



**SUPREME COURT OF CANADA**

**CITATION:** Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval, 2016 SCC 8

**DATE:** 20160318  
**DOCKET:** 35898

**BETWEEN:**

**Commission scolaire de Laval and  
Fédération des commissions scolaires du Québec**  
Appellants  
and  
**Syndicat de l'enseignement de la région de Laval and  
Fédération autonome de l'enseignement**  
Respondents  
- and -  
**Centrale des syndicats du Québec**  
Intervener

**OFFICIAL ENGLISH TRANSLATION**

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

**REASONS FOR JUDGMENT:** Gascon J. (McLachlin C.J. and Abella and Karakatsanis JJ. concurring)  
(paras. 1 to 75)

**PARTIALLY CONCURRING REASONS:** Côté J. (Wagner and Brown JJ. concurring)  
(paras. 76 to 86)

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COMMISSION SCOLAIRE DE LAVAL v. SYNDICAT DE L'ENSEIGNEMENT

**Commission scolaire de Laval and  
Fédération des commissions scolaires du Québec**

*Appellants*

v.

**Syndicat de l'enseignement de la région de Laval and  
Fédération autonome de l'enseignement**

*Respondents*

and

**Centrale des syndicats du Québec**

*Intervener*

**Indexed as: Commission scolaire de Laval v. Syndicat de l'enseignement de la  
région de Laval**

**2016 SCC 8**

File No.: 35898.

2015: October 14; 2016: March 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Labour relations — Dismissal — Arbitration — Grievances — Collective agreement stipulating that decision to dismiss teacher could be made only after “thorough deliberations” by school board’s executive committee — Executive committee deciding to dismiss teacher by way of resolution adopted after deliberations held in camera — Arbitrator allowing examination of members of executive committee on motives for their decision — Whether principle that motives are “unknowable” and deliberative secrecy apply to public employer that decides to take disciplinary action against employee.*

*Administrative law — Judicial review — Standard of review — Arbitration — Inquiry — Interlocutory decision allowing examination of members of decision-making authority of public employer on motives for their decision to dismiss employee — Objections to examination — Whether questions related to principle that motives are “unknowable” and deliberative secrecy that were raised before arbitrator are sufficiently important to legal system that standard applicable to judicial review of interlocutory decision must be correctness.*

In June 2009, B was summoned to attend a special meeting of the executive committee of the Commission scolaire de Laval (“Board”), his employer. The committee had to determine whether B’s judicial record was relevant to his functions as a teacher and, if it was, decide whether to resiliate his employment contract. After hearing B in a partially in camera meeting (from which the public was excluded), the executive committee ordered a totally in camera meeting (from which

the teacher and his union representative were excluded) in order to deliberate. Upon completion of these two in camera meetings, the committee, sitting in public once again, proceeded to adopt a resolution that terminated B's employment contract.

The Syndicat de l'enseignement de la région de Laval ("Union") filed a grievance with respect to B's dismissal, alleging, *inter alia*, that the procedure for dismissal provided for in the collective agreement had not been followed. The collective agreement stipulated that the employment relationship could be terminated "only after thorough deliberations at a meeting of the board's council of commissioners or executive committee called for that purpose". In the course of the inquiry into the grievance, the Union summoned as its first witnesses three members of the executive committee who had been present for the in camera deliberations of June 2009. The Board objected to having them testify, arguing that the motives of individual members of the committee were irrelevant and that deliberative secrecy shielded the members from being examined on what had been said in camera. The Board also submitted that the principle that motives are "unknowable" that had been stated in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, precludes the examination of the members of any collective body on the motives that underlie a decision made by way of a written resolution. The arbitrator dismissed these objections and allowed the examination of the executive committee's members.

The Superior Court, hearing a motion for judicial review of the arbitrator's interlocutory decision, applied the standard of correctness and granted the motion, barring any testimony by members of the executive committee except as regards the formal process that led to their decision that was announced at a public meeting. The majority of the Court of Appeal, also applying the standard of correctness, restored the arbitrator's decision and allowed the examination of the executive committee's members, subject to the usual limits of what is relevant.

*Held:* The appeal should be dismissed.

*Per* McLachlin C.J. and Abella, Karakatsanis and **Gascon JJ.:** The standard applicable to the arbitrator's interlocutory decision is reasonableness. Whether the examination of the members of the Board's executive committee should be allowed is ultimately an evidentiary issue. The arbitrator has exclusive jurisdiction over such matters, and he allowed the examination of the executive committee's members on the basis that their testimony would be helpful to him in determining whether the collective agreement and the legislation had been complied with. This conclusion flowed from his interpretation of the collective agreement between the parties and of the *Education Act*. The presumption that when an administrative tribunal interprets or applies its home statute, the standard of review applicable to its decision is reasonableness therefore applies in this case. This presumption is reinforced by the fact that the usual standard for judicial review of decisions of grievance arbitrators is reasonableness.

The issues in this case are not included in the narrow class of issues for which the standard is correctness. That standard can apply to questions of law that are of central importance to the legal system as a whole and are outside the decision maker's area of expertise. Questions of this nature are rare and tend to be limited to situations that are detrimental to consistency in the country's fundamental legal order. In this case, in light of the arbitrator's broad jurisdiction over evidence and procedure, there is no question of law of central importance that is outside his area of expertise. The questions of evidence and procedure that arise here with respect to the principle that motives are "unknowable" and to deliberative secrecy in the context of an employer's collective decision-making authority are not outside the arbitrator's area of expertise. Nor does the application of that principle and of deliberative secrecy to a fact situation characteristic of a dismissal amount to a question that is detrimental to consistency in the country's fundamental legal order. Once this is established, maintaining that the concepts at issue do not fall solely within the arbitrator's expertise in the area or jurisdiction over the matter, or that one of them is a general principle that applies to other legal fields, is not enough to justify dispensing with the deferential standard that is required in such a case.

In light of the information available to him at the time of the summonses, and of the content of the collective agreement and the applicable legislation, the arbitrator allowed the examination of the members of the Board's executive committee in the grievance proceeding before him. It is this decision that is at issue in

the judicial review proceedings, and it was reasonable. Neither the argument that the motives are “unknowable” nor that of deliberative secrecy counters this conclusion.

The principle that the motives of a legislative body are “unknowable” and deliberative secrecy do not apply to a public employer, the Board in this case, that decides to take disciplinary action against an employee, even if an in camera meeting is ordered. Any employee, whether in the public or the private sector, has a right to contest disciplinary action taken against him or her and can, in doing so, raise any relevant evidence. For this, the employee may examine the employer’s representatives on the reasons for the action and on the decision-making process that led to it.

It is wrong to say that *Clearwater* established a rule of relevance that applies to every collective decision made by a decision-making body by means of an official document regardless of the nature of the decision or of the body making it. Rather, the “unknowable” motives in question are those that led a legislative body to adopt provisions of a legislative nature, that is, to carry out acts of a public nature. In this case, the executive committee’s decision was made in a completely different context. Even though the Board is a legal person established in the public interest, it was acting as an employer when it decided to dismiss teacher B by way of a resolution of its executive committee. That decision had an effect on the employment contract between B and the Board and was made in the context of a process provided for in the collective agreement between the parties. It was not a decision of a

legislative, regulatory, policy or discretionary nature. Rather, it was made in the specific context of a contractual relationship. A rule of relevance based on the public nature of an impugned decision therefore does not apply here. It was reasonable for the arbitrator to rule that he needed to know what had taken place in camera in order to determine whether the executive committee's deliberations had been thorough. His decision on this point was consistent with those of several grievance arbitrators who had in the past allowed the examination of school board officials regarding in camera deliberations in disciplinary matters. Given the recognized jurisdiction of arbitrators over evidence and procedure, deference must be shown.

As for deliberative secrecy, it was reasonable for the arbitrator to reject this argument, too. When the executive committee decided to dismiss B after deliberating in camera, it was not performing an adjudicative function and was not acting as a quasi-judicial decision maker. Rather, it was acting as an employer dismissing an employee. Its decision was therefore one of a private nature that falls under employment law, not one of a public nature to which the constitutional principles of judicial independence and separation of powers would apply. As a result, the discussions held by the committee's members in camera are not shielded by deliberative secrecy.

Finally, limits should not be placed in advance on the questions that may be asked of the executive committee's members. Assessing the relevance of evidence falls within the exclusive jurisdiction of the arbitrator. It is not open to a reviewing



court to speculate about the types of questions that could be relevant before the examination has even begun. It will be up to the arbitrator to decide what is relevant on the basis of the questions that are eventually asked and to determine which of them really further the resolution of the case. If a court must intervene, it will do so after the arbitrator has ruled on a given point.

