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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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I. INTRODUCTION

The past year has seen a considerable number of administrative law decisions.[1] Most of the significant decisions have come in the area of standards of review, a concept which is continuing to attract judges' attention, discussion and disagreement. Another important development is whether a delegate's requirement to give reasons for its decision is a stand-alone ground for judicial review. In addition, there are a number of decisions dealing with procedural fairness, multiple forums, standing, and other important administrative law issues.

II. STANDARDS OF REVIEW

Previous papers have analysed the Supreme Court of Canada's decision in *Dunsmuir*[2] which merged the two previous deferential standards of review[3] into the one unified standard of reasonableness, and eliminated the need for any standards-of-review analysis where precedent has already determined that issue.[4]

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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. Portions of this paper were presented to the Canadian Bar Association, Administrative Law Section, Alberta North on April 24, 2012; the Law Society of Newfoundland and Labrador, Continuing Legal Education Seminar on May 23, 2012; and the National Judicial Institute, Atlantic Appellate Courts Seminar in October 2012.

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

3. Reasonableness *simpliciter* and patent unreasonableness (or "reasonableness *complexiter*").

4. 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*?

This past year, Canadian courts have had the opportunity to continue the discussion about the proper standard of review when a delegate is interpreting its home statute, the standard of review when the decision being challenged is discretionary, and the meaning of reasonableness, particularly when the impugned decisions involve rights and freedoms under the *Charter*.

A. Interpretation of home statute

1. *Alberta Teachers' Association*

In December 2011, the Supreme Court of Canada rendered its decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* ("*ATA News*").[5] The court applied the reasonableness standard of review in determining the consequences of the failure by the Commissioner to extend the statutory 90-day time limit for the issuance of the decision on an allegation that the ATA had improperly disclosed a teacher's personal information. In so doing, the Supreme Court of Canada disagreed with the Court of Appeal of Alberta which had applied the correctness standard of review and ruled that the Commissioner had lost jurisdiction.

Although all of the judges agreed that reasonableness was the applicable standard of review and that the Commissioner's interpretation was reasonable, there are three separate judgments which reveal significant conceptual differences about the nature of administrative law, the scope of judicial review, and the Rule of Law.

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5. 2011 SCC 61. See also *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527; *C.J.A., Local 1985 v. Saskatchewan (Labour Relations Board)*, 2011 SKQB 380; *Global Crédit & collection inc. c. Québec (Commission des relations du travail)*, 2011 QCCA 2278.

Decision of Rothstein J. (writing for himself, McLachlin C.J. and Fish, Abella and Charron JJ.):

Justice Rothstein noted that the Commissioner was interpreting his home statute and the question was within his specialized expertise. The time limit question did not fall into any of the categories which attracted the correctness standard. In particular, it was not a "true question of jurisdiction" — which in any event is an ill-defined concept which has caused confusion. There should be a presumption that reasonableness is the applicable standard of review for the statutory delegate's interpretation of its home statute. A party seeking to invoke a "true question of jurisdiction" should be required to demonstrate why the court should not review its interpretation of its home statute on the standard of reasonableness.

Decision of Cromwell J.:

Justice Cromwell noted that the courts have a constitutional responsibility to ensure that administrative action does not exceed its jurisdiction (although courts must also give effect to legislative intent when determining the applicable standard of review). He was concerned that elevating the general guideline that a tribunal's interpretation of its home statute will not often raise a jurisdictional question to a virtually irrefutable presumption goes well beyond saying that deference will usually result where a tribunal's interpretation of its home statute is in issue.

While Justice Cromwell observed that the terms "jurisdictional" and "*vires*" are unhelpful to the standard of review analysis, he emphasized that true questions of jurisdiction and *vires* do exist. There are legal questions in "home" statutes whose resolution the legislatures did not intend to leave to the statutory delegate. The mere fact that the provision in question was found in the home statute does not relieve the reviewing court of its duty to consider the

argument that the provision was one whose interpretation the legislator intended to be reviewed for correctness (which is to be done by examining the provision and other relevant factors).[6]

Decision of Binnie J. (writing for himself and Deschamps J.):

Justice Binnie agreed with Justice Cromwell that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and the Rule of Law. However, the notion of a "true question of jurisdiction or *vires*" is not helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision. Referring to the recent decision in *Mowat*,[7] Justice Binnie suggested a middle and more nuanced approach—namely, if the issue relates to the interpretation and application of a tribunal's home statute, is within its expertise and does not raise questions of general legal importance, the standard of reasonableness will generally apply.

Justice Binnie would restrict the concept of "issues of general legal importance" to those issues whose resolution has significance outside the operation of the statutory scheme under consideration. In Justice Binnie's view, "reasonableness" is a "deceptively simple omnibus term" which gives reviewing judges a broad discretion to choose from a variety of levels of

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6. See also paragraph 40 in Justice Fish's reasons in *Nor-Man*, 2011 SCC 59, where he states: "In proceeding to a contextual analysis [to determine the applicable standard of review], reviewing courts must remain sensitive to the tension between the rule of law and respect for legislatively endowed administrative bodies (*Dunsmuir*, at para. 27)."

7. 2011 SCC 53 (discussed below).

scrutiny from the relatively intense to the not so intense.[8] This calibration is challenging enough without super-adding "an elusive search" for something that can be labelled "a true question of jurisdiction or *vires*".

While Justice Binnie was not prepared to accept Justice Rothstein's creation of a "presumption" that reasonableness would be the standard of review, a simplified approach would be that if the issue relates to the interpretation or application of a tribunal's "home statute" and related statutes that are within its core function and expertise, and the matter does not raise matters of legal importance beyond the statutory scheme under review, the court should afford "a measure of deference under the standard of reasonableness".[9] This would leave the last word on [important and general] questions of law with the courts.

Comments:

A few comments:

- Jurisdictional issues must surely exist. If there were no concept of a jurisdictional issue, what is the constitutional and conceptual justification and authority for courts to intervene when there is a breach of natural justice or procedural fairness? Or, indeed, for the court intervening where a statutory delegate's discretion is unreasonable? And all the more so where the decision is protected by a privative clause?

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8. Note that this relativistic view of "reasonableness" is diametrically opposed to Justice Iacobucci's observation in *Ryan* that "reasonable" is an objective test whose content is not to be determined by reference to what might be "correct".

9. The concept of "a measure of deference" raises the same issue that is discussed in the previous footnote.

- How does one determine which issues the legislator intended to be reviewed for correctness?

- Why should the courts ever defer on a question of law? (Apart from a decision which is protected by a privative clause, or perhaps where the decision is discretionary in nature.)

- When does a statutory delegate have "expertise" about a particular matter, and how is that demonstrated to the reviewing court?

- What types of legal questions are of a sufficiently general and important nature to attract the correctness standard of review?[10]

2. *Mowat* and *Kelly*

Last year's paper discussed *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* ("*Mowat*"),[11] in which 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 deference, the Court concluded that the Tribunal's

10. Prior to the *Nor-Man* decision by the SCC, might the legal requirements for an estoppel be a question of general importance to the legal system? See the next section in the paper.

11. 2011 SCC 53.

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.

This year, the Court of Appeal of Alberta dealt with a similar issue in *Kelly v. Alberta (Energy Resources Conservation Board*.[12] The issue in *Kelly* was whether section 26 of the *Energy Resources Conservation Act*[13] gave the Board authority to award costs to an intervenor. The Court stated:

> 8 Decisions of the Board which involve the interpretation and application of the *Act*, the *Rules of Practice* or Directive 031 will be reviewed for reasonableness. Such questions of law engage the mandate and expertise of the Board, and its decisions on them are entitled to deference: *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 28, [2011] 1 SCR 160; *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349 at para. 20, 464 AR 315; *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325 at para. 13.
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> 9 True issues of jurisdiction are reviewed for correctness, but they rarely arise: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39. In this appeal, the ability of the Board to enact the Directive is likely jurisdictional, but the *vires* of the Directive is not in dispute. The interpretation and application of the Directive by the Board is reviewable for reasonableness.

3. *Rogers Communications Inc.*

In Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada,[14] Rothstein J., writing for the majority, held that correctness was the applicable standard of review even though the provisions in question were in the Copyright Board's

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12. 2012 ABCA 19.

13. RSA 2000, c. E-10.

14. 2012 SCC 35. But see *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 (discussed below).

home statute, because under the statutory scheme the court also had jurisdiction with respect to the very same legal issues, so the Board could not have greater expertise:

> 15 Because of the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions. This concurrent jurisdiction of the Board and the court at first instance in interpreting the *Copyright Act* rebuts the presumption of reasonableness review of the Board's decisions on questions of law under its home statute. This is consistent with *Dunsmuir*, which directed that "[a] discrete and special administrative regime in which the decision maker has special expertise" was a "facto[r that] will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied" (para. 55). Because of the jurisdiction at first instance that it shares with the courts, the Board cannot be said to operate in such a "discrete ... administrative regime". Therefore, I cannot agree with Abella J. that the fact that courts routinely carry out the same interpretive tasks as the board at first instance "does not detract from the Board's particular familiarity and expertise with the provisions of the *Copyright Act*" (para. 11). In these circumstances, courts must be assumed to have the same familiarity and expertise with the statute as the board. Accordingly, I am of the opinion that in *SOCAN v. CAIP*, Binnie J. determined in a satisfactory manner that the standard of correctness should be the appropriate standard of review on questions of law arising on judicial review from the Copyright Board (*Dunsmuir*, at para. 62).
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> [Emphasis in the original.]

In a dissenting decision, Abella J. would have applied the reasonableness standard of review.[15]

15. At paras. 58*ff*.

4. *Georgia Strait Alliance*

In *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)*,[16] the Federal Court of Appeal addressed the level of deference to be given to a Minister in interpreting his or her home statute.

The Minister of Fisheries and Oceans argued that he was responsible for administering the regulatory schemes under the *Species at Risk Act*[17] and the *Fisheries Act*,[18] and, therefore, that his interpretation of those provisions was entitled to deference.

The Court of Appeal rejected the Minister's argument and concluded that no deference was owed to the Minister. The Court made a distinction between adjudicative statutory delegates (who are entitled to deference on interpreting their home statutes) and non-adjudicative delegates (such as Ministers, who must be correct in their interpretation unless there is a privative clause). The Court gave a very thorough and thoughtful analysis of the historical and constitutional foundations of judicial review and the modern Canadian approach to judicial review of questions of law, including *Dunsmuir*, *Celgene*, *Mowat* and *Smith Alliance*.[19]

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16. 2012 FCA 40.

17. S.C. 2002, c. 29.

18. R.S.C. 1985, c. F-14.

19. See Appendix A.

B. Standard of review of discretionary decisions

Several recent decisions have considered the standard of review to be applied when reviewing discretionary decisions by statutory delegates.

1. *Figliola*

In *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (the "*Figliola*" case),[20] three workers sought compensation from British Columbia's Workers' Compensation Board for injuries which included chronic pain.

The Board's chronic pain policy provided for a fixed award of 2.5% of total disability for chronic pain. The workers each appealed to the Board's Review Division, arguing that the fixed compensation policy was patently unreasonable, violated section 15 of the *Charter* and was discriminatory on the grounds of disability contrary to section 8 of British Columbia's *Human Rights Code* (the *Code*).[21]

The WCB Review Officer held that he only had jurisdiction to deal with the human rights issue — it was the Workers' Compensation Appeal Tribunal ("WCAT") that had authority to scrutinize whether policies of the Board were patently unreasonable or violated the *Charter*. He went on to conclude that the policy in question did not breach the *Code*. The workers appealed the decision to the WCAT. However, before the appeal was heard, the

20. 2011 SCC 52.

21. RSBC 1996, c. 210.

British Columbia Legislature amended the legislation to remove WCAT's authority to apply the *Code*.[22]

The workers then made the same complaint to the British Columbia Human Rights Tribunal. The Board brought a motion before the Tribunal to dismiss the new complaint, on the basis that the Tribunal had no jurisdiction because of section 27(1)(a) of the *Code*, and also that the complaint had already been "appropriately dealt with" by the Board's Review Division.[23] The Tribunal rejected both arguments.

On judicial review, the Supreme Court of British Columbia set aside the Tribunal's decision.[24] The Court of Appeal reversed, and restored the Tribunal's decision.[25]

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22. Compare the situation under Part 2 of the Alberta *Administrative Procedures and Jurisdiction Act*.

23. Section 27 provides as follows:

> 27(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
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> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> . . .
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding [. . . .]

24. 2009 BCSC 377, 93 B.C.L.R. (4th) 384 (Madam Justice Stromberg-Stein).

25. 2010 BCCA 77, 2 B.C.L.R. (5th) 274.

In October 2011, the Supreme Court of Canada unanimously held that the Human Rights Tribunal's decision was patently unreasonable (the applicable standard of review under British Columbia's *Administrative Procedures Act*) and allowed the appeal.

Justice Abella, writing for the majority, noted that the statutory provision in question embraced the principles underlying *res judicata*, issue estoppel, and the rule against collateral attack; and it 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.

Query: 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)?

2. *Halifax (Regional Municipality) v. N.S. (Human Rights Commission)*

In March 2012, the unanimous decision of the Supreme Court of Canada in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*[26] greatly narrowed the concept of "preliminary or collateral" questions of law which engage the correctness standard of review, virtually reversing the longstanding decision in *Bell v. Ontario Human Rights Commission*.[27]

The issue in *Halifax* arose out of the decision by the Nova Scotia Human Rights Commission to refer a complaint to a board of inquiry. The Nova Scotia Supreme Court had prohibited the board from proceeding, but the Court of Appeal reversed that decision and cleared the way for the board of inquiry to proceed. The Supreme Court of Canada dismissed the appeal.

In dismissing the appeal, Justice Cromwell, writing for a unanimous court, noted that the Commission's decision to appoint the board of inquiry was discretionary in nature, and did not involve a decision that the complaint fell within the purview of the *Act*. Such a discretionary decision by the Commission should be reviewed on the reasonableness standard of review, and it was reasonable in law and on the evidence before the Commission.

While *Bell (1971)* remains good authority for the proposition that referral decisions are subject to judicial review, Canadian administrative law has moved on and many questions which previously would have been considered "jurisdictional" would not be necessarily

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26. 2012 SCC 10.

27. [1971] S.C.R. 756.

labelled as such today.[28] The court should have the statutory delegate's full record and decision about the matter in question, rather than deciding the matter prematurely in the abstract, regardless of whether the standard of review with respect to the issue in question is ultimately determined to be correctness or reasonableness.

Questions:

- Are there any matters which clearly are preliminary or collateral which would justify the court intervening prior to the actual decision having been made by the statutory delegate?

- If not, did the Supreme Court of Canada just abolish prohibition?

- Does it follow that the discretionary nature of the preliminary or collateral decision—so that reasonableness would be the applicable standard of review—means that the court could never intervene prophylactically where the decision was clearly unreasonable?

- Didn't the Supreme Court of Canada make precisely this type of intervention at the outset in *Figliola*?

28. Consistent with Justice Dickson's admonition in *C.U.P.E. v. NB Liquor Corp.*, [1979] 2 S.C.R. 277.

- Is it appropriate for the court to intervene with prohibition where there is a breach of natural justice or procedural fairness?[29]

C. The meaning of reasonableness

Once the court has determined that reasonableness is the applicable standard of review, that is not the end of the matter—the court must then continue to determine whether the impugned decision *is* reasonable. This requires one to use some yardstick for determining what is "reasonable".

On the one hand, the courts have made it clear that "reasonable" is highly contextual—therefore subject to excellent advocacy. On the other hand, in at least some cases one might suspect that the courts are determining "reasonableness" by reference to their view about what would be "correct"—"correctness" in the guise of reasonableness.[30] Nor is "correctness"/ "reasonableness" the appropriate standard for reviewing issues of natural justice and fairness—where the court asks whether the procedure was *fair*, not whether it was "correct" or "reasonable".

Finally, one might continue to question whether the "correctness"/ "reasonableness" standard of review analysis is universally applicable to all cases, regardless of the ground for judicial review, or only to cases involving adjudicative decisions: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 (*per* Justice LeBel).

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29. *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369.

30. Contrary to Justice Iacobucci's admonition in *Ryan*.

1. *Catalyst Paper Corp. v. North Cowichan (District)*

Catalyst Paper Corp. v. North Cowichan (District)[31] dealt with an appeal from a decision upholding a municipal taxation bylaw. The appellant argued that the bylaw was unreasonable because it resulted in a disproportionate property tax increase to property it owned. Both the British Columbia Supreme Court and the Court of Appeal rejected the appellant's argument.

