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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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I. INTRODUCTION

It seems appropriate to begin this year's paper[1] with the following judicial observation:[2]

> The process for judicial review of the decisions of administrative tribunals is among the most difficult of common law creations to rationalize and apply. The criteria for judicial review are a fruitful source of angst and confusion for law students, lawyers and judges. We have created this mess in an attempt to limit the authority of quasi judicial bodies while upholding the legislative delineation of tribunal powers and giving context to the legislated protection of tribunal decisions.
>
> To fully appreciate just how uncertain and some might say silly the test for determining whether a judge should interfere with an administrative tribunal's decision has become, one need only know that every application for judicial review requires each of the litigants to provide the reviewing judge with an analysis of the law of pragmatism first promulgated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. That exercise alone, is responsible for the serious depletion of forests.

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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 also presented to the Continuing Legal Education Society of British Columbia in Vancouver on October 27, 2011.

2. Justice T.D. Clackson in *Allsopp v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2010 ABQB 472 at paragraphs 2 and 3.

Given the tremendous volume of administrative law cases, I am reluctant to make any promises about conserving our forests!

While the past year again has not seen any earth-shaking conceptual developments, there have been a number of interesting decisions about standards of review; the relationship between judicial review in the Federal Court and proceedings against the federal Crown in provincial superior courts; standing; and procedural fairness.

II. STANDARDS OF REVIEW

The Supreme Court of Canada's decision three years ago in *Dunsmuir*[3] merged the two deferential standards of review[4] into the one unified standard of reasonableness, and eliminated the need for any standards-of-review analysis where precedent has already determined that issue.[5] To a large extent, *Dunsmuir* has satisfactorily simplified this area of the law, but a number of key issues are still being worked out—such as when the courts should or should not defer to a statutory delegate's interpretation of its home statute; what types of errors of law are sufficiently important to attract the correctness standard of review; what constitutes a "true" jurisdictional issue; whether administrative appellate bodies must apply standards-of-review analysis to determine the ambit of their role; and what makes a decision "unreasonable".

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3. *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9.

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*?

A. Interpretation of the home statute: *Celgene* and *Smith v. Alliance Pipeline*

Two recent Supreme Court of Canada cases comment on the standard of review to be applied when a statutory delegate is interpreting its home statute. The principle is that deference is usually given to a delegate interpreting its home statute (making the reasonableness standard applicable), but this is not automatically the case.

1. *Celgene*

In *Celgene Corp v. Canada (Attorney General)*,[6] the court was dealing with a decision by the Patented Medicine Prices Review Board that it had the authority to request pricing information from an American company that exported a drug into Canada under the Special Access Programme. The issue involved an interpretation of the Board's mandate under the *Patent Act (Canada)*.[7]

The court concluded that the Board did have authority to request the pricing information. However, it noted that neither party presented any argument on the standard of review, both having assumed that the correct standard of review was correctness on the basis that the case involved a jurisdictional question.

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6. 2011 SCC 1.

7. R.S.C. 1985, c. P-4.

Justice Abella, speaking for the court, reiterated that deference will usually be given when a specialized tribunal is interpreting its enabling legislation, although she implied that will not always be the case:[8]

> 34 And like Evans J.A., I also question whether correctness is in fact the operative standard. This specialized tribunal is interpreting its enabling legislation. Deference will usually be accorded in these circumstances: see *Dunsmuir*, at paras. 54 and 59; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 44; and *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678. Only if the Board's decision is unreasonable will it be set aside. And to be unreasonable, as this Court said in *Dunsmuir*, the decision must be said to fall outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (para. 47). Far from falling outside this range, I see the Board's decision as unassailable under either standard of review.

The court in *Celgene* also held that parties should not be able, by agreement, to *contract out* of the appropriate standard of review.[9]

The question that arises from *Celgene* is: How does one determine when something is or is not "jurisdictional"? The court does not give any guidance about this. Just because the issue involves an interpretation of the statutory delegate's enabling legislation surely cannot mean that the delegate always has authority to give it a reasonable (as opposed to the correct) interpretation. But how does one determine whether something in a statute was intended to

8. At para. 34.

9. At para. 33.

be a "jurisdictional given" or something within the delegate's ability to reasonably interpret?[10]

2. *Smith v. Alliance Pipeline*

In *Smith v. Alliance Pipeline Ltd.*,[11] the issue was about the interpretation of the "costs" which could be awarded to an expropriated land owner under the *National Energy Board Act*.

The company built a pipeline across Smith's farmland but failed to complete the agreed-upon reclamation work. Alliance later refused to reimburse Smith for the costs he incurred in reclaiming the land. The matter went to arbitration.[12] In the meantime, Alliance required access to Smith's land to perform maintenance work. When Smith denied access, Alliance filed a court application. Although Alliance eventually discontinued its action, Smith incurred legal fees defending it. Smith was ultimately successful in the arbitration. The arbitration committee awarded Smith a portion of his costs from the arbitration proceedings as well as his solicitor-client costs from the court application which Alliance had started but discontinued.

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10. See also *Mitzel v. Alberta (Law Enforcement Review Board)*, 2010 ABCA 336 where the court held that the issue of whether a disciplinary charge should be laid against a police officer was not a matter of "true jurisdiction" under the *Dunsmuir* analysis because there was a complaint filed against the officer. The standard of review was, therefore, reasonableness.

11. 2011 SCC 7. See also *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 where the court agreed deference should be given to the delegate interpreting the statute but stated that the delegate cannot adopt interpretations of the statute that it cannot reasonably bear. The interpretation must be "harmonious with the context and the overall scheme of the statute" (at para. 39); *Hopewell Development (Leduc) Inc. v. Alberta (Municipal Government Board)*, 2011 ABCA 68.

12. Because one of the members of the first arbitration committee was appointed to the bench before issuing a decision, a second arbitration had to be appointed.

Alliance appealed the costs ruling to the Federal Court but the appeal was dismissed. Alliance then appealed that decision to the Federal Court of Appeal and was successful. The Supreme Court of Canada allowed Smith's appeal and restored the arbitration committee's costs award.

On the issue of standards of review, the Court accepted that the governing standard of review is usually reasonableness when a tribunal is interpreting its home statute. In this case, the committee was interpreting section 99(1) of the *National Energy Board Act*,[13] a provision of its home statute regarding awards for costs. The issue was whether "costs" as set out in section 99 refers only to expenses incurred by the landowner in the proceedings before the particular committee, or whether it should be interpreted more broadly to include other proceedings in the same matter which were held before a different committee or court. The Court unanimously held that the arbitration committee's costs award was reasonable.

The case is more remarkable for the differing analyses by Justice Fish (speaking for the majority) and Justice Deschamps (writing a separate decision, but concurring in the result).

Justice Fish took the position that *Dunsmuir* created an analytical framework by which to determine standards of review by way of categorizing the issue in dispute:[14]

> 26 Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v.*

13. R.S.C. 1985, c. N-7.

14. At para. 26.

> *C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

Because the committee was interpreting its home statute, Justice Fish was satisfied the reasonableness standard applied.[15] Conversely, Justice Fish noted that this case did not fall within any of the categories which, under *Dunsmuir*, attract a correctness standard. That is, the question raised was not constitutional, was not one of general law that is of central importance to the legal system, did not draw jurisdictional lines between two or more tribunals and was not a true question of jurisdiction. Justice Fish went on to say that even if this categorical framework approach did not make reasonableness the definitive standard, other considerations also supported a standard of reasonableness, such as the fact costs awards are generally fact-sensitive and discretionary and the fact that the wording of the statute itself gave the committee sole responsibility over costs awards.

While concurring in the result, Justice Deschamps did not agree with Justice Fish's categorical approach to determining the applicable standard of review. She stated:[16]

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15. Although Fish J. did state that interpreting a home statute will "usually" attract a reasonableness standard, thus leaving the door open for arguing that the correctness standard is sometimes applicable (at para. 28).

16. At para. 80.

> 80 Respectfully, I do not accept the proposition advanced by Fish J. under the auspices of applying para. 54 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, namely that an administrative decision-maker's interpretation of its home statute, absent indicia of its particular familiarity with the statute, attracts deference unless the question raised is constitutional, of central importance to the legal system or concerned with demarcating one tribunal's authority from another. On the contrary, principles of administrative law expressed in jurisprudence and commentary support the position that according deference to an administrative decision-maker's interpretation of its home statute is anchored in the need to respect legislative intent to leave these interpretative issues to certain decision-makers when there is good reason to do so. Most of the time, the reason is that the decision-maker possesses expertise or experience that puts it in a better position to interpret its home statute relative to a court. There is no presumption of expertise or experience flowing from the mere fact that an administrative decision-maker is interpreting its enabling statute. It follows that when a decision-maker does not have particular familiarity with its home statute, and no other precedent-based category of question attracting a standard of reasonableness applies, then a standard of review analysis should be undertaken in order to make a contextually sensitive decision on the proper standard (*Dunsmuir*, at paras. 62-64).

Justice Deschamps cautioned against turning the Court's elaboration of categories in *Dunsmuir* into a "blind and formalistic application of words rather than principles".[17] She observed that reasonableness may usually be the appropriate standard of review when a tribunal is interpreting its home statute because the tribunal generally has a greater expertise about the matter being interpreted than the court. Thus, Justice Deschamps re-asserted comparative expertise as the critical factor, not the category of question:[18]

> 99 *Dunsmuir* retained the multi-pronged standard of review analysis, but it also attempted to simplify the analysis by articulating "categories of question"

17. At para. 83.

18. At paras. 99 and 100.

to resolve the standard of review on the basis of precedent. In my view, the jurisprudence makes clear that with respect to an administrative decision-maker's interpretation of its home statute, relative expertise or experience of the decision-maker is critical and cannot be overlooked if deference is to be categorically accorded. As noted by the majority in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 16, "[d]eference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise" (citing *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 28).

100 According deference to an administrative decision-maker merely for the reason that it is interpreting its home statute and no constitutional question, centrally important legal question, or question about the limits of its authority *vis-à-vis* another tribunal is incomplete. Such a position is purely formalistic and loses sight of the rationale for according deference to an interpretation of the home statute that has developed in the jurisprudence including *Dunsmuir*, namely, that the legislature has manifested an intent to draw on the relative expertise or experience of the administrative body to resolve the interpretative issues before it. Such intent cannot simply be presumed from the creation of an administrative body by the legislature. Rather, courts should look to the jurisprudence or to the enabling statute to determine whether it is established in a satisfactory manner that the decision-maker actually has a particular familiarity — or put another way, particular expertise or experience relative to a court — with respect to interpreting its home statute. If it is so established, as it typically is with labour boards, then deference should be accorded on the basis of this category of question. But if there is an absence of indicia of a given decision-maker's particular familiarity with its home statute, then, provided that no other category of question for resolving the standard of review is engaged, courts should move to the second step of *Dunsmuir* and consider the contextual factors.

[Emphasis added.]

(Justice Deschamps also noted that the committee's decision on costs was an exercise of a statutorily conferred-discretion. She cited *Dunsmuir* as authority for the principle that for matters involving discretion "deference will usually apply automatically."[19])

The distinction between Justice Fish's and Justice Deschamps' approaches is important for at least two reasons. First, their difference in approach highlights a different understanding about the fundamental conceptual underpinning of administrative law—in particular, what is the constitutional justification for the courts to defer to an administrative tribunal on a question of law involving the interpretation of its own (or a closely related) statute? Secondly, Justice Deschamps' approach allows for the court to intervene (that is, apply the correctness standard) to correct an error of law that may be very important in the particular area but not necessarily either general in nature or of central importance to the legal system as a whole.[20]

3. Breaking news—the SCC's decision in **Mowat**—*costs*

In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* ("*Mowat*"), 2011 SCC 53, the Supreme Court of Canada held that the Canadian Human Rights Tribunal's statutory power to "compensate the victim for ... any expenses incurred by the victim as a result of the discriminatory practice" did not include the power to award the victim costs. Although the Court held that the Tribunal's interpretation of its home statute was entitled to

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19. At para. 110.

20. For example, see *Rebel Holdings Ltd. v. Division Scolaire Franco-Manitobaine*, 2008 MBCA 65, [2008] 9 W.W.R. 19, where the Manitoba Court of Appeal applied the correctness standard to review 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; and *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236 at paragraphs 24 to 31.

deference, the Court concluded that the Tribunal's interpretation was unreasonable. Instead of using the Tribunal's purposive approach to interpretation, the Court analyzed the provision in its context, using a contextual approach.

The decision is important (1) because of its analysis of the proper principles of statutory interpretation; (2) because it makes it clear that administrative bodies do not have jurisdiction to award costs in the absence of very clear language conferring that power, and the power to award "compensation for expenses as a result of the discriminatory practice" cannot be used as a subterfuge to award costs; and (3) this is an example of the court—having determined that deference was the appropriate standard of review—nevertheless going on to hold that the decision in question was not reasonable. Indeed, is this actually an example of the court applying the correctness standard in the guise of reasonableness? Can *Mowat* be reconciled with *Alliance Pipeline*?

B. Standard of review and promissory estoppel

Dunsmuir contemplated that the correctness standard of review would apply to a question of "general law" that is both of "central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise".

In *The Manitoba Association of Health Care Professionals v. Nor-Man Regional Health Authority*,[21] the Manitoba Court of Appeal applied the correctness standard of review where an arbitrator had applied the doctrine of promissory estoppel.

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21. 2010 MBCA 55, application for leave to appeal to SCC granted November 18, 2010.

Facts

An arbitrator decided that the employer's practice of excluding casual service in calculating vacation benefits breached the collective agreement with the union. However, he also found that the union was estopped from asserting its rights under the collective agreement until the agreement had expired. The union sought judicial review of the decision relating to estoppel, arguing that the arbitrator had erred in law. The reviewing judge dismissed the application, holding that the arbitrator's decision was not unreasonable. The union appealed to the Court of Appeal.

The Manitoba Court of Appeal

The court allowed the union's appeal. The court concluded that while the reviewing judge had properly characterized the nature of the question as being one of mixed fact and law, he had erred by selecting the reasonableness standard of review:[22]

> 38 ...a question of mixed fact and law involves applying a legal standard to a set of facts. In this case, the parameters of the legal standard involving the doctrine of promissory estoppel have been put in issue. The union argued that the law of estoppel requires that the union have actual knowledge of the employer's erroneous method of calculation of vacation entitlement, as well as the intention to affect legal relations. The employer said that the law of estoppel was that it was sufficient, as the arbitrator had found, if the union had no more than imputed or constructive knowledge of the employer's practice. It also argued that intention could be "inferred from what reasonably should have been understood."
>
> 39 Thus, before the legal standard can be applied to the facts, there must be as clear an understanding as possible of the legal standard itself. The question

22. At paras. 38 and 39.

> before the judge was whether the application of estoppel was correct or reasonable (whichever applied) in the circumstances. This involved the application of a legal standard to a set of facts. Are the legal principle and the facts inextricably intertwined, or can they be readily separated? While the judge did not consider the matter from this perspective, I think it is incumbent to do so.

In the court's view, the question of law was easily separated from its application to the facts and the issue of whether actual knowledge and intent to affect legal relations are necessary factors to promissory estoppel raised a purely legal question which attracted the standard of correctness. The court rejected the reviewing judge's focus on the doctrine's special relevance to labour law:[23]

> 45 While the judge did not state in his reasons whether the legal component in the question before him was extricable from the facts, he seemed to treat the legal question as having special relevance to labour law. He stated that he considered that the question of law (which he did not define) was not of central importance to the legal system as a whole, and that it was not outside the arbitrator's specialized area of expertise. From this I infer that the judge regarded the legal element in the question as having particular relevance to labour law. With respect, I do not think this is correct.
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> 46 The question of whether imputed or constructive knowledge is sufficient to found an estoppel, and the related question about intent, are questions that, in my opinion, are not confined to any particular field of law. The questions and their answers transcend individual areas of law, such as property, contracts and labour law, and are of central importance to the legal system as a whole. It may be that labour arbitrators have opined on those questions, but they do not fall within their specialized area of expertise. Defining the parameters of promissory estoppel must surely be "within the normal purview of both the trial and appellate courts" (*Housen* at para. 35...).

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23. At paras. 45 and 46.

It should be noted that leave to appeal *Nor-Man* was granted by the Supreme Court of Canada without reasons. The appeal has not yet been scheduled.