*Per* Wagner, Côté and Brown JJ.: There is disagreement with the majority as regards the applicable standard of judicial review. There are times when a question concerning an area over which the arbitrator generally has full authority is of such a nature as to affect the administration of justice as a whole and relates to principles in respect of which the arbitrator has no particular expertise in that they are not specific to the arbitrator's specialized role. Where the question relates not simply to the rules of evidence in general, but to the scope of such basic rules as those relating to the immunities from disclosure and deliberative secrecy, a court reviewing an arbitrator's decision in this regard must be able to go further than merely inquiring into the reasonableness of the decision. Where necessary, it must also be able, absent clear instructions to the contrary, to substitute its own view for that of the arbitrator if the arbitrator's decision is incorrect.

The applicable standard of review cannot depend on how a court will ultimately answer the question, as that could make it even more difficult to predict what the result of the analysis will be. Instead, what is important is the nature of the question being raised. In this case, despite the existence of a privative clause and even

though the appeal arises in the context of the hearing of the evidence, over which the arbitrator has full authority, the questions that have been raised are general questions of law that, by their nature, are of central importance to the administration of justice as a whole and in respect of which the arbitrator has no particular expertise. Such questions require uniform and consistent answers, which means that both the majority and the dissenting judges of the Court of Appeal, like the Superior Court judge, were right to hold that the applicable standard of review in this case is correctness. However, the result is the same regardless of which standard applies.

### Cases Cited

By Gascon J.

**Distinguished:** *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3; **applied:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; **referred to:** *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1

S.C.R. 160; *Syndicat de l'enseignement du Grand-Portage v. Morency*, 2000 SCC 62, [2000] 2 S.C.R. 913; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106; *Syndicat des professionnelles et professionnels de l'éducation du Bas-St-Laurent v. Commission scolaire des Monts-et-Marées* (2006), S.A.E. 7953, 54 R.S.E. 481; *Syndicat des enseignantes et enseignants de Le Royer v. Commission scolaire de la Pointe-de-l'Île* (2000), S.A.E. 7006, 47 R.S.E. 1049; *Syndicat des travailleuses et travailleurs de l'enseignement de Portneuf C.E.Q. v. Commission scolaire de Portneuf* (1988), S.A.E. 4674, 35 R.S.E. 1722; *Association des enseignants de Le Royer v. Commission scolaire régionale Le Royer* (1975), S.A. 513, 6 R.S.E. 43; *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; *O'Rourke v. Commissioner for Railways* (1890), 15 App. Cas. 371; *Ward v. Shell-Mex*, [1952] K.B. 280; *Re Knight Lumber Co.* (1959), 22 D.L.R. (2d) 92; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Noble China Inc. v. Lei* (1989), 42 O.R. (3d) 69; *Comité de révision de l'aide juridique v. Denis*, 2007 QCCA 126; *Cherubini Metal Works Ltd. v. Nova Scotia*

(Attorney General), 2007 NSCA 37, 253 N.S.R. (2d) 134; *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495; *Promutuel Dorchester, société mutuelle d'assurance générale v. Ferland*, [2001] R.J.Q. 2882; *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *North Island Laurentian Teachers' Union P.A.P.T. v. Commission scolaire Laurenval* (1985), S.A.E. 3964, 33 R.S.E. 1262; *Commission scolaire des Grandes-Seigneuries et Association des professeurs de Lignery (Vishwanee Joyejob)*, 2015 QCTA 663, [2015] AZ-51203453; *Syndicat des salariés de Béton St-Hubert — CSN v. Béton St-Hubert inc.*, 2010 QCCA 2270; *Sûreté du Québec v. Lussier*, [1994] R.D.J. 470; *Collège d'enseignement général et professionnel de Valleyfield v. Gauthier Cashman*, [1984] R.D.J. 385; *Lethbridge Regional Police Service v. Lethbridge Police Association*, 2013 ABCA 47, 542 A.R. 252; *Canadian Nuclear Laboratories v. Int'l Union of Operating Engineers, Local 772*, 2015 ONSC 3436; *Blass v. University of Regina Faculty Assn.*, 2007 SKQB 470, 76 Admin. L.R. (4th) 262.

By Côté J.

**Distinguished:** *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616;  
**referred to:** *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

### Statutes and Regulations Cited

*Charter of human rights and freedoms*, CQLR, c. C-12, s. 18.2.

*Criminal Records Act*, R.S.C. 1985, c. C-47.

*Education Act*, CQLR, c. I-13.3, ss. 34.3, 143, 179, 258.1 para. 1(1), 258.4, 261.0.1 to 261.0.6 [ad. 2005, c. 16, s. 11], 261.0.2 [*idem*], 261.0.3 [*idem*], 261.0.7 [*idem*].

*Labour Code*, CQLR, c. C-27, ss. 1(f), 100 et seq., 100.2, 100.12(a), (f), 139, 139.1, 140.

### Authors Cited

Brown, Donald J. M., and David M. Beatty, with the assistance of Christine E. Deacon. *Canadian Labour Arbitration*, 4th ed. Toronto: Canada Law Book, 2015 (loose-leaf updated December 2015, release 48).

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 6<sup>e</sup> éd. Cowansville, Qué.: Yvon Blais, 2014.

Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011.

Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.

Morin, Fernand, et autres. *Le droit de l'emploi au Québec*, 4<sup>e</sup> éd. Montréal: Wilson & Lafleur, 2010.

Morin, Fernand, et Rodrigue Blouin, avec la collaboration de Jean-Yves Brière et Jean-Pierre Villaggi. *Droit de l'arbitrage de grief*, 6<sup>e</sup> éd. Cowansville, Qué.: Yvon Blais, 2012.

Quebec. Ministère de l'Éducation, du Loisir et du Sport. *Verification of Judicial Records: Information Guide for School Boards and Private Schools in Québec*. Québec: The Ministère, 2011.

Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4<sup>e</sup> éd. Cowansville, Qué.: Yvon Blais, 2008.

APPEAL from a judgment of the Quebec Court of Appeal (Bich, Gagnon and Savard JJ.A.), 2014 QCCA 591, 69 Admin. L.R. (5th) 95, [2014] AZ-51056975, [2014] J.Q. n<sup>o</sup> 2352 (QL), 2014 CarswellQue 2355 (WL Can.), setting aside a decision of Delorme J., 2012 QCCS 248, [2012] AZ-50826061, [2012] J.Q. n<sup>o</sup> 621 (QL), 2012 CarswellQue 774 (WL Can.). Appeal dismissed.

*Yann Bernard, René Paquette, Geneviève Beaudin and Kassandra Church*, for the appellants.

*Justine Dauphinais-Sauvé and Audrey Limoges-Gobeil*, for the respondent Syndicat de l'enseignement de la région de Laval.

*Stéphane Forest and Gaétan Lévesque*, for the respondent Fédération autonome de l'enseignement.

*Claudine Morin, Nathalie Léger and Amy Nguyen*, for the intervener.

English version of the judgment of McLachlin C.J. and Abella, Karakatsanis and Gascon JJ. delivered by

GASCON J. —

I. Introduction

[1] Any employee, whether in the public or the private sector, has a right to contest disciplinary action taken against him or her and can, in doing so, raise any relevant evidence. For this, the employee may examine the employer's representatives on the reasons for the action and on the decision-making process that led to it.

[2] However, public law immunities protect decisions of an adjudicative, legislative, regulatory, policy or purely discretionary nature made by public bodies. As a result, there are sometimes limits on the right to examine members of the decision-making authorities of such bodies on the considerations on which their decisions are based.

[3] The interplay of these rights and immunities can lead to conflict. This appeal involves one such conflict. At issue is the right of a public body's employee to examine members of a decision-making authority of his or her employer on the motives for their decision to dismiss the employee after deliberations held in camera.

[4] The respondent Syndicat de l'enseignement de la région de Laval ("Union") filed a grievance with respect to the dismissal of a teacher. In the course of the inquiry into the grievance, the appellant Commission scolaire de Laval ("Board") objected to the examination of three commissioners who were members of its executive committee, which had decided in camera to dismiss the teacher. In the Board's view, the motives of individual members of a collective body that underlie a decision thus made by the body by way of a resolution are "unknowable", and therefore irrelevant. In addition, the executive committee's members were shielded by deliberative secrecy from being compelled to testify regarding their in camera deliberations.

[5] The arbitrator dismissed the Board's objections and allowed the examination of the executive committee's members regarding their deliberations and their decision to dismiss the teacher. On a motion for judicial review, the Superior Court quashed the arbitrator's decision and barred any testimony by members of the executive committee except as regards the formal process that led to their decision that was announced at a public meeting. The majority of the Court of Appeal restored the arbitrator's decision and allowed the examination of the executive committee's members, subject to the usual limits of what is relevant.

