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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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I. INTRODUCTION

The goal of this paper[1] is to highlight significant developments in administrative law over the past year.

The Supreme Court of Canada has not issued any earth-shaking or concept-changing administrative law decisions during the last year. Although there are still a number of outstanding issues, the lower courts are digesting *Dunsmuir*[2] and *Khosa*[3] about standards of review, which generally appear to have had the intended effect of reducing debate about the applicable standard of review. The Supreme Court's decision in *Conway* appears to expand the jurisdiction of administrative agencies to grant *Charter* remedies. At the time of writing, the Court has not issued its decisions in the *Telezone* group of cases about whether it is necessary to go to the Federal Court to quash a decision of a federal board, tribunal or commission before launching an action in damages either there or in provincial superior court.

There has also been the usual flow of interesting decisions by various courts about the exercise of discretion, procedural fairness, standing, professional discipline, remedies in judicial review, and privacy and disclosure issues in administrative law.

At the end of this paper, I have identified some unresolved issues in administrative law.

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1. I gratefully acknowledge Dawn M. Knowles, LL.B. from our office for her very capable assistance in the preparation of this paper. I also appreciate those colleagues from across the country who draw my attention to interesting developments in administrative law in their jurisdictions. A version of this paper was presented to the Continuing Legal Education Society of British Columbia in Vancouver on 22 October 2010.

2. *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9, [2008] 1 S.C.R. 190.

3. 2009 SCC 12.

II. STANDARDS OF REVIEW

In 2008, the Supreme Court of Canada in *Dunsmuir* attempted to simplify standards-of-review analysis by merging the two deferential standards of review[4] into the one unified standard of reasonableness. It also eliminated the need for any standards-of-review analysis where precedent has already determined that issue.[5] A year later in *Khosa*, the Supreme Court of Canada addressed the relationship between the standards-of-review analysis from *Dunsmuir* and statutorily-imposed standards of review (such as contained in the British Columbia *Administrative Procedures Act*).[6] While the lower courts have generally internalized the new approach, there are still a number of issues which are being worked out.

A. Is it still necessary to address the standard of review in every case?

Neither *Dunsmuir* nor *Khosa* suggested that it was no longer necessary to determine the standard of review for every issue in every case. Surprisingly, however, the Supreme Court

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4. Patent unreasonableness and reasonableness *simpliciter*.

5. There may be issues about whether there is actually a precedent for the standard of review for a particular decision. Was the previous decision actually about the same issue? If the previous decision pre-dates *Dunsmuir*, would the previous decision have been decided the same way after *Dunsmuir*?

6. But not in section 18.1 of the *Federal Courts Act*, which the majority in *Khosa* ruled specified only *grounds*—not *standards*—of review.

of Canada itself has not addressed the standard of review in quite a number of cases since *Dunsmuir*.[7]

Some of the silence may be explained because it was assumed—without stating—that the constitutional nature of the issue involved automatically engaged the correctness standard.[8]

More perplexingly, another part of the silence may be explained because it was simply assumed—again without stating—that a clear question of "jurisdiction" was involved which necessarily engaged the correctness standard.[9] This is reminiscent of the earlier decision in *United Taxi v. City of Calgary* where it was apparently self-evident that a jurisdictional question was involved, rather than something which the legislature had remitted to the statutory delegate to determine.[10]

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7. As David Mullan has noted, after *Dunsmuir* the Supreme Court of Canada only referred to standard of review in two 2008 cases: *Proprio Direct Inc.*, 2008 SCC 32; and *Lake*, 2008 SCC 23; and in only 5 of the 17 post-2008 decisions ("Administrative Law Review", delivered to the Federal Court and Federal Court of Appeal Annual Education Seminar at Mont-Tremblant, 6 October 2010).

8. For example, *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 and *R. v. Conway*, 2010 SCC 22. But see the discussion below about *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53.

9. For example, *Canada (Attorney-General) v. Northrop Gruman Overseas Service Corp.*, 2009 SCC 50; *Plourdre v. Wal-Mart Canada Corp.*, 2009 SCC 54; and *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.

10. *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485.

While the majority in *Dunsmuir* cautioned that its decision to unite the two deferential standards of review was not intended to increase the intensity of judicial scrutiny,[11] it explicitly recognized that correctness would continue to be the appropriate standard of review for certain issues:

> [50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.
>
> [Emphasis added.]

However, the majority in *Dunsmuir* did not provide any guidance about what types of questions are "jurisdictional", and the subsequent jurisprudence has not done this either. While modern Canadian administrative law may generally be allergic to quickly characterising matters as being jurisdictional in nature,[12] that category still exists. It would be helpful if the court were to provide some analytical framework for determining when the legislature intends a matter to be a "jurisdictional given" (to be determined correctly) as

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11. Paragraph 48: "The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism." Presumably, the reference to "pre-*Southam* formalism" refers to whether the correctness standard applies to a particular question of law in the appellate context as opposed to in judicial review. The thrust of this sentence is that the merging of the two deferential standards of review was not intended to make the more searching reasonableness *simpliciter* standard of review applicable to decisions which previously were subject to the more deferential patently unreasonable standard of review.

12. For example, see Justice Abella's decisions in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; and *Council of Canadians with Disabilities v. Via Rail Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650.

opposed to something within the statutory delegate's jurisdiction (to be determined reasonably)—and then performed that analysis in the relevant cases.[13]

In other cases, the Supreme Court of Canada appears to have simply assumed—without any analysis—that the correctness standard of review applied to the particular question of law involved in the case in front of it.[14] However, as noted in the final section of this paper,[15] one of the outstanding issues in administrative law involves the circumstances in which the courts will intervene to correct an error of law. To the extent that the courts will not correct *all* errors of law, one would expect there to be some analysis about why the court can correct a particular error of law in a particular case.

Finally, as the majority noted in *Dunsmuir*,[16] it may not be necessary to conduct a standard-of-review analysis where precedent has already determined the standard of review applicable to the particular question. This, however, does require a determination that the issue in the present case is the same issue as in the previous case which is said to be the precedent. If the issues are different, then the previous case cannot be a relevant precedent. Further, there is an issue about whether a decision prior to *Dunsmuir* will necessarily be a precedent for a post-*Dunsmuir* case. This issue arose in two recent Supreme Court of Canada decisions:

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13. The concept of jurisdiction is also relevant to the court's own ability to intervene where there has been a breach of procedural fairness by a statutory delegate who is otherwise acting within the scope of its authority. What gives the court the right to intervene in such a case? Breach of procedural fairness is not a free-standing ground of judicial review, particularly where there is a privative clause that would otherwise prevent judicial review of such a decision.

14. The three cases from Quebec referred to in footnote 8 might be examples of this.

15. See Part VIII below.

16. At paragraph 57.

- In *Nolan v. Kerry*,[17] the court deferred to the Financial Services Tribunal's interpretation of a provision in its statute about costs. It rejected the suggestion that its pre-*Dunsmuir* decision in *Monsanto*[18] was a precedent that required the application of the correctness standard. While the legislative provisions were different, so technically *Monsanto* could not have been a precedent, one might now wonder whether *Monsanto* would have been decided the same way after *Dunsmuir*.

- In *Bell Canada v. Bell Aliant Regional Communications*,[19] the Court also deferred to the decision of the CRTC but went out of its way to say that it was not overruling its pre-*Dunsmuir* decisions in *Barrie Public Utilities*[20] and *Atco*[21] which applied the correctness standard. Should one assume that *Barrie* and *Atco* would have been decided the same way after *Dunsmuir*?

B. Correctness is not necessarily the standard of review for all aspects of a constitutional issue

In late 2009, the Supreme Court of Canada noted that correctness would not necessarily always be the applicable standard of review to all issues which might arise in a constitutional case.

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17. 2009 SCC 39.

18. *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 which was discussed in my 2005 paper.

19. 2009 SCC 40.

20. *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 S.C.R. 476, which was discussed in my 2003 paper.

21. *ATCO Gas and Pipelines Ltd. and Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, which was discussed in my 2006 paper.

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters[22] dealt with whether the Canadian Industrial Relations Board had jurisdiction over Consolidated Fastfrate, which was part of an interprovincial freight transportation company and, therefore, arguably a federal undertaking, or whether the provincial Labour Relations Board had jurisdiction. While the case is most interesting for its analysis of the division-of-powers issue, Justice Rothstein (speaking for the majority) observed as follows:

> 26 The parties agree that the applicable standard of review in cases of constitutional interpretation is correctness: see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17. However, as the respondent Teamsters also note, the ALRB's constitutional analysis rested on its factual findings. Where it is possible to treat the constitutional analysis separately from the factual findings that underlie it, curial deference is owed to the initial findings of fact: see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 19. In the present case, I agree with the majority of the Court of Appeal that the ALRB's factual findings regarding the operations and organizational structure of Fastfrate merit deference.
>
> [Emphasis added.]

C. Is the standards-of-review analysis applicable to questions of procedural fairness?

For some time, I have been raising the question about whether the standards-of-review analysis is required for allegations of breaches of procedural fairness. I think that the better view is that a standard-of-review analysis is not necessary where the issue is a breach of procedural fairness. The question in such a case is not whether the decision was "correct"

22. 2009 SCC 53.

or "reasonable", but rather whether the procedure used was *fair*. If it was not fair, the decision cannot stand.[23]

However, one can find a number of cases where the courts have said that "correctness" is the appropriate standard of review for procedural fairness questions. I think there are two explanations for this statement. The first explanation comes from an assumption that if deference is clearly not appropriate in determining whether there has been a breach of procedural fairness, correctness must be the applicable standard of review. The second explanation is that the essence of the correctness standard is that it is the court which makes the final determination about the issue in dispute, and because the court makes the final determination about whether the statutory delegate's procedure was fair, then what the court must be doing is applying the correctness standard. In my view, both explanations erroneously assume that standards-of-review analysis apply to procedural fairness questions.

This year, both the Ontario Court of Appeal and Nova Scotia Court of Appeal have directly considered this issue and concluded that a standards-of-review analysis is *not* required where the allegation is one of unfair procedure.

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23. It is clear that the courts will intervene to set aside an unfair process. It is not, however, clear why the courts have the authority to do this, particularly if there is a privative clause. The traditional view is that a breach of natural justice or procedural fairness causes the statutory delegate to go outside its jurisdiction, and even a privative clause cannot protect that. If, however, the courts do not characterize a breach of natural justice or procedural fairness as a jurisdictional matter, why can the courts intervene? What gives them that authority? And what gives them that authority in the face of a privative clause?

1. *Ontario (Commissioner, Provincial Police) v. MacDonald*

Ontario (Commissioner, Provincial Police) v. MacDonald[24] dealt with an application for judicial review on the grounds of bias.

In 2006, the Ontario Provincial Police Association took disciplinary action against two officers, MacDonald and Jevons, for failing to conduct a proper investigation into the alleged misconduct of a member.

During the disciplinary proceedings, issues arose concerning whether the adjudicator was biased and should recuse himself, whether the Commissioner had standing, and whether the correct parties had been named as respondents.[25] On the issue of bias, the Commissioner argued that the adjudicator had raised a reasonable apprehension of bias and made a motion for the adjudicator to recuse himself. The adjudicator refused and the Ontario Divisional Court upheld the adjudicator's decision.[26] The Commissioner appealed to the Ontario Court of Appeal.

At the Court of Appeal, the Commissioner argued that the adjudicator's decision not to recuse himself on the grounds of bias was reviewable on a standard of correctness. He argued that the Divisional Court—which had upheld the adjudicator's decision not to recuse himself—had erred by effectively applying a reasonableness standard by assessing the

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24. 2009 ONCA 805.

25. These aspects of the case will be discussed below.

26. [2009] O.J. No. 970. The Divisional Court was silent on what standard of review, if any, it applied in reviewing the adjudicator's decision.

conduct of the adjudicator from the perspective of an appellate court rather than that of a reasonable, informed and right-minded person.

The Ontario Court of Appeal rejected the Commissioner's argument and upheld the decision of the Divisional Court. The Court of Appeal stated very clearly that a standard-of-review analysis is not required for questions of procedural fairness:[27]

> 35 I agree that there is some jurisprudential support for the application of a correctness standard. I also note that the Divisional Court was silent on the issue of standard of review. However, my view is that the Divisional Court's approach in this case was correct.
>
> 36 The Divisional Court has consistently held that it is not necessary to consider standard of review when a decision is challenged on the basis of a denial of natural justice, as it is here: see *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges Act, Superintendent)* (2009), 251 O.A.C. 221 (Div. Ct.) at para. 11, citing *London (City) v. Ayerswood Development Corp.* (2002), 167 O.A.C. 120 (C.A.) at para. 10. Support for this approach is found in the comments of Arbour J. in *Moreau-Bérubé v. Nouveau-Brunswick*, [2002] 1 S.C.R. 249 at para. 74, where she says:
>
> > [Procedural fairness] requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.
>
> 37 In my view, it was unnecessary for the Divisional Court to even address the issue of standard of review because procedural fairness does not require an assessment of the appropriate standard of review. The proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met: *Forestall v. Toronto Services Board* (2007), 228 O.A.C. 202 (Div. Ct.) at para. 38. The Divisional Court followed this course and, in my view, it committed no error in doing so.
>
> 38 I pause to observe that the above cases arose from challenges to final decisions rather than interlocutory rulings like the one at issue. In my view, this is not a meaningful difference. If, as the recusal motion alleges, there exists a reasonable apprehension of bias that would taint the final decision, that same apprehension of bias taints the decision on the

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27. At paras. 35 to 38. See also *Khadr v. Canada (Prime Minister)*, 2010 FC 715, where the Federal Court allowed an application for judicial review on the grounds of procedural fairness without any discussion of standards of review, or of whether a standards-of-review analysis was required. This case, which is discussed at length below, could be further support for the statement that questions of procedural fairness do not require a standards-of-review analysis.

> recusal motion itself. Further, there is no reason why the Divisional Court should approach an interlocutory ruling on bias in a different manner than if the issue was raised after the completion of the proceedings.
>
> [Emphasis added.]

The Nova Scotia Court of Appeal had occasion to consider this issue in two recent cases.

2. *Bowater Mersey Paper*

In *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.*,[28] the Court had to consider whether an arbitrator had breached the rules of procedural fairness by basing his decision on a new submission made in rebuttal. The reviewing court had set aside the arbitrator's decision.

The Nova Scotia Court of Appeal allowed the Union's appeal. On the issue of standard of review of the arbitrator's decision, the Court stated that:[29]

> 30 The judge [para. 8] gave no deference to the arbitrator in the judge's assessment of procedural fairness. With that, I agree. I note parenthetically that deference is not withheld because of any standard of review analysis. The judge is not reviewing the tribunal's ultimate decision, to which a "standard of review" is accorded. Rather, the judge assesses the tribunal's process, a topic outside the typical standard of review analysis. In *Nova Scotia (Provincial Dental Board) v. Creager*, 2005 NSCA 9, this court said:
>
> > [24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the majority and at para. 5, per Bastarache, J. dissenting. As stated by Justice Binnie in *C.U.P.E*, at para. 102:

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28. 2010 NSCA 19.

29. At paras. 30 to 32.

> The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.

This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

> [25] Procedural fairness analysis may involve a review of the statutory intent and the tribunal's functions assigned by that statute: eg. *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 21-31; *Imperial Oil Ltd. v. Québec (Minister of the Environment)*, [2003] 2 S.C.R. 624 at paras. 31-32. But, once the court has determined that a requirement of procedural fairness applies, the court decides whether there was a violation without deference.

To the same effect: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74; *Nova Scotia v. N.N.M.*, para. 39; *Allstate Insurance Company v. Nova Scotia (Insurance Review Board)*, 2009 NSCA 75, para. 11.

31 From the same perspective, in *Kelly*, Justice Cromwell described the two step approach to procedural fairness analysis:

> [19] The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness – in other words, that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: *C.U.P.E.* at para. 102.
>
> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty.

32 Though the reviewing judge does not conduct "standard of review" analysis for procedural fairness, the judge must still determine the content of the duty of fairness. That

> duty does not just replicate the courtroom model. The duty's content is context specific and depends on various factors, including the tribunal's delegated room to manoeuvre that is contemplated by its governing statute, the nature of the tribunal's decision and the decision's importance to the parties: *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, at para. 21-31; *Imperial Oil Ltd. v. Québec (Minister of the Environment)*, [2003] 2 S.C.R. 624, at para. 31-32; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 79; *Moreau-Bérubé*, para. 74-75; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 21-28; *Kelly*, para. 21-33; *Creager*, para. 25, 100-107; *Nova Scotia v. N.N.M.*, para. 40-98 and authorities there cited.
>
> [Emphasis added.]

3. *Homburg*

In *Homburg Canada Inc. v. Nova Scotia (Utility and Review Board)*,[30] one of the issues was whether the Board had breached the rules of natural justice by proceeding with a decision on the merits thereby denying Homburg the opportunity to take advantage of a forthcoming policy revision.