C. Determining what is "reasonable"

As noted in previous papers, a determination that the appropriate standard of review is "reasonableness" is only the first step in reviewing the decision of a statutory decision-maker; one must then go on to determine whether the decision in question was or was not "reasonable".

Two recent decisions illustrate some aspects of what the courts must do when evaluating the reasonableness of an administrative decision.

1. *Németh*

The Supreme Court of Canada recently reiterated that in order for a decision to be reasonable, it must (a) relate to a matter within the statutory delegate's authority, and (b) the statutory delegate must apply the correct legal tests to the issues before it.

In *Németh v. Canada (Justice)*,[24] the Minister of Justice had made the decision to permit the appellants to be extradited. The Québec Court of Appeal dismissed an application for judicial review. The Supreme Court of Canada overturned the Court of Appeal's decision because the Minister had not applied the correct legal principles when he decided to surrender the appellants for extradition. He imposed on them the burden of showing that they would suffer persecution if extradited and by doing so, gave insufficient weight to the

24. 2010 SCC 56.

appellants' refugee status and to Canada's non-refoulement obligations. He also imposed too high a threshold for determining whether the appellants would face persecution on return to their country.

Query: is this another example of a court actually applying a correctness standard in the guise of reasonableness?[25]

2. *Leon's Furniture*

The Court of Appeal of Alberta also made some interesting observations about the meaning of reasonableness in *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*.[26]

The case dealt with a complaint to the Information and Privacy Commissioner concerning Leon's practice of recording the drivers' license numbers and licence plate numbers of customers picking up furniture. The complaint was made under Alberta's *Personal Information Protection Act* (PIPA). Leon's argued that the purpose of its practice was to detect, prevent and deter fraud. The adjudicator decided that Leon's practice violated PIPA

25. See also remarks in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 78 where McLachlin C.J. stated that the "standard of review applicable to this type of decision is usually reasonableness (understood in the sense that any confusion resting on incorrect legal principles of law would not be reasonable)".

26. 2011 ABCA 94. Application for leave to appeal to SCC filed on May 26, 2011; .leave denied on 26 November 2011.

because it went beyond what was necessary for preventing fraudulent pickup, and the collection of the disputed information was not "reasonable" pursuant to section 11 of PIPA.[27]

The Court of Queen's Bench dismissed Leon's application for judicial review, on the basis that the Commissioner's decision was reasonable.

Leon's appealed to the Court of Appeal.

At the appeal, both parties agreed that the appropriate standard of review for the court to apply in reviewing the adjudicator's decision was reasonableness. However, the court observed that there are two distinctive definitions of "reasonableness" at play in the case — the objective standard set out in section 2 of PIPA which guided the Commissioner in making his decision, and the *Dunsmuir* test which guided the Court's review of the Commissioner's decision:

> 33 As will be seen (*infra*, para. 38), s. 2 of the statute contains a definition of "reasonable", which is what "a reasonable person would consider appropriate in the circumstances". Section 2 defines "reasonable" as a pure objective standard. It is not the *Dunsmuir* test. The standard of review is also reasonableness, but in the *Dunsmuir* sense. So one issue is whether it was "*Dunsmuir*" unreasonable for the adjudicator to find that it was "objectively" unreasonable for the appellant to keep the personal information. The test in *Dunsmuir* is as follows:
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> > 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific,

27. Section 11 provided that "[a]n organization may collect personal information only for purposes that are reasonable". Section 2 of PIPA defines reasonable as "what a reasonable person would consider appropriate in the circumstances".

> particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

This is reminiscent of Chief Justice McLachlin's observation in *Dr. Q* that the standard of review which the court applies in reviewing an administrative decision is not the same question as the criteria or standard which the decision-maker was required to apply in making the initial decision.[28] The linguistically challenging aspect of *Leon's* is that the concept of "reasonableness" operated at both levels—though the meaning of "reasonable" differed in the two contexts.

The majority of the Court of Appeal overturned the adjudicator's decision that Leon's practice was unreasonable (in the objective sense), because the adjudicator's decision was unreasonable (in the *Dunsmuir* sense). The majority determined that the adjudicator's decision was unreasonable (in the *Dunsmuir* sense) by considering the structure and overall

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28. *Q v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226. The discipline committee had to determine whether the physician's action amounted to "infamous conduct". The court had to determine whether the discipline committee's decision was "reasonable".

purpose of PIPA.[29] In particular, it was unreasonable (in the *Dunsmuir* sense) for the adjudicator to determine that Leon's practice was unreasonable (in the objective sense) simply because the adjudicator thought that Leon's practice was not "necessary", did not constitute a "minimal intrusion" on the customer's privacy, or was not consistent with "best practices".[30]

D. Legislated standards of review—the BC standard of patent unreasonableness

One of the issues which arises out of the merging of the two deferential standards of review in *Dunsmuir* was whether that would affect situations where the legislature had prescribed the "patently unreasonable" standard.

This question is particularly important in British Columbia, where the *Administrative Tribunals Act*[31] prescribes the patently unreasonable standard of review for certain classes of errors. The decision in *Djakovic v. British Columbia (Workers' Compensation Appeal*

29. For another determination that the Commissioner's decision under a sister Act was unreasonable (in the *Dunsmuir* sense) because it was incompatible with the structure and purpose of that legislation, see *IMS Health Canada v. Alberta (Information and Privacy Commissioner)*, 2008 ABQB 213, 93 Alta. L.R. (4th) 12, 422 269 at paras. 101-2.

30. At. paras. 39 and 57. It should be noted that Conrad J.A. disagreed with the majority's conclusion on reasonableness. She was of the view that the adjudicator's decision was reasonable in the *Dunsmuir* sense.

31. SBC 2004, c. 45.

Tribunal)[32] provides a useful overview of how *Dunsmuir* has affected standards-of-review analysis in British Columbia:

> 22 In 2008 the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, revisited and reformulated the common law on standard of review. The impact of *Dunsmuir* on the standard of review applicable to WCAT was addressed in the recent case of *Jensen v. Workers' Compensation Appeal Tribunal*, 2010 BCSC 266, where Mr. Justice Preston comprehensively reviewed the jurisprudence that has evolved on this issue in British Columbia:
>
> > [78] The Supreme Court of Canada, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, collapsed the 'patently unreasonable'/'unreasonable' dichotomy into one standard of 'reasonableness'. However, despite *Dunsmuir*, 'patent unreasonableness' lives on in British Columbia with respect to the provincial administrative tribunals to which the *ATA* applies: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 19, [2009] 1 S.C.R. 339 [*Khosa*] see also *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada*, *Local 25-G*, 2009 BCCA 229 at para. 7 [*Victoria Times*]; *Carter v. Travelex Canada Limited*, 2009 BCCA 180 at para. 27; and *Manz v. Sundher*, 2009 BCCA 92 [*Manz*]. Generally there is an obligation on the reviewing judge to satisfy him or herself of the appropriate standard of review on the pragmatic and functional approach: *Speckling, [2005] B.C.J. No. 270; British Columbia v. Bolster*, 2007 BCCA 65; *and Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, now referred to

32. 2010 BCSC 1279 (Voith J.). The decision refers extensively to the court's earlier decision in *Jensen v. Workers' Compensation Appeal Tribunal*, 2010 BCSC 266 (Preston J.). See also the recent decision by the B.C. Court of Appeal in *Pacific Newspapers Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2011 BCCA 373. See also *Franzke v. B.C. (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 1145 at paras. 71-82; *Downs Construction Ltd. v. B.C. (Workers' Compensation Appeal Tribunal)*, 2011 BCSC 1129 at paras. 10-22.

> as the standard of review analysis. However, this direction is limited to cases where the common law is applicable. Where the tribunal falls under the legislation, a reviewing court must apply the standard of review as set out therein: *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 62 at paras. 40 and 41 [*Asquini*] ...

Patent Unreasonableness Defined and Applied

23 The ATA definition of patent unreasonableness is not exhaustive and applies only to the exercise of discretion. Section 58(3) states:

> (3) For the purpose of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
> (a) is exercised arbitrarily or in bad faith,
> (b) is exercised for an improper purpose,
> (c) is based entirely or predominantly on irrelevant factors, or
> (d) fails to take statutory requirements into account.

24 For findings of fact and law, the common law definition applies: *Manz v. Sundher*, 2009 BCCA 92, 91 B.C.L.R. (4th) 219.

25 In *Jensen*, *supra*, Mr. Justice Preston also addressed the question of whether patent unreasonableness has, post *Dunsmuir*, been redefined:

> [79] The *ATA* does not define 'patently unreasonable' outside the context of s. 58(3), which applies only to discretionary decisions, and therefore the content of the standard for questions of mixed fact and law is determined by reference to the common law: *University of British Columbia v. University of British Columbia Faculty Association et al.*, 2006 BCSC 406 at para. 50, reversed on other grounds 2007 BCCA 201 and *Baldwin v. Workers' Compensation Appeal Tribunal*, 2007 BCSC 942 at para. 35 [*Baldwin*]. While it was not immediately clear whether, in light of *Dunsmuir*, the interpretation of 'patent unreasonableness' would be more akin to 'reasonableness', the debate is now settled that the 'patently unreasonable' standard is to be defined by the common law as it existed pre-*Dunsmuir*.

However, it is not frozen as such and will continue to be calibrated according to general principles of administrative law: *Khosa*, at para. 19; while this part of the decision is *obiter*, it was adopted by our Court of Appeal in *Victoria Times*, at para. 7; see also: *Manz*, at paras. 35-36; *Tallarico v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 49 at para. 42 [*Tallarico*]; *Lavigne v. British Columbia (Workers' Compensation Review Board)*, 2008 BCSC 1107 [*Lavigne*]; *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2008 BCSC 1464, at para. 69; *Asquini*, at paras. 50-54. The logic underlying this analysis is that *Dunsmuir* does not address legislative standards of review and to import the definition of "reasonableness" from *Dunsmuir* into the *ATA* would be to ignore clear legislative intent. "The expression 'patently unreasonable' did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence": *Khosa*, at para. 19. Furthermore, *Dunsmuir* had the effect of abolishing 'patent unreasonableness' and therefore the definition of 'patent unreasonableness' must be that immediately prior to its abolition. Turning to the common law definition, the principles defining 'patent unreasonableness' have been summarized as follows in *Speckling*, at para. 33:

1. "Patently unreasonable" means openly, clearly, evidently unreasonable. (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748).

2. The review test must be applied to the result not to the reasons leading to the result. (*Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).

3. The privative clause set out in s. 96(1) of the *Act* requires the highest level of curial deference. (*Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.).

4. A decision may only be set aside where the board commits jurisdiction error.

5. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not. (*Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al.* (1997), 144 D.L.R. (4th) 385 (S.C.C.).

[80] In summary, a patently unreasonable decision is one that does not accord with reason or is clearly irrational: *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-64, (1993), 101 D.L.R. (4th) 673 at 14. It is not for the court on judicial review to reweigh the evidence; second guess the conclusions drawn from the evidence considered; substitute different findings of fact or inferences drawn from those facts; or conclude that the evidence is insufficient to support the result. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. Courts have continued to apply these principles post-*Dunsmuir*: *Manz*, at para. 37; *Buttar*, at para. 56; *Bagri v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 300 at para. 25; *Asquini*, at para. 80; *Tallarico*, at para. 55; and *Lavigne*, at para. 127. However, there remains some debate concerning the proposition that the reviewing court should focus on the result and not the reasoning. The B.C. Court of Appeal held that if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal's reasoning: *Kovach v. Singh*, (1998), 52 B.C.L.R. (3d) 98 (C.A.) at para. 26 adopted by the SCC in *Kovach v. British Columbia (Worker's Compensation Board)*, 2000 SCC 3, [2000] 1 S.C.R. 55. Furthermore, in *Dunsmuir*, the Court stated that deference requires respectful attention to the reasons offered or which could be offered in support of a decision: *Dunsmuir*, at para. 48. However, the B.C. Court of Appeal has recently stated that this principle should be applied with considerable caution

> and that a court cannot properly be said to defer to a tribunal when it ignores the tribunal's reasoning and fashions its own rationale for the result that the tribunal reached: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at paras. 50-56. The Supreme Court's reference to reasons that "could be offered" should not be taken as diluting the duty and importance of a tribunal giving proper reasons for an administrative decision: *Khosa*, at para. 63. While the decision of the B.C. Court of Appeal on this issue relates to the reasonableness standard, in my view, a court should be cautious in fashioning its own rationale for the result when reviewing on a standard of patent unreasonableness.

E. Standards of Review for Administrative Appeals: *Newton* and *Parizeau*

Last year's paper raised the question about whether an appellate administrative tribunal needs to apply standards-of-review analysis in order to determine what it is supposed to be doing on the appeal from a lower decision-maker.

At first glance, this issue might be avoided by simply looking at the exact nature and scope of the appeal granted by the legislation. For example, if the appeal is a complete hearing *de novo*, 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. The same result would occur if the legislation makes it clear that the appellate body is to use its own judgment to reach its own decision about the right outcome. If the appeal is on the record below, with no new witnesses, it would make sense for the appellate body to accept (defer to?) the findings of fact made by the original body which saw and heard the witnesses. However, would there be any circumstance where the appellate body would be justified in deferring to the original decision-maker 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?

Last year's paper referred to two decisions which made it clear that appellate administrative tribunals should simply be guided by what the statute tells it to do, and that standards-of-review analysis was not relevant to their task:

- In *Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation*,[33] 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:[34]

> 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.
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> 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"

33. 2010 NSCA 38. See also *Archibald v. Nova Scotia (Utility and Review Board)*, 2010 NSCA 27.

34. At paras. 23 and 24.

> [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.]

- The Québec Court of Appeal reached the same conclusion in *Montréal (Ville de) v. KPMG inc.*[35] 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.

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35. 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; *Carbonneau v. Simard*, 2009 QCCA 1345; and *Boehringer Ingelheim (Canada) ltée c. Cour du Québec*, 2010 QCCS 2836 for contrary decisions.

    In *Vergers Leahy inc. v. Fédération 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.

On the other hand, the Court of Appeal of Alberta had previously held that at least some appellate administrative bodies should defer in at least some respects to the lower decision-maker, which implies that they should apply standards-of-review analysis, just like appellate courts do.[36]

The issue has been considered further in two recent decisions.

1. *Newton*

The principal focus in *Newton v. Criminal Trial Lawyers' Association*[37] was the practice of the Law Enforcement Review Board (LERB) always to conduct fresh hearings based on fresh evidence when hearing an appeal from the decision of a presiding officer in a police disciplinary matter.[38]

Facts

Newton was a staff sergeant in charge of the Traffic Division of the Edmonton Police Service. He took exception to some critical comments made in a newspaper column by a

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36. *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.

37. 2010 ABCA 399. See also the companion decision in *Pelech v. Law Enforcement Review Board*, 2010 ABCA 400, and the subsequent decision in *Eltom v. Law Enforcement Review Board*, 2011 ABCA 260.

38. See also *Brian Neil Friesen Dental Corp. v. Director of Companies Office (Manitoba)*, 2011 MBCA 20 where the court held that whether an application to the court for review or appeal is *de novo* largely depends on the wording of the statute itself. Other factors include the scheme of legislation as a whole, the expertise of the original decision maker and the nature of the appeal.

journalist named Diotte. After hearing rumours that Diotte sometimes drove while under the influence of alcohol, Newton instructed a subordinate to perform a computer search of Diotte in the police computer databases. He later provided his subordinates with the particulars of Diotte and his vehicle and instructed them to "keep an eye out" for him.

The Criminal Trial Lawyers' Association (CTLA) learned of the events and filed a complaint with the Edmonton Chief of Police. Newton was charged with two disciplinary counts of unlawful or unnecessary exercise of authority and insubordination.

The presiding officer's decision

The hearing before the presiding officer consisted of the filing of an Agreed Statement of Facts and the oral testimony of ten witnesses. The presiding officer found no material dispute about the facts and no issues regarding credibility of any of the witnesses. The hearing primarily concerned the inferences to be drawn from the evidence and the proper interpretation of the relevant policies and regulations. The presiding officer found Newton not guilty of the first count, but guilty of the count of insubordination for ordering computer searches for a non-police related purpose. He imposed a written reprimand on Newton.

The appeal to the LERB

The CTLA appealed the presiding officer's decision on both the merits and penalty to the LERB.

