

**SUPREME COURT OF CANADA**

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| **Citation:** Quebec (Attorney General) *v.* Guérin, 2017 SCC 42, [2017] 2 S.C.R. 3 | **Appeal heard:** January 11, 2017  **Judgment rendered:** July 27, 2017  **Docket:** 36775 |

Between:

Attorney General of Quebec

Appellant

and

Ronald Guérin

Respondent

- and -

Conseil d’arbitrage, Fédération des médecins spécialistes du Québec and Régie de l’assurance maladie du Québec

Interveners

**Official English Translation:** Reasons of Wagner and Gascon JJ. and reasons of Côté J.

**Coram:** McLachlin C.J. and Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Joint Reasons for Judgment:**  (paras. 1 to 64) | Wagner and Gascon JJ. (McLachlin C.J. and Karakatsanis J. concurring) |

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| **Joint Reasons Concurring in the Result:**  (paras. 65 to 82) | Brown and Rowe JJ. |

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| **Dissenting Reasons:**  (paras. 83 to 112) | Côté J. |

Quebec (Attorney General) *v.* Guérin, 2017 SCC 42, [2017] 2 S.C.R. 3

Attorney General of Quebec Appellant

v.

Ronald Guérin Respondent

and

Conseil d’arbitrage,

Fédération des médecins spécialistes du Québec and

Régie de l’assurance maladie du Québec Interveners

**Indexed as: Quebec (Attorney General) *v.* Guérin**

2017 SCC 42

File No.: 36775.

2017: January 11; 2017: July 27.

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

on appeal from the court of appeal for quebec

*Administrative law — Judicial review* *— Standard of review — Arbitration — Statutory provision stating that dispute resulting from interpretation and application of agreement entered into under Health Insurance Act to be submitted to council of arbitration — Arbitrator dismissing dispute submitted by medical specialist — Standard of review applicable to arbitrator’s decision that there is no arbitrable dispute and that specialist did not have standing — Whether dispute raises true question of jurisdiction in relation to arbitrator — Health Insurance Act, CQLR, c. A‑29, ss. 19, 54.*

*Health law — Health insurance — Medical specialists — Specialized collective bargaining scheme — Arbitration — Nature of dispute — Standing — Agreement providing for recognition and designation of medical imaging laboratories that are eligible to receive digitization fee — Medical specialist contesting refusal to declare certain laboratories eligible for fee — Whether specialist’s proceeding is arbitrable dispute — Whether specialist has standing to submit dispute — Health Insurance Act, CQLR, c. A‑29, ss. 19, 54.*

The *Health Insurance Act* (“Act”) provides that the remuneration and working conditions of health care professionals are to be established by way of a collective bargaining mechanism that resulted, in this case, in the *Accord‑cadre* *entre le ministre de la Santé et des Services sociaux et la Fédération des médecins spécialistes du Québec aux fins de l’application de la Loi sur l’assurance maladie* (“Framework Agreement”). The Fédération and the Ministère de la Santé et des Services sociaux (collectively, “negotiating parties”) created a digitization fee to encourage radiologists to modernize their equipment. This fee is reserved for laboratories that the negotiating parties jointly recognize and designate, following a procedure and applying criteria they themselves have provided for in the Protocole concernant la radiologie diagnostique (“Protocol”), one of the schedules to the Framework Agreement. Section 54 of the Act provides that a “dispute resulting from the interpretation or application of [the Framework Agreement] is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction”. A distinction is made in the Framework Agreement between a “dispute with respect to fees” raised by a physician and a “collective dispute” raised by the Fédération.

G, a radiologist who is a member of the Fédération, applied to the negotiating parties for a declaration that certain clinics were eligible for the digitization fee. His application was denied. G contested that decision by submitting a dispute to the council of arbitration. The arbitrator, who was appointed to perform the functions of the council of arbitration on his own, found that he lacked jurisdiction to grant G the declaration being sought and that, at any rate, G did not have standing to submit the dispute. The motion judge granted G’s motion for judicial review, finding that the arbitrator’s decision was unreasonable. The majority of the Court of Appeal upheld the motion judge’s decision.

*Held* (Côté J. dissenting):The appeal should be allowed and the award of the council of arbitration restored.

*Per* McLachlin C.J. and Karakatsanis, Wagner and Gascon JJ.: The arbitrator’s conclusions were reasonable. The reasonableness standard necessarily applies, because the arbitrator was called upon to interpret and apply his enabling statute, the Framework Agreement and the Protocol, which are at the core of his mandate and expertise. The issues in this case do not raise a true question of jurisdiction in relation to the council of arbitration. On the one hand, it is well established that the reasonableness standard applies where an arbitrator must determine, by interpreting and applying his or her enabling legislation and related documents, whether a matter is arbitrable. Applying the reasonableness standard to such a question undermines neither the rule of law nor the other constitutional bases of judicial review. In contrast, the effect of applying the correctness standard would be to undermine the presumption in favour of the reasonableness standard that has been consistently recognized and endorsed by the Court in numerous cases. On the other hand, the question of G’s standing, too, relates to the arbitrator’s interpretation of his enabling legislation and of the Framework Agreement and does not cast doubt on his authority to make the inquiry submitted to him. Finally, the rule of law does not require the application of the correctness standard here. The fact that a question might give rise to conflicting interpretations does not on its own support a conclusion that that standard applies.

The arbitrator’s decision that the application did not raise an arbitrable dispute is reasonable. The determination of whether the dispute is arbitrable cannot be limited to s. 54 of the Act and must take the relevant terms of the Protocol into account. According to the arbitrator’s interpretation of the Protocol, the negotiating parties had reserved for themselves the authority to decide whether to recognize a laboratory, and had in so doing excluded that decision from the arbitration process. But the subject matter of G’s proceeding was a declaration recognizing the laboratories for the period at issue in the application, as he was asking the arbitrator to rule on that question in place of the negotiating parties. It was reasonable for the arbitrator to conclude that if he were to rule on the dispute, the effect would be to alter the negotiated content of the Protocol by stripping the negotiating parties of their exclusive discretion under the Protocol.

It was also reasonable for the arbitrator to conclude that G did not have standing because, under the Framework Agreement and the Act, only the Fédération can submit such a dispute to a council of arbitration. The Act gives the Fédération a monopoly of representation in respect of its members both for the negotiation and for the application of the Framework Agreement except in the case of a dispute with respect to fees, and this case did not involve such a dispute. Section 54 does not entitle G to have recourse directly to arbitration. The main purpose of this section is to establish the exclusive nature of the tribunal’s jurisdiction, not to define standing or determine who may submit a dispute. The context of the Act as a whole also confirms this interpretation. The statutory provisions that set out specific situations in which a health professional may have recourse to arbitration would serve no useful purpose if s. 54 nonetheless entitled him or her to submit every possible type of dispute. Such an interpretation would also result in an untenable increase in numbers of arbitration cases. Thousands of medical specialists and other health professionals, as well as health institutions and even third parties such as contractors or patients, could have recourse to arbitration. It is impossible to imagine that to have been the legislature’s intention as regards the purpose and scope of s. 54.

A physician who feels aggrieved has a remedy in the general law of civil liability. If G can establish that the Fédération’s conduct involved bad faith, discrimination, arbitrary conduct or serious negligence, he will be entitled to bring an action against it in court and to be compensated for the resulting harm.

*Per* Brown and Rowe JJ.: The issue of the arbitrator’s capacity to hear G’s matter raised a question of jurisdiction, not of arbitrability, reviewable on the standard of correctness. The mere fact that a question of jurisdiction has not been discerned since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, or that the jurisprudence on such questions has been inconsistent, does not mean that they have ceased to exist. In this case, the arbitrator saw his capacity to hear G’s matter as a question of jurisdiction, as did the courts below. While an issue is not arbitrable before a tribunal that has no jurisdiction to hear it, arbitrability is distinct from jurisdiction and standing. Mischaracterizing questions of jurisdiction as questions of arbitrability risks undermining the coherence of the analytical structure in administrative law. The arbitrator erred in concluding that he did not have jurisdiction to hear the matter. Section 54 of the Act gives the council of arbitration exclusive jurisdiction to hear “dispute[s] resulting from the interpretation or application of an agreement”. A dispute concerning how the agreement between the Fédération and the Minister operated with respect to G’s facility was such a dispute.

While the arbitrator’s decision on the question of G’s standing is reviewable for reasonableness and was reasonable, questions of standing can be jurisdictional. A court determining the standard of review to be applied to an administrative tribunal’s decision on a question of standing must examine the text of the statutory grant of power. Standing can be a jurisdictional question where a tribunal is confined by the terms of its grant to hear only from a certain class of persons. In this case, the passive text of s. 54, the statutory grant of power, indicates that the jurisdiction of councils of arbitration is not confined to hearing matters brought from certain classes of persons. Furthermore, there is no floodgate concern that would militate against granting standing. The more persons who are placed in the difficult position in which G finds himself, the more compelling the basis for allowing him and others to have their disputes heard by an impartial decision‑maker.

*Per* Côté J. (dissenting): The determination of whether it was open to the arbitrator to hear the case raises a true question of jurisdiction, to which the standard of correctness applies, and the arbitrator erred in concluding that he did not have jurisdiction to hear G’s dispute.

The arbitrator also erred in concluding that G did not have standing. This question is one of jurisdiction, because the arbitrator cannot hear any dispute submitted by a medical specialist, except one with respect to fees. Even if the reasonableness standard is applied, the arbitrator’s decision is not defensible in respect either of the facts or of the law. The arbitrator’s conclusion is unreasonable insofar as it is based on a mischaracterization of the nature of the dispute and a misinterpretation of s. 54 of the Act.

In this case, the arbitrator concluded that the subject matter of G’s proceeding was a declaration recognizing the laboratories for the period at issue in the application and that G was asking that the rules negotiated by the parties to the Framework Agreement be modified. But that is a mischaracterization of the nature of the dispute that completely disregards the notice of dispute that instituted the proceeding. On the contrary, G’s challenge was related to how the Fédération and the Régie de l’assurance maladie du Québec had interpreted and applied the conditions for recognition.

Section 54 of the Act is drafted in broad, clear language. The arbitrator interpreted it narrowly on the basis of the language of the Framework Agreement, thereby disregarding the fundamental principle of the hierarchy of rules, according to which the scope of the Framework Agreement must depend on that of the Act, not the reverse. Moreover, the right provided for in s. 54 of the Act must be construed broadly and liberally. When the negotiating parties decide on and designate general radiology laboratories for the purposes of the digitization fee, they are interpreting and applying the agreement within the meaning of s. 54. A dispute submitted to the arbitrator thus results from a difference of opinion between the medical specialists and the negotiating parties. The Fédération’s monopoly of representation does not extend that far. Principles of Quebec labour law, such as that of the monopoly of representation granted to a union, should not be imported into the collective bargaining scheme provided for in the Act unless the Act expressly provides for this.

Lastly, the courts would not have been an appropriate forum for G, as his allegations correspond to none of the types of conduct on the basis of which he might bring an action against the Fédération.

**Cases Cited**

By Wagner and Gascon JJ.

