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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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I. INTRODUCTION

The past year has once again seen a considerable number of decisions which highlight the complexities of administrative law.[1] The most noteworthy decisions are three decisions of the Supreme Court of Canada—one dealing with standards of review,[2] one dealing with reasons,[3] and one dealing with multiple forums and issue estoppel.[4] Of course, issues such as standing and other aspects of procedural fairness have continued to attract judicial attention as well.

II. STANDARDS OF REVIEW

Five years ago—in 2008—the Supreme Court of Canada in *Dunsmuir*[5] tried to simplify judicial review by leaving us with two standards of review—correctness and reasonableness.

Since then, the Court has significantly narrowed when the correctness standard of review will be applicable. On the one hand, it has virtually abolished the concept of "a true jurisdictional

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1. I gratefully acknowledge Dawn M. Knowles, LL.B. from our office for her very capable assistance in the preparation of this paper. I also appreciate those colleagues from across the country who draw my attention to interesting developments in administrative law in their jurisdictions. A version of this paper was presented to the Continuing Legal Education Society of British Columbia in Vancouver on 28 October 2013.

2. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34.

3. *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30.

4. *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19.

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

error".[6] On the other hand, the Court has also reduced the type of legal questions which will attract the correctness standard of review.[7]

Today, it appears that the applicable standard of review will be reasonableness in the vast majority of cases. This, however, leaves considerable scope for advocacy about whether an impugned decision is—or is not—reasonable.

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6. In *Canada (Canada Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at paragraph 18, Justices LeBel and Cromwell for the Court stated that a question is one of true jurisdiction if it requires the tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter".

   In *Boddy v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2012 NSCA 73, Justice Bryson referred to Justice Rothstein's comment from *ATA News* that questions of "true jurisdiction" may not exist. See *Can-Euro Investments Ltd. v. Ollive Properties Ltd.*, 2013 NSCA 80 and *Jones v. Halifax (Regional Municipality)*, 2012 NSSC 368 for cases where the court did find jurisdictional errors.

   On the one hand, one might wonder whether it makes any difference to the outcome, so long as the courts can be relied on to find decisions which previously might have been characterized as "jurisdictional in nature" to be "unreasonable". On the other hand, just because a decision might be "reasonable" in the abstract does not mean that the decision-maker had authority or jurisdiction to make that decision. The complete abolition of the concept of jurisdiction would have major constitutional ramifications.

7. For examples, see: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 ("*ATA News*"); *Canada (Canadian Human Rights Commission) v. Canada*, 2011 SCC 53 ("*Mowat*"); *Smith v. Alliance Pipeline*, 2011 SCC 7; *Halifax (Regional Municipality) v. N.S. (Human Rights Commission)*, 2012 SCC 10. For examples of *post-Dunsmuir* cases where the correctness standard of review was applied, see: *Shaw v. Alberta (Utilities Commission)*, 2012 ABCA 378 and *North End Community Health Association v. Halifax (Regional Municipality)*, 2012 NSSC 330; *Ontario (Alcohol and Gaming Commission, Registrar) v. 751809 Ontario Limited (c.o.b. as Famous Flesh Gordon's)*, 2013 ONCA 57 (standard of proof); *Council of Independent Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32 (whether regulation *ultra vires*).

A. 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 go on to determine whether the impugned decision *is* reasonable. This is a highly contextual matter and what is reasonable to one judge may not be reasonable to another.

1. *Irving Pulp & Paper, Ltd.*

The Supreme Court of Canada's decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*[8] provides an excellent example of both the contextual nature of the reasonableness standard of review, and the fact that different judges may have different views about whether the impugned decision is reasonable.

The case involved a grievance challenging the employer's unilaterally implemented random and mandatory alcohol testing policy for employees in safety sensitive positions. 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. Because the workplace was not an "ultra-dangerous workplace", the employer would have had to adduce evidence of prior alcohol-related incidents in the workplace to justify the policy.

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8. 2013 SCC 34. See also *Jones' Masonry Ltd. v. Labourers' International Union of North America, Local 900*, 2013 NBCA 50 (decided after the Supreme Court of Canada's decision in *Irving*) in which Justice Robertson of the New Brunswick Court of Appeal, speaking for the majority, recognized that deference is concerned with a range of reasonable outcomes and that just because a decision is not one the court would have made does not mean it should be set aside.

On judicial review, the Court of Queen's Bench accepted the mutual submissions of the parties and applied the reasonableness standard of review. However, the Court held that the arbitration board's decision to distinguish between a dangerous workplace and an "ultra-dangerous" workplace was unreasonable and quashed the decision.[9]

The union appealed that decision. The Court of Appeal held that the lower court had erred by applying the reasonableness standard of review. Instead, the Court of Appeal held the correctness standard of review should have been applied to 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, because it was an important question of law, with the reasonableness standard of review applying to the board's factual findings. The Court of Appeal held that the arbitration board had erred in holding that the testing policy could only be justified in an "ultra-dangerous" category of workplace.[10]

The union appealed to the Supreme Court of Canada. In a 6-to-3 split decision, the Supreme Court of Canada allowed the Union's appeal and restored the decision of the arbitration board. All of the judges agreed that reasonableness was the applicable standard of review, and that the determination about whether a decision is reasonable requires consideration of its context, which in this case included the previous arbitral jurisprudence. The differing conclusions of the judges rested squarely on the judges' differing opinions about what the previous arbitral jurisprudence actually was, and therefore whether the arbitrator's decision was "reasonable".

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9. 2010 NBQB 294.

10. 2011 NBCA 58. See last year's paper for an extensive discussion about the Court of Appeal decision.

The majority judgment

The majority judgment was delivered by Justice Abella.[11]

Abella J. held that that the standard of review for reviewing the decision of a labour arbitrator is reasonableness.[12] She rejected the approach of the New Brunswick Court of Appeal to apply a bifurcated standard of review (a correctness standard to the board's analytical framework for determining the validity of the policy and a reasonableness standard to the board's factual findings). She held that the Court of Appeal had erred by applying the correctness standard:

> 15 ... The New Brunswick Court of Appeal dismissed the appeal. The court applied a bifurcated standard of review. It applied a correctness standard to the board's analytical framework for determining the validity of the employer's random alcohol testing policy and a reasonableness standard to the board's factual findings. Using this segmented approach, the Court of Appeal substituted its own legal framework and concluded that no balancing of interests was required in a dangerous workplace, whether or not it was unionized. As a result, it held that employers can unilaterally impose random alcohol testing in any dangerous workplace, unionized or non-unionized, without having to show reasonable cause, such as evidence of an existing problem with alcohol use. It also found the board's findings regarding the degree of dangerousness at the workplace to be unreasonable.
>
> 16 In my respectful view, the Court of Appeal erred in disregarding this Court's direction that decisions of labour arbitrators be reviewed for reasonableness and that deference be paid to their legal and factual findings when they are interpreting collective agreements. This misapplication of the standard of review led the Court of Appeal away from its required task of determining whether the board's decision fell within a range of reasonable outcomes, and towards a substitution of its own views as to the proper legal framework and factual findings. It also led the court essentially to disregard the remarkably consistent arbitral jurisprudence for balancing safety and privacy in a dangerous workplace, and to impose instead a novel, unfettered and automatic remedy outside the existing consensus and

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11. LeBel, Fish, Cromwell, Karakatsanis and Wagner JJ. concurred.

12. At para. 7, citing *Dunsmuir* as well as *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

> expectations in the labour relations community about how these issues are to be approached under a collective agreement.

In determining whether the arbitrator's decision was reasonable, Abella J. noted that there is a substantial body of arbitral jurisprudence concerning the unilateral exercise of management rights clauses in a workplace safety context. The result of the jurisprudence has been to establish a "balancing of interests proportionality approach" which incorporates the fundamental tenet of collective bargaining that an employee can only be disciplined for reasonable cause. The underlying principle is that "an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights."[13] The dangerousness of the workplace is a relevant factor to consider in the proportionality test, but is not the only consideration.

In Justice Abella's view, there is consistent arbitral jurisprudence whereby:[14]

> 5 ...arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse. In the latter circumstance, the employee may be subject to a random drug or alcohol testing regime on terms negotiated with the union.
>
> 6 But a unilaterally imposed policy of mandatory, random and unannounced testing for *all* employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace. <u>This body of arbitral jurisprudence is of course not binding on this Court, but it is nevertheless a valuable benchmark against which to assess the arbitration board's decision in this case</u>.
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> . . .

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13. At para. 4.

14. In the course of the judgment, Justice Abella spent considerable time reviewing the arbitral jurisprudence in greater detail: see paragraphs 17 to 20, and 30 to 41 (reproduced in Appendix A to this paper).

> 8 In a thoughtful and meticulous decision of almost 80 pages, a majority of the arbitration board in this case, applying the arbitral consensus, concluded that the employer, Irving Pulp & Paper, Limited, exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use. In my view, based on the board's findings of fact and its reliance on the arbitral consensus for determining the scope of the employer's rights under the collective agreement in such circumstances, the decision was a reasonable one.
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> . . .
>
> 42 This arbitral consensus, which was carefully applied by the board, helps inform why its decision was reasonable on the facts of this case.
>
> [Emphasis added.]

Finally, in deciding whether the board's decision was reasonable, the decision must be considered as a whole:

> 54 The board's decision should be approached as an organic whole, without a line-by-line treasure hunt for error (*Newfoundland Nurses*, at para. 14). In the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed. In this case, the board's conclusion was reasonable and ought not to have been disturbed by the reviewing courts.

The dissenting judgment

The dissenting judgment was delivered by Justices Rothstein and Moldaver.[15] The dissenting judges agreed with the majority on two key issues:

15. McLachlin C.J. concurred.

a. the appropriate standard of review was reasonableness;[16] and

b. the arbitral jurisprudence should be looked at in determining whether the board's decision was reasonable.

However, Rothstein and Moldaver JJ. held that the board had departed from the arbitral consensus, and that its decision was therefore unreasonable.

In defining "reasonableness", the dissenting judges emphasized the importance of context and agreed with Abella J. that arbitral jurisprudence was an important benchmark in determining whether a decision was reasonable:

> 74 In recent years, this Court has emphasized that reasonableness is "a single standard that takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; see also *Alberta Teachers*, at para. 47). The factual and legal context in which a decision is made is critical to assessing its reasonableness for the simple reason that "[r]easonableness is not a quality that exists in isolation" (*Paccar*, at p. 1018, *per* Sopinka J.). Rather, when a reviewing court brands a decision as "reasonable" or "unreasonable", it is necessarily making a conclusion about the relationship between the ultimate decision and the facts and law that underlie it. The context of a decision thus shapes the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47) or, more simply, the "range of reasonable outcomes" (*Khosa*, at para. 4).
>
> 75 The context of this case is informed in no small part by the wealth of arbitral jurisprudence concerning the unilateral exercise of management rights arising under a collective agreement in the interests of workplace safety. We will say more about the "balancing of interests" test that has emerged from that jurisprudence in a moment, but for now the salient point is that arbitral precedents *in previous cases* shape the contours of what qualifies as a reasonable decision *in this case*. In that regard, we agree with our colleague, Abella J., who describes this "remarkably consistent arbitral jurisprudence" as "a valuable

16. The dissenting judgment also rejected the approach taken by the Court of Appeal in which correctness was applied because the appeal was, at its core, important to the public at large: paras. 66 to 73.

benchmark against which to assess the arbitration board's decision in this case" (paras. 16 and 6).

76 The arbitral cases themselves stress the importance of arbitral consensus in shaping subsequent awards. For example, in *Prestressed Systems Inc. and L.I.U.N.A., Loc. 625 (Roberts) (Re)* (2005), 137 L.A.C. (4th) 193, Arbitrator Lynk spoke of a "'common law' of the unionized workplace" and observed:

> While statutes and collective agreements form the foundation for the law of the unionized workplace in Ontario today, as well as providing the source for arbitral authority, any statement on the scope of labour arbitration law would be defici[en]t and incomplete without also including the interpretative function that arbitration awards play in building upon and adding to the law on workplace relations. When an arbitral rule or principle has emerged through industrial relations practice and become broadly accepted in a series of arbitration awards, then, even though the governing statute, the broader common law and the collective agreement may be silent on the matter, this principle at some point crystallizes and becomes part of the law of the unionized workplace. The duty of management to act fairly and reasonably, the estoppel doctrine, the *KVP* principle on company rules and the doctrine of the culminating incident, to name but only a few, have all become part of the legal regime of the workplace through the arbitral "common law". [Emphasis added; pp. 206-7.]

77 Thus no arbitral board is an island unto itself. As it is with the common law, which matures with the benefit of experience acquired one case at a time, so it is with the arbitral jurisprudence. Indeed, in this case, the arbitral board cited multiple prior arbitral awards for the proposition that Mr. Day had a right to privacy in his workplace (para. 19, citing *Halifax (Regional Municipality) and N.S.U.P.E., Local 2 (Re)* (2008), 171 L.A.C. (4th) 257 (Veniot) which referred to *Prestressed Systems*; *Re Monarch Fine Foods Co. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* (1978), 20 L.A.C. (2d) 419 (Picher); *Trimac Transportation Services- Bulk Systems and T.C.U. (Re)* (1999), 88 L.A.C. (4th) 237 (Burkett)).

78 Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption - for the parties, labour arbitrators, and the courts - that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As Professor Weiler, a leading authority in this area, observed in *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 21 L.A.C. 332:

> This board is not bound by any strict rule of *stare decisis* to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless

> they can be fairly distinguished or unless they appear to be unreasonable. [Emphasis added; p. 344.]

See, also D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), at topic 1:3200 (including discussion of the "Presumption Resulting From Arbitral Consensus"); R. M. Snyder, *Collective Agreement Arbitration in Canada* (4th ed. 2009), at p. 51 (identifying Professor Weiler's view as "typical").

> 79 Thus, while arbitrators are free to depart from relevant arbitral consensus and march to a different tune, it is incumbent on them to explain their basis for doing so. As this Court has stressed, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir*, at para. 47). Because judges are not mind readers, without some explanation, whether implicit or explicit, for a board's departure from the arbitral consensus, it is difficult to see how a "reviewing court [could] understand why the [board] made its decision" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). Reasonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency.

The dissenting judges were of the view that the arbitration board had departed from arbitral consensus and had not provided an adequate explanation for doing so:

> 80 In this case, as we will explain, the board departed from the legal test emerging from the arbitral consensus by elevating the threshold of evidence Irving was required to introduce in order to justify a policy of random alcohol testing. The board, however, offered no explanation - whether implicit or explicit, reasonable or unreasonable - for doing so. In the absence of any explanation whatsoever, we are unable to understand why the board thought it reasonable to do what it did. In the circumstances of this case, its decision thus fell outside the range of reasonable outcomes defensible in respect of the facts and law.

The dissenting judges were also of the view that, while prior arbitral jurisprudence should be looked at as a benchmark for reasonableness, precision about the prior arbitral jurisprudence was required.[17] They were of the view that cases dealing with random *drug* testing (as opposed to random *alcohol* testing) and cases dealing with *post-incident* testing

17. At paras. 83 to 90.

(as opposed to random *pre-incident* testing) should not have been considered in deciding whether Irving's policy was reasonable.

Accordingly, the minority concluded that Irving's alcohol testing was reasonable and that the Union's appeal should have been dismissed.

Comments

The Supreme Court of Canada's decision in the *Irving* case is a classic example of different judges looking at the same facts, applying the same standard of review, but nevertheless coming to completely different results.

Secondly, for both the majority and the minority, it is clear that "reasonableness" is determined by the context—"reasonableness" is not something that can be determined in the abstract, in a vacuum. Just because a decision might be reasonable in the abstract does not mean that it would be reasonable in its context. Context includes the statutory regime, the common law, and the factual matrix.

Thirdly, the focus on context emphasizes the second part of the *Dunsmuir* test for reasonableness—namely, whether the decision falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law".[18] It is not sufficient that the decision in question is "justifiable, transparent and intelligible" (the first part of the *Dunsmuir* test), or rational, or well-reasoned in the abstract. In addition, the decision must also fall within the range of possible, acceptable outcomes which are defensible in respect

18. *Dunsmuir*, paragraph 47; see also *Khosa*, at paragraph 4: the "range of reasonable outcomes".

of the facts and law—which can only be determined by the context in which the decision is made.[19]

Finally, given that both the majority and the minority based their determinations of whether the arbitrator's decision was reasonable on their (respective) views of the arbitral jurisprudence, is this an example of "reasonableness" being determined by reference to "correctness"?[20]

2. *Kane*

The decision by the Supreme Court of Canada in *Canada (Attorney General) v. Kane*[21] is another example of different judges coming to different conclusions about whether a tribunal's decision is reasonable.

Mr. Kane, was an employee of Service Canada, part of the federal government. His position had been reclassified. He objected to Service Canada's advertising the position as vacant, rather than filling it by a non-advertised internal appointment process.

The Public Service Staffing Tribunal dismissed Kane's claim and the Federal Court affirmed that decision. Both bodies concluded that Service Canada had acted reasonably and within its discretion by advertising the position as it had.

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19. Query: would a decision be "justifiable" if it did not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law?

20. Something which Iacobucci J. in *Ryan* said should not occur.

21. 2012 SCC 64.

The Federal Court of Appeal, however, allowed Kane's appeal and held that the tribunal's decision was unreasonable because it had failed to consider that an abuse of authority could arise where a decision to advertise a vacant position was based on an unreasonable finding of fact. The Court held that the tribunal had considered the position as a new position, without considering Kane's arguments that the position was a mere reclassification and that, by doing so, it had acted unreasonably.