A preliminary issue arose as to whether the appeal should be conducted as a hearing *de novo*, and whether the CTLA was entitled to call fresh evidence on the appeal. The LERB

concluded that proceedings would be conducted on a *de novo* basis and that new evidence could be presented by the CTLA.[39] In essence, the LERB took the position that it had unlimited discretion to admit fresh evidence and hold an entirely new hearing.

The evidence before the LERB consisted of the original Agreed Statement of Facts, the transcripts of the original hearing, and the oral testimony of several witnesses, two of whom had not given testimony before the presiding officer. No submissions were made before the LERB as to why the two new witnesses had not been called before the presiding officer, whether their evidence was reasonably available for the original hearing, or why the CTLA should be permitted to call their evidence on the appeal for the first time.

The LERB allowed the appeal on the first count and found Newton guilty of exercising his authority when it was unlawful or unnecessary. It affirmed the presiding officer's decision on insubordination, thus finding Newton guilty on both disciplinary counts. The LERB did not conduct any analysis of the presiding officer's reasons, did not consider whether it should give the decision of the presiding officer any deference, and did not explain why it disagreed with the presiding officer's inferences.

The appeal to the Court of Appeal

As permitted by the statute, Newton appealed the LERB's decision to the Court of Appeal. His principal argument on appeal was that the LERB completely disregarded the presiding

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39. A similar result occurred in *Re Inspector Brian Boulanger*, L.E.R.B. No. 021-2006 in which the LERB ruled that appeals before it could be *de novo* and that it had the discretion to re-call evidence and to hear fresh evidence. It held that each case should be decided having regard to the specifics of the appeal. The LERB also concluded that, if the parties consented, the LERB could dispense with a hearing and decide an appeal based on the written record.

officer's decision and thereby exceeded its jurisdiction by conducting a *de novo* hearing and admitting new evidence. Newton argued that the LERB essentially (and incorrectly) applied a correctness standard of review to the presiding officer's decision by disregarding his findings and conducting the hearing afresh.

Justice Slatter in the Court of Appeal assumed that standard-of-review analysis applied to an appellate administrative body (unlike the Nova Scotia and Québec cases referred to above).

He started his analysis by a lengthy discussion about whether *Dunsmuir/Pushpanathan* or *Housen* was the proper approach for determining the proper standard of review for the Court to apply to the decision of the Board in selecting the standard of review which the Board should apply to the decision of the presiding officer.[40] This very interesting discussion is reproduced in Appendix A to this paper. There is a somewhat similar discussion of this issue in the recent decision by the British Columbia Court of Appeal in *Henthorne v. BC Ferries Corp.*, 2011 BCCA 476.

Applying the *Dunsmuir/Pushpanathan* approach, Justice Slatter determined that correctness was the appropriate standard for the Court to use when reviewing the standard of review used by the Board when reviewing the initial decision.

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40. Justice Slatter addressed whether the Court of Appeal should apply the *Housen* test and therefore always substitute its view about the appropriate standard of review which should have been applied by the appellate administrative body, or should apply the *Dunsmuir/Pushpanathan* approach to determine whether it might in the circumstances be appropriate to defer to the appellate administrative body's decision about the standard of review to be used in reviewing the initial decision. As noted above, Justice Slatter concluded that the Court should apply the correctness standard when determining the standard of review which the Board should have applied to the initial decision.

Justice Slatter noted[41] that the Board had not expressly considered the standard of review—or the level of any deference—which it should apply to the initial decision. He held that the Board had erred in interpreting two provisions in the legislation[42] to conclude that it was always required to conduct a *de novo* hearing, which in effect amounted to applying the correctness standard of review by default.

Justice Slatter also held that the mere fact that legislation provides a right of *appeal* does not mean that an appellate administrative body should always and necessarily apply the correctness standard, rather than in at least some circumstances deferring to the initial decision-maker:[43]

> 52 As noted, the Board never directly considered the standard of review it should apply. It concluded that it was required to hold a *de novo* hearing on every appeal, and assumed that engaged a correctness standard of review. The mere presence of a right of appeal does not warrant a correctness standard of review. Even if the appeal is to be held *de novo*, that does not necessarily mean that no deference whatsoever should be applied to the decision of the presiding officer: *Imperial Oil Resources Ltd. v. 826167 Alberta Inc.*, 2007 ABCA 131, 72 Alta. L.R. (4th) 201, 404 A.R. 212 at paras. 8-18.
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> [Emphasis added.]

41. Paragraph 41.

42. The legislative provisions permitted the board to hold a hearing without oral argument, and the power to admit fresh evidence.

43. At para. 52.

Justice Slatter then referred to the factors which should be considered in determining whether the appellate administrative tribunal should defer to the initial decision:[44]

> 42 The determination of the standard of review to be applied by an appellate administrative tribunal (here the Board) to the decision of an administrative tribunal of first instance (here the presiding officer) requires a consideration of many of the same factors that are discussed in *Housen* and *Dunsmuir/Pushpanathan*, adapted to the particular context: *College of Physicians and Surgeons of Ontario v. Payne* (2002), 219 D.L.R. (4th) 350, 163 O.A.C. 25 (Div. Ct.) at para. 20.
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> 43 The following factors should generally be examined:
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> (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
> (b) the nature of the question in issue;
> (c) the interpretation of the statute as a whole;
> (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
> (e) the need to limit the number, length and cost of appeals;
> (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
> (g) other factors that are relevant in the particular context.

Justice Slatter characterized the purpose of the hearing and appeal provisions contained in the *Police Act* as allowing an avenue for public complaint and a mechanism for inquiring into complaints with a view to balance the interests of four groups: complainants, police officers, the public and the police services. Determining the respective roles of the parties involved identifying the function the Legislature intended the presiding officer to perform, the type of supervisory role for the LERB, and what rights were intended to be given to the

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44. At paras. 42 and 43.

complainant under the *Police Act* and its *Regulation*.[45] Both the LERB and the presiding officer have levels of expertise in police disciplinary procedures and it is not appropriate to simply assume that the expertise of the LERB prevails over that of the presiding officer, or *vice versa*. Which body's expertise should prevail will depend on the nature of the question:[46]

> 78 ...Where the issue relates to technical policing issues, the views of the presiding officer are entitled to deference. Where the issue relates to the transparency and integrity of the police discipline process itself, the views of the Board can legitimately prevail. The Board should ask whether the appeal in question raises, at its core, the need for civilian oversight of the police disciplinary process. As noted, not all appeals to the Board will be of that character.

There was nothing in the statutory role of the LERB, presiding officer or complainant that warranted the Board applying a standard of correctness in every appeal from a decision of a presiding officer.[47] Rather, he described the main role of the Board as being:[48]

> ... to review the record for error, and to provide civilian oversight of the process, while respecting the legitimate role and expertise of the presiding officer. The starting point is that the appeal is on the record, with an ability to admit new evidence when warranted by the issues on appeal.

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45. At paras. 57 to 75.

46. At para. 78.

47. At para. 75.

48. Paragraph 51.

Finally, Justice Slatter considered the economy and integrity of the proceedings and the inefficiency of having the LERB essentially hold a new hearing in every case. He noted that the complainant does not have standing to play an active role before the presiding officer and allowing the complainant to "run its own hearing" at the appeal level leads to delay and expense and is not appropriate in every case.[49]

In summary, Justice Slatter concluded:[50]

> 82 In conclusion, the decision of the Board to conduct a *de novo* hearing, and to assume that it owed no deference to the findings of the presiding officer was in error. The role of the Board is primarily to sit on appeal from the presiding officer. The Board is not a tribunal of first instance, and cannot simply ignore the proceedings before the presiding officer, and the conclusions reached by him. The focus of the appeal to the Board should be on its dual mandate of civilian oversight, and the correction of unreasonable results.
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> 83 There is no general power to hold a *de novo* hearing in every case, and no requirement that a *de novo* hearing be held unless the parties consent to proceeding otherwise. Where a sufficient reason is shown or the issues on appeal warrant it, the Board has the power to admit fresh evidence. When sufficient cause is shown the Board can even rehear key evidence presented to the presiding officer.
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> 84 The Board has a legitimate role to play in providing civilian oversight to the system of police discipline where oversight issues arise. The Board is not bound by the inferences and conclusions of the presiding officer, but it should be able to offer some articulable reason based in law, fact or policy when it interferes with a decision under appeal. The Board should proceed primarily from the record created by the hearing before the presiding officer. It should extend deference to the decision of the presiding officer on questions of fact, credibility, and technical policing issues. If the decision of the presiding

49. At paras. 80 and 81.

50. At paras. 82 to 84.

> officer was reasonable, the Board should not substitute its own view just because it might have come to a different conclusion. Where the appeal raises issues of acceptability of particular police conduct, or the integrity of the discipline process, the Board's mandate is more robust.

On the facts in *Newton*, the Court concluded that the LERB erred by applying a correctness standard to the decision of the presiding officer in circumstances where a reasonableness standard was required. The Court set aside the LERB's decision.

2. *Parizeau*

The Québec Court of Appeal's decision in *Parizeau c. Barreau du Québec*,[51] provides a different analysis and an interesting contrast.

The facts were these. Parizeau had been disbarred in 2000, but could apply for reinstatement after five years. The Bar Council and the Syndic opposed her application for re-admission in 2006. Much of the hearing in front of the Applications Committee involved cross-examining her about matters which pre-dated the events which led to her disbarment. The Applications Committee was not satisfied that she had learned her lesson and took responsibility for her actions, and rejected her request.

Parizeau appealed to the Professions Tribunal. At the outset, it considered the standard of review which it should apply, and adopted "reasonableness" in the *Dunsmuir* sense (except

51. 2011 QCCA 1498.

for questions of procedural fairness, to which it applied the "correctness" standard).[52] The Professions Tribunal held that the Committee's decision was not reasonable because it had misconceived its role by focussing on conduct issues which had arisen long ago, and it had without explanation ignored the preponderance of the evidence. Being satisfied that Parizeau met the requirements for being re-admitted to the Bar, the Professions Tribunal overturned the Committee's decision and ruled in her favour.

The Bar brought an application for judicial review. The Superior Court concluded that the Professions Tribunal had correctly identified the standard of review as being "reasonableness", but had incorrectly applied that standard when it effectively re-weighed the evidence and substituted its own opinion. The Superior Court held that the Committee's decision was reasonable, so it overturned the decision by the Professions Tribunal and reinstated the decision by the Committee.

Parizeau appealed to the Court of Appeal.

The Court of Appeal spent considerable time examining the detailed legislative provisions governing both the Committee and the Professions Tribunal. In particular, it noted that the

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52. I have questioned whether "correctness" is the proper standard of review for issues about procedural fairness. Surely the standard—the test, the question which the reviewing body is asking—is whether the impugned procedure was "fair"—not whether it was "correct". This point is sometimes made in the jurisprudence (for example, *Moreau-Bérubé*; *CUPE v. Ontario (Minister of Labour)*(the "*Retired Judges*" case); but one can find frequent examples where the courts have referred to "correctness" as the standard of review for procedural errors. This only makes sense if, by "correct", one means that the court can make the final determination about this question: *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 220, 91 Alta. L.R. (4th) 1 at para. 174. Using "correctness" in this context seems to assume that all questions in administrative law are subject to either "deference" or "correctness", and whenever the former is inapplicable, the latter must be the applicable standard.

    The procedural fairness issue in *Parizeau* related to whether the scope of cross-examination was inappropriate.

Legislature had provided for an *appeal* to the Professions Tribunal, which allowed it to confirm, vary or vacate any of the Committee's decisions, and itself to make any decision which in its judgment ought to have been made. There was nothing in the legislation to suggest any limitation on the scope of such an appeal, and the Professions Tribunal itself was a specialized tribunal.[53]

The Court of Appeal then considered at some length whether the *Housen* or *Dunsmuir/Pushpanathan* line of cases applied to determine what the Professions Tribunal was to do when exercising its appellate function. It recognized that the Supreme Court of Canada has adopted the same functional and pragmatic approach in determining the scope of statutory appeals from statutory delegates *to courts* as applies in applications for judicial review (which of course go to the superior courts).[54] Both of those instances involve the review by *a generalist court* of a decision by a specialist tribunal—which explains why there might be appropriate limits on the scope of review by the generalist court. The situation is different, however, where the appeal goes from one administrative body to another—particularly where the appellate administrative body is specialized.[55] In such a case, it is necessary to pay particular attention to the specific legislative provisions to determine the scope and limitations (if any) which the legislator intended to govern the appeal to the second administrative body.

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53. The Professions Tribunal is composed of a number of judges from the Quebec Court, but it sits as an administrative tribunal, not as a court.

54. Referring to *Dr. Q*, [2003] 1 S.C.R. 226; *Ryan*, [2003] 1 S.C.R. 247; *Mattel*, [2006] 1 S.C.R. 772; *Proprio Direct*, [2008] 2 S.C.R. 195; *Southam*; *Pezim*; among others.

55. As an earlier decision by the court had noted: *Laliberté c. Huneault*, 2006 QCCA 929(quoted at paragraphs 64-67 in *Parizeau*).

The Court then returned to the legislative provisions governing the appeal to the Professions Tribunal, and adopted the characterization of Justice Fish in an earlier case[56] (when he was on their court) that "[f]rom a statutory point of view, more sweeping powers of appellate intervention [...] are difficult to conceive".

Accordingly, the Court held that the Professions Tribunal was not required to defer and was entitled to substitute its own opinion for the Committee's—although it might be slow to do so where the issue was purely one of discretion[57] (as opposed to an error of law, or a palpable and overriding error in finding facts or making inferences—in other words, the *Housen* test).

By contrast, the Court of Appeal noted that the *Dunsmuir/Pushpanathan* analysis applied to determine the standard of review which the Superior Court was required to use when dealing with the application for judicial review of the appellate decision by the Professions Tribunal. Notwithstanding that the Superior Court judge stated that he was applying the reasonableness standard of review, the Court of Appeal said that he went further than that and actually (and wrongly) applied the correctness standard. Accordingly, the Court of Appeal reversed the Superior Court, and denied the application for judicial review of the decision by the Professions Tribunal.

3. *Commentary*

What can one distill out of these decisions?

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56. *Pigeon c. Daigneault*, [2003] R.J.Q. 1090 (CA; application for leave to appeal dismissed by SCC, [2003] 2 S.C.R. vi).

57. Thereby taking into account Justice Dussault's thoughtful caution in *Barreau du Québec c. Tribunal des professions* ("arrêt *Brosseau*"), [2001] R.J.Q. 875 (C.A.; application for leave to appeal dismissed by SCC, [2001] 3 S.C.R. v).

All of the cases recognize the importance of the intention of the legislature. What does the Act say about the nature and scope of the administrative appeal? Assuming that is clearly stated, that will govern. Unfortunately, the legislature very often does not describe very clearly what it means by an "appeal". In such a case, it will be necessary to look at the entire context of the legislative scheme to determine the nature of the initial decision, the types of issues which can be appealed, the comparative expertise of the initial decision-maker and the appellate body, and the like. Is there any principled basis for requiring the appellate body to defer to the initial decision-maker about any particular aspect under appeal?

The cases differ with respect to whether the administrative appellate body needs to perform a standards-of-review analysis in order to determine the nature and scope of its function. The Nova Scotia Court of Appeal clearly says not; the Alberta Court of Appeal says yes; the Québec Court of Appeal has decisions going both ways. To the extent that the "standard of review" is just shorthand for figuring out what the legislature intended the reviewing or appellate body to do, it may not matter. The outcome may be the same either way, provided one focuses on the actual words used by the legislature in the context of the particular statutory scheme—and, in particular, if there is clear (and clearly articulated) thinking about the rationale for why the appellate administrative body should defer to the initial decision in any particular respect.

These cases have a very practical application in any statutory scheme that provides for an administrative appeal to an appellate body which has expertise in the area in question. For example, many statutes dealing with professional discipline do provide for an administrative appeal within the profession—say, from the Discipline Committee to the Governing Council of the profession, or to an appeal panel composed of other members of the profession. Prior to these cases, there might have been a tendency for the appellate administrative body to

apply the reasonableness standard and be quite deferential to the first decision-maker. Depending on the issue involved in the appeal, these cases suggest that might not be the proper approach.

III. NATURAL JUSTICE AND PROCEDURAL FAIRNESS

The highly contextual nature of the content of natural justice and procedural fairness means that there is an almost infinite array of circumstances in which these types of questions can arise.

A. The Supreme Court of Canada's decision in *Mavi v. Canada (Attorney General)*

Mavi v. Canada (Attorney General)[58] is the Supreme Court of Canada's most recent decision about the duty to be fair.