The primary issue in the case involved an allegation of fettering of discretion and this will be discussed below. However, the case is worthy of note here because of the following comments by the Nova Scotia Court of Appeal:

> 66 With this issue, Homburg asserts that by deciding this matter on its merits, the Board denied Homburg natural justice. Because this type of issue involves procedural fairness, a standard of review analysis is not triggered, *per se*. Instead, after considering all the circumstances, it simply falls to us to decide if the process was fair to Homburg. For example, in *Creager v. Provincial Dental Board of Nova Scotia* (2005), 230 N.S.R. (2d) 48 (C.A.) (Q.L.), Fichaud, J.A. said this:
>
> > [24] Issues of procedural fairness do not involve any deferential standard of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at para. 74 per Arbour, J.; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paras. 100-103 per Binnie, J. for the

30. 2010 NSCA 24.

> majority and at para. 5 per Bastarache, J. dissenting. As stated by Justice Binnie in C.U.P.E, at para. 102:
>
> > The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>
> This point is also clear from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Justice L'Heureux-Dubé (paras. 55-62) considered "substantive" aspects of the tribunal's decision based on the standard of review determined from the functional and practical approach but (para. 43) considered procedural fairness without analyzing the standard of review.

See also *Rogier v. Halifax (Regional Municipality)* (2009), 273 N.S.R. (2d) 292 (S.C.) at para. 92-93.

[Emphasis added.]

4. Other decisions referring to "correctness"

However, there are still a number of decisions suggesting not only that the standard-of-review analysis is required where procedural fairness is at issue, but that the standard of review is correctness.

For example, the New Brunswick Court of Appeal recently implied that the standard of review was correctness for questions of procedural fairness,[31] as did the Québec Court of Appeal.[32] Likewise, three recent immigration decisions of the Federal Court all state in no uncertain terms that the standard of review on the questions of a breach of procedural

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31. *New Brunswick (Department of Social Development) v. New Brunswick Human Rights Commission*, 2010 NBCA 40 at para. 32.

32. *Syndicat des producteurs de bois de la Gaspésie v. Damabois, division Cap0-Chat inc.*, 2010 QCCA 1201.

fairness is correctness.[33] Indeed, the courts cite both *Dunsmuir* and *Khosa* as authority for this statement.

But why does the standard-of-review analysis (in the sense in which it is used in *Dunsmuir* and *Khosa*) apply at all to questions of natural justice and procedural fairness?

D. Standards of Review and Administrative Appellate Tribunals: *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*

Should an administrative appellate tribunal apply standards-of-review analysis when hearing appeals from lower decision-makers?

To some extent, this issue may be tied up inextricably with the exact nature and scope of the appeal granted by the legislation. Is the appeal a complete hearing *de novo*, in which case one would expect the appellate body to make its own decision on all aspects of the matter as though the original decision had never occurred? Is the appeal on the record below, with no new witnesses, in which case the appellate body might accept (defer?) to the findings of fact made by the original body which saw and heard the witnesses? Is there any justification for the appellate body to defer to the original decision on questions of law or on the actual determination of the merits of the appeal? Should the appellate body restrict its function to determining only whether the original decision was "reasonable"? Is deference appropriate where the appellate administrative body is every bit as expert as the original decision-maker?

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33. See *Herman v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 629 at para. 12; *Hillary v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 638 at para. 19; *Canada (Minister of Citizenship & Immigration) v. Panahi-Dargahloo*, 2010 FC 647 at para. 26.

The Nova Scotia Court of Appeal considered these issues in its recent decision in *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*.[34] In that case, the Church appealed a development officer's decision to refuse a development permit to the Utility and Review Board. The Board overturned the officer's decision and ordered issuance of a permit. On appeal to the Nova Scotia Court of Appeal, the Court considered whether the Board was required to undergo a standards of review analysis before it conducted the appeal. It concluded it did not. Instead, the Court held that the Board must look to what the statute tells it to do:[35]

> 23 This court applies correctness to the Board's selection of the Board's standard of review: *Archibald*, para. 19 and authorities there cited. The Board, itself an administrative tribunal under a statutory regime, does not immerse itself in *Dunsmuir*'s standard of review analysis that governs a court's judicial review. The Board should just do what the statute tells it to do.
>
> 24 Sections 265(2) and 267(2) of the *HRM Charter* allow the Board to overturn a development officer's refusal of a development permit only on the grounds that the development officer's decision "does not comply with the land-use by-law" [or with a development agreement or order – which are irrelevant here] or "conflicts with the provisions of the land-use by-law" [or with a subdivision by-law – irrelevant here]. The Board said (para. 62) that it "may only allow this appeal if it determines that the Development Officer's decision 'conflicts with' or 'does not comply' with the provisions of the Land-Use By-Law". After its analysis, the Board concluded (para. 109) that the development officer's "decision to refuse conflicts with, and does not comply with, the LUB", namely s. 67(1)(d) which permits an "other institution of a similar type" in the P Zone. The Board correctly identified its standard of review, *i.e.* that prescribed by the *HRM Charter*, to the decision of the development officer.
>
> [Emphasis added.]

34. 2010 NSCA 38. See also *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27.

35. At paras. 23 and 24.

The Québec Court of Appeal reached the same conclusion in *Montréal (Ville de) v. KPMG inc.*[36] which involved a decision of the Court of Québec sitting in appeal from a decision by the Québec Administrative Tribunal. Justice Duval Hesler held that the Court of Québec should not undertake the standards-of-review analysis, but simply address the merits of the Tribunal's decision; standards-of-review analysis was only applicable at the subsequent stage where the Superior Court was hearing a judicial review application against the Court of Quebec's decision.

Although the Court of Appeal of Alberta has previously held that administrative appellate bodies must apply standards-of-review analysis just like appellate courts do,[37] it has granted leave to have this point re-argued this Fall.

If administrative appellate bodies are not required to apply standards-of-review analysis when performing the appellate function which the legislature has assigned to them, might one speculate why the courts themselves should continue to show deference where the statutory appeal provision covers questions of law and makes no reference to deference? Do *Pezim* and *Southam* need to be re-visited (notwithstanding Justice Binnie's strong repudiation of this suggestion in *Khosa* by Justice Rothstein)?

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36. 2010 QCCA 68. The other judges concurred in the result, but did not express an opinion on this point, which they thought was not necessary to resolve the appeal. But see *Simard v. Richard*, 2010 QCSC 3986 and *Carbonneau v. Simard*, 2009 QCCA 1345 for contrary decisions.

    In *Vergers Leahy inc. v. Féderation de l'UPA de St-Jean-Valleyfield*, 2009 QCCA 2401, the Court of Appeal ruled that there was no statutory right to appeal interlocutory decisions of the Québec Administrative Tribunal, but judicial review could be available.

37. *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.

E. The Proper Application of the Reasonableness Standard: *Burke v. Newfoundland and Labrador Assn. of Public and Private Employees*

As noted last year, simply because a court identifies the appropriate standard of review does not mean it will properly apply that standard. For example, even though reasonableness is the applicable standard of review, the reviewing court may actually erroneously apply correctness in the guise of reasonableness.[38] Or a higher court may disagree about whether the original decision was—or was not—reasonable. Merely determining that reasonableness is the standard of review is not the end of the analysis.

In *Burke v. Newfoundland and Labrador Association of Public and Private Employees*,[39] the Labour Relations Board of Newfoundland and Labrador rejected Burke's claim that his Union had not properly represented him and had acted in an arbitrary or discriminatory manner or in bad faith. The chambers judge determined that the standard of review was reasonableness, and dismissed the application to quash the Board's decision. The Court of Appeal agreed that the standard of review was reasonableness, but found that the Board's decision did not respond to the essential arguments put forth by Burke and, therefore, could not meet the test of reasonableness:[40]

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38. See *United Nurses of Alberta, Local 301 v. Capital Health Authority (University of Alberta Hospital)*, 2009 ABCA 202; *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 QCCA 470.

39. 2010 NLCA 12.

40. See also *Newfoundland and Labrador Association of Public and Private Employees v. Newfoundland and Labrador Health Boards Assn.*, 2010 NLTD(G) 107.

> 66 The duty of any tribunal is to respond to, and decide on, the essential arguments presented to it. In *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, LeBel J. for the Court stated, in relation to whether a decision could be said to be reasonable within a *Dunsmuir* analysis:
>
> > [41] ... The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis ...
>
> 67 A decision that is unresponsive to the case presented cannot be said to meet the standard of "justification, transparency and intelligibility" within the *Dunsmuir* test of reasonableness. The essential submissions made should not be ignored. If they are regarded by the tribunal as frivolous or irrelevant to the issues in dispute, the tribunal should say so. If they are not, but rather, are simply unpersuasive, the tribunal should be expected to give at least a rational reason for why they are not persuasive. Such a requirement is inherent in the *Dunsmuir* focus on "the process of articulating reasons" to see if the result is supported by a chain of reasoning that is reasonable.
>
> [Emphasis added.]

The notion that a board must respond to the essential arguments presented to it in order for its decision to be reasonable is closely related to the requirement for adequacy of reasons. However, as noted in *Burke*, the two concepts are not necessarily the same:[41]

> 70 While it is not necessary to ground this judgment in an adequacy of reasons analysis, it can nevertheless be said that if reasons must *show* that the tribunal grappled with the substance of the matter, it must follow that, for the purpose of a *Dunsmuir* analysis, the tribunal's reasoning process must also *actually* grapple with the substance of the matter. Where it appears, from an analysis of the reasons given in the context of the record and submissions made, that it did not address the essential submissions, it cannot be said that the decision meets the *Dunsmuir* standard of "justification, transparency and intelligibility".

Adequacy of reasons is considered in the next part of this paper.

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41. At para. 70.

III. THE DUTY TO BE FAIR

A. The Duty of Fairness and the Executive: *Khadr v. Canada (Prime Minister)*

One very noteworthy—and newsworthy—2010 case discusses whether the executive branch of government must comply with the rules of procedural fairness.

In *Khadr v. Canada (Prime Minister)*,[42] the issue was whether the Executive owed Omar Khadr a duty of fairness in making its decision about how the federal government would respond to the Supreme Court of Canada's ruling that Mr. Khadr's section 7 *Charter* rights had been violated during his incarceration at Guantanamo Bay, Cuba.[43] The Supreme Court's ruling issued a declaration defining the *Charter* breach and ordering the Executive to craft an effective remedy to the breach.[44] The Court stated that:[45]

> The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it

42. 2010 FC 715.

43. 2010 SCC 3.

44. *Khadr II*, para. 47. While the Supreme Court of Canada agreed with the lower courts that section 7 of the *Charter* had been violated, it disagreed with the lower courts on the appropriate remedy. Both the Federal Court and Federal Court of Appeal had ordered the executive to request the return of Mr. Khadr to Canada. The Supreme Court of Canada held that an order of repatriation was not appropriate and just in the circumstances for three reasons: (1) the lower courts had given too little weight to the constitutional responsibility of the executive to make decisions on foreign affairs; (2) it was unclear whether the United States would agree to a request to return Mr. Khadr; and (3) the court did not have a complete record from which it could obtain a clear picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request to be returned to Canada.

45. 2010 SCC 3 at para. 47.

> which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.
>
> [Emphasis added.]

Following the Supreme Court's decision, the Associate Director of Communications for the Prime Minister of Canada and the Minister of Foreign Affairs issued press releases stating that they were reviewing the court's decision but that the government had not changed its previous position that it would not seek the repatriation of Mr. Khadr.

Shortly thereafter, the Government of Canada responded further by sending a diplomatic note to the United States requesting that it not use any of the information provided to it by Canada in its prosecution of Mr. Khadr. Canada took the position that the sending of this diplomatic note amounted to an appropriate and effective remedy of the *Charter* breach.

Mr. Khadr applied for judicial review of Canada's decision that the diplomatic note was an adequate remedy and the decision not to seek his repatriation.

The Federal Court allowed Mr. Khadr's application for judicial review. Justice Zinn declared that the Executive owed a duty of fairness to Mr. Khadr in crafting a remedy of the *Charter* breach and that the duty of fairness had been violated. He rejected Canada's argument that its decision should not be overturned because it was made in the exercise of the Royal Prerogative:[46]

> 54 The respondents submit that like a decision delegated by statute to the Governor in Council, a decision made pursuant to the royal prerogative must be treated with much

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46. At paras. 54 to 71. The court also rejected Canada's arguments that there was no decision to judicially review (merely statements made to the media) and that the issue concerning repatriation was *res judicata* (at paras. 35 to 53).

sensitivity, and that the Supreme Court recognized this sensitivity in *Khadr II* by leaving the final decision of how to proceed up to the government. They rely on the decision of the Supreme Court of Canada in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, and the statement at p. 757 therein that "... there is no need for the Governor in Council to give reasons for his decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition ..." from those affected.

55 I agree with the applicant that the facts before the court in *Inuit Tapirisat* differ significantly from those in this application. There, the decision of the executive was its denial of an appeal of a decision of the CRTC regarding telephone rates. It was a decision affecting many persons. The Supreme Court held that whether the rules of natural justice and procedural fairness applied was dependant upon a number of considerations including the subject matter of the decision at issue and the consequences to the person(s) affected. The Court held that no such duty was owed in that case, given these and other considerations. Importantly, it also made it clear that where the decision is an administrative one, rather than a legislative one, and where the *res* or subject matter is an individual concern or a right unique to the petitioner or appellant, rather than something affecting a broad group, different considerations arise.

56 Unlike *Inuit Tapirisat*, the present decisions under review directly impacted only one citizen, Omar Khadr.

57 The respondents submit that Canada's Response is not justiciable because it was a decision of the executive, on broad grounds of public and foreign policy, taken in the exercise of the royal prerogative in that it affected foreign relations.

58 The narrow issue to be determined is whether the duty to be fair applies to Canada's Response, which the applicant concedes involved the exercise of the royal prerogative.

59 The *Magna Carta* (1215), *The Bill of Rights* (1689), and the *Act of Settlement* (1701) were arguably the first steps taken to curtail the absolute powers of the Crown and establish the concept of parliamentary sovereignty. They began a process of restricting the prerogatives of the Crown that continues to the present day.

60 The applicant says that fairness applies because the decisions affect his individual rights. He cites and relies upon the following passage from David Phillip Jones & Anne D.S. De Villars, *Principles of Administrative* Law, 5th ed. (Toronto: Carswell, 2009) at p. 244:

> More recent decisions, however, seem to hold that, at least in principle, the duty to be fair does extend to the exercise of the prerogative powers. These cases suggest that the prevailing consideration in determining whether the duty of fairness extends to the exercise of the prerogative power is the subject matter involved, not the source of the power: that is, regardless of whether the decision stems from a prerogative power, does the decision affect the rights of an individual? If yes, the decision is subject to judicial review and the duty of fairness [citations omitted].

61 Although not cited by these authors, their conclusion is consistent with that reached by the Ontario Court of Appeal in *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.) ...

62 ... In this case, as has been discussed, the applicant submits that his rights are affected by the executive's exercise of the royal prerogative because his section 7 rights were engaged. Therefore, he says, Canada's Response is reviewable. I agree that his section 7 rights were engaged. Whether the remedy the executive chose cured the breach or not, its decision most certainly affects Mr. Khadr's *Charter* rights and therefore is justiciable.

63 Moreover, I am of the view that Mr. Khadr had a legitimate expectation that Canada would take action to cure the breach of his *Charter* rights in light of the declaration that Canada had breached his rights. As was observed by Chief Justice McLachlin, writing for the Court in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, at para. 20 "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach." As such, the decision taken affected his legitimate expectations and, following the finding in *Council of Civil Service Unions*, it is justiciable.

64 Madame Justice L'Heureux-Dubé at p. 839-840 of her reasons in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, described how a party's legitimate expectations may determine his entitlement to procedural fairness:

> ... [T]he legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights .... As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness .... Similarly, <u>if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded</u>.... Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.
>
> [Emphasis added and authorities omitted.]

65 In my view, Mr. Khadr had a legitimate expectation based on the declaration of the Supreme Court that Canada would effect a remedy that would cure the breach, and if no such curative remedy was available, then it would effect a remedy that would ameliorate the

> breach. This expectation is founded on section 24 of the *Charter* and the express words of the Supreme Court that its declaration provided "the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*."
>
> . . .
>
> 70 The Supreme Court found that a person whose rights under the *Charter* have been breached is entitled to an effective remedy from the breaching party - Canada in this case. Having found that Mr. Khadr's section 7 rights were breached and having issued a declaration to that effect, Mr. Khadr could legitimately expect that the Crown would remedy its breach. In my view, the option of doing nothing was not an option that was legally available to Canada, given the declaration of the Supreme Court - doing nothing would not be in conformity with the *Charter*. Such a response, or non-response, in my view, would only comply with Canada's *Charter* obligations if there was no action that could be taken to cure or ameliorate the breach. The paucity of remedy is not the case here as the Supreme Court held that requesting repatriation was potentially an effective remedy.
>
> 71 Mr. Khadr was entitled to receive procedural fairness and natural justice from the executive as it reached its decision as to the *Charter* remedy it would provide. Had the government done what Mr. Khadr sought, seeking his return to Canada, then it would not have been necessary for the executive to engage Mr. Khadr. His wishes were already stated and well-known. When Canada made the decision not to seek his repatriation but to fashion a different remedy, then Mr. Khadr was entitled to be afforded procedural fairness and natural justice.