The Supreme Court of Canada also dismissed the appeal. After restating the general principle that a delegating legislator is presumed to intend that a municipal authority exercise its power to pass bylaws in a reasonable manner, the court accepted that the standard of review in such cases is reasonableness.[32]

Speaking for the court, McLachlan C.J. went on to address what the standard of reasonableness requires in the context of the case:

> 17 ...Catalyst argues that the issue is whether the tax bylaw falls within a range of reasonable outcomes, having regard to objective factors relating to consumption of municipal services, factors Catalyst has outlined in a study called the "Consumption of Services Model". The District of North Cowichan, on the other hand, argues that reasonableness, in the context of municipal taxation bylaws, must take into account not only matters directly related to the treatment of a particular taxpayer in terms of consumption, but a broad array of social, economic and demographic factors relating to the community as a whole. The critical question is what factors the court should consider in determining what lies within the range of possible reasonable outcomes. Is it the narrow group of objective consumption-related factors urged by Catalyst? Or is it a broader spectrum of social, economic and political factors, as urged by North Cowichan?

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31. 2012 SCC 2.

32. At paras. 15 and 16. Note that the Court did not refer to its previous decision in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485.

> 18 The answer lies in *Dunsmuir*'s recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry: *Dunsmuir*, at para. 64. As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. For this reason, it is useful to look at how courts have approached this type of decision in the past: *Dunsmuir*, at paras. 54 and 57. To put it in terms of this case, we should ask how courts reviewing municipal bylaws pre-*Dunsmuir* have proceeded. This approach does not contradict the fact that the ultimate question is whether the decision falls within a range of reasonable outcomes. It simply recognizes that reasonableness depends on the context.
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> 19 The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. Rather, they involve an array of social, economic, political and other non-legal considerations. "Municipal governments are democratic institutions", *per* LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33.
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> [Emphasis added.]

McLachlan C.J. rejected the appellant's argument that *Dunsmuir* has changed the notion of reasonableness to require all municipal taxation bylaws to be demonstrably reasonable, having regard to objective criteria relating to taxation:

> 23 This argument misreads *Dunsmuir*. As discussed above, *Dunsmuir* described reasonableness as a flexible deferential standard that varies with the context and the nature of the impugned administrative act. In doing so, *Dunsmuir* expressly stated that the approaches to review developed in particular contexts in previous cases continue to be relevant: *Dunsmuir*, at paras. 54 and 57. Here the context is the adoption of municipal bylaws. The cases dealing with review of such bylaws relied on by the trial judge and discussed above continue to be relevant and applicable. To put it succinctly, they point the way to what is reasonable in the particular context of bylaws passed by democratically elected municipal councils.

> 24 It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.
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> 25 Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.

2. *Doré v. Barreau du Québec* and *Charter* issues

In *Doré v. Barreau du Québec*,[33] the Supreme Court of Canada discussed the reasonableness standard in the *Charter* context. A lawyer had been reprimanded by a disciplinary tribunal for writing a letter to a Superior Court judge accusing him of using his court to "launch ugly, vulgar, and mean personal attacks". The lawyer applied for judicial review of the disciplinary decision on the grounds that it violated his freedom of expression under the *Charter*.

The applications judge upheld the reprimand and the Quebec Court of Appeal dismissed the appeal. In so doing, the Court of Appeal applied the section 1 *Oakes* analysis and concluded that the lawyer's letter had limited importance compared to the values underlying freedom of expression, that the disciplinary tribunal's decision had a rational connection to the important objective of protecting the public and that the effects of the decision were proportionate to its objectives.

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33. 2012 SCC 12. See also *U.F.C.W., Local 401 v. Alberta (Information & Privacy Commissioner)*, 2012 ABCA 130.

The Supreme Court of Canada unanimously dismissed the lawyer's appeal. In its decision, the Court addressed the issue of how to reconcile the concept of reasonableness in the administrative law context with the concept of "reasonable limits" under section 1 of the *Charter*. While the normal approach in judicial review is to review discretionary decisions on a standard of reasonableness, the question was whether the presence of a *Charter* issue called for the replacement of the standard reasonableness analysis with that of the *Oakes* test.

Speaking for the majority, Abella J. distinguished between cases involving the issue of whether a law violates the *Charter* and cases involving the issue of whether an adjudicated decision violates the *Charter*. She held that in assessing whether a delegate's decision violates the *Charter*, the court should not apply the *Oakes* test in a formulaic manner. Rather, it should consider whether the delegate disproportionately, and therefore unreasonably, limited the *Charter* right. Abella J. said:

> 4 It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?
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> 5 We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection—meaning its guarantees and values—we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

> 6 In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
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> [Emphasis added.]

Abella J. concluded that the reasonableness standard should not be different when the issue is the disciplinary body's application of *Charter* protections while exercising its discretion.[34] The reasonableness standard should always be contingent on its context. Where *Charter* issues are at stake, the reasonableness analysis should centre on proportionality; that is, on ensuring that the decision interferes with the relevant *Charter* right no more than is necessary given the statutory objectives.[35]

3. *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*

In *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*,[36] the Supreme Court shed more light on the meaning of reasonableness in the context of municipal taxation and a Minister's discretion to determine land values for the purposes of the payments in lieu of taxes regime. The case dealt with an appeal from a decision of the

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34. See Appendix B for an extract from Justice Abella's judgment on this point.

35. At. para. 7.

36. 2012 SCC 29.

Federal Court of Appeal which held that the Minister's decision that a historical land site was effectively valueless because it did not support commercial activities was reasonable.

Cromwell J. delivered the judgment of the court and allowed the appeal, holding that the Minister's decision was unreasonable. He first noted that the role of the Minister of Public Works and Government Services under the payments in lieu of taxes regime was to reach an opinion about the value of federally owned property that would be attributed to it by a local assessment authority. Provided that he or she applied the correct legal test, the Minister's decision would be reviewed on a standard of reasonableness:

> 43 The Minister's decision under the Act is discretionary within the legal framework provided by the legislation, as explained in *Montreal Port Authority*: see paras. 32-38. Provided that the Minister applies the correct legal test, his or her exercise of discretion is judicially reviewed for reasonableness: see *Montreal Port Authority*, at paras. 33-36; and *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41. The exercise of discretion must be consistent with the principles governing the application of the Act and with the Act's purposes: *Montreal Port Authority*, at para. 47. As LeBel J. said in *Lake* in the context of ministerial discretion in relation to extradition, "[t]he Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable": para. 41.
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> 44 Reasonableness review is concerned both with the transparency and intelligibility of the reasons given for a decision and with the outcome of the decision-making process: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47; *Montreal Port Authority*, at para. 38. As Abella J. has recently explained in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": para. 14.

In this case, the court held that the decision was unreasonable because the Minister merely accepted the advice of an advisory panel on the valuation of the land and concluded that the value of historic site was nominal because it did not support commercial activities. However,

the nominal value would not be established by an assessment authority. Also, the decision was unreasonable because it was inconsistent with the purposes of federal legislation which recognized the value of historic land sites for taxation purposes.

D. Standard of review and promissory estoppel

Last year's paper discussed *The Manitoba Association of Health Care Professionals v. Nor-Man Regional Health Authority*[37] in which the Manitoba Court of Appeal applied the correctness standard of review where an arbitrator had applied the doctrine of promissory estoppel.

In December 2011, the Supreme Court of Canada allowed the appeal and decided that the requirements for estoppel in a labour relations matter did not fit into the category of 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".[38] Therefore, the reasonableness standard of review applied, and the decision in question was reasonable.

An arbitrator had 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.

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37. 2010 MBCA 55.

38. One of the categories that *Dunsmuir* contemplated would attract the correctness standard.

The Court of Appeal 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.[39]

In the Court of Appeal'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.

In a unanimous decision written by Justice Fish, the Supreme Court of Canada reversed the Court of Appeal's decision and held that the appropriate standard of review was reasonableness in light of the expertise of labour arbitrators and the very wide range of remedial authority granted to them.[40] In addition, the labour arbitrator's application of the doctrine of estoppel was transparent, intelligible and coherent (which relates to the separate issue of judicial review of the adequacy of reasons).

In reaching this result, Justice Fish adopted the approach he used in *Alliance Pipeline* of referring to a catalogue of categories of issues which attract the correctness standard of review[41] (by contrast, see Justice Deschamps' disagreement with this approach in *Alliance Pipeline*).

> [4] In my respectful view, the Court of Appeal erred in reviewing the arbitrator's decision for correctness: reasonableness is the applicable standard.

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39. At paras. 38 and 39.

40. 2011 SCC 59.

41. See paras. 35 and 36.

> [5] Labour arbitrators are not legally bound to apply equitable and common law principles—including estoppel—in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.
>
> [6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.
>
> [7] The arbitrator's decision in this case falls well within those bounds. I would allow the appeal and restore his award.

After referring to *Smith v. Alliance Pipeline*, Justice Fish noted that "[p]revailing case law clearly establishes that arbitral awards under a collective agreement are subject, as a general rule, to the reasonableness standard of review."[42] The question was whether the issue in this case was within an exception to the general rule. Referring to the categories which constitute exceptions to the general rule (as he did in *Smith v. Alliance Pipeline*),[43] Justice Fish held that none of the exceptions applied. Rather, he saw the matter differently:

> [37] In this case, the Court of Appeal held ... that correctness was the governing standard because, in its view, the issue involved a question of central importance to the legal system as a whole that was beyond the expertise of the arbitrator.
>
> [38] ... Our concern here is with an estoppel imposed as a remedy by an arbitrator seized of a grievance in virtue of a collective agreement. No aspect of this remedy transforms it into 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" within the meaning of *Dunsmuir* (para. 60). It therefore cannot be said to fall within that established category of question— nor any other—subject to review for correctness pursuant to *Dunsmuir*.

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42. At para. 31.

43. At. para. 35.

> [39] Moreover, the second step of the standard of review inquiry mandated by *Dunsmuir*—a contextual analysis—confirms that reasonableness, not correctness, is the appropriate standard of review.
>
> [40] In proceeding to a contextual analysis, reviewing courts must remain sensitive to the tension between the rule of law and respect for legislatively endowed administrative bodies (*Dunsmuir*, at para. 27). Four non-exhaustive contextual factors have been identified in the jurisprudence to guide courts through this exercise: (1) the presence or absence of a privative clause; (2) the purposes of the tribunal; (3) the nature of the question at issue; and (4) the expertise of the tribunal (*Dunsmuir*, at para. 64).
>
> [41] These contextual guideposts confirm that deference is appropriate in this case.

To the extent that the case can fairly be characterized as involving a discretionary *remedy*, this outcome might be justified by the Supreme Court of Canada's earlier decision in *Lethbridge Community College*.[44]

However, Justice Fish went on to the second stage of the *Dunsmuir* analysis, and concluded that the four *Pushapanathan* factors also militated in favour of a deferential standard of review. He held[45] that arbitrators have both the legal authority and the expertise required to adapt and apply common law and equitable doctrines in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context. He said that this authority flows from the broad grant of authority vested in labour arbitrators by collective agreements and by the governing statutes,[46] as well as their distinctive role in fostering peace in industrial

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44. *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28, [2004] 1 S.C.R. 727. See also paragraph 51 where Justice Fish refers to arbitrators "having the right to craft labour specific *remedial* doctrines". (Emphasis added.)

45. At para. 44.

46. At para. 46.

relations.[47] Within this domain, labour arbitrators have the right to craft labour-specific *remedial* doctrines.[48] However, he recognized that:[49]

> [52] ... the domain reserved to arbitral discretion is by no means boundless. An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to judicial review for its reasonableness.

Justice Fish rejected the suggestion that legislative action would be required to engage this flexible application of estoppel in the field of labour relations. In his view, the requisite legislative authority already existed, and this type of flexibility was inherent in the labour relations statutory schemes in force in Manitoba and other jurisdictions.[50] He also held that the way the arbitrator applied the flexible labour-relations version of the doctrine of estoppel was not unreasonable in the circumstances of this case.[51]

Justice Fish then went on to consider at some length the nature of labour arbitration, the broad grant of authority vested in labour arbitrators by collective agreements and statutes, their goal of resolving "the real substance of the matter in dispute between the parties", the need for the collective agreement to continue until the next round of negotiations, the

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47. At para. 47.

48. At para. 51.

49. At para. 52.

50. At para. 53. Question: To what extent may one refer to statutory schemes in other jurisdictions in interpreting what the legislature of a particular province has enacted?

51. At paras. 56 to 61.

institutional (if not necessarily personal) expertise of labour arbitrators, and the presence of a privative clause in the legislation.[52]

Comments:

Some comments:

- Is the *ratio* of *Nor-Man* restricted to the labour relations context, and really just an extension of the Supreme Court of Canada's decision in *Lethbridge Community College* about the broad remedial jurisdiction of labour arbitrators? In other words, can this case can be characterized as only dealing with the remedial jurisdiction of a labour arbitrator? If so, perhaps it is not surprising (except perhaps in Alberta, where it necessarily must undercut the Court of Appeal's longstanding decision in *Smoky River Coal*,[53] which the Court of Appeal only recently stated remained good law).[54]

- Would *Barrie Public Utilities*[55] be decided differently today?

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52. See especially paras. 40*ff*.

53. *Smoky River Coal Ltd. v. United Steelworkers of America, Local 7621* (1985), 18 D.L.R. (4th) 742 (ABCA).

54. *Calgary Fire Fighters Association (International Association of Fire Fighters, Local 255) v. Calgary (City)*, 2011 ABCA 121.

55. 2003 SCC 28, [2002] 1 S.C.R. 476.

- What is meant by "expertise", and how would a court know if a statutory delegate has greater expertise than the court about the particular matter in question?

- Are there any types of legal questions which are of central importance to the legal system as a whole and not within the expertise of the statutory delegate? If so, what might they be?

- If the requirements for an estoppel are not a general and important question of law, what type of question would ever fit within this category?

- Where did the Legislature give a labour arbitrator the authority to change the requirements of an estoppel?

- How does one determine the intent of the legislature to authorize a statutory delegate to give a different meaning to well-recognized legal doctrines?

- What is the role of legislative intent in determining the applicable standard of review (as opposed to the court's judicial fiat about whether what the statutory delegate did was reasonable in all the circumstances)?

  See Justice Cromwell's observation in *Information and Privacy Commissioner v. Alberta Teachers' Association*, 2011 SCC 61 (discussed above) that the legislature might intend the statutory delegate to be correct in interpreting some provisions in the statutory delegate's "home statute".

- Does the reasonableness of the statutory delegate's decision always equate to a determination that the legislature intended the statutory delegate to have the authority to make that (reasonable) decision?

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

United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung[56] is a recent case that discusses the effect, if any, that *Dunsmuir* has on the standard of patently unreasonableness in section 58(2) of British Columbia's *Administrative Tribunals Act* (the *ATA*).[57]

The case dealt with an appeal from an order dismissing the application for judicial review of two related decisions of the Labour Relations Board. The first decision found that the appellant union had breached its duty of fair representation and the second decision refused to grant leave to reconsider the first decision.

The Court of Appeal concluded that the appropriate standard of review in this case was patently unreasonableness.[58] It went on to discuss the scope of review for patent unreasonableness and rejected the appellant's argument that the scope had been altered by *Dunsmuir*:

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56. 2011 BCCA 527.

57. S.B.C. 2004, c. 45.

58. The applications judge had concluded that the issues concerning procedural fairness (right to an oral hearing and adequacy of reasons) should be reviewed on the standard of fairness set out in section 58(2)(b) of the *ATA* while the standard of patently unreasonableness would apply to all other issues. However, the appellant reframed the issues on the appeal and did not pursue its concerns about procedural fairness.

67 The appellant asserts that "[t]he Chambers judge erred in failing to interpret 'patent unreasonableness' in light of *Dunsmuir* and the principles of administrative law generally" (para. 46). It states that "'patent unreasonableness' is no longer necessarily interchangeable with 'irrational'" and contends that the standard requires "that a decision be defensible in respect of the facts and the law" (paras. 44-45). There is no question that a decision must be defensible in respect of the facts and the law, but I do not read *Dunsmuir* as confining the concept of "irrationality" to the standard of patent unreasonableness. The court's concern in *Dunsmuir* regarding the proper approach to "irrationality" had to do with having a standard's being determined by the degree of irrationality (paras. 41-42).

68 The judge considered the appellant's position and stated at para. 59 that "[t]he Supreme Court's jurisprudence has not diluted or otherwise altered the patent unreasonableness standard under the [*ATA*]". I agree with this observation.