Facts

The case dealt with the obligations of sponsors of immigrants under the federal *Immigration and Refugee Protection Act*.[59] Under the *Immigration and Refugee Protection Regulations*, sponsors are required to give undertakings of support regarding the sponsored immigrant and are obliged to reimburse the federal Crown or province for the cost of every benefit provided as social assistance to the sponsored immigrant during the term of the undertaking. *Mavi* dealt with eight sponsors who denied liability under their undertakings. One of the issues

58. 2011 SCC 30.

59. S.C. 2001, c. 27.

before the Supreme Court was whether the rules of procedural fairness applied to the proceedings initiated against the sponsors. The answer depended, in part, on whether the undertakings amounted to contracts, for which the private law of contract governed, or instruments of federal legislation enforced by delegates of the Crown, or something in between.

Justice Binnie's decision

Speaking for the majority, Binnie J. first reviewed the doctrine of procedural fairness as it has evolved over the last several years. He confirmed that the content of procedural fairness varies with the circumstances and the legislative and administrative context. In this case, he concluded that the nature of the administrative decision was a straightforward debt collection and that the legislation leaves the governments with some degree of discretion in carrying out their enforcement duties.[60]

Binnie J. described the required level of procedural fairness in the circumstances as follows:[61]

> 45 In these circumstances I believe the *content* of the duty of procedural fairness does not require an elaborate adjudicative process but it *does* (as stated earlier) oblige a government, prior to filing a certificate of debt with the Federal Court, (i) to notify a sponsor at his or her last known address of its claim; (ii) to afford the sponsor an opportunity within limited time to explain in writing his or her relevant personal and financial circumstances that are said to militate against immediate collection; (iii) to consider any relevant circumstances brought to its attention keeping in mind that the undertakings were the essential conditions precedent to allowing the sponsored immigrant to enter Canada in the first place; and (iv) to notify the sponsor of the

60. At paras. 43 and 44.

61. At para. 45.

> government's decision. Given the legislative and regulatory framework, the non-judicial nature of the process and the absence of any statutory right of appeal, the government's duty of fairness in this situation does not extend to providing reasons in each case (*Baker*, at para. 43). This is a situation, after all, merely of holding sponsors accountable for their undertakings so that the public purse would not suffer by reason of permitting the entry of family members who would otherwise not qualify for admission.

Binnie J. rejected the Attorney General's argument that the claims against the sponsors were essentially contractual in nature and did not attract the duty to be fair.[62] In this case, he found the government's cause of action arose from a statute — the terms of sponsorship are dictated and controlled by statute, the undertaking is required by statute and reflects terms fixed by the Minister under his or her statutory power. The existence of the undertaking did not take the disputes outside the realm of public law.

Justice Binnie also rejected the arguments that (1) the legislation confers discretion on the government to enforce the debt and this ousted the duty to be fair,[63] (2) that the legislation expressly excluded the duty to be fair,[64] and (3) that the province of Ontario had fettered its discretion by adopting a collection policy that did not allow the government to consider the relevant facts of the case.[65]

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62. At paras. 47 to 51. The court distinguished *Dunsmuir* which dealt with a contractual employment relationship (which did not engage the principles of natural justice and procedural fairness) as opposed to a statutory obligation (which would engage the principles of natural justice and procedural fairness).

63. At paras. 44 and 45.

64. At para. 52 to 55.

65. At paras. 65 to 67.

Finally, Justice Binnie addressed the doctrine of legitimate expectations.[66] He concluded that the wording of the undertakings themselves gave rise to a legitimate expectation of notice being given to the sponsor before enforcement proceedings would be initiated. In this case, Ontario's procedure gave ample notice and the doctrine of legitimate expectations was not breached.

B. The requirement to give reasons

The past year saw a number of noteworthy cases about the need to provide adequate reasons.

The standard of review for assessing adequacy of reasons

Given that there is a difference between challenging the procedural fairness of a decision based on the inadequacy of reasons and challenging the unreasonableness of the substantive decision, what is the standard of review for determining whether reasons are adequate?

66. At paras. 68 to72.

1. *BTC Properties*

In *BTC Properties II Ltd. v. Calgary (City)*,[67] Justice Romaine reviewed the jurisprudence from other provinces[68] and noted two differing approaches to assessing adequacy of reasons. In Ontario, the court in *Clifford* took a two-pronged approach considering (1) whether the tribunal has satisfied its procedural fairness obligation to give reasons (under *Baker*), and (2) whether the tribunal's substantive reasons and decision are reasonable or correct applying the *Dunsmuir* analysis. In Newfoundland, the court took a more simplified approach and found that there is no need to assess every decision firstly on whether the reasons are adequate and secondly whether the reasons are reasonable or correct. In effect, the Newfoundland court found that *Baker* is subsumed in *Dunsmuir*.

Justice Romaine preferred the Newfoundland approach, but because the issue is not settled in Alberta, conducted two separate reviews. Applying the *Clifford* approach, she concluded that the Board had satisfied its requirement to give reasons and that the decision itself was reasonable based on *Dunsmuir* principles. She then applied the Newfoundland approach and considered the adequacy of the reasons. She concluded that the reasons given were adequate. Accordingly, the Board's decision would be upheld regardless of the approach used.

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67. 2010 ABQB 719. See also *Deen v. Certified Management Accountants of Alberta (Complaints Inquiry Committee)*, 2011 ABCA 227; *Brian Neil Friesen Dental Corp. v. Director of Companies Office (Manitoba)*, 2011 MBCA 20; *Mastrocola c. Autorité des marchés financiers*, 2011 QCCA 9952.

68. Notably, *Clifford v. Ontario (A.G.)*, 2009 ONCA 670 and *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2008 ABQB 595, 450 A.R. 1 at para.56; and *Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Nurses' Union*, 2010 NLCA 13 (leave granted to appeal to SCC; the SCC has heard the appeal but not yet rendered its decision).

2. *Spinks*

In *Spinks v. Alberta (Law Enforcement Review Board)*,[69] Justice Côté writing for the Court of Appeal of Alberta also differentiated between (a) the adequacy of the reasons, and (b) whether the decision was reasonable. The court was clear in rejecting a deferential approach to assessing adequacy of reasons:

> 14 The Court of Appeal is to remain deferential to the perceptions of fact of the trial judge (or trial tribunal): *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, 25, 380 N.R. 47 (paras. 54-55). But that is not the same as saying that the test for adequacy of reasons is deferential, and indeed that case immediately says that the Court of Appeal then must go on to see if the trial tribunal's reasons are adequate (*ibid.*).
>
> 15 The Ontario Court of Appeal has held that the test in the Court of Appeal is not deferential; it is correctness: *Clifford v. A. - G. Ont.*, 2009 ONCA 670, 98 O.R. (3d) 210 (paras. 22-24), leave denied [2009] S.C.C.A. No. 461, (2010) 405 N.R. 388 (S.C.C.). Support for some of the *Clifford* case's propositions is also found in *Petro-Can. v. W.C. Bd.*, 2009 BCCA 396, 276 B.C.A.C. 135 (paras. 54-56). The Supreme Court of Canada tends against a deferential test, in *Dunsmuir v. Bd of Mgmt.*, 2008 SCC 9, [2008] 1 S.C.R. 190, 372 N.R. 1 (para. 48), and in *Minister of Citizenship and Imm. v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, 385 N.R. 206 (para. 63).
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> 16 The Alberta Court of Appeal reversed a conviction for professional misconduct because the reasons were inadequate: *Sussman v. College of Psychologists*, 2010 ABCA 300, 490 A.R. 304. That judgment seems not to adopt a deferential standard, and most of the statements in it about that topic are *obiter*. It simply makes the point that deficient reasons are not automatically enough to allow an appeal: see paras. 39, 40 and 51.
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> 17 As a matter of basic principles, a deferential standard of review by the Court of Appeal would make little sense, especially when the impugned

69. 2011 ABCA 162.

reasons do not say why they omit a topic. If the reasons in question omit entirely a vital topic or a necessary step, or do not even mention an important flaw in the conclusion which they reach, what is there to defer to? Cf. *Feeney v. R.* [1997] 2 S.C.R. 13, 70, 212 N.R. 83 (para. 84) (reh. granted other grds. [1997] 2 S.C.R. 117). (Occasionally the step not stated may be obvious, but usually it is not.) It is well settled that what is mandatory is sufficient reasons, not mere conclusions. Lengthy beautiful writing and long detailed recitals count for nothing, if a vital element is absent.

18 Should the Court of Appeal surmise that if the tribunal's reasons seem inadequate, the tribunal must have fully considered all the necessary topics but had some unstated motive for not mentioning any of them? And then should the Court of Appeal presume that that unknown motive was reasonable? No; that would be simple speculation. Indeed, it may well be circular reasoning. It would usually make it impossible for the Court of Appeal to review adequacy of reasons. If the tribunal's reasons do not mention an important topic at all, it is a good reason to presume that the tribunal never thought about whether the reasons should deal with that topic.

19 Those pragmatic considerations lead to a question of principle. The usual paradigm for standard of appellate review of a tribunal's decision does not fit the present situation. Usually the Court of Appeal reviews the stated thought process used by a tribunal, and sees either whether it is correct, or is at least reasonable. So usually the Court of Appeal examines a topic to which the tribunal has already addressed its mind. But adequacy of the tribunal's reasons may well not be a topic which the tribunal has addressed at all.

20 If a live disputed topic is neither trivial nor obvious, when is that tribunal's silence reasonable reasons? That question either cannot be answered, or yields but one possible answer: never. Cf. *Németh v. Min. of Justice*, 2010 SCC 56, [2010] 3 S.C.R. 281, 340, 408 N.R. 198 (para. 123).

21 And where the tribunal stated some unsatisfactory reason, what should the Court of Appeal do to defer? What would a deferential decision by the Court of Appeal look like? "We can almost understand these reasons?" Or "These reasons are almost rational?" Or "Four of six vital topics were covered, and that is a good enough batting average?"

22 In a great many cases, the discussion of the necessary topics is either present or it is not. An argument is either logical or it is not.

23 It is entirely possible that "correctness" is not an exact name for the Court of Appeal's proper approach to adequacy of tribunal reasons. This is not the Court of Appeal's review of the merits, nor of jurisdiction. Adequacy of reasons is a matter both of fairness and of the Court of Appeal's ability to do its work. On the duty to give reasons as a corollary of the duty of fairness, see *N.W. Utilities v. Edm. (City)* [1979] 1 S.C.R. 684, 705-06, 23 N.R. 565, 7 Alta. L.R. (2d) 370, 385-86; *Sanderson v. Crim. Inj. Rev. Bd.*, 2010 ABCA 167, 487 A.R. 244 (para. 11); *Baker v. Min. of Cit. & Imm.* [1999] 2 S.C.R. 817, 848, 243 N.R. 22, 174 D.L.R. (4th) 193 (para. 43); *Law Socy. of U.C. v. Neinstein*, 2010 ONCA 193, 259 O.A.C. 313, 1 Admin. L.R. (5th) 1, 15-16 (paras. 60-62); *Guttman v. Law. Socy. of Man.*, 2010 MBCA 66, [2010] 8 W.W.R. 385, 397, 255 Man. R. (2d) 151 (para. 57). If a tribunal refuses or neglects to send any record or return to a reviewing court, deference would not be shown by the court. But "correctness" is an awkward word to use in these contexts.

24 Sometimes how much explanation constitutes sufficient tribunal reasons could be a question of degree, but often it is not. So should the standard of review of adequacy of reasons depend on the precise type of error or inadequacy? Rarely does the standard of review elsewhere depend on the type of error. That analysis would often be too complicated. Indeed, often it would be circular and at best arbitrary. At worst, it would be impossible.

25 Any Court of Appeal has much expertise bearing on what are sufficient reasons to permit meaningful appellate review; few if any tribunals have any advantage there. Unclear writing usually looks clear to its author. Besides, the proof of the pudding is in the eating (reading). The Court of Appeal and the parties eat (read); the tribunal appealed cooks (writes).

26 It is true that more than one method of giving reasons may suffice, in some cases. But that is true of almost all decisions in life, including making new case law. That is not a freestanding ground to adopt a deferential standard of review.

27 The Court of Appeal should extend deference here only to any factual components or background in the reasons. The Court of Appeal should follow the rule that seriously flawed reasons can suffice to allow an appeal. There is

> no principled reason to give deference to the tribunal as to adequacy of its reasons, whether from alternative ways of writing or otherwise. If a standard of review can be named, it is correctness.
>
> [Emphasis added.]

Other interesting cases on reasons

3. *Nowoselsky*

The court in *Nowoselsky v. Alberta College of Social Workers (Appeal Panel)*[70] restated the fundamental principle that a tribunal in professional disciplinary proceedings cannot find the accused guilty of matters not set out in the formal charges. The court stated:[71]

> [19]...The tribunal is not entitled to make findings of culpability just because the evidence reveals something the tribunal feels is misconduct. The items mentioned by the Hearing Tribunal in the "Summary" were not before it, and it was not entitled to use them in adjudicating on the professional responsibility of the appellant.

4. *Sharif*

In *Sharif v. Alberta (Appeals Commission for Alberta Workers' Compensation)*,[72] the Court of Appeal of Alberta allowed an appeal where the Commission's reasons for its decision to accept certain medical evidence over other evidence were not clear. The evidence could have

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70. 2011 ABCA 58; see also *Barrington v. Institute of Chartered Accountants (Ontario)*, 2011 ONCA 409.

71. At para. 19.

72. 2011 ABCA 75.

supported either conclusion, and the decision therefore lacked justification, transparency and intelligibility and was unreasonable.

5. *Mitzel*

In *Mitzel v Alberta (Law Enforcement Review Board)*,[73] the Court of Appeal of Alberta allowed an appeal where the appeal record was incomplete and the Board's reasons did not support why the decision was made or allow a reviewing court to assess the validity of the reasons. The court stated that "this is one of the rare cases ... where essentially nothing was offered by the tribunal to support its decision on the critical issue...".[74] Given the lack of a complete record, the court remitted the matter back to a new panel for consideration.

6. *Moll*

In *Moll v. College of Alberta Psychologists*,[75] the majority of the Court of Appeal found the College's reasons in a disciplinary proceeding were adequate, but added a word of caution to members of disciplinary bodies:[76]

> 38 I would add a cautionary note. Professional disciplinary bodies such as the Council are owed deference because of their expertise in their professional field. But expertise in a health professional field does not necessarily translate into expertise in writing decisions. Nevertheless, there is a minimum standard

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73. 2010 ABCA 336. The reasons did not explain why the board concluded that an individual was part of the complaint.

74. At para. 29.

75. 2011 ABCA 110.

76. At para. 38.

> these bodies must satisfy in the reasons given for their decisions. If professional tribunals do not have the expertise internally to fulfil this task, then steps should be taken to ensure that they secure the necessary resources. The members of the profession in question, as with the public they serve, deserve no less.
>
> [Emphasis added.]

Côté J.A. dissented and concluded that the reasons were inadequate because they merely stated the committee's final conclusions, with no explanation given.[77] He also noted that the statements of fact contained in the reasons were significantly and demonstrably inaccurate.

7. *Green*

Green v. Nova Scotia (Human Rights Commission)[78] dealt with the adequacy of reasons of the Human Rights Commission's decision to dismiss a complaint and not refer it to a board of inquiry. The court reviewed the wording of the legislation and concluded that the Commission had the discretion to dismiss a complaint when the complaint was without merit[79] and that the Commission had satisfied its duty to give reasons by merely stating that the complaint was "without merit". The court held that the Commission's role in screening

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77. See also *Sussman v. College of Alberta Psychologists*, 2010 ABCA 300; *Spinks v. Alberta (Law Enforcement Review Board)*, 2011 ABCA 162 at para. 17; *Deen v. Certified Management Accountants of Alberta (Complaints Inquiry Committee)*, 2011 ABCA 227; *Pridgen v. University of Calgary*, 2010 ABQB 644.

78. 2011 NSCA 47.