The court went on to hold that Mr. Khadr had been denied procedural fairness because his counsel had not been given an opportunity to become involved in the process and to provide submissions. It made particular note of the fact that Mr. Khadr's individual rights, including his *Charter* rights, had been breached. It ordered that Mr. Khadr was entitled to know the alternative remedies that Canada was considering and to provide written submissions as to other potential remedies and as to whether, in his view, those remedies being considered by Canada were potential remedies that would cure or ameliorate the *Charter* breach. Justice Zinn also imposed strict time lines on Canada to craft an effective remedy.

The Prime Minister of Canada has appealed Justice Zinn's decision and, on 22 July 2010, the Federal Court of Appeal granted a stay of the decision pending conclusion of the appeal.[47] The Court held that the case raised many important issues, including the kind of review that was to be done by a Federal Court judge sitting on the judicial review of the Executive's discretionary response to declaratory relief granted under s. 24 of the *Charter*. The Court also held that the Executive might suffer irreparable harm due if it was ultimately found that the lower court had improperly interfered in the conduct of foreign relations, and that the balance of convenience favoured the Executive.

B. The Duty Of Fairness in the Investigative Stage

There is an evolving body of law about the extent to which the duty of fairness applies to investigative proceedings.

1. Compelling attendance at an interview: *Wise v. Law Society of Upper Canada*

Wise v. Law Society of Upper Canada[48] involves whether the investigative powers of a professional regulatory body includes the power to compel a person's attendance at an in-person interview. Wise was under investigation for professional misconduct. The Law Society investigator gave Wise a deadline by which to produce documents and attend an oral interview. Wise refused to attend the interview, arguing that the *Law Society Act (Ontario)* did not authorize the Law Society to require members suspected of professional misconduct to provide information through oral interviews. The Law Society Appeal Panel held him

47. 2010 FCA 199 (Chief Justice Blais).

48. 2010 ONSC 1937.

guilty of professional misconduct for failing to attend the interview. Wise appealed that decision to the Ontario Divisional Court.

The Divisional Court dismissed the appeal. The court cited the 2009 case of *Gore v. College of Physicians and Surgeons of Ontario*, as follows:[49]

> 16 The Court of Appeal has held, with respect to a professional self-regulating body, that "it would take clear words" from the legislature to deprive an investigator of the powers necessary to carry out an investigation:
>
> > [In *Pharmascience v. Binet* the Supreme Court] emphasized the onerous obligation placed on self-regulating bodies to protect the public. It follows that those given this obligation have the duty to inquire into the conduct of the members and "will have sufficiently effective means at their disposal to gather all information relevant to determining whether a complaint should be lodged:" at para. 37. In view of this principle, it would take clear words to deprive the investigator of powers necessary to carry out this important public interest.
>
> *Gore v. College of Physicians and Surgeons* (2009), 96 O.R. (3d) 241 (Ont. C.A.) at para. 17.
>
> 17 The Court of Appeal cautioned against interpreting narrowly the investigation powers of a professional self-regulating body, the effect of which may be to preclude it from employing the best means by which to "uncover the truth" and "protect the public".
>
> > I can see no principled basis for distorting the ordinary meaning of "inquire into and examine the practice" to exclude the means of investigation that in some circumstances are most likely to uncover the truth and therefore best protect the public.
>
> 18 The Court of Appeal also stated, in *obiter dicta*, that when a legislature imposes upon members of a self-regulating body a duty to cooperate with investigations, then the powers of investigation granted to the body should be interpreted broadly:
>
> > I note that the newly enacted subsection [s. 76(3.1) of the *Health Professions Procedural Code*], which requires the member to cooperate

49. At paras. 16 to 19.

> fully with an investigator, is an enforcement power that supports a broad interpretation of "inquire and examine".

Gore, *supra*, at para. 20.

The Divisional Court stated that it is well recognized that every professional has an obligation to co-operate with the body governing his or her profession and that self-regulating professions must have effective and flexible investigation powers to fulfil their obligations and discharge their public duty. To restrict the Law Society's power to investigate by written interrogatories would seriously impede the Society's ability to act in a timely, open and efficient manner in investigating complaints.

2. Judicial review of decision not to proceed with a complaint: *Mitten v. College of Alberta Psychologists*

The requirement of procedural fairness during the investigative stage was also briefly addressed in *Mitten v. College of Alberta Psychologists*.[50] In that case, both the Registrar of the College and the College's Discipline Committee decided not to pursue the appellant's complaint against a member. The applicable legislation provided no appeal from a decision not to pursue a complaint, so the complainant applied for judicial review. The College successfully applied to have the judicial review application struck out. The appellant appealed that decision.

The Court of Appeal of Alberta allowed the appeal in part. Because the complainant was entitled to appeal the decision by the Registrar not to proceed to a hearing, she had standing to apply for judicial review with respect to that appeal procedure. It considered the *obiter*

50. 2010 ABCA 159.

comments made in *Friends of the Old Man River Society*[51] that the appeal of a decision not to proceed to a hearing was just an extension of the investigative process. The Court in *Mitten* concluded that:[52]

> 17 While the role of the complainant in discipline proceedings at the investigative stage is limited, the statute does afford the complainant some rights. The College and the investigated psychologist may be the only full parties at that stage, but the claimant is clearly a participant in the appeal of the decision not to proceed to hearing. The *Act* specifically gives that right of appeal to the complainant. What the obiter comments in *Friends of the Old Man River* signify is that the complainant cannot turn the appeal of the decision not to proceed to a hearing into a surrogate hearing on the merits. *Friends of the Old Man River* should not be read as suggesting that a complainant who launches an appeal under the statute has no remedies if the appeal process is conducted in a fundamentally unfair manner.
>
> 18 In this case the appellant challenges, in part, the fairness of the appeal from the Registrar to the Discipline Committee. That issue is properly the subject of judicial review. Other parts of the Originating Notice reach beyond that legitimate subject, and were properly struck....

3. Privacy and investigations

In *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*,[53] the respondent was a physician who had been found guilty of violating a health centre's human rights policies and whose hospital privileges had been suspended. The suspension was ultimately overturned on judicial review. However, the health centre had retained an independent investigator to investigate the complaints in accordance with its human rights policy. In the course of her investigation, the investigator accumulated a

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51. 2001 ABCA 107.

52. At paras. 17 and 18.

53. 2010 BCSC 931.

substantial amount of documentary evidence including interview transcripts and submissions. She concluded that the respondent had violated the centre's human rights policies.

The respondent applied for judicial review of the investigator's findings. In the course of this application, the respondent sought access to the documentary evidence in the hands of the investigator. The Information and Privacy Commissioner ordered the disclosure of the documents on the grounds that the investigator was not acting in a quasi-judicial capacity, and, therefore, was not protected by the deliberative secrecy provisions of the *Freedom of Information and Privacy Act*. The applicant applied for judicial review of the Commissioner's decision.

The British Columbia Supreme Court allowed the application for judicial review. The Commissioner was incorrect in finding that the investigator was not acting in a quasi-judicial capacity. The investigator's role was more than merely accumulating evidence—she had to assess and weigh the evidence and formulate an opinion on whether the respondent had violated the human rights policies. Her decision had a direct impact on the respondent's rights and obligation. As such, she was performing a quasi-judicial function. The deliberative secrecy provisions of the Act applied since deliberation encompasses the gathering of information, its assessment, and the formulation of an opinion or conclusion in respect of it.[54]

C. The Duty to Give Reasons

Considerable attention is being paid by the courts to the adequacy—or inadequacy—of reasons given by statutory delegates for their decisions. To some extent, the inadequacy of

54. At para. 31.

reasons might make an impugned decision unreasonable, but as the Newfoundland Court of Appeal has noted, inadequacy of reasons and unreasonableness are distinct grounds for judicial review.

1. Inadequate reasons for credibility findings: *Law Society of Upper Canada v. Neinstein*

In *Law Society of Upper Canada v. Neinstein*,[55] a lawyer was disbarred for sexually harassing two women. He appealed to the Law Society's Appeal Panel, which allowed the appeal and ordered a new hearing. The Law Society appealed to the Ontario Divisional Court, which allowed the appeal, restored the original finding of professional misconduct, but reduced the penalty to a three month suspension.

Mr. Neinstein appealed the finding of professional misconduct to the Ontario Court of Appeal. The Law Society cross-appealed on the issue of penalty.

At the Court of Appeal, Mr. Neinstein's main argument was the inadequacy of reasons. He argued that the reasons given by the initial Hearing Panel were devoid of any meaningful explanations for the finding of misconduct, and effectively foreclosed a meaningful appellate review.

Speaking for the majority, Justice Doherty was sceptical that complaints about the adequacy of reasons are often cloaks for attacking the merits of a decision:[56]

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55. 2010 ONCA 193.

56. At para. 4.

> 4 I am dubious about the merits of arguments claiming that reasons for judgment are inadequate. Experience teaches that many of those arguments are, in reality, arguments about the merits of the fact finding made in those reasons. By framing the argument in terms of the adequacy of the reasons, rather than the correctness of the fact finding, an appellant presumably hopes to avoid the stringent standard of review applicable to findings of fact. Despite my scepticism about arguments that allege that reasons are inadequate, I am satisfied that the appellant has demonstrated that the reasons given by the Hearing Panel are so inadequate as to foreclose meaningful appellate review. The inadequacy of the reasons constitutes an error in law requiring an order directing a new hearing.
>
> [Emphasis added.]

Despite these doubts, Justice Doherty went on to conclude that the reasons given by the original Hearing Panel were indeed inadequate. While the reasons themselves were 39 pages long and thoroughly outlined the nature of the allegations, summarized the evidence and explained certain legal principles, they failed to adequately address why the evidence of the complainants was preferred over that of Mr. Neinstein. The case turned almost exclusively on the assessment of credibility yet the reasons provided little or no explanation for the assessments:[57]

> 63 The outcome of this proceeding turned almost exclusively on the Hearing Panel's assessment of the credibility of the appellant and the complainants. Where a decision depends on credibility assessments, an appellate court, in reviewing the sufficiency of the reasons, must be sensitive to both the advantage the tribunal has over the appellate court when it comes to assessing credibility and the difficulties inherent in articulating reasons for credibility findings: *R.E.M.*, at paras. 48-51; *R. v. Gagnon*, [2006] 1 S.C.R. 621, at paras. 20-21; *R. v. Wadforth* (2009), 247 C.C.C. (3d) 466 (Ont. C.A.), at paras. 66-68; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 46.
>
> 64 As the majority of the Divisional Court observed at para. 92, the Hearing Panel made clear findings of credibility - it believed C.T. and S.G. at least to the extent of preferring their evidence to the contradictory evidence give by Mr. Neinstein. The reasons of the Hearing Panel, however, offer little by way of explanation for those assessments....

57. At paras. 63 and 64.

The court went on to identify four possible reasons that the Hearing Panel preferred one of the complainant's evidence over Mr. Neinstein:[58]

1. She "gave her evidence in a forthright manner" (para. 91);

2. She "withstood cross-examination well" (para. 94);

3. There was "independent evidence, as noted, which corroborated her version of relevant events" (para. 94); and

4. Although there was contradictory evidence as to the layout of Mr. Neinstein's office and related matters, that evidence "was not material to a finding of whether sexual harassment took place" (para. 94).

The court than analysed each of these reasons, focussing particular attention on the meaning of corroborating evidence and the Panel's inconsistent application of the principles surrounding corroboration:[59]

> 66 The first two reasons speak to C.T.'s demeanour and may be considered together. Both addressed demeanour in a generic and conclusory manner. There is no insight provided as to why the Hearing Panel found C.T. to be "forthright" and no indication of why it

58. At para. 65. With respect to the second complainant, the court was unable to clearly identify possible reasons for preferring her evidence over that of Mr. Neinstein, and stated that the reasons came perilously close to constituting no reasons at all (at para. 84). The court criticized the Board for overlooking inconsistencies in the evidence of the second complainant on the grounds that the inconsistencies did not relate to the alleged incidents. The court stated that the Hearing Panel misdirected itself if it meant that because the contradictions in the evidence did not relate specifically to the alleged incident, they could not assist in assessing credibility (at paras. 86 to 88).

59. At paras. 66 to 76.

concluded she "withstood" cross-examination. Bald generalized assertions defy appellate review. Furthermore, while demeanour is a relevant factor in a credibility assessment, demeanour alone is a notoriously unreliable predictor of the accuracy of evidence given by a witness: see *R. v. G. (G.)* (1997), 115 C.C.C. (3d) 1 (Ont. C.A.), at pp. 6-8; *R. v. P-P. (S.H.)* (2003), 176 C.C.C. (3d) 281 (N.S.C.A.), at paras. 28-30.

67 The third reason articulated by the Hearing Panel for believing C.T. is, I think, the most significant. It is worth repeating: "There was also independent evidence, as noted, which corroborated her version of relevant events."

68 The first problem with this part of the reasons is the Hearing Panel's failure to specifically identify the evidence it is referring to in this passage. The majority of the Divisional Court (paras. 71-73) assumed that the reference to corroborative evidence was a reference to the Park Plaza bill, notes on Park Plaza stationery indicating calls to and from Mr. Neinstein's office, and the note to a Yorkville shop owner. The Divisional Court may be correct in its identification of the evidence that the Hearing Panel treated as corroborative. The point is, however, the Divisional Court is clearly making an assumption. There is nothing in the reasons of the Hearing Panel that expressly or by implication identifies the evidence that it was referring to as "independent evidence" in the passage quoted above.

69 Assuming the Hearing Panel was referring to the evidence identified by the Divisional Court, its finding that the evidence corroborated C.T.'s version of events is perplexing. Earlier, the Hearing Panel had accepted the definition of corroboration put forward by counsel for Mr. Neinstein (paras. 11-13). The Hearing Panel accepted that corroboration meant "evidence *which directly supports allegations of fact. ... Confirmation of neutral facts is neither useful nor corroborative*" (emphasis added).

70 The hotel bill, the notes on the hotel stationery and the note to the Yorkville shopkeeper could not possibly constitute corroboration of C.T.'s allegations of sexual misconduct using the definition specifically adopted by the Hearing Panel earlier in its reasons. That evidence does not directly support any of C.T.'s allegations. It is, at best, supportive of her version of events on peripheral matters and is arguably "confirmation of neutral facts", a category of evidence specifically excluded as potentially corroborative by the Hearing Panel in its definition of corroboration. If the Hearing Panel did indeed apply the definition of corroboration it had specifically adopted earlier in its reasons, it erred in law in finding that there was any evidence capable of corroborating C.T.'s version of the relevant events.

71 The majority of the Divisional Court recognized that the evidence of the hotel bill and the notes could not corroborate C.T.'s version of the alleged acts of sexual misconduct using the approach to corroboration articulated by the Hearing Panel. However, the Divisional Court went on to say at para. 73:

> However, it appears that the Hearing Panel is actually treating this evidence as confirmatory of C.T.'s evidence of the events of August 20, 1990. In order to be confirmatory, evidence must strengthen the trier of fact's belief that the witness is telling the truth [citation omitted]. In this case, this

> evidence, while not particularly strong, can be taken as supporting C.T.'s recollections of what occurred on the day in question.

72 The distinction drawn by the majority of the Divisional Court between strict notions of corroboration and the broader, more contemporary concept of confirmatory evidence is well established in the modern authorities. Evidence that strengthens the belief in the veracity of a witness can be confirmatory even though it may not provide direct support for the allegation of misconduct: *R. v. Khela*, [2009] 1 S.C.R. 104, at paras. 40-43, 52. There is, however, nothing to support the Divisional Court's assertion that the Hearing Panel was using the modern concept of confirmatory evidence in its reasons. Moreover, even on the modern approach, confirmatory evidence must be directed to an important aspect of the witnesses' testimony and not to a peripheral or minor component of that evidence. It is arguable that the hotel bill, stationery and note to the Yorkville store owner were not important aspects of C.T.'s evidence relating to the allegations of sexual harassment. There is nothing in the reasons to suggest that the Hearing Panel grappled with the potential significance of that evidence to C.T.'s allegations and came to the conclusion that the evidence was sufficiently important to be confirmatory of her evidence.

73 It is impossible to know from the Hearing Panel's reasons what it meant by "independent evidence" corroborating C.T.'s testimony. As set out above, it is possible that the Hearing Panel misapplied the definition of corroboration it had expressly adopted earlier in its reasons. It is also possible that the Hearing Panel used a different, unarticulated definition of corroboration in arriving at its conclusion that C.T.'s evidence was corroborated. It is even possible that the Hearing Panel used the concept of confirmatory evidence as described by the majority in the Divisional Court. With respect to the reasons of the majority in the Divisional Court, the uncertainty created by the Hearing Panel's reasons is not resolved by simply declaring that the Hearing Panel, in referring to corroboration, meant to use the modern concept of confirmatory evidence. That concept was never mentioned in the Hearing Panel's reasons and flies in the face of the much stricter notion of corroboration specifically adopted by the Hearing Panel in its reasons.

74 I have emphasized what I see as the problems associated with the Hearing Panel's reference to corroboration in its reasons because that passage strikes me as crucial to the Hearing Panel's decision with respect to C.T.'s allegations. The appellate court's ability to effectively understand and review that component of the decision is central, in my view, to the adequacy of the reasons as they relate to C.T.'s allegations. I repeat, either the Hearing Panel misapplied its own definition of corroboration, used some unarticulated broader concept of corroboration without identifying the evidence that fell within that concept, or used the modern concept of confirmatory evidence, again without identifying the relevant evidence or explaining why it was confirmatory of C.T.'s allegations.