**Considered:** *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; *Pérès v. Québec (Commission de la fonction publique)*, 2000 CanLII 18759; **referred to:** *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; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Commission scolaire de Laval* *v.* *Syndicat de l’enseignement* *de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29; *Nor‑Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Canon Canada Inc. v. Sylvestre*, 2012 QCCS 1422; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Ontario Refrigeration and Air Conditioning Contractors Assn. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 787*, 2016 ONCA 460, 131 O.R. (3d) 665, leave to appeal refused, No. 37179, March 10, 2017, [2017] Bull. S.C.C. 431; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300; *Canadian Merchant Service Guild v. Teamsters, Local Union 847*, 2012 FCA 210, 433 N.R. 200; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Syndicat des techniciens et techniciennes du cinéma et vidéo du Québec v. Mancone*, [2002] R.J.Q. 2905; *Centre hospitalier Régina Ltée v. Labour Court*, [1990] 1 S.C.R. 1330.

By Brown and Rowe JJ.

**Applied:** *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; **considered:** *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

By Côté J. (dissenting)

*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, 2010 SCC 28, [2010] 2 S.C.R. 61; *Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207.

**Statutes and Regulations Cited**

*Act respecting the Régie de l’assurance maladie du Québec*, CQLR, c. R‑5, s. 2.

*Health Insurance Act*, CQLR, c. A‑29, ss. 19, 21, 22.0.1, 22.2, 54, 104.1.

*Interpretation Act*, CQLR, c. I‑16, s. 41.

*Labour Code*, CQLR, c. C‑27, ss. 47.5, 69.

*Public Service Act*, CQLR, c. F‑3.1.1.

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Reid, Hubert, avec la collaboration de Simon Reid. *Dictionnaire de droit québécois et canadien avec table des abréviations et lexique anglais‑français*, 4e éd. Montréal: Wilson & Lafleur, 2010, “*différend*”.

APPEAL from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Savard and Schrager JJ.A.), 2015 QCCA 1726, [2015] AZ‑51223767, [2015] J.Q. no 10976 (QL), 2015 CarswellQue 9920 (WL Can.), affirming a decision of Grenier J., 2013 QCCS 6950, [2013] AZ‑51046703, [2013] J.Q. no 19116 (QL), 2013 CarswellQue 14437 (WL Can.), allowing the application for judicial review of a decision of the council of arbitration, no 12‑DS‑499, January 29, 2013. Appeal allowed, Côté J. dissenting.

*Patrice Claude* and *Isabelle Brunet*, for the appellant.

*René Piotte*, *Stéphanie Lalande* and *Pierre‑Alexandre Boucher* for the respondent.

*Francis Meloche* and *Sylvain Bellavance*, for the intervener Fédération des médecins spécialistes du Québec.

No one appeared forthe interveners Conseil d’arbitrage and Régie de l’assurance maladie du Québec.