[6] I would dismiss the appeal. The principle that the motives of a legislative body are "unknowable" and deliberative secrecy do not apply to a public employer, the Board in this case, that decides to take disciplinary action against an employee, even if an in camera meeting is ordered. The three members of the Board's executive



committee can be examined, subject to the limits of what is relevant and to the other rules applicable to the inquiry into the grievance. The arbitrator has exclusive jurisdiction to determine whether any questions that may be asked are relevant.

## II. Facts

[7] The Board is a legal person established in the public interest under the *Education Act*, CQLR, c. I-13.3 (“*EA*”). The Union, which is certified under the *Labour Code*, CQLR, c. C-27 (“*L.C.*”), represents a number of the Board’s employees, including B, a vocational training instructor employed by the Board since March 2000.

[8] In the winter of 2009, B’s principal asked him to send a declaration concerning his judicial record to the Board’s human resources unit. As a result of amendments made to the *EA* in 2006 (S.Q. 2006, c. 16), a school board must “ensure” that “persons who work with minor students and persons who are regularly in contact with minor students . . . have no judicial record relevant to their functions within that . . . board” (s. 261.0.2). The *EA* provides for a mechanism enabling the board to require a job applicant or an employee to send it a declaration concerning his or her judicial record (ss. 261.0.1 to 261.0.6). Where a school board notes that a person holding a teaching licence has a record it considers relevant to that person’s functions, it must notably inform the Minister of that fact (s. 261.0.7), and the Minister may refuse to renew the licence or may suspend or revoke it or attach conditions to it (s. 34.3).

[9] The *EA*'s scheme for verifying records provides an exception for an offence for which a "pardon" has been obtained (s. 34.3 para. 1(1) and s. 258.1 para. 1(1)). The *EA* thus reflects the protection provided for in s. 18.2 of the Quebec *Charter of human rights and freedoms*, CQLR, c. C-12 ("*Quebec Charter*"):

**18.2.** No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

[10] The word "pardon" as used in s. 18.2 of the *Quebec Charter* includes the "pardon" provided for at the time in the *Criminal Records Act*, R.S.C. 1985, c. C-47 ("*CRA*"): *Montréal (City) v. Québec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698, at para. 14. Moreover, as is authorized by s. 258.4 *EA*, the Minister prepared a guide entitled *Verification of Judicial Records: Information Guide for School Boards and Private Schools in Québec* (2011), to which the appellants refer in their factum. This guide deals, among other subjects, with pardons (p. 13). Thus, under the *EA*, a teacher who obtained a pardon under the *CRA* is exempted from application of the provisions on the verification of judicial records and on notifying the Minister of the existence of such a record.

[11] In March 2009, in response to his principal's request, B indicated that he had been convicted of possession of a prohibited weapon in March 1980, possession of narcotics for the purpose of trafficking in December 1980 and July 1995, and

possession of proceeds of crime in June 1996. It is also alleged that B informed the Board's human resources unit that he had applied for a pardon under the *CRA* and that he expected to obtain one in about June 2009. Moreover, the Union submitted that the principal of the training centre at which B taught had been aware of B's record on hiring him nine years earlier.

[12] After examining the declaration with respect to B's judicial record, the director of the human resources unit expressed the opinion that B's record was relevant to his functions as a teacher. A review committee reached the same conclusion. Under the *EA* (s. 261.0.3), however, the final decision on whether an employee's record is relevant to his or her functions must be made by the Board's authorities, that is, by its council of commissioners or its executive committee (ss. 143 and 179).

[13] On June 29, 2009, B was summoned to attend a special meeting of the Board's executive committee. The committee had to determine whether B's judicial record was relevant to his functions and, if it was, decide whether to resiliate his employment contract. B attended the meeting with a union representative. After hearing B in a [TRANSLATION] "partially in camera meeting" (from which the public was excluded), the executive committee ordered a "totally in camera meeting" (from which the teacher and his representative were excluded) in order to deliberate. Upon completion of these two in camera meetings that lasted a total of 27 minutes, the

committee, sitting in public once again, proceeded to adopt resolution No. 238, which terminated B's employment contract.

[14] This resolution listed the offences of which B had been convicted, noted [TRANSLATION] "the provisions of the [EA] concerning judicial records of persons who work with minors" and mentioned the recommendations of the human resources unit and the director general that B's record was relevant to his functions. The executive committee unanimously decided that "the employment relationship between the teacher [B] and the Board [is] resiliated as of this day on the ground of incapacity". In the Board's view, the fact that a teacher has a judicial record that is relevant to his or her functions makes the teacher legally incapable of performing those functions.

[15] On July 2, the Union filed a grievance on B's behalf to contest his dismissal. It alleged that [TRANSLATION] "[t]he procedure for dismissal provided for in the collective agreement was not followed" and that "[t]he board has contravened . . . the [EA] and the Quebec Charter". The Board and the Union are bound by both provincial and local collective agreements. The local agreement provides that the Board may dismiss a teacher for one of the following reasons only: [TRANSLATION] ". . . incapacity, failure to discharge his or her duties, insubordination, misconduct or immorality" (clause 5-7.02). It adds that the employment relationship may be terminated "only after thorough deliberations at a meeting of the board's council of commissioners or executive committee called for that purpose" (clause 5-7.06).

[16] On July 3, the day after the grievance was filed and four days after the employment relationship was terminated, the National Parole Board granted B a pardon under the *CRA*.

[17] The inquiry into the grievance began before arbitrator Jacques Doré on May 12, 2010 and on November 3 and 24 of that same year. After the Board had completed its evidence, the Union began its own by summoning as its first witnesses three members of the executive committee who had been present for the in camera deliberations of June 29, 2009. The Board objected to having them testify, arguing that the motives of individual members of the committee were irrelevant and that deliberative secrecy shielded the members from being examined on what had been said in camera. It asked the arbitrator to limit the scope of the three members' testimony such that they would not be questioned about the in camera deliberations. The Union countered that this testimony would be relevant, admissible and necessary, given that it intended to [TRANSLATION] “contes[t] both the procedure followed and the ground relied on by the employer”. The respondent Fédération autonome de l'enseignement (“FAE”) intervened in support of the Union's position. The appellant Fédération des commissions scolaires du Québec (“FCSQ”) also intervened, asking that the summonses be quashed.

### III. Judicial History

#### A. *Arbitrator's Interlocutory Decision*

[18] The arbitrator rejected the arguments of the Board and the FCSQ and allowed the examination of the members of the executive committee on what had been said in camera. In order to determine in particular whether the committee's deliberations had been [TRANSLATION] "thorough" as required by the collective agreement, he considered it necessary to know their substance, including what had [TRANSLATION] "happened in camera in terms of the information transmitted orally and in writing in the discussions between the members, as well as any objections that were raised, etc." (para. 17). This was especially true given his observation that according to the parties' submissions, the "thorough deliberations" had taken place in camera (para. 14). He noted that "[t]he adjective 'thorough' was not added by the parties to the agreement solely to 'make things look nice'", that it "means something" and that it "adds a dimension to the deliberations" (para. 16).

[19] In the arbitrator's opinion, the fact that a body deliberates in camera does not necessarily mean that it benefits from deliberative secrecy. As well, the fact that the executive committee can decide unilaterally to sit in camera should not enable its members to shield themselves from scrutiny by a grievance arbitrator (paras. 18-21). However, he said that he would be prepared to hear the testimony of the executive committee's members in camera, if he received a request to that effect, to ensure that they would be able to speak as freely as in their deliberations (para. 22).

B. *Quebec Superior Court (2012 QCCS 248)*

[20] Delorme J., hearing a motion for judicial review of the arbitrator's interlocutory decision, found that the application of deliberative secrecy is a [TRANSLATION] "question of law that is outside the arbitrator's particular area of expertise and is of interest to all school boards" (para. 19 (CanLII)). He accordingly applied the standard of review of correctness (paras. 17-21).

[21] Delorme J. cited *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, to the effect that deliberative secrecy is the rule for administrative tribunals, but that it can be lifted if a litigant presents valid reasons for believing that the tribunal's process was tainted by procedural errors (paras. 27-28 and 31). He added that this Court had held in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, that the intentions of members of a municipal council are irrelevant to the determination of whether a resolution adopted by the council is valid. In Delorme J.'s opinion, these principles apply to a school board's decision to resiliate an employment contract (paras. 30-31). He found that the executive committee's decision to deliberate in camera had rendered its deliberations confidential, adding that, although the committee is not required to hold its meetings in public, it has provided in its rules of procedure that they are to be open to the public [TRANSLATION] "unless it decides otherwise" (para. 24). Because the committee chose to deliberate in camera pursuant to its rules of procedure, that choice must be respected (para. 26).

[22] Delorme J. concluded that the examination could not concern [TRANSLATION] “the underlying reasons or the development of those reasons in the minds of the executive committee’s members” (para. 44). The latter could be compelled to testify only about the “formal process that led to the decision made in the public meeting” (*ibid.*).

