The Canadian Bar Association
National Administrative Law and Labour & Employment Law CLE Conference:
Access and Independence: Restoring the Balance in Administrative Tribunals
and Labour Boards

November 20 and 21, 2009
Ottawa, Ontario

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

DAVID PHILLIP JONES, Q.C.
de VILLARS JONES
Barristers & Solicitors
300 Noble Building
8540 - 109 Street N.W.
Edmonton, Alberta
T6G 1E6

Phone (780) 433-9000
Fax (780) 433-9780
dpjones@sagecounsel.com

TABLE OF CONTENTS

I. INTRODUCTION

Like in previous years, this paper[1] highlights significant developments in administrative law over the past year. Decisions of the Supreme Court of Canada, provincial appeal courts and other noteworthy judicial and legislative trends will be identified in an attempt to give a broad overview of the ever-developing principles of administrative law.

In 2008, the Supreme Court of Canada attempted to simplify the standards-of-review analysis in *Dunsmuir*. Not surprisingly, the aftermath of *Dunsmuir* has been both interesting and widespread. Courts have been interpreting and applying *Dunsmuir* in a vast array of administrative law decisions. Unfortunately, not all courts have gotten it right and it has become apparent that some areas of the standards-of-review analysis are still unclear and misunderstood. A good deal of this year's paper will focus on the aftermath of *Dunsmuir* and the areas that still require clarification.

Of course, there also have been interesting cases dealing with all aspects of the duty to be fair, multiple forums, privacy and disclosure, and the usual multitude of interesting administrative law cases that do not fit neatly into the categories above.

---

1. I gratefully acknowledge the very capable assistance of Dawn M. Knowles, LL.B. from our office in the preparation of this paper. I also appreciate those from across the country who draw my attention to interesting developments in administrative law in their jurisdictions.

II. STANDARDS OF REVIEW

A. The Aftermath of *Dunsmuir*

The previous two papers began their discussion of standards of review by citing a 2007 comment of Justice Berger of the Court of Appeal of Alberta in which he describes the standard-of-review maze as perplexing, tortuous and exhausting.[2]

In 2008, the Supreme Court of Canada appeared to heed those comments. The court in *Dunsmuir* attempted to simplify standards-of-review analysis by merging the two deferential standards of review into a new unified standard of reasonableness,[3] and streamlining the analysis where precedent has already determined the standard of review applicable to a particular decision.

However, almost exactly one year later, the Supreme Court of Canada's decision in *Canada (Minister of Citizenship & Immigration) v. Khosa*[4] once again raises a number of interesting questions, at least with respect to how the new standards-of-review analysis will be applied where there is a statutory standard of review.

---

2. *Chauvet v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2007 ABCA 155 at paragraph 17. Justice Berger's comments are reminiscent of Justice LeBel's *cri de coeur* in *Toronto v. C.U.P.E.*, [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 385.

3. Not "patent unreasonableness", as was the case pre-*Southam*.

4. 2009 SCC 12.

1. Statutory Standards of Review: *Khosa*, *Manz* and others

(a) *Canada (Minister of Citizenship & Immigration) v. Khosa*

Khosa dealt with a removal order under the *Immigration and Refugee Protection Act*.[5] The Immigration and Refugee Board had ordered Khosa to return to India following a conviction for criminal negligence causing death in an automobile street race. The Immigration Appeal Division upheld the decision and did not accept that there were humanitarian and compassionate grounds to warrant special relief.

Khosa applied to the Federal Court for judicial review. The judicial review judge dismissed the application on the grounds that it was not patently unreasonable.[6] Khosa appealed to the Federal Court of Appeal.

After applying the four *Pushpanathan* factors, the majority of the Federal Court of Appeal[7] reversed the Federal Court's decision and held that the standard of review should have been reasonableness *simpliciter*, not patent unreasonableness,[8] and quashed the Board's decision as being unreasonable. The Minister appealed the decision to the Supreme Court of Canada. The Minister argued that section 18.1 of the *Federal Court Act* establishes a legislated standard of review that displaces the common law. In other words, the Minister argued that a pragmatic and functional analysis is not required where a statutory standard of review is

---

5. S.C. 2001, c. 27.

6. 2005 FC 1218.

7. 2007 FCA 24.

8. Both of these lower court decisions were decided before *Dunsmuir* was decided.

set out[9] and, therefore, the analysis in *Dunsmuir*, which by then had been decided, is altogether irrelevant in such cases.

Eight of the nine judges allowed the Minister's appeal and restored the decision of the Immigration Appeal Division. However, although they agreed in the outcome, they disagreed on the approach to be used.

(i) *The application of Dunsmuir where the legislature has specified the applicable standard of review*[10]

Writing for the largest group in the majority,[11] Justice Binnie first notes that the decision in *Dunsmuir* has changed the focus in judicial review applications:

> 4 *Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review. Here, the decision of the IAD required the application of broad policy considerations to the facts as found to be relevant, and weighed for importance, by the IAD itself. The question whether Khosa had shown "sufficient humanitarian and compassionate considerations" to warrant relief from his removal order, which all parties acknowledged to be valid, was a decision which Parliament confided to the IAD, not to the courts. I conclude that on general principles of administrative law, including our Court's recent decision in *Dunsmuir*, the applications judge was right to give a higher degree of deference to the IAD decision than seemed appropriate to the Federal Court of Appeal majority. In my view, the majority decision of the IAD was within a range of reasonable outcomes and the majority of the Federal Court of Appeal erred in intervening in this case to quash it. The appeal is therefore allowed and the decision of the Immigration Appeal Division is restored.

---

9. It was argued that s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, sets out the standard of review to be used, not just the grounds for review.

10. This portion of the paper is taken largely from my annotation which was published in the *Administrative Law Reports* at (2009) 82 Admin. L.R. (4th) 123.

11. Chief Justice McLachlin and Justices Binnie, LeBel, Abella and Charron.

Justice Binnie goes on to discuss the importance of considering the role of Parliament and the legislatures in judicial review applications, particularly in the area of standard of review. He accepts that the legislature may validly specify the standard of review (subject to certain constitutional limitations); and, if this is done, then the courts' duty is to apply the specified standard of review:[12]

> 17 This appeal provides a good illustration of why the adjustment made by *Dunsmuir* was timely. By switching the standard of review from patent unreasonableness to reasonableness *simpliciter*, the Federal Court of Appeal majority felt empowered to retry the case in important respects, even though the issues to be resolved had to do with immigration policy, not law. Clearly, the majority felt that the IAD disposition was unjust to Khosa. However, Parliament saw fit to confide that particular decision to the IAD, not to the judges.
>
> 18 In cases where the legislature has enacted judicial review legislation, an analysis of that legislation is the first order of business. Our Court had earlier affirmed that, within constitutional limits, Parliament may by legislation specify a particular standard of review: see *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779. Nevertheless, the intended scope of judicial review legislation is to be interpreted in accordance with the usual rule that the terms of a statute are to be read purposefully in light of its text, context and objectives.
>
> 19 Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for example, it provides in s. 58(2)(*a*) that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of *indicia* of patent unreasonableness are given in s. 58(3). Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.[13]

---

12. At paras. 17 to 19.

13. Of course, as occurred in *Khosa* itself, there may be an issue about whether the legislature has clearly specified a standard of review, or has intended to displace general administrative law.

[Emphasis added.]

Therefore, the "patently unreasonable" standard continues in jurisdictions like British Columbia with statutorily codified standards of review, notwithstanding that *Dunsmuir* merged the two deferential standards into one standard called reasonableness. However, according to the majority in *Khosa*, the precise content of patent unreasonableness will vary according to the circumstances of the case and "the ordinary principles of administrative law".[14] What is not clear is how "the ordinary principles of administrative law" will continue to have anything to say about the content of the patent unreasonableness standard.

It was then necessary for the Court to determine whether section 18.1 of the *Federal Courts Act* contains a statutorily codified standard of review which the court was bound to apply on this appeal.

(ii) *Whether section 18.1 of the Federal Courts Act sets out grounds for review, or standards of review*

The majority in *Khosa* were divided on this issue.

Justice Binnie held that section 18.1 of the *Federal Courts Act* sets out *grounds* for judicial review, not *standards* of review. Accordingly, the standard of review applicable to each

---

14. When Justice Binnie speaks about "calibrating" patent unreasonableness in the B.C. *ATA* "according to general principles of administrative law", does "calibrating" imply that "patent unreasonableness" has a variable meaning, or is a spectrum? Or is this comment merely intended to mirror the situation with the new "reasonableness" standard, whose meaning is context-driven? Also, is the meaning of "patent unreasonableness" now effectively frozen? How would it be possible to continue to develop after *Dunsmuir* (which merged it into the new reasonableness standard)?

particular ground must be determined for each situation, using the standards-of-review analysis from *Dunsmuir*:[15]

> 28 In my view, the interpretation of s. 18.1 of the *Federal Courts Act* must be sufficiently elastic to apply to the decisions of hundreds of different "types" of administrators, from Cabinet members to entry-level *fonctionnaires*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not. It cannot have been Parliament's intent to create by s. 18.1 of the *Federal Courts Act* a single, rigid Procrustean standard of decontextualized review for all "federal board[s], commission[s] or other tribunal[s]", an expression which is defined (in s. 2) to include generally all federal administrative decision makers. A flexible and contextual approach to s. 18.1 obviates the need for Parliament to set customized standards of review for each and every federal decision maker.

Justice Binnie considered both the English and French versions of section 18 and concluded that section 18.1(4) is not intended to operate as a self-contained code, but is intended by Parliament to be interpreted and applied against the backdrop of the common law, including those elements most recently expounded in *Dunsmuir*. He further stated [footnotes deleted]:

> 50 I readily accept, of course, that the legislature can by clear and explicit language oust the common law in this as in other matters. Many provinces and territories have enacted judicial review legislation which not only provide guidance to the courts but have the added benefit of making the law more understandable and accessible to interested members of the public. The diversity of such laws makes generalization difficult. In some jurisdictions (as in British Columbia), the legislature has moved closer to a form of codification than has Parliament in the *Federal Courts Act*. Most jurisdictions in Canada seem to favour a legislative approach that explicitly identifies the *grounds* for review but not the *standard* of review. In other provinces, some laws specify "patent unreasonableness". In few of these statutes, however, is the *content* of the specified standard of review defined, leading to the inference that the legislatures left the content to be supplied by the common law.
>
> 51 As stated at the outset, a legislature has the power to specify a standard of review, as held in *Owen*, if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will *not* interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or

15. At para. 28.

> withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant's delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth).
>
> [Emphasis added.]

Although they concurred in the result, Justices Rothstein and Deschamps disagreed with Justice Binnie's interpretation of section 18.1.[16] In their view, section 18.1 expressly provides for the standard of review, and the court should not superimpose a duplicative common law analysis.[17] As Justice Rothstein noted, given this interpretation, the *Dunsmuir* analysis is irrelevant:

> 72 The language of s. 18.1(4)(*d*) makes clear that findings of fact are to be reviewed on a highly deferential standard. Courts are only to interfere with a decision based on erroneous findings of fact where the federal board, commission or other tribunal's factual finding was "made in a perverse or capricious manner or without regard for the material before it". By contrast with para. (*d*), there is no suggestion that courts should defer in reviewing a question that raises any of the other criteria in s. 18.1(4). Where Parliament intended a deferential standard of review in s. 18.1(4), it used clear and unambiguous language. The necessary implication is that where Parliament did not provide for a deferential standard, its intent was that no deference be shown. As I will explain, the language and context of s. 18.1(4), and in particular the absence of deferential wording, demonstrates that a correctness standard is to be applied to questions of jurisdiction, natural justice, law and fraud. The language of s. 18.1(4)(*d*) indicates that deference is only to be applied to questions of fact.
>
> 73 *Dunsmuir* reaffirmed that "determining the applicable standard of review is accomplished by establishing legislative intent" (para. 30). The present majority's insistence that *Dunsmuir* applies even where Parliament specifies a standard of review is inconsistent with that search for legislative intent, in my respectful view.

Therefore, while Justice Binnie and Justice Rothstein both agree that the *Dunsmuir* standard-of-review analysis is not necessary where there is a statutory standard of review, they

---

16. Justice Deschamps agreed with Justice Rothstein that section 18.1(4) of the *Federal Courts Act* sets legislated standards of review, which oust the common law.

17. At para. 70.

disagree about the proper interpretation and function of section 18.1(4) of the *Federal Courts Act*. Justice Binnie concludes that section 18.1 only sets out grounds of review, so that *Dunsmuir* must be used to determine the applicable standard of review (which in this case was reasonableness). It concludes that the Immigration Appeal Division decision was reasonable and ought to be restored. On the other hand, Justices Rothstein and Deschamps concluded that section 18.1 sets out the standard of review (which, given the wording, was highly deferential). According to Justice Rothstein, because the factual findings of the Immigration Appeal Division were not perverse or capricious or made without regard to the evidence, its decision should not have been quashed.

(iii) *The differing perspectives*

On the issue of whether section 18.1 establishes a standard of review, Justice Binnie views the issue as a matter of statutory interpretation and addresses the different approach taken by Justice Rothstein as follows:

> 35 My colleague Rothstein J. writes that "to say (or imply) that a *Dunsmuir* standard of review analysis applies even where the legislature has articulated the applicable standard of review directly contradicts *Owen*" (para. 100). This assumes the point in issue, namely whether as a matter of interpretation, Parliament has or has not articulated the applicable standard of review in s. 18.1.
>
> 36 In my view, the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case": see *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 575. Further, "[i]n one sense, whenever the court exercises its discretion to deny relief, balance of convenience considerations are involved" (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 3-99). Of course, the discretion must be exercised judicially, but the general principles of judicial review dealt with in *Dunsmuir* provide elements of the appropriate judicial basis for its exercise.
>
> 37 On this point, as well, my colleague Rothstein J. expresses disagreement. He cites a number of decisions dealing with different applications of the Court's discretion. He draws

> from these cases the negative inference that other applications of the discretion are excluded from s. 18.1(4). In my view, with respect, such a negative inference is not warranted.

There is indeed a fundamental disagreement on the Court about the proper conceptual framework for standards-of-review analysis. The question is: who is right, and how will it develop in the future?

(iv) *The relationship between determining the standard of review and the court's inherent discretion always to refuse a remedy*

Although Justice Binnie clearly recognizes the existence of a discretion to grant or withhold relief due to delay, failure to exhaust adequate alternate remedies, mootness, prematurity, bad faith and so forth, it appears that he conceives that the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters is also *discretionary*.[18]

By contrast, Justice Rothstein makes the important distinction between deference under the reasonableness standard of review (which is not discretionary) and the court's inherent discretion always to refuse a remedy (regardless of the standard of review). The discretion to refuse to grant a remedy does not engage the question of standard of review.[19]

In my view, Justice Rothstein is right on this point.

---

18. At paras. 36, 42, 51.

19. At paras. 134 to 136.

(v) *Summary on* Khosa

Khosa undoubtedly establishes that the legislature can specify a standard of review which is different from those contained in *Dunsmuir*.[20] There will always be an issue about whether the legislature has clearly done this.

To the extent that the legislature has not clearly specified the standard of review so that *Dunsmuir* does apply, there is a fundamental difference between Justice Binnie and Justice Rothstein in *Khosa* about how one determines whether and when the court is to defer to the statutory decision-maker. In particular, there is a difference about whether privative clauses are the mechanism by which the legislature signals its intent, or whether "expertise" (however that is defined) provides an additional "stand alone" basis for deference. There is also a significant division about the circumstances in which the courts should defer on questions of law, as well as whether judicial review and appellate review are fundamentally the same or different.

In my view, the judgments in *Khosa* demonstrate a lamentable lack of common ground about the fundamental concepts of administrative law, including the proper role of the courts in supervising the executive. Looking back over the past thirty years or so, this lack of conceptual commonality may explain why the Supreme Court's administrative law decisions have so many dissents, and why the rationale of the cases seems to zig and zag.

(b) *Manz v. British Columbia (Workers' Compensation Appeal Tribunal)*

The impact of *Dunsmuir* in jurisdictions with statutory standards of review was also addressed by the British Columbia Court of Appeal in *Manz v. British Columbia (Workers'*

20. Subject to some constitutional limitations that would prevent all forms of judicial review.

Compensation Appeal Tribunal).[21] Manz was injured in a motorcycle accident while on his way home from work but while still on his employer's property. The Workers' Compensation Appeal Tribunal ("WCAT") held that Manz's injuries arose out of, and in the course of, his employment. Because the other driver, Sundher, was also acting in the course of his employment, Manz was limited to the benefits contained in the *Workers' Compensation Act* and could not sue for damages in tort. Manz applied for judicial review of WCAT's decision.

The reviewing judge held that WCAT's decision was patently unreasonable and quashed the decision.[22] Sundher and WCAT appealed that decision.

By the time the appeal was heard, *Dunsmuir* had been decided. Accordingly, the Court of Appeal had to address whether *Dunsmuir* altered the standard-of-review analysis under British Columbia's *Administrative Tribunals Act* ("ATA"). Section 58 of that Act provides:[23]

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

---

21. 2009 BCCA 92. See also *Victoria Times Colonist, A Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229.

22. 2007 BCSC 1945.

23. Section 59 provides the standard of review where the enabling legislation has no privative clause.

> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
> (b) is exercised for an improper purpose,
> (c) is based entirely or predominantly on irrelevant factors, or
> (d) fails to take statutory requirements into account.

The issue was whether the court in *Dunsmuir*, by merging the two common law standards of reasonableness *simpliciter* and patent unreasonableness, had changed the meaning of "patently unreasonable" under the ATA. At the appeal, Manz argued that sections 58(2)(a) and 59(3) of the ATA were unconstitutional and *ultra vires* the province as they set out a standard of review of patent unreasonableness, which was no longer a common law standard of review. He alleged that by legislating the standard of review in sections 58 and 59 of the ATA, the legislature has attempted to control the supervisory role of a superior court.

The Court of Appeal rejected Manz's constitutional arguments. The court stated:

> 30 The question posed on behalf of Mr. Manz is whether this constitutional guarantee of judicial review requires that the standard applied by a court in determining the legislative intent must be determined by the courts. In my view the answer is no. The constitutionally protected role of the superior courts, confirmed in *Crevier*, is supervision of the administrative tribunal's conformity with the jurisdiction assigned to it by the enabling legislation. This is, as said in *Dunsmuir*, a duty "to ensure public authorities do not overreach their lawful powers". Nothing in ss. 58 or 59, in my view, detract[s] from that constitutional role held by the superior court, the Supreme Court of British Columbia.

The court then turned to the question of whether *Dunsmuir* changed the meaning of patent unreasonableness under the ATA:[24]

---

24. At paras. 35 and 36. See also *Asquini v. British Columbia (WCAT)*, 2009 BCSC 62.

> 35 The next question is whether the effect of *Dunsmuir* is to amend the meaning of patent unreasonableness, such that a definition more akin to the reasonableness standard should be adopted. All parties are agreed that *Dunsmuir* should not be taken to have that effect. Still, it must be addressed because there is some divergence of views on this subject in various decisions of the Supreme Court of British Columbia, discussed by Mr. Justice Blair in *Asquini*.
>
> 36 In my view, the effect of *Dunsmuir* is not to change the meaning of patently unreasonable. As said by Mr. Justice Blair in *Asquini*:
>
> > [54] Like Truscott J. in *Lavigne*, I conclude that the standard mandated by the *ATA* is that which existed at common law prior to the issuance of the decision in *Dunsmuir*. *Dunsmuir* had the effect of abolishing patent unreasonableness, and therefore the definition of patent unreasonableness must be that immediately prior to its abolition. I note that only s. 59 of the ***ATA*** contains reference to a reasonableness standard, indicating a differentiation between s. 58, for tribunals operating under a privative clause, and s. 59, for tribunals operating without a privative clause. I also note that the purpose of *Dunsmuir* was not to pave the way for more intrusive review of tribunal decisions, and that the single standard of reasonableness is now analyzed on a spectrum of deference. At one end of the spectrum there still lies a degree of deference similar to that mandated under the former standard of patent unreasonableness. It may be, therefore, that the two positions are not irreconcilable, especially in light of Mr. Justice Binnie's comments set out in para. 24 above.
> >
> > [Emphasis added.]