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

Wagner and Gascon JJ. —

1. Overview
2. This appeal concerns the reasonableness of an arbitration award made in the context of a specialized collective bargaining scheme, namely the scheme for medical specialists and the government of Quebec under the *Health Insurance Act*, CQLR, c. A‑29 (“Act”). More specifically, the award dealt with the very concept of a dispute and with standing to submit such a dispute to a council of arbitration under the Act and the *Accord‑cadre entre le ministre de la Santé et des Services sociaux et la Fédération des médecins spécialistes du Québec aux fins de l’application de la Loi sur l’assurance maladie* (“Framework Agreement”).
3. The Protocole concernant la radiologie diagnostique (“Protocol”) is one of a large number of schedules that were negotiated under the Framework Agreement. It sets out the conditions for payment of a digitization fee, as well as what a medical imaging laboratory must do, and what criteria it must satisfy, to become eligible for that fee. The respondent, Dr. Ronald Guérin, is a radiologist. He wishes to contest by way of arbitration a joint decision of the Ministère de la Santé et des Services sociaux (“Ministère”) and the Fédération des médecins spécialistes du Québec (“Fédération”) (collectively, “negotiating parties”) to refuse to declare that the laboratories he represents are eligible to receive that fee for the years 2009 through 2011.
4. The council of arbitration decided that Dr. Guérin’s objection could not give rise to an arbitrable dispute under the Act and the Framework Agreement and that, in any event, only the Fédération would have had standing to submit such a dispute. Further to a motion for judicial review, the Superior Court and the majority of the Court of Appeal both found that the council’s decision was unreasonable, concluding that it was open to Dr. Guérin under the Act to submit his dispute to the council of arbitration. The dissenting judge would have upheld the council’s decision, finding that its analysis was justified having regard to the Act and the Framework Agreement.
5. We would allow the appeal and restore the council of arbitration’s award. It was reasonable for the council to conclude that, under the Framework Agreement, the Protocol and the Act, Dr. Guérin’s proceeding did not raise an arbitrable dispute, because the Fédération and the Ministère had reserved for themselves the full discretion to designate the medical imaging laboratories that would be eligible to receive the digitization fee. It was also reasonable for the council to conclude that, in any event, Dr. Guérin did not have standing to submit such a dispute for arbitration, as it was a collective dispute that the Framework Agreement lawfully reserved for the Fédération. Moreover, contrary to what the majority of the Court of Appeal stated, physicians who feel aggrieved are not without recourse: there is a general law principle that permits them to sue the organization that represents them if it has breached its duty of fair representation.
6. Background
   1. Legislative Framework[[1]](#footnote-1)
7. The Act establishes a government‑funded universal health care system. It provides that the remuneration and working conditions of health care professionals are to be established by way of a collective bargaining mechanism. To this end, the Ministère may, “[f]or the purposes of this Act . . . enter into an agreement with the representative organizations of any class of health professionals” (s. 19 of the Act). Such an agreement “shall bind all professionals in the field of health who are members of the body which made the agreement” (s. 21). The agreement in question corresponds in the instant case to the Framework Agreement, a quite complex document containing almost 45 schedules that has been amended over 50 times since being concluded. It is the Fédération, which the Ministère has since 1970 recognized as the only organization representing medical specialists in Quebec, that is responsible for the negotiation and application of this agreement (Framework Agreement, schedule 1, s. 3.1).
8. The Act provides that “[a] dispute resulting from the interpretation or application of an agreement [like the Framework Agreement] is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction” (s. 54). In this respect, the Framework Agreement sets out an arbitration procedure, providing that [translation] “[a] dispute shall be filed by a medical specialist or by the Fédération in accordance with [the procedure]” (Framework Agreement, schedule 1, s. 20.1). A distinction is made in this procedure between a “dispute with respect to fees”, that is, one raised by a physician in relation to a claim for fees or to his or her service agreement with a health institution, and a “collective dispute” raised by the Fédération to resolve any other disagreement related to the application of the Framework Agreement (Framework Agreement, schedule 1, ss. 20.2 and 20.5).
9. On June 1, 2009, the Fédération and the Ministère created a digitization fee to encourage radiologists to modernize their equipment. This fee is reserved for laboratories that the negotiating parties jointly recognize and designate, following a procedure and applying criteria they themselves have provided for in the Protocol (s. 4.1). Rather than drawing up a list of eligible laboratories from the outset and incorporating it into the Protocol, the parties decided to adopt a flexible recognition mechanism that would enable them to adapt to the progressive development of medical imaging laboratories in Quebec.
10. For a laboratory to be recognized, it must satisfy the conditions set out in the Protocol, and a physician must submit an application to the negotiating parties (ss. 4.2 and 4.3 of the Protocol). One of the requirements is that the modernized equipment be and remain the property of radiologists (s. 4.2(iv) of the Protocol). The application is first reviewed by a joint committee of representatives of the negotiating parties, which recommends that the laboratory either be or not be recognized (s. 4.4 of the Protocol). Further to that recommendation, the negotiating parties decide on and designate the laboratories that will be recognized for the purposes of the digitization fee (s. 4.5 of the Protocol). Finally, the Régie de l’assurance maladie du Québec (“RAMQ”) implements that decision (s. 4.6 of the Protocol). Once a laboratory has been recognized, the physician may bill for the fee.
11. In September 2009, further to an arrangement entered into with the Ministère, the Fédération informed radiologists that they could on an exceptional basis have their laboratories recognized retroactively to June 1, 2009 if they submitted an application to that effect by November 1, 2009.
12. In October 2010, the negotiating parties amended the Protocol once again to clarify the conditions concerning the ownership of radiology equipment. This amendment applied as of June 1, 2009, that is, as of the day the fee first came into effect (Amendment 54 to the Framework Agreement, s. 2.3).
    1. Factual Context
13. Dr. Guérin is a radiologist and a member of the Fédération. In this case, he is acting as a medical specialist and the medical director of a radiology clinic, and as the representative of 35 radiologists practising in other clinics belonging to the same company.
14. In October 2009, Dr. Guérin applied to the negotiating parties for a declaration that the clinics in question were eligible for the digitization fee. His application was denied, however, on the basis that, because of the structure of the company, the laboratory equipment was not directly or indirectly owned by radiologists. Dr. Guérin disagreed with this interpretation of the “ownership test”, but he nonetheless tried to comply with it by making some changes to the company’s structure. He and his colleagues thus altered the structure of their corporation’s share capital and adopted a new shareholder agreement. This led the negotiating parties to inform Dr. Guérin in July 2011 that they would be recognizing the laboratories effective retroactively to June 21, 2011, the day of the joint committee’s recommendation.
15. Although Dr. Guérin was happy that the laboratories were being recognized, he felt that this recognition should be retroactive to the day the fee was created or, at the very least, to April 8, 2010, the date when the structure of the laboratories was modified. A request to that effect was denied.
16. This impasse led him to submit a dispute to the council of arbitration set up under s. 54 of the Act. The Fédération and the Ministère opposed him jointly in this proceeding, arguing as a preliminary matter that a decision regarding the recognition of a laboratory by the negotiating parties for the purposes of the digitization fee cannot give rise to an arbitrable dispute. They also maintained that only the Fédération, and not a physician, could submit such a dispute.
17. Judicial History
    1. Arbitration Award (Mtre. Marc Gravel), No. 12‑DS‑499, January 29, 2013
18. Arbitrator Gravel, who was appointed to perform the functions of the council of arbitration on his own, found that he lacked jurisdiction to grant Dr. Guérin the first of the conclusions being sought and to recognize the laboratories for the purposes of the digitization fee. In the arbitrator’s opinion, the Framework Agreement did not give him the authority to make such a decision in place of the negotiating parties. Given that recognition is an [translation] “inevitable and necessary prerequisite” to a claim for the digitization fee, a physician cannot submit a dispute with respect to fees without first having obtained this recognition (arbitration award, at para. 33, reproduced in A.R., at p. 25).
19. The arbitrator also concluded that the Fédération has a monopoly of representation in respect of its members. In his view, it is up to the Fédération and the Ministère to negotiate the recognition of laboratories. A physician has no role to play in those negotiations and cannot challenge their outcome by way of arbitration absent clear language to that effect. It was therefore not open to Dr. Guérin to [translation] “ask a council of arbitration . . . to modify in respect of him the rules that the parties to the Framework Agreement, and they alone, negotiated” (para. 57).
    1. Quebec Superior Court (Grenier J.), 2013 QCCS 6950
20. The motion judge granted Dr. Guérin’s motion for judicial review. Applying the standard of reasonableness, she concluded that the arbitrator’s decision was unreasonable because it did not fall within a “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (para. 26 (CanLII), quoting *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).
21. In the motion judge’s opinion, the only issue was whether the council of arbitration had jurisdiction to consider the dispute. She asserted in this respect that the arbitrator had [translation] “erred as regards the subject of the case before him and as regards the scope of his jurisdiction” (para. 18). Because, in her view, the case turned mainly on whether Dr. Guérin had standing, she focused her analysis essentially on the interpretation of s. 54 of the Act, rather than on that of the provisions of the Protocol the arbitrator had discussed.
22. The motion judge maintained that what Dr. Guérin had asked the arbitrator to do was not to recognize the laboratories, but to correct the interpretation and application of the conditions of the Protocol and to declare that the laboratories had satisfied those conditions as of 2009. Thus, only the interpretation and application of the Protocol — and not its substance — were at issue.
23. The motion judge concluded that s. 54 of the Act, which was drafted in broad terms, entitles a physician to contest decisions of the negotiating parties by way of arbitration. The negotiating parties cannot restrict a physician’s access to arbitration, as s. 54 of the Act authorizes them only to decide on the composition of a council of arbitration and to appoint arbitrators. The standard dictionary definition of “dispute” should apply, which means that a dispute may be submitted in respect of any difference of opinion, including the one at issue in this case.
    1. Quebec Court of Appeal, 2015 QCCA 1726
       1. Majority Reasons of Duval Hesler C.J.Q. and Schrager J.A.
24. The majority of the Court of Appeal upheld Grenier J.’s decision. They began by noting that the parties were not questioning the applicability of the reasonableness standard. In the majority’s opinion, however, the arbitrator’s decision to the effect that he lacked jurisdiction to rule on the issue before him and that Dr. Guérin did not have standing to submit the dispute was unreasonable.
25. Like the motion judge, the majority of the Court of Appeal devoted most of their reasons to the question of standing. They concluded that a physician is entirely free to have recourse to arbitration in order to resolve an issue relating to the interpretation of the Framework Agreement or to its application to his or her particular situation. Section 54 of the Act is clear, and it provides that a dispute concerning the interpretation or application of an agreement entered into under the Act can be submitted to arbitration. The Framework Agreement unduly limits the scope of s. 54 by reserving for the Fédération recourse to arbitration for any dispute other than those that physicians are expressly authorized to submit to arbitration. In addition, the language of the provisions that set out the arbitration procedure is non‑exhaustive.
26. Finally, the majority of the Court of Appeal rejected any analogy to the scheme of the *Labour Code*, CQLR, c. C‑27, in part because of the absence in the Act of a recourse analogous to the one provided for in s. 47.5 of the *Code* for failure to represent. Dr. Guérin was therefore without any recourse to contest an interpretation of the Framework Agreement that was prejudicial to him.
    * 1. Dissenting Reasons of Savard J.A.
27. The dissenting judge would have allowed the appeal, as she considered the arbitrator’s decision to be reasonable.
28. She noted that the arbitrator had found that the dispute concerned the recognition of laboratories, a final decision for which the negotiating parties were responsible and that he lacked jurisdiction to review. That is why he had not inquired into whether the mechanism for recognizing laboratories is compatible with the arbitration process provided for in the Act and the Framework Agreement.
29. The dissenting judge observed that for the majority, and for the motion judge, the dispute instead concerned the interpretation of one of the criteria that had to be satisfied in order to obtain the recognition being sought, not the mechanism for deciding whether that recognition should be granted. But what had to be asked in applying the reasonableness standard was whether the arbitrator’s analysis concerning the subject matter of the dispute fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law.
30. In the dissenting judge’s view, it had been reasonable for the arbitrator to conclude that the decision to designate a laboratory is one that falls to the negotiating parties and that cannot be contested before a council of arbitration. The agreement between those parties is binding on Dr. Guérin and his fellow physicians, and it is not open to them to contest such a designation.
31. Finally, the dissenting judge concluded that s. 54 of the Act does not preclude the negotiating parties from settling their disputes otherwise than by way of arbitration. The provisions of the Framework Agreement that reserve the possibility of submitting disputes to arbitration for the Fédération except in the case of a dispute with respect to fees are not contrary to s. 54 of the Act and are compatible with the Fédération’s monopoly of representation, which resembles the monopoly existing in labour law.
32. Issues
33. This being a case of judicial review, it will be necessary first to identify the applicable standard of review before turning to the merits to determine whether Dr. Guérin’s proceeding is a dispute within the meaning of the Act and, if so, whether it was open to Dr. Guérin himself to submit it to the council of arbitration.
34. Analysis
    1. Applicable Standard of Review Is Reasonableness
35. The courts below were unanimous in concluding that the applicable standard of review was reasonableness (motion judge’s reasons, at para. 26; C.A. reasons, at paras. 21, 45‑46 and 71). Indeed, the parties agreed on this point in the Court of Appeal. In this Court, although Dr. Guérin acknowledged that the current law supports the application of that standard, he asserted that the standard of correctness should nonetheless apply (R.F., at paras. 15‑17; transcript, at pp. 58‑59 and 80‑81).
36. The courts below were right to apply the reasonableness standard. Reasonableness necessarily applies, because the council of arbitration was called upon to interpret and apply its enabling statute, the Framework Agreement and the Protocol, which are at the core of its mandate and expertise (notice of dispute (reproduced at para. 2 of the arbitration award), in the recitals and at paras. 1‑3; *Dunsmuir*, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 39; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 11; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Commission scolaire de Laval v. Syndicat de l’enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 32).
37. The two arguments on which Dr. Guérin relies in asserting that the correctness standard should apply are without merit. First, as both the motion judge (at para. 26) and all the judges of the Court of Appeal (at paras. 21 and 85) recognized, it is wrong to argue that this appeal raises a true question of jurisdiction in relation to the council of arbitration (*Nor‑Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 35). As this Court has noted in the past, courts should “not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so” (*Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233, quoted in *Dunsmuir*, at para. 35). In a similar vein, this Court has frequently stressed that, if they exist, “[t]rue questions of jurisdiction are narrow and will be exceptional” (*Alberta Teachers*, at para. 39; see also at para. 34; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 26; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 39; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219, at para. 27). Such questions must be understood “in the narrow sense of whether or not the tribunal had the authority to make the inquiry” (*Dunsmuir*,at para. 59; see also *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 34; *Canon Canada Inc. v. Sylvestre*, 2012 QCCS 1422, at para. 29 (CanLII)).
38. It is clear, on the one hand, that the council of arbitration had jurisdiction to interpret and apply agreements entered into under the Act, such as the Framework Agreement and its schedules, including the Protocol. It therefore had the authority to make the inquiry and to determine whether Dr. Guérin’s proceeding raised an arbitrable dispute under the Act and the Framework Agreement. Indeed, it is well established that the reasonableness standard applies where an arbitrator must determine, by interpreting and applying his or her enabling legislation and related documents, whether a matter is arbitrable (*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 para. 16). The fact that an arbitrator can dismiss a proceeding on the basis that it does not constitute an arbitrable dispute does not necessarily lead on its own to the conclusion that the proceeding raises a true question of jurisdiction (see, e.g., *Ontario Refrigeration and Air Conditioning Contractors Assn. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 787*, 2016 ONCA 460, 131 O.R. (3d) 665, at para. 55, leave to appeal refused, No. 37179, March 10, 2017, [2017] Bull. S.C.C. 431).
39. When an arbitrator interprets his or her enabling legislation to determine whether a dispute is arbitrable, applying the reasonableness standard undermines neither the rule of law nor the other constitutional bases of judicial review. In contrast, the effect of applying the correctness standard by erroneously characterizing such a question as a true question of jurisdiction would be to undermine the presumption in favour of the reasonableness standard that has been consistently recognized and endorsed by this Court in numerous cases since *Alberta Teachers* (para. 39; see, e.g., *Rogers*, at para. 11; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 21; *SODRAC 2003*, at para. 35; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35; *ATCO Gas and Pipelines*, at para. 28; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 17; *Saguenay*, at para. 46; *Commission scolaire de Laval*, at para. 32; *Capilano*, at para. 22).
40. On the other hand, the other issue, concerning Dr. Guérin’s standing in this case, is not really a true question of jurisdiction either. It is true that this Court applied the correctness standard in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, in which it found that “[t]he issue [was] jurisdictional” in that it went to whether the Canadian International Trade Tribunal could hear a complaint initiated by a non‑Canadian supplier under the *Agreement on Internal Trade*, (1995) 129 Can. Gaz. I, 1323 (para. 10). Nonetheless, as the Court subsequently explained in *Alberta Teachers*, its holding in *Northrop* that the question was subject to “review on a correctness standard . . . was based on an established pre‑*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction” (para. 33 (emphasis added)). This interpretation, which was endorsed by a majority of this Court, is also authoritative.
41. Moreover, Brown and Evans observe that a number of courts have held that standing was not a true question of jurisdiction, even where the relevant enabling legislation addressed it (D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose‑leaf), heading 14:4331, footnote 369, citing *Canadian Merchant Service Guild v. Teamsters, Local Union 847*, 2012 FCA 210, 433 N.R. 200, at para. 19). In the instant case, too, the question of Dr. Guérin’s standing relates to the council of arbitration’s interpretation of its enabling legislation and of the Framework Agreement. This question does not cast doubt on “the [council of arbitration’s] authority to make the inquiry” submitted to it (*Dunsmuir*, at para. 59; see also *Nolan*, at para. 34) but is, rather, intended to determine who — Dr. Guérin or the Fédération — can submit it. That is far from the narrow and limited scope this Court has attributed to true questions of jurisdiction.
42. Finally, contrary to what Dr. Guérin is now arguing in this Court, this is not a case in which the rule of law requires the application of the correctness standard. The fact that a question of law might give rise to conflicting interpretations does not on its own support a conclusion that the correctness standard applies (*Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 17). Also, Dr. Guérin cites no award in which an arbitrator adopted an interpretation contrary to that of the arbitrator in the instant case. Thus, even if conflicting lines of authority could lead to the application of the correctness standard, which is itself not always the case (*Atomic Energy*, at para. 17; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 38‑39; see also *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 784‑801), that is, in any event, not the situation in the case at bar.
    1. Absence of an Arbitrable Dispute
43. Dr. Guérin has applied for a review of the negotiating parties’ decision not to recognize the laboratories he represents for purposes of the payment of the digitization fee from 2009 to 2011. The council of arbitration concluded that it did not have the authority to grant his application, because the application did not raise an arbitrable dispute under the Act and the Framework Agreement. In our opinion, that decision was reasonable.
    * 1. Subject Matter
44. Any decision‑maker required to resolve a dispute must first define the subject matter or essential character of the dispute (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 52). In the case at bar, the arbitrator concluded that the subject matter of Dr. Guérin’s proceeding was a declaration recognizing the laboratories for the period at issue in the application.
45. In reaching this conclusion, the arbitrator did not confine himself to Dr. Guérin’s description of the issue in his notice of dispute, that is, that the dispute [translation] “concerns the interpretation and application of section 4.[2](iv) of the Protocol” (notice of dispute, at para. 1). He also considered the conclusions being sought, and in particular the request for a declaration “that the medical imaging laboratories [represented by Dr. Guérin] should be recognized . . . as of June 1, 2009” and that the physicians working there were “therefore entitled to the digitization fee” as of that date (notice of dispute, conclusions). The arbitrator found on this basis that what Dr. Guérin actually wanted him to do was to rule on the recognition of the laboratories in place of the negotiating parties. Given that the subject matter of the dispute thus related to the interpretation of the recognition mechanism established by the Protocol, the arbitrator did not need to analyze the provisions of the Framework Agreement and the Act with respect to the arbitration process, or the provisions of the Protocol setting out the eligibility criteria for the digitization fee. He instead focused on the provisions of the Framework Agreement and the Protocol that confer the authority to determine eligibility for the fee on the negotiating parties.
46. In considering the motion for judicial review, the Superior Court and the Court of Appeal were limited to determining whether the arbitration award was reasonable, including in relation to the subject matter of the dispute. As the dissenting judge in the Court of Appeal indicated, the motion judge and the majority of the Court of Appeal were in error in instead reformulating the subject matter to find that the dispute related to the interpretation and application of the conditions for eligibility for recognition and to Dr. Guérin’s standing (motion judge’s reasons, at paras. 19‑20; C.A. reasons, at paras. 38‑39). By altering the issue in this way, they failed to show the council of arbitration the deference they owed it.
    * 1. Only the Negotiating Parties Have the Authority to Recognize Laboratories
47. The arbitrator concluded that he did not have jurisdiction to rule on whether the laboratories should be recognized. According to his interpretation of the Protocol, the negotiating parties had reserved for themselves the authority to decide whether to recognize a laboratory, and had in so doing excluded that decision from the arbitration process. In his opinion, if he were to rule on the dispute, he would in effect be substituting his own opinion for that of the negotiating parties and circumventing the decision‑making mechanism they had negotiated. In short, the arbitrator held that the proceeding did not raise an arbitrable dispute.
48. The arbitrator’s decision in this regard is reasonable. As it indicates, the negotiating parties have in the Protocol clearly reserved for themselves the right and full discretion to decide whether to recognize a laboratory. Not only did the negotiating parties argue together in favour of this interpretation in both courts below, but it is fully justified having regard to the words of the Protocol. The Protocol provides that the role of the joint committee is limited to making recommendations, which means that the committee’s opinion is not necessarily binding on the negotiating parties:

[translation]

**4.4** There shall be established a joint committee composed of equal numbers of representatives of the Fédération and the Ministère de la Santé et des Services sociaux to which shall be referred any applications for recognition submitted under section 4.3 for the purposes of the digitization fee.

After analyzing an application, the joint committee shall make a recommendation to the negotiating parties. [Emphasis added.]

Moreover, s. 4.5 of the Protocol provides unambiguously that the final decision, that of deciding on and designating laboratories, belongs to the negotiating parties and no one else, and it places no limits on the factors that might guide their decision:

[translation]

**4.5** Further to the joint committee’s recommendations, the negotiating parties shall decide on and designate the general radiology laboratories that will be recognized for the purposes of the digitization fee together with the applicable sectors of radiological activity. [Emphasis added.]

1. Dr. Guérin’s arguments are insufficient to justify a conclusion that the arbitrator’s interpretation of the Protocol was unreasonable. His position presupposes that, even though the Ministère and the Fédération had [translation] “reserved for themselves the authority to interpret and apply the provisions of the Protocol”, “a correct interpretation of the provisions establishing the applicable rules would have led to their being applied such that” the laboratories he represents were recognized as of June 1, 2009 (notice of dispute, at paras. 3 and 14). The arbitrator did not address this argument directly, but we note that although the Protocol does require that laboratories meet all the criteria under s. 4.2 in order to be recognized, the recognition of a laboratory is also subject to a decision by the negotiating parties, which are not required to apply those criteria mechanically.
2. Furthermore, Dr. Guérin does not, nor did he do so before the council of arbitration, contest the validity of the decision‑making mechanism provided for in the Protocol, but had he done so, it is our opinion that this argument would also fail. It was open to the Ministère and the Fédération, under s. 19 of the Act, to reserve this decision for themselves and to establish the appropriate mechanism by means of the Framework Agreement. No one is disputing that the negotiating parties had the authority to create a digitization fee by amending their Framework Agreement as they did. And they also had the authority to decide on the procedure for obtaining the new fee. Thus, the agreement between the parties could, for example, have included a list of recognized laboratories without setting out other criteria or providing for a recognition mechanism. The parties instead decided — with the approval of the Conseil du trésor, and as it was open to them to do — to create a different mechanism that would enable them to adapt to the flexibility of their agreement and the evolving situation of medical imaging laboratories in Quebec.
3. This, moreover, is why this type of decision‑making mechanism is not uncommon in the public health system. The appellant, the Attorney General of Quebec, noted in this Court, although this comparative argument had not been made before the council of arbitration, that agreements concluded under the Act often establish several fee classes and sometimes confer on the negotiating parties, either directly or through a parity committee, the task of reaching an agreement and specifying which institutions or professionals will be able to obtain the fees having regard to needs and changing circumstances. Likewise, it is not uncommon for such agreements to provide that the negotiating parties may put an end to any dispute, even an individual dispute, by way of an agreement (A.F., at paras. 44 and 57; see, for example, s. 24.04 of the *Entente relative à l’assurance maladie et à l’assurance hospitalisation entre le ministre de la Santé et des Services sociaux et la Fédération des médecins omnipraticiens du Québec*, A.R., at p. 222; s. 24.04 of the *Entente relative à l’assurance maladie entre le ministre de la Santé et des Services sociaux du Québec et l’Association des chirurgiens dentistes du Québec*, A.R., at p. 232; s. 17.04 of the *Entente relative à l’assurance maladie entre le ministre de la Santé et des Services sociaux et l’Association professionnelle des optométristes du Québec*, A.R., at p. 240; s. 7.05 of the *Entente relative à l’assurance maladie entre l’Association québécoise des pharmaciens propriétaires et le ministre de la Santé et des Services sociaux*, A.R., at p. 246; transcript, at pp. 42‑44).
4. It was therefore reasonable for the arbitrator to conclude that if he were to rule on the dispute, the effect would be to alter the negotiated content of the Protocol by stripping the negotiating parties of their exclusive discretion under the Protocol and reducing the recognition of laboratories to nothing more than the application of the criteria set out in s. 4.2, which cannot be the case. In other words, even if the arbitrator had decided to correct the interpretation of the conditions of s. 4.2(iv) of the Protocol and their application to the laboratories represented by Dr. Guérin, it would have been impossible for him to grant recognition in place of the negotiating parties.
5. In this regard, it cannot of course, with all due respect, be argued that the arbitrator’s decision on this question was “incorrect” solely because Dr. Guérin’s proceeding concerns “[a] dispute resulting from the interpretation or application of an agreement” within the meaning of s. 54 of the Act. The determination of whether the dispute is arbitrable cannot be limited to that section alone. Even though Dr. Guérin’s dispute results from the interpretation and application of the Framework Agreement, the terms of the Protocol — according to which it is the negotiating parties that are to decide on and designate the laboratories that will be recognized for the purposes of the digitization fee (s. 4.5) — cannot be disregarded.
6. In light of the principles from *Dunsmuir*, it is therefore our opinion that the arbitrator’s solution falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, at para. 47). We believe on this point that the motion judge and the majority of the Court of Appeal did not ask themselves the right question before concluding that the arbitration award was unreasonable.
   1. Dr. Guérin Does Not Have Standing
7. In light of this conclusion, it is not strictly necessary to address the second issue, that of standing. Indeed, this was not a determinative aspect of the arbitration award. On the other hand, it was essentially on this issue that the Superior Court and the majority of the Court of Appeal based their conclusion that the decision was unreasonable. With respect, we are of the opinion that it was in any event reasonable for the arbitrator to conclude that Dr. Guérin did not have standing because, under the Framework Agreement and the Act, only the Fédération can submit such a dispute to a council of arbitration.
   * 1. Only the Fédération Has Standing to Submit This Dispute to Arbitration
8. On this point, the arbitrator noted that the Act gives the Fédération a monopoly of representation that permits it to negotiate the terms of the Protocol and to bind all its members, who cannot then contest the outcome of the negotiation by way of arbitration. In his view, this means that Dr. Guérin did not have standing to submit his dispute. We are of the opinion that the arbitrator’s decision on this point, albeit brief, and although it in some respects confused this issue with that of whether the dispute was arbitrable, was also reasonable.
9. As the arbitrator mentioned, medical specialists are bound by the provisions of the Framework Agreement, which the negotiating parties entered into legally (ss. 19 and 21 of the Act; Framework Agreement, schedule 1, s. 3.1). Nothing precludes that agreement from delimiting the recourse to arbitration provided for in the Act. The only limits in this respect are those of the provisions of the Act that specifically indicate situations in which a health professional may submit a notice of dispute directly to a council of arbitration: where the RAMQ has refused a payment or required the reimbursement of an amount, or in the case of a disagreement related to a professional services contract with a health institution (ss. 22.0.1 and 22.2 of the Act). The negotiating parties reiterated these two situations in their arbitration procedure, but for other disagreements related to the application of the Framework Agreement, they provided, as it was open to them to do, that only the Fédération may submit a collective dispute (Framework Agreement, schedule 1, ss. 20.2 to 20.5).
10. Under the Framework Agreement, therefore, the Fédération is [translation] “the only organization representing medical specialists” both for the negotiation and for the application of any agreement entered into under s. 19 of the Act (Framework Agreement, schedule 1, s. 3.1). The Fédération thus exercises all recourses of the members it represents, with the exception of those that are expressly reserved for medical specialists by the Act or the Framework Agreement (*Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 41). In short, except in the case of a dispute with respect to fees, medical specialists are always represented by the Fédération in arbitration proceedings.
11. In the case at bar, as the arbitrator rightly noted, there can be no dispute with respect to fees that would entitle Dr. Guérin to have recourse to arbitration under the Framework Agreement and the Act. The digitization fee cannot be claimed before the laboratories have been recognized, since it is that recognition that gives rise to an entitlement to the fee. Nor is there a collective dispute between the negotiating parties, as they are in agreement on the designation of the laboratories. So there is nothing under either the Framework Agreement or the Act that entitles the physician to submit a notice of dispute of this nature directly to the council of arbitration.
12. Dr. Guérin asserts that, despite the provisions of the Framework Agreement, s. 54 of the Act entitles him to have recourse directly to arbitration, without having the Fédération act as an intermediary, for any dispute resulting from the application or interpretation of the agreement. This argument was endorsed by the Superior Court and the majority of the Court of Appeal, and their decisions focused on it. Although the arbitrator did not discuss the interpretation of s. 54, it is our opinion that the main purpose of this section, which was drafted in broad language, is to establish the exclusive nature of the tribunal’s jurisdiction, not to define standing or determine who may submit a dispute. Not only is the section totally silent as regards the standing issue, but the context of the Act as a whole also confirms this interpretation. The legislature provided for specific situations in which a health professional may have recourse to arbitration (ss. 22.0.1 and 22.2 of the Act). But the provisions in question would serve no useful purpose if s. 54 nonetheless entitled health professionals to submit every possible type of dispute. To interpret s. 54 without taking those sections into account would be inconsistent with the modern principle of statutory interpretation, according to which “it is impossible to determine the meaning of words in the absence of context” (P.‑A. Côté, with the collaboration of S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 46; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Consequently, even if s. 54 is of public order pursuant to s. 104.1 of the Act, it does not constitute a basis for circumventing the provisions of the Framework Agreement that limit the cases in which recourse can be had to arbitration.
13. The arbitrator’s conclusion on this question is supported by *Pérès v. Québec (Commission de la fonction publique)*, 2000 CanLII 18759 (Que. Sup. Ct.), a case that was similar to the one at bar. In *Pérès*, several employees of the federal public service had been transferred to the provincial public service. A parity committee made up of union and management representatives had been created to determine each employee’s classification on the basis of job levels of the provincial public service (paras. 17‑19). The committee had rendered a unanimous decision, and some employees then wanted to appeal that decision to the Commission de la fonction publique (paras. 22‑24). The Commission declined jurisdiction, holding that it could not intervene in the negotiating process that had been incorporated into the collective agreement in accordance with the *Public Service Act*, CQLR, c. F‑3.1.1 (paras. 27‑28). The Superior Court upheld that decision, holding that the individuals represented by their union were bound by the agreement and its classification process and could not circumvent them by way of a complaint to the Commission (paras. 37‑38). In other words, [translation] “[t]his classification agreement [was] binding on [the individuals in question] in the same way that a new collective agreement would [have been] binding on them” (para. 40). The situation in *Pérès* resembled the one in the instant case. Because the negotiating parties agreed on the designation of the laboratories in accordance with the Framework Agreement and the Act, it is not possible for the physician to appeal that decision to a council of arbitration. The decision is binding on the physician in the same way that the Framework Agreement entered into by the parties is binding on him.
14. Lastly, the arbitrator stated, although perhaps ambiguously, that Dr. Guérin [translation] “cannot be allowed to ask a council of arbitration . . . to modify in respect to him the rules that the parties to the Framework Agreement, and they alone, negotiated” (para. 57). In our opinion, contrary to what both the Superior Court and the majority of the Court of Appeal maintained, and Dr. Guérin now argues, what the arbitrator meant by this was not that Dr. Guérin was attempting to modify the conditions set out in s. 4.2 of the Protocol. Moreover, that is not what Dr. Guérin was doing. What we understand from para. 57 is that the arbitrator was merely pointing out that if the council of arbitration were to review a decision with respect to recognition that had been negotiated jointly by the parties, it would be altering the substance of the rules the parties had validly established. From this perspective, he was right to say that Dr. Guérin was in fact trying to change the rules of the Framework Agreement. To conclude that the arbitrator erred in his characterization of the issue or by asking the wrong question is to read too much into the words of the arbitration award.
    * 1. The Effect of Accepting Dr. Guérin’s Position Would Be an Untenable Increase in Numbers of Arbitration Cases
15. Not only is Dr. Guérin’s position not justified having regard to the Framework Agreement and the Act, but we also feel that accepting it would lead to consequences that the parties neither anticipated nor intended. Although the arbitrator did not discuss this in his decision, we note that if, as Dr. Guérin suggests, s. 54 of the Act were interpreted so as to authorize any physician affected by a decision resulting from the interpretation or the application of the Framework Agreement or any similar agreement to contest that decision before a council of arbitration individually, nothing would preclude another person affected by a similar decision from availing himself or herself of the same remedy, too. Thus, the thousands of medical specialists and other health professionals to whom the scheme of the Act applies could then have recourse to the arbitration mechanism.
16. Furthermore, health institutions, and even third parties such as contractors or patients, could also have recourse to arbitration if a decision resulting from the interpretation or application of an agreement affected them directly. This would result in an untenable increase in numbers of arbitration cases under s. 54 of the Act. We cannot imagine that to have been the legislature’s intention as regards the purpose and scope of that section.
    1. A Physician Who Feels Aggrieved Has a General Law Remedy
17. Finally, contrary to what the majority of the Court of Appeal asserted (at para. 35 of their reasons), Dr. Guérin is not without recourse. The courts would have jurisdiction if he were to allege that the Fédération had not properly discharged its duty of representation.
18. In the general law of civil liability, an association that has, as the Fédération does, an exclusive power of representation also has “a duty . . . to perform its representative function properly” (*Noël*, at para. 46; *Syndicat des techniciens et techniciennes du cinéma et vidéo du Québec v. Mancone*, [2002] R.J.Q. 2905 (C.A.)). This duty of representation “prohibits four types of conduct: bad faith, discrimination, arbitrary conduct and serious negligence” (*Noël*,at paras. 47‑48; *Centre hospitalier Régina Ltée v. Labour Court*, [1990] 1 S.C.R. 1330, at pp. 1344‑47). It originates in the general law, not just in the *Labour Code*, as the majority of the Court of Appeal seem to have said (para. 35). If Dr. Guérin can establish that the Fédération engaged in one of these types of conduct in its dealings with him, he will be entitled to bring an action against it in court and to be compensated for the resulting harm.
19. Conclusion
20. In short, given that the negotiating parties chose to reserve for themselves the full discretion to decide on and designate the laboratories that will be eligible to receive the digitization fee, the arbitrator’s decision that this dispute was not one that could be submitted to arbitration under the Act was reasonable.
21. It was also reasonable for the arbitrator to conclude that Dr. Guérin did not have standing to submit the notice of dispute to the council of arbitration. His decision was justified having regard to the Fédération’s monopoly of representation. It was also justified by the fact that no provision of either the Framework Agreement or the Act entitles a medical specialist to submit a dispute directly to a council of arbitration other than where the RAMQ has refused a payment or in a case involving a professional services contract with a health institution.
22. The courts below accordingly erred in intervening to overturn the arbitration award. We would allow the appeal and restore the decision of the council of arbitration, with costs to the appellant in all courts.