In a unanimous decision, the Supreme Court of Canada allowed the appeal and restored the tribunal's decision. The Court noted that the tribunal had acknowledged Kane's argument that the position was a mere reclassification and concluded that the tribunal had adequately addressed the argument by its interpretation and application of its home statute. Under the home statute, the employer had the discretion to use either an advertised or a non-advertised process. The Court also noted that the Court of Appeal had erred by misinterpreting Kane's argument and by attributing to the employer a "principal justification" for its decision that the tribunal did not find and that Kane never raised.

3. *Driver Iron*

The Supreme Court of Canada also touched upon the meaning of reasonableness in *Construction Labour Relations v. Driver Iron Inc*.[22] Although the decision is very short, it reiterates the important principle that a statutory delegate does not have to address all possible interpretations of its home statute when reaching a decision. As long as the interpretation of the statutory provisions are reasonable, a court should not interfere. Likewise, the court repeated that administrative tribunals do not have to consider and

22. 2012 SCC 65, [2012] 3 S.C.R. 405. See also *Manitoba v. Russell Inns Ltd.*, 2013 MBCA 46 which discusses the importance of examining the tribunal's reasons for its decision as part of the reasonableness analysis: see paras. 79 to 89.

comment on every issue raised by the parties in their reasons. The question is whether the decision, when read as a whole in the context of the record, is reasonable.

4. *Other examples of unreasonable decisions*

The following cases are a few examples of the application of the reasonableness standard where the courts found the impugned decisions to be unreasonable:

- In *Guild Contracting Specialties (2005) Inc. v. Nova Scotia (Occupational Health and Safety Appeal Panel)*,[23] the Nova Scotia Court of Appeal found that the Occupational Health and Safety Appeal Panel's decision was unreasonable. The Court found that the Appeal Panel's reasons were "not only inadequate", but "non-existent" (para 32). Contrast this to *Newfoundland and Labrador Nurses' Union*,[24] where the Supreme Court of Canada was willing to fill in gaps in the tribunal's reasons.

- *St. John's (City) v. Newfoundland Power Inc.*,[25] where the Newfoundland Court of Appeal held a commercial arbitration award to be unreasonable.

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23. 2012 NSCA 94.

24. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador Treasury Board*, 2011 SCC 62.

25. 2012 NLCA 21.

- *NAPE v. Clayton Hospitality Inc.*,[26] where the a labour arbitration award was set aside as being unreasonable because it was not responsive to the case presented to it.

- *Fudge v. Newfoundland and Labrador*,[27] where the trial division set aside a portion of a minister's decision as being unreasonable because there were no reasons as to whether the applicant was a "commercial property owner" as required by the statute.

Conclusion: merely determining that the applicable standard of review is reasonableness is not the end of the analysis—the reviewing court must go on to determine whether the impugned decision is or is not reasonable. Whether a decision is or is not reasonable must be determined by reference to the statutory scheme and the entire legal and factual context.

B. Standards of review by administrative appeal bodies

One of the issues in contemporary administrative law is what standard of review should be used by an administrative appellate body hearing an appeal from an initial decision.

See *Cuthbertson v. Rasouli*, 2013 SCC 53 (*per* Chief Justice McLachlin):

> [99] The Board must apply a standard of correctness in reviewing the decision of the substitute decision-maker: *Benes*, at para. 35; *Scardoni*, at para. 36. The wording of s. 37, which provides for full representation and gives the Board the right to substitute its decision for that of the substitute decision-maker, indicates that the Board must consider the matter

26. 2013 NLTD(G) 47.

27. 2013 NLTD(G) 78.

> *de novo*. The critical nature of the interests at stake support the Board's obligation to review the decision of the substitute decision-maker on a correctness standard.

Two recent decisions by the Court of Appeal of Alberta address this issue in the context of the Law Enforcement Review Board which provides civilian oversight over the police disciplinary process and acceptable standards of police conduct. Does this important role authorize the Board to scrutinize an initial decision by the police force more intensely? If the matter goes on to court, does the important role of the Board entitle it to greater deference?

1. *Furlong*

In *Edmonton Police Service (Chief of Police) v. Furlong*,[28] a Presiding Officer found a police officer, Furlong, guilty of discreditable conduct and dismissed him from the police force. Furlong appealed the penalty to the Law Enforcement Review Board which held that the penalty was too harsh and substituted a temporary two-year reduction in Furlong's seniority. The Chief of Police appealed the Board's decision to the Court of Appeal of Alberta.

The primary issue before the Court of Appeal was the appropriate standard of review that the Board should have applied when considering the decision of the Presiding Officer.

In its decision to substitute a lesser penalty, the Board had recognized that the general standard of review was reasonableness, but noted that the "exact manifestation of that standard of review might differ depending on the precise issue being considered." The Board

28. 2013 ABCA 121, supplemental reasons at 2013 ABCA 177.

took the position that the fact it had a "civilian oversight" role[29] meant that a more robust standard of review was required.[30] The Board concluded that the Presiding Officer's decision was unreasonable.

The Court of Appeal allowed the appeal and sent the matter back to the Board for reconsideration. The Court identified the following standards of review as being applicable on the appeal:

a. the Board's *selection* of standard of review was to be reviewed by the Court of Appeal on a standard of correctness;[31]

b. the Board's *application* of standard of review was to be reviewed by the Court of Appeal on a standard of correctness; and

c. other issues dealing with the merits and within the expertise of the Board were to be reviewed on a standard of reasonableness, unless those questions were truly "jurisdictional" in nature, or issues of general interest to the legal system.

The Court of Appeal noted that while the Board had recognized that the appropriate standard of review was reasonableness, it had misapplied the reasonableness standard by using a

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29. In the context of setting standards for police conduct.

30. The Board relied on *Newton v. Criminal Trial Lawyers' Assn*, 2010 ABCA 399 and *Pelech v. Law Enforcement Review Board*, 2010 ABCA 400 as authority for the proposition that the Board had a more robust mandate where its role was to provide civilian oversight of the police disciplinary process and acceptable standards of police conduct. Both *Newton* and *Pelech* were discussed at length in the 2011 paper.

31. This was agreed to by the parties.

"more robust" approach and giving less deference to the decision of the Presiding Officer than was warranted.[32] The Court rejected the notion that *Newton* stood for the proposition that the fact that the Board's civilian oversight role resulted in a "more robust" application of the reasonableness standard:

> 17 ... "Robust" is a colourful adjective, used once in *Newton* at para. 84, and it should not be allowed to subsume the rest of the analysis. *Newton* stated that "the Board's mandate is more robust", not that there is a more robust standard of review.
>
> 18 Every administrative tribunal is slightly different; that is one of their strengths as a regulatory mechanism. The Law Enforcement Review Board plays an unusual role by being an appellate tribunal from other decision-makers, and by also having an overlapping jurisdiction of civilian oversight. These dual roles must both be accommodated when considering decisions of the Board. The problem arises when there is overlap between the two. As *Newton* pointed out, when the Board is exercising its independent mandate of civilian oversight, it is not just reviewing the decision of a presiding officer, but neither does that mean that the Board can simply ignore the views of the presiding officer.
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> 19 It is therefore not appropriate to say that the standard of review is "more robust". That is not what *Newton* said. Rather, insofar as the Board is merely reviewing the decision of a presiding officer, the standard of review should be reasonableness. Where its civilian oversight mandate is engaged, it is not applying a higher standard of review, it is in fact exercising a separate but parallel jurisdiction. It is not helpful to describe that as a "more robust" standard of review, because it engages a different type of process altogether. In those situations the Board is performing a type of audit function on the system as a whole.
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> [Emphasis added.]

32. See discussion in footnote 20.

2. *Calgary (Police Service)*

A similar discussion is found in *Calgary (Police Service) v. Alberta (Law Enforcement Review Board)*.[33]

The Chief of Police had ruled that two aspects of a complaint filed against two police constables were unsustained and declined to send them to a hearing. The complainant appealed to the Law Enforcement Review Board. The Board overturned the Chief's decision. In rendering its decision, the Board took the position that, when the acceptability of police conduct was at issue, it was entitled to apply a more robust standard of review, beyond reasonableness.[34] The Chief of Police and the two constables appealed the Board's decision.

The Court of Appeal allowed the appeal on the ground that the Board had erred in applying the reasonableness standard of review. The Court adopted the reasons given in *Furlong*:

> 18 For the same reasons as are given in *Furlong* at paras. 14-20, the Board did err in stating the standard of review. The standard of review to be applied to the decisions of the chief of police is reasonableness. There is no standard of "robust reasonableness", and the Board's civilian oversight mandate is not engaged in every case just because the standard of police conduct is involved. That parallel mandate is only engaged where the investigation or the process has been compromised, in ways such as those illustrated in *Newton* at paras. 61, 79(c) and *Furlong* at para. 15, in which case the Board should clearly identify the circumstances that require it to invoke that jurisdiction.

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33. 2013 ABCA 124.

34. Like in *Furlong*, the Board cited *Newton* and *Pelech* as authority for taking a more robust approach to the reasonableness standard.

C. Questions of true jurisdiction or central to legal system as a whole

Previous papers have discussed the limited exception to what is now a general proposition that administrative delegates will be given deference when interpreting their home statutes—that being that matters of "true jurisdiction" or "questions of central importance to the legal system as a whole" will attract a correctness standard. As the majority of the Supreme Court of Canada observed in *ATA News* and *Halifax v. N.S. (Human Rights Commission)*,[35] true jurisdictional questions are quite rare in modern Canadian administrative law. There may (or may not ever) be a case involving a question which is central to the legal system as a whole.[36] Nevertheless, several cases this past year have involved this exception.

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35. *Supra*, note 7. Also see *Cuthbertson v. Rasouli*, 2013 SCC 53 (*per* Chief Justice McLachlin):

> [69] The practice of the Board, although not determinative, reinforces the conclusion that treatment under s. 2(1) includes withdrawal of life support. Whether implicit or explicit, a specialized tribunal's interpretation of its home statute constitutes persuasive authority: Sullivan, at p. 621. P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 584-85. The Board has regularly exercised its jurisdiction in cases where physicians proposed to withdraw life support, consistent with the view that withdrawal of life support constitutes "treatment" under the *HCCA*: see *A.K. (Re)*; *E.J.G. (Re)*; *G. (Re)*. Courts on review have endorsed this interpretation: see *Scardoni v. Hawryluck* (2004), 69 O.R. (3d) 700 (S.C.J.).

36. Query: would solicitor-client privilege be such a question? Also see *Cuthbertson v. Rasouli*, 2013 SCC 53 (*per* Chief Justice McLachlin):

> [100] The legislature has given the Board the final responsibility to decide these matters. This is not to say that the courts have no role to play. Board decisions are subject to judicial review. This mechanism for court oversight ensures that the Board acts within its mandate and in accordance with the Constitution.

1. *Russell Inns Ltd.*

In *Manitoba v. Russell Inns Ltd.*,[37] the Manitoba Court of Appeal provided a thorough discussion of what constitutes a question of true jurisdiction or a matter of central importance to the legal system as a whole for the purposes of determining the appropriate standard of review. In short, the Court rejected the argument that the question of the Land Value Appraisal Commission's jurisdiction to award interim costs order was a question of true jurisdiction. Likewise, the Court held that the issue of interim costs was not a question of general law of central importance to the legal system. The Court reiterated the narrow scope of these exceptions:

> 68 The first question is whether this ground of appeal raises a true question of jurisdiction or *vires* as that has been interpreted post-*Dunsmuir*. As we have seen, those true questions of jurisdiction, if they still exist, are narrow and will be exceptional. They relate to "the authority to decide" an issue, which will include the question of whether the agency actually has a power, but will not include the issue of why and how that power was exercised. In other words, a determination of the extent or the parameters of a grant of authority is not a jurisdictional issue for the purposes of determining the standard of review.
>
> 69 Determining the nature of the issue or question is key to determining whether it raises a question of true jurisdiction. This ground of appeal can be seen from two perspectives - that dealing with costs (Russell Inns' perspective) and that dealing with the granting of an interim order (Manitoba's perspective).
>
> 70 If viewed as a question of costs, the granting of costs is clearly dealt with in the *Act*, which would indicate that the ground relates to the interpretation of the home or related statutes rather than to true jurisdiction. If viewed as a question of the granting of interim orders, there is nothing in the *Act* regarding interim orders, which would indicate that the ground may relate to true jurisdiction rather than to the interpretation of the home or related statutes. However, in determining the true nature of the question, close attention must be paid to the admonition adopted by Bastarache and LeBel JJ. in *Dunsmuir* that "reviewing judges must not brand as jurisdictional issues that are doubtfully so" (at para. 59).
>
> 71 If one accepts Manitoba's characterization of the question as the power to grant an interim order, the interim order at issue is about costs, so that it still relates to the

37. 2013 MBCA 46. See also *Roeland v. Manitoba*, 2013 MBCA 37.

interpretation of a power in the home or a related statute. As the LVAC has the statutory power to grant costs, the question of the authority to order the payment of those costs on an interim basis must still relate to the "how and why" of the exercise of a statutory power, taking it out of the realm of a question of true jurisdiction. Thus, I find that this ground of appeal does not raise a question of true jurisdiction or *vires*.

72 The second question is whether this ground of appeal raises a question of general law of central importance to the legal system and outside the adjudicator's expertise. As we have seen from *Mowat*, questions of proof, procedure and remedial authority are issues of broad import that come before administrative tribunals and raise questions of law, but not all such questions rise to the level of general importance to the legal system as a whole or fall outside the tribunal's area of expertise. Likewise, in *ATA*, the interpretation of the timeline for granting an extension of an inquiry was categorized as a procedural issue specific to the administrative regime and not a question of central importance to the legal system as a whole.

73 This ground of appeal in this case raises a question of procedure and remedial authority, which is clearly a question of law. It is, however, limited in scope and effect to the granting of relief under the *Act* in relation to an expropriation of property. It could not be said that it goes to any legal principle underlying the legal system, and it certainly could not be said that it raises any issue of general importance to the legal system as a whole. It is an issue of the interpretation of the provision of a specific statute and nothing more. Thus, this ground of appeal does not raise a question of general law of central importance to the legal system.

74 Having determined that this ground of appeal does not raise either a question of true jurisdiction or *vires*, or one of central importance to the legal system as a whole, the result is that it raises a question about the interpretation and application by the LVAC of its home statute or a statute closely connected to its function, with which it has particular familiarity. As was stated in *Dunsmuir* at para. 54, and confirmed in *ATA* at para. 30, this category of question is normally to be determined on the standard of review of reasonableness. *ATA* further says that a review of the interpretation by a tribunal of its own statute or statutes closely connected to its function should be presumed to be subject to the standard of reasonableness (at para. 34).

75 Manitoba has failed to convince me (as it has the burden to do - *ATA* at para. 39) that reasonableness is not the correct standard. Therefore, I find that the standard of reasonableness is the standard that should have been applied to the issue in this ground of appeal.

Summary - Standard of Review

76 It is clear that, as a result of the evolution of the principles of judicial review set out in *Dunsmuir*, the focus of the second step of the standard of review analysis has changed from the application of the four factors that used to comprise the pragmatic and functional test to conducting a summary analysis based on the seven categories of questions set out first in *Dunsmuir* and later *ATA*. It is also clear that the Supreme Court has significantly limited (if

> not abolished, for all practical purposes) the category of true questions of jurisdiction, leaving the review of a decision by an administrative entity interpreting its home statute or statutes closely connected with it to be conducted on the standard of review of reasonableness, unless the question raises a constitutional issue, is 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 relates to the jurisdictional lines between two or more specialized tribunals.
>
> 77 These are significant changes that have come about since this court released its decision in *Rebel Holdings*, requiring a fresh determination of the applicable standard of review. Applying these principles as they have evolved, and for the reasons set out above, I am satisfied that the appropriate standard of review for the issue in this ground of appeal is one of reasonableness. Thus, I find that the application judge erred in law in adopting and applying the standard of review of correctness to his review of this issue.
>
> 78 Given that the application judge did not apply the correct standard of review, this court must correct the reviewing judge's error, substitute the appropriate standard of administrative review, and assess the LVAC's decision on the basis of the appropriate standard, being that of reasonableness.

2. *Shaw*

Shaw v. Alberta (Utilities Commission)[38] dealt with the interpretation of a board's home statute—certain legislative amendments to the *Electric Statutes Amendment Act*.[39] Despite clear direction by the Supreme Court of Canada that deference should be given to a delegate's interpretation of its home statutes except in cases involving true questions of jurisdiction,[40] the Court of Appeal of Alberta applied the correctness standard, holding that the question of whether the public interest aspects of a need assessment for transmission lines remained within the statutory mandate of the Commission or had been transferred by legislative amendment to the legislature or executive was a true jurisdictional issue.

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38. 2012 ABCA 378.

39. SA 2009, c. 44.

40. *Dunsmuir v. New Brunswick*, 2008 SCC 9.

3. *Alberta (Workers' Compensation Board)*

The Alberta Court of Queen's Bench considered whether the issue of the test to be applied to determine causation is a question of law that is central to the importance of the legal system so that a correctness standard applied. In *Alberta (Workers' Compensation) v. Alberta (Appeals Commission for Alberta Workers' Compensation)*,[41] Sulyma J. concluded that the question was one of mixed fact and law which attracted the reasonableness standard. In the alternative, the court concluded that if there was a question of law involved, it was a question of law arising from the interpretation of the tribunal's home statute and/or policies which did not rise to the level of a question of law that is of central importance to the legal system as a whole.