69 The Court in *Dunsmuir* gave guidance for considering the reasonableness of administrative decisions and the appropriate level of deference, stating:

> [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, 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.
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> ...
>
> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of

> administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

70 In *Viking Logistics Ltd. v. British Columbia (Workers' Compensation Board)*, 2010 BCSC 1340, 14 B.C.L.R. (5th) 176 Madam Justice H. Holmes had this to say:

> ... 'patently unreasonable', in s. 58(2)(a) of the *ATA*, is not to be simply replaced by 'reasonable', because such a substitution would disregard the legislator's clear intent that the decision under review receive great deference. Standing at the upper end of the 'reasonableness' spectrum, the 'patently unreasonable' standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is in the inquiry into whether the decision is so 'defensible' that the decision will enjoy the high degree of deference the legislator intended.

71 That is, while an analysis under the standard of patent unreasonableness in this case includes consideration of whether the Board's decision was defensible in respect of the facts and the law, this does not dilute the considerable deference to which Board decisions are entitled.

72 In *Khela v. Mission Institution (Warden)*, 2011 BCCA 450 at para. 68, in a different context, I observed:

> Pre-*Dunsmuir*, the court looked at the decisions of prison administrators through the lens of patent unreasonableness, or stated that this was the standard of review for the inquiry. In my view, post-*Dunsmuir*, the inquiry looks at the reasonableness of such decisions, but with the considerable deference required by the context. All that has changed is the terminology that did away with patent unreasonableness.

73 I would not accede to the appellant's contention that *Dunsmuir* altered the scope of judicial review on the standard of patent unreasonableness as mandated by the *ATA*. The Board remains entitled to considerable deference.

F. Intellectual property cases

The Supreme Court of Canada recently issued a series of decisions about intellectual property —and at least some of them address standards of review, in a somewhat perplexing way.

1. *Rogers Communications Inc.*

As noted above, the majority in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*[59] held that correctness was the applicable standard of review even though the provisions in question were found in the Copyright Board's home statute, and did not involve issues of general importance to the legal system as a whole, because under the statutory scheme the court also had jurisdiction with respect to the very same legal issues, so the Board could not have greater expertise.

Query: Is comparative expertise the determinative factor?

2. *Society of Composers, Authors and Music Publishers of Canada*

In *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*,[60] Abella J., writing for the unanimous court, did not explicitly address standard of review. However, it appears that she in fact applied the correctness standard of review, because she identified the "proper" meaning of "research" and agreed that the usage in question was "fair dealing". She did not say that the decision below was "reasonable".

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59. 2012 SCC 35.

60. 2012 SCC 36.

3. *Sound*

In *Sound v. Motion Picture Theatre Associations of Canada*,[61] LeBel J. did not find it necessary to discuss the standard of review because, in his opinion, the result of the appeal did not depend on which of the two standards was applied, because, in any event, the Board's decision was correct.[62]

4. *Entertainment Software Association*

In *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*,[63] the majority[64] of the court (written by Abella and Moldaver JJ.) overturned the decision of the Copyright Board and its interpretation of "communication". The majority did not refer to the standard of review, but it is clear that they applied the correctness standard because they reached their own interpretation about the meaning. The minority (written by Rothstein J.) cross-referenced his decision in *Rogers* (discussed above) that the standard of review is correctness.[65]

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61. 2012 SCC 38.

62. Which is reminiscent of Sopinka J.'s approach in *PACCAR*, which was rejected in *Pushpanathan*, *Ryan* and *Dr. Q*.

63. 2012 SCC 34.

64. In a 5 to 4 split decision.

65. At para. 67.

5. *Alberta (Education)*

Finally, in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*,[66] the issue was whether teachers' copying material for use by students was "fair dealing". The Copyright Board held that it was not. The Federal Court of Appeal held that the Board's decision was reasonable. That decision was appealed to the Supreme Court of Canada. The court split 5 to 4. Justice Abella, writing for the majority, held that the Board's decision was unreasonable because it adopted an incorrect approach to addressing that question:

> [37] This Court in *CCH* stated that whether something is "fair" is a question of fact and "a matter of impression" (para. 52, citing *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027). As a result, the Board's decision as to whether the photocopies amount to fair dealing is to be reviewed, as it was by the Federal Court of Appeal, on a reasonableness standard. Because the Board's finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable.

The minority (written by Rothstein J.) held that the Board's decision was reasonable, even though there appeared to be no evidence to support one part of its decision:

> [57] I agree with Justice Abella that the Board's conclusion that the photocopying of Category 4 copies "compete[s] with the original to an extent that makes the dealing unfair" (Board, at para. 111) seems unsupported by evidence. Even accepting that it was reasonable for the Board to conclude, based on the evidence of declining book sales, that photocopying had a negative impact on the work, it appears from para. 111 of its reasons that the Board came to this conclusion by referring to the total amount of photocopying across Canada — 250 million pages, the bulk of which is already paid for through the tariff — and not the 16.9 million Category 4 copies. Determining the effect of the Category 4 dealing on the work required relating those photocopies to the work and determining whether the effect of those copies was sufficiently important to "compete

66. 2012 SCC 37.

> with the market of the original work" (*CCH*, at para. 59). I would be inclined to find this conclusion unreasonable.
>
> [58] However, I do not think that an unreasonable observation under this one factor is sufficient to render the Board's overall assessment unreasonable. As noted in *CCH*, no one factor is determinative (paras. 59-60) and the assessment of fairness remains fact specific. In the appellants' own submission, the Board in this case considered the "purpose of the dealing" and the "amount of the dealing" factors to be the most important (A.F., at para. 45). In light of my conclusion that the Board's assessment under those and other factors was reasonable, I would not find the entire decision unreasonable because of this one finding.

Given that these cases did not raise an issue of general importance to the legal system as a whole, why would correctness be the applicable standard of review, after *ATA News*? To the extent that reasonableness was the applicable standard of review, do we know anything more about what constitutes a "reasonable" decision beyond a particular judge's impressions? This makes predictability very difficult, encourages continued litigation, and provides considerable scope for creative and persuasive advocacy.

G. Other noteworthy decisions on standards of review

1. *Irving Pulp & Paper Ltd.*

Irving Pulp & Paper Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 30[67] involved a union's appeal from the dismissal of a grievance challenging the employer's random and mandatory alcohol testing policy for employees in safety sensitive positions. An employee filed a grievance challenging the "without cause" aspect of the policy. An arbitration board allowed the grievance, holding that the employer failed to establish a need for the policy given the level of safety risk involved. The board held the

67. 2011 NBCA 58.

workplace was not an "ultra-dangerous workplace" and, therefore, the employer would have to adduce evidence of prior incidents of alcohol-related incidents in the workplace to justify the policy. The judge on judicial review accepted the mutual submissions of the parties and applied the reasonableness standard of review. He held that the arbitration board's decision to distinguish between a dangerous workplace and an "ultra-dangerous" workplace was unreasonable and quashed the decision. The union appealed that decision.

On appeal, Justice Robertson, writing for the New Brunswick Court of Appeal, held that the lower court had erred by applying a standard of review of reasonableness. Instead, he held that the issue of whether the employer's policy of mandatory random alcohol testing had to be supported by sufficient evidence of alcohol-related incidents in the workplace was a question of law to be reviewed on a standard of correctness:

> 21 This Court is under no obligation to agree with the application judge's decision to accept the parties' mutual submission that reasonableness is the proper standard of review. Moreover, having raised the issue with counsel at the appeal hearing, we are under no obligation to decide whether the application judge properly applied that standard to the arbitration board's decision. As stated at the outset, this appeal involves a question of law. Are we to presume that it is the prerogative of individual labour arbitrators throughout the country to determine the analytical framework upon which to evaluate whether drug and alcohol testing policies are reasonable, even though some of the lead cases are the product of the judicial pen? Are we to assume that labour arbitrators dealing with alcohol and drug testing policies can lay claim to a relative expertise not possessed by the judiciary? I answer both questions in the negative and raise a third: How does a reviewing court deal with the reality that the arbitral jurisprudence reveals what have been described as competing analytical frameworks or tests? In my view, there comes a point where the goal of certainty in the law must overshadow the precepts of the deference doctrine. This is one of those cases.
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> 22 As a general proposition, this Court has accorded deference to decisions of the Labour and Employment Board, individual labour arbitrators and labour arbitration panels involving questions of law arising from the interpretation of a collective agreement or the enabling legislation. Nothing that was decided in *Dunsmuir*, save for the notion of jurisdictional questions, detracts from the earlier jurisprudence of this Court. Thus, I am left with the task of justifying the decision to apply the correctness

standard of review to the arbitration board's decision. My reasoning is not complicated. The central questions raised on this appeal require the decision maker to strike a proper balance between the right of an employer to adopt policies that promote safety in the workplace, and an employee's right to privacy or to freedom from discrimination in those cases where the challenge is brought under human rights legislation. When viewed through these prescriptive lenses, it is only natural to ask whether arbitrators possess a relative expertise that supports a finding that the Legislature intended that deference would be accorded to arbitration decisions involving drug and alcohol testing.

23 Certainly, the Supreme Court has yet to accord deference to an administrative tribunal with respect to questions of law umbilically tied to human rights issues: see Jones and de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at 553. Similarly, the Supreme Court has held various privacy commissioners do not have greater expertise about the meaning of certain concepts found in their respective statutes which limit or define their authority: see Jones and de Villars at 553, note 223. Accepting that no analogy is perfect, I see no reason why this Court should depart from those precedents. Indeed, if one looks to the arbitral jurisprudence, one is struck by the reliance on judicial opinions touching on the matter. The overlap reflects the general importance of the issues in the law and of the need to promote consistency and, hence, certainty, in the jurisprudence. Finally, I am struck by the fact that there comes a point where administrative decision makers are unable to reach a consensus on a particular point of law, but the parties seek a solution which promotes certainty in the law, freed from the tenets of the deference doctrine. In the present case, it is evident that the arbitral jurisprudence is not consistent when it comes to providing an answer to the central question raised on this appeal. Hence, it falls on this Court to provide a definitive answer so far as New Brunswick is concerned. This is why I am prepared to apply the review standard of correctness. But this is not to suggest that I am about to ignore the arbitral jurisprudence which has evolved over the last two decades. Let me explain.

24 In holding that correctness is the proper standard of review with respect to the legal question posed, I do not want to leave the impression the arbitral jurisprudence dealing with random alcohol testing suddenly becomes irrelevant and the review court should embark upon a fresh analysis, immune from the principles and analytical frameworks being applied by adjudicative tribunals. To the contrary, the arbitral jurisprudence of the last decade has gone a long way to defining what reasonableness means when assessing the enforceability of alcohol and drug testing policies in the workplace. In particular, one has to recognize the significant contributions of arbitrators such as Michel G. Picher. He was the arbitrator and author in the seminal *CN Rail* decision referred to earlier and which has been consistently cited and applied by arbitrators throughout the country. Arbitrator Picher was also the chair of the arbitration

> board and author of two decisions that wound their way through the Ontario Courts: the *Nanticoke* and *Entrop* decisions, also cited above.
>
> [Emphasis added.]

However, the Court of Appeal went on to dismiss the appeal on the basis that the arbitration board had erred by holding that the policy would only be justified in an "ultra-dangerous" category of workplace.

It should be noted that leave to appeal the decision to the Supreme Court of Canada has been granted and the case is expected to be heard later this year.

2. *Alberta Union of Public Employees v. Alberta*

The reasoning of the court in *Irving Pulp and Paper* was questioned by the Alberta Court of Queen's Bench in *Alberta Union of Public Employees v. Alberta*.[68] In that case, the sole issue was whether an Arbitrator had erred in dismissing a grievance based on lack of jurisdiction. The grievance related to allegations of discrimination.

The Alberta Court of Queen's Bench held that the standard of review for decisions of labour arbitrators under the particular collective agreement had been established in prior jurisprudence as being reasonableness. The fact that the judicial review related to a question of jurisdiction or *vires* did not change the standard of review:

> 15 The caution on this topic dates back more than 30 years: the courts should not "brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so". See *Canadian Union of Public*

68. 2011 ABQB 752 (Hillier J.).

> *Employees, Local 963 v. New Brunswick Liquor Corp*, [1979] 2 SCR 227 at 233, as referenced in *Dunsmuir* at para 35 and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 SCR 160 at para 36.

16 The standard of review for arbitrators dealing with jurisdiction under this Collective Agreement has been set and confirmed by two decisions of the Alberta Court of Appeal: *Alberta v. Alberta Union of Provincial Employees*, 2008 ABCA 258, 433 AR 159 ("*Davis*") and *Alberta Union of Provincial Employees v Alberta*, 2010 ABCA 147, 194 LAC (4th) 1 ("*Guay*") at para 6.

17 The conclusion reached in these decisions exempts the Court from conducting a contextual standard of review analysis in these circumstances. Since the arbitrator is specifically empowered to decide whether a grievance is arbitrable (Code, s. 135; Collective Agreement, Article 29) the question is not a true matter of jurisdiction but the exercise of:

> 29 ...its core jurisdiction in interpreting its own statute, the Collective Agreement and labour law cases. This contextual factor suggests deference. Moreover, the Board has developed particular expertise on such interpretive issues. This factor also suggests deference. In the result, we conclude that the appropriate standard of review for the Board's decision is reasonableness.
> (*Davis*)

18 I am not persuaded that any differences as between arbitration decisions to date, nor the scope of the legal issue under consideration here, detracts in any material way from these two binding decisions. In *Davis*, the Court of Appeal examined whether a board of arbitration made a reviewable error in *exercising* limited jurisdiction to determine whether the employer acted in bad faith in dismissing a probationary employee. In *Guay*, the Court of Appeal considered whether an arbitrator committed a reviewable error in *declining* jurisdiction for a competition grievance alleging discrimination. The reasonableness standard was applied by the Court in reviewing both decisions.

19 As to the concern about clarification of divergent lines of authority, this issue too has been fairly well settled. There is nothing to preclude arbitrators from reaching different interpretations under the terms of the same collective agreement. In *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers' Association* (2001), 56 OR (3d) 85, 150 OAC 2, the Ontario Court of Appeal supported two conflicting interpretations in the face of a prior judicial review. See also *Ottawa Police Association v. Ottawa Police Services Board* (2008), 233 OAC 51, [2008] OJ No 277 (Div Ct) at paras 30-31.

20 Even if conflicting decisions allowed judicial intervention as a matter of course, a variation of the standard of review would not follow. Administrative law cases have emphasized that the deference accorded to tribunals interpreting their home legislation is not to be overridden by a need for consistency. In *Domtar Inc v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, [1993] SCJ No 75, L'Heureux-Dubé J. stated at 796-97:

> In my opinion, there is a real risk that superior courts, by exercising review for inconsistency, may be transformed into genuine appellate jurisdictions. Far from being neutral, the concept of consistency is an elusive parameter which, varying depending on the objective sought, may distort the very nature of judicial review. The arbitrariness which the judicial sanction is designed to remedy may, thus, become the result. In *Bibeault*, [1988] 2 S.C.R. 1048, *supra*, Beetz J. commented as follows on the use of the theory of preliminary or collateral questions as a means of arriving at judicial review (at p. 1087):
>
> > The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" [Emphasis added.]
>
> In my opinion, questions as to the advisability of resolving a jurisprudential conflict avoid the main issue, namely, who is in the best position to rule on the impugned decision. Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. Any inquiry into decision-making inconsistency where there is no patently unreasonable error thus diverts courts of law from the fundamental question which the legislature has in any case already answered.

21 In my view this rationale applies most strongly in a labour relations context. Although different and perhaps even irreconcilable results may leave parties with some uncertainties, they are at liberty to address the matter in collective bargaining. Obviously, in many circumstances that is not a complete solution for the individuals

> involved, but it is consistent with the Alberta legislative model which leaves the choice of dispute resolution largely up to the parties.
>
> 22 Accordingly, neither the question of jurisdiction nor the reconciliation of conflicting cases gives rise to a change in the standard of review. Consistent with *Dunsmuir* (paras 62-64) and as confirmed in *Smith* (paras 24-26) the Court is satisfied that the law is settled: the governing standard of review is reasonableness in these circumstances. To the extent this conclusion is at odds with the reasoning in *Irving Pulp* (paras 4-5), with the utmost respect, I am not satisfied that the approach taken in that case is consistent with *Dunsmuir*, which case binds this Court.

3. *Henthorne v. British Columbia Ferry Services Inc.*

In *Henthorne v. British Columbia Ferry Services Inc.*,[69] the British Columbia Court of Appeal discussed the standard of review to be applied by an appellate court when dealing with the application by the lower court of the applicable standard of review.[70] The issue was whether the appellate court should show deference to the lower court and only intervene if the lower court has made a palpable and overriding error in how it applied the appropriate standard of review (*ie.* apply the reasonableness standard) or whether the appellate court can substitute its own view of how the applicable standard of review should be applied (*ie.* apply the correctness standard).