The following are the reasons delivered by

1. Brown and Rowe JJ. — We have read the reasons of our colleagues, Wagner and Gascon JJ. While we agree in the result, we see the matters of the council of arbitration’s jurisdiction and of Dr. Guérin’s standing before the council differently.
2. In brief, we are of the view that the issue of the capacity of the arbitrator to hear Dr. Guérin’s matter raised a question of jurisdiction, not of arbitrability. Applying the standard of correctness, we find that the arbitrator erred in concluding that he did not have jurisdiction to hear the matter. As to the matter of Dr. Guérin’s standing, we agree with our colleagues Wagner and Gascon JJ. that the arbitrator’s decision on this point is reviewable for reasonableness and that it was reasonable, but we approach the identification of the appropriate standard of review from a different starting point. In our view, standing questions become jurisdictional where the tribunal is confined by the terms of its statutory grant of authority to hear only from a certain class of complainants. Because this was not the case here, reasonableness review is appropriate.
3. We also agree with our colleagues that, as this Court said in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59, questions of jurisdiction or *vires* refer to “the narrow sense of whether or not the tribunal had the authority to make the inquiry”. Identifying questions of jurisdiction is therefore, on this Court’s jurisprudence, a straightforward matter:  they arise “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter” (*Dunsmuir*, at para. 59).
4. We acknowledge that the Court has also observed, in *obiter dicta*, that “[s]ince *Dunsmuir*, [it] has not identified a single true question of jurisdiction” or “seen such a situation” (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 33-34). The reason for this may be that an administrative tribunal’s jurisdiction (decisions on which are reviewable for *correctness*) is established and confined by its enabling (“home”) statute (the interpretation of which is presumptively reviewable for *reasonableness*). While, as we make clear below, we do not in these reasons presume to cut this Gordian knot, we maintain that the mere fact that this Court has not discerned a question of jurisdiction since *Dunsmuir* does not mean that such questions have ceased to exist, nor that we should be blind to one when it clearly manifests itself. Indeed, the consequences of failing to identify a jurisdictional question as such are serious:  “as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is ‘correct’” (*Alberta Teachers’ Association*, at para. 94, per Cromwell J., concurring). This “core principl[e]” of judicial review was laid down by the Court in *Dunsmuir*:

Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts’ constitutional duty to ensure that public authorities do not overreach their lawful powers . . . . [para. 29]

1. Here, the arbitrator saw his capacity to hear Dr. Guérin’s matter as raising precisely that — a question of jurisdiction (arbitration award, at paras. 31 and 34, reproduced in A.R., at p. 25) — as did Grenier J. at the Superior Court (2013 QCCS 6950, at paras. 17-19 (CanLII)), the majority at the Court of Appeal (2015 QCCA 1726, at paras. 27 and 42 (CanLII)) and the dissenting judge at the Court of Appeal (para. 85). It is difficult to see the question otherwise, as it involved, in the language of *Dunsmuir*, “the tribunal . . . explicitly determin[ing] whether its statutory grant of power g[ave] it the authority to decide a particular matter” (para. 59).
2. Our colleagues Wagner and Gascon JJ., however, say that jurisdiction was not at issue here; rather, they view the matter as one of arbitrability. It is true that an issue is not arbitrable before a tribunal that has no jurisdiction to hear it. That said, arbitrability is distinct from jurisdiction and standing. Jurisdiction is about who has competence to decide what issues. Standing is about who can participate in the proceedings. Arbitrability, however, is akin to justiciability, in that it goes to whether the issue is capable of being considered legally and determined by the application of legal principles and techniques (by, in this case, the arbitrator). In our respectful view, the majority risks undermining the coherence of the analytical structure in administrative law by mischaracterizing questions of jurisdiction and standing as questions of arbitrability. The question of whether the arbitrator had the authority to decide on Dr. Guérin’s matter was, as we say and as this Court’s own jurisprudence demonstrates, clearly jurisdictional.
3. It follows that the arbitrator had to answer this question correctly (*Dunsmuir*, at para. 59; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topics 14:4331 and 14:4521). And, in our view, in declining to hear Dr. Guérin’s matter, he did not. By s. 54 of the *Health Insurance Act*, CQLR, c. A-29, the Quebec National Assembly gave the council of arbitration exclusive jurisdiction to hear “dispute[s] resulting from the interpretation or application of an agreement”. The matter raised by Dr. Guérin — specifically, a dispute concerning how the agreement between the Fédération des médecins spécialistes du Québec (“Fédération”) and the Minister of Health and Social Services (“Minister”) operated with respect to his facility — was clearly a “dispute resulting from the interpretation or application of an agreement”.
4. But who can bring such a dispute to arbitration? Were this dispute between the Minister and the Fédération, either would have standing to do so. Does, however, Dr. Guérin have standing to bring a “dispute resulting from the interpretation or application of an agreement” to arbitration? Our colleagues Wagner and Gascon JJ. say that the arbitrator’s decision that Dr. Guérin did not have standing is reviewable for reasonableness, and that it was reasonable. We agree. Their reasons, however, in our respectful view, elide two important points: first, questions of standing *can* be jurisdictional (in which case decisions thereon are reviewable for correctness); and second, this being so, further explanation of why the arbitrator’s decision on standing was reviewable for reasonableness is called for.
5. The first point is straightforward. Standing is often described as raising a question of jurisdiction:

Administrative adjudicators must comply with the terms of their statutory grants of authority. On occasion, it may be necessary for a tribunal to determine *explicitly* whether or not the grant authorizes it to decide a particular matter. When this situation arises, as where there are two intersecting administrative schemes, or there is a question of an applicant’s standing to institute proceedings, whether or not a claim is statute-barred, the resulting decision will usually be subject to review by the courts on the “correctness” standard of review. [Footnotes omitted; underlining added.]