However, the Court of Appeal did overturn the decision of the reviewing judge on the grounds that the decision of the WCAT was not patently unreasonable. The court held that the reviewing judge impermissibly weighed the evidence and moved outside the definition of patently unreasonable.[25]

---

25. The court adopted the definition of patently unreasonable set out in *Speckling v. BC (WCAT)*, 2005 BCCA 80 as follows: "... only if there is no evidence to support the findings, or the decision is 'openly, clearly, evidently unreasonable', can it be said to be patently unreasonable...". But see *Victoria Times Colonist, A Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229 where the BC Court of Appeal equates patent unreasonableness to irrationality.

(c) *Tallarico, Asquini* and *Buttar*

Situations similar to *Manz* arose in *Tallarico v. British Columbia (Workers' Compensation Appeal Tribunal)*,[26] *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*,[27] and, more recently, in *Buttar v. British Columbia (Workers' Compensation Appeal Tribunal)*.[28] All three decisions dealt with sections 58 and 59 of the *Administrative Tribunals Act* and, in all three cases, the British Columbia Supreme Court concluded that *Dunsmuir* did not change the meaning of patently unreasonable under the *Administrative Tribunals Act*.

The issue of whether British Columbia still has a standard of patent unreasonableness appears settled—at least for the time being.

Presumably the same reasoning would apply where other jurisdictions have specified patent unreasonableness to be the standard of review.[29]

---

26. 2009 BCSC 49.

27. 2009 BCSC 62.

28. 2009 BCSC 1228. See also *Victoria Times Colonist, A Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229; *Doughty v. Whitworth Holdings Ltd.*, 2008 BCSC 801; *British Columbia (Ministry of Children and Family Development) v. McGrath*, 2009 BCSC 180.

29. For example, s. 47.1(3) of the *Traffic Safety Act*, R.S.A. 2000, c. T-16; s. 29 of the *Health Professions Act*, S.Y. 2003, c. 24.

2. The meaning of reasonableness

In *Dunsmuir*, Justice Binnie described "reasonableness" as a "broad tent". Some commentators have subsequently questioned whether "reasonableness" is a single standard or whether it refers to a spectrum.[30]

(a) *Finning*

This issue was addressed by the Court of Appeal of Alberta in *International Assn. of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc.*[31] The respondent argued that there is a spectrum of reasonableness, and a review of a decision from a labour board is deserving of the highest level of deference on that spectrum. The Court of Appeal rejected that argument:[32]

> ... No such spectrum exists. The decision is either reasonable, that is, "whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law" (at para. 47), or it is not. The "revised system" developed in *Dunsmuir* was intended to simplify the approach to judicial review. The concept of a "spectrum" of reasonableness ignores both the definition and the objective articulated by the Supreme Court of Canada: *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para. 18, [2008] O.J. No. 2150.

(b) *Khosa*

In *Khosa*, Justice Binnie makes it clear that "reasonableness" is "a single standard that takes its colour from the context"; and that courts must determine whether the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law"; so that "... as long as the process and the outcome fit comfortably with the principles

---

30. For example, in paragraph 54 in *Manz*, the B.C. Court of Appeal stated that the new reasonableness standard from *Dunsmuir* "... is now analyzed on a spectrum of deference".

31. 2008 ABCA 400.

32. At para. 12.

of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome".[33]

Finally, it should be noted that seven of the eight judges in *Khosa* agreed that the Immigration Appeal Division's decision was reasonable. However, Justice Fish strenuously disagreed. Apparently, reasonable people can disagree about whether the outcome of a particular decision is reasonable!

(c) *Petro-Canada*

The recent British Columbia Court of Appeal decision in *Petro-Canada v. British Columbia (Workers' Compensation Board)*[34] also addresses the meaning of reasonableness. The court was hearing an appeal concerning orders by the Workers' Compensation Board declaring that Petro-Canada had failed to ensure the health and safety of its employees, failed to perform a risk assessment, and failed to report unsafe work conditions. The Supreme Court had quashed the orders on the basis that the Board had erred in its interpretation of "employer". The Board appealed the judge's decision.

The Court of Appeal allowed the appeal. The Court of Appeal held that the mere fact that the Board misinterpreted "employer" does not mean that the decision must be quashed as

---

33. At paras. 59 and 108 (Justice Rothstein).

34. 2009 BCCA 396. See also *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, in which the Ontario Court of Appeal rejected the notion that the adequacy of reasons and the reasonableness of a decision fall into a single category. See also David Mullan's paper entitled *Administrative Law Update - 2008-09* prepared for the Continuing Legal Education Society of British Columbia's 2009 Administrative Law Conference.

unreasonable. It concluded that, in assessing reasonableness, a court should focus on the result reached by the tribunal rather than on the reasons for reaching that result:[35]

> 49 I do not disagree with the chambers judge's finding that the Review Officer's discussion of the scope of the word "employer" contained several errors. I would even go so far as to agree with him that the Review Officer's discussion of the meaning of the word ignored well-established principles of statutory interpretation to such an extent that it might be characterized as unreasonable. That alone, however, does not mean that the decision must be quashed as unreasonable. Not every error in a tribunal's chain of reasoning will compel the quashing of its decision. The role of the error in the decision is critical.
>
> 50 The Board argues that the Court should not focus on whether the reasons given by the Review Officer were reasonable, but rather on whether the result that he reached could be supported by a chain of reasoning that is reasonable. Indeed, counsel goes so far as to suggest that the Court can look to other decisions by Review Officers that reach a similar result through different chains of reasoning – in particular, we have been referred to Review Decision #R0082711, another decision concerned with service stations. While that Review Decision does appear to offer a less controversial path to the result reached by the Review Officer in this case, I do not find it helpful in determining whether the decision under review here was unreasonable. I note, too, that Review Officers are not bound by decisions of other Review Officers (see s. 99 of the *Act*).
>
> 51 The proposition that the Court should focus on the result reached by the tribunal rather than on its reasons in assessing reasonableness enjoys some support in the case law. In *Kovach, Re* (1998), 52 B.C.L.R. (3d) 98 (C.A.) at para. 26, Donald J.A. (dissenting) stated:
>
> > [The majority judgment] identified serious flaws in the Board's reasoning but I think that the review test must be applied to the result not to the reasons leading to the result. In other words, if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal's reasoning.
>
> 52 The Supreme Court of Canada allowed the appeal from this Court's decision "substantially for the reasons of Donald J.A.": *Kovach v. British Columbia (Workers' Compensation Board)*, 2000 SCC 3, [2000] 1 S.C.R. 55.
>
> 53 The Board also relies on a quotation from David Dyzenhaus to the effect that deference requires "respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at p. 286. The quotation has been cited by the Supreme Court of Canada with approval in several cases, most recently in *Dunsmuir*, at para. 48.

35. At paras. 49 to 62.

54 The idea that the Court should review a decision based on the reasonableness of the result as opposed to the [actual] chain of reasoning leading to the result must be applied with considerable caution, in my opinion. A court cannot properly be said to defer to a tribunal when it ignores the tribunal's reasons and fashions its own rationale for the result that the tribunal reached. It should also be kept in mind that both this Court's judgment in *Kovach* and the quotation from Professor Dyzenhaus' article pre-date the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the case which clearly established the duty of tribunals to provide reasons for their decisions. It would make little sense to impose on a tribunal a duty to give reasons if those reasons could be ignored on judicial review. The Supreme Court of Canada has recently adverted to the problems inherent in over-emphasizing deference to reasons which could have been, but were not, given by the tribunal. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 63, the Court noted:

> Although the *Dunsmuir* majority refers with approval to the proposition that an appropriate degree of deference "requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision'" (para. 48 (emphasis added)), I do not think the reference to reasons which "could be offered" (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision, as stated in *Baker* at para. 43.

55 The correct approach to the matter was articulated by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 56:

> [The fact that the reviewing court must look to the reasons given by the tribunal to determine reasonableness] does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

56 A court assessing an administrative tribunal's decision on a standard of reasonableness owes the tribunal a margin of appreciation. The court should not closely parse the tribunal's chain of analysis and then examine the weakest link in isolation from the reasons as a whole. It should not place undue emphasis on the precise articulation of the decision if the underlying logic is sound. On the other hand, a court does not have *carte blanche* to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result.

57 On this appeal, the Review Officer's discussion of the definition of the word "employer" was unsound. On the other hand, the error was harmless, because it is obvious that Petro-Canada is, indeed, an employer for the purposes of s. 115. While Petro-Canada argues that the Review Officer's concentration on the appropriate definition of "employer" permeated the balance of his decision, I am unable to agree. The Review Officer proceeded through

> his reasons methodically, and his misstep with respect to the definition of "employer" cannot fairly be said to have affected the balance of his reasons.
>
> [Emphasis added.]

This result appears to be sensible: if the error in reasoning had no material effect, then it would be pedantic to quash the decision for being unreasonable. On the other hand, particularly where there is a duty for the statutory delegate to give reasons, why should the court ignore the reasons given and invent better reasons that might have been given? After all, the court is not the original decision-maker, and (particularly if the standard of review is deferential) is not hearing the matter *de novo* on appeal.

3. Questions of Law: *Khosa* and *Western Forest Products Inc.*

(a) *Khosa*

In addition to addressing statutory standards of review, the decision in *Khosa* is important because of the court's discussion of the standard of review applicable to questions of law. Indeed, the difference in Binnie J. and Rothstein J.'s approaches is particularly important.

While Justice Binnie accepts that "[e]rrors of law are generally governed by a correctness standard", he contemplates that the *Dunsmuir* analysis needs to be used to determine whether the court should employ the more deferential standard of reasonableness even when reviewing a question of law[36]. He refers to both *Pezim* and *Pushpanathan* as authority for

---

36. At para. 44. See also *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, in which the court suggests that where the question involves the interpretation of the board's enabling statute, the correctness standard should only be used in exceptional circumstances: at para. 34. See also *Taub v. Investment Dealers Assn. of Canada*, 2009 ONCA 628 and *Hibernia Management and Development Inc. v. Canada-Newfoundland Offshore Petroleum Board*, 2008 NLCA 46 which reiterate that reasonableness may be the appropriate standard on questions of law. See also *Police* (continued...)

deferring on at least some questions of law. Although in *Dunsmuir* Justice Binnie advocated a somewhat wider role for the courts in reviewing errors of law,[37] in *Khosa*, he quotes the more deferential approach from the majority in *Dunsmuir*.[38]

Justice Rothstein strongly disagrees with this approach. In his view, the intention of the legislature is key[39]. As noted above, he views section 18.1(4) of the *Federal Courts Act* as prescribing *standards* of review (including the ability to correct all errors of law), so it is unnecessary and inappropriate to invoke the *Dunsmuir* analysis.[40] Further, in his view, privative clauses are the signal which legislatures use to indicate their intention that the courts should apply deference. In the absence of a privative clause, the courts should not defer on a question of law.[41] According to Justice Rothstein, the court in *Pezim* erred in treating expertise (in the absence of a privative clause)[42] as a stand-alone basis for

---

36. (...continued)
Assn. of Nova Scotia Pension Plan v. Amherst (Town), 2008 NSCA 74 in which the Nova Scotia Court of Appeal stated that straightforward matters of pure law should be reviewed for correctness, whereas questions of fact, mixed law and fact, discretion, policy or complex legal issues should be reviewed on a reasonableness standard (at para. 62).

37. See paras. 24 and 28 in *Dunsmuir*.

38. Quoting paras. 41, 49 and 54 from *Dunsmuir*.

39. The "polar star of legislative intent" in Justice Binnie's words in *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at paragraph 149. At paragraphs 96 in *Khosa*, Justice Rothstein criticizes the "majority's common law standard-of-review approach as involving two polar stars—express legislative intent and judicially determined expertise—that may or may not align. While there was some attempt by the majority in *Dunsmuir* to reconnect these inquiries, the move has been incomplete... . In my view, it is time for the courts to acknowledge that privative clauses and tribunal expertise are two sides of the same coin."

40. At paras. 70 to 75 and 99 to 116.

41. At paras. 76 to 87; 91. Justice Rothstein's analysis is contrary to the statement by Justice Bastarache at para. 25 of *Pushpanathan* that the absence of a privative clause does not necessarily engage the correctness standard. But was Justice Bastarache historically and conceptually right? And is "expertise"(whatever that means) a stand-alone basis for deference? If so, why?

42. Recall that in *Pezim* there was a statutory right of appeal, not a privative clause.

deference[43]. Except where there is a privative clause, the role of courts should be to ensure universality of the law, which would make administrative law consistent with general appellate practice[44]. In any event, the standard-of-review analysis from *Dunsmuir* does not provide any certainty about the standard itself or about how it will be applied.[45]

Justice Binnie addressed the two different approaches as follows:

> 21 My colleague Justice Rothstein adopts the perspective that in the absence of a privative clause or statutory direction to the contrary, express or implied, judicial review under s. 18.1 is to proceed "as it does in the regular appellate context" (para. 117)... .
>
> I do not agree that such an implication is either necessary or desirable. My colleague states that "where a legal question can be extricated from a factual or policy inquiry, it is inappropriate to presume deference where Parliament has not indicated this *via* a privative clause" (para. 90), citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras.8 and 13. *Housen*, of course, was a regular appeal in a civil negligence case.
>
> 22 On this view, the reviewing court applies a standard of review of correctness unless otherwise directed to proceed (expressly or by necessary implication) by the legislature.
>
> 23 Rothstein J. writes that the Court's "depart[ure] from the conceptual origin of standard of review" in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. *Pezim* was a unanimous decision of the Court which deferred to the expertise of a specialized tribunal in the interpretation of provisions of the *Securities Act*, S.B.C. 1985, c. 83, despite the presence of a right of appeal and the absence of a privative clause.
>
> 24 The conceptual underpinning of the law of judicial review was "further blurred", my colleague writes, by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, which treated the privative clause "simply as one of several factors in the calibration of deference (standard of review)" (para. 92). In my colleague's view, "[i]t is not for the court to impute tribunal expertise on legal questions, absent a privative clause and, in doing so, assume the role of the legislature to determine when deference is or is not owed" (para. 91).
>
> 25 I do not share Rothstein J.'s view that absent statutory direction, explicit or by necessary implication, no deference is owed to administrative decision makers in matters that relate to their special role, function and expertise. *Dunsmuir* recognized that with or without a

---

43. At paras. 87 to 88, and 93 to 96.

44. At paras. 89 to 91.

45. At paras. 97 and 98.

> privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54).
>
> 26 *Dunsmuir* stands against the idea that in the absence of express statutory language or necessary implication, a reviewing court is "to apply a correctness standard as it does in the regular appellate context" (Rothstein J., at para. 117). *Pezim* has been cited and applied in numerous cases over the last 15 years. Its teaching is reflected in *Dunsmuir*.

Justice Binnie concludes by rejecting his colleague's "effort to roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess."[46]

(b) *Western Forest Products Inc.*

Both *Dunsmuir* and *Khosa* were considered by the British Columbia Court of Appeal in *Western Forest Products Inc. v. Hayes Forest Services Ltd*.[47]

By ministerial order, Western Forest Products Inc. ("Western") was required to reduce its timber harvest pursuant to the *Forestry Revitalization Act (BC)*. Under that Act, Western was

---

46. At para. 26. Query: How does Justice Binnie's view that judicial review and appellate review are different square with Chief Justice McLachlin's view in *Dr. Q.* at para. 21 that they should be treated the same?

47. 2009 BCCA 316.

required to make a forestry revitalization proposal to its logging contractors. In making its proposal, the *Timber Harvesting Contract and Subcontract Regulation* required Western to apply certain criteria, which had to be applied "fairly, impartially and without regard to any past disagreements between the parties."

Western's proposal involved cancelling a logging contract with Hayes Forest Services Ltd. ("Hayes") while keeping logging contracts with other contractors intact. Hayes objected to the proposal, partly on the grounds that it did not meet the fairness requirements contained in the Regulation. An arbitrator concluded that Western's proposal was unfair to Hayes because Western failed to consider alternatives which might mitigate the impact on Hayes. Western appealed the arbitrator's decision. The chambers judge allowed Western's appeal. Without conducting a standard-of-review analysis, she determined that the correct standard of review was correctness because the matter involved a question of law under the *Commercial Arbitration Act (BC)*. Applying a correctness standard, she concluded that the arbitrator had misinterpreted the term "fairly" in the Regulation[48]. Western was not bound to make a proposal that minimized the impact on Hayes.

Hayes appealed the chambers judge's decision. Hayes argued that the chambers judge erred by (1) giving the term "fairly" an unduly restrictive meaning, (2) applying a correctness standard without conducting a standard-of-review analysis and (3) overturning the arbitrator's factual findings.

The British Columbia Court of Appeal dismissed the appeal. The court rejected the first and third grounds of appeal outright. The second ground of appeal—the issue of standard of review on questions of law under the *Commercial Arbitration Act*—entailed more discussion.

---

48. 2007 BCSC 1469.

Hayes argued that *Dunsmuir* had ousted the previous jurisprudence which held that questions of law under the *Commercial Arbitration Act* are to be reviewed on a standard of correctness. The Court of Appeal considered both *Dunsmuir* and *Khosa* when asking whether jurisprudence had satisfactorily determined the degree of deference to be applied to an arbitrator's decision on fairness. However, it could not find a satisfactory answer in either case:

> 37 I do not find a satisfactory answer in *Dunsmuir* and *Khosa*. While the majority in *Khosa* affirmed (at para. 25) that "there might be multiple valid interpretations of a statutory provision", and the majority in *Dunsmuir* commented at para. 54, that "[d]eference will usually result where a tribunal is interpreting its own statute", it is not self-evident that edict applies to an arbitrator appointed under the *Regulation* to arbitrate a dispute over a point of law subject to an appeal under the *Commercial Arbitration Act*. In *Dunsmuir*, the majority also commented (at para. 59) that administrative bodies must "be correct in their determinations of true questions of jurisdiction or *vires*." While the point of law in issue on this appeal has a jurisdictional aspect, the arbitrator's authority to decide a fairness objection is not challenged.
>
> 38 The narrow question is whether the interpretation of s. 33.22(h) is one of the "other questions of law" where the "standard of correctness must be maintained" to "[promote] just decisions and [avoid] inconsistent and unauthorized application of law": *Dunsmuir*, at para. 50.
>
> 39 In light of this recent jurisprudence, this Court's response to that question must be revisited... .

The Court acknowledged that, prior to *Dunsmuir* and *Khosa*, a correctness standard most certainly would have applied, but that was no longer necessarily the case:

> 43 What was once obvious is no longer. As I read *Dunsmuir* and *Khosa*, the implication this Court took from s. 31 of the *Commercial Arbitration Act* is no longer sufficient to justify the application of a correctness standard to all questions of law that come to this Court by leave of a chambers judge or the consent of the parties under that provision. In *Khosa*, at para. 18, Binnie J. wrote for the majority:
>
> > In cases where the legislature has enacted judicial review legislation, an analysis of that legislation is the first order of business. Our Court had earlier affirmed that, within constitutional limits, Parliament may by legislation specify a particular standard of review: see *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779. Nevertheless, the intended scope of judicial

> review legislation is to be interpreted in accordance with the usual rule that the terms of a statute are to be read purposefully in light of its text, context and objectives.
>
> 44 In dissent, Rothstein J. took much the same approach to the interpretation of federal judicial review legislation as this Court took of the appeal provision in the *Commercial Arbitration Act* in *Surrey School District*, writing at para. 117:
>
> > ... The necessary implication is that where Parliament did not provide for deferential review, it intended the reviewing court to apply a correctness standard as it does in the regular appellate context.
>
> But he wrote for himself and Deschamps J. in finding Parliament had set a legislated standard of review in s. 18.1(4) of the *Federal Court Act* by not including a privative clause or any other expression of its intention that deference should be given the decision-maker. Binnie J., writing for the majority, found such an implication neither "necessary nor desirable" (at para. 21). At para. 23, he noted that the Court's unanimous decision in *Pezim* "deferred to the expertise of a specialized tribunal in the interpretation of provisions of the *Securities Act*, S.B.C. 1985, c. 83, despite the presence of a right of appeal and the absence of a privative clause"; and, at para. 26, that "[i]ts teaching is reflected in *Dunsmuir*."
>
> 45 So, the next order of business is an analysis of the applicable judicial review legislation to determine whether the legislative scheme specifies a particular standard of review for some or all questions of law, and if so, the standard applicable to the point at issue on this appeal.