4. *Allen*

Allen v. Alberta (Law Enforcement Review Board)[42] dealt with the issue of whether a police officer had exercised an unlawful or unnecessary exercise of authority when he made the complainant partially strip down in the course of an arrest. As part of the disciplinary proceedings, a question arose about whether the police officer required reasonable and probable grounds to perform the strip search.

The Court of Appeal of Alberta addressed whether the interpretation of criminal law (such as interpretation of the *Criminal Code* and the *Charter of Rights* in the criminal context) are jurisdictional issues or questions of general importance to the legal system so that a correctness standard would apply. The Court concluded that such issues are not within the

41. 2012 ABQB 733.

42. 2013 ABCA 187.

mandate of the Law Enforcement Review Board and the Board did not have any particular expertise in that area. Accordingly, because criminal law matters are generally decided by courts and it is highly desirable that there should be consistency in interpretation, the correctness standard of review should apply.

D. Other noteworthy cases on standards of review

1. *Lethbridge Regional Police Service*

In *Lethbridge Regional Police Service v. Lethbridge Police Assn.*,[43] the Court of Appeal of Alberta remarked on the significant difference between deference and immunity from review.

A labour arbitrator had found that a probationary police constable had been discriminated against and unfairly dismissed. The Police Service applied for judicial review and the reviewing judge quashed the decision. The Police Association appealed.

In discussing standards of review, the Court of Appeal[44] noted that labour arbitrators have traditionally been afforded considerable deference and that the general standard of review for the decisions of labour arbitrators is reasonableness.[45] Deference is due to both factual findings and inferences drawn from those findings. However, this does not mean such findings are immune from review:

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43. 2013 ABCA 47, leave to appeal to SCC refused without reasons June 20, 2013.

44. Martin, Watson and Slatter JJ.

45. At. para. 26. See also discussion at para. 28 regarding standard of review being correctness where a number of tribunals have concurrent jurisdiction over an issue, such as in human rights and discrimination cases.

> 63 The arbitrator's findings of fact and inferences from the evidence are entitled to deference. But deference is not the same thing as immunity from review. The arbitrator is not entitled to make findings of fact which have no support in the evidence. In this case the arbitrator found that the decision was partly motivated by "stereotypical thinking", but he did not tie this to any particular evidence, he merely stated that "his sense from all the evidence" led him to that conclusion. That is not necessarily a reviewable error, because sometimes it is difficult to isolate all the particular facts that lie behind a particular inference.
>
> [Emphasis added.]

III. NATURAL JUSTICE AND PROCEDURAL FAIRNESS

The most significant decision discussing the duty to be fair this year once again involves the duty of a statutory delegate to give reasons for its decision.

A. The requirement to give reasons

Last year's paper discussed at length the Supreme Court of Canada's decision in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador Treasury Board*[46] in which the unanimous court held that the inadequacy of reasons is not a stand-alone ground for judicial review.[47]

46. 2011 SCC 62.

47. But is to be determined as part of the overall *Dunsmuir* appraisal of the decision for reasonableness.

1. *Cojocaru*

This year, the Supreme Court of Canada addressed the adequacy of reasons where a trial judge had copied material directly from counsels' submissions into the reasons for the decision. The case is *Cojocaru v. British Columbia Women's Hospital and Health Centre*[48] and, while it is not strictly an administrative law case, the principles and discussion should be transferrable to reasons given by administrative tribunals.

Cojocaru involved a negligence action against a hospital, and several physicians and nurses for injuries suffered during a caesarean delivery. The trial judge allowed the action and awarded $4 million in damages.[49] In his reasons, the trial judge reproduced large portions of the plaintiff's submissions.

The British Columbia Court of Appeal, in a 2-to-1 split decision, overturned the decision and ordered a new trial.[50] One of the majority's grounds for overturning the trial decision was the trial judge's extensive copying of the plaintiff's submissions.

In a unanimous decision delivered by McLachlin C.J., the Supreme Court allowed the appeal in part.[51] McLachlin C.J. began her reasons by recognizing the long standing practice of judges to copy part of their reasons from submissions or other legal sources:

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48. 2013 SCC 30.

49. 2009 BCSC 494.

50. 2011 BCCA 192.

51. The trial judge's finding of liability and assessment of damages was restored with respect to one defendant but was overturned with respect to the Hospital, a nurse and two physicians.

> 1 The main question on this appeal is whether a trial judge's decision should be set aside because his reasons for judgment incorporated large portions of the plaintiffs' submissions. For the reasons that follow, I conclude that while it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not without more permit the decision to be set aside. Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside.
>
> [Emphasis added.]

McLachlin C.J. then analysed the nature and function of reasons and the long tradition of judicial copying:

> 12 Judicial decisions can be set aside either for substantive errors or procedural errors. A complaint that a judge's decision should be set aside because the reasons for judgment incorporate materials from other sources is essentially a procedural complaint. It goes not to whether the decision is correct on the merits having regard to the evidence and the law, but to whether the process by which it was reached is procedurally fair. A fair process requires not only that the parties be allowed to submit evidence and arguments to the judge, but that the judge decide the issues independently and impartially as the judge is sworn to do. Extensive incorporation may raise concerns that the judge has not done so.
>
> 13 To determine whether a defect relating to reasons for judgment is evidence of procedural error negating a fair process, the alleged deficiency must be viewed objectively, through the eyes of a reasonable observer, having regard to all relevant matters: see e.g. *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267. Reasons need not be extensive or cover every aspect of the judge's reasoning; in some cases, the basis of the reasons may be found in the record. The question is whether a reasonable person would conclude that the alleged deficiency, taking into account all relevant circumstances, is evidence that the decision-making process was fundamentally unfair, in the sense that the judge did not put her mind to the facts, the arguments and the issues, and decide them impartially and independently.
>
> The Presumption of Judicial Impartiality
>
> 14 Society entrusts to the judge the weighty task of deciding difficult issues of fact and law in order to resolve disputes between citizens. Judges are appointed from among experienced lawyers and are sworn to carry out their duties independently and impartially.
>
> 15 Judicial decisions benefit from a presumption of integrity and impartiality – a presumption that the judge has done her job as she is sworn to do. This reflects the fact that the judge is sworn to deliver an impartial verdict between the parties, and serves the policy need for finality in judicial proceedings.

16 Courts have repeatedly affirmed that the starting point in an inquiry such as this is the presumption of judicial integrity and impartiality. In *Teskey*, Charron J., for the majority, stated, at para. 19:

> Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality. ... Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.

17 Justice Abella, in dissent, agreed, writing at length about the judicial history of the presumption of integrity and the purposes it serves:

> The presumption of integrity acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold. This includes not only a presumption – and duty – of impartiality but also of legal knowledge. ... [J]udges are presumed to know and act in accordance with their legal responsibilities .... [para. 29]

18 The presumption of judicial integrity and impartiality means that the party seeking to set aside a judicial decision because the judge's reasons incorporated the material of others bears the burden of showing that a reasonable person, apprised of the relevant facts, would conclude that the judge failed to come to grips with the issues and deal with them independently and impartially. In *Teskey*, Charron J. wrote, at para. 21:

> Even though there is a presumption that judges will carry out the duties they have sworn to uphold, the presumption can be displaced. The onus is ... on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the [presumption is rebutted by the reasons].

19 Similarly, Abella J. in *Teskey* stated, at para. 33:

> The test for displacing the presumption, therefore, requires that the apprehension of bias be reasonable in the eyes of someone who is reasonably informed about all the relevant circumstances. Those circumstances include "the traditions of integrity ... and ... the fact that impartiality is one of the duties the judges swear to uphold". [Citations omitted.]

20 The threshold for rebutting the presumption of judicial integrity and impartiality is high. The presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 32, *per* L'Heureux-Dubé and McLachlin JJ., cited in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59.

21 *Teskey* illustrates how attacks on judicial decisions on the basis of defects relating to the judgment process should be approached. In that case, the trial judge had convicted the

> accused, with reasons to follow. No reasons were forthcoming. Finally, the trial judge delivered elaborate reasons 11 months after the convictions, and only after repeated requests from counsel. The defence argued on appeal that the reasons were after-the-fact justifications of the verdict, raising concerns about whether the judge at the time of the convictions had considered the law and applied it to the evidence as he was sworn to do. A majority of this Court, *per* Charron J., set aside the convictions. The minority, *per* Abella J., would have upheld the convictions. Both judgments agreed that the starting point was the presumption of judicial integrity, and that the onus is on the party assailing the reasons to present cogent evidence to displace the presumption.
>
> 22 The basic framework for assessing a claim that the judge failed to decide the case independently and impartially may be summarized as follows. The claim is procedural, focussing on whether the litigant's right to an impartial and independent trial of the issues has been violated. There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.

McLachlin C.J. then considered whether the practice of judicial copying attracts a "functional" inquiry into whether reasons are adequate to advise the parties and the public of the reasons for the decision and for the purpose of providing a basis for appeal. While she acknowledged such a principle in the criminal context, she cited the *Newfoundland and Labrador* case[52] for the proposition that an independent sufficiency analysis is not required in the administrative law context. In this case, she concluded that the issue was not the sufficiency of the reasons *per se*, but was rather the process giving rise to the reasons; therefore, the right question to ask was whether the presumption of judicial impartiality had been rebutted.[53] McLachlin C.J. framed the questions as follows:

> 28 Procedural defects relating to reasons for judgment are many and varied. <u>In all cases, the underlying question is the same: would a reasonable person, apprised of all the relevant circumstances, conclude that the judge failed to come to grips with the issues and make an</u>

52. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador Treasury Board*, 2011 SCC 62.

53. At paras. 23 to 26.

> impartial and independent decision, thereby defeating the presumption of judicial integrity and impartiality?
>
> [Emphasis added.]

McLachlin C.J. then gave a detailed analysis of when, if ever, judicial copying displaces the presumption of judicial integrity and impartiality, including a thorough review of the cases.[54] She concluded that copying in reasons for judgement is not, in itself, grounds for setting a judge's decision aside. However:[55]

> ... if the incorporation of the material of others would lead a reasonable person apprised of all the relevant facts to conclude that the trial judge has not put his or her mind to the issues and made an independent decision based on the evidence and the law, the presumption of judicial integrity is rebutted and the decision may be set aside.

The onus is on the party challenging the decision. Moreover, whether or not copying in a particular case is sufficient to rebut the presumption of judicial integrity will depend on the nature of the case and the extent and quality of the copying.

In this case, the court concluded that, while the copying by the trial judge was extensive, it could not be said that the trial judge did not consider the issues and make an independent decision on them.

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54. At paras. 30 to 50, reproduced in Appendix B.

55. At para. 49.

2. *University of Alberta v. Chang*

A few months before the Supreme Court of Canada rendered its decision in *Cojocaru*, the Court of Appeal of Alberta dealt with a similar issue in *University of Alberta v. Chang*.[56] However, in *Chang*, the Court ruled that the trial judge's reasons, which contained extensive cutting and pasting from the parties' briefs, were inadequate and set the decision aside.

In a unanimous decision, the Court of Appeal of Alberta noted that judges of first instance are not "mere scribes, collators of evidence, collage artists, or way stations on the road to justice".[57] Judges must not only ultimately decide cases but explain how the eventual result was reached.[58] This involves a fundamental judicial obligation to "conduct an independent analysis of the case, and articulating it in appropriate form":

> 20 The repute of the administration of justice depends in the end on litigants having confidence in and respect for the decisions that affect their rights, whether they won or lost. It is imperative that the litigants feel that they were fairly dealt with, that their arguments and evidence were considered, and that a principled, balanced, transparent, independent and impartial analytical process has been applied in reaching the final decision. To a great extent, whether these objectives are achieved depends on the reasons that are given in support of any particular result: *R. v. R.E.M.*, 2008 SCC 51 at para. 11, [2008] 3 SCR 3; *Sheppard* at para. 22; *Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital and Health Center*, 2011 BCCA 192 at paras. 124-7, 17 BCLR (5th) 253; leave to appeal granted [2011] S.C.C.A. No. 253, [2011] 3 S.C.R. vi.
>
> 21 Previous decisions have commented on the problems that result when a chambers judge merely copies the briefs filed, rather than composing original reasons. Because they are prepared in an adversarial context, the briefs of the parties tend to be "one-sided". They generally tend to place the position of that litigant in the best possible light, and downplay

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56. 2012 ABCA 324. See also *Petrowski v. Horse Racing Alberta*, 2013 ABQB 267 where the court distinguished between a judge copying from the parties' briefs and a tribunal giving reasons which were identical to those given in another, unrelated case.

57. At para. 18.

58. See also *Wall v. Independent Police Review Officer*, 2013 ONSC 3312.

(or even ignore) the arguments, authorities, and evidence in support of the opposite side. Merely copying those briefs often results in a failure to select in a judicial way from the evidence and legal authorities, with a resulting failure to assimilate the competing positions in a transparent and defensible manner.

22 The following particular manifestations of this general problem result:

(a) when the parts of the reasons containing the eventual decision are extracted entirely from one of the briefs, the reasons lack an appearance of impartiality: *Cojocaru* at para. 117; *Sorger v. Bank of Nova Scotia* (1998), 39 OR (3d) 1 at pp. 8-9, 160 DLR (4th) 66 (CA);

(b) reasons that are merely copied do not disclose the line of analysis used, and can even suggest that the position of one party was merely adopted without any proper analysis: *Cojocaru* at paras. 111, 113, 119.

(c) drafting the reasons, and being subjected to the discipline of having to articulate the line of analysis, is itself an integral part of the judicial decision making process: *Sheppard* at para. 23; *R.E.M.* at para. 12. Merely copying briefs either obscures or eliminates this important step in judicial decision making. When the brief of one party is adopted, the reasons for decision are often merely conclusory: *Sorger* at pp. 8-9;

(d) the absence of meaningful reasons inhibits appellate review generally, and the proper application of the particular standard of review: *Cojocaru* at paras. 112, 127; *Fuller Western Rubber Linings Ltd. v. Spence Corrosion Services Ltd.*, 2012 ABCA 137 at para. 5, 524 AR 246. This is particularly so where the party quoted has relied on alternative arguments, and the reasons do not make it clear which argument the judge adopted.

(e) if the allegations of fact in one brief are adopted, there is often a failure to explain why the evidence tendered by the other party was discounted, disbelieved, or subordinated: *Sheppard* at para. 55.6; *R.E.M.* at para. 21; *Cojocaru* at para. 118; *Fuller Western* at para. 6; *Janssen-Ortho Inc. v. Apotex Inc.*, 2009 FCA 212 at para. 77, 392 NR 71; *Es-Sayyid v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59 at paras. 61-3, 432 NR 261, leave to appeal refused Oct. 5, 2012 SCC #34712, [2012] S.C.C.A. No. 116.

(f) if the reasons merely adopt the position of one party, and that party has relied on some arguments which are legally correct, and some which are not, the reasons may incorporate errors of law.

(g) if only one of the parties has cited important authority (even if non-binding), and the arguments of the other party are adopted, there will be no explanation of why this important authority should be distinguished or not followed: *Fuller Western* at para. 6.

> (h) the practice of merely adopting the written briefs as reasons leads to the temptation of requiring written briefs from counsel on every issue, no matter how important or straightforward. The preparation of written briefs is very expensive, and the courts should not unnecessarily impose this burden on litigants. Trial judges are expected to decide many issues simply based on the oral arguments of counsel.
>
> Many of these problems are manifested in the reasons presently before the Court.
>
> 23 While a chambers judge has an obligation to provide reasons, the absence or inadequacy of reasons is not automatically a reason to allow an appeal: *F.H. v. McDougall*, 2008 SCC 53 at para. 99, [2008] 3 SCR 41. The reasons must meet the two functional purposes set out in *Sheppard* at paras. 24, 55.8: the decision must be reasonably intelligible to the parties, and provide the basis for meaningful appellate review. Reasons are not dissected minutely nor out of context: *R.E.M.* at paras. 16-8, 35; *R. v. Stirling*, 2008 SCC 10 at para. 13, [2008] 1 SCR 272.
>
> 24 In some cases the reasons are so deficient that a new hearing is required, as in *Sheppard*, *Sorger*, and *Cojocaru* [in the B.C. Court of Appeal]. In other cases meaningful appellate review may well be possible, notwithstanding the deficiencies in the reasons, because the appellate court can discern the basis upon which the decision was made. In still other cases the appellate court may be able to dispose of the controversy, notwithstanding the insufficiency of the reasons, because the record is sufficiently clear to permit a decision. In the latter class of cases, it will be difficult to effectively apply the normal standard of review, because without a clear exposition of the trial judge's analysis, it is difficult to tell if it discloses palpable and overriding error. Nevertheless, rendering a final decision will often be to the advantage of the parties, who will usually not want to be subjected to the expense of a new hearing before the trial court.

Question: Would the decision be different after the Supreme Court of Canada's decision in *Cojocaru*?

B. Evidentiary aspects of procedural fairness

1. *Alexander*

British Columbia (Securities Commission) v. Alexander[59] dealt with the admissibility of hearsay evidence. In appealing a decision of the Securities Commission, Alexander raised the argument that the Commission had erred by relying entirely on certain documents that amounted to unauthenticated hearsay evidence and by failing to call the purported author of the documents as a witness.