(Brown and Evans, at topic 14:4331)

1. Similarly, in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10, this Court described a question of standing as “jurisdictional”. Our colleagues Wagner and Gascon JJ., citing *Alberta Teachers’ Association*, at para. 33, say that the Court’s conclusion in *Northrop Grumman* was the product of “pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction” (para. 35). With great respect, this explanation is simply not grounded in a tenable reading of *Northrop Grumman*. While the Court did indeed look in that case to pre-*Dunsmuir* jurisprudence, its conclusion that the matter raised a question of jurisdiction was expressed with exclusive reference to the nature of the question posed: “The issue on this appeal is jurisdictional in that it goes to whether the [Canadian International Trade Tribunal] can hear a complaint initiated by a non-Canadian supplier under the [*Agreement on Internal Trade*]. Accordingly, the standard of review is correctness” (para. 10 (emphasis added)).
2. We also acknowledge that, as our colleagues observe, by referring to a decision of the Federal Court of Appeal, the case law cited by the authors Brown and Evans in support of their statement that questions of standing are jurisdictional is inconsistent. This is unsurprising, as the jurisprudence is indeed inconsistent, having injected confusion even into the definition of a question of jurisdiction itself. (Contrast *Dunsmuir*, at para. 59 (“true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter”) with *Alberta Teachers’ Association*, at para. 42 (“I am unable to provide a definition of what might constitute a true question of jurisdiction”).)
3. But again, none of this means that questions of jurisdiction have ceased to exist. While our colleagues do not suggest otherwise, their reasons do not explain precisely *why* the question of Dr. Guérin’s standing is *not* jurisdictional — or, more precisely, why the presumption, stated by the majority in *Alberta Teachers’ Association*, that this is not a question of jurisdiction but rather a question of statutory interpretation, was not rebutted. Nor do they explain what would have been required to rebut it. Of course, this is precisely the difficulty which Cromwell J. identified in his concurring reasons in *Alberta Teachers’ Association*:

My colleague suggests that true questions of jurisdiction or *vires* arise so rarely when a tribunal is interpreting its home statute that it may be asked whether “the category of true questions of jurisdiction exists” and further that “the interpretation by the tribunal of ‘its own statute or statutes closely connected to its function, with which it will have particular familiarity’ should be presumed to be a question of statutory interpretation subject to deference on judicial review” (para. 34). There is no indication of how, if at all, this *presumption* could be rebutted. I have two difficulties with this position.

The first difficulty concerns elevating to a virtually irrefutable presumption the general guideline that a tribunal’s interpretation of its “home” statute will not often raise a jurisdictional question. This goes well beyond saying that “[d]eference will usually result” with respect to such questions (as in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54) or that “courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal’s authority” (as in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 34). . . . Creating a presumption without providing guidance on how one could tell whether it has been rebutted does not, in my respectful view, provide any assistance to reviewing courts. The second difficulty concerns the suggestion that jurisdictional questions may not in fact exist at all. Respectfully, these propositions undermine the foundation of judicial review of administrative action. [Underlining added; paras. 91 and 92.]

1. To be clear, we do not doubt the authority of *Alberta Teachers’ Association* as a decision of this Court. Rather, we point out that its application is logically and practically impeded by the unresolved problem — indeed, the analytical incoherence — which Cromwell J. identified therein, and of which this case presents an obvious instance. As we say, we do not presume to cut this Gordian knot here; and nor do our colleagues. We maintain, however, that it follows from the foregoing, particularly the statements of this Court in *Dunsmuir* and *Northrop Grumman*, and from the commentary on the subject, that more needs to be said than our colleagues say about why Dr. Guérin’s standing does not raise a jurisdictional question. It is not, again with respect, solely a matter of home statutes, presumed expertise and deference. Otherwise, reasonableness review of the arbitrator’s decision on Dr. Guérin’s standing would operate in marked tension with this Court’s statement in *Northrop Grumman*. The two must be reconciled.
2. As this Court stressed in *Dunsmuir*, “determining the applicable standard of review is accomplished by establishing legislative intent” (para. 30). A court determining the standard of review to be applied to an administrative tribunal’s decision on a question of standing must therefore examine the text of the statutory grant of power. In *Northrop Grumman*, for instance, the standing issue was whether a non-Canadian supplier could bring a complaint regarding military procurement under the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.). The Court resolved this issue by first looking to s. 30.11(1) of that Act, which provides that “a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint”. It then noted that s. 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602, further provides that a “designated contract” is one described in certain trade agreements, including the *Agreement on Internal Trade*, (1995) 129 Can. Gaz. I, 1323, which requires that the supplier under a “designated contract” be a “Canadian supplier”.
3. The significance of the foregoing is this: the statutory grant in *Northrop Grumman*, taken together with its regulations and the *Agreement on Internal Trade* which those regulations referentially incorporated, explicitly restricted the class of suppliers which could bring a complaint. This is what made standing a jurisdictional question in that case: the tribunal was confined *by the terms of its grant* to hear only from a certain class of complainants. For the tribunal to have heard from anyone else would have exceeded the scope of its grant, thereby amounting to jurisdictional error.
4. This brings us to the reason why the matter of Dr. Guérin’s standing to appear before the council of arbitration in this case does not present a question of jurisdiction. Recall that the arbitrator’s statutory grant of power is contained in s. 54 of the *Health Insurance Act* which reads, in relevant part:

A dispute resulting from the interpretation or application of an agreement is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction.

1. The passive text in s. 54 of “is submitted” (“*est soumis*”), unaccompanied by any qualification upon who *does* the actual “submitting”, stands in contrast to the language of the statutory grant in *Northrop Grumman* (“Canadian supplier”). The arbitrator’s decision on Dr. Guérin’s standing was, as our colleagues Wagner and Gascon JJ. say, reviewable for reasonableness, but principally because the jurisdiction of councils of arbitration is not statutorily confined under s. 54 to hearing matters brought from certain classes of persons.
2. One final point. While we agree with our colleagues that the arbitrator’s decision regarding Dr. Guérin’s standing was reasonable, we do not share their “floodgates” concern (paras. 58-59) arising from the potential proliferation of matters coming before councils of arbitration should Dr. Guérin be granted standing. While they see this as militating against granting standing, we respectfully see this concern as tending to cut the other way. The more persons who are placed in the difficult position in which Dr. Guérin finds himself, the more compelling the basis for allowing him and others to have their disputes heard by an impartial decision-maker.

English version of the reasons delivered by

1. Côté J. (dissenting) — I cannot improve on what my colleagues Brown and Rowe JJ. say on the standard of review to be applied with respect to the arbitrator’s jurisdiction. I therefore concur with them on that issue. In other words, I am of the opinion that the determination of whether it was open to the arbitrator to hear the case of the respondent, Dr. Ronald Guérin, raises a true question of jurisdiction, and that the appropriate standard in this regard is correctness. I agree with Brown and Rowe JJ. that the arbitrator erred in concluding that he did not have jurisdiction to hear the case before him.
2. I have also read what my colleagues Brown and Rowe JJ. say on the standard of review to be applied on the issue of the respondent’s standing, but in my view, their reasoning should have led them to conclude that, in this case, the appropriate standard in this regard is correctness. There are circumstances in which the issue of standing is a question of jurisdiction, and in such a case, the appropriate standard of review is correctness (*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10). In the case at bar, I am of the opinion that whether the respondent had standing is a question of jurisdiction, because the arbitrator’s interpretation of the *Health Insurance Act*, CQLR, c. A‑29 (“HIA”),and the *Accord‑cadre entre le ministre de la Santé et des Services sociaux et la Fédération des médecins spécialistes du Québec aux fins de l’application de la Loi sur l’assurance maladie* (“Framework Agreement”) leads to the conclusion that he cannot hear any dispute submitted by a medical specialist, except one with respect to fees.
3. However, even if the reasonableness standard is applied on this issue, I am of the opinion that the arbitrator erred in concluding that the respondent did not have standing in this case. The only point of contention between myself and Brown and Rowe JJ. that merits further discussion thus relates to the review of the arbitrator’s decision on whether the respondent had standing.
   1. The Arbitrator’s Decision Is Unreasonable
4. In applying the reasonableness standard, this Court must determine whether the arbitrator’s decision is justified, transparent and intelligible, as well as whether it falls within a range of “possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47). In my opinion, this question must be answered in the negative: the arbitrator’s decision is not defensible in respect either of the facts or of the law.
5. More specifically, the arbitrator’s conclusion that the respondent did not have standing to submit his dispute is unreasonable insofar as it is based on (1) a mischaracterization of the nature of the dispute and (2) a misinterpretation of s. 54 of the HIA.
   * 1. The Arbitrator’s Conclusion Is Based on a Mischaracterization of the Nature of the Dispute
6. My colleagues Wagner and Gascon JJ. state that “the arbitrator concluded that the subject matter of Dr. Guérin’s proceeding was a declaration recognizing the laboratories for the period at issue in the application” and that, “[i]n considering the motion for judicial review, the Superior Court and the Court of Appeal were limited to determining whether the arbitration award was reasonable, including in relation to the subject matter of the dispute” (paras. 39 and 41). They thus appear to be suggesting that the determination of the subject matter of a dispute is binding on the courts and that such a determination is not subject to judicial review. Yet it is clear that judicial review is appropriate where an administrative decision maker mischaracterizes the subject matter of a dispute. An administrative decision maker’s conclusion can be unreasonable if it is based on a mischaracterization of the dispute before him or her. In my view, that is exactly what has happened in this case.
7. The arbitrator noted that [translation] “[a] member or a group of members of the [Fédération des médecins spécialistes du Québec] cannot go back on the recommendation of the joint committee that was endorsed by the Fédération des médecins spécialistes and have it reviewed and modified by way of arbitration” (arbitration award, at para. 52, reproduced in A.R., at p. 29). He concluded on this basis that the respondent could not “be allowed to ask a council of arbitration . . . to modify in respect of him the rules that the parties to the Framework Agreement, and they alone, negotiated” (para. 57).
8. But that is a mischaracterization of the nature of the dispute. The respondent did not ask that the rules negotiated by the parties to the Framework Agreement be modified. On the contrary, his challenge was related to how the Fédération des médecins spécialistes du Québec and the Régie de l’assurance maladie du Québec had interpreted and applied the conditions for recognition. He characterized the subject matter of the dispute as follows in his notice of dispute:

[translation]

1. The dispute concerns the interpretation and application of s. 4.1(iv) of the Protocole concernant la radiologie diagnostique of the Accord‑cadre entre le Ministre de la santé et des services sociaux et la Fédération des médecins spécialistes du Québec aux fins de l’application de la Loi sur l’assurance maladie, which was introduced by Amendment 49, and subsequently replaced by Amendment 54, to that agreement;
2. The dispute stems from decisions by the defendants to recognize the medical imaging laboratories (MILs) in which the plaintiff and his mandators practise for the purposes of the digitization fee provided for in the Protocole concernant la radiologie diagnostique, effective June 21, 2011;
3. The plaintiff submits that a correct interpretation of the provisions establishing the applicable rules would have led to their being applied such that, as a result of the defendants’ decisions to recognize the MILs in question, the plaintiff and his mandators may claim from the Régie de l’assurance maladie du Québec the digitization fees provided for in the Protocole since June 1, 2009; [Reproduced at para. 2 of the arbitration award.]
4. The respondent in fact concedes that he would not have standing to contest the conditions of an agreement that has been duly entered into under s. 19 of the HIA. What he was arguing before the arbitrator was instead that the conditions for recognizing a laboratory for the purposes of the digitization fee provided for in the agreement had been incorrectly *interpreted and applied*, and that the laboratories at issue should therefore have been recognized for the purposes of the digitization fee for the period in question.
5. That is exactly what he requested from the arbitrator in his notice of dispute:

[translation]

**MAY IT PLEASE** the council of arbitration to grant the following conclusions:

**DECLARE** that as of June 1, 2009, the medical imaging laboratories named below should have been recognized for the purposes of section 4 of the Protocole concernant la radiologie diagnostique of the Accord‑cadre entre le Ministre de la santé et des services sociaux et la Fédération de médecins spécialistes du Québec aux fins de l’application de la Loi sur l’assurance maladie, introduced by Amendment 49 to that agreement; [Emphasis added; arbitration award, at para. 2.]

1. I agree with Schrager J.A., writing for the majority of the Court of Appeal, that the [translation] “physician contests the application to his . . . specific situation of the existing conditions provided for in section 4. What the respondent is asking does not amount to a request to (re)negotiate section 4 when what is in issue is the interpretation and application of the section proposed by the Fédération” (2015 QCCA 1726, at para. 39 (CanLII)).
2. The arbitrator’s characterization of the nature of the dispute in this case thus completely disregards the notice of dispute that instituted the proceeding.
3. In my opinion, given that the conclusion that the respondent did not have standing is founded on a mischaracterization of the nature of the dispute, it cannot be said to be reasonable in that it does not fall within a range of “possible, acceptable outcomes which are defensible in respect” of the pleading filed to institute the dispute and the declaration the respondent was asking the arbitrator to make (*Dunsmuir*, at para. 47). I am not suggesting that the arbitrator was necessarily bound by the characterization proposed by the respondent. Rather, what I am saying is that to find that the arbitrator’s decision was justified, transparent and intelligible, we must at the very least be in a position to understand why he reached the decision he did. That is not the case here.
   * 1. The Arbitrator’s Conclusion Is Based on a Misinterpretation of Section 54 of the HIA
4. In concluding that the respondent did not have standing, the arbitrator interpreted s. 54 of the HIA narrowly, thereby disregarding the applicable principles of interpretation to such an extent as to overlook the fact that the section exists. For example, he made the following comments at paras. 48-49:

[translation] For the council of arbitration to be able to intervene in a case such as this, it would have been necessary for there to be a clear provision, either in the Act, where there is none, or in the Framework Agreement, to the effect that a medical specialist or a group of medical specialists has the power either to negotiate for recognition or to institute an arbitration proceeding to contest the recommendation made by the joint committee [under] section 4.4 [of the Protocole concernant la radiologie diagnostique] that they deem unsatisfactory.

The negotiating parties did not intend to give the council of arbitration a power of oversight in this regard, nor did they give individuals or groups the right to contest a recommendation of the joint committee or the implementation of such a recommendation by the Régie [de l’assurance maladie du Québec], which has the authority to [translation] “follow up on notices received from the negotiating parties that contain information needed to apply or to cease applying the digitization fee in a designated laboratory and sector of radiological activity (section 4.6 of [the Protocole concernant la radiologie diagnostique]).”

He added the following at para. 52:

[translation] A member or a group of members of the [Fédération] cannot go back on the recommendation of the joint committee that was endorsed by the Fédération des médecins spécialistes and have it reviewed and modified by way of arbitration. Nowhere in the [HIA] or in the Framework Agreement can a provision be found that authorizes the council of arbitration to substitute its own opinion for that of the joint committee and its own decision for that made by the negotiating parties further to the joint committee’s report. If the negotiating parties had intended to confer on a member of the [Fédération] or a group of its members the right to contest a recommendation of the joint committee before a council of arbitration, they would have had to state clearly that the joint committee’s work and conclusions could be contested and modified by means of the dispute procedure.

1. In my opinion, the legal basis whose existence was called into question by the arbitrator is in fact found in s. 54 of the HIA, which reads as follows:

**54.** A dispute resulting from the interpretation or application of an agreement is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction.

The composition of the council of arbitration and the appointment of its members may be determined in an agreement. If the composition and appointment are not so determined, they are determined by the Minister of Labour after consultation with the bodies representing professionals in the field of health.

1. I agree with the majority of the Court of Appeal that [translation] “section 54 of the [HIA] is a ‘clear provision’ in that it is drafted in broad language that does not admit, either implicitly or contextually, of a construction that limits standing to apply for arbitration to the Fédération and the Ministère” (para. 34 (footnote omitted)).
2. I also agree with the conclusion of the majority of the Court of Appeal that [translation] “[t]he arbitrator limited the application of section 54 [of the HIA] partly on the basis of sections 20.2 and 20.5 of Schedule 1 to the Framework Agreement” and that “[t]his is an error of law, and the resulting interpretation of the arbitrator is neither rational nor a possible outcome on this issue” (para. 29). I note that s. 20.2 of schedule 1 to the Framework Agreement sets out the procedure for submitting a dispute with respect to fees and that s. 20.5 of that same schedule provides that the Fédération may file a collective dispute against the Minister, the Régie de l’assurance maladie du Québec or an institution.
3. In allowing the preliminary exceptions that had been submitted to him, the arbitrator completely disregarded the fundamental principle of the hierarchy of rules, which may be summarized as follows:

[translation] In any legal system, there is a hierarchy of legal rules: at its foundation is the Constitution, upon which ordinary statutes are based, followed by regulations and, finally, particular administrative acts and actual acts of execution. The principles of supremacy of the Constitution and parliamentary supremacy are what could be considered the constitutional base of our administrative law. This leads to the fundamental rule that every government power is necessarily a delegated power, that every government act derives its only force from an Act of Parliament or of a legislature. That is what the Supreme Court stated in 1943: “[E]very order in council, every regulation, . . . every order, whether emanating immediately from His Excellency the Governor General in Council or from some [other] agency, derives its legal force . . . from [an] Act of Parliament” . . . .

. . .

This principle applies to regulations, which are considered to be “delegated legislation”, as well as to specific decisions and to contracts.

(P. Garant, with P. Garant and J. Garant, *Droit administratif* (6th ed. 2010), at p. 200)

1. It follows from this principle that the scope of schedule 1 to the Framework Agreement must depend on that of the HIA, not the reverse. To interpret the scope of a statute by reference to the delegated legislation and the contracts it authorizes (in this case, the Framework Agreement) does violence to the structure of the legal framework established by the HIA. Such a line of reasoning is as wrong as trying to define the scope and substance of a right guaranteed by the *Canadian Charter of Rights and Freedoms* on the basis of how it has been implemented by the legislature.
2. Sections 20.2 and 20.5 of schedule 1 to the Framework Agreement thus cannot take precedence over s. 54 of the HIA and limit its scope absent an express statutory provision to that effect. The HIA is a statute of public order (s. 104.1) that cannot be rendered inapplicable by an agreement. Its public order status precludes the parties from entering into an agreement that would deny s. 54 any effect with regard to the respondent (*Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, 2010 SCC 28, [2010] 2 S.C.R. 61, at para. 41). In my opinion, an interpretation that suggests otherwise cannot be said to be reasonable.
3. Moreover, s. 41 of the *Interpretation Act*, CQLR, c. I‑16, provides that “[e]very provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit” and that “[s]uch statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit”. It follows that the right provided for in s. 54 of the HIA to submit any dispute resulting from the interpretation or application of an agreement to a council of arbitration must be construed broadly and liberally.
4. Section 54 of the HIA is drafted in broad, clear language. It is “[a] dispute resulting from the interpretation or application of an agreement [that] is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction.” The scope of the section cannot be restricted by an agreement, because no possible restrictions are provided for in the HIA.
5. As the motion judge noted, the word “dispute” in s. 54 of the HIA is not defined in that Act, which means that it is necessary to refer to the standard dictionary definitions. She quoted the definition from the *Petit Robert*, according to which a *différend* (dispute) is a [translation] “[d]isagreement resulting from a difference of opinion or the competing interests of two or more people” (2013 QCCS 6950, at para. 24 (CanLII); see also *Le Petit Robert* (new ed. 2012), at p. 736). The majority of the Court of Appeal agreed and added another definition from the *Dictionnaire de droit québécois et canadien*, according to which a *différend* is a [translation] “disagreement between two or more people” (para. 24, quoting H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (4th ed. 2010), at p. 202).
6. In my opinion, when the negotiating parties [translation] “decide on and designate the general radiology laboratories that will be recognized for the purposes of the digitization fee” pursuant to s. 4.5 of the Protocole concernant la radiologie diagnostique, they are interpreting and applying the agreement within the meaning of s. 54 of the HIA. A dispute submitted to the arbitrator thus results from a difference of opinion between the medical specialists and the negotiating parties. There is no reason to limit the scope of s. 54 of the HIA, and in particular the concept of a “dispute” within the meaning of that section, to disagreements between the Fédération and the Minister as the arbitrator did.
7. Nor can it be said, as my colleagues Wagner and Gascon JJ. suggest, that the Fédération’s monopoly of representation also extends to the interpretation and application of the agreement. It is true that the Fédération has a monopoly recognized by the Minister, which, moreover, the respondent does not dispute, for the purpose of negotiating an agreement under s. 19 of the HIA. However, the Fédération’s monopoly is limited to the conclusion of such an agreement. The view that the Fédération’s monopoly also extends to the application of the agreement cannot really be reconciled with the fact that, generally speaking, “[t]he function of the [Régie de l’assurance maladie du Québec is] to administer and implement the programs of the health insurance plan instituted by the [HIA] and any other program entrusted to it by law or by the Government” (*An Act respecting the Régie de l’assurance maladie du Québec*, CQLR, c. R‑5, s. 2). That is why the HIA entitles a medical specialist to submit a question relating to the interpretation or application of the Framework Agreement to arbitration in accordance with ss. 22.0.1 and 22.2 of the HIA where the Régie de l’assurance maladie du Québec refuses to pay him or her a fee or requests the reimbursement of such a fee. This being said, the existence of these specific recourses, in which the opposing parties are the medical specialist and the Régie de l’assurance maladie du Québec, in no way diminishes the existence and the scope of the broader remedy provided for in s. 54 of the HIA for any other dispute resulting from the interpretation or application of an agreement, in which it would be possible for the opposing parties to be a medical specialist and the Fédération.
8. I also note that my colleagues’ position regarding the scope of the Fédération’s monopoly is based on principles of Quebec labour law (*Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 41). Yet the scheme of the HIA contains no specific provision authorizing the Fédération to exercise all the recourses the Framework Agreement grants to medical specialists as is the case with the labour law scheme established by the *Labour Code*, CQLR, c. C‑27, s. 69. In my opinion, it is not wise to import labour law principles, such as that of the monopoly of representation granted to a union, into the scheme of the HIA unless that Act expressly provides for this.
9. Wagner and Gascon JJ. state that the interpretation of s. 54 of the HIA that I propose would result in an unacceptable or inappropriate increase in arbitration cases. In this regard, I adopt the argument of my colleagues Brown and Rowe JJ. that, on the contrary, “[t]he more persons who are placed in the difficult position in which Dr. Guérin finds himself, the more compelling the basis for allowing him and others to have their disputes heard by an impartial decision‑maker” (para. 82). This of course supports the view that it was unreasonable for the arbitrator to conclude that the respondent did not have standing and in so doing to prevent the respondent from applying to the forum provided for by the legislature for submitting a dispute resulting from the interpretation or application of an agreement.
10. On this last point, Wagner and Gascon JJ. consider that the arbitrator did not leave the respondent without recourse, as “[t]he courts would have jurisdiction if he were to allege that the Fédération had not properly discharged its duty of representation” (para. 60). But it is unrealistic to argue that the courts would have been an appropriate forum for the respondent, since, as my colleagues in fact acknowledge, the Fédération’s duty of representation is limited to certain types of conduct: bad faith, discrimination, arbitrary conduct and serious negligence (*Noël*, at para. 48). In the instant case, the respondent alleges that the Fédération misinterpreted and misapplied the conditions for recognizing his laboratory for the purposes of the digitization fee provided for in the agreement, which does not correspond to any of the types of conduct to which my colleagues refer.
11. In sum, in addition to disregarding the fundamental principle of the hierarchy of rules by limiting the scope of the HIA by reference to the agreement it authorizes, the arbitrator failed to apply the relevant principles of interpretation as codified by the legislature. The arbitrator’s conclusion that the respondent did not have standing was based on an erroneously restrictive construction of the HIA and did not fall within a range of possible, acceptable outcomes which are defensible in respect of the applicable principles of interpretation (*Dunsmuir*, at para. 47). It was therefore unreasonable.
    1. Conclusion
12. In my opinion, the arbitrator erred in concluding that he did not have jurisdiction to hear the respondent’s dispute. He also erred in concluding that the respondent did not have standing. I would therefore dismiss the appeal.