The Court of Appeal then considered the statutory regime, including the Regulation and the *Commercial Arbitration Act*, as well as the nature of the dispute resolution scheme for the forest industry as a whole, and concluded that the arbitrator's decision on the issue of fairness should be reviewed on a standard of reasonableness.[49] Interestingly, it then went on to hold that the arbitrator's interpretation of the fairness requirements contained in the Regulation—to require Western to consider mitigating the impact on Hayes—was unreasonable. As a result, the Court of Appeal upheld the chambers judges' decision.[50]

---

49. At para. 58.

50. While all five judges on the panel agreed that the appropriate standard of review was reasonableness, and that the arbitrator's decision was unreasonable, two judges found the decision unreasonable for different reasons than the majority. They focused on the fact that Hayes had failed to comply with procedural requirements under the Regulation by failing to provide reasons for a fairness objection.

4. Proper Application of the Standard

It seems to go without saying that once a reviewing court has determined the applicable standard of review, the court must actually apply that standard and show the proper amount of deference. However, even where a reviewing court properly identifies the applicable standard of review, it sometimes in fact applies a different standard.[51]

(a) *United Nurses of Alberta, Local 301 v. Capital Health Authority (University of Alberta)*

The Court of Appeal of Alberta recently overturned a reviewing judge's decision because the latter had actually applied the correctness standard even though she had properly identified the standard of review as reasonableness.

In *United Nurses of Alberta, Local 301 v. Capital Health Authority (University of Alberta)*,[52] the court examined the reviewing judge's reasons and concluded that she had erred in the application of the reasonableness standard:

> 6 The appellant submits that while the chambers judge selected the appropriate standard of review, she erred in its application. It notes that the standard remains highly deferential: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 ("*Khosa*"). Further, it submits that on judicial review the court inquires into the qualities of the decision both as to the process of articulating the reasons and to its outcomes. In other words, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the

---

51. Which is not the same thing as applying the proper standard differently (*e.g.*, one judge finding a decision to be reasonable while another judge finds the same decision to be unreasonable).

52. 2009 ABCA 202. See also *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Ltd.*, 2009 NSCA 60 where the court stated that the chambers judge had applied the correctness standard "dressed up in reasonableness' clothing" (at para. 33); and *desjardins c. Comité de déontologie policière*, 2009 ACCA 470.

facts and law: see *Dunsmuir*. The appellant submits that the board's decision was reasonable as that term is understood and ought not to have been overturned.

7 We agree. In reviewing a decision for reasonableness, the inquiry is into both the reasons and the outcome. While the chambers judge clearly disagreed with the interpretation of the collective agreement found by the arbitration board and made reference to the reasonableness standard of review, her reasons reveal that she applied the standard of correctness to that decision.

8 In framing the issues on appeal as she did for example in her reasons at [9], she embarked on an exercise not contemplated or authorized by *Dunsmuir* or *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247. She analysed the specific reasoning to determine whether there were sufficient defects to render the decision unreasonable. The issue properly framed however is whether taken as a whole "any of those reasons adequately support the decision". Rather than asking whether there is any line of analysis within the given reasons that could reasonably lead to this conclusion, she reviewed the reasons individually and in isolation to find defects that would render it unreasonable. Examples of this appear at [46] of her reasons where she stated that the panel "restricted the meaning of those words". While this may be so, it does not, without more, render the interpretation unreasonable. At [51] the chambers judge applied the principles of interpretation to resolve incompatibilities, an exercise that remained within the purview of the arbitration board. Other examples can be found in paragraphs [52], [64], [72], and [117].

9 It is obvious from her carefully crafted decision that the chambers judge was wrestling with the difficult issue of when a matter of interpretation of a collective agreement warrants judicial intervention. Or put another way, when does an incorrect interpretation (in a reviewing judge's view) become an unreasonable one? Guidance from the Supreme Court of Canada in *Dunsmuir* and *Khosa* reminds us that the relevant inquiry is not whether the reviewing judge agrees with the interpretation but whether the interpretation given was reasonable; that is, were the reasons intelligible and transparent and the result one of the possible legal outcomes available, not necessarily the most likely.

[Emphasis added.]

(b) *Guinn v. Manitoba*

The Manitoba Court of Appeal had a similar case in *Guinn v. Manitoba*.[53] A motions judge had accorded "little if any" deference to a decision of the Farm Lands Ownership Board about whether certain lands were farmland. The court found that, although the motions judge

53. 2009 MBCA 82.

had properly determined that reasonableness was the applicable standard of review, he proceeded to give the Board's decision no deference at all:[54]

> 22 The appeal from the Board's decision was brought pursuant to s. 6(1) of the *Act* which sets out a statutory right of appeal. Whether by way of judicial review or by way of statutory right of appeal, the first step for a court reviewing the decision of a tribunal is to determine the degree of curial deference to be applied to that tribunal's decision by way of a standard of review analysis, or what we used to call the "pragmatic and functional approach." See *Dr. Q*, at para. 21, and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 63.
>
> 23 This, the motions judge proceeded to do. He came to the conclusion that the correct standard of review was one of reasonableness. I agree with him. However, after coming to that conclusion, he proceeded to give the decision of the Board no deference at all. He stated in his reasons (at para. 43):
>
> > I find the standard of reasonableness rather than the standard of correctness is the appropriate standard to be applied here. Given the fact I have virtually the same information to consider as did the Board and having no knowledge of whether they have expertise or specialized knowledge in the area of concern, I find that very little if any deference need be shown to their decision.
>
> 24 The motions judge's statement that "very little if any deference need be shown to their decision" does not correctly describe what a court is supposed to do when reviewing a tribunal's decision on the standard of reasonableness. As was stated in *Dunsmuir* "[r]easonableness is a deferential standard" (at para. 47).

The court disagreed with the Applicant's argument that the standard-of-review analysis is contextual and that, even within the reasonableness standard of review, deference is an elastic concept:[55]

> 26 I disagree. While the selection of an appropriate standard of review requires a contextual analysis, the question of the degree of deference owed to the tribunal is considered as part of that analysis. See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 54. But once the standard of reasonableness is chosen, the court owes the tribunal deference within the boundaries of that standard.

---

54. At paras. 22 to 24.

55. At paras. 26 to 30.

27 As a matter of fact, this argument of a floating level of deference was tried and rejected in the case of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, where the court stated (at paras. 43, 44, 47):

> The respondent asserts that the standard of reasonableness is an "area on the spectrum or continuum" between patent unreasonableness and correctness. This argument is meant to support the low deference that the Court of Appeal afforded to the decision of the Discipline Committee despite having decided that a pragmatic and functional examination led to the conclusion that the standard of reasonableness applied. The thrust of the respondent's submissions is that it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances. To deny this flexibility, the respondent argues, would signal a return to a formalist approach to judicial review.
>
> This argument must be rejected. If it is inappropriate to add a fourth standard to the three already identified, it would be even more problematic to create an infinite number of standards in practice by imagining that reasonableness can float along a spectrum of deference such that it is sometimes quite close to correctness and sometimes quite close to patent unreasonableness... .
>
> ... The suggestion that reasonableness is an "area" allowing for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances and would be incompatible with the idea of a meaningful standard... .

28 It is true that Justice Binnie, in his concurring reasons in *Dunsmuir*, seemed to be suggesting a return to varying levels of deference. Justice Binnie states that the decision to collapse reasonableness simpliciter and patent unreasonableness seemed to "shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference" (at para. 139).

29 However, I agree with the Ontario Court of Appeal's comments in *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71 at paras. 14 to 24 and particularly, at paras. 18 to 19, where the court stated:

> I understand the majority in *Dunsmuir* to be referring now to only two degrees of deference, correctness, where no deference is accorded, and reasonableness, where deference is accorded. It is not necessary or appropriate to then assess the degree of deference within the reasonableness standard.
>
> In my view, by collapsing the patently unreasonable standard and the reasonable standard, the majority has not set aside the court's earlier decision in *Law Society of New Brunswick v. Ryan*, nor has it signalled that courts must now puzzle over the degree of deference to give to a tribunal

> within the reasonableness standard. The existence of varying degrees of deference within the single reasonableness standard suggests that a decision made by a tribunal will be found to be unreasonable if the court accords the tribunal a low degree of deference but that same decision will be found to be reasonable if the court decides to accord the tribunal a high degree of deference. I do not read the decision of the majority in *Dunsmuir* as encompassing any such approach.

30 Thus, once the standard of reasonableness is chosen, so long as the explanation for the Board's decision was intelligible and justifiable and the decision itself "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law," the court must defer to the outcome chosen by the tribunal. As explained in *Dunsmuir* (at para. 47):

> ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

(c) *Taub v. Investment Dealers Assn. of Canada*

Another example is found in *Taub v. Investment Dealers Assn. of Canada*,[56] where the Ontario Court of Appeal held that the Divisional Court had properly concluded that the standard of review was reasonableness but had not actually applied that standard. Instead of assessing whether the board had reached a reasonable conclusion, the Divisional Court conducted its own analysis and came to its own conclusion about the correct interpretation of a particular statutory provision contained in the *Securities Act (Ontario)*. The Court of Appeal noted the language used by the lower court:

> ... Some examples of the language used by the majority demonstrate its approach. For example, at para. 35 the majority states: "The court must decide whether the wording of s. 21.1(3) of the *Securities Act* is limiting, in the sense that it prescribes whom a self-regulated organization may regulate (emphasis added)." And at para. 47 it states: "In view

56. 2009 ONCA 628.

> of our conclusion that the *Securities Act* does not authorize self-regulatory bodies recognized under the Act to discipline former members ... ." [Emphasis added.]

(d) *Communications, Energy and Paperworkers' Union, Local 1520 v. Maritime Paper Products Ltd.*

Similarly, in *CEP, Local 1520 v. Maritime Paper Products Ltd.*,[57] the Nova Scotia Court of Appeal found that the chambers judge, having properly identified the applicable standard of review as reasonableness, in fact then went on to review the impugned decision for correctness:

> [33] So the judge interpreted Article 9C(s)'s "ordinary meaning" himself, and concluded that Mr. Yosef's transfer was not "for management convenience". Then, not being persuaded that his own interpretation was incorrect, the judge ruled that the arbitrator's different interpretation was "not defensible on the facts and law", justified or transparent. This is correctness dressed in reasonableness' clothing.
>
> [Emphasis added.]

Clearly, the reviewing court must actually apply the standard of review which it has properly identified.[58]

5. Other interesting post-*Dunsmuir* cases

The following post-*Dunsmuir* cases are also worth noting:

---

57. 2009 NSCA 60.

58. And of course different judges may reach different conclusions even when they each properly apply the same standard—for example, Justice Fish's different conclusion from all of the other judges in *Khosa* about whether the decision of the Immigration and Refugee Board was reasonable.

- The Supreme Court of Canada discussed standards of review again in *Bell Canada v. Bell Aliant Regional Communications*.[59] The court focused on the expertise of the decision-maker and concluded that the CRTC's decision regarding the methodology for setting rates and the allocation of certain proceeds from those rates should be reviewed on a standard of reasonableness.

- In *Nolan v. Kerry (Canada) Inc.*,[60] the Supreme Court of Canada confirmed that *Dunsmuir* sets out a two-step process for determining the applicable standard of review. First, the court must ascertain whether previous jurisprudence has already determined the standard of review. Secondly, if necessary, the court must apply the standard-of-review analysis using the four *Pushpanathan* factors. More importantly, the court applied the standard of reasonableness to an issue involving the interpretation of the tribunals' enabling statute, and confirmed that courts should only exceptionally apply the correctness standard with respect to questions involving the interpretation of an enabling statute.[61]

- *Sparks v. British Columbia (Ministry of Public Safety and Solicitor General)*[62] is an example of a court adopting the standard of review determined in earlier jurisprudence without applying the pragmatic and functional approach. The

59. 2009 SCC 40.

60. 2009 SCC 39.

61. At para. 34. "Exceptional circumstances" would appear to included cases where the interpretation of the statute raises a broad question of the tribunal's authority (or perhaps an important question of law?).

62. 2009 BCCA 374.

Court of Appeal upheld the reviewing judge's decision even though the issues in the two cases were similar, but not identical.[63]

- In *Yu v. Wanglin*,[64] the Court of Appeal of Alberta stated that, in determining the standard of review, "subject to the terms of the governing statute, consistency in approach across professional disciplinary bodies is desirable".[65]

- *Keith v. Mycyk*[66] dealt with the standard of review to be applied by the Visitor of the University of Saskatchewan when reviewing decisions made by the university regarding the distribution of surplus funds. It also addressed the standard of review to be applied by the court when reviewing the decisions of the Visitor. The Saskatchewan Court of Appeal concluded that the standard to be applied by the Visitor was objective reasonableness,[67] while the standard to be applied by the court was reasonableness. On the issue of whether the Visitor could order interest on her judgment, the court ruled the standard of review was correctness because it was a matter involving the Visitor's jurisdiction.

---

63. The court accepted that the patently unreasonable standard had been determined in an earlier case dealing with a driving prohibition, and did not have to be re-addressed in this case which involved the cancellation of a driver's licence.

64. 2009 ABCA 166.

65. At para. 12, citing *Hennig v. Institute of Chartered Accountants of Alberta*, 2008 ABCA 241 at para. 16.

66. 2009 SKCA 71.

67. Finding that *Dunsmuir* does diminish the principles of *Pearlman* which held that the traditional judicial review analysis is "not the most appropriate lens through which a Visitor considers a university's decision": at para. 32.

- In *British Columbia (Ministry of Children and Family Development) v. McGrath*,[68] the reviewing judge discussed the standard of review for a decision about whether there had been a "continuing contravention" of the *Human Rights Code*. Brown J. concluded that the appropriate standard of review was correctness because the issue involved a question of mixed fact and law.[69]

- *Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)*[70] discusses the impact of *Dunsmuir* on section 256 of the Nova Scotia *Workers' Compensation Act*.[71] Before *Dunsmuir*, a patently unreasonable error of fact was held to be an error of law for the purposes of section 256. The court held that *Dunsmuir* did not change this—an egregious error in fact finding constitutes an error of law (and, presumably, is unreasonable).[72] (The characterization of the error as a question of law may be critical for determining whether a right of appeal exists, apart from determining the applicable standard of review.)

- *Abdoulrab v. Ontario (Labour Relations Board)*[73] is an illustration that standards-of-review analysis is still misunderstood despite *Dunsmuir*. The

---

68. 2009 BCSC 180.

69. At para. 221.

70. 2009 NSCA 35. See also *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4.

71. Section 256 allows appeals of decisions of the Appeals Tribunal to the Court of Appeal on questions of law or jurisdiction only, but not on questions of fact. See also *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*, 2009 NSCA 4 at paragraph 44.

72. However, it may be that questions of mixed fact and law do not constitute a question of law, thereby preventing an appeal which is restricted to questions of law: see *MacDonald v. Mineral Springs Hospital*, 2008 ABCA 273 *per* Berger JA (dissenting) at paragraphs 80-84.

73. 2009 ONCA 491.

> appellants argued that a standard of reasonableness meant that the board has a margin of error and that the reviewing court's function is to measure the extent to which the board's decision departed from the correct one. If the departure was within a reasonable margin of error, the standard of review of reasonableness prevented the court from overturning it. The court called the appellant's assertion "a grave misconception".[74]

B. Standards of Review and Questions of Procedural Fairness

One area within the topic of standards of review seems to be particularly misunderstood—namely, the application of standards-of-review analysis to alleged breaches of the duty to be fair or the requirements of procedural fairness. Some courts properly take the view that a standards-of-review analysis is not required where the complaint stems from a procedural error. In such cases, the question is not whether the board's process was "correct" or "reasonable", but rather whether the process was "fair".

Other courts incorrectly appear to take the view that a standards-of-review analysis is required, but that the standard of review in such cases is "correctness".

Much of the confusion stems from the wording used by courts and commentators. For instance, the word "incorrect" is often used to describe a board's procedure or the adequacy of its reasons. This appears to have led some courts to assume that the standards-of-review analysis applies to the review of board decisions even where the complaint is one of unfair procedure.

---

74. At para. 42.

The following are just a few recent cases which illustrate this important difference in terminology. The first group focuses on "fairness" (the question being asked—that is, the "standard"):

- In *Mills v. New Brunswick (Human Rights Commission)*,[75] the New Brunswick Queen's Bench stated that "[w]here, as here, the issue before the Court relates to procedural fairness, it is unnecessary to determine the standard of review... . Procedural fairness concerns the manner in which the decision is made. In all cases, tribunals such as the HRC must be fair".[76]

- In *St. John (City) v. New Brunswick (Workplace Health, Safety and Compensation Commission)*,[77] the New Brunswick Court of Appeal stated that "[w]hen it comes to allegations of breaches of the fairness duty, the general rule is that no deference is owed the tribunal's ruling".[78]

- In *Gutierrez v. Canada (Minister of Citizenship & Immigration)*,[79] the Federal Court states "[r]eviewing courts owe no deference to the Board on questions

75. 2009 NBQB 190.

76. At para. 27. The court cites *Moreau-Berubé v. N.B (Judicial Council)*, [2002] 1 S.C.R. 249 and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 in support of its statement.

77. 2008 NBCA 83.

78. At para. 4. While the court does not go so far as to say the standard of review is correctness, it certainly implies it by using the word "deference" and by including this "general rule" in its overview of the general framework of standards of review following *Dunsmuir*.

79. 2009 FC 610.

of procedural fairness. If there has been a breach of procedural fairness, the Board's decision cannot stand".[80]

- In *Gahir v. Alberta (Workers' Compensation Appeals Commission)*,[81] the Court of Appeal of Alberta stated that, with respect to an allegation of bias, the standard-of-review analysis set out in *Pushpanathan* and *Dunsmuir* does not apply, just as it does not apply to issues of natural justice.

- In *Jung v. Canada (Minister of Citizenship & Immigration)*,[82] the Federal Court stated that "[w]ith regard to questions of procedural fairness, the decision is reviewed to determine whether in the particular circumstances the duty of fairness was breached".[83]

- In *Ramalingam v. State Farm Mutual Automobile Insurance Co.*,[84] the Ontario Superior Court stated that "[n]ormally, in an application for judicial review, where the applicant alleges a denial of natural justice or procedural fairness, it is not necessary to engage in a standard-of-review analysis. Rather, the task

---

80. At para. 15.

81. 2009 ABCA 59.

82. 2009 FC 678.

83. At para. 21. The court distinguishes humanitarian and compassionate decisions, which are to be reviewed on a reasonableness standard, and questions of law, which are to be reviewed on a correctness standard, from questions of procedural fairness, to which presumably neither standard applies (at paras. 19 to 21).

84. [2009] O.J. No. 3491 (S.C.J.).

for the court is to determine whether there has been compliance with the applicable principles of natural justice or procedural fairness".[85]

- In *1657575 Ontario Inc. (c.o.b. Pleasures Gentlemen's Club) v. Hamilton (City)*,[86] the Ontario Court of Appeal stated that "[i]t is not necessary to assess the appropriate standard of review when considering an allegation of a denial of procedural fairness".

The second group refers to "correctness" (which is not the relevant question, but might refer to the court's ability to make the final determination):

- In *Hagel v. Canada (Attorney General)*,[87] the Federal Court states that "[i]t is well established that procedural fairness is reviewable on a correctness standard".[88]

- In *B.R.E.S.T. Transportation Ltd. v. Noon*,[89] the Federal Court again stated that the "standard of review for issues of procedural fairness is correctness".[90]

85. At para. 35.

86. 2008 ONCA 570.

87. 2009 FC 329.

88. At para. 28, citing *Sketchley v. Canada*, 2005 FCA 404.

89. 2009 FC 630.