C. *Quebec Court of Appeal (2014 QCCA 591, 69 Admin. L.R. (5th) 95)*

[23] The majority of the Court of Appeal, per Bich J.A., allowed the appeals of the Union and the FAE and restored the arbitrator’s interlocutory decision. They, like Delorme J., applied the standard of correctness. In their view, the principle that motives are “unknowable” and deliberative secrecy, on which the Board and the FCSQ relied, are questions of central importance to the legal system as a whole that are outside the arbitrator’s specialized area of expertise and require a uniform and consistent answer to ensure legal order (paras. 39-53).

[24] This being said, Bich J.A. held in light of *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that a decision with respect to employment, and more specifically with respect to dismissal, made by a public body falls under employment law, whether individual or collective, and not under public law (para. 76). In her opinion, the rule from *Clearwater* does not apply in the case at bar. According to that rule, which is merely a restatement of the principle of relevance, the motives of the members of a public body’s decision-making authority in performing functions of a legislative, regulatory,



policy or purely discretionary nature are irrelevant to the determination of whether a decision made in such a context is valid (para. 89). However, the Board is not performing such functions in deciding, as in B's case, to dismiss an employee (para. 92).

[25] Furthermore, Bich J.A. held that deliberative secrecy does not apply in the instant case, since the executive committee is not an authority that performs adjudicative functions (para. 124). Also, the fact that the executive committee decided unilaterally to meet in camera is not in itself sufficient to shield its members from being compellable (paras. 102-19).

[26] Bich J.A. noted that the rule of relevance is of general application, including in a proceeding before a grievance arbitrator (para. 59). It is settled law that [TRANSLATION] "the circumstances of and grounds for" a dismissal are relevant to a challenge to the dismissal (paras. 64 and 67). Moreover, clause 5-7.13 of the local collective agreement gives the arbitrator a very broad power to examine the dismissal "from every angle, having regard both to procedure and to substance" (para. 129). This does not, in Bich J.A.'s view, mean "that there are no limits to the questions that can be put to the commissioners who have been summoned" (para. 142). What each decision maker thought at each minute of the deliberations will undoubtedly not be relevant. But it is the arbitrator who must decide whether particular questions are relevant and will further the inquiry into the grievance (para. 143). Bich J.A. noted that if an appellate court were to determine the exact meaning of the expression

“thorough deliberations”, it would usurp the grievance arbitrator’s exclusive jurisdiction to interpret the collective agreement (para. 133).

[27] Gagnon J.A., dissenting, would have dismissed the appeals and affirmed Delorme J.’s judgment. Unlike Delorme J., however, he would have quashed the summonses of the executive committee’s members rather than limiting their testimony to the formal process (para. 214). Applying the standard of correctness, Gagnon J.A. concluded that *Clearwater* applies to the decisions of any public collective decision maker, whether acting in a private or public capacity, provided that the communicated decision officially expresses the public body’s will (paras. 172-73). Resolution No. 238 of the Board’s executive committee is one such decision. It speaks for itself and sets out the grounds for dismissal (paras. 177-79). Thus, although the executive committee’s members are in principle compellable (para. 152), given the absence of any allegation of bad faith, examining them would be irrelevant to the determination of whether the dismissal was valid (paras. 174 and 180).

[28] Gagnon J.A. stressed that the employer is not required to show that the deliberations leading up to the adoption of a resolution for dismissal were adequate (para. 162). In his view, the expression “thorough deliberations” is not [TRANSLATION] “a formal qualitative standard” that will, if it is not met, cause a dismissal to be invalid (para. 188). At any rate, he observed, it can be seen from the evidence that the decision to dismiss “was not made lightly” (para. 206).

#### IV. Issues

[29] The central issue of the appeal is whether the Union may examine the three commissioners, members of the Board’s executive committee, and what the scope of such examinations would be. It will require the Court to determine whether the principle that the motives of a legislative body are “unknowable” and deliberative secrecy are applicable to the facts of this case. It will also be necessary to establish, if the examinations are allowed, what limits will apply to them as a result of the rule of relevance. Before doing this, I must begin by identifying the standard of review that applies to the arbitrator’s decision.

#### V. Analysis

##### A. *Standard of Review*

[30] Unlike the judges of the Court of Appeal and the Superior Court, I find that the standard applicable to the arbitrator’s interlocutory decision is reasonableness. Whether the examination of the members of the Board’s executive committee should be allowed is ultimately an evidentiary issue. The arbitrator has exclusive jurisdiction over such matters. In my opinion, a desire, like that of the appellants, to attribute an excessive scope to this Court’s decisions in *Clearwater* and *Tremblay* does not transform this determination into a question of law that is of central importance to the legal system and is outside the arbitrator’s area of expertise, such that the standard of correctness should apply.

[31] By virtue of the powers conferred on him or her by s. 100.2 *L.C.*, a grievance arbitrator has full authority and exclusive jurisdiction over evidence and procedure in the arbitration process: *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, at pp. 487 and 491. In disciplinary matters, the arbitrator has jurisdiction to rule both on the procedure followed and on the substance of the impugned measure: s. 100.12(f) *L.C.*; F. Morin and R. Blouin, with J.-Y. Brière and J.-P. Villaggi, *Droit de l'arbitrage de grief* (6<sup>th</sup> ed. 2012), at pp. 587-88; D. J. M. Brown and D. M. Beatty, with C. E. Deacon, *Canadian Labour Arbitration* (4<sup>th</sup> ed. (loose-leaf)), at pp. 7-162 to 7-163. He or she also has exclusive jurisdiction to interpret the collective agreement between the parties: ss. 100 and 1(f) *L.C.*; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paras. 50 and 58; *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, at p. 552. The arbitrator in the instant case was asked to interpret, in particular, the expression [TRANSLATION] “thorough deliberations” used in clause 5-7.06 of the agreement between the Board and the Union. In his decision, he concluded that he would have to hear the testimony of the executive committee’s members in order to determine whether clauses 5-7.02 and 5-7.06 of that agreement had been complied with when B was dismissed. Clause 5.7.13 provides that he “may annul the . . . decision if the prescribed procedure was not followed or if the grounds for dismissal were unfounded or did not constitute a sufficient basis for dismissal”.

[32] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the Court stated that when an

administrative tribunal interprets or applies its home statute, there is a presumption that the standard of review applicable to its decision is reasonableness (paras. 39 and 41; see also *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 et 28; *Dunsmuir*, at para. 54). That presumption applies in the case at bar. The arbitrator’s decision to allow the Union to examine the executive committee’s members was based on his conclusion that their testimony would be helpful to him in determining whether the collective agreement and the legislation had been complied with. This conclusion flowed from his interpretation of the local agreement between the parties and of the *EA*. His home statute, the *Labour Code*, provides that an arbitrator may “interpret and apply any Act or regulation to the extent necessary to settle a grievance” (s. 100.12(a)). The Court has held that a reviewing court owes the greatest possible deference to an interpretation of provisions of the *EA* by a grievance arbitrator in an educational setting: *Syndicat de l’enseignement du Grand-Portage v. Morency*, 2000 SCC 62, [2000] 2 S.C.R. 913, at para. 1.

[33] The presumption is reinforced by the fact that the Court has held that the usual standard for judicial review of decisions of grievance arbitrators is reasonableness: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 7; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 8; *Dunsmuir*, at

para. 68. The Court added in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, that this standard is equally appropriate where the arbitrator applies or adapts, for example, common law and equitable doctrines that emanate from the courts: paras. 5-6, 31 and 44-45. This is because the grievance arbitrator is part of a discrete and special administrative scheme under which the decision maker has specialized expertise. In Quebec, moreover, the grievance arbitrator is protected by general full privative clauses (ss. 139, 139.1 and 140 *L.C.*; *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323, at para. 89).

[34] The presumption from *Alberta Teachers* has not been rebutted in the instant case. The issues in this case are not included in the narrow class of issues identified in *Dunsmuir* for which the applicable standard is correctness. As the Court explained in *Dunsmuir*, that standard can apply to questions of law that are of central importance to the legal system as a whole and are outside the decision maker's area of expertise (paras. 55 and 60). Such questions must sometimes be dealt with uniformly by courts and administrative tribunals "[b]ecause of their impact on the administration of justice as a whole" (para. 60). However, questions of this nature are rare and tend to be limited to situations that are detrimental to "consistency in the fundamental legal order of our country" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471

(“*Mowat*”), at para. 22; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paras. 26-27; see also *Dunsmuir*, at para. 55).

