respectful view, provide any assistance to reviewing courts. The second difficulty concerns the suggestion that jurisdictional questions may not in fact exist at all. Respectfully, these propositions undermine the foundation of judicial review of administrative action.
4. *Dunsmuir* was clear that at the heart of judicial review of administrative action is a balance between legality and legislative supremacy. On one hand, the principle of legality requires the courts to ensure that administrative tribunals and agencies exercise their delegated powers lawfully. This includes the requirement that “[a]dministrative bodies . . . be correct in their determinations of true questions of jurisdiction or *vires*”: *Dunsmuir*,at para. 59. In other words, there are some questions with respect to which the courts are obliged to substitute their understanding of the correct answer for the tribunal’s understanding of the correct answer. On the other hand, the principle of legislative supremacy means that, in carrying out their functions, courts must be respectful of legislative intent that these bodies should be largely undisturbed by the courts in exercising those powers (para. 27). While courts have the constitutional responsibility “to review administrative action and ensure that it does not exceed its jurisdiction”, they also must give effect to legislative supremacy by determining the applicable standard of judicial review by “establishing legislative intent” (paras. 29-31).
5. I agree that the use of the terms “jurisdiction” and “*vires*”have often proved unhelpful to the standard of review analysis. This, however, should not distract us from the fundamental principles: as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is “correct”. These core principles of judicial review of administrative action were laid down by the Court as recently as the 2008 decision in *Dunsmuir*. I therefore can neither agree with my colleague that the fact that a legislative provision is in a “home statute” has become a virtually unchallengeable proxy for legislative intent nor join him in speculating about whether jurisdictional review even exists. The standard of review analysis not only identifies the limits of the legality of the tribunal’s actions, but also defines the limits of the role of the reviewing court. The reviewing court cannot consider the “substantive merits” of a judicial review application or statutory appeal unless it identifies and applies the appropriate standard of review. That is what defines those “substantive merits”.