79. Section 29(4) of the *Human Rights Act (Nova Scotia)*, R.S.N.S. 1989, c. 214. Other grounds for dismissing a complaint include when it is in the best interest of the individual on whose behalf the complaint is made, where the complaint raises no significant issues of discrimination, where the substance of the complaint has already been dealt with in another proceeding, where the complaint is made in bad faith or is frivolous, where there is no reasonable likelihood of success or where an exemption order has been made.

complaints included a public policy role that required administrative efficiency. The words "without merit" were sufficiently clear for the complainant to understand that the Commission, having weighed the evidence before it, was of the view that the complaint did not warrant referral to a board of inquiry because there was no chance the complaint would succeed.[80]

"Without merit" was clearly a conclusion. Is there some point at which it is simply impossible to give a reason for a conclusion? For example, where the conclusion is a matter of judgment?

8. *New Brunswick (A.G.) v. The Dominion of Canada General Insurance Company*

In *Attorney General of New Brunswick v. The Dominion of Canada General Insurance Company*,[81] the Court of Appeal of New Brunswick stated in no uncertain terms that the fact that a transcript of the board's post-hearing deliberations was provided to the court is no substitute for adequate reasons:[82]

> 5 The fact that a transcript of the Board's post-hearing deliberations made its way onto our Bench is of no moment and no substitute for the crafting of a reasoned decision. While both Dominion and the Attorney General rely on that transcript to bolster their respective positions, it cannot form part of the appeal record. Introduction of the transcript for purposes of "bootstrapping" materially deficient reasons for decision is an imprudent abdication of a tribunal's right to deliberative secrecy in the administrative decision-making

80. At para. 33.

81. 2010 NBCA 82.

82. At para. 5.

> process. To be blunt, it is pure folly to believe that a transcript of disjointed questions, observations, musings and even expressions of opinion by individual decision-makers and their experts is an acceptable substitute for a set of reasons that should be as cogent as they are persuasive, while representing the collective views of only those who have the statutory right to decide.
>
> [Emphasis added.]

C. Bias

Claims of reasonable apprehension of bias continue to be a source of judicial frustration.

1. *Workum*

In *Alberta (Securities Commission) v. Workum*,[83] the two appellants were directors and senior officers of a junior capital pool company. They were both sanctioned by the Alberta Securities Commission for violating financial disclosure requirements, receiving undisclosed financial benefits, as well as a number of other wrongdoings.

On appeal, the appellants raised allegations of bias on four different bases:

(a) institutional bias;
(b) reasonable apprehension of bias as a result of an ongoing investigation regarding members of the Securities Commission;
(c) reasonable apprehension of bias created by the Commission calling its Chief Accountant to give expert testimony; and

83. 2010 ABCA 405.

(d) reasonable apprehension of bias created by the fact that the Commission is entitled to retain the fines it levies (pursuant to the *Securities Act (Alberta)*).

On the issue of institutional bias, the appellants argued that the structure and form of the Commission, the overlapping functions of its members — which resulted in members being involved in investigation and enforcement or adjudicative activities — and the sweeping and significant powers given to members resulted in bias. In the Court of Appeal, Justice McDonald rejected this argument stating:[84]

> 54 In my view, *Brosseau* clearly remains the law of Canada and indeed more recently the Supreme Court of Canada in *Oceanport Hotel Limited v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781, reiterated that the Legislature can create tribunals with overlapping functions as long as a single officer does not participate in the investigation only to sit later as an adjudicator. This of course is not the case here as only the Executive Director can initiate an investigation and that person does not sit on any panel deciding the case. In effect, this supports argument for counsel for the respondent that the investigative and adjudicative functions are now more separate than they were when the system that was considered by the Supreme Court of Canada in *Brosseau* existed.

The appellants also argued that there had been complaints that certain members of the Commission had acted improperly and unfairly in relation to enforcement activities as a whole and that the findings from the Commission's investigation into the allegations were

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84. At para. 54. For another case dealing with allegations of institutional bias, see *Bajwa v. Veterinary Medical Assn. (British Columbia)*, 2011 BCCA 265 where the court dismissed an application for judicial review based on institutional bias because the same issues (whether the tribunal was guilty of systemic discrimination) were being argued before the Human Rights Tribunal.

never made public. The court rejected this argument, holding that the evidence supporting this allegation consisted merely of personal opinion and speculation.[85]

The appellants then raised the argument that a reasonable apprehension of bias was created by the Commission calling its Chief Accountant to give expert evidence. They argued that the Commission was biased in favour of their Chief Accountant's evidence because it was an "institutional impossibility" that the Commission would find against the evidence given by its own Chief Accountant. The court rejected this argument:[86]

> 71 Although the appellants have created a new phrase, their submissions really amount to an argument of reasonable apprehension of institutional bias. In another context, the fact that Snell was a superior official within the same body deciding the case might give rise to a reasonable apprehension of bias. However, in the administrative context, this is not the case. Where the statute creating a tribunal authorizes overlapping functions of this sort, the traditional rules regarding bias do not apply. The oft-quoted statement of L'Heureux-Dubé J. at 310 of *Brosseau*, governs in the administrative context:
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> > Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the

85. At para. 59.

86. At paras. 71 and 72.

> doctrine of "reasonable apprehension of bias" *per se*. In this case, the appellant complains that the Chairman was both the investigator and adjudicator and that, therefore, the hearing should be prevented from continuing on the grounds of reasonable apprehension of bias.
>
> 72 In the same way that it cannot be said that it is impossible for the Commission to find against its own staff, the sole fact that the Chief Accountant is a senior official of the same tribunal does not give rise to a reasonable apprehension of bias....

The court distinguished other cases in which a reasonable apprehension of bias was found where an expert witness was employed by the tribunal on the basis that those cases did not involve the Securities Commission and, more specifically, none involved tribunals whose enabling statute authorize it to hire and retain expert employees such as the Chief Accountant. In contrast, the other cases involved experts being hired on limited retainers.[87]

Finally, the court considered the appellants' argument that a reasonable apprehension of bias arose from the fact the Commission is entitled to keep the administrative penalties it levies. The court reviewed the case law discussing pecuniary bias and concluded that no reasonable apprehension of bias arose in this case where the *Securities Act* specifically provides that any monies the Commission receives from administrative penalties may only be expended for the purposes of educating investors and promoting or otherwise enhancing knowledge of the securities and financial markets.[88]

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87. At paras. 74 to 84.

88. At para. 108, referring to. s. 19(5) of the *Securities Act (Alberta)*.

2. *Jaroslav*

In *Jaroslav v. Canada (Minister of Citizenship & Immigration)*,[89] the applicants were refugee claimants from the Czech Republic. They alleged that the Immigration and Refugee Board was biased because the Minister of Citizenship and Immigration had made public comments that a large number of Czech refugee claims were false or fraudulent. The applicants cited actual statistics in an effort to prove that, following the Minister's comments, the percentage of successful Czech refugee claims drastically decreased and this amounted to evidence of actual bias.

The court dismissed the application for judicial review, holding that no reasonable apprehension of bias had been demonstrated. The court emphasized the need to take the Minister's comments in context. It also concluded that statistical evidence is not sufficient to demonstrate bias and that the Board is an independent decision maker that would not have been influenced by the Minister's comments.

3. *Alberta Teachers' Assn.*

Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)[90] is an example of a successful allegation about bias. The case involved a complaint by a teacher that the Alberta Teachers' Association ("ATA") had breached her privacy rights by inadvertently mailing a letter and Statement of Qualifications (which should have been sent to her) to the wrong ATA member. The Commissioner ordered an inquiry and extended the

89. 2011 FC 634.

90. 2011 ABQB 19.

time for completing review of the case. The ATA objected to the extension of time and requested the inquiry to be terminated.

The Commissioner did not accept the ATA's objection and, in his decision, made some "concluding observations" as follows:[91]

> I make some concluding observations. One is that objections to time extensions add steps that themselves extend the time a matter takes, and expend the resources of this office that could otherwise be used to decide substantive issues. The ATA's complaint is about the time taken on this matter, yet its objection has further delayed the process.
>
> Further, the objection seems intended to ultimately defeat the purposes of the Act. I recognize that a party acts within its rights in bringing an objection based on timing, and organizations that are prejudiced in their ability to respond by the passage of time should not hesitate to do so. However, the ATA has not indicated how it would be prejudiced if the matter were to proceed. A primary purpose of the Act is to enable me to provide direction to organizations as to whether they are in compliance with their duties under the legislation. In the absence of such prejudice, I would ask respondent organizations, even private ones, to consider whether it is in their own and the public interest to make objections for the purpose of avoiding direction as to how to meet their duties under the legislation. As well, it is disingenuous for organizations to selectively rely on the timing provisions of the Act, or not, depending on whether doing so meets their own interests.
>
> My final observation relates to the tone of the ATA's letter. It states:
>
> > As neither of the tests in paragraph 35 [of the ATA case] can be satisfied in this case, I have concluded that this notice of your default is necessary and should suffice to terminate the inquiry process, in accordance with the presumptive consequence set out in paragraph 37(2) [of the ATA case].

91. Reproduced at para. 18.

> Kindly confirm to the parties at your very earliest opportunity that the inquiry is hereby terminated. Thank you for your immediate attention to this matter.
>
> The decision as to whether this inquiry is to continue must be made by me having regard to the submissions of both parties and the facts and law I regard as relevant. This demand that I terminate the inquiry, at my earliest opportunity, simply on the basis of the ATA's "notice of my default", reflects a misunderstanding of the different roles of the parties and the decision maker in this process. The ATA may put forward its views and make submissions, but it is not the decision-maker. Furthermore, while parties need not be deferential, they must be appropriately respectful of the role of the tribunal. I concur with the comment of the Complainant in this case that the demand made by the ATA, as quoted above, is not appropriately respectful.

In an application for judicial review, the ATA argued that the Commissioner's comments gave rise to a reasonable apprehension of bias. Mr. Justice Graesser of the Alberta Court of Queen's Bench agreed. He held that the clear implication from the Commissioner's concluding comments is that he considered that the ATA was being disingenuous in its position on delay.[92] This raised a reasonable apprehension of bias. However, Graesser J. did not accept the ATA's argument that the Commissioner demonstrated bias by criticizing the tone of the ATA's letter, stating that the Commissioner was merely "calling a spade a spade".[93] He stated that:

> 140 ...A party cannot complain that the trier of fact is biased and can no longer hear the case if the trier of fact makes an uncomplimentary but justifiable comment about the party's demeanor. Appropriate admonishments can be made without affecting the impartiality of the trier of fact.

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92. At para. 138.

93. At para. 140.

4. *Lim*

In *Lim v. Association of Professional Engineers of Ontario*,[94] the Ontario Superior Court held that the "astonishing" conduct of a member of the tribunal support staff raised a reasonable apprehension of bias. The court noted that the tribunal's Manager (Legal and Regulatory Affairs):

- refused to respond to requests for consideration of the availability of parties and witnesses in setting dates;
- fixed dates for hearings without consultation with the parties;
- referred to statements from counsel about being unavailable on certain dates as "assertions" and "disingenuous excuses";
- referred to requests for adjournments as "excuses";
- threatened to report counsel for one of the parties to the Law Society;
- sought to have the administrative staff of the tribunal made a party respondent to a motion for a stay; and
- gave the Chair of the tribunal and a panel member advice concerning the addition of support staff as a party.

The court stressed that the conduct of the Manager alone, although unfortunate, did not give rise to a reasonable apprehension of bias. It was the fact that he gave advice concerning the addition of administrative staff as a party — and that the Chair tolerated such conduct — which crossed the line and amounted to a reasonable apprehension of bias.

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94. 2011 ONSC 106, supp. reasons at 2011 ONSC 2673.

D. Miscellaneous cases on procedural fairness

- In *Djakovic v. British Columbia (Workers' Compensation Appeal Tribunal)*,[95] the British Columbia Supreme Court held that the tribunal denied procedural fairness when it refused to allow the injured worker to cross-examine two rehabilitation staff members who were present when he suffered his injury and failed to acknowledge medical evidence which supported the worker's claim.

- In *Macdonald v. Institute of Chartered Accountants of British Columbia*,[96] the British Columbia Court of Appeal held that a tribunal's refusal to grant an adjournment to the appellant for the purposes of retaining counsel did not breach the duty to be fair where the appellant had been given clear notice of the disciplinary proceedings and the opportunity to retain counsel.

- In *Yazdani v. Canada (Minister of Citizenship and Immigration)*,[97] the Federal Court held that the applicants had been denied procedural fairness when their application for permanent residence visas were refused on the grounds that the applicants had failed to supply requested information to the reviewing officer. The request for information had been sent to the applicants via email to their immigration consultant but the emails had not been received. The evidence showed that the emails had been sent, that no notices of delivery failure had been received by the respondent, that a correct and valid email address had

95. 2010 BCSC 1279.

96. 2010 BCCA 492.

97. 2010 FC 885.

been given to the reviewing officer by the applicants and that the consultant was diligent in maintaining his email system. However, there was no evidence that the emails had been received. The request for additional information was a crucial piece of correspondence and the fact that the applicants never received the correspondence meant that they were not provided with notice to update their applications as required. Where there was no evidence that the applicants were at fault for the failed email communications, the court drew an inference that the email communication system had failed for undetermined cause or causes. In such circumstances, it would be unduly harsh to place the risk of failed communication on the applicants.

- *Goold v. Alberta (Child and Youth Advocate)*[98] dealt with an application for judicial review of a decision to remove a lawyer from the Child and Youth Advocate roster. The applicant argued that the duty to be fair had been violated where no oral hearing was held, no cross-examination of witnesses, and no transcripts of proceedings were created. The reviewing court dismissed the application and the Court of Appeal of Alberta dismissed the appeal. The court noted that the applicant had not objected to the process, had overlooked the opportunity to be present and had declined an opportunity to provide written submissions. The court stated that "a person who participates in a procedure without objection will be taken to have waived any claim to an

98. 2011 ABCA 63.

alternative procedure".[99] The Youth Advocate is not a court, and is not obliged to follow formal court procedures.

- In *Barrington v. Institute of Chartered Accountants (Ontario)*,[100] the Ontario Court of Appeal addressed the right to adequate notice in disciplinary proceedings and, particularly, the requirement that the notice adequately set out the charges. The court held that there had been no breach of the duty to be fair where the accused had been found guilty of misconduct arising from an agreement which was not referred to in the charges. The agreement in question was merely evidence that was relevant to the formal charges — it was not a new allegation or particular of the charge — and the accused were not surprised or prejudiced by the tribunal's consideration of the agreement.

- In *Ontario (Director, Disability Support Program) v. Tranchemontagne*,[101] the Ontario Court of Appeal rejected social science evidence on the issue of addictions, substance dependance and whether disqualifying addicts from Ontario's disability support program was beneficial to addicts. The court categorized the evidence as legislative fact evidence that attracted less than the usual degree of appellate deference.[102]

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99. At para. 26, citing *Radhakrishnan v. University of Calgary Faculty Assn.*, 2002 ABCA 182; *Violette v. Brunswick Dental Society*, 2004 NBCA 1; *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191.

100. 2011 ONCA 409.

101. 2010 ONCA 593.

102. At paras. 144 to 159.

IV. STANDING

The past year has seen some noteworthy decisions on the issue of standing.

1. *Leon's Furniture Ltd.*

Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)[103] addressed the standing of Alberta's Information and Privacy Commissioner to make submissions on the merits of an appeal.

Leon's was challenging a decision of an adjudicator (appointed by the Commissioner) which held that Leon's practice of collecting customers' drivers licence numbers and license plate numbers violated the *Personal Information Protection Act*.[104]

Leon's relied on the line of cases starting with *Northwestern Utilities*[105] which held that an administrative tribunal's submissions on judicial review are limited to issues of jurisdiction or to explain the record, but that it should not make submissions on the merit or correctness

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103. 2011 ABCA 94, application for leave to appeal to SCC filed on May 26, 2011, denied November 26, 2011. See also *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2011 BCCA 373; *Timberwolf Log Trading Ltd. v. British Columbia*, 2011 BCCA 70; *Westergaard v. British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 256; *C.O.P.E., Local 378 v. Lantic Inc.*, 2011 BCSC 242; and *College of Nurses of Ontario v. Trozzi*, 2011 ONSC 3659, where the court denied intervenor status to a tribunal in a proceeding not involving its own decision. In doing so, the court considered the jurisprudence on standing.

104. S.A. 2003, c. P-6.5.

105. [1979] 1 S.C.R. 684.

of the decision. *Northwestern Utilities* was recently strongly endorsed by the Court of Appeal of Alberta in *Brewer v. Fraser Milner Casgrain LLP*.[106]

The court adopted a more flexible approach to standing, following the line of cases which includes *Rockyview (Municipal District No. 44) v. Alberta (Planning Board)*[107] and *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*.[108] These cases take a contextual approach to standing, recognizing that some flexibility is required when defining the proper role of tribunals in judicial review proceedings.