There was no dispute that the documents at issue were hearsay evidence. Nonetheless, the court held that the principles of natural justice had not been breached by the Commission's reliance on them or by its failure to call the purported author to give evidence. The Court of Appeal noted the principle that hearsay evidence that is relevant or logically probative to a material fact in issue is admissible before administrative tribunals.[60] Documents are real evidence which must be authenticated, and then a determination must be made about their reliability with respect to the truth of their contents. If these steps have been accomplished, then there may be an issue about whether the statutory delegate's reliance on the hearsay evidence is procedurally unfair:

> 70 As to the larger issue of whether the Commission's reliance on hearsay evidence rendered the hearing procedurally unfair, this Court rejected that proposition in *Ocean Port Hotel Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, 2002 BCCA 311. There, Mr. Justice Donald, writing for the Court, held that the Liquor

59. 2013 BCCA 111. The decision for the unanimous Court was written by Madam Justice D. Smith.

60. *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2011 BCCA 119 at paras. 28 and 35. Note that some administrative tribunals are bound by the rules of evidence applicable in courts of law.

Control Board's reliance on hearsay evidence to find that a hotel pub had violated its liquor licence did not render the proceeding procedurally unfair, stating:

> [14] It is said for the appellant that the appeal hearing was not fairly conducted because of the Board's excessive reliance on hearsay; and, furthermore, the findings cannot stand because they are largely based on hearsay.
>
> [15] ... [counsel for Ocean Port] accepts that hearsay evidence was admissible. He said, however, that it was unfair and unreasonable to base findings on the dubious quality of the hearsay in this case. While I subscribe to the view that curial deference is not owed when breaches of natural justice are at issue, I would shift the focus of the analysis from hearing fairness to the reasonableness of the decision once hearsay evidence is conceded to have been properly before the decision maker.

. . .

> 73 Thus, a tribunal's reliance on hearsay, in whole or in part, to form the basis of its decision does not render a hearing procedurally unfair if the evidence is relevant and may fairly be regarded as reliable. Nor is cross-examination a requirement of procedural fairness before a tribunal provided the other side has the opportunity to respond to the evidence (*Cambie* at 28). Once the evidence is admitted, which I am satisfied was correctly done in this case, it is for the tribunal to assign what weight it will attach to that evidence. Thereafter, the focus of any judicial review shifts from hearing fairness to the reasonableness of the decision: *Ocean Port Hotel* at 15, *Cambie* at 35 and 36.

Similarly, the failure to call the author of the hearsay correspondence does not necessarily make the procedure unfair:

> Failure to Call Mr. Neilson
>
> 74 I am also persuaded that the rules of natural justice were satisfied by the Commission providing Mr. Alexander with the opportunity to know the case he had to meet. The documentary evidence the Commission intended to tender to prove the allegations against Mr. Alexander was disclosed to him before the hearing, which gave Mr. Alexander the opportunity to respond to and challenge the inferences that could be drawn from the documents. While the Executive Director declined to call Mr. Neilson (it was not necessary for him to do so in order to have the documents admitted into evidence), it remained open to Mr. Alexander to subpoena him for cross-examination. His failure to do so was a strategic decision and in my view he cannot at this time rely on that omission to raise the spectre of procedural unfairness.

> 75 In these circumstances, I am satisfied that the Commission's receipt of and reliance on the documents without the benefit of Mr. Neilson's testimony did not violate the rules of natural justice or render the hearing procedurally unfair. I would not accede to this ground of appeal.

2. *Commission of Inquiry re Phoenix Sinclair-Hughes*

In *Southern First Nations Network of Care v. Manitoba (Commission of Inquiry into the Death of Phoenix Sinclair-Hughes)*,[61] the Manitoba Court of Appeal was called on to consider whether the principles of procedural fairness required the disclosure of witness interview transcripts to the parties and intervenors. The case was an appeal from a stated case by the Commissioner of Inquiry into the death of Phoenix Sinclair.

A unanimous panel of the Court of Appeal held that the duty to be fair did not require the disclosure of the witness transcripts in these circumstances. The Court recognized the contextual nature of the requirements of procedural fairness and stated that the level of disclosure required by the duty of procedural fairness varies along a spectrum.[62] It considered the fact that the parties never expected to receive more than summaries of the witness's evidence. They were fully involved in the development of the Commission Rules and made no objection to the disclosure being provided by way of summaries. The Court was satisfied that the parties had received adequate and meaningful summaries that set out the anticipated evidence of the witness.[63]

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61. 2012 MBCA 99.

62. At para. 38, citing S. Blake, *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011).

63. See paras. 44 to 48.

The court differentiated between inquests and public inquiries and rejected the appellant's argument that the disclosure of transcripts was required:

> 52 First, the *Hudson Bay* case involved an inquest. This is a public inquiry. While *Hudson Bay* notes that some of the goals of the two are similar and that both are concerned with being fair fact-finding processes, differences were also explained. In particular, in *Hudson Bay*, the court stated, "unlike inquests, inquiries are not limited to merely death-related matters" ...
>
> 53 These differences are evident when comparing the legislation. The legislation governing inquests is the *FIA*; the relevant legislation for commissions of inquiry is contained in Part V (ss. 83-96) of the *MEA*. Neither *Act* provides detailed procedural rules. However, it is clear that there is a difference in the scope of the investigation required in each case.
>
> 54 Under the *FIA*, inquests are assigned to a judge who must determine the material circumstances of the death, including the cause, manner and circumstances of the death, the identity and age of the deceased, and the date, time and place of death. The judge is not required to do anything more, although he or she may recommend changes in provincial programs, policies, legislation or practices if he or she is of the opinion that such changes could reduce the likelihood of similar deaths (s. 33(1)).
>
> 55 Under the *MEA*, on the other hand, a commission of inquiry is assigned to an independent commissioner to inquire into those defined matters which the Lieutenant Governor in Council believes to be of sufficient public importance and which are not otherwise regulated (s. 83(1)). A commissioner's particular mandate and powers are granted by way of a specific Order in Council. This endows the commission with a broad mandate and allows commissioners a wide discretion within the terms of reference regarding the scope of inquiry, and the process to be followed. This difference in scope and authority impacts on the balance between procedural fairness and effectiveness. The public interest is not served by inquiries that take years to complete.
>
> 56 More crucial than the difference in legislation are the factual differences. In *Hudson Bay*, no summaries of the interviews by Crown counsel were provided or offered to the other parties. There had been no discussion as to rules in this regard. There were no assurances given directly to the witnesses in *Hudson Bay* that the transcripts were for internal purposes only. There was no agreement in *Hudson Bay* that the transcripts or summaries would not be used for cross-examination purposes.
>
> 57 As to relevance, in the *Hudson Bay* case, the transcripts at issue related to witnesses that Crown counsel had already decided were going to testify. There were concerns about conflicting evidence and an evidentiary vacuum in some instances.
>
> 58 Also significant is the difference in scope between this Inquiry and the *Hudson Bay* inquest. In *Hudson Bay*, a total of 23 witnesses testified, but at the time the motion for the

> transcripts was brought, 12 witnesses had already testified. The question of statutorily confidential information did not arise nor was the necessity to redact material raised. The transcripts in question were ready and there were no summaries prepared or contemplated. One of the reasons that the transcripts were ordered to be produced was that it was more expeditious than the preparation of summaries at that point in the inquest..[quotation deleted]
>
> 59 In contrast, this is a wide-ranging public inquiry with three separate phases. There have been approximately 154 potential witnesses interviewed. Some potential witnesses have been interviewed more than once and some interviews were conducted in group settings. A total of 46,000 pages of material have already been reviewed line by line to delete confidential information and disclosed. The transcripts in dispute constitute another 11,000 pages, representing 85 interviews, which, Commission counsel argues, would, if disclosed, have to be reviewed line by line to delete confidential information before they could be released. We were told that at least 77 summaries have already been prepared.

The Court recognized the need to balance the need for procedural fairness and the needs for expediency, efficiency and effectiveness:

> 67 I do not wish to minimize the emotional, mental and reputational impact this matter has had on the parties and intervenors. "Persons involved in public inquires, even if they are not the primary subject of examination, may become victims of 'collateral damage'" (Ruel at p. 131).
>
> 68 In this regard, the following comments of Cory J. in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 are pertinent (at para. 55):
>
> > The findings of fact and the conclusions of the commissioner may well have an adverse effect upon a witness or a party to the inquiry. .... It is true that the findings of a commissioner cannot result in either penal or civil consequences for a witness. .... Nonetheless, procedural fairness is essential for the findings of commissions may damage the reputation of a witness. For most, a good reputation is their most highly prized attribute. It follows that it is essential that procedural fairness be demonstrated in the hearings of the commission.
>
> 69 To that end, I agree with counsel for the appellants that a significant degree of procedural fairness is owed to those who are called to testify because of the potential impact on the witnesses' reputations and careers.
>
> 70 But there must be some balance. This is not a trial. The parties and intervenors are not entitled to perfection or even a *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, level of disclosure,

> as mandated in criminal proceedings. Procedural fairness must be balanced with the need for an inquiry to be thorough, rigorous, expeditious, efficient, timely and effective in the public interest. Justice delayed is justice denied. I also agree with the statements of Justice Teitelbaum in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417 (at para. 54):
>
> > This is not to say, however, that the content of fairness is necessarily more stringent where there is a risk that one's reputation may be negatively affected. As I stated in *Addy v. Canada (Commission and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces in Somalia)*, [1997] 3 F.C. 784 (T.D.) "the possible and purported damage to the applicants' reputations must not trump all other factors and interests" (*Addy*, at paragraph 50). In determining the standard of fairness, it is necessary to "balance the risks to an individual's reputation and the social interests in publication of a report" (*Addy*, at paragraph 61). Likewise, the risks to an individual's reputation must be balanced with the social interest in permitting the commission to conduct its inquiry and to inform and educate the public about the matter or conduct under review.

C. Bias

1. *Furlong*

In *Edmonton (Police Service) v. Furlong*,[64] the Court of Appeal of Alberta identified three factors that should be considered in determining whether a reconsideration should be heard by the same panel as the original decision, or by a different panel:

> 3 When a matter is remitted back to an administrative tribunal, there is no fixed rule: *Elk Valley Coal Corp. v. United Mine Workers of America Local 1656*, 2009 ABCA 407, 474 AR 145, 18 Alta LR (5th) 13; *Walsh v. Mobil Oil Canada*, 2012 ABQB 527 at paras. 54-5, 71 Alta LR (5th) 343. A number of factors are considered:
>
> > (a) Fairness and the Appearance of Impartiality. If the original panel of the tribunal pronounced on a specific issue and was reversed, a new panel will usually be nominated to avoid any appearance of prejudging. If the issue

64. 2013 ABCA 177.

> requiring reconsideration is new or is supplementary or collateral to the issues generating the rehearing, it is sometimes appropriate for the same decision-maker to continue: *Chernetz v. Eagle Copters Maintenance Ltd.*, 2008 ABCA 265 at para. 101, 96 Alta LR (4th) 222, 437 AR 104; *Interclaim Holdings Ltd. v. Down*, 2004 ABCA 60, 346 AR 64. Whether the issue on which a rehearing has been directed would raise considerations of impartiality in the mind of a reasonable person is a matter of degree.
>
> (b) Practicality. The size and composition of some tribunals might preclude remitting the issue back to the same panel, or alternatively it might make remission to the same panel inevitable.
>
> (c) Efficiency. If the reconsideration will involve a re-weighing of the evidence, it could be wasteful or expensive to have a new panel conduct a fresh hearing: *Chernetz* at para. 101. If the issues raised are primarily issues of law or policy, or if they can be satisfactorily resolved based on the evidentiary record from the first hearing, a new panel might be practical.
>
> [Emphasis added.]

2. *Sandhu*

In *Sandhu v. British Columbia (Provincial Court, Judge)*,[65] Justice Gropper of the British Columbia Supreme Court held that a provincial court judge had not demonstrated bias by refusing to permit the applicant to act as an interpreter where the applicant was not on the list of "court-certified interpreters". The fact that there was no actual "court-certified list"of interpreters did not result in bias—the judge had merely stated a misnomer by using that term where the list was, in reality, a list of interpreters maintained by the Ministry of the Attorney General.

65. 2012 BCSC 1064, aff'd on other grounds 2013 BCCA 88.

3. *Awasis Agency of Northern Manitoba*

In *Awasis Agency of Northern Manitoba v. Manitoba (Provincial Court, Judge)*,[66] the Manitoba Court of Queen's Bench considered a claim of bias against a provincial court judge presiding over an inquiry under the *Fatal Inquiries Act*.[67]

The court noted that it is well established that an inquest must be seen as different from a criminal and civil trial and that an inquest is different from a public inquiry. The scope of an inquest is defined by the legislation and the court itself, not by the parties, and the role of the inquest judge is therefore inquisitorial.[68]

Notwithstanding these differences, however, the inquest judge must maintain an open mind:

> 36 It cannot be nor is it contested in this case that an inquest judge undertaking his or her role as discussed above, must do so with an open and impartial mind. He or she must be free from any predisposition respecting issues, individuals or organizations involved in the inquest. The inquest judge's report and recommendations must be based on facts as he or she has gathered them, even if such fact gathering involves, on occasion, a participatory role on the part of the inquest judge that might in an adversarial proceeding (civil or criminal) be seen to otherwise distort the balance required for fact finding. As I discuss later, while an inquest judge's mandate is not unlimited in scope, the inquest judge, in considering the surrounding and relevant circumstances, may very well probe areas and examine witnesses in his or her own way without necessarily transgressing the lines that separate partiality from impartiality.
>
> 37 While not everything in judicial style or approach can be idiosyncratic or "up for grabs", a more interventionist style or approach in the context of an inquest (in the name of fact gathering and clarifying) is not necessarily irreconcilable with a fair hearing, nor should it be seen as synonymous with an apprehension of bias....

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66. 2013 MBQB 47.

67. C.C.S.M., c. F52.

68. See paras. 34 and 35.

> 38 A Provincial Court judge is recognized to possess certain implied powers to control his or her own procedures, subject of course to any express limitations of statutes to the contrary. See *Hudson Bay Mining and Smelting 2004*, *supra*, paras. 24 and 25. These inherent powers to control his or her own procedure would include the ability of the court to examine (personally or otherwise) witnesses. As the Government of Manitoba has submitted, how that questioning should occur is a matter of procedure that remains with the court. It states in its submission:
>
> > 41 ...In keeping with the legislative framework that mandates the court the task of making findings of fact, the court's role should not be curtailed in exercising its decision to allow interested persons to participate in the inquest. Similarly, to the extent that inquest counsel is appointed to attend the inquest, the discretion remains with the presiding judge as to the process it will employ to ascertain the facts.
> >
> > 42 Commonly, eliciting facts is achieved through inquest counsel examining witnesses, with the interested persons being afforded an opportunity to cross-examine witnesses. However, it is ultimately the court that must make the findings of fact based upon its mandate, and in that sense, is not guided by the parties in reaching those findings. To that end, the court's ability to control its own process is fundamental to fulfilling the objectives of the FIA.
>
> 39 Irrespective of the procedure the inquest judge adopts for eliciting and gathering facts, where the inquest judge chooses to intervene and examine a witness, while the questions may be pointed, direct and even suggestive, they must be premised upon a still open mind looking for answers yet unknown. Assuming an open mind and a willingness to consider all of the evidence as a whole, seldom will the examination of one witness by an inquest judge give rise to an apprehension of bias. For it should be remembered that, even where the inquest judge's questions appear more pointed, those questions can only be directed to the gathering of facts for eventual recommendation, not for the purposes of identifying a culpable party or expressing opinions on culpability.

Despite the inquest judge's inquisitorial role, the Court did emphasize the inquest judges's need to demonstrate impartiality, courtesy, restraint and respect the scope of the inquest in question.

IV. STANDING

1. *Alberta (Workers' Compensation Board)*

In *Alberta (Workers' Compensation Board) v. Alberta (Appeals Commission for Alberta Workers' Compensation)*,[69] the Alberta Workers' Compensation Board ("WCB") appealed a decision of the Appeals Commission which held that an employee's asbestos-related disease, which was a compensable injury, was a contributing factor in his death so that his estate was entitled to death benefits. In the alternative, the WCB sought judicial review of the same decision. The WCB argued that the Appeals Commission had erred by misapplying the statutory provisions, WCB policy and the common law tests of causation. An issue arose about whether the Appeals Commission's role on the appeal should be limited. The Court of Queen's Bench limited the Commission's role to that of making arguments on the appropriate standard of review and its interpretation of what it said in its reasons. The court was satisfied that the adverse parties, the WCB and the Estate, were both present and represented by legal counsel and were both capable of making the necessary arguments.[70]

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69. 2012 ABQB 733.

70. See paras. 30 to 38 in which the court reviewed the case law starting from *Northwestern Utilities v. Edmonton (City)*, [1979] 1 SCR 684, and including *Skyline Roofing Ltd. v. Alberta (WCB)*, 2001 ABQB 624, *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 160 and *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94. See also *Henthorne v. British Columbia Ferries Services Inc.*, 2011 BCCA 476.