Justice Groberman concluded that no deference was owed by the appeal court:[71]

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69. 2011 BCCA 476. A similar issue arose in *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 which was discussed in last year's paper and the Supreme Court of Canada denied leave to appeal in that case.

70. The issue relates to *how* the lower court applied the applicable standard of review; not whether it applied the appropriate standard of review. See also *Pridgen v. University of Calgary*, 2012 ABCA 139.

71. Garson J.A. concurred.

70 With respect to the broader question of the standard of appellate review on appeals from judicial review applications, I am not convinced that anything in *Dr. Q* casts doubt on the principles.

71 *Dr. Q* was not a case arising out of judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Rather, it was a statutory appeal from a decision of an Inquiry Committee of the B.C. College of Physicians and Surgeons. The issue in the case was whether or not findings of fact made by the Inquiry Committee should be upheld. The chambers judge had considered the proper test to be as follows:

> [39] When exercising the function of an Appellate Court, I am mindful that the question to be asked in reviewing the evidence as a whole and the conclusions of the tribunal of first instance, is not, is there any evidence which can support the conclusions? In this case, there is some such evidence. The question is, instead, is the evidence sufficiently cogent that it is safe to uphold the findings of the panel.
>
> (*Re Dr. Q*, [1999] B.C.J. No. 2408, 1999 CanLII 5112 (S.C.))

72 This Court accepted that the Supreme Court judge was correct in finding that her function included the re-weighing of the evidence. Further, this Court held that it was required to defer to the findings of the Supreme Court judge:

> [T]his is a case about the weighing of the evidence and the re-weighing of the evidence in the appeal process. The standard that we must apply in assessing the judgment of Madam Justice Koenigsberg is whether in her re-weighing of the evidence she was clearly wrong.
>
> *Q. v. College of Physicians & Surgeons of British Columbia*, 2001 BCCA 241 at para. 25.

73 The Supreme Court of Canada disagreed, holding that the chambers judge erred in re-weighing the evidence. The fact that the proceedings before her were by way of appeal rather than judicial review did not give her the power to re-evaluate the evidence. The Court also held that this Court had erred in deferring to the chambers judge's determination. In doing so, it said, at para. 43:

> The role of the Court of Appeal was to determine whether the reviewing judge had chosen and applied the correct standard of review, and in the event she had not, to assess the administrative body's decision in light of the correct standard of review, reasonableness. 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 question of the right standard to select and apply is one of law and, therefore, must be answered correctly by a reviewing judge.

74 Accordingly, no deference is owed to the reviewing judge in respect of his or her determination of the appropriate standard of review. That standard may, under *Dunsmuir*, be a standard of correctness or one of reasonableness. Other standards may be established by statute - for instance, patent unreasonableness under the *Administrative Tribunals Act*. Whatever standard applies, however, the question for the reviewing court is whether the tribunal erred in law by making a decision that did not satisfy the standard. The question of whether the tribunal decision met the standard is a question of law on which the reviewing court will not be entitled to deference on appeal.

75 As I read *Dr. Q*, the point made by the Court in the passage quoted above is simply that no deference is to be afforded to a subordinate court on an issue of law, whether that court is a decision-maker in the first instance or is reviewing the decision of an administrative body. In that sense, the subordinate court is not in the privileged position that some administrative tribunals are on judicial review.

76 It is because no deference is afforded the court of first instance on either the issue of the appropriate standard of review or the application of that standard that Rothstein J.A. (as he then was) said, in *Prairie Acid Rain Coalition* (at para. 14), that "[i]n practical terms, this means that the appellate court itself reviews the tribunal decision on the correct standard of review. That proposition has been quoted and followed in numerous cases, including *Corbiere v. Wikwemikong Tribal Police Services Board*, 2007 FCA 97 and *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23.

77 I would add only one note of caution. While judicial review applications are concerned almost exclusively with questions of law, there are certain exceptions. A chambers judge on a judicial review application may be called upon to make original findings of fact in limited circumstances - for example, it might be alleged that a tribunal breached the requirements of procedural fairness in a manner that is not evident from the tribunal's formal record. In deciding the issue, the chambers judge may have to weigh affidavit evidence (or testimony) to determine what actually occurred. Whenever a chambers judge is legitimately called upon to make original findings of fact on a judicial review application, the criteria set out in *Housen* dictate that an appellate court will grant deference to these findings.

78 Equally, a chambers judge on judicial review may be called upon to exercise discretion, either in deciding to allow the application to proceed, or in determining the appropriate remedy. Such original exercises of discretion by the chambers judge are also entitled to deference under the analysis in *Housen* (see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 39).

> 79 In summary, it is my view that even when judicial review is concerned with alleged errors of fact by the tribunal, the issues before the reviewing court will be questions of law. Indeed, almost all judicial review applications concern issues of law. On those issues, an appeal court owes no deference to the chambers judge. In accordance with the criteria set out in *Housen*, then, the appellate court will, for practical purposes be in the same position as it would be if it were reviewing the decision of the tribunal directly. Deference will be owed to the chambers judge who conducted the judicial review only in those limited situations where he or she was called upon to make an original finding of fact, or to undertake an original exercise of discretion.
>
> [Emphasis added.]

4. *Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board)*

In *Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board)*,[72] the Court of Appeal of Alberta rejected the appellant's argument that when a delegate has a statutory duty to give reasons, the standard of review in assessing the reasons is more demanding, and correctness applies.[73]

III. NATURAL JUSTICE AND PROCEDURAL FAIRNESS

The most significant decisions discussing the duty to be fair this year involve the duty of a delegate to give reasons for its decision, and whether inadequacy or lack of reasons is a stand-alone ground for judicial review, and what possible remedies might be available where reasons are inadequate or completely lacking.

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72. 2012 ABCA 208.

73. This case is discussed in more detail under the "Requirement to give Reasons", below.

A. The requirement to give reasons

1. *Newfoundland and Labrador Nurses' Union*

The most noteworthy case on procedural fairness this past year is the Supreme Court of Canada's decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador Treasury Board*.[74]

In unanimous reasons written by Justice Abella for a seven member panel, the Supreme Court made it clear that the inadequacy of a statutory delegate's reasons is not a stand-alone ground for judicial review, but is to be determined as part of the overall *Dunsmuir* appraisal of the reasonableness of the decision:

> 12 ...the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]
> >
> > (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

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74. 2011 SCC 62. See also *Calgary (City) v. Alberta (Municipal Government Board)*, 2012 ABCA 13 and *Cameron Corporation v. Edmonton (Subdivision and Development Appeal Board)*, 2011 ABCA 363.

See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2004), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.

13 This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. That was the basis for this Court's new direction in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s. 12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal

> made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> 17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

The Supreme Court of Canada's decision probably overtakes the reasoning of the Alberta Court of Queen's Bench in *BTC Properties II Ltd. v. Calgary (City)*[75] and the Court of Appeal of Alberta in *Spinks v. Alberta (Law Enforcement Review Board)*[76] which were both noted in last year's paper.

2. Requirement to give reasons in reconsideration applications

In *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*,[77] the British Columbia Court of Appeal addressed the requirement to give reasons for decisions denying leave to apply for reconsideration under the *Employment Standards Act*.[78] The Labour Relations Board had adopted a policy of not providing reasons for denying leaves to apply

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75. 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.

76. 2011 ABCA 162.

77. 2011 BCCA 527.

78. R.S.B.C. 1996, c. 113.

for reconsideration.[79] The Board's practice was to receive full submissions on both leave and the merits, and, if it concluded that leave should be granted, to deal with leave and the merits in one decision. If it decided that leave should be refused, it would simply deny leave without providing reasons.

The Court of Appeal disagreed with the Board's practice and held that, while the requirement to give reasons is not overly onerous in such cases, it is desirable for reasons to be given nonetheless (*per* Chiasson J.A.):

> 50 The Legislature has entrusted to the Board, not the court, the task of determining whether original decisions conform to principles mandated under the *Code*. When leave to reconsider is refused because an original decision conforms to these principles, the parties are entitled to know why and to be able to make an informed consideration of any potential grounds for judicial review.
>
> 51 In my view, the importance of preserving the legislative scheme of review established by the *Code* outweighs the Board's reluctance to provide reasons for refusing leave to reconsider. The legislation, Board policy, and experience suggest that the task of giving adequate reasons is not onerous.
>
> 52 The legislation prescribes the grounds on which leave for reconsideration may be granted, which in practice translates into the grounds on which generally it is refused. In *Brinco*, the Board stated clearly the criteria that must be met by an applicant seeking leave. Since *RG Properties*, the Board has sometimes given very terse reasons and on other occasions very detailed reasons. This variability likely flows from the Board's view of the exigencies applicable to individual cases. As a general rule, I see no reason for a detailed examination of the merits in reasons refusing leave. In cases where leave is refused because an original decision is not inconsistent with the principles of the *Code*, a court on judicial review will be apprized fully of the bases for an applicant's assertion that the Board's conclusion is unreasonable. In addition, a court's consideration of the Board's refusal to grant leave likely will be informed by the original decision, as well as by other relevant surrounding circumstances.

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79. See para. 31: "The Board considered the comments of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and concluded that the duty of procedural fairness does not require the Board to give reasons for decisions denying leave to apply for reconsideration of an earlier decision for which reasons have already been given (para. 27)."

. . .

88 Generally, where the Board refuses leave to reconsider an original decision, judicial review should be taken only of the decision refusing leave. It is likely that the original decision will inform the court's review. It is desirable that sufficient reasons, which need not be extensive, be given to inform the parties why leave has been refused and to enable sufficient consideration for an application for judicial review.

[Emphasis added.]

3. Other decisions on the requirement to give reasons

- In *Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board)*,[80] the Court of Appeal of Alberta rejected the appellant's argument that when a delegate has a statutory duty to give reasons, the standard of review in assessing the reasons is more demanding, and correctness applies. The court concluded that tribunal reasons are to be assessed on the reasonableness standard, even if a tribunal is statutorily obligated to give reasons.[81]

- In *2127423 Manitoba Ltd. (c.o.b. London Limos) v. Unicity Taxi Ltd.*,[82] the Manitoba Court of Appeal noted that in determining whether written reasons are required in a particular case, the failure of the person complaining about lack of reasons to request written reasons may be a factor for the court to consider on an application for judicial review.[83] It also noted that the duty of

80. 2012 ABCA 208.

81. At para. 26.

82. 2012 MBCA 75.

83. At para. 45.

fairness normally only requires for reasons to be provided to the persons whose interests are being directly affected.[84] Finally, it held that the lack of written reasons did not in and of itself constitute a breach of the duty to be fair in this particular case because the record acted as a sufficient surrogate for formal, written reasons so that a person could understand the rationale behind the Board's decision.[85]

- In *Leahy v. Canada (Minister of Citizenship & Immigration)*,[86] the Federal Court of Appeal cautioned that supporting affidavits on judicial review cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker. The court also concluded that it could not decide issues such as whether certain documents were exempt from production on the basis of solicitor-client privilege or litigation privilege because of the scarcity of reasons for the delegate's decision.

B. Evidentiary aspects of procedural fairness

1. *Cross examination of expert witnesses*

In *Johnson v. Alberta (Appeals Commission for Alberta Workers' Compensation)*,[87] there were conflicting medical opinions about whether the employee's medical issues were related

84. At para. 46.

85. At para. 47.

86. 2012 FCA 227.

87. 2011 ABCA 345.

to his employment. The Appeals Commission decided that the physicians did not have to be compelled to attend the hearing for the purposes of cross examination because there were equally effective ways to deal with the conflicting expert opinions. The chambers judge set aside the Appeal Commission's decision and ordered that notices to attend be issued to the physicians.

The Court of Appeal of Alberta upheld the chambers judge's decision. It held that, in the interest of fairness, cross-examination was required to resolve the conflicting opinions. While cross examination is not always required when there is conflicting medical opinions, the question is whether there is an equally effective procedural method of responding to the conflicting medical opinions:

> 16 It is trite to observe that in most contested cases that come before the WCB conflicting medical opinions will present which have to be evaluated during the process. It does not follow that every such case will require the attendance of physicians for cross-examination by the claimant or his counsel. In each case the question will be whether an equally effective method of responding to the impugned medical opinions will achieve procedural fairness.
>
> [Emphasis added.]

The Court held the Appeal Commission's and chambers judge's consideration of the *Baker* factors governing procedural fairness was not necessary where the statute or regulations provided rules of procedure:

> 12 The Appeals Commission and the chambers judge relied on the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 to determine the requirements of procedural fairness in the context of the case at bar. In our opinion, resolution of that issue does not engage a consideration or analysis of the *Baker* factors.

> 13 There is a presumption in Canadian law that administrative decision-makers must discharge their functions fairly: *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at paras. 38-9; *Baker* at para. 45. While the common law will prescribe certain standards of procedural fairness in particular situations, the common law will in all cases yield to specific statutory language: *Mavi* at para. 40; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 at para. 22. The decision in *Baker* sets out a number of factors that are to be considered in establishing the procedures required by law where the statute is silent.
>
> 14 The present dispute was not a situation in which the *Baker* factors had to be analyzed to determine if the Respondent was entitled under the common law to a hearing, or to introduce fresh evidence, or whether he had standing at the hearing, or whether live testimony of witnesses, or cross-examination, were available options. All those issues are dealt with in the *WCA* and the Rules. The appropriate analysis should, accordingly, be based on those Rules, and an examination of whether the Appeals Commission's interpretation and application of them was reasonable.
>
> 15 It was therefore unnecessary for the Appeals Commission to consider whether the Respondent had a "reasonable expectation" that cross-examination would be allowed, as Rule 3.10 specifically contemplates cross-examination in the proper case. Further, where, as here, the tribunal has made a rule allowing for cross-examination, then the "procedural choice" of the tribunal is to allow cross-examination in the right cases. The decision of the tribunal to allow or disallow cross-examination in a particular case is not a "procedural choice" as that phrase is used in *Baker*. It is the very decision that is under review, which will be respected if it is reasonable.
>
> [Emphasis added.]

2. Confidentiality concerns

Leahy v. Canada (Minister of Citizenship & Immigration)[88] dealt with an access to information request under the federal *Privacy Act* (the Act). The respondent refused to provide the information to the applicant primarily on the grounds of third party and solicitor-client and litigation privilege exemptions contained in the Act. The Federal Court dismissed

88. 2012 FCA 227.

the application for judicial review and held that the respondent's decision to refuse disclosure was reasonable.

The Federal Court of Appeal allowed the appeal. It noted that the record before the court included both a confidential affidavit and confidential record which had been filed pursuant to a confidentiality order under the Act. The issue on appeal concerned the scope and format of confidential evidence and submissions made on behalf of the respondent where such evidence was disclosed to the court but not the person requesting access to information.

The court held that the duty to be fair had been breached by the refusal to disclose the requested information:

> 47 The contents of the confidential record were problematic. We discuss below the inadequacy of the evidentiary record. For the purpose of the procedural issue, the contents of the confidential record were problematic because the confidential affidavit of Mr. Warner contained information that demonstrably was not confidential and the confidential memorandum of fact and law similarly contained information and submissions that were not confidential in nature.

The court concluded that an overly broad claim of confidentiality violated the open court principle and was procedurally unfair:[89]

> 51 As the Court explained at that time, an overbroad claim of confidentiality is wrong at law for at least two reasons.
>
> 52 First, it is a fundamental principle that proceedings of Canadian courts are open and accessible to the public. The open court principle extends to the affidavit evidence and the written submissions filed on judicial review. Any restriction on the presumption of openness should only be permitted when:

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89. The court also addressed substantive issues concerning solicitor-client privilege and litigation privilege which will be discussed below under Part VII—Privacy and Disclosure.

> (a) such a restriction is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not present the risk; and
>
> (b) the salutory effects of the restriction outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of each party to a fair and public hearing, and the efficacy of the administration of justice.
>
> (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332 at paragraphs 22 to 31)

There is no justification for placing non-confidential information or submissions in a confidential document. To do so violates the open court principle.

53 Second, fairness requires that a party know the case to be met. An overbroad claim to confidentiality that prevents the opposite party from knowing as much as possible about the evidence and the submissions made to the Court improperly impairs the opposite party's ability to respond to the case. Put simply, an overbroad claim of confidentiality is inconsistent with the duty of procedural fairness.