75 The fourth reason given by the Hearing Panel for accepting C.T.'s evidence was its finding that none of the inconsistencies between her evidence and the evidence of other witnesses concerning the setup of Mr. Neinstein's office were "material" to the truth of the allegations of sexual harassment. I accept that the Hearing Panel, having set out much of the contradictory evidence, was not obliged to go through the various inconsistencies *seriatim* and explain why those inconsistencies were not material. For example, it was open

> to the Hearing Panel to decide that while the defence evidence contradicted C.T.'s evidence about the existence of a couch in Mr. Neinstein's office, that defence evidence also allowed for the possibility that chairs could be put together to form a couch like setup. On either the defence version or C.T.'s version of the office setup, the sexual contact described by C.T. could well have occurred. The substance of this inconsistency is immaterial to the ultimate question in issue. The Hearing Panel was not required to elaborate on it further.
>
> 76 The conclusory assertion that none of the inconsistencies were "material" does, however, make appellate review difficult. There was strongly conflicting evidence about the existence of pictures of Mr. Neinstein's wife in his office. C.T. denied that there were any pictures of Mr. Neinstein's wife in his office and testified that she did not know he was married. She presented herself as a person who had become ashamed and humiliated by the sexual relationship that had developed between her and Mr. Neinstein in part because she was unaware that he was married. If, in fact, pictures of Mr. Neinstein's wife were in his office as the witnesses testified, it would be difficult to believe that C.T., who was in that office on many occasions, did not see those pictures. If she was disbelieved on this point, that disbelief could well be material to her credibility on the sexual harassment allegations. Without any explanation of why the inconsistencies concerning the photographs were immaterial, it is difficult to know whether the Hearing Panel appreciated the potential significance of the conflicting evidence concerning the photographs and the potential importance to C.T.'s credibility should she be disbelieved on this point.

The court then considered the need to give reasons for rejecting the credibility of a witness:[60]

> 77 In respect of C.T.'s allegations, C.T. was not the only person whose credibility was in issue. The Hearing Panel also had to address the credibility of Mr. Neinstein and his witnesses. I agree with the majority of the Divisional Court (para. 92) that it is not necessarily reversible error to fail to give reasons for rejecting the credibility of a witness. Particularly, in light of *McDougall*, a finding that one party is credible may be conclusive where the other party's evidence is irreconcilable with the evidence of the party found to be credible: see *R. v. D.(J.J.R.)* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at paras. 34-39.
>
> 78 However, I do not accept that a review of the adequacy of the reasons should not include a consideration of how the Hearing Panel addressed Mr. Neinstein's evidence. The adequacy of the reasons can only be assessed by considering those reasons as a whole. In some cases, what might appear to be insufficient reasons for a favourable finding of credibility may be buttressed by additional reasons given for rejecting the evidence of a witness who gave contradictory evidence. Similarly, the absence of reasons addressing the credibility of one side of a "he said she said" case may impact on the adequacy of the reasons as a whole.

60. At paras. 77 to 81.

> 79 There is exactly one sentence about Mr. Neinstein's evidence in the part of the Hearing Panel's reasons where it purports to make and explain its credibility findings (at paras. 90-99). That sentence, at para. 92, reads as follows: "Without reservation the member denied all of the allegations of misconduct."
>
> 80 There is no analysis of his evidence or the evidence of his witnesses. There is nothing in the content of that evidence or the character of those witnesses that would make the evidence inherently unreliable and justify an outright, unexplained rejection of that evidence without any comment. It can be fairly said that Mr. Neinstein, on a reading of the Hearing Panel's reasons, would have absolutely no idea what, if anything, the Hearing Panel made of his evidence, and that of his supporting witnesses. Nor can a reviewing appellate court know what the Hearing Panel made of that evidence. Indeed, the reasons suggest that the Hearing Panel, having found C.T. credible, never engaged in any analysis of Mr. Neinstein's evidence. The Hearing Panel's silence in respect of the evidence led on behalf of Mr. Neinstein renders meaningful appellate review of the Panel's credibility assessments very difficult.
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> 81 The observations I have made in the preceding paragraph have equal application in a case where a Hearing Panel finds in favour of the lawyer. Surely, if this Hearing Panel had found that the allegations were not made out because it preferred Mr. Neinstein's evidence, there would have been an obligation to explain to the complainants why their evidence was not accepted. Indeed, the Hearing Panel did give specific and relatively detailed reasons for rejecting the evidence of L.D., the third complainant (paras. 203-211). Had the Hearing Panel afforded the same treatment to Mr. Neinstein and his witnesses, an appellate court would have been in a much better position to conduct a meaningful review of the Hearing Panel's decision.

2. *Guttman v. Law Society of Manitoba*

The Manitoba Court of Appeal also gave a lengthy analysis on the adequacy of reasons in *Guttman v. Law Society of Manitoba*.[61]

Mr. Guttman was a lawyer with a history of professional misconduct. In 2006, he plead guilty to a further charge of professional misconduct and was disbarred. At the time of the latest misconduct, the appellant's wife had been recently diagnosed with cancer, the appellant

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61. 2010 MBCA 66. See also *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158.

had to care for his two children, one of whom was autistic, and he was involved in a high profile murder trial. In 2008, his wife died.

Mr. Guttman appealed the disbarment on the grounds that the Discipline Committee had not given sufficient reasons for not taking into account his personal problems when assessing penalty.

The Manitoba Court of Appeal allowed the appeal and substituted a penalty of a one-year suspension. In assessing the adequacy of the Committee's reasons, the Court stressed the need for reasons to outline the rationale for rejecting evidence:[62]

> 54 In light of the submission and the evidence before the Committee, which, as noted, was uncontroverted (although its import was not accepted by the Society), it is difficult to understand the lack of reasons for the Committee's rejection of the significance of the stress caused by the appellant's personal circumstances. The Committee said that it was "not persuaded that a causal connection between the stresses in Mr. Guttman's life and his behaviour has been established." That conclusion must mean that the Committee rejected the evidence outlined above which clearly tends to establish such a connection. The Committee did not explain why it rejected the evidence, simply stating that it did "not accept that those stresses caused him to lie to E.I."
>
> 55 It was open to the Committee to accept or to reject the evidence proffered by the appellant. If the evidence was to be rejected, some rational basis for so doing must exist and to some extent must be articulated in the Committee's reasons. Otherwise, neither the appellant nor this court on appeal can understand why the evidence, which in this case was uncontroverted, was not accepted.
>
> 56 The importance of sufficiency of reasons of administrative tribunals was recently discussed by Goudge J.A. in *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R. (3d) 210 (at paras. 29-31):
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> > *R.E.M.* [2008 SCC 51, [2008] 3 S.C.R. 3] emphasizes that where reasons are legally required, their sufficiency must be assessed functionally. In the context of administrative law, reasons must be sufficient to fulfil the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to

62. At paras. 54 to 68.

> permit effective judicial review. As *R.E.M.* held, at para. 17, this is accomplished if the reasons, read in context, show why the tribunal decided as it did. The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. To paraphrase for the administrative law context what the court says in *R.E.M.*, at para. 24, the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.
>
> *R.E.M.* also emphasizes that the assessment of whether reasons are sufficient to meet the legal obligation must pay careful attention to the circumstances of the particular case. That is, read in the context of the record and the live issues in the proceeding, the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter: see *R.E.M.*, at para. 43.
>
> In addition, in my view, it is important to differentiate the task of assessing the adequacy of reasons given by an administrative tribunal from the task of assessing the substantive decision made. A challenge on judicial review to the sufficiency of reasons is a challenge to an aspect of the procedure used by the tribunal. The court must assess the reasons from a functional perspective to see if the basis for the decision is intelligible.
>
> [Emphasis added.]

After referring to *Neinstein*,[63] the Manitoba court continued:

> 58 It was incumbent for the Committee to explain why it did not accept the evidence that the obvious stresses suffered by the appellant caused or at the least significantly contributed to the going astray of his moral compass. If the absence of medical evidence was a factor, that should have been stated. The Committee said that it did not "necessarily agree that in every case medical evidence is needed," but I am left with the distinct impression that its absence may have been a factor for the Committee. In any case, any evidentiary gap that might have existed has now been filled in by the fresh evidence, admitted on appeal without objection by the Society.
>
> 59 The evidence of the psychiatrist provides confirmation of the evidence of the appellant and those who wrote to the Committee on his behalf, that, as the psychiatrist wrote, "[w]ithout question, these stressors have impacted on his better judgment and undoubtedly have contributed, very significantly, to his current difficulties with the Law Society."

63. Paragraphs 60-62.

60 If the Committee had a basis for concluding that there was no causal connection between the stressors and the misconduct, that basis is not apparent from the reasons.

61 Virtually the only comment the Committee made about the letters was that it said that it considered them (see para. 40 above), but wondered whether the authors and especially those who were lawyers knew of the appellant's discipline history. As is indicated above (at paras. 30, 31) on the face of the letters six lawyers (the five partners of his firm, and another lawyer) were aware that the appellant had a discipline history; the other letters were silent on that subject.

62 The complete absence of any rationale for the rejection of the evidence described above means, in my respectful view, that the reasons of the Committee fall short of the standards described above.

63 While the Committee is entitled to that degree of deference consistent with the standard of reasonableness, at the same time, its reasoning process must withstand the spotlight of scrutiny consistent with that standard.

64 There was no analysis by the Committee of the letters from a number of lawyers and others, which had been submitted by the appellant for the truth of the observations therein. There was nothing in the letters that would suggest they were unreliable. Yet the central purport of all this evidence was rejected, essentially without a rational reason. On this critical issue the Committee's reasons suffer from the same defect as those in *Neinstein*, about which Doherty J.A. said that the "reasons do not address the 'why' component required in reasons for judgment" (at para. 83).

65 I am, of course, mindful that we are to accord a considerable latitude to a body such as the Committee; as Iacobucci J. said in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 (at para. 56):

> .... 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.

66 This was not a minor or technical lapse. The failure to explain why the evidence which I have described in detail was rejected, or at the least why it was not persuasive, is a failure which goes to the heart of and affects the entire decision.

67 As has been made clear (see para. 49) the standard of reasonableness applies to both the outcome and the process under review. I have no hesitation in saying that, if the Committee had a rational basis for rejecting the evidence and had explained that, to some extent at least, and leaving aside the matter of the fresh evidence, the sanction of disbarment was certainly one of the acceptable and defensible outcomes, especially considering the appellant's discipline history. I do think, however, that even had there been such rationale and explanation, the fresh evidence might warrant this court remitting the matter back to the Committee for further consideration.

> 68 In light of the absence of any apparent rationale for the rejection, however, I am satisfied that the reasoning process followed by the Committee falls short of the required standard. Thus, deference is not owed to the decision and intervention is permissible.

3. *Walsh*

In *Walsh v. Council for Licensed Practical Nurses*,[64] a disciplinary committee found Walsh guilty of professional misconduct for failing to report an incident involving the care of a patient. In its reasons, the committee stated that Ms. Walsh had failed to abide by the Standards of Practice and Code of Ethics.

The Court of Appeal of Newfoundland and Labrador held that the reasons given by the committee were inadequate because they did not identify a relevant provision in either the Standards of Practice or the Code of Ethics that had been breached. Moreover, no actual written Standards of Practice or Code of Ethics were entered into evidence. It was not sufficient for the committee to merely state that the Standards or Code had been breached without giving reference to a specific provision which would guide members in deciding whether or not an incident needed to be reported.

The court also criticized the reasons as being a mere summary of the evidence that did not provide the parties with an adequate explanation to ascertain the basis of the decision.[65] The court also noted that where witnesses gave differing views on an issue, the reasons must give some explanation for accepting the views of one witness over another.[66]

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64. 2010 NLCA 11.

65. At para. 22.

66. At para. 22.

4. *Burke*

In *Burke v. Newfoundland and Labrador Assn. of Public and Private Employees*,[67] the Court of Appeal of Newfoundland and Labrador reiterated the importance that reasons must not merely state conclusions.

Mr. Burke, an employee of the Memorial University of Newfoundland, was terminated from his employment for excessive sick leave and poor job attendance. The Union grieved and two separate arbitrations were ultimately held for the purpose of negotiating a last chance agreement. Mr. Burke was not satisfied with the manner in which the Union handled the grievances. He complained to the Labour Relations Board that the Union had processed his grievances in a superficial or careless manner. The Labour Relations Board rejected Mr. Burke's complaint and he applied for judicial review of that decision. The chambers judge upheld the Board's decision; Mr. Burke appealed to the Court of Appeal.

The Court of Appeal allowed the appeal. The court first noted that the Board decision at issue related to the processing of the second arbitration. It was, therefore, limited to considering whether the Union had properly handled that arbitration, not the correctness of the first or second arbitration awards.

The court then held that the reasons given by the Board for dismissing Mr. Burke's complaint were inadequate. Mr. Burke had made specific allegations of arbitrary behaviour that

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67. 2010 NLCA 12. See also *Newfoundland and Labrador Association of Public and Private Employees v. Newfoundland and Labrador Health Boards Assn.*, 2010 NLTD(G) 107; *Dodd v. Alberta (Registrar of Motor Vehicle Services)*, 2010 ABQB 506. But see *Green v. Nova Scotia (Human Rights Commission)*, 2010 NSSC 242 in which the Nova Scotia Supreme Court held that a board's terse decision was not unfair where the applicant had been intimately involved in the development of the materials before the board.

supported a complaint that the Union had acted in a superficial or careless manner in the processing of the second arbitration. However, the Board's reasons did not address the specific allegations before it—they merely reviewed the history of the matter, including the procedural steps taken by the Union from the time of the initial grievance through to both arbitrations, and stated conclusions that the Union had demonstrated a caring attitude and had acted fairly and properly. The Board and the applications judge had failed to focus on the Union's actions within the time frame related to the specific allegations in questions and had completely failed to respond to the essential arguments that were before it. The Board's decision was unresponsive to the case before it, and was, therefore, unreasonable.

As noted earlier, the Court distinguished between the obligation to give meaningful reasons and unreasonableness as separate grounds for review. Even if the reasons are adequate (and therefore meet the first branch of the reasonableness standard set out in *Dunsmuir*), it is still necessary to determine whether the impugned decision is reasonable and supportable in light of the facts and the law.

5. *Sussman v. College of Alberta Psychologists*, 2010 ABCA 300

D. Delay by the Decision-maker: *Yadav*

In *Yadav v. Canada (Minister of Citizenship and Immigration)*,[68] the Federal Court held that a 10-month delay between the time of an interview with an immigration officer and a decision about whether Mr. Yadav's marriage was genuine was an unreasonable delay that breached the duty of fairness. The court accepted Mr. Yadav's argument that it was unfair for the immigration officer to render a decision based entirely on memory and handwritten

68. 2010 FC 140.

notes. The court also concluded that the immigration officer's decision focussed on the *bona fides* of the marriage at the time the marriage was entered into, as opposed to the genuineness of the marriage at the time of the interview. The court blamed the delay for this oversight.

E. Delay by the Applicant: *Maple Leaf Foods*

In *Maple Leaf Foods Inc. v. Consorzio Del Prosciutto Di Parma*,[69] Maple Leaf applied for judicial review of a public notice given by the Registrar of Trademarks. The application for judicial review was made 10 years after the public notice and 7 years after a decision of the Federal Court which had held that Maple Leaf did not have standing to appeal the notice.

The Federal Court held that the application for judicial review was barred because of the seven-year delay between the application and the decision, and that the application amounted to an abuse of process.

F. Evidentiary Issues

1. Rebuttal Evidence—*Bowater Mercy Paper Co. Ltd.*

In *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.*,[70] an arbitrator allowed a grievance after being persuaded by a new submission raised in the Union's rebuttal argument. The employer had not objected to the Union's rebuttal submissions nor asked to make a surrebuttal. The employer later applied

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69. 2009 FC 1035. See also *Deep v. Ontario*, 2010 ONSC 2102. But see *New Brunswick (Department of Social Development) v. New Brunswick Human Rights Commission*, 2010 NBCA 40 in which the Court held that a six year delay was not unusual in human rights complaints.

70. 2010 NSCA 19.

for judicial review of the arbitrator's decision on the grounds that the arbitrator had breached the rules of procedural fairness by depriving the employer of the opportunity to make a surrebuttal.

The reviewing judge allowed the application and set aside the arbitrator's decision.

The Nova Scotia Court of Appeal allowed the Union's appeal. It rejected the employer's argument that the arbitrator had a duty to notify it that the Union's rebuttal submission "had legs" and warranted a surrebuttal. The Court held that the arbitrator had no such duty:[71]

> 54 I disagree that either procedural fairness or s. 43(1)(a) of the *Trade Union Act* entitles a party to a progress report from an arbitrator on the interim cogency of the opponent's submission. The arbitrator may wait until all is done, then dissect the body of argument in the light of dawn. A quasi judicial tribunal is rightly wary of expressing a premature view, and no principle of procedural fairness requires it to do so.

The Court was satisfied that the submissions raised in the Union's rebuttal were part of the arbitration hearing where the employer had full opportunity to present evidence and could have either objected to the Union's new rebuttal submission or requested a surrebuttal.[72] The employer did neither and the rules of procedural fairness were not violated.

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71. At para. 54.

72. If the employer had requested a surrebuttal and the arbitrator had denied the request, then the rules of procedural fairness would have been violated (para. 52). But, in the case, the employer made no such request.