2. *Atco v. Alberta Utilities Commission*

As a side issue in *Atco Gas & Pipelines Ltd. v. Alberta (Utilities Commission*, the Court of Appeal of Alberta had this to say about the decision-maker's standing in a statutory appeal:[71]

> [12] A collateral issue arose with respect to the scope of the factum filed by the Commission. The law is clear that, in order to maintain its independence and neutrality, the submissions by the tribunal under appeal should be limited in tone and content: *Northwestern Utilities v Edmonton (City)*, [1979] 1 SCR 684 at pp. 708-10; *Leon's Furniture Ltd. v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 at paras. 16-29, 502 AR 110. The factum filed by the Commission in this appeal crossed that line where it argued the merits of the decision under appeal. In this case the presence of the intervener Utilities Consumer Advocate provided the necessary adversarial context.
>
> [13] Where another party or intervener is present, it will often be appropriate for the Commission to defer filing its factum until the full record is known. This Court has the ability to strike out an offending factum, or deny the right to make oral arguments in appropriate circumstances. The Court is also not satisfied that a tribunal's usual immunity from costs applies to deterrent costs awards or administrative penalties under the Rules of Court: *Henthorne v British Columbia Ferry Services Inc.*, 2011 BCCA 476 at paras. 42-4, 24 BCLR (5th) 306; *Timberwolf Log Trading Ltd. v British Columbia (Commissioner under the Forest Act)*, 2011 BCCA 70 at paras. 12-3, 16 BCLR (5th) 81.

Note the Court's helpful suggestion that a decision-maker might seek leave to permit it to file its factum after other respondents or interveners have done so (rather than simultaneously with them), so that it would have the opportunity to decide whether it would be necessary or appropriate for it to address any issues by its own factum.

One might ask whether it is time to re-think *Northwestern Utilities* (which was decided almost 35 years ago).[72] On the one hand, there is far greater recognition today of the wide

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71. 2013 ABCA 310 (Costigan, Martin and Slatter JJ.A.).

72. See a very thoughtful article on re-thinking tribunal standing, see Frank A.V. Falzon, Q.C., "Tribunal Standing on Judicial Review", (2008) 21 C.J.A.L.P. 21.

variety of different types of statutory delegates which exercise a wide variety of different functions. On the other hand, the legislatures persist in including provisions in the constituting statutes of many statutory decision-makers which imply a greater role by the decision-maker in an appeal from their decisions than contemplated by *Northwestern Utilities*.[73] Is there an argument that an administrative agency—particularly one which has a significant public policy function—should itself be able to address the merits of its decision (as well as its jurisdiction,[74] the statutory scheme, the applicable standard of review, and how that standard of review applies to its decision), and not be dependent on one or other party to make arguments which it should be able to make for itself? Does the *Northwestern Utilities* approach fit with the Supreme Court of Canada's strong reinforcement of the credibility of administrative decisions since *Dunsmuir*? Is there (or should there be) a distinction in the decision-maker's role in a statutory appeal (which is governed by the statute)[75] compared to an application for judicial review (which is governed by the common law)?

The Court of Appeal referred to the British Columbia Court of Appeal's decisions in *Henthorne* and *Timberwolf* as authority for the possibility that the court might strike out an

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73. Section 29(12) of the *Alberta Utilities Commission Act*, R.S.A. 2000, c. A37.2, provides as follows:

    29(12) The Commission is entitled to be represented, by counsel or otherwise, on the argument of an appeal.

74. Question: Is a consequence of the narrowing of the concept of "true jurisdictional issues" after *ATA News* a correlative narrowing of the scope of what a decision-maker can make submissions about on an application for judicial review or a statutory appeal, with respect to its jurisdiction?

75. See Frank A.V. Falzon, Q.C., "Appeals to Administrative Tribunals", (2005) 18 C.J.A.L.P. 1; and John M. Evans, "The Role of Appellate Courts in Administrative Law", (2007) 20 C.J.A.L.P. 1.

offending factum, or deny the right to make oral arguments in appropriate circumstances.[76] The problem, of course, is when should this be determined? In *Henthorne*, the B.C. Court of Appeal said that this issue should be dealt with at the beginning of the appeal itself—which of course makes it difficult for all counsel to know precisely what will be before the Court when it actually deals with the appeal. By contrast, the Ontario Court of Appeal in the *Children's Lawyer* case indicated that a specific motion should be brought to determine this issue prior to the hearing of the main appeal.[77] In my view, the Ontario practice is preferable.

One might also ponder the Court of Appeal's suggestion that the court might make "deterrent costs awards or other administrative penalties" if a tribunal's factum or oral submissions step over the line, notwithstanding"a tribunal's usual immunity from costs". I am not aware of any case where a court has awarded costs against an administrative tribunal (as opposed to disallowing costs).[78] Although the Court of Appeal specifically contemplates that it might award costs against an administrative tribunal, it is not clear why the Court would have jurisdiction to do so, particularly where the statute in question specifically prohibits costs being awarded against the tribunal.[79]

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76. No oral submissions were made by Commission counsel in *Atco*.

77. *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, (2005) 75 O.R. (3d) 309.

78. In *Henthorne*, Madam Justice Newbury stated (at paragraph 44): "... I am of the view that the appellate court should not hesitate to make an appropriate costs order if *Northwestern Utilities* is still to have any practical effect."

79. Section 29(13) of the *Alberta Utilities Act* provides as follows:

> 29(13) Neither the Commission nor any member of the Commission is in any case liable for costs by reason or in respect of an appeal or application.

(continued...)

3. *Douglas*

Douglas v. Canada Attorney General[80] arose out of a complaint made to the Canadian Judicial Council about a judge. The complainant was granted limited standing to appear at an inquiry into certain issues concerning Douglas J.'s conduct. In the course of the hearing before the Inquiry Committee, Douglas J. raised an allegation of bias and asked the members of the Committee to recuse themselves. The members refused to recuse themselves, and Douglas J. applied for judicial review of that decision.

The complainant sought standing to participate in Douglas J.'s application for judicial review on the recusal issue. Prothonotary Mireille Tabib dismissed the complainant's application. While as a general rule parties to proceedings before a federal board, commission or tribunal are, *prima facie*, proper and necessary parties to judicial review applications attacking these proceedings or the results thereof, the complainant was not a party to the hearings before the Inquiry Committee:

> 18 This argument cannot be retained for two reasons. First, the general understanding that parties to the original proceedings are automatically to be named as respondents when these proceedings are subject to judicial review was developed in the context of adversarial proceedings, in which the competing rights of two or more parties are adjudicated, and not necessarily where the proceedings, as here, are in the nature of an inquiry.

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79. (...continued)
The Court of Appeal did not refer to this statutory provision, but only referred to "a tribunal's usual immunity from costs".

80. 2013 FC 451. See also Decision dated June 11, 2013, Docket T-1567-12 which deals with several motions to intervene by organisations involved in the judicial disciplinary process, namely, the Canadian Judicial Council, the Inquiry Committee of the Canadian Judicial Council, the Independent Counsel to the Inquiry Committee and the Canadian Superior Courts Judges Association.

> 19 Indeed, prior to the major overhaul of the *Federal Court Rules* in 1998, Rule 1602(3) did provide that "Any interested person who is adverse in interest to the applicant in the proceedings before the federal board, commission or other tribunal shall be named as a respondent" in a judicial review application. The Federal Court, in *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada - Krever Commission)*, [1996] F.C.J. No. 290, held that this rule did not apply to persons who were granted standing before a commission of inquiry. It reasoned that because the nature of such a commission was inquisitorial rather than adversarial, persons who had been granted standing before a commission were not entitled to be named as respondents but could seek leave to intervene pursuant to the Court's discretionary powers under Rule 1611 - akin to the current Rule 109 of the *Federal Courts Rules*. Although the relevant provisions of the *Federal Courts Rules* have changed, and that decision is therefore not directly applicable here, the Court's analysis of the distinction between adversarial and inquisitorial processes remains relevant. A person who was granted standing, even as a full participant, before an inquisitorial body should not, in my view, automatically be considered a necessary respondent to an application for judicial review arising out of these proceedings; that person would still be required to show that it is "directly affected by the order sought in the application", as provided by Rule 303(1).
>
> 20 The second and perhaps most obvious reason why Mr. Chapman's argument cannot be retained is that he was not, in fact, granted standing as a party in the proceedings before the Inquiry Committee.
>
> 21 The record shows that Mr. Chapman did seek "full standing to participate in the entirety of the Hearing, with the rights of a party, including the rights to full disclosure, as well as to cross-examine and call evidence and make legal submissions" based on his alleged rights and interests as complainant. The Inquiry Committee considered and expressly rejected this request ...
>
> [Footnote omitted.]

The Prothonotary also rejected the argument that the complainant should be named a respondent because his rights would be affected by the decision:

> 28 Neither in his written representations nor in oral argument has counsel for Mr. Chapman articulated a basis upon which these declarations and orders might affect any of Mr. Chapman's rights. Mr. Chapman's arguments are entirely based on the Inquiry Committee's finding that he had "a direct and substantial interest of an exceptional nature in the [Inquiry Committee's] proceedings". It is argued that the same "direct and substantial interest of an exceptional nature" equally justifies that he be granted status as respondent here.

> 29 Having an interest in certain proceedings that would justify the grant of a limited right of participation, akin to intervener status, is not at all the same as being directly affected by the order sought in a proceeding....

The Attorney General sought to be removed as a respondent on the judicial review application. Several organisations involved in the judicial disciplinary process made motions to intervene on a stay application.

The Prothonotary also ruled that the Attorney General should not be removed from the application for judicial review. The Attorney General had not shown he was unable to act, as required by Rule 303 of the *Federal Courts Rules*.[81] The Prothonotary's decision provides a thorough and useful discussion on the right of respondents to participate, the traditional role

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81. Rule 303 reads as follows:

> 303. (1) Subject to subsection (2), an applicant shall name as a respondent every person
>
> (a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or
>
> (b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.
>
> (2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.
>
> (3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.

The rules may be somewhat different in other jurisdictions.

of the Attorney General, and the possibility of interveners in an application for judicial review.[82] See Appendix C for extracts from the decision.

On the motions to intervene in a related stay application, Prothonotary Tabib granted leave to intervene on specified terms to the Independent Counsel to the Inquiry Committee and the Canadian Judicial Council on the basis that each of these two organisations had shown that it would bring to the court an explanation, position, argument or perspective that would not be expected to be provided by one of the parties.

4. *Sandhu*

In *Sandhu v. British Columbia (Provincial Court, Judge)*,[83] the British Columbia Supreme Court refused to grant standing to an applicant who was challenging a provincial court judge's decision to refuse to allow him to act as an interpreter in a small claims action.

The court rejected the applicant's argument that he had sufficient interest in the matter to bring the petition because he was an affected person who had been "exceptionally prejudiced by the impugned decision". The court also denied that the applicant was owed a duty of fairness.[84]

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82. See Appendix C for the discussion concerning the traditional role of the Attorney General in applications for judicial review.

83. 2012 BCSC 1064.

84. At paras. 50 to 58.

The British Columbia Court of Appeal affirmed the decision,[85] solely on the issue of standing. The Court held that there was no evidence that the applicant was exceptionally prejudiced by the decision.

V. MULTIPLE FORUMS AND ISSUE ESTOPPEL—*Penner*

In *Penner v. Niagara (Regional Police Services Board)*,[86] the Supreme Court of Canada considered whether the doctrine of issue estoppel should be applied to prevent a civil law suit against police officers who had been exonerated in police disciplinary hearings.

Mr. Penner had been arrested for disruptive behaviour in an Ontario courtroom. He later filed a complaint against two police officers alleging unlawful arrest and unnecessary use of force. He also commenced a civil action for damages against the two police officers, the court security officer, the Chief of Police and the Police Services Board.

The hearing officer in the disciplinary matter dismissed Penner's complaint and the Ontario Divisional Court ultimately upheld the hearing' officer's decision.[87] The officers then applied to have many of Penner's claims in his civil action dismissed on the basis that they

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85. 2013 BCCA 88.

86. 2013 SCC 19. For other recent decisions on the application of issue estoppel to administrative decisions, see: *Sihota v. Edmonton (City)*, 2013 ABCA 43 in which the Court considered issue estoppel in the planning and land use context and held that planning decisions have sufficient judicial nature to engage the doctrine of issue estoppel; and *British Columbia (Workers' Compensation Board) v. Skilite Building Maintenance*, 2013 BCSC 1666 where the respondent attempted to bring an action to controvert the validity of orders by the Board.

87. Although the Ontario Civilian Commission allowed Mr. Penner's appeal, the Ontario Divisional Court disagreed and restored the hearing officer's decision.

arose from the same facts as the disciplinary complaint which had been dismissed. The motions judge allowed the application and struck the civil claims on the grounds of issue estoppel, holding that the application of issue estoppel would not work an injustice in this case.[88] The Court of Appeal dismissed Penner's appeal.[89] He appealed to the Supreme Court of Canada.

In a 4-to-3 split decision, the Supreme Court of Canada allowed Penner's appeal, with the result that his civil action could continue. The conceptual differences in analysis between the majority and minority decisions are striking, and reflect very different views of when issue estoppel is available to prevent litigation in multiple forums.

The majority's decision

The majority decision was written by Cromwell and Karakatsanis JJ., with McLachlin C.J. and Fish J. concurring.

The majority used the very traditional concept of issue estoppel—namely, as a doctrine which presumptively applies to prevent the re-litigation of (1) the same question, (2) which has been finally decided by a judicial decision, (3) involving the same parties or those who stand in their place[90]—subject, however, to the Court's overriding discretion not to apply the doctrine

88. 2009 CarswellOnt 9420.

89. 2010 ONCA 616.

90. *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 (Dickson J.). Note that in *Penner*, the *Police Services Act* specifically made the complainant a party to the disciplinary proceedings against the policemen. This would frequently not be the case in disciplinary proceedings—with the result that the strict requirements for the application of the doctrine of issue estoppel might not be present.

where it would be unfair to do so or its application would result in an injustice.[91] Although the doctrine of issue estoppel developed in the context of multiple *court* proceedings, it is clear that it now applies to multiple *administrative* proceedings. In *Penner*, the potential application of the doctrine arose in the *court* proceeding after a decision in a quasi-judicial *administrative* proceeding. The majority went out of its way to make it clear that issue estoppel could properly be applied in such circumstances, emphasizing the need in general to respect the Legislature's choice in selecting an administrative body to deal with the issue which requires giving credence to its decisions and preventing re-litigating them in court.[92]

The issue for the majority was whether this was an appropriate case to exercise the Court's discretion *not* to apply the doctrine of issue estoppel, even though all three of the constituent elements were present.

The majority addressed the standard of review for a discretionary decision in the following terms:

> IV. Standard of Review
>
> [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

In considering whether to reverse the lower courts' discretionary decisions, the majority at the outset rejected the argument that the doctrine of issue estoppel should never be applied

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91. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460.

92. Or, presumably, in another administrative forum?

where police disciplinary hearings are involved because of the courts' role in overseeing police accountability.

After considering other factors, the majority held that the lower courts had erred, and this was indeed a proper case in which to exercise the Court's discretion to permit the civil action to continue:

> 8 We conclude that there is not and should not be a rule of public policy precluding the applicability of issue estoppel to police disciplinary hearings based upon judicial oversight of police accountability. The flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met. However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. We would allow the appeal.[93]

After noting that the factors identified in *Danyluk* are not exhaustive and are not to be applied in a mechanical manner,[94] the majority observed that unfairness in applying the doctrine of issue estoppel can arise in two main ways: (1) the unfairness of the prior proceedings, and (2) it might be unfair to use the results of even a fair prior process to preclude the subsequent claim.[95]

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93. See also discussion at paras. 32 to 35.

94. *Penner*, paragraph 38.

95. Paragraph 39.

Unfairness in the previous proceeding may result from the lack of procedural fairness, the unavailability of an appeal, the expertise of the decision-maker (or lack thereof).[96]

Using the result of the previous (procedurally fair) proceeding to prevent the subsequent proceeding might be unfair or result in an injustice in a number of ways—including but not necessarily limited to:

- Where there is a difference in the purpose, processes or stakes involved in the two proceedings.

- The intention of the legislature in creating the administrative proceedings. The majority noted that the *Police Services Act* provides that evidence generated during the previous process was inadmissible in civil proceedings, prohibits the persons who carry out the previous process from being compelled to testify in civil proceedings about information obtained in the course of their duties, and requires information gathered in the previous proceedings to be kept confidential. The majority thought that all of these indicate that the legislature specifically contemplated parallel proceedings in relation to the same matter.[97]

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96. If any of these unfair factors were present, one would expect to be able to challenge the validity of the prior proceeding. The doctrine preventing collateral attack, however, would seem to foreclose the possibility of doing so in the *subsequent* proceeding: *R. v. Consolidated Maybrun Mines*, [1998] 1 S.C.R. 706; *R v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737. Nevertheless, if the subsequent proceeding does not involve challenging the validity of the prior proceeding, then it would appear from the majority's decision in *Penner* that the unfairness of the prior proceeding might be a factor for the Court to consider in deciding whether to exercise its discretion to permit the subsequent proceeding to continue, even though issue estoppel would otherwise prevent this.

97. Paragraphs 50 to 51.

- The reasonable expectations of the parties about the scope and effect of the previous proceedings, including their expectations about the impact of those proceedings on the parties' broader legal rights.[98] The majority noted that (1) Mr. Penner's civil action was filed prior to the release of the hearing officer's decision; (2) the previous jurisprudence that an acquittal of an officer at a disciplinary hearing did not give rise to issue estoppel in relation to the same issues in a subsequent civil action; and (3) the unlikelihood that a person would think that a disciplinary proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in their civil action.

- Further, a mechanical application of the doctrine of issue estoppel might well have the effect of causing persons to participate unnecessarily and perhaps inappropriately actively in the previous proceedings, which might risk turning the previous administrative proceeding into a proxy for a potentially unavailable subsequent civil action.[99]

- Another consideration is whether there would be a lack of symmetry in the effect of applying the doctrine of issue estoppel:[100]

> 61 By assuming that issue estoppel "works both ways", the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.