Speaking for the majority, Justice Slatter distinguished between tribunals performing adjudicative functions, where both parties are present and participating fully in the proceedings before the tribunal and the court on judicial review, and those tribunals performing more investigative, educational or policy making roles. The court noted that often tribunals become the investigator, prosecutor and adjudicator and have complete carriage of the proceeding. In such cases, the original complainant does not participate at all.[109] While the standing of purely adjudicative tribunals may properly be limited on review or appeal, Slatter J.A. concluded that the standing of tribunals performing multifaceted roles should be decided based on the context and the realities of the situation:[110]

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106. 2008 ABCA 160.

107. (1982), 22 Alta. L.R. (2d) 87 (C.A.).

108. (2005), 75 O.R. (3d) 309 (C.A.).

109. At para. 21. It should be noted that, while Conrad J.A. issued a dissenting judgment, he agreed with Slatter J.A. on the issue of standing.

110. At para. 28.

> 28 I agree that the law should acknowledge the multifaceted roles of many modern administrative tribunals, and the realities of the situation. The *Northwestern Utilities* case should be used as a "source of the fundamental considerations". Its principle will often be applied with full vigour to administrative tribunals that are exercising adjudicative functions, where two adverse parties are present and participating. While the involvement of a tribunal should always be measured, there should be no absolute prohibition on them providing submissions to the court. Whether the tribunal will be allowed to participate, and the extent to which it should participate involves the balancing of a number of considerations.

Justice Slatter said it was not possible to compile a list of all the relevant factors to consider when determining the proper level of participation of a tribunal. However, factors such as the existence of other parties who can effectively make the necessary arguments, the importance of maintaining the appearance of independence and impartiality of the tribunal and the effect of tribunal participation on the overall fairness of the proceedings were all relevant considerations.[111] Slatter J.A. also said the wording of the enabling statute — and whether it effectively gives carriage of the proceedings to the tribunal — and the nature of the proposed arguments should also be considered.

2. *1447743 Alberta Ltd.*

The Court of Appeal of Alberta also readdressed standing in *1447743 Alberta Ltd. v. Calgary (City)*.[112] That case dealt with an application for leave to appeal a decision of the Subdivision and Development Appeal Board refusing a permit to the applicant. A preliminary issue was raised concerning the extent of the Board's standing to participate on the leave application.

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111. At para. 29.

112. 2011 ABCA 84.

Martin J.A. reviewed the case law and concluded that courts have tended to adopt a more lenient attitude in allowing a tribunal to participate in appeal and judicial review proceedings than first applied following *Northwestern Utilities*. He stated:[113]

> 6 I do not understand either *Northwestern* or *Brewer* to establish a hard and fast rule. Rather, these cases indicate the need for a court to examine not only the legislative framework and any rights accorded to the tribunal to appear before the court, but to also consider the extent to which the court is provided with submissions from other interested parties that respond to the attack on the tribunal's decision. Accordingly, the scope permitted of a tribunal to participate in judicial proceedings where its decision is being challenged will largely depend on the exercise of judicial discretion by the court hearing the merits of the proceeding, and should account for the unique circumstances and overall context of that proceeding: see *Paccar*, *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 at para. 35 ("*Children's Lawyer*"), *Pacific Newspaper Group Inc., a Division of CanWest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2009 BCSC 962, 96 B.C.L.R. (4th) 387 at para. 29 ("*Pacific Newspapers*"), *Buttar v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 129, 86 Admin L.R. (4th) 307 at para. 39. Relevant factors will include, but are not limited to, any legislative provisions touching on the scope of the tribunal's authority to appear before the court, and the extent to which other interested parties are able and willing to join issue with the aggrieved party and provide an adversarial context to the proceedings. Additional factors may also include the expertise of the tribunal, the overall context of the proceedings before the tribunal, as well as the nature of the proceeding and the issues raised on appeal or judicial review. Of course, the overriding concern remains the preservation of the tribunal's integrity and impartiality.

Martin J.A. concluded that the Board was entitled to make submissions as to the scope of its jurisdiction and to explain the record, including submissions as to whether the proposed

113. At para. 6.

grounds of appeal were issues of law or jurisdiction or whether they were issues of fact and mixed law.

Finally, Martin J.A. made an interesting point that should likely be noted by all administrative lawyers:[114]

> 22 I find that the Board's written submissions do not appear to overstep the bounds set out above. However, I wish to emphasize the insightful commentary of the Ontario Court of Appeal in *Children's Lawyer*, where it was pointed out that the tribunal's tone and approach should remain respectful of the fact that the parties may, at a future date, appear before it, and the tribunal that "seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary." The overriding concern remains the tribunals' impartiality. The Board will be much more likely to maintain the impression that it will treat the parties with fairness and impartiality in future tribunal proceedings where it adopts a respectful and deferential tone to its submissions, similar to that of an *amicus curiae*, as opposed to an aggressive and defiant approach often characterized by a party litigant.

3. *Alberta Teachers' Association*

In *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*,[115] the Alberta Court of Queen's Bench dealt with an application by the ATA challenging the Commissioner's standing to object to the admission of certain portions of affidavits filed by the ATA that raised issue of bias, fettering of discretion and acting in an unfair, unreasonable

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114. At para. 22.

115. 2011 ABQB 19.

and abusive manner. The affidavits were not part of the record before the Commissioner and were allegedly based on hearsay.

Graesser J. held that the Commissioner had status to make submissions as to the contents of the ATA's affidavits and to defend itself from those types of allegations. He rejected a rigid application of the *Northwestern Utilities* principles:[116]

> 29 Here, the ATA sought to extend the principles from *Northwestern Utilities* to situations where the body being reviewed was accused of bias, fettering its discretion by failing to deal with issues, and acting in an unfair, unreasonable and abusive manner. None of the cases cited by the ATA support the argument that a quasi-judicial tribunal cannot defend itself from those types of allegations.
>
> 30 Had these matters been raised before the Commissioner either in the first instance or following his decision by way of a request for reconsideration, and had the Commissioner been able to deal with these matters in the first instance, it might well have been inappropriate under the *Northwestern Utilities* principles for the Commissioner to argue the merits of his decisions on those issues. But these issues of bias, fettering discretion and unfairness were raised for the first time on this judicial review. I saw nothing improper with the Commissioner making representations with respect to issues that relate to his conduct, and to the propriety of the materials the Applicant put before the Court as they relate to those issues. I saw little difference between allowing the tribunal to make submissions with respect to jurisdiction or the standard of review and responding to attacks on its conduct.
>
> 31 The ATA further argued that any defence of the tribunal should come from the opposing party to the application, in this case Ms. Wright. Certainly in some cases, the Respondent to a judicial review application takes up the cause of defending the tribunal as part of its defence of the decision being reviewed. When that is the case, there may be no need for the tribunal to participate directly on the issue, although I am doubtful that the tribunal must sit back and

116. At paras. 29 to 33.

> say or do nothing if the Respondent makes ineffective arguments, incomplete arguments, or arguments that the tribunal disagrees with. Avoiding duplication of arguments is one thing, but arbitrarily preventing a full discussion of the issues by disallowing active participation by the tribunal is contrary to the interests of justice.
>
> 32 Here, Ms. Wright is self-represented. She should not be expected to argue technical points of law, essentially on behalf of the Commissioner. ... If I were to have acceded to the ATA's argument, the Commissioner would have had to remain silent and unanswering to a vigorous attack on his conduct and his impartiality. The Court would have been put in the difficult position of having to do its own research into the law in the area and then either argue the Commissioner's case for him or play Devil's Advocate with the ATA. That is not a seemly role for the Court, and while sometimes that is necessary on *ex parte* applications or unopposed matters and in other limited circumstances to avoid injustice, it is doubtful that such an approach is appropriate where a quasi-judicial body is being challenged for bias and improper conduct.
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> 33 When the tribunal being challenged is not being defended by the Respondent and the tribunal wants to address the Court on these issues, it would be a rare circumstance that the tribunal should not be heard.

5. *Commentary*

The recent Alberta cases are consistent with developments in Ontario and some cases in British Columbia, and stand in contrast to the earlier decision by the Court of Appeal in *Brewer* which indicated a very strict application of *Northwestern Utilities* (although the issue in *Brewer* was whether the Chief Commissioner of the Human Rights Commission had the legal right to appeal a decision by the Human Rights Panel).

"Value added" seems to be the underlying rationale for allowing standing and greater participatory rights to decision-makers whose decisions are being impugned. Can they add something to the particular process?

These decisions also underline the absolute necessity that the decision-makers must make any submissions in a respectful, non-combative, neutral manner.

And it is important to remember that decision-makers cannot use this standing to re-write or fortify the reasons which they gave (or should have given) when they made their decision.

6. Breaking news—the BC CA decision in Henthorne v. BC Ferries Corp

On November 26, 2011, the British Columbia Court of Appeal issued its decision in *Henthorne v. BC Ferries Corp*, 2011 BCCA 476 reiterating that the narrow view of tribunal standing in *Northwestern Utilities* is the law in British Columbia, and striking out the factum filed by the decision-maker (the WCAT) with costs. This issue is dealt with extensively in both the reasons of Justice Newbury and the reasons of Justice Groberman (with whom Justice Garson agreed). Justice Groberman in particular addressed the question about the standard of review to be applied in determining the question of tribunal standing.

See also the earlier decision by Justice Russell in *Ministry of Public Safety and Solicitor General v. Stelmack and the Information and Privacy Commissioner*, 2011 BCSC 1244 at paragraphs 143-150, which had adopted a somewhat more lenient approach to tribunal standing.

V. MULTIPLE FORUMS: THE *TELEZONE* GROUP OF CASES

Previous papers have discussed the 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*.[117] They have also noted that there were a series of decisions from the Supreme Court of Canada pending on this very issue. Those decisions were released on 23 December 2010.[118]

Background

The issue arises from three Federal Court of Appeal decisions (*Tremblay*, *Grenier* and *Manuge*)[119] which are based on the doctrine against collateral attacks.[120] These decisions effectively converted the doctrine from being a *discretionary* ground for refusing relief into a *jurisdictional limitation* preventing any court from hearing any damage actions which involve unresolved issues about the validity of a decision by a federal board, commission or other tribunal.[121] Needless to say, this line of cases potentially affected not only the

117. R.S.C. 1985, c. F-7.

118. *TeleZone Inc. v. Canada (Attorney General)*, 2010 SCC 62; *Canada (Attorney General) v. McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & Agri-Food)*, 2010 SCC 64; *Nu-Pharm Inc. v. Canada*, 2010 SCC 65; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66; and *Manuge v. Canada*, 2010 SCC 67.

119. *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.

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

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

jurisdiction of the Federal Court itself but also the jurisdiction of provincial superior courts.[122] The Supreme Court of Canada has now effectively reversed these earlier cases.

1. *TeleZone*

TeleZone Inc. filed an action against the Federal Crown in the Ontario Superior Court of Justice claiming breach of contract, negligence and, in the alternative, unjust enrichment arising from a decision of the Minister of Industry Canada that rejected its application for a license to provide telecommunications services.

The Attorney General argued that the action for damages could not be brought before the Superior Court unless and until TeleZone had applied for judicial review of the Minister's decision and the decision was quashed by the Federal Court of Canada. The Attorney General argued that TeleZone's action was an inadmissible collateral attack on the Minister's order and that the Federal Court had exclusive judicial review jurisdiction over decisions of federal boards, commissions and tribunals pursuant to section 18 of the *Federal Courts Act*.[123]

The Ontario Superior Court dismissed the objection on the ground that it was not plain and obvious that the action would fail. The Ontario Court of Appeal upheld the decision, holding that there was concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown.

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

123. R.S.C. 1985, c. F-7. The Attorney General relied on the *Grenier* decision, [2005] FCA 348.

The Supreme Court of Canada dismissed the Attorney General's appeal. Speaking for a unanimous court, Binnie J. stated:[124]

> 5 The Ontario Court of Appeal rejected the Attorney General's position, and in my respectful opinion, it was correct to do so. *Grenier* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.
>
> 6 In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. That being the case, the Superior Court has jurisdiction to proceed. The Ontario Superior Court ((2007), 88 O.R. (3d) 173) and the Ontario Court of Appeal (2008 ONCA 892, 94 O.R. (3d) 19) so held. I agree. I would dismiss the appeal.

Binnie J. went on to articulate the importance of access to justice:[125]

> 18 This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity.

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124. At paras. 5 and 6.

125. At paras. 18 and 19.

> The Court's approach should be practical and pragmatic with that objective in mind.
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> 19 If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

The court rejected the Attorney General's collateral attack argument as well as the claim that "permitting different damages claims to proceed in different provinces before a variety of superior court judges arising out of the same or related federal government decisions would re-introduce the spectre of inconsistency across Canada which the enactment of the *Federal Courts Act* was designed to alleviate".[126] The court was satisfied that this concern must have been considered by Parliament and that sections 17 and 18 of the *Federal Courts Act*[127] itself create a certain amount of overlap with respect to holding the federal government accountable for its decision making. Binnie J. stated that this degree of overlap is inherent in the legislative scheme designed to provide claimants with convenience and a choice of forum in the provincial courts.[128]

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126. At para. 22.

127. R.S.C. 1985, c. F-7.

128. At para. 22, citing statement from the Minister of Justice in Parliament, *House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414).

Justice Binnie then gave an interesting analysis of the nature of judicial review and the distinction between judicial review and an action for damages:[129]

> 24 The Attorney General correctly points to "the substantive differences between public law and private law principles" (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.
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> 25 Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that *do* occur will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.
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> 26 The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs — despite ill-founded allegations of obscenity — than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be

129. At paras. 24 to 32.

unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

27 The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision, to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

28 Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action. It is not necessary because a government decision that is perfectly valid may nevertheless give rise to liability in contract. *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (C.A.), leave to appeal refused, [2003] 1 S.C.R. vii, [2003] S.C.C.A. No. 8) or tort (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201).

29 Nor is a breach of statutory power necessarily sufficient. Many losses caused by government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability" (Factum, at para. 28).

30 In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, Charron J. wrote that "[a] person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or other prosecutorial duties with the result that the accused suffers damage. However,

> the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion" (para. 7 (emphasis added)). H. Woolf, J. Jowell and A. Le Sueur point out in *De Smith's Judicial Review* (6th ed. 2007), that "[u]nlawfulness (in the judicial review sense) and negligence are conceptually distinct" (pp. 924-25). Put another way, while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.
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> 31 The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. See also *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 8.
>
> 32 The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives....
>
> [Emphasis added.]

Finally, Justice Binnie added a minor caveat to his conclusion:[130]

> 78 ... There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has

130. At para. 78.

pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

2. The companion cases

The reasons set out by Binnie J. were expressly adopted in the companion cases of *McArthur*,[131] *Parrish & Heimbecker*,[132] *Nu-Pharm Inc.*,[133] and *Canadian Food Inspection Agency*.[134] These cases make it clear that the principles in *TeleZone* apply regardless of whether the action for damages is brought in a provincial superior court or Federal Court.[135]

In the companion case of *Manuge v. Canada*,[136] the court also adopted the reasoning in *TeleZone* by finding that Manuge, a former member of the Canadian Forces, could bring a class action against the federal Crown for damages arising from a provision of a disability benefit plan. This case is of special mention because it focuses more on the caveat added by Binnie J. in *TeleZone* which gives the court a residual discretion to stay an action for damages if it is premised on public law considerations to such a degree that it is a claim for judicial review with only a thin pretence to a private wrong. The court in *Manuge* held that

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131. 2010 SCC 63, which dealt with an inmate's claim for damages arising from federal prison authorities' decisions which allegedly amounted to arbitrary detention and mistreatment.

132. 2010 SCC 64, which dealt with a company's claim against the federal government for a decision revoking and re-issuing an import license.

133. 2010 SCC 65, which dealt with Nu-Pharm's action for damages against the federal Crown for a decision by Health Canada to prohibit the sale of a drug.

134. 2010 SCC 66, which dealt with an action by three meat producers against the Professional Institute of the Public Service of Canada for having disrupted the marketing of meat.

135. *Parrish & Heimbecker* and *Nu-Pharm* both involved actions for damages in Federal Court. See also *Sivak v. Canada (Minister of Citizenship & Immigration)*, 2011 FC 402.