2. The power to exclude evidence—*Lavallee v. Alberta (Securities Commission)*

In *Lavallee v. Alberta (Securities Commission)*,[73] the appellants challenged sections 29(e) and (f) of the *Securities Act (Alberta)* which provide:

> 29. For the purpose of a hearing before the Commission or the Executive Director, as the case may be, the following applies:
>
> ...
>
> (e) the Commission or the Executive Director, as the case may be, shall receive that evidence that is relevant to the matter being heard;
>
> (f) the laws of evidence applicable to judicial proceedings do not apply.
>
> [Emphasis added.]

The appellants submitted that the combined effect of these provisions violated sections 7 and 11 of the *Charter* and section 1(a) of the *Alberta Bill of Rights*[74] by making it mandatory for the Commission to admit all relevant evidence regardless of its probative value, its prejudicial effect and its reliability.

Wittman A.C.J. rejected the *Charter* argument but agreed that the provisions may, in some instances, be inconsistent with section 1(a) of the *Alberta Bill of Rights* which recognizes a right to enjoyment of property and the "right not to be deprived thereof except by due process

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73. 2010 ABCA 48, leave to appeal to SCC refused without reasons on 15 July 2010.

74. Section 1(a) of the *Alberta Bill of Rights* recognizes the right to enjoyment of property and the "right not to be deprived thereof except by due process of law".

of law". He declared sections 29(e) and (f) to be inoperative, but only to the extent that the admission of relevant evidence would violate due process of law.[75]

The appellants appealed the chambers judge's conclusion on the *Charter* to the Court of Appeal.

The Court of Appeal dismissed the appeal. The Court concluded that a mandatory interpretation would render the provisions irrational or meaningless or could lead to absurd consequences. In particular, the Court noted that a mandatory interpretation could lead to the breach of solicitor and client privilege, one of the principles of fundamental justice. Instead, the Court emphasized the Commission's need for discretion in admitting evidence and governing its own procedure:

> 15 As was noted by the chambers judge, Commission panels have seemingly taken the position that they have a discretion as to what evidence they will admit in a hearing. In *Sentinel Financial Management Corp.*, 2008 ABASC 477, at para. 10, the panel made the following statements with respect to its understanding of ss. 29(e) and (f):
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> > Sections 29(e) and (f), respectively, of the Act provide that in a hearing the Commission "shall receive that evidence that is relevant to the matter being heard" and that "the laws of evidence applicable to judicial proceedings do not apply". This provision gives the Commission considerable latitude in determining what evidence to admit and, if admitted, the weight to assign to that evidence. As part of that assessment, we consider the policy and legal requirements of evidentiary rules.
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> 16 The discretion inherent in this approach to the provisions is, in my view, essential to the efficient and effective conduct of Commission hearings. Sub-section 29(f) says that the Commission is not bound by the rules of evidence; it does not say that it is obliged to ignore them entirely and I would not read s. 29(e) so as to compel that result.
>
> 17 It does not follow that Commission panels are required to hold a *voir dire* as a matter of course to determine the admissibility of evidence. That is not required by the legislation or by the principles of procedural fairness. As the chambers judge noted at para. 205 of his reasons, "in a regulatory context the admission of hearsay or compelled testimony or the

75. 2009 ABQB 17.

> lack of opportunity to cross-examine will not necessarily breach procedural fairness": see also *Alberta Securities Commission v. Brost,* 2008 ABCA 326, 2 Alta. L.R. (5th) 102 ("*Brost*"). It is clear from the *Securities Act* that panels are to employ less formal procedures than would be required in a court. It is therefore open to a panel to admit, for example, hearsay evidence without holding a *voir dire*. By the same token, a panel has the discretion to refuse evidence; for example, evidence that it considers to be inherently flawed. The provisions of the statute must be read so as to give effect to the legislative intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and giving the Commission control over its own process.
>
> 18 In my view, the Commission retains a discretion under s. 29(e) as to the relevant evidence it will admit in a hearing. On that basis, the appeal is dismissed.

The Court then went on to consider the *Charter* argument and concluded that sections 7 and 11 of the *Charter* were not engaged. With respect to the section 11 argument, the Court agreed with the chambers judge that the appellants were not facing any true penal consequences that would invoke section 11 of the *Charter*. Instead, the Court noted that the purpose of the relevant provisions of the *Securities Act* was to deter conduct and the "notion of general deterrence is neither punitive or remedial".[76]

The Court also rejected the section 7 argument on the grounds that section 7 does not protect purely economic rights.[77]

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76. At para. 25, citing *Cartaway Resources Corp*, 2004 SCC 26. See also *Thow v. British Columbia (Securities Commission)*, 2009 BCCA 46.

77. At para. 27.

G. The Rule Against Bias

1. The non-angelic nature of decision-makers: *Law Society of Upper Canada v. Neinstein*

The *Neinstein* case[78] was discussed at length above for its discussion on reasons. The case is also of note for its conclusions on an issue concerning bias.

Mr. Neinstein had been found guilty of professional misconduct for sexually harassing two women, one of whom was a client. Three and a half years after the Hearing Panel's decision finding Mr. Neinstein guilty, the chairman of the Panel was himself disciplined for having a sexual relationship with a client. The relationship between the Panel chairman and his client had in fact been going on at the time of Mr. Neinstein's hearing.

On appeal of his finding of guilt to the Ontario Court of Appeal, Mr. Neinstein argued that the fact that the chairman of the Panel was involved in a sexual relationship with a client gave rise to a reasonable apprehension of bias. He argued that "a reasonable person, informed of Mr. Hunter's misconduct, could conclude that Mr. Hunter could be disposed to deal harshly with Mr. Neinstein because he knew at the time he was presiding over Mr. Neinstein's hearing that his own sexual misconduct might come to light and become the subject matter of a professional discipline inquiry at some future point. In treating Mr. Neinstein harshly, Mr. Hunter would hope to create an image of himself at the Law Society as someone who would not tolerate sexual misconduct in a professional context."[79]

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78. 2010 ONCA 193.

79. At para. 15.

The Ontario Court of Appeal rejected this argument, noting that all decision-makers have private lives that may include improprieties:[80]

> 16 The scenario painted by Mr. Greenspan cannot be dismissed as an outright impossibility. It is, however, based on speculation that goes well beyond the kinds of reasonable inferences that can be made in assessing a reasonable apprehension of bias claim. Individuals who sit in courts or tribunals and are required to make independent and impartial decisions have private lives. Some may do things in those private lives that may be improper or illegal. Those misdeeds may subsequently come to light and become the subject matter of some form of inquiry. To suggest that decision-makers could reasonably be viewed as being influenced by considerations of what might best serve their interests at some unknown future date if some past impropriety should come to light and become the subject of some form of inquiry is farfetched, and stretches the concept of a reasonable apprehension of bias beyond all practical limits. In so holding, I do not exclude the possibility that in a given case there may be evidence that elevates the speculation underlying Mr. Greenspan's submissions to the level of legitimate inference. I do, however, reject the submission that the necessary link between Mr. Hunter's personal misconduct and the appearance of partiality can be made on the abstract level presented on this appeal.
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> 17 The proffered evidence is not capable of supporting a finding of a reasonable apprehension of bias as regards to Mr. Hunter. It is, therefore, irrelevant to these proceedings and should not be received on appeal.
>
> [Emphasis added.]

2. Referrals back to the original decision-maker

In *Elk Valley Coal Corp. v. United Mine Workers of America, Local 1656*,[81] the Court of Appeal of Alberta had to consider whether the economies of referring a matter back to the original arbitrator outweighed the risk of a reasonable apprehension of bias.

A chambers judge had found that an arbitrator had erred in law by assuming, without deciding, that the termination of an employee pursuant to an employer's drug and alcohol

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80. At para. 16.

81. 2009 ABCA 407.

policy was *prima facie* discriminatory. The issue was whether the matter should be remitted back to the original arbitrator to decide the issue of discrimination or whether a new arbitrator should be appointed. The chambers judge remitted the matter to a new arbitrator. While she recognized the economies of sending the matter back to the original arbitrator, the chambers judge concluded that the nature of the error warranted a new arbitrator, as she was concerned that the original arbitrator might be influenced by his previous decision.

The Court of Appeal of Alberta upheld the chambers judge's decision on the basis that it was reasonable. While the Court noted that there were advantages to sending the matter back to the original arbitrator—efficiency and timeliness—the appointment of a new arbitrator would ensure that justice would both be done and be seen to be done. The Court of Appeal identified the following factors in deciding whether to send a matter back to an original decision-maker:

- the issues engaged;
- the nature of the error made;
- the basis for the decision;
- the resolution of the case;
- the features of the hearing;
- the manner in which the decision was delivered; and
- the relevant actions of counsel.[82]

The Court concluded that the facts of the current case—particularly, the fact that the decision was founded on an assumption and not a finding of law—warranted the appointment of a new arbitrator.

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82. At paras. 15 to 19.

3. Prior rulings do not constitute bias

In *R. v. A.(J.L.M.)*,[83] the applicant sought to have four of the five members of a Court of Appeal Panel recuse themselves from the hearing of an appeal on the grounds of bias.[84]

The applicant asserted that the members of the Panel should be disqualified because they had "ruled contrary to the position of the [applicant], ... expressed an opinion of the effect of the Consolidated Practice Direction and the Notice to the Profession at issue in this appeal, ... have ruled on the legal correctness of the decisions, the subject of review...".

The main issue was, therefore, whether an appellate judge should be disqualified by bias from sitting on an appeal panel because he or she had previously expressed an opinion in an unrelated appeal (with different litigants) on a topic that would likely arise in the present appeal. The Court also asked whether it is relevant *how* he or she expressed that opinion.

All four judges who had been asked to recuse themselves gave separate judgments, but all concurred in the result: there is no reasonable apprehension of bias in such cases.

First, Justice Côté noted that case law overwhelmingly supports that a judge is not disqualified for bias because he or she has previously expressed opinions on a relevant question of law. Côté J.A. went even further and stated that "a judge is not disqualified even if he or she has expressed or reached previously, in the same case, an opinion on a topic which comes up again for decision again.... Similarly, it is not disqualifying bias for the

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83. 2009 ABCA 344. See also *Searles v. Alberta (Minister of Health & Wellness)*, 2010 ABQB 157.

84. The fifth member recused himself from the subject appeal because he was the author of the decisions under reconsideration.

same panel in the same appeal to suggest that the decision in question may be wrong..."[85]. Côté J.A. discussed the tests for disqualification on the basis of bias as follows:[86]

> 17 There is a strong presumption that judges will be true to their oaths, and will decide an upcoming case on its evidence, applying the law as best they can, without fear or favour. So it takes strong grounds to make out a reasonable apprehension of bias on grounds of prejudgment (as distinguished from financial or family interest). For concision, I merely cite these summaries: *Ellis-Don v. I.B.E.W.*, *supra*, and its unreported Supreme Court of Canada decision; cases cited in *Boardwalk Reit v. Edmonton (City) (#1)*, 2008 ABCA 176, 437 A.R. 199, para. 49; *R. v. Perciballi*, *supra* (paras. 17-18); *R. v. Bagot* [2000] 6 W.W.R. 214, 717 (Man. C.A.); *R. v. Trang*, 2002 ABQB 1130, 332 A.R. 1, 17 Alta. L.R. (4th) 358 (paras. 19-23), and cases there cited; Gorman (2009) 55 Crim. L.Q. 46, 48-49, 58, 59, 60, 61, 66, 92-93, and cases there cited.
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> 18 As many cases have said (including those just cited), the test is what a reasonable observer would think who is fully informed and has thought the matter through, not an observer with a suspicious mind or a mind too sensitive: *R. v. R.D.S.* [1997] 3 S.C.R. 484, 118 C.C.C. (3d) 353 (para. 111), 218 N.R. 1 (para. 110); *Cdn. Pac. v. Matsqui I.B.* [1995] 1 S.C.R. 3, 50, 177 N.R. 325 (para. 81); Gorman, *loc. cit. supra*, at 59. Counsel for the respondent accepts and uses that test.
>
> 19 Several times in oral argument, counsel for the respondent argued implications of bias from some simple brief act on a previous occasion, such as going into a legal topic not strictly necessary on the face of a judgment, or signing a Practice Direction. Each time that a judge suggested to that counsel that the Court's customary procedures and internal operating rules showed a very different actual act or motive, counsel answered that the reasonable observer would not know that, and so would draw the conclusion of bias.
>
> 20 For example, the impugned passage in *Blacklaws v. Morrow*, 2000 ABCA 175, 261 A.R. 28 (paras. 101-04) simply answers a passage at the end of the dissent. One cannot assume that the Court of Appeal majority signs its final reasons before the dissent is even drafted. Nor can one infer (as does the respondent) that Justices of Appeal are disqualified by previous published judgments but not by previous votes at Court meetings adopting public statements such as Practice Directions.
>
> 21 But that is not the law of bias. Facts matter, whether internal or published. The Supreme Court of Canada has more than once emphasized that the hypothetical reasonable observer in the test for bias must know all the facts and think the matter through. Those facts include internal court practices not observable by outsiders. See especially *Wewaykum I.B. v. R.*, 2003 SCC 45, [2003] 2 S.C.R. 259, 309 N.R. 201 (para. 92).

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85. At paras. 15 and 16.

86. At paras. 17 to 21.

Côté J.A. noted that the test for impartiality is similar for administrative tribunals and judges:[87]

> 23 Subject to the strong presumption of impartiality of judges described above, the test is similar for prejudgment by administrative tribunals and for judges. It is not whether the judge or tribunal member has opinions or has previously expressed them. It is whether his or her mind is closed, or strongly resistant to persuasion, and cannot be swayed by reasonable argument or evidence (as assessed by that reasonable observer). The law on that is summarized in *R. v. Trang*, *supra* (paras. 15, 16), and Gorman, *loc. cit. supra*, at 47, 56-57, 92. That is the very clear *ratio* of a strong case (about an alderman on a public zoning hearing), in *Save Richmond Farmland Socy. v. Richmond (Twp.)* [1990] 3 S.C.R. 1213, 116 N.R. 68. Counsel for the respondent here spoke of a past display of an "inclination". That is not enough.

Finally, Côté J.A. identified a variety of practical reasons for concluding that a judge is not disqualified for bias because he or she has previously expressed opinions on a relevant question of law:

- a finding of bias in such circumstances would result in judge shopping, or in only very new or inexperienced judges hearing motions;
- most decisions are reserved judgements which have been circulated to the entire court and on which many judges have expressed opinions;
- judges tend to have long careers and will pronounce on tens of thousands of questions of fact or law during that career;
- appellate judges are typically the most experienced trial judges;
- appeal courts have longstanding practices to allow for different viewpoints or attitudes among the judges;
- judges are usually selected randomly;

87. At para. 23.

- it would be impractical for an appeal court with more than five members to have all members sit on every appeal; and
- the concept of *stare decisis* has never been abolished—knowledge and understanding of precedent remains an important aspect of our legal system.

Similarly, Chief Justice Fraser declined to disqualify herself on the basis of bias. In addition to agreeing with the reasons given by Côté J.A., she rejected the applicant's argument that she was disqualified because she was the author of (or had signed) the Consolidated Practice Direction and Notice to the Profession in question.

Justices Watson and O'Brien gave similar reasons for refusing to recuse themselves.

4. Impatience does not constitute bias: *Ontario (Commissioner, Provincial Police) v. MacDonald*

In *Ontario (Commissioner, Provincial Police) v. MacDonald*,[88] the Ontario Court of Appeal upheld the Divisional Court's ruling that an adjudicator was not disqualified from hearing further proceedings in a disciplinary matter because he had remarked to the counsel for the prosecution that the investigation's approach had been unusual, unfortunate and a mystery, and that time had been wasted unnecessarily. Likewise, the fact that the adjudicator had questioned counsel's motive for bringing the recusal motion did not amount to a reasonable apprehension of bias. Viewed individually or cumulatively, the remarks did not demonstrate bias. The Court of Appeal agreed with the Divisional Court that the comments of the adjudicator were understandable given the difficulty, length and politically-charged nature

88. 2009 ONCA 805.

of the proceedings.[89] It held that the Divisional Court had properly applied the "reasonable person" test and its chain of reasoning was perfectly acceptable.[90]

H. The Duty to be Fair in the Employment Context

While the case of *Dunsmuir v. New Brunswick*[91] is most often cited for its analysis of standards of review—and the merging of the patently reasonableness and reasonableness *simpliciter* standards—a second aspect of *Dunsmuir* relates to the issue about whether the dismissal of public employees is governed by the principles of private law or pubic law. If the former, the private law of contract would govern; if the latter, the duty to be fair would apply.

The previous line of cases, which included *Ridge v. Baldwin*,[92] *Nicholson*[93] and *Knight*,[94] had developed the law to the point where the termination of any employment relationship that could be classified as a public office attracted the duty of fairness. If an employee holding a public office—whether at pleasure or pursuant to reasonable notice requirements—was dismissed in a manner that breached the duty of fairness, the dismissal was void. This was the outcome of the adjudicator's decision in *Dunsmuir*. The Supreme Court of Canada,

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89. The Court cited from *Kelly v. Palazzo* (2008), 89 O.R. (3d) 111 (C.A.) where the court stated that "[i]t takes much more than a demonstration of judicial impatience with counsel or even downright rudeness to dispel the strong presumption of impartiality" (at para. 58).