98. Paragraphs 52 to 58.

99. Paragraphs 62 and 63.

100. Paragraphs 59 to 61.

- The identity of the decision-maker in the previous proceeding might make it unfair to preclude the subsequent proceeding:[101]

> 64 Under the public complaints process of the *PSA* at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.
>
> 65 It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in *Sharma*). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account in assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.
>
> 66 Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.
>
> 67 We emphasize that this unfairness does not reside in the Chief of Police carrying out his statutory duties. The parties accept that, given the statutory framework, there is no objection on fairness grounds to the role of the Chief and there is certainly no suggestion that he failed in any way to carry out his statutory duties. Further, no obvious unfairness arises if the disciplinary decision finds police misconduct, as this is a decision against the interests of the Chief or the Police Services Board. The unfairness that concerns us only arises at the point that the Chief's (or his designate's) decision that there was no police misconduct in a disciplinary context is used for the quite different purpose of exonerating him, by means of issue estoppel, from civil liability relating to the same matter.
>
> 68 Had the Court of Appeal been given the opportunity to fully consider the importance of these points, our view is that it would have seen that applying issue estoppel against the appellant in the circumstances of this case was fundamentally unfair.

101. Paragraphs 64 to 68.

Taking all of these factors into account, the majority concluded that the Court should exercise its discretion and not apply the doctrine of issue estoppel to preclude Mr. Penner's civil law suit:

> Conclusion
>
> 69 Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to depart from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.
>
> 70 Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as Mr. Penner's status as a party and the procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.
>
> 71 Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

The dissenting decision

The dissenting judgment was delivered by Lebel and Abella JJ., with Rothstein J. concurring.

The minority were of the view that the proper approach to the discretionary application of issue estoppel was not that set out by *Danyluk* (which the majority followed), but rather was the approach set out in the recent case of *British Columbia (Workers' Compensation Board) v. Figliola*:[102]

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102. 2011 SCC 52, discussed in last year's paper.

> 76 The key relevant aspect of this precedent is that it moved away from the approach taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, which enunciated a different test for the discretionary application of issue estoppel in the context of administrative tribunals. In so doing, *Danyluk* said that the approach should be "fairness" and set out a number of factors for assessing how "fairness" applied. In our view, these factors can no longer play the same role, nor be given the same weight, based on this Court's subsequent jurisprudence starting with *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. These factors have largely been overtaken by the Court's subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in *Dunsmuir* and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160. The factors dealing with the wording of the statute and the purpose of the legislation are now referred to as the tribunal's mandate (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471).

The minority's concerns were as follows:

- The majority's approach risked transforming issue estoppel "into a free-floating inquiry into 'fairness' and 'injustice' for administrative tribunals".[103]

- The majority's approach did not give sufficient credence or deference to decisions by administrative tribunals:

> 101 This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is crucial to preserving the principles underlying our modern approach to administrative law. Our colleagues' failure to safeguard the finality of litigation also substantially undermines these principles. In applying the doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of "fairness". To do so would undermine the entire system of administrative law.
>
> . . .
>
> 106 Moreover, the principle of finality underlying issue estoppel is directly linked to the principles of deference in the administrative law. The

103. Paragraph 78.

> application of issue estoppel recognizes that "[p]arties should be able to rely particularly on the conclusive nature of administrative decisions ... since administrative regimes are designed to facilitate the expeditious resolution of disputes" (*Figliola*, at para. 27). It also acknowledges the principle of deference which underlies the judicial review jurisprudence of this Court and the importance and values that it attaches to administrative decisions (see, for example, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11).... The broad exercise of the residual discretion not to apply issue estoppel in the present case can hardly be reconciled with the importance of deference to administrative decisions which underlies the judicial review jurisprudence of this Court. In so doing, our colleagues deny the value and importance of administrative adjudication, which this Court has so strongly emphasized on many occasions.

- Differences between court and administrative processes should not be used to undermine the need for finality.[104]

> 103 In applying issue estoppel in the context of administrative law, differences in the process or procedures used by the administrative body should not be used to override the principle of finality. The different purposes of administrative tribunal proceedings should not be invoked either. Otherwise, every substantive legal issue could be reconsidered in subsequent or concurrent civil proceedings, as it could almost always be said that such proceedings have different purposes. The discretionary application of issue estoppel in the administrative law context recognizes that the full panoply of protections and procedures may not exist in an administrative proceeding, but that neither a lack of such protections nor the different objectives of an administrative process are, by themselves, sufficient to warrant the exercise of the court's discretion. In other words, the moving party cannot seek to "rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts" (*Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 41).
>
> 104 The majority in *Figliola* consistently referred to tribunal and court decisions together when discussing the applicable principles, including the exercise of discretion, and never distinguished between them. The idea that

104. Paragraph 103.

> discretion should be exercised more broadly when dealing with administrative tribunals was found only in the dissent (para. 61).
>
> . . .
>
> 107 The court's residual discretion not to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with principles of deference that lie at the core of administrative law. Where the legislature has provided a tribunal with the requisite authority to make a decision, and that decision is judicial or quasi-judicial in nature, it would run counter to the principles of deference to broaden the court's discretion in a manner that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn, instead, to the courts for a re-adjudication of the merits. As the Ontario Court of Appeal found in *Schweneke*, an overly broad application of discretion [not to apply the doctrine of issue estoppel] in the administrative context would "swallow whole the rule that makes the doctrine applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation" (para. 39).

- Taking into account procedural unfairness in the first process in deciding whether to apply issue estoppel in the second process would undercut the rule preventing collateral attack.[105]

The dissenting judgment emphasized that fairness includes the need to protect the finality of the first decision. They considered—and rejected—the other particular elements in this case which the majority considered relevant to not applying the doctrine of issue estoppel in this case.

Accordingly, the minority would have dismissed Mr. Penner's appeal, and his civil action.

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105. Paragraphs 77 and 106.

Comments

The majority and minority decisions raise the following comments:

- Both *Penner* and *Figliola* involve discretion to preclude a second proceeding which has been appropriately dealt with elsewhere. In *Figliola*, there was an express statutory provision granting the Human Rights Tribunal the discretion to dismiss a complaint which had been appropriately dealt with elsewhere. In *Penner*, the common law provides judicial discretion about whether the doctrine of issue estoppel should *not* be applied to dismiss a subsequent action. Factually, *Penner* is the opposite of *Figliola*.

- *Figliola* did not provide a generalized doctrine of *forum conveniens* where there is more than one statutory delegate which has jurisdiction over the same matter. *Figliola* did not explicitly reverse the SCC's decision in *Tranchemontagne v. Ontario (Director, Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513.

- In *Penner*, both the majority and the minority were clear that a previous *administrative* decision could create issue estoppel. Indeed, *Figliola* was an example where issue estoppel was applied between two *administrative* bodies. The applicability of issue estoppel in the *administrative* context would appear to have been firmly established. It is not clear, therefore, why the dissenting minority felt compelled to discuss this at such length (particularly because this was not an issue for the majority—nothing in the majority's decision indicated

that different rules would apply where either the first or both processes were *administrative* rather than court processes).

- Given that the appeal in *Penner* involved a review of the lower court's exercise of its discretion whether or not to apply the doctrine of issue estoppel, one might have expected the Supreme Court to have identified and discussed the standard applicable for reviewing discretionary decisions. The majority did so, briefly;[106] however, the minority did not refer to the standard of review.

- The minority asserted that *Danyluk* was no longer good law, and that the fairness factors from *Danyluk* could no longer play the same role or be given the same weight "based on [the] Court's subsequent jurisprudence starting with *Dunsmuir*...."[107] With respect, it is not obvious how the standards of review analysis in *Dunsmuir* (or the merging of the previous two deferential standards of review into the new reasonableness standard) relates in any way to the role or weight of the fairness factors—apart, perhaps, from giving credence to reasonable decisions by the second decision-maker about whether

106. Paragraph 27.

107. See paragraph 76. It is also not clear how the following passage from that paragraph relates to the analysis from *Danyluk*:

> These factors have largely been overtaken by the Court's subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in *Dunsmuir* and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160. The factors dealing with the wording of the statute and the purpose of the legislation are now referred to as the tribunal's mandate (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471).

to exercise its discretion not to apply the doctrine of issue estoppel (as opposed to the Court second-guessing the decision on a correctness standard).

- In *Penner*, both the majority and the minority would have disposed of the appeal themselves—like the majority did in *Figliola*—there appears to have been no consideration about whether the matter should have been sent back to the lower court to exercise its discretion in accordance with the directions given by the Supreme Court.[108] On the one hand, this might be because issue estoppel arose in an appeal *from a lower court*, so it would be second nature for an appellate court to substitute its decision for a legally incorrect decision by the lower court. On the other hand, would the court have done the same thing if the question about issue estoppel had arisen between two administrative bodies?[109] That, of course, is what divided the majority and the minority in *Figliola*.

- There is a significant difference between the majority and the minority in *Penner* about whether the alleged unfairness of the first decision is relevant to the application of issue estoppel. The majority identified this as one category of unfairness which could be relevant. The minority were clear that any unfairness in the first proceedings should be addressed at that level, whether

108. Although in *Figliola*, Cromwell J. and McLachlin C.J. were part of the minority which would have sent the matter back to the Human Rights Tribunal to exercise its discretion in accordance with the directions given by the Court; both of these judges were part of the majority in *Penner* which decided the issue without sending it back to the lower court. In *Figliola*, LeBel, Abella and Rothstein JJ. were part of the majority which did not send the matter back to the Human Rights Tribunal but rather issued a final judgment for the Court—which is consistent with what they would have done in *Penner*.

109. Or any time when an administrative body is the second process, which applies the doctrine of issue estoppel (regardless of whether the first process was an administrative body or a court)?

by appeal or judicial review.[110] It seems to me that the minority must be correct on this point, and the result of the majority's decision may be to introduce some uncertainty about the extent and application of the rule against collateral attack (*Consolidated Maybrun* and *Al Klippert*).

- More thought needs to be given to the discussion about whether the provisions in the *Police Service Act* indicated a legislative intent that the disciplinary proceedings would be parallel and separate from any other possible proceedings, and therefore the legislature did not contemplate the application of issue estoppel to prevent a civil action arising out of the same facts. Many administrative schemes provide that evidence from their proceedings is not admissible in any other proceedings, and exempt the administrative decision-maker from compelled (or perhaps even being competent) to testify in other proceedings.

- At the end of the day, the minority had a different appreciation of the factors which the majority took into account in determining whether it would be unfair to apply the doctrine of issue estoppel to Mr. Penner.[111] Given that the Court split on where fairness lay in *Penner*, it would appear that these sorts of differences provide considerable scope for advocacy in future cases.

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110. Paragraph 77.

111. Is it clear that the minority contemplated that there could conceivably be some circumstance where it would be unfair to apply the doctrine of issue estoppel? Or would they effectively have converted the application of issue estoppel into a peremptory rule, rather than a discretionary one?

- Is (or should there be) a difference in how the discretion not to apply the doctrine of issue estoppel operates (a) when the first decision is from an administrative tribunal? (b) when the two decisions involve administrative tribunals? (c) when the second decision process is litigation in the courts? (d) when the two processes involve litigation in the courts?

- The decision does not deal with other aspects of the multi-forum challenge: (a) the related issue of where there is *exclusive* jurisdiction in an administrative tribunal, to the exclusion of the courts: *Weber*[112] and *Morin*;[113] or (b) the situation where two courts might have concurrent jurisdiction: *Telezone* and related cases.[114] There is some reference to the related issue of the doctrine preventing judicial review where there is an adequate alternative remedy. What we still lack is a comprehensive, generalized doctrine of *forum conveniens*.

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

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

114. *TeleZone Inc. v. Canada (Attorney General)*, 1010 SCC 62. See also *Canada (Attorney General) v. McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & AgriFood)*, 2010 SCC 64; *Nu-Pharm Inc. v. Canada*, 2010 SCC 65; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66; and *Manuge v. Canada*, 2010 SCC 67.

VI. A MISCELLANY OF OTHER DEVELOPMENTS

A. Constitutional law and the division of powers

Anderson and Gabriel

Two recent adjudicative decisions involve the issue of whether adjudicators appointed under the *Canada Labour Code* had jurisdiction to hear unjust dismissal complaints against First Nation employers. In both *Anderson v. Fox Lake Cree Nation*,[115] and *Gabriel v. West Region Tribal Council Inc.*,[116] the adjudicator held that he did have jurisdiction to hear the complaints.

B. Jurisdictional issues and alternate remedies

J.W.

In *J.W. v. Alberta (Victims of Crime Programs Committee)*,[117] Justice Wakeling of the Alberta Court of Queen's Bench dismissed an application for judicial review where the relevant statute provided the applicant with an adequate internal remedy. While Wakeling J. agreed that the decision of the Director of the Victims of Crime Financial Benefits Program was unreasonable, the appropriate remedy was for the applicant to apply for review of the Director's decision to the Review Board, which would, in the circumstances, likely provide

115. Decision of A. Blair Graham, Q.C. dated 30 October 2012.

116. Decision of A. Blair Graham, Q.C. dated 20 December 2012.

117. 2013 ABQB 212.

a better remedy (which would include the referral for a psychological assessment, something the court could not do).

Enbridge

Enbridge Gas New Brunswick Limited Partnership v. New Brunswick (Attorney General)[118] is an example of a party appealing directly to the court for the interpretation of a statutory provision. Enbridge sought a declaration that s. 4(1) of the *Rates and Tariffs Regulation* was *ultra vires* the Lieutenant-Governor in Council. The case is most noteworthy because of the majority's comments made in *obiter* expressing its unease with Enbridge's application:

> 14 Before closing, I must express my unease with the way in which the underlying interpretative issue reached this Court; an unease which was conveyed to counsel at the hearing of the appeal. Rather than raising the issue before the Board and asking for its interpretation of the legislation, Enbridge went directly to the Court of Queen's Bench and asked for a declaration of invalidity. But that is not the procedure the *Energy and Utilities Board Act* normally envisages for dealing with interpretative issues. Under s. 32, the Board may of its own motion hear and determine any matter. Moreover, s. 36(1) provides that the Board has full jurisdiction to hear and determine all matters, whether of law or fact. Section 52(1) enables an aggrieved party to apply for judicial review to this Court, as opposed to a right of appeal. Applying the Supreme Court's decisions in *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the Board's interpretation of the *Gas Distribution Act, 1999* and the pertinent *Regulations* would be subject to review on the basis of a rebuttable presumption that reasonableness is the applicable standard. In brief, the route taken by Enbridge not only bypassed the relative expertise of the Board but also the application of the deference doctrine.
>
> 15 It is at least arguable that the interpretative issue at hand could have been taken directly to the Board. Most certainly, it could have been raised as a preliminary matter at a rate hearing. What is certain is that we do not have the benefit of the Board's "relative expertise" in interpreting the provisions of the legislation (on this point, see the concurring reasons of Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, [1990] S.C.J. No. 110 (QL)). Instead, this Court was left with the task of

118. 2013 NBCA 34.

> interpreting "technical" terms with which the courts of this Province cannot be presumed to have a familiarity. To exacerbate matters, the affidavit evidence submitted by both parties was not helpful in explaining, for example, the rate-fixing process, the relevance of various factors and their potential impact on the Board's assessment of what is "just and reasonable" having regard to both the interests of Enbridge and its customers. In future, when an application for declaratory relief, such as the present one, is brought directly to the courts, the onus should be on the person seeking the relief to persuade the Court of Queen's Bench why the scheme outlined in the *Energy and Utilities Board Act* should be bypassed. Should the court exercise its discretion to hear the application, this would not foreclose the possibility of the Board seeking intervener status in those cases where its relative expertise may shed light on regulatory matters with which courts are unfamiliar: see *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93.
>
> 16 My colleague, Bell J.A., does not share the "unease" expressed in the preceding two paragraphs. I feel compelled to respond as the true precedential significance of this case may ultimately rest in those paragraphs. First, my concern is a cautionary observation directed at judges who are called on to adjudicate on the *vires* of subordinate or delegated legislation, in circumstances where the provisions in question involve technical or regulatory concepts that fall within the relative expertise of a specialized tribunal. After all, the granting of declaratory (equitable) relief is discretionary. Second, it may well be that correctness would have been the proper standard of review had the Board been given the opportunity to deal with the validity of s. 4(1) of the *Regulation*. But it is best to leave that issue for another day. In the interim, it must be remembered that this is not a case involving the constitutional validity of legislation as was true in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] S.C.J. No. 11 (QL), nor should it be presumed that all questions of law are subject to the correctness standard of review. Finally, the reality is that neither the application judge nor this Court had the benefit of the Board's opinion even if correctness were the proper review standard. What a pity!

Manitoba Government and General Employees Union

In *Manitoba Government and General Employees Union v. Manitoba (Labour Board)*,[119] the Manitoba Court of Queen's Bench reiterated that the court did have jurisdiction to grant an interim injunction against an administrative tribunal—in this case, an injunction against the

119. 2012 MBQB 281.

Labour Board to prohibit the holding of representation votes. Likewise, section 24 of the *Charter* gave the court the authority to grant a stay of proceedings.