90. At para. 5, citing *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

- In *Junusmin v. Canada (Minister of Citizenship & Immigration)*,[91] the Federal Court stated that "[t]he sufficiency of reasoning of a decision by a Board member is a component of the duty of procedural fairness. As such, the standard of judicial review applicable to whether a Board member has given sufficient reasons for its decisions is assessed according to the correctness standard".[92]

- In *Canada (Attorney General) v. Poon*,[93] the Federal Court stated that "[t]he providing of meaningful reasons is necessary in order to ensure procedural fairness and natural justice ... and is reviewable on the standard of correctness".[94]

- In *Yu v. Wanglin*,[95] the Court of Appeal of Alberta applied a standard of reasonableness to the issue of adequacy of reasons.

- In *Canadian Pharmaceutical Technologies International Inc. v. Canada (Attorney General)*,[96] the Federal Court judge noted that the parties agreed that the standard of review on a question of procedural fairness was correctness, and she agreed that no deference was owed. However, she went on to state

---

91. 2009 FC 673.

92. At para. 23, citing *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 and *Sketchley v. Canada (Attorney General),* 2005 FCA 404 among others.

93. 2009 FC 654.

94. At para. 26.

95. 2009 ABCA 166.

96. 2009 FC 244.

that "it is up to this Court to form its own opinion as to the fairness of the process ..." suggesting that no standard-of-review analysis was required.[97]

- In *Deemar v. College of Veterinarians of Ontario*,[98] the Ontario Court of Appeal applied a standard of correctness on the issue of whether an expert report should be excluded from evidence.

It is no wonder there is confusion about whether a standard-of-review analysis is required on questions of procedural fairness!

In the author's opinion, the better view is that a standard-of-review analysis is not necessary where the complaint is that the board's decision or action breached the rules of procedural fairness. The question in such cases is not whether the decision was correct or reasonable, but rather, whether the procedure used was fair. If it was not, the decision cannot stand.

It should be noted that in British Columbia, section 58 of the *Administrative Tribunals Act* specifies that questions about natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.[99] This clarifies the matter in British Columbia and supports the author's view that the standards of correctness and reasonableness have no place in reviewing matters of procedural fairness.

---

97. At para. 34.

98. 2008 ONCA 600.

99. For a discussion on this, see *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 62.

C. Standards of Review and Administrative Appellate Tribunals

One final aspect of standards-of-review analysis must be raised. While much is being said about the standard of review to be applied by the *courts* when reviewing decisions of statutory delegates, there is little clarification about whether administrative appellate tribunals should also be applying standards-of-review analysis when hearing appeals from lower decision-makers.[100]

Most statutes are entirely silent about the nature of such an appeal within the administrative structure. Many people would presume that an administrative appellate body would be able to completely rehear a matter—or at least exercise its own judgment about the right outcome—and would be surprised to be told that the administrative appellate body was bound to defer to the original decision-maker.[101] Conceptually, this expectation would be consistent with either (a) standard-of-review analysis having no application in this context, or (b) correctness always being the applicable standard of review.

However, if an administrative appellate body is to apply standards-of-review analysis, it raises the possibility that the applicable standard of review might be reasonableness, and therefore the appellate administrative body should defer to the original decision-maker. This might be appropriate where the appeal is restricted to the record, and the original decision-maker saw and heard witnesses which will not be before the appellate body. But is there any justification for an appellate administrative body to defer on any question of law? Should

---

100. Some guidance is provided in *Plimmer v. Calgary (City) Police Service*, 2004 ABCA 175; *Nelson v. Alberta Assn. of Registered Nurses*, 2005 ABCA 229 in which the court stated that the Appeals Committee should show some deference to the Conduct Committee's fact findings and apply a standard of reasonableness; and *Litchfield v. College of Physicians and Surgeons of Alberta*, 2008 ABCA 164.

101. Except perhaps in matters of credibility where the original decision-maker heard the witnesses and the appellate administrative body does not.

it restrict its function to determining only whether the original decision was "reasonable" (as opposed to deciding for itself the appropriate outcome on the merits)? Is deference appropriate where the appellate administrative body is every bit as expert as the original decision-maker? Is deference ever appropriate where there is a *de novo* appeal?[102]

While some argue that no standard-of-review issue arises in appeals before intermediate tribunals—because the legislatures clearly intended such appellate bodies to decide appeals on the merits—others suggest that correctness should always be the standard of review.

Some clarification may soon be given by the Court of Appeal when it decides *Newton v. Criminal Trial Lawyers Assn.*,[103] which involves the issue of whether the Law Enforcement Review Board exceeded its jurisdiction by conducting a trial *de novo* and failing to apply the correct standard of review to the Assistant Commissioner's decision.

The obvious solution is for the legislatures to be clearer when they provide an appeal to an intermediate administrative body, preferably specifically indicating what they expect that body to do (that is, what standard of review is to be applied by it).

III. THE DUTY TO BE FAIR

In addition to the issue of whether a standard-of-review analysis is required in procedural fairness cases, the duty to be fair continues to generate plenty of interesting decisions in other aspects as well.

---

102. See *Osteria De Medici Restaurant Ltd. v. Yaworski*, 2009 ABQB 563 (Jeffrey J.).

103. 2008 ABCA 404.

A. The Duty of Fairness in the Investigative Stage

1. *Hills v. Provincial Dental Board of Nova Scotia*

The case of *Hills v. Provincial Dental Board of Nova Scotia*[104] dealt with a disciplinary hearing against a dentist ("Hills") who had been found guilty of unprofessional conduct and was ordered to complete an education program and pay costs of $60,000. Hills appealed the decision both on its merits and on the penalty imposed. One of his grounds of appeal was that his right to procedural fairness was violated in the investigative process. He argued that the investigation was not impartial because the complainant was a member of the Dental Board and a direct competitor of Hills.

The Nova Scotia Court of Appeal rejected this argument. First, it confirmed that "the duty of procedural fairness will only be violated during the investigative stage of a disciplinary hearing if the professional under investigation is prejudiced by the flawed investigation".[105] The court reviewed the record and concluded that there was no evidence that the investigation was unfair or biased. Even if the process had been flawed, the court was satisfied that Hills had not suffered prejudice. Finally, the court noted that Hills had not sought judicial review of the discipline decision, but had appealed it to the Court of Appeal. The court stated that it was not the court's role in the appeal to scrutinize the investigative process followed by the complaints committee.[106]

---

104. 2009 NSCA 13.

105. At para. 25.

106. At para. 31.

2. *Lienaux v. Nova Scotia Barristers' Society*

In *Lienaux v. Nova Scotia Barristers' Society*,[107] a lawyer was found guilty of conduct unbecoming a barrister for making disparaging remarks about another lawyer and several judges. Lienaux appealed the decision on a number of grounds, one of which was that the disciplinary panel made the decision without having conducted an investigation into whether his comments were true. The Court of Appeal rejected this ground of appeal, finding that the issue involved the panel's statutory right to control its own process. The court stated that "[w]hen deciding the extent of its investigation, the Panel was therefore exercising its discretion and interpreting its enabling legislation".[108] The court adopted the reasonableness standard of review and concluded that, given the fact that Lienaux offered absolutely no evidence to support his comments, the panel's decision was reasonable.[109]

B. No Duty to Provide a Transcript

Hills[110] also addressed the issue of whether a board has a duty to provide a complete transcript of the proceedings. Hills was appealing the decision of a discipline committee which found him guilty of unprofessional conduct. The certification of the record provided by the committee for the appeal contained a transcript of proceedings which was incomplete due to a technical malfunction. Hills argued that the absence of a complete transcript amounted to a breach of procedural fairness because sections 20 and 38 of the *Dental Act (Nova Scotia)* state that the Registrar is required to maintain records of the board's proceedings and that the record on appeal shall include a copy of the transcripts. He argued

---

107. 2009 NSCA 11.

108. At para. 29.

109. Or, at least, not demonstrated to be unreasonable.

110. 2009 NSCA 13.

that unless the decision was overturned for some other reason, a new hearing should be ordered.

The Court of Appeal rejected Hills' argument. It held that the failure of a discipline committee to provide a complete transcript did not amount to a breach of procedural fairness:

> 17 The respondent refers to several authorities which suggest that missing all or part of a transcript does not automatically result in a new hearing. In *R. v. Hayes*, [1989] 1 S.C.R. 44, the Supreme Court of Canada ruled that a new criminal trial need not be ordered unless there is a serious possibility the missing portion of the transcript would disclose an error, or that the omission deprived the appellant of a ground of appeal. That principle has been applied in the administrative law context in *Desjardins v. Canada (National Parole Board)* (1989), 29 F.T.R. 38 (Fed. T.D.), and *Cameron v. National Parole Board*, 1993CarswellBC 2556 (S.C.); [1993] B.C.W.L.D. 2291. In both cases, despite a mandatory requirement that the Parole Board keep a voice recording of the hearing, the courts concluded that the Board's proceedings were not automatically nullified or invalidated when complete transcripts were not available. The Supreme Court of Canada, in *Canadian Union of Public Employees, Local 301 v. Montreal*, [1997] 1 S.C.R. 793 (*C.U.P.E.*), endorsed, in the administrative law context, the test set out in *Hayes* (*supra*) that a transcript gap need only result in a new trial if there is a serious possibility of error in the missing portion, or that the omission deprived the appellant of a ground of appeal. In *C.U.P.E.*, the Supreme Court rejected an argument that the absence of a transcript violated the fundamental principle of natural justice that "no man be condemned unheard," and approved the Federal Court of Appeal's conclusion in *Kandiah v. Minister of Employment and Immigration*, [1992] F.C.J. No. 321, that the principles of natural justice would not be infringed and the reviewing court should not quash an administrative order if, despite the absence of a transcript, the decision facing the reviewing court could be made on the basis of evidence established through other means.
>
> 18 The Supreme Court stated in *C.U.P.E.*:
>
> > Even in cases where the statute creates a right to a recording of the hearing, courts have found that the applicant must show a "serious possibility" of an error on the record or an error regarding which the lack of recording deprived the applicant of his or her grounds of review: *Cameron v. Canada (National Parole Board)*, [1993] B.C.J. No. 1630 (S.C.) which follows *Desjardins v. Canada (National Parole Bd.)* (1989), 29 F.T.R. 38 (Fed. T.D.). These decisions are compatible with the test developed by this Court in the criminal context in *R. v. Hayes*, [1989] 1 S.C.R. 44. As I stated for the majority, at p. 48:
> >
> > > A new trial need not be ordered for every gap in a transcript. As a general rule, there must be a serious possibility that there was an error in the missing portion of

> the transcript, or that the omission deprived the appellant of a ground of appeal.

After endorsing the test that had been set out in earlier cases such as *Hayes* and *Cameron*, Justice L'Heureux-Dube further explains the rationale of the test at para. 80 and 81 of *C.U.P.E.*:

> ... In cases where the record is incomplete, the denial of justice allegedly arises from the inadequacy of the information upon which a reviewing court bases its decision. As a consequence, an appellant may be denied his or her grounds of appeal or review. The rules enunciated in these decisions prevent this unfortunate result. They also avoid the unnecessary encumbrance of administrative proceedings and needless repetition of a fact-finding inquiry long after the events in question have passed.
>
> In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a "serious possibility" of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.
>
> [underlining added]

19 When there is no requirement to produce a certified copy of the transcript, the foregoing authorities establish that, even when there is an obligation to record the proceedings, a remedy will be available only if an appellant demonstrates a serious possibility that there was an error in the missing portion of the transcript, or that the omission deprives the appellant of a ground of appeal.

20 Dr. Hills contends that s. 38(3) of the *Dental Act* distinguishes this case from those authorities, and the court should impose a lesser burden on him because there is a mandatory requirement for a certified transcript. I do not agree. Natural justice is not compromised by the absence of a certified transcript unless the information available on appeal or review is deficient. If the record is adequate to allow resolution of the matter despite gaps that may exist, or if there are other means to make a record sufficiently complete to permit the appeal court to fairly and properly render a decision, the principles of natural justice will not be violated.

21 In *Kenney v. Jodrey*, [1988] N.S.J. No. 245 (C.A.), this court determined that where much of the evidence relating to the crucial issue had been transcribed, the appellant did not establish prejudice by not having available a transcript of every word spoken by each witness. Although the transcript omits part of the evidence in this case, the record contains some information concerning the nature and effect of Dr. Ross' missing testimony. His evidence was summarized in the appellant's counsel's closing submission, which forms part

of the record, and the Discipline Committee's decision references and briefly describes the testimony.

22 The appellant has not demonstrated that alternate means to communicate the missing testimony to this court have been pursued. No request has been made to file affidavits by the appellant or Dr. Ross to provide information concerning what is absent from the record, and no application has been made to present notes from anyone in attendance, although the factum filed on Dr. Hills' behalf acknowledges that the Board's counsel (not the same named solicitor who examined witnesses and made submissions) kept "fairly detailed notes." The appellant's obligation to inform the court concerning the nature of missing evidence was recognized in *Roy v. Assumption Mutual Life Insurance Company*, [2003] N.B.J. No. 122, 2003 NBCA 21, where the New Brunswick Court of Appeal stated in para. 20 and 21:

> ... the appellants must satisfy this court, by means at their disposal, of the merit of their grounds of appeal against the trial judge's findings of fact by showing that these findings are clearly wrong, given the evidence before him. Since the transcript of the evidence does not exist, the appellants must find ways to inform this court of all of the evidence adduced at trial in order to satisfy the court of the merits of their grounds of appeal. After all, the appellants were present at their trial and know what evidence was put before the court.
>
> Nothing filed before this court in this matter would allow this court to determine if there is any merit to the grounds of appeal or if a new trial is required to ensure that justice is done between the parties.

23 Dr. Hills has not established that the available record contains insufficient information for this court to dispose of the issues raised by his appeal, nor has he shown that the substance of the missing evidence cannot be captured by means other than with a transcript. He has not shown that there is a "serious possibility" of error in the missing portion of the transcript or that he has been deprived of a basis for appeal. The first ground of appeal does not succeed because the Appellant has not demonstrated that the absence of a complete certified copy of the transcript renders this court unable to properly determine the matter.

[Emphasis added.]

C. The Duty to Give Reasons

1. *Hills v. Provincial Dental Board of Nova Scotia*

Hills[111] also contains an excellent discussion on the requirement of a board to give adequate reasons for its decision. The court reviewed the principles set out by the Supreme Court of Canada in *Ryan*,[112] *Dunsmuir* and *Lake*,[113] and concludes that a court must look to the decision as a whole to determine whether it contains sufficient information to permit review by an appellate court.[114] It should only interfere if the reasons are so deficient that they do not serve the purposes of providing an understanding of why the decision was made and allowing for an assessment of its validity.[115]

The Court in *Hills* also recognized that:[116]

> ... when members of discipline tribunals are not lawyers, their decisions should not be subject to excessive scrutiny. The Ontario Court of Appeal expressed this view in *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (C.A.) at para. 15:
>
> > ... It was never intended that the decisions of bodies such as this should be subject to such painstaking scrutiny as the Divisional Court has recorded here. The court must be cognizant of the fact that not only are the members of [the] disciplinary body such as the College of Pharmacists experts in the field of their profession and thus knowledgeable of the problems of the profession, they are lay persons so far as the law is concerned. The courts have consistently held that the reasons given by discipline committees of self-governing bodies must be the reasons of the committees and cannot be

111. 2009 NSCA 13.

112. 2003 SCC 20.

113. 2008 SCC 23.

114. At para. 47.

115. At para. 48.

116. At para. 41.

> written by counsel or professional staff ... . This being the case, it follows that courts should not be overly critical of the language employed by such bodies and seize on a few words as being destructive of the entire disciplinary process.

2. *Clifford v. Ontario Municipal Employees' Retirement System*

The case of *Clifford v. Ontario Municipal Employees' Retirement System*[117] addressed the issue of whether the adequacy of reasons remains a question of procedural fairness, or whether it is part of the inquiry into the reasonableness of a board's decision.[118] The Ontario Court of Appeal rejected the argument that reasons must be assessed on a standard of reasonableness:[119]

> 22 Where an administrative tribunal has a legal obligation to give reasons for its decision as part of its duty of procedural fairness, the question on judicial review is whether that legal obligation has been complied with. The court cannot give deference to the choice of a tribunal whether to give reasons. The court must ensure that the tribunal complies with its legal obligation. It must review what the tribunal has done and decide if it has complied. In the parlance of judicial review, the standard of review used by the court is correctness.
>
> 23 In my view, this remains unchanged by *Dunsmuir*. In his concurring reasons in that case, Binnie J. makes clear that the courts cannot defer to the administrative decision maker's choice of process where that decision maker is legally obliged to provide procedural fairness. He says this at para. 129:
>
> > [A] fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. [Emphasis added.]

---

117. 2009 ONCA 670.

118. The Divisional Court had accepted the proposition that a decision that was not supported by adequate reasons was necessarily unreasonable.

119. At paras. 22 to 24.

> 24 With respect, I disagree with the suggestion that *Dunsmuir* now requires the reviewing court apply the standard of reasonableness to assess whether the administrative tribunal has complied with its duty of procedural fairness. There is no doubt that the reconsideration of the standards of judicial review in *Dunsmuir* and its conclusion that there should be only two standards (correctness and reasonableness) is an important jurisprudential development, most particularly where the application for judicial review challenges the substantive outcome of an administrative action. In such a context, the discussion in *Dunsmuir* of the choice of standard of review is vital in assessing that outcome. However, where, as here, the question is whether the administrative tribunal has complied with its duty of procedural fairness, the court must decide the question. As Binnie J. said, the court must have the final say.

Thus, the court rejected the notion that the adequacy of reasons is subsumed in whether the decision is reasonable: these are two separate questions.

3. *MacDonald v. Mineral Springs Hospital*

The Court of Appeal of Alberta applied similar reasoning in *MacDonald v. Mineral Springs Hospital*,[120] where the Hospital Privileges Appeal Board had not given any reasons for deciding that it did not have jurisdiction to hear Dr. MacDonald's appeal. Justice Hunt ruled that the issue about whether reasons are adequate (or exist at all) is different from whether the substance of the decision is reasonable:

> [42] Each party offered arguments in support of or against the HPAB's conclusion based in part on an analysis of the *Act* and the bylaws. It is perhaps the case that such *ex post facto* reasoning could support the view that the decision was reasonable. Doing so, however, would undermine one of the fundamental reasons why courts must defer to tribunals in cases such as this: because they have expertise about how hospitals function. Accepting the reasonableness of their decisions absent so much as a hint as to how they reached them would also encourage tribunals not to explain themselves. Moreover, it would engage courts in doing the very work that legislatures intended tribunals to do. This outcome would also work against the basic purpose of judicial review, which is "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes." *Dunsmuir* at para. 28.

120. 2008 ABCA 273, 437 A.R. 7.

Justice Hunt contemplated that sometime a decision-maker's reas ons could be eked out from the totality of the record of its proceedings, but that might also not be the case:

> [43] There may be cases where the reasons for a tribunal's decision are apparent from the totality of the record. That is unlikely to be the case, when, as here, the decision has to be grounded on analysis of complicated statutory-type provisions that can only be understood in the context in which they operate.

Without knowing the tribunal's reasons, one could not determine whether the substance of the tribunal's decision was reasonable:

> [44] Nothing can be gleaned here by examining the reasonableness of the outcome, because only two are possible: either HPAB had jurisdiction or it did not. Therefore, in applying the reasonableness standard it is necessary to focus on matters such as justification, transparency and intelligibility. Without the benefit of the HPAB's reasoning about how it employed its expertise to interpret its home statute, it is impossible to determine whether its decision was reasonable.

Accordingly, the matter was remitted back to the HPAB:

> **Conclusion**
>
> [45] As a result, under section 21(3) of the *Act* the issue must be remitted to the HPAB with a direction that it explain why it concluded that the decision not to vary Macdonald's OR time is not a question of privilege. The reasons must be sufficient to allow for meaningful appellate review (given that there is a statutory right of appeal on questions of law) and answer Macdonald's functional need to know' why the decision has been made.

4. BC's Administrative Justice Office Discussion Paper on Reasons

The British Columbia Administrative Justice Office has recently completed a discussion paper entitled "Statutory Decision-Makers and the Obligation to Give Reasons for

Decisions".[121] The paper contains an excellent discussion on the advantages and disadvantages of giving reasons, the legal obligation to give reasons, the content of reasons, and the pros and cons of legislation governing the requirement to give reasons, and the consequences of failing to give reasons. The paper is an excellent resource for anyone faced with an issue concerning a board's reasons or failure to provide reasons.