90. After concluding that a standards-of-review analysis was not required in allegations of a breach of procedural fairness.

91. 2008 SCC 9.

92. [1963] 2 All E.R. 66 (H.L.).

93. (1979), 88 D.L.R. (3d) 671 (S.C.C.).

94. [1990] 1 S.C.R. 653.

however, altered the law in a significant way—by holding that even where the employer is the government or public office, it is the employment contract which governs dismissal procedure and procedural fairness does not apply. Because unionized government employees usually have collective agreements which govern the procedure for terminations, *Dunsmuir* might not have much practical effect; but the substitution of contractual rights for administrative law protections might significantly and adversely affect non-unionized government employees or office-holders (including most managers) because they do not generally have contracts which regulate the process for terminating their employment relationship.

In 2010, this issue was considered in a decision of the Court of Appeal of Alberta. The case of *Alberta Union of Public Employees v. Alberta*,[95] at first glance, seems unremarkable. It deals with an application for judicial review of an Arbitration Board's decision dismissing a union's grievance. An employee was dismissed from the Alberta Public Service because of offensive remarks made on the internet about some co-workers. A disciplinary meeting was held without first giving notice to the employee that it was, in fact, a disciplinary meeting, and without giving the employee a chance to request union representation at the meeting. The employer's conduct violated the notice and fair procedure requirements set out in the collective agreement.

The Arbitration Board dismissed the union's grievance on the grounds that the defects in procedure did not amount to a substantial breach of the collective agreement and that the decision to dismiss the employee would have been the same even if the notice requirements had been met. The union applied for judicial review to the Alberta Court of Queen's Bench.

95. 2010 ABCA 216.

The reviewing judge, Justice Nielsen, allowed the application for judicial review on the grounds that the Board had misinterpreted the procedural requirements in the collective agreement. He held that the Board's interpretation of the collective agreement was not reasonable and remitted the matter back to the Board.

The Court of Appeal upheld Justice Nielsen's decision.[96] The Court focussed on the terms of the collective agreement and, more accurately, the interpretation of those terms. The Court concluded that the arbitrators' interpretation of the procedural provisions in the collective agreement was unreasonable. The majority decision did not even discuss the duty to be fair.

The interesting part of the case comes in Justice Slatter's separate reasons, which are stated to be "concurring in the result" but which appear to be more akin to a dissent.

While Justice Slatter began his reasons by stating that he agreed that the appeal should be dismissed and the matter remitted back to the Board, he later stated that he would allow the appeal and refer the matter back to the Board. Justice Slatter raised the second aspect of *Dunsmuir* that the duty of fairness was not engaged in the dismissal of public employees. He noted that the effect of *Dunsmuir* is that a breach of procedural provisions contained in an employment contract no longer renders the entire dismissal void. Instead, the employee will be entitled to ordinary contractual remedies, and it is up to the arbitrator to decide the appropriate remedy in the circumstances.

In determining the appropriate remedy, Justice Slatter suggested that the arbitrator will have to consider whether the employer's actions would have been any different if the procedural

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96. There were two sets of reasons, one of the majority (Rowbotham J.A. and Bielby J.A.) and one of Mr. Justice Slatter. The differing reasons will be discussed in turn.

provisions had been complied with—that is, would the employee still have been dismissed? In Justice Slatter's view, the arbitrator was not obliged to set aside the dismissal merely because proper procedures were not followed; Justice Slatter rejected the argument that this would amount to mere speculation on the part of the arbitrator:[97]

> . . . As just discussed, the Board was not obliged to set aside the dismissal just because there were procedural failures.
>
> 35 It was, however, argued that once the procedural breach was found, any attempt to determine whether the outcome of the disciplinary meeting would have been the same was merely "speculation". Essentially, it was argued that it was inappropriate for the Board to attempt to determine what would have happened if the grievor's rights to receive notice of the disciplinary meeting had been respected. The chambers judge accepted this argument:
>
> > 58 In my view, it is purely speculative for the Majority to conclude at page 57 that "[i]t is unclear to the Board that even if the July 17th interview had been conducted properly, the Grievor's responses would have been different." The Grievor was entitled to have the Meeting conducted in accordance with Clause 28.02 of the Collective Agreement and had the Meeting been so conducted, the Arbitration Board and this Court would not be faced with any need to speculate as to the Grievor's conduct.
>
> From one perspective this is merely another way of saying that all procedural breaches render the dismissal "void". Even if the resulting dismissal decision is not legally void, if the decision maker is precluded from deciding at a factual level "what would have happened", the consequences would be the same: the dismissal would have to be set aside.
>
> 36 It is no answer to point out that if proper notice had been given, the Board and the Court "would not be faced with the problem" of deciding "what would have happened". This is akin to giving a personal injury plaintiff everything that he asks for, because "if the defendant hadn't run him over, we wouldn't be faced with the need to calculate his damages".
>
> 37 There is a legal distinction between speculation and drawing inferences from the circumstantial and direct evidence on the record. The trier of fact is permitted to do the latter, but not the former. The standard of review for the drawing of inferences is deferential. Inferences drawn from the facts are reviewed for reasonableness, or palpable and overriding error. If the inference drawn is reasonable, a reviewing court should not intervene just because other inferences (even arguably better inferences) could also have been drawn: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 74.

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97. At paras. 34 to 39.

> 38 For these purposes, "speculation" can therefore be described as the drawing of an inference in the absence of any evidence to support that inference, or in situations where there is no "air of reality" to the inference: *R. v. Dubois*, [1980] 2 S.C.R. 21, adopting the dissenting reasons in (1979), 17 A.R. 541, 49 C.C.C. (2d) 501 at paras. 15-17 (C.A.); *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 (C.A.) at p. 530; *R. v. Martin*, 2010 NBCA 41 at paras. 34-6; *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152 at pp. 169-70; *Kerr v. Ayr Steam Shipping Co.*, [1915] A.C. 217 at pp. 233-4.
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> 39 There is no legal prohibition on drawing inferences with respect to hypothetical events. Triers of fact are frequently called on to decide "what would have happened if things had been different". On other occasions triers of fact are required to make findings with respect to future events, which must of necessity be hypothetical.

Slatter J.A. went on to state that once the conclusion was reached that the procedural provisions in the collective agreement had been breached, the onus was on the employer to persuade the Board that the outcome of the disciplinary meeting would have been the same, notwithstanding the breach.[98] If the Board concluded that the outcome would have been the same, a reviewing court should not intervene unless the Board's decision was unreasonable.[99]

Slatter J.A. concluded that while the reviewing judge was correct for remitting the matter back to the Board, he was of the opinion that the reason for remitting the matter back was for the Board to assess an appropriate remedy (not to re-decide the matter).

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98. At para. 43.

99. According to Slatter J.A., the inference drawn by the Board about "what would have happened" need only be one possible inference based on the evidence. It does not have to be the only possible inference or the inference preferred by the reviewing court (at para. 47).

IV. ADMINISTRATIVE LAW ASPECTS OF CONSTITUTIONAL ISSUES

A. Division of Powers

A determination about the division of powers necessarily determines whether it is the federal or provincial administrative régime which applies to the activity in question. Recent examples include:

- *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*[100] where the issue was whether provincial or federal labour law applied to a freight consolidator.

- *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)*[101] where the issue was whether garbage truck drivers fell within the provincial or federal employment standards régimes.

B. Interdelegation

From time to time, questions arise about the constitutional legality of one level of government delegating administrative authority to agencies of the other level.

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100. 2009 SCC 53.

101. 2010 BCCA 272.

In *Jackson v. Ontario (Minister of Natural Resources)*,[102] the Ontario Court of Appeal held that the federal government had properly delegated its authority to the provincial Minister of Natural Resources to attach quotas to commercial fishing licences. The Court reviewed the regulatory framework, including the *Constitution Act, 1867*, the federal *Ontario Fishery Regulations* and the provincial *Fish and Wildlife Conservation Act, 1997* and concluded:[103]

> 26 Under our constitutional system, Parliament cannot delegate its legislative powers to a provincial legislature. Parliament can, however, delegate its legislative powers to another body: see *R. v. Furtney*, [1991] 3 S.C.R. 89, at 104. Here, Parliament has not delegated its legislative power in relation to inland fisheries to the provincial legislature. Instead, it has delegated its legislative power over fisheries to another body, the Governor in Council, which, in turn, has sub-delegated this power to the Ontario Minister of Natural Resources. Thus, the delegation at issue here is not constitutionally impermissible. The narrow question raised by the appeal is whether the delegation is invalid because it was not carried out properly.

After holding that the delegation was constitutionally permissible, the Court considered whether the delegation was invalid because it was not carried out properly. The appellants argued that the delegation was invalid for three reasons: (1) that the federal *Fisheries Act* does not specifically authorize the Governor in Council to delegate powers—including the power to attach quotas to commercial fishing licenses—to the provincial Ministers; (2) that the regulations do not establish a comprehensive federally-enacted regulatory scheme under which the Ontario Minister can attach conditions to fishing licenses; and (3) what has been delegated is a legislative power, not an administrative power.

The Court of Appeal rejected all three arguments. With respect to the first argument, the Court held the absence of specific authority in the *Fisheries Act* was not fatal to the Governor in Council's delegation of authority to the provincial Minister. The issue was one of

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102. 2009 ONCA 846.

103. At para. 26.

Parliamentary intent, and the Court was satisfied that Parliament intended the Governor in Council to be authorized to delegate its powers and duties.[104]

With respect to the second argument, the Court concluded that the law is clear that, "in delegating authority, the delegating body—Parliament, or as in this case, the Governor in Council—need not establish a comprehensive regulatory regime or even fix standards or guidelines".[105] The Court was satisfied that the Governor in Council was authorized to make regulations on a variety of matters including regulations respecting the terms and conditions under which a license may be issued.[106]

Finally, with respect to the argument that legislative powers had been delegated, the Court held that:[107]

> 47 Respectfully, this contention is misconceived. For the purpose of determining whether a delegation is valid, the distinction between legislative and administrative power is irrelevant. The delegation of any kind of power, legislative or administrative, to Parliament or a provincial legislature, is not permitted. The delegation of any kind of power, even a legislative power, to an official or to a body other than Parliament or a legislature, is quite permissible: see e.g. *Chemicals Reference*; *R. v. Furtney* at para. 33; and Hogg, *Constitutional Law of Canada*, 5th ed. supplemented (Scarborough: Thomson Carswell, 2007) at 14-22.
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> 48 Admittedly, para. 63 of the judgment of this court in *Peralta* suggests that legislative power cannot be delegated. That suggestion is inconsistent with principles of delegation and

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104. See paras. 30 to 37.

105. At para. 39, citing *Reference Re: Regulations in Relation to Chemicals*, [1943] S.C.R. 1.

106. At para. 44. The Court rejected the argument that the case of *Brant Dairy Co. v. Ontario (Milk Commission)*, [1973] S.C.R. 131 applied so that a regulation purportedly made in the exercise of a delegated power was invalid. The Court distinguished *Brant Dairy* because, in *Brant Dairy*, the Milk Board had acted illegally because it improperly carried out the delegated power given to it, while in *Jackson*, the Minister acted legally because she properly carried out the power delegated to her (see paras. 38 to 45).

107. At paras. 47 and 48.

> with the Supreme Court of Canada's jurisprudence. Thus, it is unnecessary to characterize the delegation of the provincial Minister. However characterized, the Governor in Council's delegation of its powers to Ontario's Minister of Natural Resources is valid.

C. The jurisdiction of the Federal Courts

The issue in *Onuschak v. Canadian Society of Immigration Consultants*[108] was whether the Canadian Society of Immigration Consultants[109] is a federal board, commission or other tribunal within the meaning of the *Federal Courts Act*, and if so, whether the activities in question had a public aspect or connation to them or whether they were merely incidental to the Society's status as a corporation incorporated under the *Canada Corporations Act*. The purpose of the Society is to regulate immigration consultants in the public interest.

Ms. Onuschak was under investigation by the Society for possible breaches of its Code of Discipline. If found guilty, her membership could be rescinded. She applied to the Federal Court for various declarations pertaining to her eligibility to run for the position of director of the Society and to the validity of the Society's nomination and election procedures. Prior to the issues being heard, counsel for the parties made a preliminary application for a ruling on the Federal Court's jurisdiction to hear the matter.

Justice Harrington started his reasons by making the following observations:[110]

> 3 The Federal Court has been plagued with jurisdictional issues ever since it was established by Parliament. Indeed, these issues arise from the very fact that the Court was established by Parliament rather than by a provincial legislature. The establishment and

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108. 2009 FC 1135. See also *Dart Aerospace Ltd. v. Duval*, 2010 FC 755.

109. The Canadian Society of Immigration Consultants was incorporated in 2003 under the *Canada Corporations Act*.

110. At paras. 3 to 6.

organization of courts falls within provincial jurisdiction under section 92(14) of the *Constitution Act, 1867*. However, by way of exception, section 101 authorizes Parliament to establish a general court of appeal for Canada, which it has done by creating the Supreme Court of Canada in 1875, as well as additional courts for the better administration of the laws of Canada. The first such court was the Exchequer Court which was replaced by what are now the Federal Court and the Federal Court of Appeal. The Federal Court of Canada, Trial Division, and the Federal Court of Appeal, as they were then known, were established by Act of Parliament in 1970. There are two other section 101 courts, the Court Martial Appeal Court and the Tax Court of Canada.

4 It had been widely assumed that courts established for the better administration of the laws of Canada had jurisdiction if Parliament confided jurisdiction upon them in an area within federal legislative competence even if there was no operative, applicable federal law to administer.

5 However, following a series of Supreme Court decisions, including *Canadian Pacific Ltd. v. Québec North Shore Paper Co.*, [1977] 2 S.C.R. 1054, *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654 and *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, it is now clear that the Federal Court only has jurisdiction if:

1a. The dispute pertains to a federal legislative class of subject;

1b. There is actual operative applicable federal law, be it statute, regulation or common law, pertaining to the pith and substance of the litigation; and

1c. The administration of that federal law has been confided to it.

6 The situation was summarized by Chief Justice Jackett in *Associated Metals & Minerals Corp. v. The Evie W*, [1978] 2 F.C. 710 (F.C.A.), aff'd [1980] 2 S.C.R. 322. He said at paragraph 8:

> To illustrate what I mean, reference might be made to the 1976 and 1977 decisions, *viz*:
>
> > In the *Québec North Shore Paper* case, the claimant was invoking the general law of contract prima facie applicable to all persons ("provincial" law) in the Federal Court on the view that pro tanto such law could be "altered" by a federal law in relation to interprovincial or international transportation although there was no existing federal law on which it could found its claim; and
> >
> > In the *McNamara* case, Her Majesty in right of Canada was invoking the general law of contract prima facie applicable to all persons ("provincial" law) in the Federal Court on the view that "pro tanto" such law could be

> "altered" by a federal law in relation to federal government operations although there was no existing federal law on which She could found her claim.

In both cases,

> the claimant was basing its claim on the general law of property and civil rights prima facie applicable to all persons, which was "provincial" law that could not, as such, be altered by Parliament, and
>
> the claimant was unable to base its claim on any existing federal law although, at least arguably, Parliament could have enacted a special law in relation to a federal subject matter that would have prevailed over the provincial law and have made it, to that extent, inoperative....

The issue in *Onuschak* was whether the Society was properly within the jurisdiction of the Federal Court or whether it fell under provincial jurisdiction within the broad category of regulation of professions which is a matter of property and civil rights.

The Court concluded that it had jurisdiction as the Society is a federal board, commission or other tribunal. The federal government's power over naturalization and aliens under section 91(25) of the *Constitution Act, 1867* includes the power to establish tribunals, including the establishment of an arm's length organization incorporated under the *Canada Corporations Act* whose purpose was to regulate immigration consultants. While the Court noted that it is well established that non-government organizations can be federal boards or tribunals for some purposes but not for others,[111] the Court was satisfied that it had jurisdiction to hear not only judicial reviews of the Society's decisions on disciplinary matters, but also judicial reviews respecting the Society's elections and operating by-laws.

111. At para. 23.

D. Administrative ability to grant a remedy under s. 24(1) of the *Charter: Conway*

In *R. v. Conway*,[112] the Supreme Court of Canada considered whether the Ontario Review Board had jurisdiction to grant *Charter* remedies.

In 1984, Mr. Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon. He has been detained in mental health facilities ever since. In the course of his 2006 mandatory annual review before the Review Board, Mr. Conway argued that the mental health facility had breached his *Charter* rights[113] and sought an absolute discharge as a remedy under section 24(1) of the *Charter*. In the alternative, Mr. Conway sought an order directing the facility to provide him with a particular treatment and prohibiting the facility from housing him near a construction site.

The issue was whether the Ontario Review Board has jurisdiction to grant remedies under section 24(1) of the *Charter*. The Board concluded that it did not, refused to grant an absolute discharge, and refused to consider the *Charter* claims in their entirety. Mr. Conway appealed to the Ontario Court of Appeal.