3. Disclosure to non-parties

In *2127423 Manitoba Ltd. (c.o.b. London Limos) v. Unicity Taxi Ltd.*,[90] two taxi companies appealed the decision of the Taxicab Board to grant additional licenses to the applicants. In the course of their appeal, the appellants asked the Board to disclose various information concerning the application, including a copy of the applicant's business plan. While the Board provided some information, it refused to provide a copy of the business plan and anything that might contain confidential information. The appellants appealed the Board's decision.

The Manitoba Court of Appeal dismissed the appeal and held that the appellants were mere objectors to the hearing—as well as being the applicant's direct competitors—and were not

90. 2012 MBCA 75.

parties to the hearing. In the circumstances, the Board had fulfilled its duty of fairness and had balanced the interests of all parties and participants by disclosing a sufficient amount of information to the appellants.

C. Bias

In *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*,[91] the issue was whether the fact that a member of the panel on a tariff hearing had played a minor role in a previous facility hearing during which procedural irregularities had occurred resulted in a reasonable apprehension of bias. The impugned panel member had sat on a panel deciding costs relating to the facility hearing and on a rehearing concerning transmission line approval but he had not been involved in the initial facility hearing. The Court of Appeal of Alberta held that the member's previous involvement was not sufficient to constitute bias:

> 29 Where the bias is alleged to arise from involvement in previous proceedings, it is also relevant to look at the connection between the present proceedings and the previous proceedings. Mere prior involvement with an issue does not inevitably lead to disqualification: *Collins v Canada*, 2011 FCA 171, 421 NR 201; *S.G. v Larochelle*, 2005 ABCA 111, 363 AR 326. In this case the tariff hearing is only peripherally related to the prior "facility" hearing. The tariff hearing had nothing to do with the need for the line, or its location. The only link is a cost component from participating in that hearing, and the issue is whether those costs are recoverable within the regulated system. In regulatory law tariff hearings and new facility approval have always been regarded as distinct issues. This connection is too tenuous to support a reasonable apprehension of bias.
>
> [Emphasis added.]

The court noted that the appellant did not raise its objections until six months after the hearings had finished. It concluded that a reasonable informed observer would consider the

91. 2012 ABCA 84.

timeliness of the complaint in determining if there is an apprehension of bias and that it was "neither helpful nor necessary to determine whether the [panel member] would have recused himself or herself if the matter had come to light earlier".[92]

IV. STANDING

The past year has seen four interesting cases on standing: one from Alberta, one from Nova Scotia and two from British Columbia.[93]

A. *Pembina Institute*

Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)[94] dealt with standing for leave to appeal from an interim decision of the Alberta Utilities Commission granting approval for the construction of a power plant.

The applicant, a non-profit, non-government organization concerned with sustainable energy practices and policies, had been denied intervenor status before the Commission on the grounds that it would not be directly and adversely affected by the decision. Pembina did not appeal the decision denying it intervenor status, but sought standing to seek leave to appeal the decision granting interim approval to the construction of the plant.

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92. Citing: *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para. 78.

93. See also *Canada (A.G.) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, which involved standing to apply for judicial review of various provisions in the *Criminal Code* on *Charter* grounds.

94. 2011 ABCA 302.

The Court of Appeal of Alberta (*per* Rowbotham J.A.) held that, on the unique facts of this case, Pembina did have standing to bring the leave application despite the fact that it had been denied intervenor status before the Commission:

> 16 This court noted in *Big Loop Cattle Co v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 328, 490 AR 246, that "[n]ormally an applicant for leave was a party or intervener before the Board"; however, the court recognized that "there may be limited circumstances where someone else may apply for leave": para 51. The applicant relies on *Big Loop*, as well as *Bengston v. Alberta (Natural Resources Conservation Board)*, 2003 ABCA 173, 330 AR 81, for authority that in certain circumstances a party that did not have standing before an administrative body may still apply for leave to appeal that body's decision. In *Bengston*, standing was granted on appeal to a party that did not have standing before the Natural Resources Conservation Board. In that case, the grounds on which leave to appeal was sought all involved issues that would have been raised before the Board if the party had been afforded standing below, but the party lacked the necessary standing to raise those issues because the *Agricultural Operation Practices Amendment Act*, SA 2001, c 16, expressly limited standing to "the applicant and the municipalities that are affected persons": section 21(2). Given the party's interest in the outcome of the proceedings, the court noted that the fact that the party did not have standing under the terms of the governing legislation "[did] not preclude him from obtaining standing on an alternate basis for the purpose of judicial review": para 28. The reasons for allowing standing in *Bengston* are distinguishable from the facts of this case, where the applicant sought and was denied standing below but now raises a novel issue that could not have arisen before the Commission. As such, *Bengston* is not directly applicable.
>
> 17 In *Big Loop*, leave was granted to a number of parties. These parties were interveners before the Energy Resources Conservation Board, and they were granted leave on an issue that was argued below. Therefore, the facts of *Big Loop* are also distinguishable and, like *Bengston*, the case is not directly applicable. However, another party, Lefthand, who was not an intervener before the Board, also sought leave on a number of other issues including a question involving section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The *Charter* issue was not addressed in the proceedings before the Board. The court noted *in obiter* that "[t]he addition of Lefthand as an applicant was an attempt to ensure that there was an individual before the court in order that section 15(1) might be engaged ... Had I granted leave on the *Charter* issue, it might have been necessary for an individual to apply to intervene in the appeal": para 51. These comments suggest that the "limited circumstances" where it may be appropriate to grant standing on appeal to a party that lacked standing before the administrative tribunal may include a circumstance where an issue is advanced before this court that did not and could not exist in the initial proceedings.

18 The applicant also bases its claim for standing on the broader principles of public interest. The notion of public interest standing was addressed by the Supreme Court of Canada in a trilogy of cases, *Thorson v. Canada (Attorney General)*, [1975] 1 SCR 138, 43 DLR (3d) 1; *Nova Scotia (Board of Censors) v. McNeil*, [1976] 2 SCR 265, 55 DLR (3d) 632; and *Canada (Minister of Justice) v. Borowski*, [1981] 2 SCR 575, 130 DLR (3d) 588. In all three cases public interest standing was sought by a private party for the purpose of challenging the constitutional validity of legislation. The Supreme Court of Canada in the subsequent decision of *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607, 23 DLR (4th) 321 extended the principles in the trilogy to "a non-constitutional challenge by an action for a declaration to the statutory authority for ... administrative action": 630. The court noted that "the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this court in *Thorson*, *McNeil* and *Borowski* to the public interest in the maintenance of respect for the limits of legislative authority": 631.

19 Pembina raises a concern regarding the administrative authority of the Commission which falls within the principle set out in *Finlay*. In *Reese v. Alberta (Minister of Forestry, Lands & Wildlife)* (1992), 123 AR 241, 87 DLR (4th) 1 (QB), the court, relying on *Finlay*, stated the test for public interest standing as follows:

> If the issue were (a) justiciable and (b) serious in that there was a serious issue as to whether the administrative act was illegal (*i.e.*, not authorized by the statute pursuant to which it purported to be made), and (d) if there were no other reasonable and effective means of bringing the issue before the court, in my view it would be open to the court to recognize (c) that the applicant has a "genuine interest" in the issue even if the applicant cannot show that he has a direct, personal interest in the sense that the administrative act operates to his personal disadvantage. Obviously that "genuine interest" will be more readily inferred if the statute clearly contemplates that the applicant has a role in the process leading up to the administrative act. However, in a fit case, "genuine interest" may be found to exist even when such a role is not contemplated by the statute, so long as to recognize such a "genuine interest" would not be inconsistent with the inherent nature of the statutory process: para 26.

20 In my view on the specific facts of this case, the issue raised by the applicant falls within the situation contemplated in *Reese*. The ultimate question on which leave to appeal is sought is whether the Commission erred in jurisdiction when it granted the Interim Decision; this is a justiciable issue. Put another way, the issue raised by Pembina is whether the Commission made a determination and granted a decision in a way that is illegal in the sense that it is not authorized by the *AUCA*. This raises a concern regarding respect for limits to administrative authority. There is no other means by which this issue could be brought before this court, as there were no parties granted

> standing before the Commission. Furthermore, on the unique facts of this case there was no way that this particular issue could have arisen before the Commission in any proceedings below. Accordingly, even though the *AUCA* did not contemplate a role for the applicant in its proceedings, I conclude that based upon the principles of public interest standing, the unique facts of this case, and the applicant's genuine interest in the issue which it raises, the applicant has standing to bring this leave application.

Ultimately, however, the court held that the issues raised in the appeal were moot, and denied leave to appeal.

B. *Robichaud*

The Nova Scotia Supreme Court addressed standing in *Robichaud v. College of Registered Nurses (Nova Scotia)*.[95] In that case, the applicants for judicial review were the surviving siblings of a deceased patient. They filed a complaint against a nurse for allegedly failing to undertake procedures to preserve the patient's life. The complaint was dismissed by the College's Complaints Committee and the applicants applied for judicial review on the grounds that the Committee had made an erroneous finding of fact, had failed to consider representations of a witness, and had failed to act on a request for a copy of the Response filed by the respondent.

The issue was whether the applicants had standing to apply for judicial review. The court held they did not and dismissed the application.

The court emphasized that the applicants were merely complainants in a disciplinary hearing; they were not parties. As non-parties, they had no standing to apply for judicial review of the merits of the disciplinary body's decision. The court also examined whether the

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95. 2011 NSSC 379.

applicants had some special, private or sufficient interest in the decision or proceeding. It concluded that applicants' interest was limited to being afforded a reasonable opportunity to appear at the hearing and submit representations, which they had been given. Finally, the court satisfied itself that the Complaints Committee had followed the rules governing its proceedings.

C. *Stelmack* and *Henthorne*

In the fall of 2011, the British Columbia courts issued two decisions discussing the standing of a tribunal to make submissions on judicial review.

1. *Stelmack*

In *British Columbia (Ministry of Public Safety and Solicitor General v. Stelmack*,[96] the British Columbia Supreme Court was hearing two applications for judicial review of decisions of the Information and Privacy Commissioner relating to the release of video footage taken while the respondent was in police custody.

One of the issues that arose was whether the Commissioner's submissions on judicial review extended beyond what is appropriate for submissions of an unbiased decision-maker. In particular, the submissions of the Commissioner took a position on the following issues:

- the admissibility of the extra-record evidence on judicial review of the Commissioner's Order;
- the characterization of the Senior Adjudicator's Review Decision;

96. 2011 BCSC 1244.

- the standard of review on all issues; and
- the extent of the Court's remedial authority on judicial review.

One of the applicants argued that the Commissioner's submissions ventured into the merits of the issues and relied on *Northwestern Utilities* to argue that the Commissioner's submissions were beyond the scope of its role on review.

The court declined to adopt the narrow *Northwestern Utilities* view of the Commissioner's standing:

> 147 I agree, however, with the comments of Madam Justice Rowles in *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*, 2006 BCCA 404 where she said at para. 60:
>
> > [60] I conclude with the following observation, prompted by some of the submissions of the Intervenors. What was said in *Northwestern Utilities*, to the extent that it has been taken as an invariable rule, may be due for a re-evaluation. The decision of the Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 253 D.L.R. (4th) 489 provides support for that view. In that case, Gouge J.A. expressed the opinion that the standing of administrative tribunals on reviews of their own decisions must be considered contextually rather than by reference to an *a priori* rule.
>
> 148 This being the case, what considerations apply when a court is determining the allowable scope of an administrative tribunal's submissions?
>
> 149 I summarize the relevant factors and principles from the reasons of Mr. Justice Gouge in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309, 253 D.L.R. (4th) 489 at paras. 36-39 and 43-45 (C.A.):
>
> > The need to have a fully informed adjudication of the issues before the court. Whether because of its specialized expertise, or for want of an alternative knowledgeable advocate, submissions from the tribunal may be essential to achieve a fully-informed adjudication of the issues.

> The importance of maintaining tribunal impartiality. There may be a risk that full-fledged participation by a tribunal as an adversary in a judicial review proceeding will undermine future confidence in its objectivity.
>
> The nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to knowledgeably respond to the attack on the tribunal's decision, may all be relevant in assessing the seriousness of the impartiality concern and the need for full argument.
>
> Other considerations that arise in particular cases.
>
> In the end, the court must balance the various considerations in determining the scope of standing that best serves the interests of justice.

150 In *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.*, 2005 BCSC 1562, Madam Justice Garson was asked to consider, on a preliminary basis, the scope of the Commissioner's submissions on judicial review. She took a similar approach, saying, at paras. 44-45:

> [44] ... In my view, the line between permissible and impermissible argument by the tribunal is drawn at the point at which the Commissioner defends the actual merits of his decision.
>
> [45] In this case the particular factors that weigh in favour of greater, but not unfettered, participation include:
>
> - the lack of representation before the court of the applicant parents;
> - the role of the Commissioner within the statutory scheme, which is to balance and resolve the public interest in access to information with individual interests in personal privacy;
> - the inquisitorial nature of the Commissioner's process; and,
> - the special knowledge and expertise of the tribunal, all of which weigh in favour of greater participation.

The court went on to review the Commissioner's submissions and disallowed submissions that strayed into the merits of the review but allowed submissions which were necessary for the matter to be fully considered on judicial review and which were of assistance to the Court

as well as those submissions on standards of review and on the extent of the Court's remedial authority on judicial review.

2. *Henthorne*

Just a couple of months later, the British Columbia Court of Appeal had opportunity to comment on the same issue in *Henthorne v. British Columbia Ferries Services Inc*.[97] In that case, the Court of Appeal reiterated that the narrow view of tribunal standing established in *Northwestern Utilities* is the law in British Columbia, and struck out the factum filed by the decision-maker—the Workers' Compensation Appeals Commission—with costs.

The case arose from the sinking of a ferry in which two passengers were killed. Henthorne was the captain of the ferry who, during the course of an internal investigation into the accident, made remarks concerning the safety and seaworthiness of the vessel and the fact that he had previously reported some safety concerns to his employer. Henthorne's employer, the respondent, later terminated Henthorne's employment.

Henthorne filed a complaint with the Workers' Compensation Board alleging discrimination on the basis of being a "whistle-blower".[98]

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97. 2011 BCCA 476.

98. Section 151 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 states:

> 151 An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
>
> (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
>
> (b) for the reason that the worker has testified or is about to testify in any matter,

(continued...)

The case officer found that the respondent had breached section 151 of the *Workers' Compensation Act* and ordered the respondent to reinstate Henthorne.

The respondent appealed the case officer's decision to the Appeals Tribunal which allowed the appeal and set aside the reinstatement.

Henthorne applied for judicial review of the Appeal Tribunal's decision. On review, Henthorne raised a preliminary objection to the Appeal Tribunal's standing as respondent on the basis that its submissions exceeded the limited role normally accorded to a tribunal in a judicial review proceeding. The reviewing judge dismissed the objection and dismissed the application for judicial review.

On appeal to the Court of Appeal, counsel for Henthorne moved to strike the Appeal Tribunal's factum on the basis that most, if not all, of it went to the merits of the appeal. Justice Newbury thoroughly reviewed the jurisprudence and concluded that the factum should be struck:[99]

> 37 The law in British Columbia on this point is well-tilled ground. Among the decisions of this court is *British Columbia (Securities Commission) v. Pacific*

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98. (...continued)

> inquiry or proceeding under this Act or the *Coroners Act* on an issue related to occupational health and safety or occupational environment, or
>
> (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to
>
> (i) an employer or person acting on behalf of an employer ...

99. Groberman J.A. and Garson J.A. concurred on the issue of standing but disagreed with Newbury J.A.'s characterization of one of the questions on appeal.

International Securities Inc. 2002 BCCA 421, 215 D.L.R. (4th) 58, a statutory appeal from a decision of the Securities Commission on the basis of alleged failure to observe rules of procedural fairness. Mr. Justice K. Smith for the Court reviewed various cases in which *Northwestern Utilities* had been considered, including *Bibeault v. McCaffrey* [1984] 1 S.C.R. 176; *Paccar*, *supra*; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994) 76 F.T.R. 1 (F.C.); *Re Consolidated-Bathurst Packaging Ltd. et al.* (1985) 20 D.L.R. (4th) 84 (O.C.J., Div. Ct.); *Quintette Coal Ltd. v. Assessment Appeal Board* (1984) 54 B.C.L.R. 359 (B.C.S.C.), *per* Finch J, (as he then was); and *Bekar v. Bulkley-Nechako (Regional District)* (1987) 19 B.C.L.R. (2d) 256 (S.C.), *per* Gow, L.J.S.C. Smith J.A. observed that the rule in *Northwestern Utilities* "has been sapped only slightly" and that it applied to the Commission...

...

The Commission itself was limited to making submissions as to jurisdiction. (See para. 45; see also *Barker v. Hayes* 2007 BCCA 51 (Chambers) and *Timberwolf Log Trading Ltd. v. British Columbia (Commissioner)* 2011 BCCA 70.)