D. The Duty to Disclose

The Ontario Court of Appeal recently addressed the requirement of disclosure as a component of the duty to be fair. In *1657575 Ontario Inc. (c.o.b. Pleasures Gentlemen's Club) v. Hamilton (City)*,[122] the City followed a recommendation from the Director of Building and Licensing to revoke the appellant's business licence on the grounds that the appellant had not actively carried on business within a reasonable period of time after the issuance of the licence. While the City disclosed to the Appellant that it had been given a recommendation of revocation, it did not disclose the grounds for the recommendation or give the appellant a copy of the recommendation as a by-law required.

The Ontario Divisional Court upheld the City's decision and dismissed the appellant's application for judicial review. The appellant appealed to the Ontario Court of Appeal.

The Court of Appeal allowed the appeal and set aside the City's decision to revoke the licence. The City had failed to disclose its reasons for revoking the licence and this had tainted the hearing from the outset and denied the appellant its right to a fair hearing.

---

121. The paper can be found on the Office's website at http://www.gov.bc.ca/ajo/.

122. 2008 ONCA 570. See also *Nortel Networks Inc. v. Calgary (City)*, 2008 ABCA 370 in which the Court of Appeal of Alberta held that a taxpayer was deprived of procedural fairness by the Municipal Government Board's failure to disclose information used in a tax assessment.

E. Evidentiary Issues

1. *Deemar v. College of Veterinarians of Ontario*

In *Deemar v. College of Veterinarians of Ontario*,[123] the Ontario Court of Appeal upheld a disciplinary committee's decision to strike an expert report and exclude it from evidence. The committee had found that the expert's report contained advocacy and offered an opinion on the credibility of a witness and that the expert had "strayed from the function of an expert ... and takes on the role of advocate and possibly the role of the trier of fact".[124]

While the Divisional Court had overturned the committee's decision to exclude the evidence, the Court of Appeal allowed the appeal and held that the committee had given ample reasons for striking the report. The court noted that a professional's right to choose his or her own expert is qualified by the jurisdiction of a disciplinary committee to rule on the admissibility of evidence. Here, the committee had properly balanced the interests of the professional with the public's interest in a prompt disposition of allegations of professional misconduct.

2. *Wasylyshen v. Alberta (Law Enforcement Review Board)*

In *Wasylyshen v. Alberta (Law Enforcement Review Board)*,[125] the appellants sought leave to make an interlocutory appeal from a ruling by the Law Enforcement Review Board ("LERB") allowing transcripts from prior judicial decisions to be admitted as evidence in two separate appeals. They argued that the Board's ruling was incorrect because it allowed the unfair admission of hearsay evidence.

---

123. 2008 ONCA 600.

124. At para. 7.

125. 2008 ABCA 432.

The Court of Appeal of Alberta dismissed the application, finding that the appeal was premature. The court held that the appellants' concerns about the admission of the evidence had not been completely dealt with by the Board—the issue of whether the transcripts should be admitted was still an open question that could be debated before the Board. The court rejected the appellants' argument that admitting the evidence would prejudice the entire appeal process. While the court recognized that the fairness argument had some merit because admitting the evidence would place the appellants in a difficult position of having to rebut the "evidence" of judges, it concluded that the policy considerations against allowing an interlocutory appeal outweighed the arguments supporting an interlocutory order.

F. The Right to Self-Representation

A recent Nova Scotia Court of Appeal case considered a lawyer's right to represent himself in legal proceedings. In *Lienaux v. Nova Scotia Barristers' Society*,[126] a lawyer represented himself and his wife in an action against a former business partner. When the court ruled against him, the lawyer made several disparaging comments about an opposing lawyer and several judges. He was later found guilty of conduct unbecoming a barrister for making the comments.

The Disciplinary Panel imposed a number of penalties including a one-month suspension and an order prohibiting the lawyer from representing anyone, including himself, in any future matter relating to his action against his former partner. The Nova Scotia Court of Appeal held that the panel erred in not allowing the lawyer to represent himself in future proceedings, as he had a fundamental right to be self-represented.

126. 2009 NSCA 11.

G. The Rule Against Bias

1. *Pelletier* and *Chrétien*

The Federal Court addressed serious allegations of bias in the highly publicized cases of *Pelletier v. Canada (Attorney General)*[127] and *Chrétien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*.[128] Pelletier and Chrétien both applied for judicial review of a Fact Finding Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities. They alleged that the Commissioner was biased and his findings should be set aside.

Justice Teitelbaum of the Federal Court confirmed that the duty of fairness does apply to commissions of inquiry.[129] He reviewed the content of procedural fairness and noted that the content of the duty is variable and flexible. With respect to public inquiries, Teitelbaum J. cited from *Krever* and *Baker* as follows:[130]

> 40 With respect to the nature of public inquiries, Justice Cory set out the following basic principles in *Krever, supra*, at paragraph 57:
>
> (a) (i) a commission of inquiry is not a court or tribunal, and has no authority to determine legal liability;
>
> (ii) a commission of inquiry does not necessarily follow the same laws of evidence or procedure that a court or tribunal would observe.
>
> (iii) It follows from (i) and (ii) above that a commissioner should endeavour to avoid setting out conclusions that are couched in the specific language of

127. 2008 FC 803.

128. 2008 FC 802.

129. At para. 37 of *Pelletier* and para. 39 of *Chrétien*.

130. At paras. 40 and 41 of *Pelletier* and paras. 42 and 43 of *Chrétien*.

> criminal culpability or civil liability. Otherwise the public perception may be that specific findings of criminal or civil liability have been made.

(b) a commissioner has the power to make all relevant findings of fact necessary to explain or support the recommendations, even if these findings reflect adversely upon individuals;

(c) a commissioner may make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference;

(d) a commissioner may make a finding that there has been a failure to comply with a certain standard of conduct, so long as it is clear that the standard is not a legally binding one such that the finding amounts to a conclusion of law pertaining to criminal or civil liability;

(e) a commissioner must ensure that there is procedural fairness in the conduct of the inquiry.

41 In *Baker*, the Supreme Court of Canada identified five non-exhaustive factors that are to be considered when determining the content of the duty of fairness. They are: (i) the nature of the decision and the decision-making process; (ii) the statutory scheme; (iii) the importance of the decision to the individuals affected; (iv) the legitimate expectations of the parties; and (v) the choices of procedure made by the decision-making body. Justice L'Heureux-Dubé in *Baker* stressed that:

> [...] underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker: *Baker*, supra, at para. 22.

He concluded that the content of the duty of fairness was to be determined by using the five non-exhaustive factors set out in *Baker*. After applying the five factors, the court held that the parties were entitled to a high degree of procedural fairness due largely to the potential damage that the findings of the Commissioner could have on the reputations of the parties involved.[131]

131. At paras. 43 to 59 of *Pelletier* and paras. 45 to 61 of *Chrétien*.

Justice Teitelbaum went on to state that the standard of review applicable to the Commission's findings was whether the findings were supported by some evidence in the record of the inquiry or whether the findings were "based on some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory".[132]

The court then discussed the test for bias:[133]

> 71 After considering the jurisprudence cited by the parties, I conclude that the Commission falls somewhere between the middle and high end of the *Newfoundland Telephone* spectrum. Thus, using a flexible application of the reasonable apprehension of bias test, I adopt the test enunciated by Justice de Grandpré in *Committee for Justice and Liberty*:
>
> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [...] [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe [the Chairman of the Board], whether consciously or unconsciously, would not decide fairly": *Committee for Justice and Liberty*, *supra*, at page 394.
>
> 72 As Justice Cory stated in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 [hereinafter *R.D.S.*], the test for a reasonable apprehension of bias "contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case" (*R.D.S.* at para. 111). He further noted that "the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'" (*ibid.*) [emphasis in original]. He added "the threshold for a finding of real or perceived bias is high" and "a real likelihood or probability of bias must be demonstrated ... a mere suspicion is not enough" (*R.D.S.* at paras. 112-113).
>
> 73 I harken back to the words of Lord Denning in *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon*, [1968] 3 All E.R. 304 (C.A.) at p. 310, 1 Q.B. 577 (C.A.) at p. 599, wherein he stated:

---

132. At paras. 60 to 62 of *Pelletier* and paras. 62 to 64 of *Chrétien*.

133. At paras. 71 to 74 of *Pelletier* and paras. 73 to 76 of *Chrétien*.

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand [cited cases omitted]. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough [cited cases omitted]. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

74 There exists a presumption that a decision-maker will act impartially, and "[m]ore than a mere suspicion, or the reservations of a 'very sensitive or scrupulous conscience', is required to displace that presumption" (*Beno (FCA)*, *supra*, at para. 29). The onus of demonstrating bias lies with the person who is alleging its existence and the threshold for finding a reasonable apprehension of bias is high. But, where a reasonable apprehension of bias is found, the hearing and any decision resulting from it will be void, since the damage created by such an apprehension of bias cannot be remedied. This is consistent with Justice Le Dain's decision, speaking for the Court in *Cardinal v. Director of Kent Institution*, *supra*, at p. 661, wherein he stated:

> [...] I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

The court then reviewed the facts of the case and concluded that there was ample evidence of a reasonable apprehension of bias. Comments made by the Commissioner[134] indicated that he had prejudged issues and was not impartial. These comments were made openly in

---

134. The comments included statements that the sponsorship program "was run in a catastrophically bad way", that he had "everything that [he] needed" and that he had "the best seat in the house for the best show in town".

interviews to the media and before all of the evidence had been heard. The Commission's findings were set aside.

2. *Beier v. Vermilion River (County)*

In *Beier v. Vermilion River (County)*,[135] the applicants appealed a decision of a panel of the Subdivision and Appeal Board on the grounds that the composition of the panel gave rise to a reasonable apprehension of bias.

The applicants applied for development approval allowing them to expand their oilfield business on land located in the County of Vermilion River. A panel of the Subdivision and Development Appeal Board ("SDAB") refused to grant approval on the grounds that the proposed development would expand the applicants' business operations to an unacceptable scope. Two members of the SDAB panel were also members of the Council of the County of Vermilion River which had denied the applicants a development permit on the grounds that the proposed development would have a significant impact on the community and environment. The applicants appealed the panel's ruling. The Court of Appeal allowed the appeal and ordered a new hearing.

The new hearing was conducted before a panel which included two members of the original SDAB panel. Counsel for the applicants immediately objected to the composition of the panel but the objection was rejected after the panel members gave individual assurances that they would hear the matter with an open mind.[136] At the end of the hearing, all parties were asked if they felt they had been given a fair hearing, and there were no negative responses.

---

135. 2009 ABCA 151. The subsequent decision is at 2009 ABCA 338. See also *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 574 in which the Alberta Court of Queen's Bench ordered that a re-hearing had to occur before a different adjudicator.

136. Although the objection was "duly noted".

When the decision went against them again, the applicants sought leave to appeal the panel's decision, partly on the grounds of reasonable apprehension of bias.[137] While the court made no finding on the leave application about the issue of bias, it did grant leave to appeal on the sole issue of whether the composition of the second panel gave rise to a reasonable apprehension of bias. In granting leave, Justice Watson stated:[138]

> 13 The formal order did not expressly specify that the hearing should be before a different panel. The Court of Appeal of the United Kingdom suggested, in *English v. Emery Reimbold & Strick Ltd.*, [2002] 3 All E.R. 385, [2002] EWCA Civ 605 at paras. 24 - 25, that a Court of Appeal might refer a court trial case back to the same trial judge to provide reasons if reasons are inadequate, but in that light see *Boardwalk Reit LLP v. Edmonton (City)* (2008), 437 A.R. 199, [2008] A.J. No. 515 (QL), 2008 ABCA 176 at paras. 91 - 92, leave denied, [2008] S.C.C.A. No. 328 (QL) and *Freyberg v. Fletcher Challenge Oil & Gas Inc.* (2006), 401 A.R. 30, [2006] A.J. No. 1401 (QL), 2006 ABCA 336 at para. 5. For development appeals, the applicants submit that the weight of authority in Alberta is that a re-hearing should be before a new panel citing *e.g. Murray v. Rockyview (Municipal District No. 44)* (1980), 21 A.R. 512, [1980] A.J. No. 649 (QL) at para. 63; *506221 Alberta Ltd. v. Parkland County et al.* (2008), 43 M.P.L.R. (4th) 211, [2008] A.J. No. 261 (QL), 2008 ABCA 109 at para. 16; *Mountain Creeks Ranch Inc. v. Yellowhead (County) Subdivision and Development Appeal Board* (2006), 48 Admin. L.R. (4th) 130, [2006] A.J. No. 398 (QL), 2006 ABCA 126 at paras. 16 - 17. In these cases, the reversal was on grounds of reasonable apprehension of bias or of an analogous concern, not of inadequacy of reasons. In *Freyberg* the matter turned on the practical advantage of having a large Court of Queen's Bench. It is appropriate for me to defer to a panel to decide what, if any, policy ought to apply in this Court as to the meaning of orders that the Court may make as to re-hearings directed for decisions of the SDAB.

The majority of the Court of Appeal subsequently granted the appeal[139] and directed the matter to be heard by a completely different panel of the SDAB.

---

137. Other grounds included alleged breaches of procedural fairness such as failing to permit a transcript of the entire hearing and not allowing cross-examination of a witness. The court rejected all grounds of appeal except for the bias argument.

138. At para. 13.

139. 2009 ABCA 338 (Picard and MacDonald JJ.; Ritter J. dissenting).

3. *Gahir v. Alberta (Workers' Compensation Appeals Commission)*

The Court of Appeal of Alberta also addressed bias in *Gahir v. Alberta (Workers' Compensation Appeals Commission)*.[140] The appellant alleged a reasonable apprehension of bias existed because two members of the Appeals Commission were long-time employees of the Workers' Compensation Board who were appointed to the Appeals Commission very shortly after they left that employment. While personal bias of the members was not alleged, the appellant argued that a form of institutional bias was present because former employees would be disposed to accept the fact findings and policy interpretations of the Board.

The court rejected the appellant's argument. It emphasized the fact that the *Workers' Compensation Act* does not disqualify *former* employees from being appeals commissioners[141] and confirmed that statutory provisions prevailed over the common law test for bias.[142] In the face of the clear statutory provision, the allegation of institutional bias could not succeed.

4. *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*

Institutional (or tribunal) bias was also discussed in *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*.[143] An employer appealed a decision of the Appeals Tribunal which ordered the employer to assist an injured employee find a barrier-free residence. First, the employer argued that the Tribunal lacked

---

140. 2009 ABCA 59.

141. Although s. 10(2) does disqualify current employees and members of the board of directors.

142. At paras. 18 to 21.

143. 2009 NBCA 13.

jurisdiction to make an order with respect to housing. The court rejected this argument. Secondly, the employer argued that the decision was voidable on the basis of institutional or tribunal bias. The court accepted this argument and allowed the employer's appeal.

The bias argument arose from the fact that the local MLA, who was a former member of the Tribunal, made submissions on behalf of the employee at the hearing. During his testimony, the MLA advised the Tribunal that he was a former member of the Tribunal and that he had experience as a member of the Legislature's Standing Committee on Crown Corporations.[144] He also testified about past cases in which he had helped injured workers find suitable housing and advised of several meetings and telephone conversations he had with the Commission's director and case manager respecting this particular case. He went to on inform the Tribunal that he had advised the President of the Commission that he could overrule the Commission's decision and that the President had responded that the panel would "look at this very seriously and probably accept it".

On appeal, the Court of Appeal held that the standard of review on the bias allegation was correctness. The court rejected the Commission's argument that the employer had waived its right to raise bias because it failed to participate in the hearing before the Tribunal:[145]

> ... The question we must address is the extent to which the doctrine of waiver curtails the employer's right to raise issues that were not raised before the Appeals Tribunal because of the employer's failure to participate in the administrative hearing. In the present case, the employer was given timely notice of that hearing but elected not to participate. Curiously, the record before us contains an undertaking signed by Norma Duplessis, as advocate for the employer (Fundy Linen), not to divulge information or documents being provided to the Appeals Tribunal. However, Ms. Duplessis took no part in the proceedings before the Appeals Tribunal. In any event, one could not reasonably expect a lay advocate to advance legal issues and argument of the kind being advanced in this Court.

144. The Commission is deemed to be a Crown Corporation under the *Proceedings Against the Crown Act (New Brunswick)*.

145. At paras. 16 to 21.

17 The law is clear that an employer who fails to participate in the proceedings before the Appeals Tribunal does not lose its right of appeal to this Court. However, the doctrine of waiver severely limits the issues that may be raised in this Court. Specifically, the employer is precluded from arguing the "merits of the appeal". In *Chipman Wood Products (1973) Ltd. v. Thompson, et al.*, a worker had been injured in the course of his employment. The Commission denied his application for compensation. The worker appealed to the Appeals Tribunal. The employer was given notice of the hearing but decided not to participate. The worker was partially successful and the employer exercised his statutory right to appeal to this Court on two grounds. First, the employer challenged the merits of the Appeals Tribunal's decision. Second, the employer alleged an apprehension of bias on the part of the Appeals Tribunal. This allegation arose once it was learned that the local MLA, who was also a member of Cabinet, had represented the worker before the Appeals Tribunal. It is the Lieutenant-Governor in Council (Cabinet) that appoints members of the Appeals Tribunal. This Court held that the employer's decision not to participate or attend the appeal hearing constituted a waiver of the right to argue the merits of the Appeals Tribunal's decision. As well, this Court held that a party might waive his right to make an objection to a decision-maker who would otherwise be disqualified on the ground of bias. However, on the facts of that case, this Court held that waiver did not apply because the employer could not reasonably have anticipated that a provincial cabinet minister would be representing the employee before the Appeals Tribunal (see also *Violette v. New Brunswick Dental Society* (2003), 267 N.B.R. (2d) 205, [2004] N.B.J. No. 5 (Q.L.), 2004 NBCA 1 and *510264 N.B. Inc. et al. v. New Brunswick* (2004), 281 N.B.R. (2d) 147, [2004] N.B.J. No. 376 (Q.L.).

18 Returning to the facts of the present case, the employer cannot assert that it had no notice that the MLA would be testifying before the Appeals Tribunal. The employer did in fact receive a copy of a memorandum issued by the Appeals Tribunal indicating that the worker's advocate was requesting a summons for the attendance of the MLA at the hearing before the Appeals Tribunal. The memorandum goes on to state that the request for the summons was too late (15 days prior to the appeal hearing) but that if the MLA wished to appear, his name could be added to the list of "participants". At the request of the worker's advocate, the MLA's name was added.

19 Although the employer, Fundy Linen, must be deemed to have known that the MLA would be "appearing" at the tribunal hearing, I am not prepared to hold that the employer waived its right to challenge the Appeal Tribunal's decision on the ground of "bias". Indeed, courts must approach the waiver issue with caution when dealing with allegations of bias. The categories of bias are diverse and each category should be looked at individually with a view to ensuring that the public confidence in the integrity of the tribunal decision-making process is preserved. In *Rothesay Residents Association Inc. v. Rothesay Heritage Preservation and Review Board et al.* (2006), 299 N.B.R. (2d) 369, [2006] N.B.J. No. 227 (Q.L.), 2006 NBCA 61, this Court outlined the existing categories of bias: (1) the decision-maker has a financial interest in the outcome of the case; (2) the decision-maker has a personal relationship with a party or someone with a significant role in the case; (3) the decision-maker has acquired outside knowledge of the case; (4) the decision maker demonstrates "actual bias" based on words or conduct typically made during the appeal hearing; and (5) institutional bias. The latter category is concerned with tribunals that are so structured such that there is a pre-disposition of its members to decide in a certain way because of complex internal and external relationships (*e.g.*, tribunal staff with overlapping

functions). The facts of this case give rise to yet another category of bias. It arises in the context of a tribunal that lacks structural independence from the very government that is responsible for the appointment of tribunal members and their terms of engagement. In these circumstances, the law is concerned with the threat or appearance of improper interference with the independent exercise of the tribunal's adjudicative functions.