**APPENDIX**

**(Relevant Statutory and Contractual Provisions)**

*Health Insurance Act*, CQLR, c. A‑29

**22.0.1.** Whenever the Board [the Régie de l’assurance maladie du Québec] believes that a professional in the field of health or a third person has exacted payment from an insured person in contravention of this Act, where nothing in the regulations so permits, or has claimed an amount exceeding the amount that would have been paid by the Board to a health professional subject to the application of an agreement for insured services furnished to an insured person who failed to present his health insurance card, claim booklet or eligibility card, it shall reimburse the amount so paid by the beneficiary and notify the professional or the third person in writing thereof. The Board shall make such a reimbursement solely where the insured person applies therefor in writing within one year after the date of payment.

An amount so reimbursed and the administrative costs prescribed constitute a debt toward the Board and may be recovered from the professional in the field of health or third person by compensation or otherwise, on the expiry of a period of 30 days from the date of the notice.

Within six months of the compensation, the professional in the field of health may appeal from the Board’s decision before the Superior Court or the Court of Québec according to their respective jurisdictions or, in the case of a question of interpretation or application of an agreement, before a council of arbitration established under section 54. The burden of proving that the decision of the Board is ill‑founded is on the health professional.

. . .

**22.2.** Where the Board believes that services for which payment is claimed by a professional in the field of health or for which he has obtained payment in the preceding 36 months were services furnished in non‑conformity with the agreement, the Board may refuse payment for such services or have them reimbursed by compensation or otherwise, as the case may be. Disputes resulting from this paragraph are settled by the council of arbitration instituted by section 54.

Where, after an investigation, the Board believes that services for which payment is claimed by a professional in the field of health or for which he has obtained payment in the 36 preceding months were services that have not been furnished, that he has not furnished in person or that he has falsely described, or services that were non‑insured services, services not considered insured by regulation or services not established as insured services by regulation, the Board may refuse payment for such services or have them reimbursed by compensation or otherwise, as the case may be.

Where the Board decides to refuse payment for services or to make compensation, it must inform the professional in the field of health of the reasons for its decision.

In the cases provided for in this section, the burden of proof that the decision of the Board is ill‑founded, is on the professional in the field of health.

A professional in the field of health who wishes to appeal a decision of the Board before the Superior Court or the Court of Québec according to their respective jurisdictions, must do so within six months of receiving such decision.

For the purposes of this Act and within the scope of the basic prescription drug insurance plan, the second, third, fourth and fifth paragraphs, adapted as required, apply to an institution.

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**54.** A dispute resulting from the interpretation or application of an agreement is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction.

The composition of the council of arbitration and the appointment of its members may be determined in an agreement. If the composition and appointment are not so determined, they are determined by the Minister of Labour after consultation with the bodies representing professionals in the field of health.

*Framework Agreement between the Minister of Health and Social Services and the Fédération des médecins spécialistes du Québec for the purposes of the* *Health Insurance Act* (*Accord‑cadre entre le ministre de la Santé et des Services sociaux et la Fédération des médecins spécialistes du Québec aux fins de l’application de la Loi sur l’assurance maladie*)

[translation]

**SCHEDULE 1.**

. . .

**TITLE 1.**

**GENERAL**

. . .

**SECTION 3.**

*REPRESENTATION*

**3.1**The Minister recognizes the Fédération as the only organization representing medical specialists for the negotiation and application of any agreement concerning medical services and medical administrative duties performed in hospital centres.

This recognition shall be binding on the Board and on all institutions.

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**TITLE V.**

**ARBITRATION PROCEDURE**

**SECTION 20.**

*DISPUTE*

**20.1** A dispute shall be filed by a medical specialist or by the Fédération in accordance with this title.

There are two types of disputes: the dispute with respect to fees and the collective dispute.

**DISPUTE WITH RESPECT TO FEES**

**20.2** A medical specialist may submit a dispute in response to a refusal of payment or a request for reimbursement by the Board.

A physician who has not submitted an application for review shall file such a dispute within six months of receipt of the Board’s decision concerning a refusal of payment or a request for reimbursement.

A physician who has submitted an application for review shall file such a dispute within six months of receipt of the Board’s decision further to the submissions process provided for in section 15.

The filing of a notice of dispute terminates the submissions process.

The Fédération may, in the same circumstances, act on behalf of one or more medical specialists.

**20.3** A dispute with respect to fees shall not be heard if it is within the exclusive jurisdiction of the Commission des Affaires sociales.

**20.4** A medical specialist may submit a dispute against an institution in the event of a disagreement regarding the application of his professional services contract.

**2. COLLECTIVE DISPUTE**

**20.5** The Fédération may file a collective dispute against the Minister, the Board or an institution.

It may in so doing raise any disagreements relating to the application of this agreement.

It may also contest any administrative instrument — such as a directive, a decree, a contract of affiliation or an organization plan — that it considers to be in contravention of this agreement.

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**SCHEDULE 5**

**LABORATORY MEDICINE TARIFF** [*Tarif de la médecine de laboratoire*]

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**DIAGNOSTIC RADIOLOGY PROTOCOL** [*Protocole concernant la radiologie diagnostique*]

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**SECTION 4.**

*DIGITIZATION FEE: RECOGNITION OF LABORATORIES*

**4.1** For the purpose of promoting the digitization of radiology equipment in general radiology laboratories, a digitization fee (R=9) shall be applicable in laboratories that are recognized by the negotiating parties for the designated sectors of radiological activity.

For the pursuit of that purpose, three separate areas of activity shall be recognized: general radiology, mammography and fluoroscopy.

**4.2** In order to be recognized, a general radiology laboratory identified in the list provided for in section 1 shall satisfy the following conditions:

All the equipment of the laboratory that is used in the sector of radiological activity for which the digitization fee is being claimed must be digitized;

In respect of the digitization fee applicable in either the mammography or the fluoroscopy sector of activity, all the equipment used in the general radiology sector of activity must also be digitized;

The laboratory must have a PACS that is compatible with the mandatory standards for the archiving of pictures in the regional diagnostic imaging repository and for feeding this repository in accordance with its archiving capacity via a network connection to which the laboratory is given access.

The costs of the network connection up to the market cost of a standard business line shall be borne by the laboratory; all additional costs shall be borne by the Ministère de la Santé et des Services sociaux or another organization it designates.

All the radiology equipment and the PACS used in a general radiology laboratory for which a digitization fee is being requested (hereinafter referred to as the “radiology equipment”) shall belong to and mainly benefit medical specialists in radiology practising in the context of the health insurance plan (hereinafter referred to as the “radiologists”).

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**4.3** A medicalspecialist in radiology who wishes to obtain recognition of a general radiology laboratory for the purposes of the digitization fee shall submit an application to that effect to the negotiating parties.

He shall indicate the sector of radiological activity for which the digitization fee is being requested and provide all information and documents that will be needed in order to analyze his application and that will show that the conditions set out in section 4.2 have been satisfied.

**4.4** There shall be established a joint committee composed of equal numbers of representatives of the Fédération and the Ministère de la Santé et des Services sociaux to which shall be referred any applications for recognition submitted under section 4.3 for the purposes of the digitization fee.

After analyzing an application, the joint committee shall make a recommendation to the negotiating parties.

**4.5** Further to the joint committee’s recommendations, the negotiating parties shall decide on and designate the general radiology laboratories that will be recognized for the purposes of the digitization fee together with the applicable sectors of radiological activity.

**4.6** TheBoard shall follow up on notices received from the negotiating parties that contain information needed to apply or to cease applying the digitization fee in a designated laboratory and sector of radiological activity.

*Appeal allowed with costs in all courts,* Côté J. *dissenting.*

Solicitors for the appellant: Bernard, Roy (Justice Québec), Montréal.

Solicitors for the respondent: Bélanger Sauvé, Montréal.

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1. The relevant provisions of the Act, the Framework Agreement and the Protocol are reproduced in an appendix to the judgment. [↑](#footnote-ref-1)