136. 2010 SCC 67. See also *Kimoto v. Canada (Attorney General)*, 2011 FC 89.

the residual discretion should not be exercised in the case at hand because Manuge had a reasonable cause of action.

3. Breaking news—The SCC's decision in **Figliola***, 2011 SCC 52*

The Supreme Court of Canada issued an important decision on October 26, 2011 about the application of 27(1)(f) of the B.C. human rights legislation which permits the Human Rights Tribunal to dismiss a complaint if it "has been appropriately dealt with in another proceeding". The issue in question was whether the policies of the Workers' Compensation Board breached the *Human Rights Code*. That issue had been dealt with under the Worker's Compensation legislation and the Workers' Compensation Appeal Tribunal ("WCAT") held that there was no breach of the human rights legislation. Figliola did not take the WCAT's decision to judicial review, but rather then made a complaint to the Human Rights Tribunal about the same issue. The Human Rights Tribunal declined to exercise its discretion under section 27(1)(f) to dismiss the complaint, and set the matter down for a full hearing. On judicial review, the B.C. Supreme Court quashed the decision of the Tribunal, but the B.C. Court of Appeal reinstated it.

The Supreme Court of Canada unanimously held that the Human Rights Tribunal's decision was patently unreasonable (the applicable standard of review under B.C.'s *Administrative Procedures Act*) and allowed the appeal. Justice Abella, writing the majority, noted that the statutory provision in question embraced the principles underlying *res judicata*, issue estoppel, and the rule against collateral attack; and was oriented towards "creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching". The reasons given by the Human Rights Tribunal (which included concerns about the procedure in front of the

WCAT although that decision was not taken to judicial review, whether the parties were strictly speaking the same in the two proceedings, and its view that it was more expert in human rights matters than the WCAT) were irrelevant and would have resulted in an unnecessary prolongation and duplication of proceedings which had already been decided by an adjudicator with the requisite authority. Justice Abella saw "no point in wasting the parties' time and resources by sending the matter back for an inevitable result" and dismissed the complaint to the Human Rights Tribunal. Writing a concurring decision on behalf of four of the judges, Justice Cromwell noted that section 27(1)(f) is discretionary in nature, and therefore would have sent the matter back to the Human Rights Tribunal for reconsideration.

Immediate questions for administrative lawyers are:

- Would the result have been the same in the absence of this specific statutory provision granting the Human Rights Tribunal the discretion to dismiss a complaint which has been appropriately dealt with elsewhere? Probably not. It probably does not constitute a generalized doctrine of *forum conveniens* where there is one or more statutory delegates which has jurisdiction over the same matter. At the very least, it does not explicitly reverse the SCC's relatively recent decision in *Tranchemontagne v. Ontario (Director, Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513.

- When should a court make the decision which it thinks the discretionary decision-maker ought to have made, and when should it send the matter back to the original decision-maker to exercise its discretion (perhaps in accordance with directions from the court about what it must or must not consider)?

- In effectively making the decision, did the majority in fact apply the correctness standard of review (even though everyone throughout said that patently unreasonable was the applicable standard of review)?

VI. CONSTITUTIONAL ISSUES

Because administrative law is part of public law, constitutional issues sometimes arise in administrative law litigation.

A. Duty to consult with Aboriginal peoples

Two recent Supreme Court of Canada cases deal with the Crown's duty to consult in Aboriginal matters.

1. *Rio Tinto*

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[137] the court was hearing an appeal from a decision of the British Columbia Utilities Commission which approved an Energy

137. 2010 SCC 43; see also *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2011 ABCA 29.

Purchase Agreement (EPA) authorizing the sale of excess power generated by a dam to BC Hydro. The First Nations argued that the EPA should have been subject to Aboriginal consultation since the dam was on their ancestral homeland.

The Commission accepted that it had the power to consider the adequacy of Aboriginal consultation but held that the consultation issue did not arise because the EPA did not adversely affect any Aboriginal interest. The British Columbia Court of Appeal allowed the First Nations' appeal.

The Supreme Court of Canada allowed the appeal and restored the decision of the Commission. Speaking for the court, McLachlin C.J. noted that the duty to consult is grounded in the honour of the Crown and is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process.[138] The duty to consult arises when three elements are satisfied:[139]

> 31 The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right....
>
> [Emphasis added.]

McLachlin C.J. then considered the role of tribunals in consultation:

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138. At para. 32.

139. At para. 31. Each requirement is discussed at length at paras. 40 to 50.

> 55 The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.
>
> 56 The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.
>
> 57 Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.
>
> 58 Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

McLachlin C.J. rejected the argument that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides:

> 60 This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for

> a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.
>
> 61 A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.
>
> 62 The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

In this case, McLachlin C.J. held that the Commission had the power to consider whether adequate consultation with Aboriginal peoples had taken place and that the Commission had

taken the correct view of the law on the duty to consult. It reasonably concluded that the EPA would not adversely affect any Aboriginal interest giving rise to the duty to consult.[140]

However, BC Hydro is required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them.

2. *Little Salmon*

Beckman v. Little Salmon/Carmacks First Nation[141] dealt with a treaty entered into between the Little Salmon/Carmacks First Nations and the governments of Canada and the Yukon Territory. The treaty gives Little Salmon/Carmacks a right of access for hunting and fishing for subsistence in their traditional territory. They applied to have a decision of Yukon's Land Application Review Committee set aside on the basis that the government had breached the duty to consult by approving an application for an agricultural land grant relating to 65 hectares of surrendered land contained within the boundary of their territorial lands. The Yukon government argued that no consultation was required because the treaty in question was silent on the requirement of consultation in land grant applications. It submitted that the treaty amounted to a complete code which ousted the common law requirement of consultation.

The Yukon Supreme Court set aside the Committee's decision because the Yukon government had failed to comply with the duty to consult and accommodate Aboriginal

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140. The failure to consult on the initial construction of the dam (which occurred in the 1950s) was seen as an underlying infringement which was not sufficient to trigger a duty to consult.

141. 2010 SCC 53.

peoples. In so holding, the court concluded that the treaty did not exclude the duty of consultation, although the duty was at the lower end of the spectrum. The Yukon Court of Appeal agreed that the treaty did not exclude the duty to consult, but it held that the level of consultation conducted by the government fulfilled the duty to consult. It allowed the government's appeal and restored the decision of the Committee.

The Supreme Court of Canada dismissed the First Nations' appeal and held that the government had adequately consulted with the First Nations.

Speaking for the majority, Binnie J. first reviewed the history and purpose of treaties, and particularly, of modern comprehensive land claims treaties. He held that the *source* of the duty to consult lies outside the treaty, that it derives from constitutional values and common law principles. However, he agreed that a treaty may specify the *content* of the duty to consult and that it is therefore necessary to look at the treaty provisions to determine the parties' respective obligations and whether there is some form of consultation provided for in the treaty itself.[142] Binnie J. did not accept the government's argument that the treaty was a complete code. He stated that the duty to consult is derived from the honour of the Crown which is applied independently of the expressed or implied intentions of the parties as set out in the treaty.[143]

Binnie J. distinguished between the duty to consult (in the constitutional sense) and administrative law principles such as procedural fairness. However, he disagreed with the First Nations' argument that administrative law principles do not apply to Aboriginal-Crown disputes. He held that administrative decision-makers regularly have to confine their

142. At para. 67.

143. At para. 38.

decisions within constitutional limits, and in this case that meant respecting the honour of the Crown and the corresponding duty to consult.

In this case, Binnie J. was satisfied that the treaty did provide for some sort of consultation where the land grant might adversely affect the traditional economic and cultural activities of Little Salman/Carmacks. In addition, the treaty itself set out the elements to be considered in determining an appropriate level of consultation, including proper notice, a reasonable period of time for the consulted party to prepare its response, and an opportunity for the consulted party to present its views. Binnie J. was satisfied that the government had fulfilled its obligation to consult and that there had been no breach of procedural fairness.

Deschamps J. delivered the minority judgment.[144] She disagreed with Binnie J.'s view that the common law constitutional duty to consult applies in every case, regardless of the terms of the treaty in question. She did agree, however, that the treaty was not an absolute code. Deschamps J. took the view that the common law constitutional duty to consult Aboriginal peoples applies to the parties to a treaty only if they have said nothing about consultation in respect of the right the Crown seeks to exercise under the treaty.[145] According to Deschamps J., the signature of the treaty entails a change in the nature of consultation — it becomes a duty that applies to the Crown's exercise of rights granted in the treaty as opposed to a measure to prevent the infringement of one or more rights.

144. LeBel J. concurred.

145. At para. 94.

B. *Charter* issues

Three cases discuss *Charter* issues in the context of administrative law.

1. *Pridgen*

Pridgen v. University of Calgary[146] dealt with an allegation of a breach of the right to free expression guaranteed in section 2(b) of the *Charter*.

Two university students posted some disparaging remarks about a professor on Facebook. The University's General Faculties Council Review Committee found them both guilty of non-academic misconduct and placed them on probation. The students applied for judicial review of the Committee's decision.

The first issue to be considered by the reviewing judge was whether the students were precluded from advancing constitutional arguments which were not set out in their Originating Notice. Strekaf J. concluded they were not. She held that the constitutional arguments were not new causes of action, but rather simply additional reasons why the students argued the decision should be set aside. Moreover, the University had not suffered any prejudice by the failure to advance these arguments in the Originating Notice.[147]

Strekaf J. then considered the University's argument that the *Charter* argument was moot because the probation period had expired. She rejected this argument holding that there was no evidentiary basis for concluding that the issue was moot. She cited from *Trang v. Alberta*

146. 2010 ABQB 644.

147. At para. 24.

(Edmonton Remand Centre)[148] in finding that there was a live issue about whether the students' *Charter* rights had been breached and that an application for a declaration could proceed in the absence of a claim for any other remedy.[149]

Strekaf J. went on to conclude that the University is not part of the government so as to make *all* of its actions subject to the *Charter*. Likewise, she held that the University was not in essence performing a municipal function so as to attract *Charter* scrutiny. However, Strekaf J. was satisfied that the University was implementing a specific government policy — the provision of accessible post-secondary education to the public in Alberta. Therefore, she held that the *Charter* did apply to disciplinary proceedings taken by the University against the students. In this case, she concluded that the University did violate the students' freedom of expression and that the violation was not justified under section 1 of the *Charter*. The decision of the Committee was set aside.

2. *Sazant*

In *College of Physicians & Surgeons (Ontario) v. Sazant*,[150] the issue was whether a section of the *Health Professions Procedural Code* violates section 8 of the *Charter* because it delegates all of the investigatory powers of a commission under the *Public Inquiries Act*, including the ability to issue a summons to produce evidence, to College investigators.

148. 2005 ABCA 66.

149. At para. 28.

150. 2011 ONSC 323.

The court was satisfied that there was no question that the *Charter* applies to the College's powers. Likewise, there was no question that compelling the production of evidence through a summons constitutes a "seizure" within the meaning of section 8 of the *Charter*. However, the court concluded that the section of the Code does not violate section 8. The court distinguished Supreme Court of Canada cases such as *Southam*[151] and *Wigglesworth*[152] on the basis that the College was not performing a criminal or "quasi-criminal" investigation. Rather, it was determining whether the appellant should be disqualified from practicing medicine.

The court also distinguished the Supreme Court of Canada decisions on the basis that the power to issue a summons is much less intrusive than the power to issue a search warrant or to enter into premises for the purpose of conducting a search and seizure.

3. *Tranchemontagne (No. 2)*

Ontario (Director, Disability Support Program) v. Tranchemontagne[153] dealt with a provision in the *Ontario Disability Support Program Act*[154] which disqualifies those who are disabled solely because they are dependent on alcohol, drugs or some other chemically active substance from eligibility for disability benefits. The issue was whether the provision

151. *Hunter v. Southam*, [1984] 2 S.C.R. 145.

152. [1987] 2 S.C.R. 541.

153. 2010 ONCA 593.

154. S.O. 1997, c. 25, Sched. B.

violates section 1 of Ontario's *Human Rights Code*[155] which grants the right to equal treatment with respect to services, goods and facilities without discrimination.

The Social Benefits Tribunal held that the provision was discriminatory based on the test set out in *Law v. Canada (Minister of Employment and Immigration)*[156] for establishing discrimination under section 15 of the *Charter*. The Divisional Court upheld the Tribunal's decision.

While the Ontario Court of Appeal dismissed the appeal and agreed that the provision was discriminatory, it did not accept the revised test for discrimination which had been adopted by the Divisional Court. It also disagreed with the Divisional Court's finding that, once a *prima facie* case of discrimination has been established, the onus shifts to the responding party to disprove discrimination.

The Court of Appeal thoroughly reviewed the case law on the test for discrimination and concluded that there is a requirement that the distinction based on a prohibited ground must create a disadvantage.[157]

Also, to establish a *prima facie* case of discrimination, a claimant must demonstrate a distinction on a prohibited ground that creates a disadvantage by perpetuating prejudice or stereotyping.[158]

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155. R.S.O. 1990, c. H.19.

156. [1999] 1 S.C.R. 497.

157. At paras. 73 to 79.

158. At paras. 80 to 107.

Finally, the court held that the burden of proving discrimination always rests with the claimant.[159]

VII. A MISCELLANY OF OTHER DEVELOPMENTS

The following cases do not fit neatly into one of the above headings but are nevertheless interesting for administrative lawyers.

1. *R. v. Imperial Tobacco*

In *R. v. Imperial Tobacco Canada Ltd.*,[160] the Supreme Court of Canada struck out the third party claims of tobacco companies against the Government of Canada. It held that the claims, which were founded in negligent misrepresentation, negligent design, and failure to warn, as well as equity, had no reasonable chance of success. Likewise, the claim that the Federal Crown was a "manufacturer" of tobacco was struck. The case contains an interesting discussion on what constitutes a policy decision that is immune from tort liability. The court concluded that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may be struck on the ground that it cannot ground an action in tort.[161]

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159. At paras. 108 to 127.

160. 2011 SCC 42.

161. At para. 91.

2. The inherent jurisdiction of provincial superior courts

In *R. v. Caron*,[162] the Supreme Court of Canada confirmed that provincial superior courts have inherent jurisdiction to render assistance to inferior courts to enable them to administer justice fully and effectively.[163] This included the power of the Alberta Court of Queen's Bench to issue an interim costs order for proceedings being held in Provincial Court. The court was also satisfied that this inherent jurisdiction extended to making a funding order for proceedings being held in inferior tribunals. The superior court could render assistance but only where the tribunals were powerless to act and it was essential to avoid an injustice that action be taken. However, the jurisdiction should be exercised sparingly and with caution.[164]

3. The "record"—extrinsic materials

Last year's paper discussed *C.S.W.U. Local 1611 v. SELI Canada Inc.*[165] which dealt with the admissibility of 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.

The reviewing judge held that the affidavits, including the unofficial transcripts, were admissible. The British Columbia Court of Appeal granted leave to appeal.

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162. 2011 SCC 5.

163. At para. 24, citing from I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23.

164. At para. 30.

165. 2010 BCSC 243.

Speaking for the majority of the Court of Appeal, Groberman J.A. dismissed the appeal.[166] While the transcripts did not form part of the traditional concept of the "record", they could nevertheless be placed before the court on a judicial review application. Citing with approval from *Hartwig*,[167] the court concluded that a party to judicial review "should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make".[168]

4. Time limit for applying for judicial review

In *Rockwood Community Assn. Ltd. v. Halifax (Regional Municipality)*,[169] the court considered the limitation period for applying for judicial review under Rule 7.05 of Nova Scotia's *Civil Procedure Rules* (which provides that a person may seek judicial review by filing a notice before the earlier of either 25 days after the day the decision is communicated to the person or six months after the days the decision is made). The court held that the Rule does not require personal service or service by registered or certified mail. Provided that the person was informed of the decision, the person in fact would have received communication of the decision and the 25 day time period starts to run. All that is required is awareness of the decision.[170]

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166. 2011 BCCA 353.

167. *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74.

168. At para. 84.

169. 2011 NSSC 91.

170. At paras. 26 to 30.

In *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*,[171] the court held that the six month time limit for applying for judicial review set out in the *Alberta Rules of Court*[172] does not apply to actions seeking true declaratory relief. However, where the action on its face seeks declaratory relief, but in substance challenges a specific act or administrative decision, the limitation period does apply. A party cannot cloak the action as a claim for declaratory relief in order to avoid the six-month limitation period.