20 In *Rothesay Residents Association*, this Court held that a failure to raise the issue of bias at the first practical opportunity may constitute waiver of the right to do so at a later date, provided the party now alleging bias was aware of all the pertinent facts surrounding the grounds for disqualification. In this way, the party with full knowledge of the grounds of disqualification cannot sit back and invoke "bias" as a tactical strategy to undermine the tribunal's decision in the event he or she is unsuccessful with respect to the merits of the case. But the Court also went on to cite authorities that support the view that a decision infected by an appearance of partiality is void and not voidable and, therefore, the defence of waiver is not available. Admittedly, there is authority to the contrary. In response, this Court asked whether reviewing courts should possess a residual discretion to set aside a biased decision in cases where waiver has been established on the facts. The question was left for another day because it had not been shown that the party alleging bias in *Rothesay Residents Association* was in possession of all pertinent facts.

21 This is not a case where the unsuccessful party (Fundy Linen) is invoking bias as part of a procedural tactic. The fact of the matter is that employers do not typically appear before the Appeals Tribunal for reasons that are perhaps unique to our workers' compensation scheme. But the fact remains that the employer deliberately chose not to participate in the tribunal hearing knowing that the MLA would be testifying. On the other hand, one could argue that the waiver doctrine should be inapplicable in circumstances where the MLA has assumed the role of "advocate" rather than that of "witness". It is one thing for the employer to have knowledge that the MLA would be testifying and quite another to anticipate the nature of his testimony. Had the MLA limited his testimony to factual matters surrounding efforts made to find barrier-free accommodation on behalf of the worker, the issue of tribunal bias might have evaporated. However, the MLA's own words betray his plea that he was not acting as the worker's advocate. Is this distinction a sufficient basis for holding that the waiver defence has not been made out? Some might argue that this is a judicial stretch of an already thin argument that attempts to constrain the reach of the waiver doctrine. This is why I am prepared to hold that this is not a case where the doctrine of waiver should override a party's right to a ruling with respect to a bias allegation based on a tribunal's lack of structural independence. As the policy justification for the rule against biased decision-making is the public's loss of confidence in the administration of justice, this policy justification outweighs a party's right to expect legal issues to be raised in a timely manner. In my view, this is a proper case for the court to exercise its residual discretion to deal with the merits of the bias allegation, notwithstanding the application of the waiver doctrine. As well intentioned as the MLA might have been, his conduct before the Commission and the Appeals Tribunal raises the appearance of improper interference with the administrative decision-making process.

Having found that the doctrine of waiver did not apply, the court went on to find that the allegation of institutional bias—on the basis of lack of structural independence—had been established:

> 23 Administrative decision-makers must be protected from both express and implied threats of improper interference when fulfilling their statutory obligations. If there is no adequate guarantee of independence, reasonable people will be concerned that decision makers are vulnerable to interference by those who control or are capable of influencing tribunal appointments and the terms of appointment. As is succinctly stated in David Phillip Jones and Anne S. Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Thomson Carswell, 2004) at 405: "... the objective is to provide both parties to disputes and members of the public with appropriate assurances that the decisions of tribunals are not only made impartially but seen to be made impartially." There is no question that the Appeals Tribunal lacks structural independence. Members are appointed and reappointed by the executive branch of government which also fixes the terms of engagement (a matter addressed below). This reality, however, is not in breach of any constitutional principle. While a lack of tribunal independence may appear to conflict with the application of common law principles (*e.g.*, natural justice), the law is clear that the degree of independence expected of tribunal members may be ousted by express statutory language or by necessary implication: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control Licensing Branch)*, [2001] 2 SCR 781, [2001] S.C.J. No. 17 (Q.L.), 2001 SCC 52.
>
> 24 No one questions the understanding that the provisions of the *WHSSC Act,* dealing with the appointment of members to the Appeals Tribunal, constitute an express ouster of any common law requirement that tribunals be structured so as to be independent of those responsible for the appointment and reappointment of their members and terms of engagement. But does this mean that the law cannot continue to impose restrictions on the right of elected officials to participate in administrative proceedings on behalf of a constituent who is seeking access to a public benefit? I think not. If the Legislature remains unwilling to accord structural independence to a tribunal (*e.g.*, security of tenure) then it falls on the law to impose restrictions on the ability of elected officials to participate in tribunal hearings. The objective is to ensure that parties to the proceedings and members of the public are provided with appropriate assurances that tribunal decisions are not only made impartially but seen to be made impartially.
>
> 25 In deciding what restrictions should be placed on the ability of elected members of the Legislature to appear before an administrative tribunal on behalf of a constituent, my analysis focuses on two distinct aspects of the issue. The first involves the extent to which the elected official has the capacity to make or influence decisions surrounding the appointment, reappointment and terms of engagement of tribunal members. Members of the executive branch of government (Cabinet) are at one end of the spectrum. Opposition members of the Legislative Assembly are at the other end and outside the parameters of the analysis being pursued in these reasons for judgment. This leaves for consideration the participation of members of the Legislative Assembly who are also members of the governing party. The second aspect of the issue focuses on the capacity in which members of the Legislative Assembly might appear before the tribunal on behalf of a constituent.

> There are two possibilities. They could appear in a representative capacity (that is to say, as advocate) or as a witness, voluntary or otherwise.
>
> 26 In the analysis that follows, I reach the following conclusions. As a matter of strict law, members of the executive branch of government should not appear before an administrative tribunal, lacking structural independence, on behalf of constituents in a representative capacity (advocate). The same rule should apply to members of the Legislative Assembly who are members from the governing party. With respect to the possibility of a Minister or MLA appearing as a witness on behalf of a constituent, a general rule against testifying should be recognized. But there should be room in the law for an exception based on a tribunal finding of "exceptional circumstances".

5. *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*

In *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*,[146] the British Columbia Supreme Court held that the fact that the vice chair of the Appeals Tribunal had previous involvement[147] with the appellant's case did not amount to a reasonable apprehension of bias. The court rejected the argument that the vice chair should have recused himself from the appeals panel:[148]

> 73 I do not find the vice chair MacArthur's descriptions of Mr. Asquini's injury as minor or extremely minor as a basis upon which to conclude there was bias or a reasonable apprehension of bias on the part of vice chair MacArthur who in his Original Decision acknowledged the binding nature of the Certificate dated December 22, 1999, although vice chair MacArthur did not accept the MRP's accompanying narrative as binding. In acknowledging the MRP certificate, I conclude that the vice chair accepted the ramifications of the April 27, 1990 injury which initially did appear to be minor, with the full ramifications of the injury becoming clear some years later.
>
> 74 From my analysis of the evidentiary foundation upon which Mr. Asquini grounds his allegations of bias, reasonable apprehension of bias, or conflict of interest, I conclude that vice chair MacArthur acted in a procedurally fair manner and in accord with the common law rules of natural justice and procedural fairness. Vice chair MacArthur at the commencement of the 2004 appeal hearing properly brought forward his 1994 involvement

---

146. 2009 BCSC 62.

147. As a member of the review board which had found the employee's injury an "extremely minor injury".

148. At paras. 73 and 74.

> in Mr. Asquini's claim. No objection was taken to his continuing to hear the appeal and I infer from the fact that he continued with the hearing that he saw no basis on which he ought to decline to hear the appeal. Mr. Asquini's representative did not raise at the hearing what she later asserted was a difficult personal relationship with vice chair MacArthur, an assertion which formed much of the argument before vice chair Morton.

6. *Waste Management of Canada Corp. v. Thorhild No. 7 (County)*

In *Waste Management of Canada Corp. v. Thorhild No. 7 (County)*,[149] Waste Management applied for judicial review and the setting aside of a vote taken with respect to a proposed rezoning bylaw. One of the members of County Council who voted against the by-law was a former member of a citizens' action group which had opposed the by-law. Waste Management argued that this member of Council should have been disqualified from the vote by reason of a pre-judgment or conflict of interest resulting in a reasonable apprehension of bias.

The Court of Queen's Bench dismissed the application. Although the member had opposed the by-law as a private citizen, the Court was satisfied that, as a member of Council, he was open-minded and capable of persuasion.

7. *Boardwalk Reit LLP v. Edmonton (City)*

Finally, last year's paper discussed the case of *Boardwalk Reit LLP v. Edmonton*,[150] in which the Court of Appeal of Alberta considered whether a three member panel of judges should be disqualified because one of them had previous personal dealings with the administrative board in question. That judge had voluntarily agreed to take no part in deciding the appeal on the merits, but one of the parties argued that the other two members of the panel should

---

149. 2008 ABQB 762.

150. 2008 ABCA 176. See also *R. v. J.L.M.A.*, 2009 ABCA 344.

also step aside because the presence of the third judge had tainted the panel. The court concluded that there was no reasonable apprehension of bias and that all three members of the panel were qualified to hear the matter, including the judge who had voluntarily stepped down. The court went on to ultimately set aside the board's decision.

It should now be noted that in December 2008, the Supreme Court of Canada refused Boardwalk's application for leave to appeal.

IV. STANDING

Previous papers have discussed how the general rule established in *Northwestern Utilities Ltd.*[151]—that administrative tribunals must limit their submissions on appeals or judicial reviews to matters of jurisdiction, not the merits of the decision—has sometimes been eroded in recent years. However, last year in *Brewer v. Fraser Milner Casgrain LLP*,[152] the Court of Appeal of Alberta strongly reinforced the rule in *Northwestern Utilities*. The Supreme Court of Canada recently refused leave to appeal *Brewer*.[153]

This year, four cases illustrate that the issue of standing is still an important issue in administrative law.

---

151. [1979] 1 S.C.R. 684.

152. 2008 ABCA 160. The Court of Appeal also determined that the Chief Commissioner did not have standing to appeal a decision by the tribunal to the Court of Queen's Bench.

153. Without reasons, at [2008] SCCA No. 290.

A. *Buttar v. Workers' Compensation Appeal Tribunal*

The case of *Buttar v. Workers' Compensation Appeal Tribunal*[154] dealt with the standing of the Workers' Compensation Appeal Tribunal ("WCAT") in an application for judicial review of its decision. The petitioners argued that WCAT's standing was limited to making submissions on jurisdiction and the scope of standard of review. They argued that the written arguments of WCAT contained advocacy relating to the merits of the decision. WCAT argued that section 15 of British Columbia's *Judicial Review Procedure Act*, as well as jurisprudence, gave it standing not only to make submissions on jurisdiction and standard of review, but also to make submissions to explain the record and relate the record to the decision in order to demonstrate that it did not exceed its jurisdiction.

The British Columbia Supreme Court dismissed the petitioners' application. It reviewed the jurisprudence and rejected a strict interpretation of WCAT's standing:[155]

> 38 There has been little in the way of jurisprudence to help delineate where the boundary lies between explaining the record and arguing the merits of the tribunal's decision. Indeed Mr. Justice Donald in *Lang* noted at para. 54 that the line is a blurry one, as did Madam Justice Garson in *BC Teachers' Federation* at paras. 44 and 58.
>
> 39 What these two decisions provide is confirmation that it is up to the reviewing judge in each case to determine if the tribunal has gone too far by moving beyond explaining the record and crossing the blurry line into arguing the merits of the decision.
>
> 40 If one returns to the earlier decision in *Paccar* there is assistance in what is meant by the phrase "arguing the merits of the decision" in the judgment of Mr. Justice La Forest. In *Paccar*, a union had applied to the Labour Relations Board of British Columbia alleging violations of the *Labour Code* and sought a determination as to whether the collective agreement was in full force and effect. At the Supreme Court of Canada the union argued the Industrial Relations Council had no standing before the court to make submissions in support of the reasonableness of its decision as it had already had that opportunity in two lengthy sets of reasons.

---

154. 2009 BCSC 129.

155. At paras. 38 to 46.

41 Mr. Justice La Forest, writing for himself and Chief Justice Dickson, rejected the union's position and stated at pg. 1014:

> In my view, the Industrial Relations Council has standing before this Court to make submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its power.

42 After analysing the evolution of the jurisprudence in relation to the scope of the tribunal's standing and judicial review, Mr. Justice La Forest adopted the comments of Mr. Justice Taggart in *BCGEU* where he held that a tribunal could not appear to defend the correctness of its decision, but could address those aspects that would assist the reviewing court in determining the reasonableness of the tribunal's decision.

43 At pp. 1016-1017 of *Paccar*, Mr. Justice La Forest notes the following:

> Before this Court, the Industrial Relations Council confined its submissions to two points. ... The second branch of the Council's submissions was to show that the Board had considered each of the union's submissions before it, and had given reasoned, rational rejections to each of the arguments. The argument before us emphasized that the Council had made a careful review of the relevant authorities and had made a decision that was within its exclusive jurisdiction. At no point did it argue that the decision of the Board was correct. Rather it argued that it was a reasonable approach for the Board to adopt. The Council had standing to make all these arguments, and in doing so it did not exceed the limited role the Court allows an administrative tribunal in judicial review proceedings.

44 Madam Justice L'Heureux-Dubé was the only other member of the court to address the issue of standing in *Paccar*, essentially agreeing with Justice La Forest's analysis. Thus, three members of the court in *Paccar* accepted as beyond question a tribunal's standing to explain the record before the court and to advance its view of the appropriate standard of review.

45 Mr. Justice La Forest also approved the tribunal's standing to explain why its decision was a reasonable approach to adopt and was not patently unreasonable. To this extent the tribunal was free to argue the merits of its approach although not to the point of defending the decision as correct. The scope of an administrative tribunal's standing was therefore expanded considerably beyond the limited question of jurisdiction as previously provided for in *Northwestern Utilities*.

46 In this case Mr. Webster has argued that WCAT's standing should be limited to addressing the issue of jurisdiction and the scope or standard of review. The jurisprudence does not support this position. Even the decision in *Lang* supports a wider role than that advanced by the petitioners. The jurisprudence supports the notion of a tribunal reviewing and explaining the record to show that it did not lose jurisdiction by rendering a patently unreasonable decision. See also *Baker* at para. 5 and *Basura* at para. 3. Moreover, to paraphrase the concluding observations of Mr. Justice Taggart of the Court of Appeal in

> *BCGEU v. British Columbia Industrial Relations Council*, 33 B.C.L.R. (2d) 1, it would be of little assistance to the court to have counsel for WCAT to appear simply to recite what the relevant test for judicial review is in this case, be it unreasonableness or patent unreasonableness, but not to permit her to illustrate from the facts of the case why this decision is not patently unreasonable.

B. *Bargen v. Northwest Territories (Medical Board of Inquiry)*

On a related subject, the Northwest Territories Supreme Court recently considered who the proper respondent was in an appeal from a finding of professional misconduct. In *Bargen v. Northwest Territories (Medical Board of Inquiry)*,[156] a physician appealed a decision of a Board of Inquiry which found him guilty of improper conduct. Under the *Medical Profession Act (NWT)*, the Board of Inquiry consisted of two to four members and a President. The role of the President was to act as gatekeeper—that is, to make a preliminary review of complaints and either dismiss the complaint, refer it to the Board, or refer it to an investigator for further investigation.

In *Bargen*, the President referred the complaint to an investigator, who gave a report prompting the President to refer the matter to the Board of Inquiry. The decision of the Board of Inquiry was ultimately appealed and the issues of parties and standing were raised:

> 11 This statutory framework raises a question as to who is the proper respondent to this appeal. The style of cause names the "Medical Board of Inquiry". The respondent to this appeal, however, designates itself as the "President of the Medical Board of Inquiry". The respondent submits that the *Medical Profession Act* differentiates between the role of the President as investigator and gatekeeper from the role of the Board of Inquiry as the adjudicative body. Case law states that an adjudicative body should not be a party on an appeal going to the merits of the decision. Therefore, according to the respondent, the proper party is the President. I agree with the respondent on this point.
>
> 12 While nothing turns on this question as far as the merits of the appeal are concerned, it is a question of importance as to the appropriate practice in statutory appeals.

156. 2009 NWTSC 5.

> 13 The governing rule, as enunciated by the Supreme Court of Canada in *Northwestern Utilities Ltd.* v. *Edmonton*, [1979] 1 S.C.R. 684, is that, in the absence of statutory provisions as to standing, an adjudicative tribunal whose decision is under review or appeal cannot appear and argue the merits. Its role is confined to arguments as to its jurisdiction or to explain the record. That this is still the governing rule can be seen in the commentary by Côté J.A. in *Brewer* v. *Fraser Milner Casgrain LLP*, [2008] A.J. No. 460 (C.A.), at paras. 29 - 39.
>
> 14 The Act, as noted by the respondent, distinguishes between the roles of President and the Board. The President acts in an investigative capacity. His decision-making is limited to whether the complaint should be dismissed or whether it should be referred to a hearing. It is a preliminary gatekeeping function. An analogy can be drawn to the role of a prosecutor who examines a complaint to see if there is a *prima facie* case. It is the President who initiates the hearing process. The President, however, does not adjudicate. It is therefore the President who is the proper respondent to an appeal under the Act.
>
> [Emphasis added.]

C. *Beier v. Vermilion River (County)*

In *Beier v. Vermilion River (County)*,[157] the Court of Appeal of Alberta briefly addressed standing when it held that a municipality (or county) had standing to take part in an application for leave to appeal of a decision of the Subdivision and Development Appeal Board. In making its ruling, the court considered section 688 of Alberta's *Municipal Government Act* which gives the court the power to direct which bodies must be named as respondents to the appeal. The court held that the municipality, "being the democratic representative of the electors in the community, has the right to take part. As a representative role, the municipality's involvement can at least assist in the constitution of an adversarial context suitable to the airing out of necessary questions of law and jurisdiction".[158]

157. 2009 ABCA 151.

158. At para. 8.

D. *Commission des transports du Québec c Villeneuve et Tribunal Administratif du Québec*

In *Commission des transports du Québec c Villeneuve et Tribunal Administratif du Québec*,[159] the Commission revoked Villeneuve's taxi permit. Villeneuve appealed to the Administrative Tribunal of Quebec, which reversed the decision. The Commission then applied for judicial review. Villeneuve applied to strike the judicial review application, on the basis that the Commission had no standing; the Superior Court granted Villeneuve's application. However, the Quebec Court of Appeal decided that, under that particular legislative scheme, the Commission did have standing to apply for judicial review.

V. MULTIPLE FORUMS—CONCURRENT, EXCLUSIVE, SEQUENTIAL?

Previous papers have noted that one of the conundrums of administrative law is how to deal with multiple forums for the same issue. Three distinct ways in which this problem can manifest itself have been identified:

- First, there is the *Weber*[160] and *Morin*[161] situation—where the jurisdiction of the court (or another administrative agency) is *ousted* because a statutory delegate has *exclusive* jurisdiction over the same subject matter.[162] The most

159. 2009 ACCA 1558.

160. *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

161. *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Québec (AG)*, 2004 SCC 39.

162. *Weber* and *Morin* hold that where there is a jurisdictional issue as between the courts and a labour arbitrator, jurisdiction is to be determined through a two-part analysis. First, it is necessary to look at the relevant legislation and what it says about the arbitrator's jurisdiction. Secondly, it is necessary to look at the nature of the dispute in order to determine whether the legislation suggests

(continued...)

common example of this situation is matters arising out of a collective agreement which stipulates that disputes must be resolved through the grievance and arbitration process provided for in the agreement.

- Secondly, there is the ability (or requirement) for a statutory delegate to apply the general law (such as human rights law) in performing its statutory mandate, as discussed in *Parry Sound*.[163]

- Thirdly, there is the developing doctrine of *forum conveniens* to prevent multiple proceedings. As discussed last year, this doctrine is most often seen in administrative law cases where the courts exercise their discretion not to hear an application for judicial review where there is an equally effective right of appeal.[164]

---

162. (...continued)
that resolution of the dispute falls exclusively to the arbitrator. See also *K.A. v. The City of Ottawa*, [2006] O.J. No. 1827 (C.A.), Sharpe J.A. writing for the unanimous court; *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology*, [2006] O.J. No. 1756 (J.I. Laskin, E.A. Cronk and R.P. Armstrong JJ.A.) and *Bisaillon v. Concordia University*, 2006 SCC 19.

163. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157.

An exception would be where the legislature has specifically prohibited the statutory delegate from considering some area of law, for example in British Columbia and Alberta where certain tribunals are prohibited from considering certain constitutional questions.

164. *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, especially at paragraphs 32 to 38, 112, and 140 to 153.