The Ontario Court of Appeal allowed the appeal in part.[114] While it agreed with the Board that it was not a court of competent jurisdiction for the purpose of granting an absolute

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112. 2010 SCC 22. See also *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805 in which the BC Supreme Court allowed Bacon's application for judicial review regarding his treatment while being detained pending trial for murder. The court granted the prerogative remedies of *habeas corpus*, *mandamus* and *certiorari* and ordered the respondent to make changes in how it handled Bacon's mail, telephone access and visitation rights. The Court also declared that the respondent had breached Bacon's section 7 and 12 *Charter* rights.

113. In general, he alleged that the living conditions and arbitrary actions by staff violated his rights to liberty, safety, dignity and security of his person.

114. 2008 ONCA 326.

discharge,[115] it concluded that it was unreasonable for the Board to refuse to address the issues concerning Mr. Conway's treatment. It remitted that matter back to the Board.

The Supreme Court of Canada upheld the Court of Appeal's decision. The Court gave a thorough review of the evolution of the case law over the last 25 years which has shaped the relationship between the *Charter*, its remedial provisions and administrative tribunals.[116] The Court concluded that the Board had jurisdiction to grant *Charter* remedies, although Mr. Conway was not entitled to the particular *Charter* remedies he sought.[117]

Speaking for the Court, Abella J. stated:[118]

> 19 Section 24(1) states:
>
> > Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> 20 We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, *per* McLachlin J. (in dissent), at para. 70; *Dunedin*; *Douglas College*; *Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts *and* administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.
>
> 21 The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter*

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115. Because granting such a remedy would frustrate the intent of Parliament to protect the public (see para. 101).

116. At paras. 24 to 82.

117. At para. 18.

118. At paras. 19 to 23. See also paras. 78 to 82.

issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*.

22 All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

23 This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

[Emphasis added.]

The merger of the previous jurisdiction was summarized again at paragraphs 81 to 82:

81 Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter*—and *Charter* remedies—when resolving the matters properly before it.

82 Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent

> will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

The Court then considered the remedies sought by Mr. Conway. It concluded that an absolute discharge was not available because that would be contrary to Parliament's intent to protect the public from dangerous offenders. With respect to the other remedies sought by Mr. Conway, Abella J. concluded:

> 100 The same is true of Mr. Conway's request for a treatment order. Allowing the Board to prescribe or impose treatment is not only expressly prohibited by the *Criminal Code* (s. 672.55); it is also inconsistent with the constitutional division of powers (*Mazzei*). The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where an NCR patient is detained, pursuant to various provincial laws governing the provision of medical services. "It would be an inappropriate interference with provincial legislative authority (and with hospitals' treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused" (*Mazzei*, at para. 31).
>
> 101 A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.
>
> 102 Finally, Mr. Conway complains about where his room is located and seeks an order under s. 24(1) prohibiting CAMH from housing him near a construction site. Neither the validity of this complaint, nor, obviously, the propriety of any redress, has yet been determined by the Board.
>
> 103 Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 30). Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications *R.. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 2). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes (*Nasogaluak*; *Dagenais*; *Okwuobi*). In this case, it may well be that the substance of Mr. Conway's complaint about where his room is located can be fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If that is what the Board ultimately concludes

> to be the case, resort to s. 24(1) of the *Charter* may not add either to the Board's capacity to address the substance of the complaint or to provide appropriate redress.

Conway appears to have "completed the circle" and established that at least certain administrative agencies are competent to grant remedies under section 24(1) of the *Charter*. In practical terms, however, there are a number of limitations on what this might mean:

- First, the logic underlying the decision relates to administrative bodies which have been empowered to make determinations of law. Not all statutory delegates have this power, though many adjudicative bodies do.

- Secondly Justice Abella acknowledges that Parliament and provincial legislatures could make it clear that a particular statutory delegate does not have the power to consider a *Charter* (or other constitutional) issue, let alone grant a remedy under section 24(1) of the *Charter*. British Columbia and Alberta have already enacted such statutory provisions.[119]

- The administrative agency can only issue remedies contemplated by its constituent legislation.

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119. See British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c. 45, sections 44 and 45; and Alberta's *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, as am. S.A. 2005, c. 4, Part 2.

E. Damages as a remedy for breaches of the *Charter*

In *Vancouver (City) v. Ward*,[120] the Supreme Court of Canada ruled that damages are available "in appropriate and just circumstances" as a constitutional remedy for a breach of a person's *Charter* rights.

Coupled with the decision in *Conway* that many administrative bodies are courts of competent jurisdiction for the purpose of section 24(1) of the *Charter*, it may be that at least some administrative bodies may be able to grant "constitutional damages" as a remedy for breaches of the *Charter*.

V. A MISCELLANY OF OTHER DEVELOPMENTS

The following cases do not fit neatly into one of the above headings but are of interest for a variety of reasons.

A. *Rault v. Law Society of Saskatchewan*—joint submissions

The Saskatchewan Court of Appeal case of *Rault v. Law Society of Saskatchewan*[121] addressed the amount of deference disciplinary committees must give to joint submissions regarding penalties.

In 2008, Ms. Rault, a member of the Law Society of Saskatchewan, faced several disciplinary charges. Counsel for the Law Society and Ms. Rault negotiated a resolution in which

120. 2010 SCC 27.

121. 2009 SKCA 81.

Ms. Rault would resign from the Law Society rather than being disbarred. The parties made a joint submission to the Disciplinary Committee proposing the resolution. However, after hearing both counsel, the Disciplinary Committee disbarred Ms. Rault, making only brief reference to the joint submissions. Rault appealed her disbarment.

The Saskatchewan Court of Appeal allowed the appeal and substituted a penalty of resignation in the face of discipline, with no eligibility for reinstatement for three years. The Court held that the Committee was not entitled to ignore the joint sentencing submission. The Court noted that in Ontario, the Discipline Committee of the Law Society of Upper Canada has formally adopted a policy in which discipline committees are encouraged to accept joint submissions where the committee concludes that the joint submission is within the range of reasonable penalties in the circumstances. Alberta, Manitoba and British Columbia have similar views.[122]

B. *Neville v. Fitzgerald*—parliamentary privilege

In *Neville v. Fitzgerald*,[123] the Child and Youth Advocate for the Province of Newfoundland applied for a declaration that, in the event a resolution was introduced in the House of Assembly calling for her removal, she had a right to be heard on the grounds of procedural fairness and natural justice.

The Speaker of the House of Assembly argued that parliamentary privilege protected the conduct of the House proceedings from judicial scrutiny and that the Court had no jurisdiction to hear the application.

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122. At paras. 14 to 16.

123. 2009 NLTD 189.

The Newfoundland and Labrador Trial Division dismissed the Advocate's application. It held that the subject matter was outside the jurisdiction of the Court as it concerned the conduct of proceedings in the legislative chamber of the province. Parliamentary privilege protected the proceedings.

C. *Montréal (City) v. Montreal Port Authority*—review of discretion

The Supreme Court of Canada decision in *Montréal (City) v. Montreal Port Authority*[124] dealt with the scope of discretion given to two federal Crown corporations—the Montreal Port Authority and the CBC—regarding the calculation of payments in lieu of real property taxes.

The Supreme Court held that the federal *Payments in Lieu of Taxes Act* required that the tax rate be calculated as if the federal property was taxable property belonging to a private owner. The Montreal Port Authority and CBC had unreasonably exercised their discretion under the Act by refusing to take account of tax rate reforms and refusing to pay the amounts claimed by the City. In assessing the scope of discretion given to the Crown corporations, the Court stated that:[125]

> 33 However, in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework. Discretionary acts fall within a normative hierarchy. In the instant cases, an administrative authority applies regulations that have been made under an enabling statute. The statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.

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124. 2010 SCC 14. See also *Halifax (Regional Municipality) v. Canada (Public Works& Government Services)*, 2010 FCA 196.

125. At para. 33.

D. *Syndicat de la fonction publique du Québec v. Québec (Attorney General)*—proper forum

This case[126] dealt with the jurisdiction of an arbitrator to hear grievances filed by casual and probationary employees of the Québec government. The employer argued that the grievances fell within the jurisdiction of the Commission des relations du travail and that arbitrators could not hear the matters, while the union argued that the standard of public order provided for in section 124 of the *Act respecting labour standards* (the Act) was implicitly incorporated into every collective agreement so that the arbitrators had jurisdiction.

The Supreme Court of Canada held that the arbitrators did have jurisdiction. In a 5-4 decision,[127] the majority rejected the implicit incorporation argument because it was inconsistent with the drafting techniques and intent of the Québec Legislature. However, the majority held that an arbitrator considering a dismissal grievance must have jurisdiction for the purpose of determining whether the grievance and arbitration procedure set out in the collective agreement is equivalent to the recourse provided for in section 124 of the Act. That is, the arbitrator must determine, in light of the modifications to the collective agreement that flow from the public order status of the Act, whether he or she has the power under the collective agreement to grant the employee a remedial measure equivalent to the one available under section 124 of the Act. If no, the arbitrator lacks jurisdiction and must decline it in favour of the Commission des relations du travail.

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126. 2010 SCC 28. See also *Syndicat des professeurs du Cégep de Ste-Foy v. Québec (Attorney General*, 2010 SCC 29; *Syndicat des professeurs et des professeures de l'Université du Québec à Trois-Rivières v. Université du Québec à Trois-Rivières,* 2010 SCC 30.

127. The majority consisted of Lebel, Fish, Abella, Charron and Cromwell JJ. The dissent consisted of McLachlin C.J., Binnie, Deschamps and Rothstein JJ.

The dissenting judges concluded that the arbitrators had no jurisdiction. They were of the view that the Legislature clearly intended that the Commission have jurisdiction over casual and probationary employees and there was no justification for holding that every collective agreement had to provide for arbitration for every grievance.

Curiously, the Court did not address standard of review, but simply launched into statutory interpretation.

E. *Mining Watch Canada v. Canada (Fisheries and Oceans)*—declaration instead of quashing

In *Mining Watch Canada v. Canada (Fisheries and Oceans)*,[128] Mining Watch filed an application for judicial review of the federal Department of Fisheries and Ocean's decision that a comprehensive study was not required on the issue of whether dams could be constructed to create a tailings impoundment area. The project was allowed to proceed based on a screening report.

The Federal Court allowed the application for judicial review on the grounds that the Department had breached its duty by scoping the project in such a way that a comprehensive study was not required. The Court quashed the decision to issue permits and approvals and prohibited further action by the responsible authority until it had conducted a public consultation and a comprehensive study. The Federal Court of Appeal set aside that decision.

The Supreme Court of Canada allowed the appeal. The wording of the *Canadian Environmental Assessment Act* and the regulations meant that the responsible authority did

128. 2010 SCC 2.

not have the discretion to determine the assessment track of a project. The authority had erred by failing to conduct a comprehensive study and acted without statutory authority by proceeding by way of screening.

However, the Court disagreed with the Federal Court judge on remedy. While the Federal Court quashed the decision to issue permits and prohibited the authority from taking further action until public consultation and a comprehensive study were completed, the Supreme Court of Canada held the appropriate relief was merely a declaration that the responsible authority erred in failing to conduct a comprehensive study. The Court noted that this was a test case brought by Mining Watch and the fact that Mining Watch had no proprietary or pecuniary interest in the outcome of the proceedings. The Court also considered that there was no evidence of dissatisfaction with the provincial environmental assessments that had been completed or with the assessment process.

F. *Gratton-Masuy Environmental Technologies Inc. v. Ontario*—capacity to sue and be sued

In *Gratton-Masuy Environmental Technologies Inc. v. Ontario*,[129] the Ontario Court of Appeal considered the legal capacity of a non-corporate statutory entity to be sued for declaratory and injunctive relief as well as whether a reasonable cause of action was disclosed by allegations of bad faith, malice and bias against the same non-corporate statutory entity and certain of its members. The statutory entity in question was Ontario's Building Materials Evaluation Commission which was created under section 28 of the *Building Code Act, 1992*.

129. 2010 ONCA 501.

The Ontario Court of Appeal held that the Commission was not liable in a lawsuit for damages, nor was it capable of being sued for declaratory or injunctive relief.[130] The Court also upheld the Divisional Court's finding that the statement of claim disclosed no reasonable cause of action against the Commission or its members.

G. *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*—multiple forums

The Supreme Court of Canada has granted leave to appeal in a case considering whether the British Columbia Human Rights Tribunal has jurisdiction to hear a complaint alleging that the chronic pain policy of Workers' Compensation Board is discriminatory. In *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*,[131] the British Columbia Court of Appeal held that the Tribunal's decision on whether to proceed with a complaint was purely discretionary. The Court held that the *Human Rights Code* conferred jurisdiction on the Tribunal to adjudicate human rights complaints even though the same issue was being raised before or had been dealt with by another body.

This case will have important consequences on the issues of multiple forums and jurisdiction.

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130. The Court applied the test set out in *Westlake v. Ontario*, [1971] 3 O.R. 533 (H.C.J.), aff'd [1972] 2 O.R. 605 (C.A.), aff'd [1973] 33 D.L.R. (3d) 256 (S.C.C.) which examined the liability of suit of statutory entities.

131. 2010 BCCA 77, leave to appeal to SCC granted on 8 July 2010.

H. *Canadian Broadcasting Corp. v. Nova Scotia (Attorney General)*—proper respondent

In *Canadian Broadcasting Corp. v. Nova Scotia (Attorney General)*,[132] the CBC filed a notice of motion for judicial review concerning the failure of the Provincial Court to index its records of search warrants. The only named respondent was the Attorney General. Counsel for the Attorney General argued that the CBC's failure to name the Provincial Court as a separate respondent was a fundamental flaw which prevented the matter from proceeding. The Nova Scotia Supreme Court considered whether the Provincial Court had independent status in the proceeding; that is, whether it was a suable entity. The Court reviewed the evolution of institutional independence and concluded that the notice of motion was flawed by naming a member of the executive as the respondent instead of the court itself. However, the flaw was easily cured by adding the Provincial Court as a party. The Court ordered that either the Provincial Court or the Chief Judge, as a representative party, be joined as a party.

I. The "record"—extrinsic materials

Two recent decisions—one in British Columbia and one in Alberta—readdress the issue of whether extrinsic evidence is properly part of the record before a reviewing court.

1. *SELI*

In *C.S.W.U. Local 1611 v. SELI Canada Inc.*,[133] SELI applied for judicial review of a decision of the British Columbia Human Rights Tribunal. One of the grounds for judicial

132. 2010 NSSC 295.

133. 2010 BCSC 243.

review was that the Tribunal had breached the principles of natural justice and acted in a patently unreasonable manner by refusing to have a court reporter record the hearing.

As part of the material filed in support of its application, SELI included two affidavits sworn by a legal assistant employed by SELI's counsel. The affidavits included lengthy attachments of unofficial transcripts of the proceedings before the Tribunal which had been prepared by the legal assistant.

Both the respondent union and the Tribunal argued that the affidavits were not properly part of the official record and were, therefore, not admissible in the judicial review proceedings. They relied on two recent decisions of the British Columbia courts in which extrinsic material was excluded,[134] arguing that (1) extrinsic evidence can only be admitted as it relates to an alleged error in fact if the alleged error is jurisdictional in nature and if the extrinsic evidence is necessary to demonstrate the alleged error and (2) if the extrinsic evidence is necessary, it is limited to what is necessary to demonstrate the alleged error.

The reviewing judge rejected those arguments and held that the affidavits, including the unofficial transcripts, were admissible. Mr. Justice Goepel distinguished the *Kinexus* and *Ross* cases on the basis that both of those cases dealt with the admissibility of notes—or a transcription of notes—that had been taken during the proceedings. In this case, the privately produced transcripts were transposed from tape recordings which could be used to verify their accuracy and completeness.

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134. *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 and *Ross v. British Columbia (Human Rights Tribunal)* (1 May 2009), Vancouver L042211 (BCSC).

Goepel J. also rejected the argument that the transcripts should be excluded for policy reasons.[135] Finally, Goepel J. also concluded that neither the Tribunal's *Rules of Practice and Procedure*[136] or the *Human Rights Code*[137] prohibited the admission of the affidavits or the unofficial transcripts.

The Union sought leave to appeal Justice Goepel's decision to the British Columbia Court of Appeal. On 14 May 2010, Saunders J.A., in chambers, denied leave.[138] Saunders J.A concluded that, in the interests of orderly and efficient proceedings, a court should not grant leave to appeal of a procedural order made in the midst of a judicial review proceeding. In her view, the proposed appeal was similar to an appeal from an evidentiary ruling in trial as to the admissibility of evidence.

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135. Goepel J. preferred the reasoning in the Saskatchewan case of *Hartwig v. Saskatoon (City) Police Assn.*, 2007 SKCA 74 over the reasoning in *142445 Ontario Ltd. (c.o.b. Utilities Kingston) v. I.B.E.W., Local 636*, [2009] O.J. No. 2011 (Ont. S.C.J.) in finding that the policy reasons for admitting extrinsic evidence are more persuasive than those for excluding it. The court stated that "[a]ggrieved parties should not be discouraged or prevented from seeking meaningful judicial review" (at para. 67).

136. Rule 35(6) provides that recordings made pursuant to Rule 35(5) do not form part of the Tribunal's official record. Rule 35(5) provides that hearings are not recorded unless the Tribunal agrees to a request for recording (and to provide a court reporter) or a participant records the proceedings at his or her own expense after obtaining the consent of the Tribunal and the other participants.