[35] Bich J.A. maintained that the questions related to the principle that motives are “unknowable” and deliberative secrecy are of central importance to the legal system because they concern [TRANSLATION] “all decisions made by public (or even private) bodies that act through collective decision-making authorities” (para. 49). In her opinion, they are questions that could be raised not only before arbitrators or administrative tribunals, but also in any court of law. She stressed that these questions do not form part of “the arbitrator’s specialized area of adjudicative expertise” (para. 51). With respect, this characterization seems to disregard what the appellants are actually asking for and what the arbitrator ultimately decided.

[36] The arbitrator was asked, in the context of his interpretation of the *Labour Code*, the *EA* and the collective agreement between the parties, to decide on the application of well-known and uncontroversial rules and principles. On the one hand, while it is true that this Court has never applied *Clearwater* to facts like the ones in the case at bar, the scope of that case was clearly defined by Binnie J., who stated that the “rule” in question related to whether the testimony of members of a legislative body would be relevant (para. 45). In their respective reasons, both Delorme J. (at para. 29) and Bich J.A. (at para. 46) referred to “relevance” to characterize what must be considered as a result of *Clearwater*. Because the arbitrator has full authority over evidence and procedure in an inquiry into a grievance, it is up to the arbitrator to

apply the rule of relevance to the facts of the case in such a way as he or she deems helpful for the purpose of ruling on the grievance. This is exactly what the arbitrator did in the instant case in concluding that what took place in the executive committee's in camera deliberations was relevant. A reviewing court owes deference to the arbitrator's decision. Moreover, the appellants themselves recognize in this Court that their arguments against allowing the commissioners to be called to testify about those deliberations are based on the question whether that testimony would be relevant. With this in mind, applying the standard of correctness cannot be justified.

[37] On the other hand, as regards deliberative secrecy, its scope is well known. The appellants are not asking that this scope be expanded. Bich J.A. agreed on this point when she wrote that the appellants [TRANSLATION] "... are employing a concept here that does not apply in the circumstances" (para. 123). As a result, all the arbitrator had to do in this regard was to apply a known rule in order to decide whether deliberative secrecy shielded the executive committee's deliberations in the context of B's dismissal. In light of the arbitrator's broad jurisdiction over evidence and procedure, this does not amount to a question of law of central importance that is outside his area of expertise.

[38] Although my colleague Côté J. does not call the reasonableness of the arbitrator's decision into question, she finds that the standard of correctness should apply to it instead. On this point, her concurring reasons stray, in my humble opinion, from the Court's decisions in *Nor-Man*, *Alberta Teachers* and *Dunsmuir*, among



others. The questions of evidence and procedure that arise here with respect to the principle that motives are “unknowable” and to deliberative secrecy in the context of an employer’s collective decision-making authority are not outside the arbitrator’s area of expertise. Nor does the application of that principle and of deliberative secrecy to a fact situation characteristic of a dismissal amount to a question that is detrimental to consistency in the country’s fundamental legal order. Once this is established, maintaining that the concepts at issue do not fall solely within the arbitrator’s expertise in the area or jurisdiction over the matter (paras. 82 and 84 of my colleague’s reasons), or that one of them is a general principle of law that applies to other legal fields (para. 82 of her reasons), is not in my opinion enough to justify dispensing with the deferential standard that is required in such a case: *Nor-Man*, at para. 55, citing the majority in *Smith*, at para. 26, and *Dunsmuir*, at para. 60; *Mowat*, at para. 23.

[39] In the instant case, in light of the information available to him at the time of the summonses, and of the content of the collective agreement and the applicable legislation, the arbitrator allowed the examination of the members of the Board’s executive committee in the grievance proceeding before him. It is this decision that is at issue in the judicial review proceedings, and it was reasonable. The reasons for the arbitrator’s decision are transparent and intelligible, and the justification given for it is sufficient; it falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para. 47). Neither the argument that the motives were “unknowable” nor that of deliberative secrecy, on

which the appellants rely, counters this conclusion. At this point, all the arbitrator has done is to allow the examination of the members of the executive committee to begin. He has not yet ruled on the relevance of specific questions, as none had been asked yet when the Board objected to the witnesses being called.

B. *Motives are “Unknowable”*

[40] The appellants submit that the arbitrator erred in not applying the principle that motives are “unknowable” when he allowed the examination of the executive committee’s members. In the appellants’ opinion, the Court held in *Clearwater* that a rule to this effect applies to any collective decision-making body that makes a decision in writing. The motives of such a body are never relevant to a review by a court, arbitrator or administrative tribunal of the validity of an impugned decision. Thus, the appellants argue, because the Board’s executive committee recorded the result of its decision-making process in a resolution, that resolution sets out everything that is needed to explain the decision to dismiss teacher B. The motives of the individual committee members are not relevant, as the resolution is proof of its content.

[41] To the appellants, the principle that motives are “unknowable” must apply to every public body, regardless of whether its acts are public or private in nature, as well as to every private body. The sole criterion for finding that the motives of such a body are “unknowable” is the requirement that it act collectively and speak

by way of a resolution or other official document, such that the decision is made by no individual member.

[42] In my opinion, the appellants are wrong. Their argument attributes an excessive scope to *Clearwater*. It was reasonable for the arbitrator to choose not to apply that case to the decision of the Board's executive committee to dismiss its teacher.

[43] In *Clearwater*, a land developer was contesting the validity (in the sense of legality or *vires*) of a resolution adopted by a municipal council. The developer wanted to show that the council had acted unlawfully in authorizing, by way of resolution, a judicial inquiry into transactions involving the developer. To prove this, it sought to summon as witnesses certain members of the municipal council who had voted for the resolution.

[44] This Court rejected this attempt to summon the municipal council members. In the key passage quoted by the appellants, Binnie J. wrote the following:

The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the [power under s.100 of its enabling legislation] and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by . . . a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to

interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications . . . . [Emphasis added; para. 45.]

[45] It is true that *Clearwater* concerned the relevance of a legislative body's motives and that, in that case, the summonses were quashed on the basis that they were not relevant. But it is wrong to say that *Clearwater* established a rule of relevance that applies to every collective decision made by a decision-making body by means of an official document regardless of the nature of the decision or of the body making it. Rather, the "unknowable" motives in question are those that led a legislative body to adopt provisions of a legislative nature, that is, to carry out acts of a public nature. There is nothing in Binnie J.'s analysis to support extending his conclusion respecting irrelevance in the manner suggested by the appellants.

[46] In *Clearwater*, Binnie J. relied, *inter alia*, on *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, noting that "[t]his case provides a good illustration of why the rule in *Thorne's Hardware* . . . is salutary" (para. 44). However, the claim in *Thorne's Hardware* had been that an order in council made by the Governor in Council that extended the limits of a port was unlawful and discriminatory. The parties contesting the decision wished to adduce the Governor in Council's motives in evidence. Dickson J. (as he then was) wrote that "[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings" (p. 111). Because of this, "[i]t is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the

[impugned] Order in Council” (*Thorne’s Hardware*, at p.112). Given that the Governor in Council’s decision was purely one of policy and was discretionary in nature, the motives behind it were not relevant to the determination of whether it was lawful. In that case, too, whether the motives of the body that had made the decision were relevant depended on the nature of the decision itself.

[47] In my opinion, Bich J.A. was right that the rule from *Clearwater*, to the extent that it can in fact be regarded as distinct from the simple rule of relevance, applies only to decisions of a legislative, regulatory, policy or purely discretionary nature made by public bodies (para. 95). In other words, it applies to decisions made by a public body when it carries out acts of a public nature. In the case at bar, the executive committee’s decision was made in a completely different context. Resolution No. 238 concerned a decision to dismiss one of the Board’s teachers under the procedure provided for in the collective agreement.

[48] In *Dunsmuir*, this Court held that in the context of an employment contract, the dismissal of a public sector employee is as a general rule governed by the law of contracts and employment law, and not by public law principles. Bastarache and LeBel JJ., writing for the majority, stated that “the existence of a contract of employment, not the public employee’s status as an office holder, is the crucial consideration” (para. 102). Thus, where a contractual relationship exists between an employee and a public employer, “disputes relating to dismissal should be

resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations” (para. 113).

[49] In that case, the Court relied on its earlier decision in *Wells*, in which it had rejected the argument that the principles of public law (namely those of administrative law) are applicable to a dispute concerning the employment of a public servant:

While the terms and conditions of the contract may be dictated, in whole or in part, by statute, the employment relationship remains a contract in substance and the general law of contract will apply unless specifically superseded by explicit terms in the statute or the agreement. [para. 30]

Since *Wells*, it is established that the principles of contract law are presumed to apply to the majority of public sector jobs, the exception being where there is an express statutory provision to the contrary: P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 336. The Court held that this rule applied in a context in which “[t]he majority of civil servants . . . are unionized and employed under collective agreements which define the terms of their work as well as the Crown’s obligations towards them” (*Wells*, at para. 23; Hogg, Monahan and Wright, at p. 336). The fact that relationships between employees and public employers are often governed by collective agreements has no impact on the application of the conclusions reached by the Court in *Dunsmuir*.