Sometimes—but rarely, to date—the legislature has specifically empowered a statutory delegate to decline to exercise its jurisdiction where there is another, more convenient forum for resolving the dispute. An example is section 34(1)(a) of the Ontario *Human Rights Code*. Absent such specific statutory authority, a statutory delegate cannot decline to exercise its jurisdiction merely because another statutory delegate also has jurisdiction: *Tranchemontagne*, 2006 SCC 14.

A. Is judicial review a pre-condition for suing the Federal Crown?

An emerging issue is whether a party can seek damages against the Federal Crown for damage suffered as a result of a decision or action by a federal board, commission or tribunal without first successfully applying for judicial review of that decision or action under the *Federal Courts Act*.[165]

The issue arises from three Federal Court of Appeal decisions (*Tremblay*, *Genier* and *Manuge*)[166] which are based on the doctrine against collateral attacks.[167] However, these decisions effectively convert the doctrine from being a *discretionary* ground for refusing relief into a *jurisdictional limitation* preventing any court from hearing any damage actions which involve unresolved issues about the validity of a decision by a federal board, commission or other tribunal.[168] Because actions against the Federal Crown can be brought in either the Federal Court or in the relevant provincial superior courts,[169] this line of cases

---

165. For a more detailed discussion of this issue, see Miles Hastie, "Continuing Contortions in Federal Crown Liability", (2009) 22 C.J.A.L.P. 175.

166. *Canada v. Tremblay*, 2004 FCA 172, [2004] F.C.R. 165 (CA) *per* Desjardins J.A; *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287 *per* Létourneau J.A.; and *Manuge v. Canada*, 2009 FCA 29 *per* Létourneau J.A.

167. *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737.

168. Consider the parallel with the refusal to grant judicial review where there is an effective alternative remedy—is this a discretion, or a jurisdiction limitation? See *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Merchant v. Law Society of Alberta* (2008), 86 Admin.L.R. (4th) 116 (AB CA).

169. Section 17 of the *Federal Courts Act* provides for damage actions against the Federal Crown to be brought in either the Federal Court or provincial superior courts.

potentially affects not only the jurisdiction of the Federal Court itself but also the jurisdiction of provincial superior courts.[170]

Although the Quebec Court of Appeal initially applied *Grenier*,[171] it has recently declined to do so.[172] The Ontario,[173] Newfoundland[174] and Alberta[175] Courts of Appeal have also rejected *Grenier*. However, the Federal Court of Appeal has subsequently issued decisions continuing to follow *Grenier*.[176]

Accordingly, it is not surprising that the Supreme Court of Canada has granted leave in a number of these cases, and will hear the appeals together on January 20 and 21, 2010.[177]

---

170. And it also would effectively shorten the limitation period for actions against the Crown to the 30-day limitation period for applying for judicial review under section 18.1 of the *Federal Courts Act*.

171. *Canada v. Capobianco*, 2005 QCCA 209.

172. *Agence canadienne d'inspection des aliments c. Institut professionnel de la function publique du Canada*, 2008 QCCA 1726, 80 Admin. L.R. (4th) 43; leave to appeal to SCC granted: 2008 SC.C.A. No. 469.

173. In a decision involving four consolidated appeals (*Telezone*, *Fielding Chemical Technologies*, *McArthur*, and *G-Civil*): 2008 ONCA 892; 86 Admin.L.R. (4th) 163, 94 O.R. (3d) 19 (J.I.. Laskin, Borins and Feldman, JJ.A.). The Federal Crown applied for leave to appeal in three of these cases (not *G-Civil*), which the SCC has granted: 2009 SCCA Nos. 77, 78 and 79. The Federal Court of Appeal decided *Mauge* after the decision by the Ontario Court of Appeal. The latter has subsequently repeated its view of the law in *River Valley Poultry Farm Ltd. v. Canada (Attorney General),* 2009 ONCA 326.

174. *Genge v. Canada (Attorney General)*, 2007 NLCA 60.

175. *Re Fantasy Construction Ltd.*, 2007 ABCA 335.

176. *Nu-Pharm Inc. v. Canada*, 2008 FCA 227, leave to appeal granted at 2008 SCCA No. 409; and *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, leave to appeal granted at 2009 SCCA No. 31.

177. Leave has been granted in *Agence canadienne d'inspection des aliments*, *Telezone*, *Fielding Chemical Technologies*, *McArthur*, *Nu-Pharm*, and *Parrish & Heimbecker*.

The Ontario cases, which were argued consecutively, dealt with appeals from decisions of a federal administrative board or tribunal. All four actions were commenced in the Ontario Superior Court, and all four raised the issue of whether a successful application for judicial review in the Federal Court was a precondition to an action for damages in the Superior Court.

The four appeals can be summarized as follows:

1. The *TeleZone* case

TeleZone sued the federal Crown for breach of contract—and negligence—for failing to issue it a licence to provide personal communication services in Canada. The federal Crown argued that the Ontario Superior Court did not have jurisdiction to hear the matter because the Minister of Industry Canada was acting as a federal board, commission or other tribunal when it denied the licence. The Superior Court refused to grant the federal Attorney General's motion to dismiss the action. The Attorney General appealed.

2. *G-Civil Inc. v. Canada*

The federal Minister of Public Works and Government Services rejected G-Civil's tender for repair work. G-Civil sued for breach of contract. The Superior Court granted the Crown's motion to dismiss G-Civil's action on the basis that the Superior Court did not have jurisdiction to hear the matter because the Minister of Public Works and Government Services Canada was acting as a federal board, commission or other tribunal when it rejected the tender. G-Civil appealed. The Court of Appeal granted G-Civil's appeal and reinstated its action against the federal Crown. [Note: The Attorney General did not appeal the Court of Appeal's ruling, so this is not one of the cases going to the Supreme Court of Canada.]

3. *Fielding Chemical Technologies Inc. v. Canada*

Fielding sued the federal Crown for the tort of misfeasance in public office, alleging that the federal Minister of the Environment had authorized orders banning the export of PCB waste to the United States for the purpose of protecting the Canadian waste disposal industry, and not for the purpose of protecting the environment as required by the *Canadian Environmental Protection Act*. The Crown argued that the Ontario Superior Court did not have jurisdiction to hear the matter because the Minister was acting as a federal board, commission or tribunal when it denied the licence. The Superior Court dismissed the Crown's motion. The Attorney General appealed.

4. *McArthur v. Canada*

McArthur was a federal prisoner who sued the federal Crown for damages for false imprisonment for being wrongfully assigned to solitary confinement. The federal Attorney General applied to dismiss his action on the basis that there was a statutory scheme for challenging assignments to solitary confinement (which he did not use), and the Federal Court of Appeal had exclusive jurisdiction to review decisions by the Segregation Review Board under that scheme, with the consequence that the Ontario Superior Court had no jurisdiction with respect to the action for damages.

The Superior Court granted the Crown's motion to dismiss the action. McArthur appealed.

The Decision by the Ontario Court of Appeal

The Ontario Court of Appeal started its decision by discussing the meaning of jurisdiction:[178]

> 3 The term jurisdiction has many meanings. In determining jurisdiction, a court may be deciding whether it has power to adjudicate over the person of the defendant or the subject matter of the claim asserted by the plaintiff in its statement of claim. As well, a court may be deciding whether the tribunal has territorial jurisdiction, whether the amount claimed is within the tribunal's monetary jurisdiction, or whether the person sitting as the tribunal has jurisdiction to determine the plaintiff's claim. In these appeals, the concern is whether the Ontario Superior Court has jurisdiction over the subject matter of each of the plaintiffs' claims. Parties, by consent, waiver or any other manner, cannot confer jurisdiction over a tribunal to try a case where none exists. On the other hand, where jurisdiction to adjudicate a claim exists, as the authorities explain, it takes clear legislative language to remove jurisdiction. For example, in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at p. 651, Cory J. stated: "The *Federal Court Act* does not remove the historic and long standing jurisdiction of provincial superior courts to hear an application for a writ of *habeas corpus*. To remove that jurisdiction from the superior courts would require clear and direct statutory language".
>
> 4 Jurisdiction is the power of the court to render an enforceable judgment. Therefore, for the purpose of these appeals, jurisdiction relates to whether the Ontario Superior Court has the power to adjudicate the claim, or claims pleaded in the four statements of claim. As there are not concepts such as partial, inchoate or contingent jurisdiction, either the Superior Court has jurisdiction, or it does not. Nothing in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 or the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in any way precludes the Superior Court from having jurisdiction to hear any claim that is substantively adequate. This is because, as I will explain, the superior court is a court of general jurisdiction having inherent jurisdiction to adjudicate claims consisting of virtually any subject matter.

The court concluded that the Superior Court had jurisdiction in all four cases and that an application for judicial review was not a prerequisite to the actions for damages. The court noted that the plaintiff in each of the cases was not seeking to set aside the underlying administrative action.[179] The court stated:[180]

---

178. At paras. 3 and 4.

179. At para. 91.

180. At paras. 92 to 95.

92 I agree with Morawetz J. in *TeleZone* and Macdonald J. in *Fielding* that the proper approach is to determine whether the Superior Court has jurisdiction to adjudicate the plaintiff's claim. If it does, that ends the matter unless there is legislation, or there is an arbitral agreement, that clearly and unequivocally removes that jurisdiction. As a court of general jurisdiction, the Superior Court has jurisdiction over every conceivable claim, unless it is shown that it does not constitute a reasonable cause of action. Hence, jurisdiction lies in the Superior Court in each case unless removed by s. 18 of the *FCA*. As I will explain, s. 18 does not remove the Superior Court's jurisdiction. Section 18 deals with remedies, not with jurisdiction. However, both Morawetz J. and MacDonald J. in *Fielding* were incorrect in applying the plain and obvious test, suitable for a rule 21.01(1)(b) motion dealing with whether a statement of claim discloses a reasonable cause of action. Either the Superior Court has jurisdiction, or it doesn't have jurisdiction.

93 The first twenty years of the Federal Court's existence produced a large number of jurisdictional difficulties, not the least of which occurred when a plaintiff joined a claim against the federal Crown with a claim against another person. They had to be determined in different courts - the Federal Court and a provincial superior court. Prior to 1990, the Federal Court held exclusive jurisdiction over claims against the federal Crown. The 1990 amendments to the *FCA* made the Federal Courts' jurisdiction in claims against the Crown concurrent with the provincial superior courts. These remedial amendments were intended to avoid split or multiple proceedings in suits against the Crown. Thus, s. 17 of the *FCA* and s. 21 of the *CLPA* reaffirm that the Superior Court has jurisdiction in all cases other than those in which the Federal Court has been given exclusive jurisdiction.

94 The exclusive jurisdiction provision of the *FCA*, which is central to all of the appeals, is s. 18 which provides the Federal Court with exclusive original jurisdiction to issue a prerogative remedy or grant declaratory relief "against any federal board, commission or other tribunal". To maintain that the Superior Court lacks jurisdiction over any of the claims, the Crown must fit the plaintiffs' claims squarely within s. 18(1). In my view, the Crown has failed to do so. Section 18 does not give the Federal Court the power to take away the jurisdiction of the Superior Court except for the remedies it emanates. Section 18 does not deal with procedure. It deals with remedies. In none of the cases is a remedy sought that comes within the prerogative writs or extraordinary remedies of s. 18. Section 18 does not empower the Federal Court to award damages, which are sought in each of the four cases. To the extent that *Grenier* supports the position of the Crown, I believe that it was wrongly decided. In any event, it is not binding on this court.

95 In summary, s. 17 of the *FCA* complements s. 21 of the *CLPA*, both statutes conferring concurrent jurisdiction on the provincial superior courts and the Federal Court where claims, such as those advanced in the four cases that form this appeal, are made against the Crown. It is plain on its face that s. 18 does not constitute a bar, or a condition precedent, to the jurisdiction of the Superior Court over a claim for damages in contract or in tort against the Crown. Causes of action in contract or tort are distinct from the prerogative writs and extraordinary remedies described in s. 18. Shortly put, relief by way of damages is not a form of relief contemplated by s. 18.

The court also rejected the Crown's collateral attack argument:[181]

> 96 The Crown focuses its argument on the submission that in *TeleZone*, *G-Civil*, *Fielding* and *McArthur* the Superior Court does not have jurisdiction to hear the plaintiffs' claims because the plaintiffs have collaterally attacked the administrative decisions that played a role in the factual history of each case. To present this argument, the Crown greatly expanded the record beyond the claims in the plaintiffs' statements of claim and relied on *Grenier*. Collateral attack, like abuse of process, is a defence that finds its proper place in a statement of defence. In any event, as I will explain, in none of the cases was there a collateral attack on any administrative decision. Neither from the pleadings, nor from the record, can a collateral attack be discerned.
>
> 97 In *R. v. Wilson*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack was stated as follows:
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally-and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
>
> In other words, when a separate and new action is filed to challenge some aspect of an earlier and separate case, it is called a collateral attack on the earlier case. That is not what happened in any of the four cases. None of the plaintiffs in its statement of claim attacked, or challenged the correctness of, the underlying administrative decision. Assuming that it is permissible to consider extrinsic evidence, it does not assist the Crown in making out a collateral attack. In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, it was held in *orbiter* that the collateral attack doctrine applies to the decisions of administrative boards and tribunals. In *Consolidated Maybrun*, as in *Weber*, under the *Environmental Protection Act*, R.S.O. 1980, c. 141, the legislature had set up a specialized tribunal to hear questions relating to the environment. The accused, who had been charged and convicted with failing to comply with a Ministerial directive, was not permitted to collaterally challenge the correctness of the order on his prosecution for failing to comply with the directive. He had to appeal to the Environmental Appeal Board. In *C.U.P.E.* it was held to be an abuse of process for an arbitrator to revisit the finding of a criminal court that a grieving employee was guilty of a sexual assault. Both *Consolidated Maybrun* and *C.U.P.E.* demonstrate that collateral attack as well as issue estoppel and abuse of process are defences.

181. At paras. 96 and 97.

The court provided a useful summary of its decision:[182]

> 110 Before I conclude by dealing with each of the appeals, I will provide a brief summary. Subject matter jurisdiction refers to the power of a particular court to decide a particular type of case. The Ontario Superior Court, as a court of general jurisdiction, has the *prima facie* power to decide every type of case, provided the statement of claim discloses a reasonable cause of action. Only by clear and explicit limitation may the power of the Superior Court to decide a particular type of case be curtailed. For example, as in *Weber*, a statutory remedial scheme or an arbitration clause will remove the jurisdiction of the Superior Court. Section 18 of the *FCA* clearly does not limit the right to bring an action in contract or tort, or for breach of *Charter* rights, in the Superior Court. It does not provide for the remedy sought by the plaintiff in any of the four cases. Thus, a judgment may be properly rendered if a court has the power to adjudicate the type of controversy contained in the statement of claim. The Superior Court has such power in each of the four cases.
>
> 111 A collateral attack refers to challenging the correctness of a judgment through subsequent independent proceedings. The attack is collateral to the initial judgment that was accepted and not appealed. There is no attack on the relevant administrative decision in the pleadings of any of the four cases. Nor does an attack emerge from the record. In each case the plaintiff claimed damages in tort or contract. It is also noteworthy that in none of the cases did the plaintiff participate in the decision-making process of the administrative decision. Therefore, in none of the four cases was there a collateral attack on an administrative decision. Moreover, a collateral attack is a defence and does not go to jurisdiction.

As noted above, the Supreme Court of Canada has granted leave to appeal in three of the cases involved in *Telezone*, as well as a similar case from Quebec and two from the Federal Court of Appeal.[183]

---

182. At paras. 110 and 111.

183. The appeals are scheduled to be heard together on January 20 and 21, 2010.

B. Federal Court or Provincial Superior Court? *State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*

In *State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*,[184] State Farm appealed a lower court decision which stayed its application to the New Brunswick Court of Queen's Bench on the basis that the proper forum was the Federal Court.

The case dealt with a request by Gaudet under the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") for information gathered about him by a private investigator. State Farm refused to disclose the material on the grounds that PIPEDA did not apply. Gaudet complained to the federal Privacy Commissioner who decided to hear Gaudet's complaint. State Farm applied for a declaration that the federal Privacy Commissioner lacked jurisdiction and a determination of the constitutionality of PIPEDA. The trial judge dismissed the application and the Court of Appeal dismissed State Farm's appeal.

On the issue of forum, the New Brunswick Court of Appeal held the proper forum was the Federal Court. The exclusive jurisdiction for declarations against the federal Privacy Commissioner—indeed, all federal commissioners—lies with the Federal Court.

On the issue of the constitutionality of the legislation, both the provincial and federal court had jurisdiction to decide the constitutional applicability of federal legislation. However, because the issue concerning the authority of the Privacy Commissioner was clearly within the jurisdiction of the Federal Court, the New Brunswick court declined to hear the matter because it would bifurcate the proceedings.

---

184. 2009 NBCA 5. See also *Bilodeau c. Canada (Ministre de Justice)*, 2009 QCCQ 3472.

C. Proper Forum—Different Administrative Tribunals: *University of Saskatchewan v. Workers' Compensation Board of Saskatchewan*

University of Saskatchewan v. Workers' Compensation Board of Saskatchewan[185] dealt with the competing jurisdictions of two administrative tribunals.

Bowman alleged that she had been harassed during the course of her employment with the University. The union filed a grievance on her behalf in which it sought damages in tort for intentional or negligent infliction of mental suffering. Bowman also filed a claim for compensation with the Workers' Compensation Board for injuries arising from the harassment, namely depression. The WCB ruled that the claim did not fall under its exclusive jurisdiction because there was no workplace injury. The grievance arbitrator ruled that he could proceed only on the non-monetary aspects of the grievance because the monetary issues were barred because they fell under the jurisdiction of the Board.

The University applied to the Court of Queen's Bench for judicial review of the WCB's decision. The chambers judge dismissed the University's application, finding its decision was reasonable.

The Saskatchewan Court of Appeal allowed the University's appeal. The WCB had erred by declining jurisdiction:[186]

> 56 Accordingly, the question for the [WCB] on this application was whether and to what extent the grievance before the labour arbitrator raised claims that, *if established*, constituted claims for workplace injury compensable under the *Act*. This question was not addressed by the [WCB], which wrongly concluded that its own dismissal of the grievor's WCB claim was conclusive of the issue.

185. 2009 SKCA 17.

186. At paras. 56 and 57.

> 57 In effect, the [WCB] assumed that an action was barred in relation to a workplace injury only if and to the extent that the claimant had been successful in claiming compensation under the *Act*. An unsuccessful claimant, on this assumption, would be entitled to pursue a civil claim against the employer in relation to a workplace injury, even if the workplace injury alleged in the civil action was one that was compensable under the *Act*, and for which compensation had been denied only because it had not been proven. This interpretation of the *Act* is inconsistent with the provisions of the *Act*, and the philosophy of the *Act*, that grant immunity to employers who contribute to the compensation scheme. It would protect an employer only if an employee received compensation under this *Act*.

The court held that the bar on civil claims for matters within the WCB's jurisdiction applied regardless of the WCB's decision that the employee's injury was compensable:[187]

> 60 Accordingly, it is my conclusion that the decision of the [WCB] should be quashed and the matter referred back to it to be determined in accordance with the law. If the [WCB] declined jurisdiction to decide this matter, it erred in doing so, for s. 168 entitles parties to a ruling on applications brought to the [WCB under that section. If, on a more charitable reading, the [WCB] found that no part of the claim asserted by way of arbitration was barred, solely on the basis that the claim had been dismissed by the Claims Entitlement Specialist, then its decision was wrong in law and for that reason unreasonable. The [WCB] was obliged to consider the reasons for the dismissal of the claim in order to determine whether the claim was one that fell within the jurisdiction of the [WCB]. A claim dismissed solely because its factual basis has not been proved is one that does fall within the jurisdiction of the [WCB] and, indeed, is one on which the [WCB] has exercised its jurisdiction.
>
> 61 It is incumbent on the [WCB] to examine the grievance advanced by the respondents by way of arbitration and determine whether and to what extent that claim is a claim for a workplace injury that, *if established*, would entitle the grievor to compensation under the *Act*. In this regard, it must fully consider not only the fact that the grievor's claim under the *Act* has been denied, but the basis upon which it was denied. In short, the question is whether the injury *claimed* falls within the jurisdiction of the [WCB], not whether the claimant was successful in *proving* the claim to the [WCB]. In this case, a reasonable reading of the report of the Claims Entitlement Specialist was that she found that the claim advanced pursuant to the *Act* was one that was covered by the *Act*, but that the claimant had failed to prove the claim. Assuming without deciding that the [WCB] is bound by this determination, it follows that the claim does fall within the jurisdiction of the [WCB] and the question remaining for it to decide is the extent to which the claim asserted in the arbitration is for the same (or any other) workplace injury. Again, this is not a question of whether the *remedies* claimed by way of arbitration or remedies available under the *Act* [fall within the jurisdiction of the *Act*], but, rather, whether the basis of the claim by way of arbitration is a workplace injury that (if established) falls within the jurisdiction of the *Act*.