38 In *Lang v. British Columbia (Superintendent of Motor Vehicles)* 2005 BCCA 244, this court reviewed *Northwestern Utilities* and *Paccar*, *supra*, and observed that the latter decision does not "provide the tribunal a broad opportunity to argue the merits". In Donald J.A.'s words, "While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed." (Para. 54.)

39 In 2006, in *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)* 2006 BCCA 404, 274 D.L.R. (4th) 523, the question arose whether the TSX Venture Exchange could make submissions at the hearing of an appeal to this court from a decision of a panel of the Securities Commission. As pointed out by Rowles J.A. for the Court, the hearing panel's function was limited to adjudication, whereas the Exchange was "responsible for conducting the investigation of infractions and prosecuting them". (Para. 55.) The Court therefore concluded that permitting the Exchange, as opposed to the Commission, to make submissions did not offend *Northwestern Utilities*, but also commented that to the extent that the case has been taken as an invariable rule, it "may be due for a re-evaluation". (See also *Vancouver Rape Relief Society v. Nixon* 2005 BCCA 601, lve. to app. refused [2006] S.C.C.A. No. 365.)

40 The foregoing authorities and others are reviewed in an article by Mr. F. Falzon, Q.C., *Tribunal Standing on Judicial Review*, (2008) 21 C.A.L.T. 21. The author observes that "judges are not necessarily of like mind regarding the extent to which tribunal participation in court truly discredits a tribunal's impartiality" and points out at 35 that the Supreme Court of Canada has itself, without objection or comment, permitted administrative tribunals to participate fully in court hearings on natural justice

issues. (See e.g., *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* [2001] 1 S.C.R. 221.) Elsewhere, the author refers to "confusion" in the law on this matter and suggests that a "categories and exceptions" approach to the issue of tribunal standing is, like *Northwestern Utilities* itself, "due for re-evaluation". (At 38.) He urges that the matter be clarified by the Supreme Court of Canada.

41 In the meantime, the authorities in this province are in my opinion clearly in favour of applying *Northwestern Utilities*, subject to some exceptions (or "encroachments") arising from *Paccar*. But even if a more nuanced 'balancing' approach like that suggested in *Children's Lawyer* were to be mandated in British Columbia, that approach would not in my view militate in favour of permitting WCAT to make the submissions it has in the case at bar.

42 As already noted, no jurisdictional error (in the narrow sense suggested by *Dunsmuir*, *supra*, at para. 59) or error in the choice of standard of review was advanced here; nor is there an allegation of a breach of the rules of natural justice. The appeal does not involve the construction of the *Workers Compensation Act* or Regulations. The dispute is essentially a private one between Mr. Henthorne and his former employer, in which a private remedy is sought. The employer, a large corporation, is well represented and has made extensive and helpful submissions. The Tribunal's reasons for reversing the decision of first instance dealt at length with the issues that subsequently became the focus of the judicial review. In these circumstances, there is little that the Tribunal could add, or has in fact added, to the proper adjudication of the appeal. As against this, the importance of fairness, real and perceived, weighs more heavily. To permit both the employer and the tribunal whose decision is being reviewed to be lined up against the appellant does not seem to me to be "just and efficient" (see *Orange Julius Canada Ltd. v. Surrey (City)* 1999 BCCA 430 (Chambers) at para. 7), particularly at a time when courts are being urged to ensure the speedy resolution of disputes.

43 I would grant Mr. Henthorne's motion to strike the factum filed by WCAT.

V. MULTIPLE FORUMS

A. The SCC's decision in *Figliola*

On October 26, 2011, the Supreme Court of Canada issued an important decision about the application of section 27(1)(f) of British Columbia's *Human Rights Code*[100] (the *Code*) which permits the Human Rights Tribunal to dismiss a complaint if it "has been appropriately dealt with in another proceeding".

In *British Columbia (Workers' Compensation Board) v. British Columbi (Human Rights Tribunal)* (the *Figliola* case),[101] the issue was whether the policies of the Workers' Compensation Board breached the *Code*. The issue had been dealt with under 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 apply for judicial review, but rather, made a complaint to the Human Rights Tribunal about the same issue. The Human Rights Tribunal declined to exercise its discretion to dismiss the complaint under section 27(1)(f) of the *Code*, and set the matter down for a full hearing. On judicial review, the Supreme Court quashed the decision of the Tribunal, but the Court of Appeal reinstated it.

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100. RSBC 1996, c. 210.

101. 2011 SCC 52.

The Supreme Court of Canada unanimously held that the Human Rights Tribunal's decision was patently unreasonable (the applicable standard of review under British Columbia's *Administrative Procedures Act*) and allowed the appeal.

Justice Abella, writing for the majority, saw "no point in wasting the parties' time and resources by sending the matter back for an inevitable result" and ultimately 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.

Some 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)?

- How does this case compare with the Supreme Court's later decision in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, where the court decided not to review the Commission's exercise of discretion to send a complaint on to a Board of Inquiry?

VI. *CHARTER OF RIGHTS AND FREEDOMS*

Because administrative law is part of public law, *Charter* issues often arise in administrative law litigation.

A. *Doré*

The Supreme Court of Canada's decision in *Doré v. Barreau du Québec*[102] is discussed above under Standards of Review and that discussion will not be repeated here. Suffice it to say that the court in *Doré* stated that "[i]t goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values".[103]

The court then addressed the issue of what framework should be used to scrutinize how the relevant values in the case at hand were applied. In particular, the court addressed how to

102. 2012 SCC 12.

103. At. para. 24.

reconcile the concept of reasonableness in the administrative law context with the concept of "reasonable limits" under section 1 of the *Charter* and the applicability of the *Oakes* test. The court concluded that in assessing whether a delegate's decision violates the *Charter*, a court should not apply the *Oakes* test in a formulaic manner. Rather, it should consider whether the delegate disproportionately, and therefore, unreasonably, limited the *Charter* right.[104]

B. *Pridgen*

Last year's paper discussed *Pridgen v. University of Calgary*[105] which dealt with an allegation by two university students that their right to free expression had been violated when they were reprimanded by the University's General Faculties Council Review Committee for making disparaging remarks about a professor on Facebook. The Court of Queen's Bench held that the University had violated the students' right to freedom of expression and that the violation was not justified under section 1 of the *Charter*. Accordingly, the lower court set aside the decision of the Committee.

The Court of Appeal of Alberta has recently dismissed the University's appeal.[106]

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104. See discussion in Part II(C) above.

105. 2010 ABQB 644.

106. 2012 ABCA 139.

Focussing just on administrative law considerations, all three judges[107] held that the decision of the Review Committee was unreasonable,[108] and therefore had to be set aside.

With respect to whether the *Charter* applied to the University's disciplinary process, two of the judges (McDonald and O'Ferrall, JJ.A.) held that it was not necessary to decide this point in this case.

On the other hand, Justice Paperny held that the *Charter* did apply to this University's disciplinary process, and that the various University bodies ought to have considered the students' *Charter* rights when imposing disciplinary penalties on them:

> 104 That education at all levels, including post-secondary education as provided by universities, is an important public function cannot be seriously disputed. The rather more fine distinction the University seeks to draw here is that it is not a "specific governmental objective", which it says *Eldridge* requires. I find this distinction to be without merit. *Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the *PSL Act*, while couched in broad terms, are tangible and clear.
>
> 105 Applying the *Eldridge* analysis to the facts of this case is one possible approach. However, I find that the nature of the activity being undertaken by the University here, imposing disciplinary sanctions, fits more comfortably within the analytical framework of statutory compulsion. The issue is whether in disciplining students pursuant to authority granted under the *PSL Act*, the University must be *Charter* compliant. The statutory authority includes the power to impose serious sanctions that go beyond the authority held by private individuals or organizations. Those sanctions include the power to fine, the power to suspend a student's right to attend the university, and the power to expel students from the university: *PSL Act*, section 31. Accordingly, *Charter* protection for students' fundamental freedoms, including freedom of expression, applies in these circumstances. This goes to the fundamental purpose of the *Charter* as noted

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107. Paperny, McDonald and O'Ferrall, JJ.A.

108. Note that the lower court judge had used the correctness standard of review for some issues, whereas all three of the Court of Appeal judges used the reasonableness standard of review with respect to the administrative law aspect of the case.

> by Wilson J. at 222 of her dissent in *McKinney*, where she stated that those who enacted the *Charter* "were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role"...
>
> . . .
>
> 112 .... In exercising its statutory authority to discipline students for non-academic misconduct, it is incumbent on the Review Committee to interpret and apply the Student Misconduct Policy in light of the students' *Charter* rights, including their freedom of expression.
>
> [Emphasis added.]

Paperny J.A. rejected the University's arguments that the relationship between the University and its students was purely contractual and that the application of the *Charter* in these circumstances undermined or threatened the University's academic freedom or institutional autonomy.[109]

C. *U.F.C.W., Local 401 v. Alberta (Information & Privacy Commissioner)*

In *U.F.C.W., Local 401 v. Alberta (Information & Privacy Commissioner)*,[110] the Court of Appeal of Alberta considered whether the respondent union had a constitutionally protected right to collect images of persons crossing the picket line and post those images on a website.

Upon receiving a number of complaints concerning the union's practice, an Adjudicator with the Information and Privacy Commission issued an order preventing the union from recording such images. On judicial review, the chambers judge concluded that the Adjudicator's order violated the union's right to freedom of expression, quashed the

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109. At paras. 113 to 123.

110. 2012 ABCA 130; application for leave to appeal granted by the S.C.C. on 25 October 2012.

offending portions of the Adjudicator's decision and struck down certain portions of the *Personal Information Protection Act (the Act)*[111] as being unconstitutional. The Attorney General appealed.

The Court of Appeal allowed the appeal in part. While it upheld the findings of the chambers judge on constitutionality, it varied the remedy to order a declaration that the application of the Act to the activities of the union was unconstitutional instead of a declaration that portions of the Act itself were unconstitutional.

VII. PRIVACY AND DISCLOSURE

Disclosure and confidentiality in the administrative law context have become a hot topic.

A. *Clark*

Clark v. Alberta (Institute of Chartered Accountants, Complaints Inquiry Committee)[112] dealt with an appeal by the Complaints Committee of the Alberta Institute of Chartered Accountants from an appeal panel's decision to stay the prosecution of a member on the basis of abuse of process.

The member was being investigated for unprofessional conduct in the form of disclosing confidential client information to third parties. An issue arose when the investigator assigned to the complaint asked the member and other interested parties to send information to him

111. SA 2003, c. P-6.5.

112. 2012 ABCA 152.

to his wife's email account. The member applied to have the proceedings against him dismissed because the investigator had disclosed confidential information about him to a third party—the investigator's wife—without his consent.

The Discipline Committee dismissed the member's application. The member appealed to an appeal panel. The appeal panel allowed the appeal and held that the investigation amounted to an abuse of process arising from the unacceptable disclosure of confidential information. By way of remedy, the appeal panel stayed the proceedings against the member. The Institute appealed.

The Court of Appeal of Alberta dismissed the appeal and held that it was reasonable for the appeal panel to conclude that the member did not consent to the disclosure of his confidential information. The appeal panel was also reasonable in concluding that an abuse of process had been made out. In the circumstances of this case, where the Institute itself was guilty of the same conduct that was the subject of the complaint against the member, a stay was the appropriate remedy.[113]

B. *R. v. Dunn*

While *R. v. Dunn*[114] is not strictly an administrative law case, it contains an excellent discussion about the principles of litigation privilege.

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113. The case is also interesting because of the court's discussion on whether a stay was the appropriate remedy. The court is clear that a stay is not always the appropriate remedy to cure an abuse of process, but rather will only be available "in extreme cases". Where the individual's right to a fair trial is not compromised, a stay will not be the appropriate remedy: see para. 17.

114. 2012 ONSC 2748.

The accused were being tried on charges of defrauding the public and their former employer, Nortel Networks Corporation. During the course of a forensic audit of the corporation's financial statements, the auditors held several interviews with the accused. The accused had lawyers present at some of the interviews, but not all. The issue was whether the lawyers could be ordered to produce certain notes made by them during the course of the interviews.

The Crown argued that litigation privilege did not apply because the accused and/or other adverse parties were present when the notes were taken. Alternatively, the Crown argued that the dominant purpose of the notes was not litigation because the accused were not compelled to attend the interviews and/or that the notes amounted to nothing more than an incomplete transcript.

The Ontario Superior Court rejected the Crown's arguments and held that the notes were subject to litigation privilege. The court was satisfied on a balance of probabilities that the notes were created for the dominant purpose of anticipated litigation. The court emphasized that:

> 59 In performing his or her duty, a barrister has to be free from unnecessary interference. The prospect of a barrister being required to disclose his or her notes of the evidence would inevitably mean that the barrister's thoughts and observations are no longer his or her own.

The court went on to conclude that none of the exceptions to litigation privilege applied.[115]

115. At paras. 68 to 71.

C. *Leahy*

In *Leahy v. Canada (Minister of Citizenship & Immigration)*,[116] the Federal Court dealt with an application under the federal *Privacy Act*[117] for judicial review of a decision refusing the applicant access to certain information. The applicant raised a number of grounds for judicial review, but most notably, argued that the respondent had improperly exempted the information from disclosure on the grounds of solicitor-client privilege and litigation privilege.

The Federal Court dismissed the application. First, O'Keefe J. concluded that section 27 of the *Privacy Act*, which allows for exemptions based on solicitor-client privilege, includes both solicitor-client privilege and litigation privilege.[118] He then went on to conclude that the documents in question had been properly exempted based on both solicitor-client privilege and litigation privilege.[119] He rejected the argument that the documents should have been partially severed and disclosed.

However, the Federal Court of Appeal recently overturned the Federal Court's decision.[120] It held that while it may be that some or all of the documents were properly withheld from the applicant, it was unable to render a decision because of the lack of adequate reasons and the paucity of evidence before it:

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116. 2011 FC 1006.

117. RSC 1985, c. P-21.

118. At para. 63.

119. At paras. 65 to 78.

120. 2012 FCA 227.

121 If the reasons for decision are non-existent, opaque or otherwise indiscernible, and if the record before the administrative decision-maker does not shed light on the reasons why the administrative decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraphs 14 and 15 (adequacy of reasons is to be assessed as part of the process of substantive review and is to be conducted with due regard to the record; *Public Service Alliance of Canada v. Canada Post Corp*., 2011 SCC 57, [2011] 3 S.C.R. 572 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (within limits, the decision can be upheld on the basis of the reasons that could have been given).

122 Any reviewing court upholding a decision whose bases cannot be discerned would blindly accept the decision, abdicating its responsibility to ensure that it is consistent with the rule of law.

123 In this case, the decision letter, signed by Ms. McManus, merely asserts the exemptions that apply. No further reasons are given. The record consists of a relatively thin affidavit, documents that have been produced to the appellant, and documents that have been withheld from the appellant.

124 This material does not provide us with the basic information we need in order to discharge our role. There are several examples.

125 First, as explained above, under the Act, it is the "head" of the institution or his or her authorized delegate who is to decide whether exemptions apply and, if so, whether the information should nevertheless be produced to the requester. The record shows that a number of people were involved in reviewing and assessing the documents and making recommendations and that the decision letter was signed by Ms. McManus. The record is silent as to who made the relevant decisions and no satisfactory inference may be drawn from the record.

126 There is no problem with the decision-maker seeking the assistance of others and considering their recommendations. But in the end, under the statute, the "head" or their authorized delegate is to make the decision.

127 But in this case, we do not even know who the decision-maker was.

128 Second, we are told that information has been withheld on the basis of solicitor-client privilege and litigation privilege. But nowhere in the record is there any indication of what the decision-maker thought these concepts meant. Did the decision-maker properly understand these concepts? We do not know.

> 129 Related to this is the involvement of others to review the documents and make recommendations to the decision-maker. Were these persons properly instructed concerning the requirements of solicitor-client privilege and litigation privilege?
>
> 130 Third, it is entirely appropriate for the reviewing court to examine the documents that have been withheld, draw appropriate inferences and use those inferences to assess whether the decision-maker made any reviewable error. But those inferences can take the reviewing court only so far.
>
> 131 For example, in this case, some of the documents said to be covered by solicitor-client privilege appear to concern legal advice. However, more information is necessary. Were the documents maintained in confidence? Were the authors, the recipients, or both lawyers?
>
> 132 Other documents do not appear to concern legal advice, and the record is silent as to which, if any, documents are said to attract litigation privilege.
>
> 133 Fourth, under the Act, the decision-maker must assess whether any of the exemptions to disclosure apply to the information sought. But that is not the end of the analysis. Even though an exemption applies, the decision-maker nevertheless can exercise his or her discretion to disclose the material: *Attaran v. Canada (Minister of Foreign Affairs)*, 2011 FCA 182, [2011] F.C.J. No. 730.
>
> 134 At a minimum, the reasons or the record should show that the decision-maker was aware of this discretion to release exempted information and exercised that discretion one way or the other.
>
> 135 In this case, there is nothing in the reasons or the record on this point.