[50] In the instant case, even though the Board is a legal person established in the public interest under the *EA*, it was acting as an employer when it decided to dismiss teacher B by way of a resolution of its executive committee. That decision had an effect on the employment contract between B and the Board and was made in the context of a process provided for in the collective agreement between the parties. It was not a decision of a legislative, regulatory, policy or discretionary nature. Rather, it was made in the context of the very type of contractual relationship that was at issue in *Dunsmuir* and *Wells*. In reviewing such a decision, a grievance arbitrator applies the principles of employment law that are applicable to any dismissal. As a result, this case is clearly distinguishable from *Clearwater*. A rule of relevance based on the public nature of an impugned decision does not apply here.

[51] This conclusion is further strengthened by the appellants' acknowledgment that the executive committee's members can at the very least be compelled to testify on certain aspects of the in camera deliberations and on the grounds for the dismissal. They conceded at the hearing before us that the Union can, among other things, ask the members if, in their deliberations, they considered the possibility of B's being pardoned or if they thought that the *EA* requires an automatic dismissal as soon as the executive committee concludes that an employee's judicial record is relevant to his or her functions. This concession is poles apart from Binnie J.'s conclusion in *Clearwater* that the members of the municipal council could in no way be called to testify on the motives behind their decision to adopt a resolution.

[52] Furthermore, it is quite hard to distinguish questions concerning the process that led to a decision from questions concerning the motives behind the decision. A single question could be useful for determining both whether the process was lawful and whether the disciplinary sanction satisfies the substantive requirements provided for in the collective agreement and in labour legislation. For example, the question whether the members of the executive committee considered the existence of B's application for a pardon might be relevant to the assessment of the process followed by the committee. The same question might also be relevant to the assessment of the validity of the committee's substantive decision.

[53] This leads me to conclude that it was reasonable for the arbitrator to rule that he needed to know what had taken place in camera in order to determine whether the executive committee's deliberations had been thorough. His decision on this point was consistent with those of several grievance arbitrators who had in the past allowed the examination of school board officials regarding in camera deliberations in disciplinary matters: *Syndicat des professionnelles et professionnels de l'éducation du Bas-St-Laurent v. Commission scolaire des Monts-et-Marées* (2006), S.A.E. 7953, 54 R.S.E. 481, at paras. 59-60 and 66-69; *Syndicat des enseignantes et enseignants de Le Royer v. Commission scolaire de la Pointe-de-l'Île* (2000), S.A.E. 7006, 47 R.S.E. 1049, at pp. 1051-52; *Syndicat des travailleuses et travailleurs de l'enseignement de Portneuf C.E.Q. v. Commission scolaire de Portneuf* (1988), S.A.E. 4674, 35 R.S.E. 1722; *Association des enseignants de Le Royer v. Commission scolaire régionale Le*



*Royer* (1975), S.A.E. 513, 6 R.S.E. 43, at p. 45. Given the recognized jurisdiction of arbitrators over evidence and procedure, deference must be shown.

[54] The other decisions cited by the appellants in support of their argument that the executive committee's motives are "unknowable" are of no assistance to them. In *Duke of Buccleuch v. Metropolitan Board of Works* (1872), L.R. 5 H.L. 418, the House of Lords ruled on an action for enforcement of an arbitral award in which one of the parties was trying to summon the arbitrator himself to testify. Similar situations were considered in *O'Rourke v. Commissioner for Railways* (1890), 15 App. Cas. 371, *Ward v. Shell-Mex*, [1952] 1 K.B. 280; and *Re Knight Lumber Co.* (1959), 22 D.L.R. (2d) 92 (B.C.S.C.). All these cases involved adjudicative decisions in which the decision makers' motives were not allowed to be adduced in evidence, not because they were irrelevant, but on the basis of deliberative secrecy.

[55] Finally, extending the conclusions reached by this Court in *Clearwater* to every decision made by a public or private collective decision-making body, as the appellants propose, would have unfortunate consequences in spheres that are unrelated to the context of the instant case. In the appellants' submission, *Clearwater* would apply not only to public bodies like school boards, but also to Crown corporations, all of which make their decisions known through resolutions adopted collectively by their decision-making authorities. And the same rule would apply to private corporations that operate in the same way. If that were the case, the makers of a wide range of decisions made collectively would be shielded from ever testifying

about their motives or their deliberations, even in cases in which such testimony would be of particular relevance to the dispute. It would not be desirable to attribute such a scope and such effects to the reasons of narrow scope given by Binnie J. in *Clearwater*.

C. *Deliberative Secrecy*

[56] The appellants' other argument regarding deliberative secrecy is no more persuasive. Once again, I find that it was reasonable for the arbitrator to reject this argument. It is wrong to say that the members of the executive committee are shielded by deliberative secrecy here and that they cannot be called to testify about their deliberations during the "total" in camera portion of the meeting of June 29, 2009.

[57] The scope of deliberative secrecy is clearly defined in the case law. In *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, the Court, per McLachlin J. (as she then was), stressed that the protection of the process by which judges reach their decisions is a core component of the constitutional principle of judicial independence:

The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence . . . . As stated by Dickson C.J. in *Beauregard v. Canada*, [[1986] 2 S.C.R. 56,] the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to

explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence. [Emphasis added; pp. 830-31.]

The need to shield the judicial decision-making process from review by the other branches of government flows from the principle of separation of powers that is reflected in the constitutional requirement of judicial independence.

[58] It is true that, as the appellants point out, the Court has held, since its decision in *MacKeigan*, that deliberative secrecy also protects the deliberations of administrative tribunals (*Tremblay*, at p. 966). For such decision makers, however, the protection is not watertight. Although secrecy remains the rule, it can be lifted, for example, “when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice” (*Tremblay*, at p. 966). Nonetheless, in the absence of procedural defects, deliberative secrecy continues to shield such decision makers from having to testify if their decisions are contested.

[59] The appellants argue on the basis of *Tremblay* that this principle resolves the question whether the members of the executive committee must testify. Because its members were officers of the Board, a public body that holds its powers and makes its decisions under the *EA*, the committee must, the appellants submit, be considered to be one of the administrative decision-making authorities to which *Tremblay* applies. In the appellants’ submission, given that the Union has made no

allegation of bad faith or of a procedural defect, deliberative secrecy should not be lifted to allow the members to be examined about their in camera deliberations.

[60] I disagree. *Tremblay* does not apply to every administrative organization required to perform [TRANSLATION] “decision-making functions”, to borrow the expression the appellants use to characterize a type of administrative act that is not limited to adjudicative functions (A.F., at para. 108). Once again, *Tremblay* is clear and does not have the scope the appellants seek to attribute to it. That case concerns the deliberative secrecy that applies to administrative tribunals, that is, to bodies that perform adjudicative functions. Moreover, the cases the appellants cite to illustrate the application of deliberative secrecy support this view. In *Duke of Buccleuch, O'Rourke, Ward and Knight Lumber*, the arbitrators and administrative tribunal members the parties wished to call to testify had exercised powers of an adjudicative nature. The same is true of *Noble China Inc. v. Lei* (1998), 42 O.R. (3d) 69, in which the Ontario Court (General Division) held that the deliberations of an arbitrator in a commercial arbitration process were protected by deliberative secrecy as a result of *Tremblay*. Deliberative secrecy was also found to apply to deliberations of administrative tribunals performing adjudicative functions in *Comité de révision de l'aide juridique v. Denis*, 2007 QCCA 126, and *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37, 253 N.S.R. (2d) 134.

[61] But when the executive committee decided to dismiss B after deliberating in camera, it was not performing an adjudicative function and was not acting as a

quasi-judicial decision maker. Rather, it was acting as an employer dismissing an employee. Its decision was therefore one of a private nature that falls under employment law, not one of a public nature to which the constitutional principles of judicial independence and separation of powers would apply. No valid analogy can be drawn between the administrative tribunal in *Tremblay*, whose quasi-judicial decision was final and could not be appealed, and the decision-making authority of a public employer — even where the authority in question is the employer’s executive committee — that decides to resiliate an employee’s employment contract.

[62] I am also unable to accept the appellants’ argument that, because the executive committee was applying a statutory rule (namely the Board’s obligation to ensure that the teacher had no judicial record relevant to his functions), its decision was adjudicative in nature. An employer’s decision to dismiss an employee cannot be characterized as adjudicative merely because the employer is required to apply statutory rules. The dismissal of teacher B resulted from the exercise of the Board’s right of management. This right is defined by the *Labour Code*, the *EA* and the collective agreement. The dismissal did not result simply from the application of substantive rules provided for in the *EA* to the facts found by the executive committee, as is the case with adjudicative decisions (*Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 504).