C. The Return and Confidentiality

Patient X

In *Patient X v. College of Physicians and Surgeons of Nova Scotia*,[120] the Court allowed the applications of a patient and her physician to be identified by pseudonyms in a judicial review application concerning a complaint of sexual misconduct against the physician. In addition, the record was partially sealed and redacted. However, the Court refused to exclude publication of the patient's medical information from the record and refused to ban the public from the court proceedings.

D. Time limits

Okotoks

In *Okotoks (Town) v. Foothills (Municipal District No. 31)*,[121] the Court of Appeal of Alberta held that the six-month limitation period for bringing applications for judicial review

120. 2013 NSSC 32.

121. 2013 ABCA 222. See also *Edmonton Flying Club v. Edmonton (City)*, 2013 ABQB 421 and *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2011 ABCA 29, leave to appeal to SCC refused February 23, 2012.

contained in the Alberta *Rules of Court* applied to an application under the *Municipal Government Act*[122] for a declaration that a municipal bylaw was invalid.

Wall

In *Wall v. Independent Police Review Director*,[123] the Ontario Divisional Court held that section 60(2) of the *Police Services Act*[124] did not act as a limitation period barring complaints filed more than six months after the incident complained of occurred. It is merely a guideline.

E. Costs

Russell Inns

Manitoba v. Russell Inns Ltd.[125] dealt with the issue of whether the Land Value Appraisal Commission had the authority to make an interim costs award. The Manitoba Court of Appeal considered the wording of section 15 of the *Expropriation Act*[126] and concluded that the Commission did not have authority or jurisdiction to order the interim payment of costs. The Court also confirmed the trial judge's finding that he was not statutorily required to award costs on a solicitor-client basis and that costs were in the discretion of the court.

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122. RSA 2000, c. M-26.

123. 2013 ONSC 3312.

124. R.S.O. 1990, c. P15.

125. 2013 MBCA 46.

126. C.C.S.M. c. E190.

Sihota

In *Sihota v. Edmonton (City)*,[127] the Court of Appeal of Alberta restated the general rule that, absent misconduct or extraordinary circumstances, an administrative tribunal that is involved in judicial review applications neither receives nor pays costs.

F. *Alberta Public Agencies Governance Act*

The *Alberta Public Agencies Governance Act*[128] was proclaimed in force on June 12, 2013. The Act establishes governance practices for departments and agencies in the province. Essentially, it sets out processes used to structure and oversee provincial agencies so that they can achieve their mandates. The Act recognizes the responsibility and accountability of public agencies and the need for clear communication and transparency with respect to the governance, mandates and activities of public agencies.

Administrative lawyers will be particularly interested in the following provisions relating to appointments to public agencies:

Members of Public Agencies

Recruitment of members

13(1) The process by which a member is recruited to a public agency must

(a) identify any skills, knowledge, experience or attributes required of the member before recruitment begins, and

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127. 2013 ABCA 125.

128. SA 2009, c. A-31.5.

(b) base the selection of a person for appointment as a member on assessment of the extent to which the person possesses the identified skills, knowledge, experience or attributes.

(2) The steps that are taken or intended to be taken in a recruitment process and any identified skills, knowledge, experience or attributes required of a member to be appointed must be made public either before or after the member is appointed.

Term of office

14(1) Every appointment must be for a fixed term.

(2) Subject to the regulations, no person shall be appointed as a member for a term that would result in the person serving as a member for more than

(a) 12 consecutive years, in the case of a public agency that is empowered to perform an adjudicative function, or

(b) 10 consecutive years, in any other case.

(3) Breaks in service of less than 2 years shall be disregarded in determining a number of consecutive years for the purposes of subsection (2).

(4) If in the opinion of the responsible Minister it is necessary to ensure the effective operation of a public agency, the responsible Minister may recommend to the Lieutenant Governor in Council that an order be made providing that subsection (2) does not apply in respect of a specified appointment to the public agency, and the Lieutenant Governor in Council may make an order to that effect.

Reappointment

15 An appointed member may be reappointed for an additional term only if, in the opinion of the responsible Minister, the member meets the requirements of the position.

Saving

16 Actions of a public agency or its governing body are valid notwithstanding any defect in compliance with section 13, 14 or 15 in the recruitment, appointment or reappointment of any member.

G. Solicitor–Client Privilege

Many statutory provisions give the statutory delegate the power to compel production of records. An issue sometimes arises about whether such a provision gives the statutory delegate the power to require the production of a record which is protected by solicitor-client privilege.[129] A variant on the issue is whether the statutory delegate can demand production of the record in order to verify whether it is protected by solicitor-client privilege.

In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*[130] the Supreme Court of Canada ruled that very clear statutory language would be required in order to permit a governmental official to require the production of a record which is protected by solicitor-client privilege.

An issue arose in Newfoundland about whether a provision in their *Access to Information and Protection of Privacy Act* was sufficiently specific to permit the Information and Privacy Commissioner to compel the production of a record with respect to which solicitor-client privilege was asserted. Applying the principles of statutory construction, the Trial Division held that the legislation did not give the Commissioner this power. Applying the principles of statutory construction differently, the Appellate Division held that it did. Shortly thereafter, the Legislature amended the Act to make it clear that the Commissioner did not have this power, and any questions about solicitor-client privilege were to be determined by the court.[131]

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129. And other types of legal privilege.

130. [2008] 2 S.C.R. 574.

131. See *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)* where the Trial Division and the Court of Appeal of that Province considered the statutory wording (which is virtually identical language to section 56(3) of the Alberta *FOIPP Act* and the language used in other provinces), used different methods of statutory interpretation, and came to opposite conclusions about the intention of the Legislature: 2010 (continued...)

In addition to an issue about whether the statutory language is sufficiently specific, there is an issue about whether sections 7 and 8 of the *Charter* would prevent such legislation from being effective. See the decision by the British Columbia Court of Appeal in *Federation of Canadian Law Societies v. Attorney General of Canada*.[132]

This issue is important because of the very large number of statutory provisions conferring the power on all sorts of statutory delegates to order production of documents.

H. Interpreting a regulation or judicially reviewing the decision that led to the regulation?

In *Association of Justices of the Peace of Ontario v. Ontario*,[133] the issue involved the calculation of the cost of living increase to be made to the salaries of the justices of the peace. Statistics Canada had changed its methodology for calculating cost of living. The salary commission had recommended splitting the difference. The provincial government did not accept that recommendation, and enacted a regulation containing the lower percentage increase. The Association framed its challenge as an interpretation of the regulation. The Court of Appeal dismissed the appeal, and held that the Association should have brought an application for judicial review of the decision by the provincial government about the amount of the increase.

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131. (...continued)
NLTD 31 and 2011 NLCA 69 (26 October 2011). Note that the *Charter* issue was not considered in the Newfoundland litigation. Bill 29 amended the Act, and received Royal Assent on 27 June 2012. The author is aware of three similar cases pending in Alberta.

132. 2013 BCCA 147; leave to appeal to the SCC granted on 10 October 2013 (35399). See also *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 SCR 209.

133. 2013 ONCA 532 (*per* Goudge, Watt and Pepall, JJ.A.).

> 12 Turning to the appeal of the December 7, 2012 order, we agree with the application judge. The real dispute between the parties is about the respondent's response to the Commission's recommendations for the 2008 remuneration of Justices of the Peace. The Regulation that the appellant seeks to have interpreted is merely the implementation of that response. The jurisprudence of the Supreme Court of Canada makes clear that in these circumstances judicial oversight is by way of judicial review of the response, on a standard of rationality, not by judicial interpretation of the implementing Regulation. In that way, the balance is preserved between judicial independence and the legislature's right to set judicial remuneration. The appellant's appropriate course therefore is to proceed by way of judicial review, not by way of an interpretation of the implementing Regulation.

I. Retroactivity of declaratory legislative amendments

An issue arises not infrequently about the effect of subsequent legislation declaring the meaning of a previous enactment (which an administrative tribunal or the courts may have interpreted in a way with which the legislature does not agree). For a thorough discussion of this issue, see *Régie des rentes du Québec v. Canada Bread Company*, 2013 SCC 13.

VII. CONCLUSION

Courts, statutory delegates, arbitrators and adjudicators continue to be challenged by the diverse and complex aspects of administrative law. There is certainly no argument that administrative law has become stagnant—and there is lots of room for excellent advocacy!

APPENDIX A

Extracts from the decision of Abella J. in

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper, Inc. 2013 SCC 34

17 At the outset, it is important to note that since we are dealing with a workplace governed by a collective agreement, that means that the analytical framework for determining whether an employer can unilaterally impose random testing is determined by the arbitral jurisprudence. Cases dealing with random alcohol or drug testing in *non-unionized* workplaces under human rights statutes are, as a result, of little conceptual assistance (*Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (C.A.)).

18 It may be tempting to suggest that dangerous unionized workplaces should be beyond the reach of the collective bargaining regime, freeing an employer both from the duty to negotiate with the union and from the terms of the collective agreement. This suggests, Cassandra-like and evidence-free, that collective bargaining is the altar on which public and workplace safety is sacrificed and that only employers have the capacity to address these concerns.

19 But the reality is that the task of negotiating workplace conditions, both on the part of unions and management, as well as the arbitrators who interpret the resulting collective agreement, has historically - and successfully - included the delicate, case-by-case balancing required to preserve public safety concerns while protecting privacy. Far from leaving the public at risk, protecting employees - who are on the front line of any danger - necessarily also protects the surrounding public. To suggest otherwise is a counter-intuitive dichotomy.

20 And this without any evidence that dangerous workplaces that are unionized have experienced *any*, let alone a disproportionate number of, accidents resulting from collectively bargaining safety measures. It also assumes that no balancing is required at all once a finding is made that a workplace is dangerous. This not only negates any recognition of the significant privacy interests at play, it wrongly assumes that when there is no collective agreement, an employer is free to exercise its own discretion about worker safety. All provinces have legislation protecting worker safety, thereby restricting an employer's wishes. And, as we saw in *Entrop*, even in a non-unionized workplace, an employer must justify the intrusion on privacy resulting from random testing by reference to the particular risks in a particular workplace. There are different analytic steps involved, but both essentially require attentive consideration and balancing of the safety and privacy interests.

. . .

30 In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measures have been exhausted if there is "reasonable cause" to believe that the employee is impaired while on duty, where the employee has

been directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse. (See *Esso Petroleum Canada and C.E.P., Loc. 614, Re* (1994), 56 L.A.C. (4th) 440 (McAlpine); *Canadian National Railway Co. and C.A.W.-Canada Re* (2000), 95 L.A.C. (4th) 341 (M. Picher), at pp. 377-78; *Weyerhaeuser Co. and I.W.A. (Re)* (2004), 127 L.A.C. (4th) 73 (Taylor), at p. 109; *Navistar Canada, Inc. and C.A.W, Local 504 (Re)* (2010), 195 L.A.C. (4th) 144 (Newman), at pp. 170 and 177; *Rio Tinto Alcan Primary Metal and C.A.W.-Canada, Local 2301 (Drug and Alcohol Policy) (Re)* (2011), 204 L.A.C. (4th) 265 (Steeves), at para. 37(b)-(d).)

31 But the dangerousness of a workplace - whether described as dangerous, inherently dangerous, or highly safety sensitive - is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

32 The blueprint for dealing with dangerous workplaces is found in *Imperial Oil Ltd. and C.E.P., Loc. 900 (Re)* (2006), 157 L.A.C. (4th) 225 ("*Nanticoke*"), a case involving a grievance of the employer's random drug testing policy at an oil refinery, which the parties acknowledged was highly safety sensitive. Arbitrator Michel Picher summarized the principles emerging from 20 years of arbitral jurisprudence under the *KVP* test for both drug *and* alcohol testing:

- No employee can be subjected to random, unannounced alcohol or drug testing, save as part of an agreed rehabilitative program.

- An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.

- It is within the prerogatives of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.

- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use. *As part of an employee's program of rehabilitation, such agreements or policies requiring such agreements may properly involve random, unannounced alcohol or drug testing generally for a limited period of time, most commonly two years*. In a unionized workplace the Union must be involved in the agreement which establishes the terms of a recovering employee's ongoing employment, including random, unannounced testing. *This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interests of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing*. [Emphasis added; para. 100.]

33 There can, in other words, be testing of an individual employee who has an alcohol or drug problem. *Universal*, random testing, however, is far from automatic. The reason is explained by Arbitrator Picher in *Nanticoke* as follows:

> ... a key feature of the jurisprudence in the area of alcohol and drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced drug testing

> for all employees in a safety sensitive workplace as being an implied right of management under the terms of a collective agreement. *Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so*, or in the absence of an accident or near miss and outside the context of a rehabilitation plan for an employee with an acknowledged problem *is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated*. It is not to be inferred solely from general language describing management rights or from language in a collective agreement which enshrines safety and safe practices. [Emphasis added; para. 101.]

34 Significantly, Arbitrator Picher acknowledged that the application of the balancing of interests approach could permit general random testing "in some extreme circumstances":

> It may well be that the balancing of interests approach ... would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace, such a measure might well be shown to be necessary for a time to ensure workplace safety. That might well constitute a form of "for cause" justification. (*Nanticoke*, at para. 127)

35 In the case before him, however, since there was no evidence of a substance abuse problem at the oil refinery, the random drug testing component of the policy was found to be unjustified (*Nanticoke*, at para. 127). His decision was upheld as reasonable by the Ontario Court of Appeal (*Imperial Oil Ltd. v. Communications, Energy & Paperworkers Union of Canada, Local 900*, 2009 ONCA 420, 96 O.R. (3d) 668).

36 The balancing of interests approach has not kept employers from enacting comprehensive drug and alcohol policies, which can include rules about drugs and alcohol in the workplace, discipline for employees who break those rules, education and awareness training for employees and supervisors, access to treatment for substance dependence, and after-care programs for employees returning to work following treatment.

37 But I have been unable to find any cases, either before or since *Nanticoke*, in which an arbitrator has concluded that an employer could unilaterally implement random alcohol or drug testing, even in a highly dangerous workplace, absent a demonstrated workplace problem (*Esso Petroleum*, at pp. 447-48; *Metropol Security, a division of Barnes Security Services Ltd. and U.S.W.A., Loc. 5296 (Drug and Alcohol testing) (Re)* (1998), 69 L.A.C. (4th) 399; *Trimac Transportation Services - Bulk Systems and T.C.U. (Re)* (1999), 88 L.A.C. (4th) 237; *Canadian National*, at pp. 385 and 394; *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, [2002] B.C.C.A.A.A. No. 9 (QL), at para. 30; *ADM Agri-Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 195 (Substance Abuse Policy Grievance)*, [2004] C.L.A.D. No. 610 (QL), at para. 77; *Petro-Canada Lubricants Centre (Mississauga) and Oakville Terminal and C.E.P., Local 593 (Re)* (2009), 186 L.A.C. (4th) 424 (Kaplan), at pp. 434-39; *Rio Tinto*, at para. 37(a) and (d)).

38 In the only two arbitration decisions that have upheld random alcohol testing, the employers were found to be justified in implementing random alcohol testing for employees in safety sensitive positions because there was a demonstrated general problem with alcohol use in a dangerous workplace (*Communications,*

Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd., T.J. Christian, Chair, May 27, 2000, unreported ("*Strathcona*"); *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004*, [2007] C.L.A.D. No. 243 (QL) (Devlin) ("*GTAA*")).

39 In *Strathcona*, the arbitrator upheld the termination of an employee in a safety sensitive position at an oil refinery who tested positive on a random alcohol test. Imperial Oil Limited had implemented the random testing policy after surveying employees across all its facilities about alcohol-related incidents and near misses. According to the survey, the plant operations group that included the grievor's position had a disproportionately high rate of accidents due to substance abuse, with 2.7% of employees reporting that they had personally had near misses due to substance use in the previous 12 months. The arbitrator accepted the survey results as a "rational and sufficient foundation for the random testing Policy" (p. 73). He concluded that "there is evidence of a problem with alcohol use by employees at the Strathcona Refinery" (p. 60). On that basis, he upheld the reasonableness of the random testing policy and the consequential discipline.

40 In *GTAA*, the employer had a random alcohol and drug testing policy for individuals occupying safety sensitive positions at Pearson International Airport in Toronto. The arbitrator acknowledged that "the safety-sensitive nature of a particular industry [is] not, in itself, sufficient to outweigh the privacy interests of individual employees and to support a regime of random testing" (para. 251) and that "[a]rbitrators have required evidence of a drug and/or alcohol problem in the workplace which cannot be addressed by less invasive means" (para. 254).

41 The evidence showed a "pervasive problem" with alcohol (*GTAA*, at para. 262). Both employer and union witnesses testified about numerous occasions when they had seen employees drinking on the job or storing alcohol at work, smelled alcohol on other employees' breath, or found empty liquor containers on site. There were also concerns that alcohol abuse at work often went unreported. Based on this evidence, the arbitrator concluded that random alcohol testing was a reasonable employer policy. Because there was little evidence of on-the-job *drug* use, however, the random drug testing aspect of the policy was found not to be justified.

42 <u>This arbitral consensus, which was carefully applied by the board, helps inform why its decision was reasonable on the facts of this case</u>.

[Emphasis added.]

APPENDIX B

Extract from the decision of McLachlin C.J. in

Cojocaru v. British Columbia Women's Hospital and Health Centre, 2013 SCC 30

Copying in Reasons for Judgment

30 The issue before us is not whether the practice of incorporating what others have written into judgments is a good thing. As we will see, judicial copying is a longstanding and accepted practice, yet one that, carried to excess, may raise problems. Rather, the issue is when, if ever, copying displaces the presumption of judicial integrity and impartiality.