137. Section 27.3 gives the Tribunal the power to make rules respecting practice and procedure to facilitate just and timely resolution of complaints. The Court stated that s. 27.3 does not give the Tribunal the power to determine its record for the purpose of judicial review (at para. 73). Nor do the Code or the Rules authorize the Tribunal to make rules that limit or prevent a party from pursuing all grounds of review or limit the material which the reviewing court can consider. To the extent that Rule 35(6) purports to do so, it is of no force and effect (at para. 75).

138. 2010 BCCA 276.

However, on 11 August 2010, the British Columbia Court of Appeal revisited the issue and granted the Union leave to appeal Justice Goepel's decision.[139] The Court concluded that Saunders J. was incorrect in likening the proposed appeal to an appeal from an evidentiary ruling in trial as to the admissibility of evidence.

2. *Westfair*

In *United Food and Commercial Works Union, Local 401 v. Westfair Foods Ltd.*,[140] the Court of Appeal of Alberta had to consider whether an affidavit sworn by a union official was admissible in front of the reviewing court. The affidavit contained information about what happened during extended hearings of the Alberta Labour Relations Board which had taken place over three years prior to the affidavit being sworn. During the course of examinations on the affidavit, it was learned that the union official had not been present at all of the hearings.

The Court of Appeal held that the affidavit was not admissible. The court agreed with the chambers judge that judicial review is a final proceeding (not an interlocutory one) and, therefore, affidavits must be "within the knowledge of the deponent".[141] It noted that there were no transcripts of the extended hearings, only skeletal summaries prepared by the Board. The union official was absent from some of the hearings and, when he was in attendance, he took no notes. While the official had reviewed the union's solicitor's notes, that was not an acceptable method to refresh his memory. The court held that the law does not allow a

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139. 2010 BCCA 371.

140. 2010 ABCA 120.

141. Rule 305(1), *Alberta Rules of Court*.

deponent to review someone else's records years later to refresh his or her own non-existent memory. To do so would diminish the boundary between personal knowledge and hearsay.[142]

The content of the record, and the admissibility of extrinsic materials, is obviously an issue that still requires some attention.

J. Time limit for applying for judicial review

In *Bellemare v. Lisic*,[143] the Québec Court of Appeal noted that there was a non-written rule[144] requiring applications for judicial review to be filed in the Superior Court within 30 days of the impugned decision, but held that the time limit could be extended in appropriate circumstances.

In *Batstone v. Newfoundland and Labrador (Workplace Health, Safety and Compensation Review Division)*,[145] the Newfoundland and Labrador Supreme Court concluded that the rule of court requiring applications for judicial review to be commenced within six months is *ultra vires* the rule-making authority of the Rules Committee. The court held that the common law right to seek judicial review by way of *certiorari* is a substantive right and that a rule of court that purports to limit such a right is not a matter of practice and procedure properly dealt with in a rule of court.

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142. At para. 7.

143. 2010 QCCA 810.

144. In many jurisdictions, there is a written time limit, often contained in the rules of court. In Alberta, the time limit is six months (unless a different, usually shorter, time limit is prescribed by statute), and cannot be extended by the court.

145. 2010 NLTD(G) 108 (Nfld. & Lab. S.C.T.D.).

K. Tribunal governance

Ontario and Alberta have passed legislation about tribunal governance:

- Ontario *Adjudicative Tribunals Accountability, Governance and Appointments Act*, S.O. 2009 c. 33, Sch. 5 Consolidated Statutes of Ontario and Ont. Reg. 126/10 (in force 7 April 2010);

- *Alberta Public Agencies Governance Act*, S.A. 2009, c. A-31.5 (not yet proclaimed).

VI. SOME UNRESOLVED ISSUES IN ADMINISTRATIVE LAW

Although the last couple of years have seen an enormous effort by the Supreme Court of Canada in *Dunsmuir* and *Khosa* to simplify the standards-of-review analysis part of administrative law, there are still a number of important unresolved issues—both in the standards-of-review area, and in other areas of administrative law.[146] Although some of these have been referred to above, it is convenient to make a list of them here.

A. The circumstances in which a court will defer to a statutory delegate's decision on a question of law

For some time, there has been a dispute about what is the appropriate standard of review for an error of law.

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146. There *are* other parts of Administrative Law beyond standards-of-review analysis!

In England, the courts will correct all errors of law on an application for judicial review—just like they will do in a normal civil appeal.[147]

However, in Canada, there has been considerable debate about the circumstances in which the court should defer to a statutory delegate's interpretation of the law.

- In *Pezim* and *Southam* (both of which involved a statutory appeal, not an application for judicial review), the Supreme Court of Canada did not apply the correctness standard but rather deferred to original decision-maker's legal analysis.

- In *Pushpanathan*, the Supreme Court noted that the absence of a privative clause did not necessarily mean that correctness would be the standard used to review an alleged error of law.

- In *Dunsmuir*, the majority held that correctness should only apply if the alleged error of law involved a general question which was important to the legal system as a whole—such as solicitor-client privilege. Justice Binnie would have applied the correctness standard to a somewhat larger category of errors of law than the majority.[148]

- In *Rebel Holdings Ltd. v. Division Scholaire Franco-Manitobaine*, 2008 MBCA 65, [2008] 9 W.W.R. 19, the Manitoba Court of Appeal applied the

147. *Shaw v. Northumberland Compensation Appeals Commission*, [1952] 1 All E.R. 122 (Eng. C.A.). The English courts will correct an error of law on the face of the record even if the error does not go to jurisdiction—which is the one recognized anomalous use of *certiorari*.

148. See paragraphs 24 and 28 in *Dunsmuir*.

correctness standard to a question of law which was of fundamental importance to the statutory régime for expropriation and would have precedent-setting value, although it was not of central importance to the legal system or outside the statutory delegate's specialized area of expertise.[149]

- Notwithstanding his view in *Dunsmuir* that correctness should be applied to a broader range of legal errors than contemplated by the majority, Justice Binnie subsequently in *Khosa* adopted the majority's narrower view. By contrast, Justice Rothstein's dissent in *Khosa* would have applied correctness to all errors of law not protected by privative clauses; and Justice Deschamps' dissent would have assimilated the practice in judicial review and civil appeals to make correctness applicable for all questions of law.

So the unresolved issue is under what circumstances will the court defer with respect to a question of law? *Always*, unless the question is "general, of central importance to the legal system as a whole, and outside the adjudicator's specialized area of expertise"? *Never*, unless the question involves provision of the home statute[150] and closely related statutes which require the expertise of the administrative decision-maker? *Never*, if there is a "full statutory right of appeal"?

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149. For another example, see *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236 at paragraphs 24 to 31.

150. Deference is not necessarily appropriate merely because a provision is included in the home statute: see *Canada (Attorney General) v. P.S.A.C.* (1991), 80 D.L.R. (4th) 520 (S.C.C.) ("*Econosult*").

B. The relationship between statutory standards of review and common law standards

The Supreme Court's decision in *Khosa*[151] considered whether section 18.1 of the *Federal Courts Act* contains statutory standards of review (as opposed to grounds of review), and if so what would be the relationship between such statutory standards of review and the standards-of-review analysis from *Dunsmuir*.

The issue is particularly important in British Columbia, where the *Administrative Tribunals Act* specifies the standards of review to be applied to many (but not all) types of questions.

The issue will be important whenever a legislature has specified a standard of review.[152] In particular, there are a number of statutes which specify that the court can only interfere with the decision of a statutory delegate if the latter's decision is patently unreasonable. What does the statutory reference to "patent unreasonableness" mean in light of the fact that *Dunsmuir* has amalgamated"patent unreasonableness" and "reasonableness *simpliciter*" into the new reasonableness standard?

On a more fundamental level, one author has argued that the decision in *Khosa* exposes a much larger question than the appropriate standards of review analysis—namely, whether the Federal Courts, as superior courts, have inherent jurisdiction (as opposed to general jurisdiction) to override privative clauses.[153] Nicolas Lambert argues that, traditionally, the

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151. 2009 SCC 12.

152. 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.

153. Nicolas Lambert, "The Nature of Federal Court Jurisdiction: Statutory or Inherent?" (2009), 23 Canadian Journal of Administrative Law & Practice 145.

power to set aside a private clause is seen as an expression of inherent judicial power, something that has long been denied to the Federal Courts.[154] If this argument is shared by others, *Khosa* may have much more far reaching implications than first thought.

C. Deciding that reasonableness is the standard of review isn't the end of the inquiry

There is a tendency to think that the judicial review process stops at the point where the court has determined the applicable standard of review—in particular, that nothing more needs to be done once the court has determined that deference is appropriate and reasonableness is the applicable standard of review.

This is not accurate. The court must then go on to determine whether the impugned decision was or was not reasonable—whether there was justification, transparency and intelligibility within the decision-making process; and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*).

One can find many examples of cases where the courts—even though being deferential—have nevertheless found that the impugned decision was unreasonable. An example is *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner)* where an expert decision-maker was found to be unreasonable.[155]

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154. At page 148.

155. (2008) 74 Admin. L.R. (4th) 269 (Q.B.).

One can also find examples of cases where the courts have inappropriately actually applied the correctness standard in the guise of reasonableness: *United Nurses of Alberta, Local 301 v. Capital Health Authority (University of Alberta Hospital)*.[156]

D. Should an administrative appellate body apply standards-of-review analysis?

Statutes frequently provide a right of appeal from an initial administrative decision-maker to an appellate administrative decision-maker. Does the appellate administrative decision-maker need to apply standards-of-review analysis in order to determine what it is supposed to be doing on the appeal?

In Alberta, the Court of Appeal has required an administrative appellate body to apply a standards-of-review analysis to determine the applicable standard of review to be used when hearing an appeal from the original administrative decision-maker.[157] However, the Court has granted leave in two cases for this point to be re-argued, and the cases are being heard in October.

At least some other jurisdictions have not required appellate administrative decision-makers to apply standards-of-review analysis, and what they are expected to do on the appeal is determined by whatever the statute says.[158]

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156. 2009 ABCA 202, 6 Alta. L.R. (5th) 1 at paragraphs 5-10.

157. *Plimmer v. Calgary (City) Police Service*, 2004 ABCA 175, 16 Admin. L.R. (4th) 137; *Nelson v. Alberta Assn. of Registered Nurses*, 2005 ABCA 229.

158. See, for example, *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at paragraphs 23-24; and *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27. See also the Québec cases referred to in footnote 36.

Of course, statutes are frequently unclear about precisely what function they expect appellate bodies to perform—whether administrative or judicial appellate bodies. Examples of this confusion include (a) what is meant by a *de novo* appeal? and (b) what is the appellate body to do where it is given broad powers to substitute its own decision for that of the body below?

E. What is meant by "expertise"?

Although *Dunsmuir* and *Khosa* refer to the statutory delegate's comparative "expertise" as a reason for deference, it is still not clear what is meant by "expertise". See pp. 550-1 of *Jones and de Villars* [159] for a catalogue of many different meanings of "expertise".

F. The Standards of Review for Questions of Procedural Fairness

There is still the question about whether a standards of review analysis is required when a decision is challenged on the basis of a breach of procedural fairness. Is a standard of review analysis required and if so, what is the applicable standard of review? Correctness? Fairness?

By "standard" we mean what is the point of reference, what is the question being asked? In the procedural fairness context, the question is: "Was the process *fair*?" The question is not "Was the process *correct*?"

159. Jones & de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009).

Accordingly, the better view is that *fairness* is the applicable standard for reviewing questions of natural justice or procedural fairness.[160]

G. Multiple forums: is judicial review a pre-condition for suing the federal Crown?

One of the vexing questions in administrative law is how to deal with multiple forums. If there is more than one forum available in which to air a particular issue, can proceedings be taken in all of them simultaneously, or is there a mechanism for requiring the person to use the most appropriate forum, or at least some mechanism for determining the order in which the forums should be accessed?

There is no satisfactory general answer to this question.

- In some cases, the jurisdiction of the court (or another administrative agency) is *ousted* because a statutory delegate has *exclusive* jurisdiction over the same subject matter: *Weber*[161] and *Morin*.[162]

160. "Correctness" only makes sense if one conceives that the essence of "correctness" is that the court can substitute its view or make the final determination about the appropriateness of the procedure which was used. "Deference" or "reasonableness" would never seem to be the standard of review applicable to questions of procedural fairness—but that does not mean that "correctness" would apply by default.

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

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

- In some cases, 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]

- In some cases, there may be a requirement to exhaust one's remedies in one particular forum before (or instead of) accessing another: *Harelkin v. University of Regina*[164] and *Canadian Pacific Ltd. v. Matsqui Indian Band*.[165]

- Sometimes 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*. However, 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.

- There is an emerging issue about 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*. Three

163. [2003] 2 S.C.R. 157. Note the opposite situation: in some cases 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 hearing certain constitutional questions.

164. [1979] 2 S.C.R. 561.

165. [1995] 1 S.C.R. 3, especially at paragraphs 32-38, 112, and 140-153.

Federal Court of Appeal decisions (*Tremblay*, *Genier* and *Manuge*)[166] held that the doctrine against collateral attacks prevents 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.[167]

On the other hand, a number of recent cases have declined to apply the *Grenier* line of reasoning.[168]

The Supreme Court of Canada heard a consolidated appeal of these cases in January 2010, but its decisions have not yet been released.[169]

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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. In effect, the Federal Court of Appeal converted the doctrine against collateral attacks from being a *discretionary* ground for refusing relief into a *jurisdictional limitation*.

168. *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 S.C.C.A. No. 469; 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, leave to appeal to the SCC was granted in three of these cases (not *G-Civil*): 2009 SCCA Nos. 77, 78 and 79; *Genge v. Canada (Attorney General)*, 2007 NLCA 60; *Re Fantasy Construction Ltd.*, 2007 ABCA 335.

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

H. Costs: the *Mowat* case

Leave has been granted to the Supreme Court of Canada in a case involving a claim for legal costs before an administrative tribunal. In *Canada (Attorney General) v. Mowat*,[170] the Federal Court of Appeal held that Parliament did not grant, and did not intend to grant, the Canadian Human Rights Tribunal the power to award costs and that such a power could not be implied in section 53(2) of the *Canadian Human Rights Act* which authorizes the Tribunal to compensate a complainant for any expenses incurred as a result of discriminatory practice.

The Supreme Court of Canada granted leave to appeal on 22 April 2010 and the matter has not yet been scheduled. This case will be of great interest to a large number of administrative tribunals.

I. The concept of "jurisdiction"

The concept of "jurisdiction" is troublesome in contemporary modern administrative law. Does it apply just to questions about the acquisition of jurisdiction (a "narrow view") or also to ways in which a statutory delegate may subsequently lose jurisdiction? The issue is important for several reasons. First, it may determine the standard of review—there would seem to be no case for a court to defer on a question of jurisdiction. Secondly, it explains why the court can intervene in the face of a privative clause—if the error in question does not result in a loss of jurisdiction, how can the court ignore the privative clause? It also explains why the court can intervene for a breach of natural justice. The concept of jurisdiction underlies the constitutional basis and justification for judicial review.

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170. 2009 FCA 309. On a similar issue, the Supreme Court of Canada heard argument in *Smith v. Alliance Pipeline Ltd.*, 2009 FCA 110 on 5 October 2010 but reserved judgment. One of the issues in the appeal was the standard of review applicable to an appeal about costs.

J. The distinction between appeals and judicial review

Why should there be distinctions between what the court does on appeals and applications for judicial review?

K. Standing

Will the courts continue to follow the narrow view from *Northwestern Utilities*?[171] Or will they follow *Children's Advocate*?[172] Under what circumstances (if any) will an administrative decision-maker have standing to bring an application for judicial review?[173]

L. Is there a common conceptual understanding of administrative law?

Reading the courts' decisions year in and year out, one must wonder whether there is a common conceptual understanding of administrative law.

The various judgments in *Dunsmuir* and *Khosa* are examples of very different conceptual understandings of the constitutional basis for the courts' entitlement to review decisions by statutory delegates, and in what circumstances. Is the "polar star" legislative intent? If so, how does one explain ignoring privative clauses? Why is the court entitled to intervene

171. [1979] 1 S.C.R. 684.

172. (2005) 253 D.L.R. (4th) 489 (Ont. C.A.). See also *Global Securities Corp. v. Executive Director of the British Columbia Securities Commission and TSX Venture Exchange Inc.*, 2006 BCCA 404.

173. *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 160; leave to appeal to SCC denied at [2008] S.C.C.A. No. 290 (2 Sept 2008). Compare *Commission des transports du Québec c. Villeneuve*, 2009 QCCA 1558, which held that the transport commission had standing to apply for judicial review of a decision by the Québec Administrative Tribunal on an appeal about a decision by the transport commission. See also *Hoechst Marion Roussel Canada v. Canada (Attorney General)*, (2001), 208 F.T.R. 223 (prothonotary).

where there has been an unfair procedure (particularly if there is a privative clause)? How is the discretion to refuse a prerogative remedy related to the standards-of-review analysis (if at all)? Why do the courts ever defer on questions of law? Who should have standing to challenge administrative decisions, when and why? Does the concept of "jurisdiction" have any relevance to contemporary Canadian administrative law; and, if so, what does it mean?

VII. CONCLUSION

There has been no slowing down in the number of administrative law decisions being challenged—and this state of affairs will likely continue—giving much food for thought to administrative lawyers.