[63] Furthermore, to hold that the application of deliberative secrecy depends on whether the executive committee applied statutory provisions in deciding whether

to dismiss a teacher would lead to absurd results. According to this reasoning, if the executive committee dismissed a teacher for theft, a dismissal that would not involve the provisions of the *EA*, its in camera deliberations would not be protected by deliberative secrecy. Yet its decision would be of the same nature as the one made in this case. Moreover, if every decision to dismiss an employee were considered to be an adjudicative decision, the only remedy available to the employee would be to go straight to a motion for judicial review. But in the context of a collective agreement, the way to contest a dismissal is obviously to instead file a grievance under the *Labour Code* (ss. 100 et seq.).

[64] Finally, I note that the appellants have acknowledged that holding a meeting in camera is optional and may be imposed at the sole discretion of the executive committee. The rules of procedure for the meetings of the Board's executive committee provide that deliberations held in public are the rule and those held in camera the exception (art. 8). According to the appellants' submissions, deliberative secrecy shields only in camera deliberations from examination. This argument, too, leads to a strange result. The members of the executive committee could thus choose whether or not they can be compelled to testify about their deliberations. To give a party the possibility of shielding its deliberations from judicial review as it sees fit would not be desirable. The consequence of accepting this argument is that the application of deliberative secrecy would become optional despite the fact that it is an imperative rule that flows from the constitutional principle of the separation of powers: H. Brun, G. Tremblay and E. Brouillet, *Droit*

*constitutionnel* (6th ed. 2014), at p. 871, citing *Promutuel Dorchester, société mutuelle d'assurance générale v. Ferland*, [2001] R.J.Q. 2882 (Sup. Ct.). Judges cannot of course choose to lift deliberative secrecy to explain the reasoning behind their conclusions whenever it suits them to do so.

[65] In sum, regardless of the perspective from which the appellants' argument on deliberative secrecy is considered, the only possible conclusion is that the executive committee was not performing an adjudicative function when it decided to dismiss teacher B. Rather, it was acting as an employer in the context of a contractual relationship to which the principles of employment law applied. As a result, the discussions held by its members in camera are not shielded by deliberative secrecy. It was reasonable for the arbitrator to reject this argument.

#### D. *Relevance*

[66] The majority of the Court of Appeal were thus right to reject the appellants' arguments regarding the principle that motives are "unknowable" and deliberative secrecy, to restore the impugned decision, and to allow the examination of the executive committee's members, subject to the usual limits of what is relevant. However, an additional question was raised at the hearing in this Court: If the Court reaches this decision, should limits be placed in advance on the questions that may be asked of the executive committee's members? In my opinion, the answer is no.

[67] Assessing the relevance of evidence falls within the exclusive jurisdiction of the arbitrator. In this case, given that the employer applied for judicial review of the interlocutory decision allowing the examination of the executive committee's members, they have yet to be asked any questions. It is not open to a reviewing court to speculate about the types of questions that could be relevant before the examination has even begun. This conclusion is justified both by the arbitrator's powers under the legislation and the collective agreement and by the nature of a grievance arbitration proceeding.

[68] First, s. 100.2 *L.C.* provides that the grievance arbitrator has full authority over evidence and procedure in the arbitration process. The Court has on many occasions reiterated that in a grievance arbitration proceeding, the arbitrator has exclusive jurisdiction over evidence and procedure, which includes the assessment of relevance: *Larocque*, at pp. 485 and 491; *Cie minière Québec Cartier v. Québec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095, at para. 11; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 343-44. It has also stressed the importance of the deference that must be shown to arbitrators in order to preserve the "expeditious, effective and specialized dispute settlement method" represented by grievance arbitration: *Wal-Mart*, at para. 85; see also *Newfoundland and Labrador Nurses' Union*, at paras. 24-25; *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727, at paras. 40-41; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003]



2 S.C.R. 157, at paras. 16 et seq. This deference and maintaining grievance arbitration as an expeditious, effective and specialized process constitute “a basic requirement for peace in industrial relations”: *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 36.

[69] Next, the context in which relevance is assessed includes the fact that in disciplinary matters, the arbitrator has a broad power to replace the sanction imposed by the employer with one he or she deems fair and reasonable having regard to “the circumstances concerning the matter” (s. 100.12(f) *L.C.*). These circumstances might include substantive and procedural issues. Clause 5-7.13 of the collective agreement authorizes the arbitrator to annul the dismissal [TRANSLATION] “if the prescribed procedure was not followed or if the grounds for dismissal were unfounded or did not constitute a sufficient basis for dismissal”. This means that he can consider both the validity and the appropriateness of the dismissal and can also examine the resolution that was adopted and the process that was followed to arrive at its adoption.

[70] Moreover, the grievance filed by the Union concerns the expression [TRANSLATION] “thorough deliberations” found in clause 5-7.06. The arbitrator thus had to consider this provision of the collective agreement, which he was responsible for enforcing, in determining whether the evidence was relevant. The requirement of thorough deliberations where an employee is dismissed can be found in many agreements in Quebec’s education sector. As long ago as 1985, Arbitrator Frumkin noted that this concept had [TRANSLATION] “been considered in a large number of

decisions” by arbitrators: *North Island Laurentian Teachers’ Union v. Commission scolaire Laurenval* (1985), S.A.E. 3964, 33 R.S.E. 1262, at p. 1274. The case law in this regard was summarized in a recent award, in which the arbitrator noted that before dismissing an employee, a school board must [TRANSLATION] “act after careful consideration” and must also “respect the rights of the complainant and his or her Union and . . . act reasonably and responsibly”: *Commission scolaire des Grandes-Seigneuries et Association des professeurs de Lignery (Vishwanee Joyejob)*, 2015 QCTA 663, [2015] AZ-51203453, at para. 493; see also paras. 494-95. In short, grievance arbitrators have been interpreting and applying the concept of thorough deliberations in the education sector for many years, and continue to do so today. It would be inappropriate for a reviewing court to specify as of now what meaning should be given to that expression for the purpose of ruling on the relevance of evidence that has yet to be heard.

[71] Finally, it seems to me self-evident that the nature of arbitration proceedings would be unsuited to an advance assessment of testimony that has not yet been heard. Relevance is established on the basis of the legal framework, the factual context and the circumstances of the particular case: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at p. 854; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at pp. 54-55. Owing to certain features specific to grievance arbitration, the legal framework and factual context often become known only as the proceedings and the examination of witnesses unfold. This is because most decisions that might be grieved, including

decisions to take disciplinary action, are made by the employer, for reasons that it often knows better than the union and the employee: F. Morin *et al.*, *Le droit de l'emploi au Québec* (4th ed. 2010), at pp. 1293 and 1315. To the above must be added the informal nature of the pleadings that lead to arbitration and the absence of applications with detailed allegations that would be available to a court of law to help it determine what is relevant on the basis of the facts alleged in support of a proceeding. In this context, it would be risky to rule in advance on the relevance of evidence that could depend on what will be revealed in the course of the examination of the employer's representatives.

[72] For example, the arbitrator in the case at bar has already mentioned that it would be relevant for the Union to examine the executive committee's members about what [TRANSLATION] "happened in camera in terms of the information transmitted orally and in writing in the discussions between the members, as well as any objections that were raised, etc." (para. 17). Given the broad powers conferred on the arbitrator to consider both the procedure followed and the appropriateness of the substantive disciplinary action, this does not seem, as Bich J.A. rightly observed, to be open to question (paras. 68-69). An employee is clearly entitled to examine and confront those who decided to dismiss him about the circumstances of their decision and the details of the process that led up to it. Likewise, it would be inappropriate to preclude in advance all questions about the motives behind the dismissal. As I have mentioned in para. 51 of these reasons, the appellants have themselves conceded that

certain questions about the in camera deliberations and the grounds for dismissal would be relevant.

[73] Of course, as Bich J.A. rightly points out (at paras. 142-43), this does not amount to an authorization to survey the states of mind of the decision makers to find out how each one's individual thoughts evolved over the course of their deliberations. Nor does it authorize a fishing expedition or redundant examinations of all of them. Indeed, the grievance's legal framework and factual context are clearly identified. It will be up to the arbitrator to take them into account in order to decide what is relevant in this context on the basis of the questions that are eventually asked and to determine which of them really further the resolution of the case. If a court must intervene, it will do so after the arbitrator has ruled on a given point.