D. *Stelmack*

In *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*,[121] the British Columbia Supreme Court dealt with an application for judicial review from a decision of the Information and Privacy Commissioner ordering the release of video footage taken while the respondent was in police custody.

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121. 2011 BCSC 1244.

The respondent alleged that she had been unlawfully detained and assaulted while in custody and had requested the video images from the Ministry. The Ministry denied her request on the ground that the disclosure would serve to undermine the security of the jail. The respondent made a request to the Information and Privacy Commissioner for release of the video footage. The Adjudicator ordered the video footage to be disclosed. The Ministry and one of the corrections officers applied for judicial review of the Adjudicator's decision.

The court dismissed the application and held that the Adjudicator had reasonably concluded that the video footage was not exempt from disclosure. The third party personal information contained on the images could be severed by blurring or obscuring faces from the video. The court rejected the Ministry's argument that disclosure would harm a law enforcement matter.[122]

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122. Section 15 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, provides in part:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter,
>
> ...
>
> (f) endanger the life or physical safety of a law enforcement officer or any other person,
>
> ...
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

VIII. A MISCELLANY OF OTHER DEVELOPMENTS

A. The jurisdiction of the court to grant judicial review

1. *Auyeung*

In *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*,[123] the British Columbia Court of Appeal discussed whether judicial review is available with respect to an original decision when leave for reconsideration of that decision had been refused. That is, the question was whether the court on judicial review was limited to considering the decision refusing leave to reconsider or whether it could consider the original decision itself.

The court concluded that, given the Board's high degree of expertise in labour relations, the court should not interfere with the Board's original decision. The court was limited to considering whether the reconsideration decision was patently unreasonable, unfair or incorrect.

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123. 2011 BCCA 527. But see *Routkovskaia v. British Columbia (Human Rights Tribunal)*, 2012 BCCA 141 where the court distinguished *Auyeung* on the basis of there being a different operative administrative law framework involved. The court in *Routkovskaia* stated that relevant differences included the fact that the B.C. Labour Relations Board's jurisdiction to reconsider is broader and is codified and that seeking reconsideration by the Board was an internal remedy that generally must be exhausted before applying for judicial review. As a result, the court concluded that the reasoning in *Auyeung* did not apply and the court below was not limited to solely reviewing the reconsideration decision.

2. *Lee*

In *Lee v Yeung*,[124] the Alberta Court of Queen's Bench considered a court's jurisdiction to review the actions of a private body or society. The court concluded that it had jurisdiction to review the society's election process including whether its rules had been observed, whether anything had been done contrary to natural justice and whether the election result was reached in a *bona fide* manner. The court stated that "courts will intervene in the private activities of non-statutory parties where the aggrieved parties have no other remedy available to them. In such cases, judicial intervention is not only appropriate but can be expected".[125]

3. *Canadian Society of Immigration Consultants*

In *Canadian Society of Immigration Consultants v. Canada (Minister of Citizenship and Immigration)*,[126] the Federal Court considered the scope of the court's jurisdiction to review the validity of regulations dealing with immigration consultants and designating a new regulator. The applicant argued that the Governor in Council and Minister had exceeded their jurisdiction and acted *ultra vires* their regulation-making authority because the impugned regulations were an abuse of discretion, made in bad faith and based on irrelevant grounds.

The Federal Court dismissed the application for judicial review, concluding that, in principle, regulations or policy decisions are not reviewable, except in cases of excess of jurisdiction

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124. 2012 ABQB 40 (Macklin J.).

125. At para. 52.

126. 2011 FC 1435.

or failure to comply with legislative or regulatory requirements. Any duty to consult had been satisfied and the process was fair and transparent.

The Federal Court of Appeal dismissed the applicant's appeal.[127] While it declined to decide whether the duty of fairness and the doctrine of legitimate expectations applied to the passing of regulations, it held that, even if they did apply, the requirements of procedural fairness had been met.

4. *Jozipovic*

In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*,[128] the British Columbia Court of Appeal held that a chambers judge had jurisdiction to find a Board policy invalid because it was not a rationally-supported interpretation of the legislation. The impugned policy was unreasonable and was declared of no force and effect.

B. The Return and Admissibility of Affidavit Evidence

1. *C.J.A., Local 1985 v. Saskatchewan (Labour Relations Board)*

In *C.J.A., Local 1985 v. Saskatchewan (Labour Relations Board)*,[129] an issue arose about whether certain exhibits to an affidavit were inadmissible on the grounds that they contained irrelevant and extraneous materials which constituted an improper attempt to supplement the record already filed with the court.

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127. 2012 FCA 194.

128. 2012 BCCA 174; leave to appeal to Supreme Court of Canada has been filed.

129. 2011 SKQB 380.

The Saskatchewan Queen's Bench held that the objection of the respondents respecting the admissibility of the affidavit was overly restrictive and did not recognize recent developments in the jurisprudence:

> 20 ... Firstly, some of the applicants allege bias, and all of the applicants allege that there have been breaches of natural justice. It is a well established principle that it is permissible to use affidavit evidence to prove facts relevant to grounds of review that include a breach of natural justice, bias, fraud or other matters of this nature. See *S.G.E.U. v. Saskatchewan (Provincial Auditor)* (1986), 29 D.L.R. (4th) 684 (Sask. C.A.), and *Revelstoke Pre-Mix v. Chauffeurs, Teamsters & Helpers Local 395*, [1977] 2 W.W.R. 39 at 44 (Sask. C.A.).
>
> 21 Secondly, it is now open to a party in this Province to put forth all materials before a reviewing Court that bears on the arguments the parties are entitled to make. In *Hartwig v. Saskatoon (City) Police Association*, 2007 SKCA 74, 284 D.L.R. (4th) 268, the Saskatchewan Court of Appeal formulated a new approach that tailors evidentiary rules to the evolving standards of judicial review...
>
> ...
>
> 22 For the most part, the affidavit material sets forth material which helps contextualize the arguments that the Applicant Unions are entitled to make. The Bymoen affidavit appends documents that provide helpful background (i.e. copies of their CDO applications and the transcript of the proceedings before the SLRB). Exhibits "A", "B", "C" and "D" pertain to an entirely separate action. However, the inclusion of those documents are arguably necessary to permit and advance its "bias" argument.
>
> 23 Ideally, the Bymoen affidavit would have identified how the evidence contained within it relates to the issues before the Court in order to lay the groundwork for their admission - as stipulated by Richards J.A. in para. 33 of *Hartwig*. Notwithstanding this shortcoming, I find that the Bymoen affidavit is admissible because it is filed to support the bias and natural justice arguments and serves to place before the Court all of the material which bears on the arguments that the applicants are entitled to make.
>
> 24 Accordingly, I find that the impugned Bymoen affidavit is admissible.

2. *University of Alberta*

Saskatchewan (Labour Relations Board) should be contrasted with the recent Alberta case of *University of Alberta v. Alberta (Information and Privacy Commissioner)*.[130] In that case, the Alberta Court of Queen's Bench took a restrictive approach in deciding whether to admit affidavit evidence that was not before the tribunal. In distinguishing two cases decided pursuant to the *Federal Court Rules*, the court held that the *Alberta Rules of Court* only allow new documents to be admitted on judicial review in limited circumstances:

> 14 Finally, Alberta jurisprudence has clearly set out a more restrictive approach to admitting new documents and evidence in a judicial review. Alberta case law clearly establishes that additional evidence is only admissible in judicial review in limited situations. Slatter J, as he then was, noted in *Alberta Liquor Store Assn v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at para. 40: -
>
> > The general rule is that judicial review is conducted based on the Return filed by the tribunal. Neither Rule 406 nor Rule 753.08 require an affidavit in support. The record before the tribunal is generally the record before the Court, and additional affidavits and evidence are exceptional: *White v. Alberta (Workers' Compensation Board Appeals Commission)*, 2006 ABQB 359, 57 Alta. L.R. (4th) 282, 41 Admin. L.R. (4th) 141, at para. 35.
>
> . . .
>
> 18 This general rule is necessary given the nature of judicial review. In judicial review, the tribunal's decision is not subject to appeal, but to a determination of whether the decision meets the requisite standard of review. The judge on review is looking at the tribunal's reasons to determine whether, based on the evidence before the tribunal, it reached a rational decision (reasonableness standard) or a correct decision (correctness standard)...

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130. 2011 ABQB 699 (Lee J.). See also *Leahy v. Canada (Minister of Citizenship & Immigration)*, 2012 FCA 227 where the court cautioned that supporting affidavits on judicial review cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker: at para. 145.

3. *Stelmack*

The case of *British Columbia (Ministry of Public Safety and Solicitor General) v. Stelmack*[131] dealt with whether the Information and Privacy Commissioner has the jurisdiction to reopen an order of an Adjudicator on the basis of considering evidence that was not before the Adjudicator but that was before the court on judicial review. In particular the issues before the court were:

- Does the Commissioner have jurisdiction to reopen the Order?
- What test should be used to determine whether extra-record evidence is admissible on reopening?
- Was the extra-record evidence adduced by the applicants admissible?

The court concluded that the Adjudicator had applied the correct test to determine whether new evidence was admissible to reopen the inquiry and that the extra-record evidence was not admissible:

> 231 It is trite law that a court's role on judicial review is to supervise administrative decision-makers and not to usurp their function...
>
> 232 Flowing from this is the general principle that courts assess the reasonableness and fairness of an administrative decision on the basis of the evidence which was before the decision-maker, except in circumstances in which a party alleges that the decision-maker exceeded its authority or acted unfairly.
>
> 233 In *Eamor,* the case cited by Brown to support the admissibility of her extra-record evidence, this Court cited *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 106 D.L.R. (3d) 212 for the four-part test for admitting extra-record evidence on appeal. Mr. Justice Low found that *Wade v. Strangway* (1996), 132 D.L.R. (4th) 406, 18

131. 2011 BCSC 1244.

B.C.L.R. (3d) 108 (C.A.) extended the applicability of the test to judicial review hearings.

234 However, I note that in both *Eamor* and *Wade*, the petitioner sought to argue that the decision was unfair. In *Eamor,* the petitioner asked the Court to consider evidence that the arbitrator was misled and that the decision against the petitioner was therefore fraudulently obtained...

235 *Eamor* does not stand for the proposition that all extra-record evidence will be considered on judicial review if it meets the test for admitting new evidence on appeal. Evidence that a decision was fraudulently obtained is generally admissible on judicial review to permit the court to determine issues of procedural fairness because a decision obtained by fraud is unfair.

236 The underlying case, *Wade*, supports this interpretation. In that case, the petitioner asked the Court to find that a university President's decision not to recommend the petitioner for tenure was based on a wholly inadequate foundation. The Court dismissed the petitioner's application to adduce on review evidence which was not before the decision-maker but which was available at the relevant time.

237 The Court accepted that the four-part test from *Palmer* applies when assessing whether extra-record evidence should be admitted on appeal of a judicial review. However, again, the petitioner alleged that the decision was tainted by a conflict of interest, that is, that the decision was unfair. After considering the flaws in the new evidence, Newbury J.A., writing for the Court, said at para. 10:

> [10] ... As I said earlier, absent a jurisdictional error or breach of the duty of fairness, Dr. Strangway was entitled to make the decision he did when he did ...

238 I read this case as saying that where a party alleges a jurisdictional error or a breach of the duty of fairness, the *Palmer* test applies to determine whether extra-record evidence is admissible. I note that *Wade* has been cited only once, in *Eamor*, a case in which fraud was alleged.

. . .

240 This review of the relevant law leads me to conclude that the *Palmer* test applies to determine whether extra-record evidence is admissible on issues of jurisdiction and procedural fairness.

Conclusions on Admissibility of Extra-Record Evidence on Judicial Review of the Order

241 The Senior Adjudicator concluded that the test to determine whether to reopen the Inquiry to consider extra-record evidence, and to revisit the terms of the Order is the *Palmer* test, the test for accepting extra-record evidence on appeal. That test has four parts:

1. the evidence should generally not be admitted if by due diligence it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases ...;
2. the evidence must be relevant, in the sense that it bears upon a decisive or potentially decisive issue in the trial;
3. the evidence must be credible, in the sense that it is reasonably capable of belief; and
4. it must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the trial.

[Emphasis added.]

C. Summary dismissals/stays of proceedings

1. *Saskatchewan Labour Board*

In *C.J.A., Local 1985 v. Saskatchewan (Labour Relations Board)*,[132] the Saskatchewan Court of Queen's Bench discussed the test for summary dismissal in the labour relations context. In particular, the court focused on whether the requirement of "no arguable case" had been met and distinguished between a board's power to summarily dismiss and the power to decide matters without an oral hearing.

132. 2011 SKQB 380.

2. *Clark*

In *Clark v. Alberta (Institute of Chartered Accountant, Complaints Inquiry Committee)*,[133] the Court of Appeal reiterated that a stay of proceedings is not always the appropriate remedy when an abuse of process has been established. A stay should only be granted in extreme cases.

D. Exercise of Discretion

In *Canadian Union of Postal Workers v. Canada Post Corp.*,[134] the Federal Court discussed the Minister's discretion in appointing an arbitrator in a labour dispute. The union applied for judicial review of the Minister's decision on the grounds that she had unreasonably exercised her discretionary power by ignoring two essential qualifications required of the arbitrator. The respondent argued that the Minister's discretion was unobstructed, unguided and not subject to any criteria with respect to the qualifications of the arbitrator. The Federal Court agreed with the union. It held that "however discretionary a ministerial appointment may be, there is no such thing as absolute discretion".[135] The Court set aside the decision of the Minister.

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133. 2012 ABCA 152. See also *Commission des droits de al personne et de la jeunesse c. Manoir Archer inc.*, 2012 QCCA 343 for another example of a stay being granted in an administrative law context..

134. 2012 FC 110. It is interesting to note that the union has also challenged the appointment of the subsequent arbitrator on the grounds of bias. The arbitration proceedings have been temporarily stayed until the court renders a final decision on the bias allegations.

135. At para. 24.

A number of the other cases discussed earlier involve judicial review of discretionary decisions by a statutory delegate—including *Figliola* and *Halifax (Regional Municipality) v. N.S. (Human Rights Commission)*.

E. Reconsideration

In *Johnson v. Alberta (Appeals Commission for Alberta Workers' Compensation)*,[136] the Court of Appeal of Alberta noted that "the power to reconsider is not to be used as a method of providing supplemental reasons when a court challenge appears on the scene in order to shore up reasons originally given".[137] Likewise a rehearing is not to be used by a tribunal to, in effect, provide a brief for judicial review.

F. Time limit for applying for judicial review

In *Lee v. Yeung*,[138] the Alberta Court of Queen's Bench held that the six-month limitation period for bringing applications for judicial review contained in the Alberta *Rules of Court* applied even where the applicants sought both public and private law remedies (the latter would have otherwise been subject to a longer limitation period).

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136. 2011 ABCA 345.

137. At para. 10.

138. 2012 ABQB 40.

G. Costs

1. *Brian Neil Friesen Dental Corp.*

In *Brian Neil Friesen Dental Corp. v. Director of Companies (Manitoba)*,[139] the Manitoba Court of Appeal held that costs should not be awarded against the statutory delegate in the absence of misconduct (and referred to some cases where costs were awarded and the circumstances involved in those decisions). The court considered the limited role the delegate had in the appeal.

2. *Kelly*

In *Kelly v. Alberta (Energy Resources Conservation Board)*,[140] the Court of Appeal of Alberta considered the discretionary power of the Board to award costs to "local interveners" under its home statute. The court concluded that it was an unreasonable interpretation of the statute to hold that the power to award costs to local interveners was limited to when there was actual physical damage to the interveners' land and that it was unreasonable to consider perceived success of intervention when assessing the interveners' entitlement to costs.

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139. 2011 MBCA 71.

140. 2012 ABCA 19.

3. *Routkovskaia*

In *Routkovskaia v. British Columbia (Human Rights Tribunal)*,[141] the British Columbia Court of Appeal addressed whether the chambers judge had breached the duty of procedural fairness by making a costs award without having heard submissions by the losing party. It held that she had not. The court also rejected the appellant's argument that the same policy considerations which presumably underlie the statutory limitation on costs at the tribunal level should apply on judicial review. Finally, the court reiterated the principle that sympathy for a litigant's financial plight is not a reason to deprive a successful litigant of their costs.