II. Legislative Intent

1. I begin with the significance of the terms “jurisdiction” and “*vires*”. I remain of the view that true questions of jurisdiction or *vires* exist. As I will explain later in these reasons, the jurisprudence affirms that they do. However, for the purposes of the standard of review analysis, I attach little weight to these terms. They add little to the analysis, and can cause problems. Undue emphasis on the concepts they embody bedevilled administrative law with preliminary jurisdictional questions that allowed for undue interference with administrative decisions. This Court’s jurisprudence has long eschewed an expansive approach to “jurisdiction” that animated early cases such as *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. As was wisely said in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227, at p. 233, courts “should not be alert to brand as jurisdictional . . . that which may be doubtfully so”. In *Dunsmuir*, the Court repeated this sentiment and noted that such questions will be “narrow” and that jurisdiction should be understood in the “narrow sense of whether or not the tribunal had the authority to make the inquiry . . . whether its statutory grant of power gives it the authority to decide a particular matter” (para. 59).
2. The touchstone of judicial review is legislative intent: *Dunsmuir*, at para. 30. (I put aside situations in which there is clear legislative intent to prevent judicial review of jurisdiction as such preclusion is not permitted as a matter of constitutional law: see, e.g., *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.) This focus means that whether a question falls into the category of “jurisdictional” is largely beside the point. What matters is whether the legislature intended that a particular question be left to the tribunal or to the courts.
3. Where the existing jurisprudence has not already determined in a satisfactory manner the degree of deference to be accorded to an administrative decision maker operating in a particular statutory scheme, the courts are to apply a number of relevant factors to the case at hand, factors which include the presence or absence of a privative clause, the purpose of the tribunal as determined by interpretation of its enabling legislation, the nature of the question at issue and the expertise of the tribunal. These are the concrete criteria, clearly established by the Court’s jurisprudence, which are used to identify questions that are reviewable for correctness because the legislature intended the courts to have the last word on what constitutes a “correct” answer. These questions may be called “jurisdictional”: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 28. However, labelling them as such does nothing to assist the analysis. I therefore agree with Rothstein J. to the extent that he considers that, as analytical tools, the labels of “jurisdiction” and “*vires*” need play no part in the courts’ everyday work of reviewing administrative action.
4. As the Court noted in *Dunsmuir*, “[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” (para. 54 (citations omitted)). The fact that a provision is in the tribunal’s own statute or statutes closely connected to its function with which it will have particular familiarity thus may well be an important indicator that the legislature intended to leave its interpretation to the tribunal. But there are legal questions in “home” statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal’s delegated power are more likely to be set out. The majority of the Court in *Dunsmuir* (at para. 59) identified an example of such a question by referring to *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. Writing for the Court, Rothstein J. identified another in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10, stating that “[t]he issue on this appeal is jurisdictional in that it goes to whether the [Canadian International Trade Tribunal] can hear a complaint initiated by a non-Canadian supplier”. In reaching this conclusion, the Court noted that this standard of review had been determined *in a satisfactory manner* by the existing jurisprudence (para. 10). Recast to side-step the language of “jurisdiction” or “*vires*”, these two cases demonstrate that there are provisions in home statutes that tribunals must interpret correctly.
5. The point is this. The proposition that provisions of a “home statute” are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in “home” statutes are “exceptional” is not an answer to a plausible argument that a particular provision falls outside the “presumption” of reasonableness review and into the “exceptional” category of correctness review. Nor does it assist in determining by what means the “presumption” may be rebutted.
6. The respondent’s position in this case is that s. 50(5) of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, is a provision the Commissioner was obliged to interpret correctly. While the fact that this provision is in the Commissioner’s “home” statute suggests caution in accepting that characterization of the provision, this alone does not relieve the reviewing court of examining the provision and the other relevant factors to determine the legislature’s intent in relation to it.
7. When this is done, my view is that the legislature did not intend to authorize judicial review for correctness of the Commissioner’s interpretation of s. 50(5). The power to extend time is granted in broad terms in the context of a detailed and highly specialized statutory scheme which it is the Commissioner’s duty to administer and under which he is required to exercise many broadly granted discretions. The respondent’s contention that s. 50(5) is a provision whose interpretation is reviewable on a correctness standard should be rejected because, having regard to the nature of the statutory scheme, the nature of the Commissioner’s broadly conferred duties to administer that highly specialized scheme, and the nature of the provision in issue, it was the legislature’s intent to leave to the Commissioner the question of whether s. 50(5) allowed him to extend the time limit after the 90 days had expired. I therefore agree with my colleague’s conclusion that the applicable standard of review is reasonableness.

III. Jurisdictional Review

1. I do not join my colleague in asking whether the category of true questions of jurisdiction exists. I have signalled above that the language of “jurisdiction” or “*vires*” might be unhelpful in the standard of review analysis. But I remain of the view that correctness review exists, both as a matter of constitutional law and statutory interpretation. This will be true, on occasion, with respect to a tribunal’s interpretation of its “home” statute. As the Court affirmed in *Dunsmuir*, “judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits” (para. 31).
2. In the face of such a clear and recent statement by the Court, I am not ready to suggest, as my colleague does, at para. 34, that this constitutional guarantee may in fact be an empty shell. To be clear, this constitutional guarantee does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard. *Dunsmuir* was clear and unequivocal on this point as the passage I have just cited demonstrates. I think it unfortunate that the Court should be seen to be engaging in casual questioning of the ongoing authority of what it said so clearly and so recently. Parliament and the legislatures, as a matter of constitutional law, cannot oust judicial review for correctness of a tribunal’s interpretation of jurisdiction limiting provisions. Of course, there is no suggestion that this principle is engaged in this case.

IV. Conclusion

1. I agree with Rothstein J. that the appeal should be allowed with costs in this Court and in the Court of Appeal; that the adjudicator’s decision on the timeliness issue should be reinstated; and that the matter should be remitted to the chambers judge to consider the issues not dealt with and resolved in the judicial review proceedings.

*Appeal allowed with costs.*

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