[74] In concluding, I must make one final comment. In my humble opinion, it is most unfortunate that, more than six years after filing a grievance with respect to a dismissal, the Union has not yet been able to begin presenting its evidence. The mission of the grievance arbitration system, that is, to provide employers and employees with justice that is accessible, expeditious and effective, has been forgotten. I would note the importance of the sensible rule that, with only a few exceptions, a grievance arbitrator's interlocutory decision, in particular one concerning evidence and procedure, is not subject to judicial review: *Syndicat des salariés de Béton St-Hubert — CSN v. Béton St-Hubert inc.*, 2010 QCCA 2270, at para. 23 (CanLII); *Sûreté du Québec v. Lussier*, [1994] R.D.J. 470 (C.A.); *Collège*

*d'enseignement général et professionnel de Valleyfield v. Gauthier Cashman*, [1984] R.D.J. 385 (C.A.). The courts of several provinces have taken a similar deferential approach to interlocutory decisions of arbitrators: *Lethbridge Regional Police Service v. Lethbridge Police Association*, 2013 ABCA 47, 542 A.R. 252, at para. 21; *Canadian Nuclear Laboratories v. Int'l Union of Operating Engineers, Local 772*, 2015 ONSC 3436, at paras. 5-7 and 11 (CanLII); *Blass v. University of Regina Faculty Assn.*, 2007 SKQB 470, 76 Admin. L.R. (4th) 262, at para. 82. In the instant case, the arbitrator had offered to hear the testimony of the executive committee's members in camera (para. 22). That would in all probability have obviated any risk of consequences that would be impossible to correct at the time of the final award. The lengthy judicial review proceedings at the stage of an interlocutory decision that are now drawing to a close could then have been avoided.

## VI. Disposition

[75] I would therefore dismiss the appeal with costs throughout and remand the case to the arbitrator in order that the inquiry into the grievance may at long last proceed.

English version of the reasons of Wagner, Côté and Brown JJ. delivered by

CÔTÉ J. —

[76] I agree that the appeal should be dismissed. However, I find that the Superior Court and both the majority and the dissenting judges of the Court of Appeal were right to hold that the applicable standard of review in this case is correctness.

[77] My colleague Gascon J. writes that “[w]hether the examination of the members of the Board’s executive committee should be allowed is ultimately an evidentiary issue” and that “a desire, like that of the appellants, to attribute an excessive scope to this Court’s decisions in [*Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3,] and [*Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952,] does not transform this determination into a question of law that is of central importance to the legal system and is outside the arbitrator’s area of expertise, such that the standard of correctness should apply” (para. 30). It is true that the arbitrator has jurisdiction over evidentiary issues and that deference is usually owed in this regard. There are times, however, when a question concerning an area over which the arbitrator generally has full authority is of such a nature as to affect the administration of justice as a whole and relates to principles in respect of which the arbitrator has no particular expertise in that they are not specific to the arbitrator’s specialized role. According to the principles stated by the Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and 60, and as the Court of Appeal noted at para. 33 of its reasons in the case at bar, [TRANSLATION] “the standard of correctness will apply to decisions of arbitrators (as to those of any administrative tribunal) in which they rule on general questions of law that are, first, of central importance to the legal system and, second, outside their

specialized area of expertise in the sense of not being specific to their specialized role” (2014 QCCA 591, 69 Admin. L.R. (5th) 95 (emphasis added)).

[78] Although such questions are rare — as the majority of the Court of Appeal acknowledged — I consider it necessary to refrain from giving too narrow an interpretation to the category of general questions of law that was established in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, and reiterated in *Dunsmuir*. Where the question relates not simply to the rules of evidence in general, but to the scope of such basic rules as those relating to the immunities from disclosure and deliberative secrecy, a court reviewing an arbitrator’s decision in this regard must be able to go further than merely inquiring into the reasonableness of the decision. Where necessary, it must also be able, absent clear instructions to the contrary, to substitute its own view for that of the arbitrator if the arbitrator’s decision is incorrect. But my colleague’s reasoning leads to the conclusion that judicial review on a question related to the scope of professional secrecy, for example, would also be subject to the reasonableness standard. Given the importance of such questions and the fact that an arbitrator has no particular expertise or expertise unique to his or her specialized role with respect to such matters, I am of the opinion that, despite the privative clause in the instant case, the legislature could not have intended such an outcome.

[79] Even more importantly, I find that the applicable standard of review cannot depend on how a court will ultimately answer the question, as that could make

it even more difficult to predict what the result of the analysis will be. Instead, what is important is the nature of the question being raised. In the case at bar, the appellants submit that the effect of *Clearwater* is that any collective decision-making body that makes a decision in writing is shielded by a form of immunity from disclosure. They also argue that deliberative secrecy, as recognized in *Tremblay*, applies to every administrative body with adjudicative functions. Although the cases on which the appellants rely do not have the scope the appellants would give them — I agree with my colleague in this regard — the questions of law raised in their submissions are nonetheless general in nature and must be applied uniformly and consistently. Gascon J. seems in fact to acknowledge this, at least in part, in writing that “extending the conclusions reached by this Court in *Clearwater* to every decision made by a public or private collective decision-making body, as the appellants propose, would have unfortunate consequences in spheres that are unrelated to the context of the instant case” (para. 55 (emphasis added)). What the appellants want the Court to accept in the case at bar is, first and foremost, a principle that motives are “unknowable” that applies to every collective decision-making body that makes a decision in writing.

[80] This being said, it must be acknowledged that the application of the principles stated by this Court, at least those from *Clearwater*, does not lead to a clear result in the instant case, as can be seen from the conclusions reached by the Superior Court judge and the dissenting judge of the Court of Appeal on the merits of the case. In short, although I agree that the appellants are trying to attribute an excessive scope



to *Clearwater* and *Tremblay*, their arguments are not entirely unfounded. As I mentioned above, when all is said and done, what is important is the nature of the question being raised, not how a court will answer it.

[81] The foregoing is what led all the judges of the Court of Appeal and the Superior Court judge to find that the applicable standard of review is correctness. In this regard, Bich J.A. wrote that [TRANSLATION] “the questions submitted to the arbitrator, as drafted, are limited neither to the context of the grievance before him nor to that of the collective agreement on which the grievance is based, and they engage principles that apply generally to the administration of justice as a whole and are not entirely dependent on the particular facts of the case” (para. 44 (emphasis added)). It would be hard to put it better.

[82] Furthermore, if the Court were to decide in the instant case to accept the appellants’ argument regarding the principle that motives are unknowable and to hold that the commissioners cannot be examined, that decision would be based not on circumstances specific to this case, but on a general principle of law that applies in every legal field and to proceedings in every court and administrative tribunal. Thus, even if the examination of the commissioners were not authorized on the basis that it would be irrelevant, the conclusion that it would be irrelevant would not flow from the assessment intrinsically linked to the facts of the case that is traditionally made by an arbitrator, but would instead be based on a principle that is not specific to the arbitration context and that has not yet been clearly defined by the courts.

[83] This case can therefore be distinguished from *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, to which my colleague refers (at paras. 33 and 38). First of all, what was at issue in that case was the *application to the facts* of a principle — estoppel — whose scope was well known and clearly defined. Moreover, Fish J. stated that arbitrators are well equipped to adapt and fashion that principle as they see fit (para. 45). The same cannot be said with respect to the immunities from disclosure and deliberative secrecy. These principles, which relate to the administration of justice as a whole, must be applied uniformly and consistently. In addition, the principle at issue in *Nor-Man* was closely linked to the arbitrator’s discretion to order the remedy he or she considers just and appropriate in the circumstances of the case before him or her. Finally, and most importantly, the application of the principle of estoppel was not of central importance to the legal system in such circumstances.

[84] It is true that the existence of a privative clause indicates that the legislature intended to limit the review of an arbitrator’s decision to a minimum. Deference to the legislature’s intention is important in employment law matters. Nevertheless, the existence of a privative clause is not in itself determinative (*Dunsmuir*, at para. 52), nor can it preclude intervention by a court on every question over which an arbitrator has jurisdiction or that relates to the arbitrator’s general jurisdiction as a decision maker (as opposed to his or her particular expertise). Section 139 of the *Labour Code*, CQLR, c. C-27, cannot preclude a court from intervening in respect of [TRANSLATION] “issues of a general nature that might be raised in the same

terms before any arbitrator and any administrative tribunal, but also in any court of law, and that cannot be resolved differently from one forum to the next” (per Bich J.A., at para. 39 (emphasis added)).

[85] In short, despite the existence of a privative clause and even though the appeal arises in the context of the hearing of the evidence, over which the arbitrator has full authority, the specific questions that are raised in this case are general questions of law that, by their nature, are of central importance to the administration of justice as a whole and in respect of which the arbitrator has no particular expertise or expertise that is unique to his or her specialized role. As Bastarache and LeBel JJ. wrote, for the majority, in *Dunsmuir*, “[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers” (para. 60).

[86] Finally, I note that, in the instant case, the result is the same regardless of whether the applicable standard is correctness or reasonableness.

*Appeal dismissed with costs.*

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