5. Double jeopardy

The case of *Macdonald v. Institute of Chartered Accountants of British Columbia*[173] addresses the concept of double jeopardy in the administrative law context. The court confirmed that the rule applies in disciplinary proceedings but that the rule is only engaged where the impugned conduct arises from the same transaction.

6. The requirement of civility

In *Goold v. Alberta (Child and Youth Advocate)*,[174] the Court of Appeal of Alberta reiterated that the obligation of counsel to tenaciously advance the interests of his or her client does not require or justify a lack of civility. Likewise, the requirement of civility is not inconsistent with the independence of the bar or the fundamental duty of counsel to advance the position of the client.

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171. 2011 ABCA 29, application for leave to appeal to SCC filed on March 24, 2011.

172. Rule 753.11.

173. 2010 BCCA 492.

174. 2011 ABCA 63.

7. Canon Law

The case of *Hart v. Roman Catholic Episcopal Corp of the Diocese of Kingston in Canada*[175] differentiated between administrative law and Canon Law. The court concluded that it had no jurisdiction to hear the plaintiff's[176] claim for wrongful or constructive dismissal because the office of Pastor is ecclesiastic in nature and governed by Canon Law. Canon Law dictates the circumstances under which the office of Pastor can be brought to an end. The court will only intervene in such religious disputes where (1) the requirements of natural justice have not been satisfied by the internal processes; or (2) where internal processes have been exhausted. This decision is consistent with the courts' general reluctance to become involved in the internal workings of associations or private organizations (except for ensuring fair procedures).

8. Reconsideration or rescission

In the companion cases of *Watson v. Alberta (Workers' Compensation Board)*[177]and *Lee v. Alberta (Workers' Compensation Board Appeals Commission)*,[178] the Court of Appeal of Alberta held that Dispute Resolution and Decision Review Body of the Alberta Workers' Compensation Board has the jurisdiction to rescind one of its own decisions which was made in error or without authority. Moreover, this jurisdiction exists regardless of whether the legislation expressly grants the power of reconsideration.

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175. 2010 ONSC 4709.

176. The plaintiff was a Roman Catholic priest who was dismissed by the Archdiocese.

177. 2011 ABCA 127.

178. 2011 ABCA 128.

9. Meaning of "employee"

The court in *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*[179] found that a long-time employee of Lockerbie who was sub-contracted to do construction work at the Syncrude plant was not an employee of Syncrude for the purposes of filing a discrimination complaint against Syncrude to the Human Rights Commission.

VIII. RECENT DEVELOPMENTS IN THE UK

Canadian administrative lawyers may be interested in the recent decisions by the Supreme Court of the United Kingdom in *Cart v. The Upper Tribunal (Immigration & Asylum Chamber); R (MR (Pakistan)) v. The Upper Tribunal (Immigration & Asylum Chamber)*[180] and *Eba v. Advocate General for Scotland*.[181]

1. A description of the new adjudicative tribunal system in the United Kingdom

The decisions contain a good description of the new adjudicative tribunal system in the United Kingdom, which can briefly be summarized as follows.

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179. 2011 ABCA 3.

180. [2011] UKSC 28.

181. [2011] UKSC 29.

In 2007, the United Kingdom Parliament created a new system of unified administrative tribunals by passing the *Tribunals, Courts and Enforcement Act 2007*. This new system is not unlike the Administrative Tribunal of Québec.

The legislation creates two levels of tribunals in England and Wales (with some modifications for Scotland and Northern Ireland):

- The First-Tier Tribunal is organized into "chambers" according to subject matter (such as immigration & asylum matters). Most—but not all—adjudicative matters go to this level.

- The Upper Tribunal is also organized into chambers by subject-matter. Some adjudicative matters go directly to the Upper Tribunal. It also hears appeals from the First-Tier Tribunal (with leave, from either level). The Upper Tribunal also has a statutory jurisdiction which is the equivalent of the judicial review jurisdiction of the High Court, if certain conditions are met. The Upper Tribunal is "a superior court of record".

Each chamber has its own president, and consists of members who are judges and non-lawyers. Almost all of the presidents of the Upper Tribunal chambers are High Court Judges (by practice, not by statutory requirement). All of the judges from the ordinary courts are automatically judges of both the First-Tier and the Upper Tribunals. The whole system is presided over by the Senior President of Tribunals (who happens to be a Court of Appeal Judge, but that is not statutorily required).

Unlike in Canada, the Tribunals are considered to be part of the judiciary, not part of the executive.[182] Members of the Tribunals are called "judges".

With leave, a right of appeal on most points of law lies from the Upper Tribunal to the Court of Appeal.

There is no express provision in the 2007 legislation limiting the supervisory jurisdiction of the High Court to review the decisions of the Upper Tribunal.

2. A brief description of the development of the administrative system and judicial review in England

The decision by the Supreme Court in *Cart* contains a very helpful description of the development of the administrative system in England: from the creation of the great variety of administrative tribunals and their specialized nature; their location within their respective departments and with departmental resources (which raised concerns about whether they were sufficiently independent); the *Tribunals and Inquiries Act 1958* which abolished most privative clauses and created the possibility of appeals from administrative tribunals to the High Court; the introduction of the presidential system under which tribunals were headed by judges; the transfer of the tribunals from operating ministries to the Ministry of Justice; and the 2007 legislation.

The decision also traces the varying scope of judicial review—in particular, the simplification of the procedure for obtaining the prerogative writs by the creation of the

182. See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52.

application for judicial review; the recognition that judicial review is available to quash the decision of an inferior court or tribunal for error of law on the face of the record (*Ex parte Shaw*); and the extension in *Anisminic* of the concept of a "jurisdictional error".

In addition, the Court considers the general unavailability of judicial review where there is an adequate right of appeal (analogous to *Harelkin* in Canada).[183]

3. Thoughts for a Canadian administrative lawyer

The decisions raise the following thoughts for Canadian administrative lawyers:

- The development of the unified Tribunal System in the United Kingdom is likely to greatly reduce the number of applications for judicial review, with the result that English law will probably be less relevant to the development of Canadian administrative law in the future.

- The UK Supreme Court does not refer to the concept of "standard of review", although from a Canadian administrative lawyer's eyes that is exactly what the issue was in *Cart*.

- There is a significant difference in the place of adjudicative decision-makers in England compared to Canada—in the former, the Tribunals are part of the Ministry of Justice, not part of the operating department, and not part of the executive. This ensures a significant degree of obvious independence. By

183. *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. The English cases referred to by Lady Lane are: *Woodling v. Secretary of State for Social Services*, [1984] 1 WLR 348 and *R. v. Immigration Appeal Tribunal, Ex parte Bakhtaur Sing*, [1986] 1 WLR 910 (at paras. 19 and 20).

contrast, the Supreme Court of Canada's decision in *Ocean Port* makes it clear that administrative tribunals are part of the executive, which in turn makes it difficult to make arguments about the lack of structural independence. The result in both countries depends upon Parliamentary Sovereignty—it is just that the respective Parliaments have made different decisions about how to structure their adjudicative tribunals.

- Is there merit in creating a unified tribunal system? What has been the experience with the Québec Administrative Tribunal, and does it achieve a better administrative process than in the other provinces which have retained *ad hoc* adjudicative bodies?

- Just as there may be no obviously coherent reason why particular decisions in England at first instance go to a particular level of Tribunal, so in Canada there is no particular coherence about the level of court to which a statutory appeal lies—sometimes appeals lie to the Court of Queen's Bench, other times to the Court of Appeal, without any consistent discernible pattern.

- In the Court of Appeal, Lord Justice Laws had ruled that the mere fact that the Upper Tribunal was a "superior court of record" was not sufficient to prevent judicial review of its decisions. The Supreme Court agreed with this. The author has not researched whether this point has ever been litigated in Canada.

IX. CONCLUSION

Obviously administrative law issues continue to keep Canadian courts, tribunals and administrative lawyers busy. Keeping up is becoming more and more difficult, but more and more important, as the principles appear to be ever-evolving and increasingly flexible.

APPENDIX A

Extract from the decision of Slatter J.A. in *Newton v. Criminal Trial Lawyers' Association* 2010 ABCA 399

Justice Slatter started his analysis with how the Court of Appeal should determine its own standard of review about what the Board had done:[184]

> 28 A threshold issue is to determine the standard of review that the Court of Appeal should apply to the decision of the Board. As noted, the main issue in this appeal is the standard of review that the Board should apply to the decision of the presiding officer. The threshold issue is therefore the "standard of review of the selection of the standard of review". The discussion of the two standards of review necessarily overlaps.

In discussing this threshold issue, Slatter. J.A., speaking for the majority, noted the difference in the relationship between appellate superior courts and trial courts and the relationship between the superior courts and administrative tribunals:

> 29 ...There are at present two main paradigms governing the standard of review analysis: one concerning the relationship between appellate superior courts and trial courts, and the other concerning the relationship between the superior courts and administrative tribunals.
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> 30 The standard of review analysis respecting appellate superior courts and trial courts was definitively stated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. Shortly put, an appellate superior court reviews the decisions of trial courts on questions of law for correctness. Errors of fact, mixed errors of fact and law, and inferences to be drawn from the facts are generally reviewed for palpable and overriding error.
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> 31 The standards of review in *Housen* were set having regard to the fact that an appeal is not intended to be a retrial of the case. Correctness is applied to questions of law, because of the need to have universality in the statement of legal rules, and because of the accepted law-settling role of appellate courts. Deference is accorded to findings of fact (a) to limit the number, length and cost of appeals, (b) to promote the economy and integrity of trial proceedings, and (c) to recognize the expertise and advantageous position of the trial judge: *Housen* at paras.16-8.
>
> 32 The standard of review analysis respecting the relationship between superior courts and administrative tribunals is found in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, building on the platform laid down in *Pushpanathan v. Canada (Minister of*

184. At para. 28.

Citizenship and Immigration), [1998] 1 S.C.R. 982. *Dunsmuir* summarized the standards used at para. 51:

> ... questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

Truly jurisdictional questions are usually reviewed for correctness. Errors of law within the expertise or mandate of the tribunal are often reviewed for reasonableness. Questions of law of more general interest to the legal system are often reviewed for correctness.

33 The standard of review applied by the superior courts to decisions of administrative tribunals recognizes the purely supervisory role of the superior courts. Judicial review has a constitutional foundation related to the rule of law. "The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes": *Dunsmuir* at para. 28. Because the role of the superior courts is supervisory, it is not their place to substitute their judgment for that of the tribunal. The legislature has given the authority to make the decisions under review to the tribunal, not the courts. Therefore, deference to the decision of the tribunal is an important factor in setting the standard of review. The standard of review is set by considering four factors: "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal": *Dunsmuir* at para. 64.

34 It is important to note that the four *Dunsmuir*/*Pushpanathan* factors rest on an unstated assumption: that the relationship of the reviewing and reviewed bodies is a constant. *Dunsmuir*/*Pushpanathan* deals with the relationship between a reviewing s. 96 superior court of justice and an administrative tribunal. The four *Dunsmuir*/*Pushpanathan* factors presume that constant, and the four factors are applied assuming that context. *Housen* also rests on an unstated assumption about the relationship of the reviewing and reviewed bodies. *Housen* deals with the relationship between appellate courts and superior trial courts, which is likewise a constant in the analysis. *Housen* can go one step further than *Dunsmuir*/*Pushpanathan* because the balancing of the relevant factors in setting the standard of review that an appellate court will apply to decisions of a trial court is also a constant, so that the factors that go into that analysis are always the same. Under *Housen* it is not necessary to do the standard of review analysis for each trial court, as must be done under the *Dunsmuir*/*Pushpanathan* paradigm for each administrative tribunal.

35 The *Housen* and the *Dunsmuir*/*Pushpanathan* analyses intersect when a court of appeal is reviewing the decision of a superior trial court, which has judicially reviewed the decision of an administrative tribunal. The trial court must be correct in its selection of the standard of review it should apply to the tribunal: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19 at para. 43:

> At this stage in the analysis, the Court of Appeal is dealing with appellate review of a subordinate court, not judicial review of an administrative decision. As such, the normal rules of appellate review of lower courts as articulated in *Housen*, *supra*, apply.

The selection of the standard of review by the trial court is a question of law which the court of appeal reviews for correctness. This is a pure application of the *Housen* test, not the *Dunsmuir*/*Pushpanathan* test.

36 Some courts have assumed that an appellate administrative tribunal must be correct in its selection of the standard of review it applies to the decision of the tribunal of first instance: *Plimmer v. Calgary (City) Police Service*, 2004 ABCA 175, 29 Alta. L.R. (4th) 243, 354 A.R. 62 at para. 20; *College of Hearing Aid Practitioners of Alberta v. Zieniewicz*, 2003 ABCA 346, 24 Alta. L.R. (4th) 59 at para. 9. Essentially, these courts have assumed that the test set out in *Dr. Q* applies to appellate administrative tribunals. The parties largely conceded the point in this appeal. But as noted, the rule as stated in *Dr. Q* is an application of the *Housen* test, not the *Dunsmuir*/*Pushpanathan* test. Because an appellate administrative tribunal is not analogous to a trial court, the *Housen* test is not obviously the one applicable, and it is not self-evident that *Dr. Q* applies in this context.[185]

Slatter J.A. went on to recognize that the appeal in *Newton* involved a third paradigm: the relationship between an administrative tribunal and an appellate tribunal. The issue is what standard of review should the appellate tribunal apply to the decision of the tribunal of first instance? Should it apply the *Housen* analysis or the *Dunsmuir*/*Pushpanathan* analysis or a different analysis altogether? He concluded that neither analysis was entirely apt:

37 ...They are both based on different constitutional and legal foundations. The relationships that they govern are not necessarily the same as the relationship between an appellate tribunal and an administrative tribunal of first instance. The role of an internal appellate tribunal operating within an administrative structure is significantly different from that of an external reviewing superior court: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 at para. 44; *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)*, 2002 BCCA 473, 216 D.L.R. (4th) 587 at para. 14.

38 *Dunsmuir* at para. 54 outlined some of the issues of law on which a tribunal may be afforded deference, and on which the standard of review applied by a superior court will be deferential:

> Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: ... Deference may also be warranted where an administrative tribunal has developed particular expertise in the application

185. At paras. 29 to 36.

> of a general common law or civil law rule in relation to a specific statutory context ...

The standard of review that should be applied by an appellate administrative tribunal to the decisions of a tribunal of first instance should be categorized as a question of law. The correct answer depends in large part on the exact wording of the statute.

39 Using the *Dunsmuir*/*Pushpanathan* analysis, what standard of review should the Court of Appeal apply to the decision of the Board in its selection of the standard of review of the presiding officer? There is no privative clause, and indeed there is a right of appeal, which signals less deference. The Board's main role is to provide civilian oversight of the police disciplinary process, and it has no expertise in the analysis and setting of standards of review, a technical legal point in which the courts have a considerable amount of experience. That also suggests less deference. Setting the standard of review requires interpretation of the Board's home statute, an issue on which deference is often shown: *Dunsmuir* at paras. 54-5. Further, the Board would have a better awareness of its role within the administrative structure, compared to the role of the presiding officers, which suggests more deference: *Dunsmuir* at para. 49; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 42. However, the appropriate standard of review is a question of general interest to the legal system, and is therefore a question on which *Dunsmuir* would suggest a correctness standard. Setting the standard of review is a legitimate aspect of the superior court's supervisory role, suggesting less deference. When all of these factors are considered, the proper standard of review for this Court to apply to the decision of the Board (in selecting the standard of review it should apply to the decision of the presiding officer) is correctness.

40 To summarize, the proper approach is as follows:

> (a) the superior court should use the *Dunsmuir/Pushpanathan* analysis in determining what standard of review it will apply to the legal question of the appropriate standard of review to be used by the appellate tribunal. The rule in *Dr. Q*, which applies the *Housen* analysis, is not the correct approach.
>
> (b) applying the four *Dunsmuir/Pushpanathan* factors will often result in the superior court applying a correctness standard of review to the selection by the appellate tribunal of the standard of review it will apply to the tribunal of first instance. Subject to the specific provisions of the statute, this is a part of the legitimate supervisory role of the superior court.

In this case the result is the same as the result in *Dr. Q* (a correctness standard of review) but that may not always be the case.[186]

[Emphasis added.]

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186. At paras. 37 to 40.