187. At paras. 60 and 61.

VI. DISCLOSURE AND PRIVACY

A. *Law Society of Saskatchewan v. E.F.A. Merchant, Q.C.*

In *Law Society of Saskatchewan v. E.F.A. Merchant, Q.C.*,[188] the Law Society appealed a decision by the Court of Queen's Bench which refused to order Merchant to produce documents relevant to a complaint against him.

The Law Society was investigating a complaint against Merchant that he had disobeyed a court order by paying money held in trust to his client instead of paying the money into court. The Law Society requested information from Merchant about his dealings with his client, and Merchant refused to produce the information on the grounds of solicitor-client privilege.

The Law Society applied to the Court of Queen's Bench for an order compelling production of the relevant records. The chambers judge refused to grant the order because it was not "absolutely necessary".[189] The judge interpreted the Law Society Rules and found that the Rules, along with the *Legal Profession Act (Saskatchewan)*, granted the Law Society too much discretion and did not adequately protect solicitor-client privilege.

The Saskatchewan Court of Appeal allowed the appeal. The court reviewed the basic principles of solicitor-client privilege and the requirement of "absolute necessity". The court rejected the Law Society's argument that the common law extends the envelope of solicitor-client privilege to include the Law Society, finding instead that "[t]he foundation of the

---

188. 2008 SKCA 128, leave to appeal to SCC refused.

189. Citing *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.

privilege is the special character of communications between a client and his or her lawyer".[190] However, the court held that the chambers judge had misapplied or misinterpreted the "absolutely necessary" requirement set out in *Descôteaux*:[191]

> 41 In my respectful view, the respondents' submissions on this aspect of the appeal are misdirected. In the present context, the "absolutely necessary" concept is concerned not with whether or how effectively the Law Society will protect the confidentiality of privileged records after they are produced. It is concerned with whether those records should be produced at all. The respondents' position, particularly in oral argument, was to the effect that solicitor-client privilege could not be overcome unless the *Act* and the Rules guaranteed the privileged information would be kept strictly confidential. However, this misconceives the "absolutely necessary" concept.
>
> 42 The principle of protecting communications between a client and his or her lawyer has long been established as a fundamental feature of the legal system and as being critical for the proper administration of justice. Nonetheless, at least at this point in the evolution of the law, solicitor-client privilege does not have a status which renders it immune to legislative limitation. Subject to the possibility of *Charter of Rights and Freedoms* or other constitutional considerations not argued or relied on by the respondents, Parliament or a provincial legislature, by choosing appropriate statutory language, can restrict solicitor-client privilege or authorize its breach. Thus, for example, in *Solosky v. The Queen*, *supra*, the Supreme Court recognized that the Penitentiary Service Regulations and a Commissioner's Directive empowered the head of a prison to inspect and read correspondence, including privileged correspondence, in order to ensure the safety and security of the institution.
>
> 43 The "absolutely necessary" concept introduced in *Solosky v. The Queen*, and formalized in *Descôteaux v. Mierzwinski*, presupposes that solicitor-client privilege is subject to statutory limitation. In other words, it does not purport to deny legislative authority to interfere with privilege but, rather, prescribes how the authority to limit privilege must be exercised. This is readily apparent from the language used by Lamer J. in *Descôteaux v. Mierzwinski* itself which, for ease of reference, is repeated below:
>
> > 13. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

190. At para. 37.

191. At paras. 41 to 44.

> 44 It follows that the respondents fail to engage the real issue in this appeal when they argue the "absolutely necessary" concept prevents disclosure of the records demanded by the Law Society because the ongoing confidentiality of those records cannot be guaranteed. To repeat, the question raised by the "absolutely necessary" requirement is not whether the Legislature and the Law Society have done everything absolutely necessary to protect the confidentiality of privileged records. It is whether, in deciding to request the records and in framing its request for them, the Law Society has respected solicitor-client privilege except to the extent absolutely necessary to achieve the objectives of the *Act*.

The court held that the *Legal Profession Act* clearly reveals a legislative intention that the Law Society be empowered to demand access to relevant material, and this must include the production of privileged material. Having decided that the Law Society had authority to demand privileged records, the Court went on to consider whether the Law Society's request avoided interfering with privilege "except to the extent absolutely necessary". The court concluded that the Law Society has a duty to investigate complaints and an authority to demand privileged documents in the course of discharging that duty. It was seeking the production of only those documents relevant to investigate the complaint, and there was no other way to obtain those records. The Court of Appeal granted an order allowing the Law Society to enter Merchant's office and seize the relevant records.

B. *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*

The issue of confidentiality of information also arose in *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*.[192] The case dealt with whether a law firm which acted for the appellant ("AUPE") on an *ad hoc* basis could act for the respondent ("UNA") on an appeal from a dismissal of an application for judicial review. The Labour Relations Board held that the law firm could act because there was no conflict of interest.

---

192. 2009 ABCA 33, leave to appeal to SCC refused.

The Court of Appeal of Alberta upheld the Board's decision. First, the court noted that AUPE, in its retainer with the law firm, had expressly or implicitly consented to having the law firm continue to represent the respondent if a conflict arose between AUPE and UNA. The court rejected AUPE's argument that the consent was not legally valid because the law firm had not given full disclosure about the particular file. Secondly, the court was satisfied that the parties must have assumed and agreed that the mere fact that the law firm had confidential information about both clients would not disqualify it from acting. The court noted that where clients have consented to multiple representation, it is generally understood that the ability to keep more generic information confidential may be reduced. But, this would not be sufficient to override the consent given:[193]

> 40 Ordinarily, all information given by the client to the lawyer will be considered to be privileged, and the client can enforce the lawyer's obligation to keep it all confidential. But where the client has consented to multiple representation, the client's ability to keep more generic information confidential may be reduced. The problem was noted in *Advance Waiver of Conflicts* at pg. 319:
>
> > Finally, there is the "playbook" problem in which a former client claims that a lawyer who learned information of a very general nature—such as strategies for negotiating transactions, launching hostile takeovers, or settling litigation—should be disqualified from a broad range of adverse representations in which that information might be useful. The Restatement rejects a sweeping version of the playbook argument, but leaves the door open for more narrowly tailored claims. A few courts have taken a more expansive view.
>
> Thus the mere fact that AUPE may have discussed with Chivers Carpenter in general terms its institutional strategies would not be enough to override the consent given.
>
> 41 *MacDonald Estate* set out some presumptions that apply when a firm is in possession of confidential information from one client, and ends up acting for another client adverse in interest to the former. First of all, the law presumes from the existence of a prior retainer "sufficiently related" to the present retainer that confidential information was imparted: *MacDonald Estate* at para. 46. There is a "heavy burden" on the lawyer to show otherwise. While there is a "strong inference that lawyers who work together share confidences", the firm can show that confidential information possessed by one lawyer was not passed on to others: *MacDonald Estate* at para. 49. If the firm sets up suitable "ethical walls", and takes

193. At paras. 39 to 40.

other appropriate internal procedures, it can be shown that the confidential information was protected. The onus is on the lawyer to prove that the confidential information was protected, kept confidential, and not misused. The Board applied these principles, without modification to reflect the client's consent, present in this case but absent in *MacDonald Estate*.

42 A law firm acting for multiple clients with express consent should still be presumed to have a duty to keep confidential information of each client confidential, and to ensure that it is not misused. However, where the clients have given a generic consent for the firm to continue to act for both of them, some of the presumptions in *MacDonald Estate* can no longer operate with full vigour. As the Court noted in *MacDonald Estate* at para. 44:

> In this regard, it must be stressed that this conclusion [respecting confidential information] is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

In particular, where (as here) different lawyers are acting for the different clients, the rule that information known to one lawyer is presumed to be known by the whole firm, and is presumed to be passed on, is less compelling. The clients must have consented to this state of affairs, even if they did not consent to the misuse of their confidential information. Where there is express consent to act for two clients, the mere existence of confidential information should not raise a presumption that it has been passed to another lawyer, or misused to the detriment of the client. This is particularly so where, as the Board found, there are a limited number of counsel practicing in this specialized field: *Strother* at paras. 55, 62; *O.P.C.M.I.A. U.S.A. & Can., Local 222 v. Alberta*, 2008 ABQB 225, 91 Alta. L.R. (4th) 230 at paras. 35, 41.

43 Likewise, the burden of proof on the lawyer set in *MacDonald Estate* is inappropriate in cases of express consent. There is no basis to presume that confidential information has been or will be misused, where all the clients have consented. The consent must at least incorporate a presumed level of trust in the integrity of the lawyer and the firm, and an acknowledgment that there is, at least, no presumption that the lawyer will misuse the confidential information. The problems of the perception of the public and the objecting client which were the basis for the rules formulated in *MacDonald Estate* (at paras. 44-9) no longer prevail in the face of express consent. As stated in *Advance Waiver of Conflicts* at pg. 328:

> The comments [to the *Model Rules of Professional Conduct*], however, should also state that, once a conflicting representation is consented to, the client giving consent (and any other complaining third party) will have the burden of showing specific facts establishing that the lawyer has misused confidential information in order for the lawyer to be disqualified or sanctioned for her conduct. Otherwise, specious claims of misuse of confidential information would eviscerate the advance conflict waiver... .

As such, arguably the burden of proving some potential misuse of information or other prejudice should initially be on the client.

In this case, the court was satisfied with the reasonableness of the Board's decision that the two retainers were not so connected as to raise an inference that confidential information had been compromised.

VII. A MISCELLANY OF OTHER DEVELOPMENTS

As usual, there have been a number of other interesting developments in administrative law over the last year or so.

A. *Alberta (Minister of Employment and Immigration) v. Alberta Federation of Labour*

In *Alberta (Minister of Employment and Immigration) v. Alberta Federation of Labour*,[194] the Alberta Court of Queen's Bench quashed two interlocutory decisions of an Adjudicator under the *Freedom of Information and Privacy Act (Alberta)* ("FOIPA"). The decisions required the Alberta Federation of Labour to give notice of its request for information to all affected third parties. The court rejected the argument that the application for judicial review was premature because the impugned decisions were interlocutory, finding that the Adjudicator's requirement to give unqualified and immediate notice to affected third parties was unreasonable and contrary to the purposes of FOIPA. It was an extraordinary circumstance which warranted judicial intervention.

194. 2009 ABQB 344.

B. *Democracy Watch v. Conflict of Interest and Ethics Commissioner and Attorney General of Canada*

In *Democracy Watch v. Conflict of Interest and Ethics Commissioner and Attorney General of Canada*,[195] Democracy Watch complained to the federal Conflict of Interest and Ethics Commissioner that Prime Minister Stephen Harper and others were in a conflict of interest with respect to the Mulroney-Schreiber situation. The Commissioner wrote back to Democracy Watch stating that she did not have sufficient credible evidence of the allegation or sufficient grounds to begin an examination. Democracy Watch applied for judicial review of the Commissioner's decision contained in her letter. The Federal Court of Appeal held that the Commissioner's letter was not reviewable because she had not issued a decision or order within the meaning of section 66 of the *Conflicts of Interest Act* or section 18 of the *Federal Courts Act*. The court stated that "[w]here administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review".[196] The court noted that Democracy Watch had no statutory right to have its complaint investigated and the Commissioner had no statutory duty to act on the complaint.

C. *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*

In *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*,[197] the Ontario Court of Appeal upheld the Divisional Court's decision that the penalty imposed by the Board was unreasonable. The Board had been ordered to reconsider its penalty decision from 2002. On reconsideration, the Board took the view that it could not consider evidence of events that took place after 2002. The court held that there was nothing preventing the Board from

---

195. 2009 FCA 15, leave to appeal to SCC refused.

196. At para. 10

197. 2009 ONCA 234.

considering post-2002 events—all of the circumstances were relevant until the penalty was confirmed and final. The Board should have considered mitigating circumstances such as Stetler's age, health[198] and unblemished record.

D. *Walsh v. Mobil Oil Canada*

In *Walsh v. Mobil Oil Canada*,[199] the Court of Appeal of Alberta overturned a chamber's judge decision which awarded Walsh damages and solicitor-client costs in a judicial review application. While the court upheld the judge's findings on employment-related discrimination, it held that there was nothing in the record related to damages, and therefore it was an error of law for the judge to make directions about damages. The court also reduced costs to party and party costs.

E. *Confédération des syndicats nationaux v. Canada (Attorney General)*

The Supreme Court of Canada issued a noteworthy decision dealing with federal versus provincial taxation powers in *Confédération des syndicats nationaux v. Canada (Attorney General)*[200]. The case dealt with a challenge to the changes to the unemployment insurance regime. The Supreme Court held that certain sections of the *Employment Insurance Act* were unconstitutional because they transformed premiums into a payroll tax. While the case primarily involves constitutional law and not administrative law, it is noted here to illustrate the administrative law point about improper delegation of taxing authority.

---

198. The court considered the negative health consequences the prolonged court process was having on Stetler.

199. 2008 ABCA 268.

200. 2008 SCC 68.

F. The Record

In *Calgary Health Region v. United Nurses of Alberta,*[201] Associate Chief Justice Wittmann ruled that the dissenting opinion from a three-member arbitration board should be included in the Return of the record in an application for judicial review.

The Saskatchewan Court of Appeal has permitted the record to be supplemented by affidavits, because otherwise the applicants would not practically be able to challenge a finding of fact which they said was unreasonable: *Hartwig v. Saskatchewan (Inquiry into Matters Relating to the Death of Neil Stonechild, Commissioner)*:[202]

> [19] It is readily apparent therefore that the scope of judicial review has evolved significantly in the 55 years since the *Northumberland*, [1952] 1 All E.R. 122] case was decided. In contrast, the conception of what is properly before the court in a judicial review application has been largely static. As a result, we are currently at a point where, on one hand, the factual findings of administrative decision-makers made within jurisdiction can be reviewed from the perspective of reasonableness but, on the other hand, the evidence on which those findings are made cannot be put before the courts. This situation frequently creates serious injustices and precludes meaningful review. In my opinion, there is a pressing need to bring the law concerning the materials which can be placed before the courts in judicial review applications into line with the substance of contemporary administrative law doctrine.
>
> [20] The Hartwig, Senger and Police Association motions are an illustration of the difficulties inherent in the existing state of affairs. Each applicant argues that various findings made by the Commission are unreasonable or patently unreasonable. There is no suggestion from the Minister or elsewhere that, if they have standing, the applicants are not entitled to make these submissions. But, of course, the only way their positions can be properly advanced is if they are entitled to point to the evidence placed before the Commission and attempt to show how it was misunderstood, overlooked or otherwise wrongly interpreted. As a result, the position taken by the Minister as to the scope of the materials properly before the Court would, as a matter of practical reality, deny the

---

201. 2008 ABQB 753 *per* Wittmann ACJ (as he then was).

202. 2007 SKCA 74, 284 D.L.R. (4th) 268 *per* Richards J.A. See also *Mosaic Potash Colonsay ULC v. United Steelworkers of America, Local 7656*, 2008 SKQB 238. However, affidavits can only be admitted to show what was actually before the decision-maker, not to provide additional information: *Henderson v. City of Saskatoon et al.*, 2008 SKQB 135.

applicants any prospect of successfully advancing the arguments they are otherwise entitled to make.

[21] This sort of problem has been solved, or at least avoided, in most Canadian jurisdictions by way of legislation aimed specifically at judicial review or by way of provisions included in rules of court. In Ontario, for example, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22, requires any tribunal to which it applies to compile a record consisting of, *inter alia*, "the transcript, if any, of the oral evidence given at the hearing" and "all documentary evidence filed with the tribunal". Similar enactments can be found in other jurisdictions. See: Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2005) at paras. 6:5420 *et seq*.

[22] No such provisions exist in Saskatchewan. Judicial review applications proceed within the framework of Part Fifty-Two of *The Rules of Court*. Rule 669 is of particular relevance here as it spells out the requirements concerning the "return" which a tribunal is obliged to make if an application is launched. In relevant part, it reads as follows:

> 669(1) Where an application is made for an order by way of *certiorari* or to quash proceedings, a notice to the following effect, adapted as may be necessary and addressed to the court, tribunal or other authority shall be endorsed in or on the notice of motion:
>
> "You are required by the rules of court forthwith to return to the local registrar of this court at the Court House (address in full) Saskatchewan, the conviction, order, decision, (or as the case may be) and the reasons therefor, together with the process commencing the proceeding, and the warrant, if any, issued thereon."
>
> (2) All things required by Subrule (1) to be returned to the local registrar shall be deemed to be part of the record.

[23] I note, however, that there is nothing in Rule 669 which would be inconsistent with a ruling to the effect that, in appropriate circumstances, parties to judicial review applications are entitled to put before the reviewing court the evidence considered by the tribunal when it made the decision in issue. The fact that the decision of the tribunal, its reasons and the process commencing the proceeding are deemed "part of" the record by Rule 669 does not in itself exclude other materials from the consideration of a court. Indeed, Rule 671 contemplates orders requiring information beyond the return to be brought forward.

[24] In my opinion, therefore, it is necessary to recognize and give effect to the reality that, in order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question. No other result is fully consistent with the present substance of administrative law.

. . .

[33] Thus, in all of the circumstances, the best course in this area for now is to simply recognize the right of participants in judicial review proceedings to bring forward the

> evidence which was before the administrative decision-maker. This may be done by way of an affidavit which identifies how the evidence relates to the issues before the court and which otherwise lays the groundwork for its admission. That was the general approach taken by Hartwig.

G. Using the *Bill of Rights* to ensure a fair hearing process

In *Lavallee v. Alberta Securities Commission*,[203] the Court of Queen's Bench ruled that the guarantee of a fair hearing in the Alberta *Bill of Rights* overrode section 29(3) of the *Securities Act* which *required* the Securities Commission to receive all evidence that is "relevant to the matter being heard"—without any explicit authority to exclude relevant evidence which would be prejudicial, inappropriate or otherwise inadmissible.

H. Alberta's Bill 32

In 2009 the Legislature of Alberta passed Bill 32, the *Alberta Public Agencies Governance Act*. The Act, which will come into force on proclamation, recognizes that public agencies and Ministers of the Crown are accountable to the public for their activities and fulfilment of their mandates. It also recognizes the importance of communication and transparency in the governance and activities of public agencies. The Act sets out the powers and responsibilities of Ministers responsible for public agencies, the responsibilities of public agencies themselves and contains provisions for the recruitment and reappointment of members (including limiting their terms of office).

---

203. 2009 ABQB 17 at paragraphs 166 to 207 *per* Wittmann ACJ (as he then was).

I. The Demise of the B.C. Administrative Justice Office

Unfortunately, budgetary constraints have brought about the demise of the Administrative Justice Office in B.C. For the moment, its webpage is being maintained, so that all of its excellent work is still accessible (at least for the moment).[204] This is a great loss for Canadian administrative law.

VIII. CONCLUSION

At the very least, administrative law is never straight-forward!

Despite valiant attempts by the Supreme Court of Canada to simplify things, *Dunsmuir* and *Khosa* do not provide a precise formula for determining either the applicable standard of review or the outcome from applying that standard. Nor do these decisions provide a common and generally accepted conceptual framework for reconciling the tension between legislative supremacy and the common law principles of administrative law on the one hand, and judicial intervention and judicial deference on the other hand.

The duty to be fair and impartial continues to elude some decision-makers, as their precise meaning and content vary from case to case.

Privacy laws continue to add a whole new element to administrative law.

Once again, it is safe to conclude that administrative lawyers will be kept very busy in the year to come!

---

204. The website is found at http://www.gov.bc.ca/ajo/default.htm.