IX. CONCLUSION

It has been another busy year in the realm of administrative law. And as the concepts of standards of review, procedural fairness, standing, and privacy continue to evolve, there is every reason to expect this trend to continue—with lots of work for administrative lawyers!

141. 2012 BCCA 141.

APPENDIX A

Extract from the decision of Mainville J.A. in *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)* 2012 FCA 40

Historical and constitutional foundations of judicial review

71 It is useful to set out briefly the foundations of judicial review in Canada. The two guiding principles of the British constitution - on which the constitution of Canada is modelled - are the sovereignty of Parliament and the rule of law. These constitutional principles were largely developed as a result of the English Civil War of the 17th Century and its aftermath. This long, difficult and often bloody struggle between the Crown and Parliament culminated in the victory of the Parliamentarians in the so-called "Glorious Revolution", which ensured the accession to the throne of William and Mary and led to the adoption of the *Bill of Rights* of 1689, later followed by the *Act of Settlement* of 1701.

72 Through these historical events, the Crown's powers were made subject to the laws of Parliament. Prior to the *Bill of Rights* of 1689, the Crown had asserted that it could "assum[e] and exercis[e] a power of dispensing with and suspending of laws and the execution of laws without the consent of Parliament": Preamble to the *Bill of Rights* of 1689. While the *Bill of Rights* of 1689 firmly consecrated the principle of Parliamentary sovereignty, it also implicitly empowered the courts, and particularly the common law courts, to both interpret Parliament's laws and censure unlawful behaviour on the part of Crown officials. This was further entrenched by the subsequent *Act of Settlement* of 1701 which recognized the independence of the judiciary.

73 The *Bill of Rights* of 1689, the *Act of Settlement* of 1701, and the constitutional principles flowing from those documents thus ensured that the Crown and its officials would be thereafter bound by Parliament's laws as interpreted by the independent common law courts: see Dussault and Borgeat, "Administrative Law - A Treatise" second edition, volume 4, Carswell, 1990 at pages 12-13 and 27 to 31; A. L. Goodhart and R. E. Megarry, "Judicial Review and the Rule of Law: Historical Origins" (1956), 72 L.Q.R. 345 at p. 362; Lord Hailsham of St. Marylebone, "Democracy and Judicial Independence" (1979), 28 N.B.L.J. 7 at page 9.

74 The principles of Parliamentary sovereignty and of the rule of law are still today at the heart of judicial review: *Dunsmuir* at paras. 27 to 30.

75 With the expansion of state intervention in the first part of the 20th Century, Parliament set up numerous intricate legislative schemes seeking to achieve complex economic and social goals. It delegated more and more powers to various administrative bodies entrusted with the authority to implement these schemes. Parliament also created numerous administrative tribunals to adjudicate

the disputes resulting from these complex schemes. In some cases, Parliament sought to protect these administrative bodies and tribunals from interference by the courts. This was principally achieved by the inclusion of various privative clauses in the legislation enabling these administrative bodies and tribunals to carry out their functions.

76 Though the courts throughout the Commonwealth fiercely resisted these curtailments of their authority, they eventually relented in deference to the principle of Parliamentary sovereignty. However, the courts always maintained a right - albeit limited - to control administrative decisions on the ground that the rule of law required it in certain appropriate circumstances, notably in cases of excess of jurisdiction, abuse of power or failure to comply with principles of natural justice.

The modern Canadian approach to judicial review of questions of law

77 The modern Canadian approach to judicial review of questions of law involving administrative tribunals can be ascertained from *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 ("*C.U.P.E.*") and *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476 ("*Control Data*"). Justice Lamer summarized as follows the Canadian approach in *Control Data* at pages 492-493:

> In principle, where there is a privative clause the superior courts should not be able to review errors of law made by the administrative tribunals. However, it is now settled that some errors of law can cause the arbitrator to lose his jurisdiction. The debate turns on the question of *which* errors of law result in the loss of jurisdiction. Contrary to the decision of Lord Denning in *Pearlman v. Keepers and Governors of Harrow School,* [1979] 1 All E.R. 365, where he said (at p. 372) that "no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends" (subsequently disapproved by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union,* [1980] 3 W.L.R. 318, and *Re Racal Communications Ltd.,* [1980] 2 All E.R. 634), this Court has tended since *Nipawin, supra,* [*Service Employees'International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382]] and C.U.P.E., *supra,* to avoid intervening when the decision of the administrative tribunal was reasonable, whether erroneous or not. In other words, only unreasonable errors of law can affect jurisdiction. The following extract from C.U.P.E., *supra,* at p. 237, frequently referred to in later cases, has become the classic statement of the approach taken by this Court:
>
> > Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

> This is a very severe test and signals a strict approach to the question of judicial review. It is nevertheless the test which this Court has applied and continues to apply [...]

78 Thus, if Parliament (or a provincial legislature) has adopted a privative clause providing that the decisions of an administrative tribunal - or of any other administrative decision maker - are not subject to judicial review for error of law, the courts should strive to respect that legislative intent and should only interfere where a given decision is unreasonable.

79 In subsequent cases, the Supreme Court of Canada applied this approach, even in the absence of a privative clause, insofar as certain factors set out in the enabling legislation made the legislative intent clear.

80 In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 ("*Pezim*') and in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 ("*Southam*") - both of which involved a statutory appeal - the Supreme Court of Canada did not apply a correctness standard to questions of law, but rather deferred to the original decision-maker's legal analysis. In both cases, the application of the reasonableness standard flowed from legislative intent. As noted by Justice Iacobucci in *Pezim* at pages 589-590:

> The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

81 In *Pezim* and *Southam*, privative clauses were found to be only one of many factors which may be considered for the purpose of ascertaining a legislative intent to limit the scope of a court's power to review an administrative tribunal's decision on questions of law. Factors such as the nature of the problem before the tribunal, the wording of the enabling (or "home") statute, the purpose of that statute, and the areas of expertise could be considered to ascertain legislative intent, in addition to the presence or absence of a privative clause. Consequently, a so-called "pragmatic and functional" approach - similar to the one developed in *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 for the identification of jurisdictional issues - was required in order to ascertain the scope of judicial review of an administrative tribunal's decision: *Pezim* at p. 592.

82 Similar considerations were expressed in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraph 26: "The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed". This was also reiterated in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 21: "....the pragmatic

and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law".

Dunsmuir and the subsequent case law

83 The Minister submits in this appeal that in view of the responsibilities conferred on him by the SARA and the *Fisheries Act*, his interpretation of those statutes is not susceptible to judicial review on a standard of correctness. The Minister's position implies that the standard of review analysis ends as soon as Parliament confers on a minister the responsibility to administer a federal statute. This, the Minister submits, is the conclusion which must be drawn from the recent jurisprudence of the Supreme Court of Canada. I disagree.

84 The Supreme Court of Canada, in *Dunsmuir*, and subsequently in *Celgene*, *Mowat* and *Smith*, has not repudiated the relevance of legislative intent, nor discarded the relevance of a standard of review analysis, as the Minister implies. This is not what these decisions stand for. As noted in *Dunsmuir* at paragraph 30, "...determining the applicable standard of review is accomplished by establishing legislative intent."

85 As Justices Bastarache and LeBel jointly noted in *Dunsmuir* at paragraphs 27 to 31, judicial review is intimately connected with the preservation of the rule of law and with maintaining legislative supremacy. While developing a more coherent and workable framework for judicial review - notably by merging the "patently unreasonable" and "reasonableness *simpliciter*" standards of review into a single "reasonableness" standard - *Dunsmuir* still requires that a proper standard of review analysis be carried out in appropriate circumstances.

86 For this purpose, *Dunsmuir* has set out a two step process: first, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular question; second, where the first inquiry proves unfruitful, courts must proceed to a standard of review analysis involving the factors making it possible to identify the proper standard of review: *Dunsmuir* at para. 62.

87 In the case of an administrative tribunal exercising adjudicative functions in the context of an adversarial process, and explicitly or implicitly empowered by its enabling statute to decide questions of law, judicial deference will normally extend to its interpretation of its enabling statute or of a statute closely connected to its functions. This conclusion was drawn in *Dunsmuir* on the basis of existing case law, which had already extensively canvassed the standard of review applicable to adjudicative administrative tribunals. As stated in *Dunsmuir* at para. 54:

> [54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. 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: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City)*

> *Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.
>
> [Emphasis added]

88 However, deference on a question of law will not always apply, notably where the administrative body whose decision or action is subject to review is not acting as an adjudicative tribunal, is not protected by a privative clause, and is not empowered by its enabling legislation to authoritatively decide questions of law. A standard of review analysis is still required in appropriate cases. As noted by Justices Bastarache and LeBel at paragraphs 63 and 64 of *Dunsmuir*:

> [63] The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.
>
> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (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. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

89 What *Dunsmuir* has made clear is that "[a]n exhaustive review is not required in every case to determine the proper standard of review": *Dunsmuir* at para. 57. Further, *Dunsmuir* has also made clear that "at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions": *Dunsmuir* at para. 68 (emphasis added); *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 53.

90 Consequently, since *Dunsmuir*, unless the situation is exceptional, the interpretation by an adjudicative tribunal of its enabling statute or of statutes closely related to its functions should be

presumed to be a question of statutory interpretation subject to deference on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 34 and 41, per Justice Rothstein ("*Alberta Teachers' Association*").

91 The decisions of *Celgene*, *Mowat*, and *Smith* relied upon by the Minister are consistent with *Dunsmuir* and with the relevance of legislative intent. Properly understood, these cases do not support the Minister' position as to the standard of review.

92 *Celgene* concerned the interpretation of an expression found in provisions of the *Patent Act*, R.S.C. 1985, c. P-4 by the Patented Medicine Prices Review Board. That issue of statutory interpretation was reviewed and decided on a standard of correctness. However, a question was raised as to whether correctness was the operative standard in the circumstances. This question was not answered by the Court in the light of its conclusion that the Board's decision was unassailable under a standard of review based either on correctness or on reasonableness. The Minister's reliance on this decision is therefore misplaced.

93 *Mowat* concerned a decision to award legal costs made by the Canadian Human Rights Tribunal acting in its adjudicative capacity under the *Canadian Human Rights Act* following an adversarial process. In issue in that case was the Tribunal's interpretation of provisions in the *Canadian Human Rights Act*. Justices LeBel and Cromwell concluded that, under *Dunsmuir*, deference should normally be extended to decisions of adjudicative tribunals as to the interpretation of their enabling statutes. Applying a reasonableness standard of review, Justices LeBel and Cromwell finally concluded that the Canadian Human Rights Tribunal's interpretation of its enabling legislation was not sustainable. Again, that case does not support the Minister's position since it concerned an adjudicative tribunal.

94 *Smith* concerned a decision to award costs made by an Arbitration Committee established under Part V of the *National Energy Board Act*, R.S.C. 1985, c. N-7. The issue in that case was the Arbitration Committee's interpretation of the word "costs" in subsection 99(1) of the *National Energy Board Act*. Justice Fish, for the majority, ruled that since the Arbitration Committee was interpreting its enabling statute, a reasonableness standard of review applied in light of the principles set out in *Dunsmuir*. This conclusion flowed from Parliament's intent, as noted at para. 31 of this decision:

> [...] in fixing the costs that must be paid by expropriating parties, the Committee has been expressly endowed by Parliament with a wide "margin of appreciation within the range of acceptable and rational solutions" (*Dunsmuir*, at para. 47): the only costs that must be awarded under s. 99(1) are those "determined by the Committee to have been reasonably incurred". This statutory language reflects a legislative intention to vest in Arbitration Committees sole responsibility for determining the nature and the amount of the costs to be awarded in the disputes they are bound under the *NEBA* to resolve. [Emphasis added]

95 The analytical framework and the presumption set out in *Dunsmuir* have been recently described as follows by Justice Fish in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, above at paras. 35 and 36:

> [35] An administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, 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'", or a "true question of jurisdiction or *vires*". It will be reviewable for correctness as well if it involves the drawing of jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, at paras 58-61; *Smith*, at para. 26; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, *per* LeBel J.).
>
> [36] The standard of reasonableness, on the other hand, normally prevails where the tribunal's decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or 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" (*Dunsmuir*, at paras. 51 and 53-54; *Smith*, at para. 26).

96 This analytical framework and this presumption must be understood in the context in which they were developed: they concern adjudicative tribunals. The presumption is derived from the past jurisprudence which had extensively considered the standard of review applicable to the decisions of such tribunals. By empowering an administrative tribunal to adjudicate a matter between parties, Parliament is presumed to have restricted judicial review of that tribunal's interpretation of its enabling statute and of statutes closely connected to its adjudicative functions. That presumption may however be rebutted if it can be found that Parliament's intent is inconsistent with the presumption.

97 The Minister is inviting this Court to expand the above-described *Dunsmuir* analytical framework and presumption to all administrative decision makers who are responsible for the administration of a federal statute. I do not believe that *Dunsmuir* and the decisions of the Supreme Court of Canada which followed *Dunsmuir* stand for this proposition.

98 What the Minister is basically arguing is that the interpretation of the SARA and of the *Fisheries Act* favoured by his Department and by the government's central agencies, such as the Department of Justice, should prevail. The Minister thus seeks to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable. This harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this Court to reach such a far-reaching conclusion.

99 The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from *Dunsmuir*, which was reiterated in *Alberta Teachers' Association* at paras. 34 and 41, does not extend to these circumstances. The standard of review analysis set out at paragraphs 63 and 64 of *Dunsmuir* must thus be carried out in the circumstances of this case in order to ascertain Parliament's intent.

100 In other words, does Parliament intend to shield the Minister's interpretation of the pertinent provisions of the SARA and of the *Fisheries Act* from judicial review on a standard of correctness? On the basis of the standard of review analysis further set out below, I answer in the negative.

APPENDIX B

Extract from the decision of Abella J. in
Doré v. Barreau du Québec
2012 SCC 12

45 It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

46 The starting point is the expertise of the tribunals in connection with their home statutes. Citing Prof. David Mullan, *Dunsmuir* confirmed the importance of recognizing that

> 1. those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime... .
>
> 2. (para. 49, citing "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93.)

And, as Prof. Evans has noted, the "reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension" (p. 81).

47 An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:

> ... administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.
>
> (p. 605, citing "Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels" (1987-88), *McGill L.J.* 170, at pp. 173-74.)

48 This case, among others, reflected the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation (see *Conway*, at paras. 79-80). As Major J. noted in dissent in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, tailoring the *Charter* to a specific situation "is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise" (para. 64; see also *C.U.P.E.*, at pp. 235-36).

49 These principles led the Court to apply a reasonableness standard in *Chamberlain*, where McLachlin C.J. found that a school board had acted unreasonably in refusing to approve the use of books depicting same-sex parented families. She held that the board had failed to respect the "values of accommodation, tolerance and respect for diversity" which were incorporated into its enabling legislation and "reflected in our Constitution's commitment to equality and minority rights" (para. 21). Similarly, in *Pinet*, Binnie J. used a reasonableness standard to review, for compliance with s. 7 of the *Charter*, a decision of the Ontario Review Board to return the appellant to a maximum security hospital, observing that a reasonableness review best reflected "the expertise of the members appointed to Review Boards" (para. 22). The purpose of the exercise was to determine whether the decision was "the least onerous and least restrictive" of the liberty interests of the appellant while considering "public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society" (paras. 19 and 23). In *Pinet*, the test was laid out in the statute, but Binnie J. made it clear that the emphasis on the least infringing decision was a constitutional requirement.

50 In *Lake*, where the court was reviewing the Minister's decision to surrender a Canadian citizen for extradition, implicating ss. 6(1) and 7 of the *Charter*, the Court again applied a reasonableness standard. LeBel J. held that deference is owed to the Minister's decision, as the Minister is closer to the relevant facts required to balance competing considerations and benefits from expertise:

> This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt* [*Canada v. Schmidt*, [1987] 1 S.C.R. 500]) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). [Emphasis added; para. 34]

51 The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

> If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]

52 So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

53 The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated. Most breaches of art. 2.03 of the *Code of ethics* calling for "objectivity, moderation and dignity", necessarily engage the expressive rights of lawyers. That would mean that most exercises of disciplinary discretion under this provision would be transformed from the usual reasonableness review to one for correctness.

54 Nevertheless, as McLachlin C.J. noted in *Catalyst*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

55 How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the "twin goals of public safety and fair treatment" grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).

56 Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

57 On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

58 If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.