31 Approached from this perspective, a number of the criticisms advanced against copying fall by the wayside. One such criticism, made by the majority of the Court of Appeal in this case, is the judge's failure to attribute the incorporated material to the original author. This criticism is connected to the idea that the reasons should be the "original" product of the judge's mind, and that to the extent they are not, the judge should acknowledge her sources. Failure to attribute sources and lack of originality, without more, do not assist in answering the ultimate question – whether a reasonable person would conclude from the copying that the judge did not put her mind to the issues to be decided, resulting in an unfair trial. The fact that a judge attributes copied material to the author tells us nothing about whether she put her mind to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment-writing; on the contrary, it is part and parcel of the judicial process. It may not be best practice for judges to bulk up their judgments with great swaths of borrowed material. But the fact remains that borrowed prose, attributed or otherwise, does not, without more, establish that the judge has failed to come to grips with the issues required to be decided.

32 To set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment-writing. The conventions surrounding many kinds of writing forbid plagiarism and copying without acknowledgement. Term papers, novels, essays, newspaper articles, biographical and historical tomes provide ready examples. In academic and journalistic writing, the writer is faced with the task of presenting original ideas for evaluation by an instructor or by peers, or of engaging in principled debate in the press. The task of judgment-writing is much different. As Simon Stern puts it:

> Judges are not selected, and are only rarely valued, because of their gift for original expression. Just as most lawyers would rather present their arguments as merely routine applications of settled doctrine, yielding the same legal results that other courts have delivered repeatedly, judges usually prefer to couch their innovations in familiar forms, borrowing well-worn phrases to help the new modifications go down smoothly. The bland, repetitive, and often formulaic cadences of legal writing in general, and judicial writing in particular, can be explained in large part by a commitment to the neutral and consistent application of the law.... [T]he effort to demonstrate that similar cases are being treated alike often finds its rhetorical manifestation in a penchant for analyses that have a *déja vu*

> quality – usually because the words *have* been read before. This tendency, though visible throughout the legal system, is most pronounced at the trial level. [Emphasis in original; p. 1.]
>
> ("Copyright Originality and Judicial Originality" (2013), 63 U.T.L.J. 1)

And again:

> It is hardly news that legal writing is embedded in a network of precedent, formulas, and boilerplate, that it reflects a general preference for the tried and true over the novel, and that it routinely depends on practices – verbatim repetition of others' words, adoption of others' prose and arguments – that might trigger infringement claims in an intellectual property dispute. [p. 6]

33 The scope for judicial creativity is narrow, but not non-existent. It finds expression in the ordering of the reasons and the disposition of the arguments and issues, and in the occasional eloquent statement of the facts or restatement of the law. Nevertheless, it remains the case that judicial opinions, especially trial judgments, differ from the kind of writings that traditionally attract copyright protection, with the concomitant demands of originality and attribution of sources. Judgments are "usually collaborative products that reflect a wide range of imitative writing practices, including quotation, paraphrase, and pastiche" (Stern, at p. 2). Judgments routinely incorporate phrases and paragraphs from a variety of sources, such as decided cases, legal treatises, pleadings, and arguments of the parties. Appellate judges may incorporate paragraphs borrowed from another judge on the case or from a helpful law clerk. Often the sources are acknowledged, but often they are not. Whether acknowledged or not, they are an accepted part of the judgment-writing process and do not, without more, render the proceeding unfair.

34 In this spirit, and in the interests of expediting judicial business, courts actively encourage parties to submit written arguments and proposed orders. This process is accelerating. In the United States, and more and more in Canada, courts welcome electronic submissions. Such submissions help the judge get the decision right, facilitate the task of judgment writing and speed the judicial process. As Gregory M. Silverman frankly observes, the "benefits provided by electronic filing" include "reduced time for ... retyping as portions of one document can be easily transferred to another using the cut-and-paste operation of word processing software" ("Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet" (2004), 79 Wash. L. Rev. 175, at p. 196).

35 The concern about copying in the judicial context is not that the judge is taking credit for someone else's prose, but rather that it may be evidence that the reasons for judgment do not reflect the judge's thinking. They are not the judge's reasons, but those of the person whose prose the judge copied. Avoiding this impression is a good reason for discouraging extensive copying. But it is not the copying *per se* that renders the process of judgment-writing unfair. A judge may copy extensively from the briefs in setting out the facts, the legal principles and the arguments, and still assess all the issues and arguments comprehensively and impartially. No one could reasonably contend that the process has failed in such a case.

36 To sum up, extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that

a reasonable person apprised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.

The Permissibility of Judicial Copying: A Look at the Cases

37 Judges are busy. A heavy flow of work passes through the courts. The public interest demands that the disputes and legal issues brought before the courts be resolved in a timely and effective manner, all the while maintaining the integrity of the judicial process. In an ideal world, one might dream of judges recasting each proposition, principle and fact scenario before them in their own finely crafted prose. In reality, courts have recognized that copying is acceptable, and does not, without more, require the judge's decision to be set aside. While the theoretical basis on which the result is explained varies, this is the position in England, various commonwealth countries, the U.S. and in Canada.

38 In England, the Court of Appeal has affirmed that copying does not invalidate a decision: *English v. Emery Reimbold & Strick Ltd.*, [2002] EWCA Civ 605, [2002] 3 All E.R. 385. This view appears to be generally accepted. For example, in 2006, a British tribunal, applying *Emery*, explained that "there is nothing to prevent a Tribunal from adopting the arguments advanced on behalf of one of the parties if it accepts those arguments and has nothing to add to them": *Meadowstone (Derbyshire) Ltd. v. Kirk*, 2006 WL 690588 (U.K. Employment Appeal Tribunal), at para. 21. Although the tribunal acknowledged that "[i]t is better practice for a Tribunal to spell out in its own words the reasons for any conclusion which it reaches", if it chooses to repeat a party's language, it cannot be said that this practice "fail[s] to meet ... the minimum standards by which every judgment should be measured" (para. 21).

39 *Emery* was applied by the Hong Kong Court of Appeal in a case where the trial judge incorporated extensive portions of counsel's submissions in the judgment, and the losing party appealed on grounds of procedural fairness and adequacy: *Shin v. Kung*, [2004] HKCA 205, at paras. 366-69 and 377. The court dismissed the appeal, holding that a judge is entitled to accept or reject a party's case in its entirety. "A judge's total adoption or rejection of counsel's submissions *per se* does not imply the lack of independent adjudication, nor does it constitute a valid ground for upsetting the judgment on the basis of an unfair trial", the court stated (para. 367). Applying the test of "a fair-minded and informed observer" (at para. 377), it dismissed concerns about adequacy and bias.

40 In Australia, it has been held that "[a]doption of one party's submissions by a judge ... is one method of providing adequate reasons", adding that "[i]t may not be the choice of every judge but it is impossible to say that it necessarily .... falls short of the judicial duty to provide reasons": *James v. Surf Road Nominees Pty Ltd.*, [2004] NSWCA 475, at para. 168. In *Fletcher Construction Australia Ltd. v. Lines MacFarlane & Marshall Pty Ltd. (No. 2)*, [2002] VSCA 189, [2002] 6 V.R. 1, at para. 163, the Victorian Supreme Court of Appeal, reviewing a trial judgment for adequacy, remarked that "[a] careful examination of the reasons for judgment shows that the judge adopted [the plaintiff's] closing submissions almost in their entirety." But it did not set the judgment aside for copying alone.

41 The United States Supreme Court ruled almost 50 years ago that when a trial judge "adopt[s] verbatim" the findings of fact submitted by counsel, "[t]hose findings, though not the product of the workings of the ... judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence": *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), at p. 656. This rule appears to have been consistently followed in the United States although not without occasional adverse comment in

extreme cases, as in *United States v. Marine Bancorporation, Inc.* 418 U.S. 602 (1974), at p. 615, where extensive copying without citations to transcripts hampered appellate review and added to the appellate court's burden. (See Stern, at p. 9, fn. 24.)

42 The Supreme Court of Canada has never ruled on the matter. However, the two leading cases, *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1 (C.A.), and *R. v. Gaudet* (1998), 40 O.R. (3d) 1 (C.A.), support the view that copying does not in itself establish procedural unfairness, and that the question is whether the copying shows that the trial judge did not consider the evidence and issues and render an impartial, independent decision.

43 In *Gaudet*, the trial decision was upheld despite the fact that over 90 percent of its content was adopted from the Crown's submissions (Stern, at p. 34). The trial judge had expressly stated that he had conducted an independent review, and the Ontario Court of Appeal said that there was "no reason to conclude that the trial judge did not do what he stated he had done – conduct an independent review of the evidence and carefully consider both the defence and Crown submissions" (p. 16).

44 In *Sorger*, the Ontario Court of Appeal approached the issue of extensive copying in reasons for judgment as a matter of procedural fairness. It was faced with a 128-page trial judgment consisting of nearly 125 pages transcribed from the parties' submissions – 55 pages from the plaintiffs' submissions and 70 pages from the defendants' submissions (Stern, at p. 34). The trial judge devoted only two pages to findings of fact, all copied verbatim from the defendants' material without any analysis of the evidence and no consideration of the jurisprudence. Evoking concerns about the fairness of the trial, the Court of Appeal concluded that the trial judgment offered "nothing to indicate that the trial judge attempted to grapple fairly and impartially with the case presented by the plaintiffs or decide it independently". It concluded that "[a] reasonable and informed observer would have a reasonable apprehension that the mind of the trial judge was closed to a fair and impartial consideration of the appellants' case" (pp. 8-9). The trial judge's decision was set aside and a new trial ordered, not on the ground that the copying in itself vitiated the judgment, but on the ground that the copying, viewed in terms of the judgment as a whole, would satisfy a reasonable observer that the judge failed to grapple independently and impartially with the issues before him.

45 Subsequent cases affirmed that copying alone is not grounds for appellate intervention. The Ontario Court of Appeal upheld a decision on an application for a search warrant where the judge's entire reasons consisted of a reference to one party's arguments by paragraph number: *Canada (Attorney General) v. Ni-Met Resources Inc.* (2005), 74 O.R. (3d) 641. The losing party argued that the reasons were insufficient to fulfill their functions because they simply adopted paragraphs from the other party's argument. The court rejected this submission.

46 In *2878852 Canada Inc. v. Jones Heward Investment Counsel Inc.*, 2007 ONCA 14 (CanLII), the same court, in a divided judgment and with some criticism, upheld reasons that incorporated the parties' submissions by identifying them solely by paragraph number, lending a "writing by numbers" effect (Stern, at p. 24).

47 In *R. v. Dastous* (2004), 181 O.A.C. 398, where the trial judgment consisted of five paragraphs in which the trial judge stated he accepted all the Crown's submissions, the Ontario Court of Appeal in a short judgment set the decision aside in part because the trial judge had given no reasons for his rejection of the accused's evidence. In *R. v. Kendall* (2005), 75 O.R. (3d) 565, leave to appeal refused, [2006] 1 S.C.R. x,

the same court rejected a trial judgment that consisted only of an expression of agreement with and adoption of the defence submissions at trial, again because it was impossible to know why the judge decided as he did.

48 The Federal Court of Appeal considered a judgment that reproduced verbatim 100 paragraphs of a trial judgment complete with original underlining, footnotes and references in *Janssen-Ortho Inc. v. Apotex Inc.*, 2009 FCA 212, 392 N.R. 71. After recommending that judges should attribute sources, the court nevertheless concluded that the judgment afforded "[no] basis to ... conclude ... that the Judge did not perform his duty to examine the evidence as he was called upon to do" (para. 79).

49 In summary, courts in Canada and elsewhere have held that copying in reasons for judgment is not, in itself, grounds for setting the judge's decision aside. However, if the incorporation of the material of others would lead a reasonable person apprised of all the relevant facts to conclude that the trial judge has not put his or her mind to the issues and made an independent decision based on the evidence and the law, the presumption of judicial integrity is rebutted and the decision may be set aside.

50 This does not negate the fact that, as a general rule, it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and explain in his or her own words her conclusions on the facts and the law. The process of casting reasons for judgment in the judge's own words helps to ensure that the judge has independently considered the issues and come to grips with them. As the cases illustrate, the importance of this may vary with the nature of the case. In some cases, the issues are so clear that adoption of one party's submissions or draft order may be uncontroversial. By contrast, in complex cases involving disputed facts and legal principles, the best practice is to discuss the issues, the evidence and the judge's conclusions in the judge's own words. The point remains, however, that a judge's failure to adhere to best practices does not, without more, permit the judge's decision to be overturned on appeal.

APPENDIX C

Extracts from the decision of Prothonotary Mireille Tabib in

Douglas v. Canada (Attorney General)
2013 FC 451

[Extract 1: Rule 303 and respondents in an application for judicial review]

47 Persons named as respondents have the right to participate fully, as parties, in an application, but they do not have the obligation to do so. They may decline to participate at all or choose to address only certain issues in the proceedings. Nor is their participation restricted to opposing the application: they may support or consent to any or all parts of it.

48 Participation in an application is, further, not exclusively restricted to those named as respondents. Persons who have no right to be named as respondents but have a recognizable interest in the proceedings or who can show that their participation will assist in the determination of the application may seek and be granted leave to intervene. The ability of the Court to recognize and authorize interventions by non-parties further demonstrates that parties are not expected to always be willing or able to defend all aspects of an application.

49 Thus, it would be misleading to interpret or apply Rule 303 as defining the respondent's role as an opponent to an application. Rule 303 merely prescribes the persons who, as respondents, will have automatic and full rights to determine and decide whether and how they will participate in an application.

. . .

51 Rule 303(1) requires that any person directly affected by an order sought be named as a respondent. In judicial review proceedings, this provision will generally apply where the decision under review itself determined or affected the legal rights of another person. In such cases, the respondent's rights will generally be in conflict with the applicant's and the respondent can assist the Court by bringing an opposite point of view to the applicant's. Because judicial review involves the exercise of the Court's supervisory jurisdiction over public bodies, Rule 304 requires that the Attorney General be served with any application for judicial review. This allows the Attorney General to consider whether, even where a party adverse in interest can be expected to defend the application, it is nevertheless necessary or appropriate for him to seek leave to intervene in the application.

52 Not all decisions or orders of federal boards, commissions or other tribunals involve the competing rights of two or more persons. Often, the decision and resulting judicial review process will affect the legal rights of only one person. Indeed, with the exception of Mr. Chapman, whose motion has been dismissed, none of the parties or recognized interveners on this motion have suggested that there exists a person directly affected by the order sought herein or required to be named as a party respondent pursuant to Rule 303(1).

53 Rule 303(2), applicable only to applications for judicial review, mandates in such cases that the Attorney General be named as a respondent. This ensures, but does not require, that the Attorney General can fulfill his role as guardian of the public interest and protector of the rule of law by opposing the application or making such submissions as are appropriate, without the need to seek and obtain leave to intervene in the proceeding (see *Sutcliffe et al v Minister of Environment (Ontario) et al*, 69 OR (3d) 257, [2004] O.J. No. 277 (Ont CA) at para 17-18).

54 As mentioned, the role of a respondent is not confined to opposing an application. A party respondent enjoys the right to consider and determine the extent and purpose of his participation. In the context of judicial review, the Attorney General, as the respondent named by default pursuant to Rule 303(2), is expected to exercise that right in the public interest.

55 In carrying out his role as respondent, the Attorney General's overarching mandate is to assist the Court in reaching a decision that accords with the law. It is not uncommon for the Attorney General to refrain from making submissions or observations on particular aspects of the case, to support the applicant's request for relief on the same or other grounds as the applicant, or even to take no position on any of the issues raised (*Hoechst Marion Roussel Canada v Canada (Attorney General)*, 2001 FCT 795 at para 67 and 69). Thus, Rule 303(2) does not mandate how the Attorney General must choose to act as a respondent, but that he be given the ability to exercise that choice.

56 Rule 303(3) essentially provides that the Attorney General may, on motion and in certain circumstances, ask the Court that another person or body be named to act as respondent in his place. I am not aware of, nor have any of the parties and interveners before me found, any case where the Attorney General has invoked Rule 303(3). It is the Attorney General's position on this motion that he is unable to assume the role of respondent, as defined above, in this application. To be clear, the Attorney General does not take the position that he is unwilling to act, but that, in view of the nature of the proceedings giving rise to this application, he is unable, at law, to act as respondent.

57 The rationale supporting the Attorney General's position is presented in detail in his motion record, and will be analyzed below. However, as a preliminary issue raised at the hearing before me, the Attorney General argued that it is not the Court's task, on this motion, to determine whether the Attorney General is indeed unable to act as respondent herein. The Attorney General submits that Rule 303(3) only requires him to provide a reasonable basis for his conclusion that he is unable to act. Upon this, the Court should show significant deference to the Attorney General's determination, and proceed directly to consider whether another person should be substituted to the Attorney General.

58 There is no support in the wording of Rule 303(3) or at law for this interpretation. Rule 303(3) explicitly provides that the Court's discretion to order the substitution of the Attorney General is to be exercised on the motion of the Attorney General, and "where the Court is satisfied that the Attorney General is unable" to act. It is, on a plain reading of the rule, the Court and not the Attorney General who is required to be satisfied of the alleged inability to act. Had the drafters of the *Federal Courts Rules* contemplated that the threshold for the exercise of the Court's discretion should be the Attorney General's own determination, or the existence of reasonable grounds for the Attorney General to believe that he is unable to act, it would have been a simple matter to draft Rule 303(3) accordingly. Deference to the Attorney General, it seems to me, might come into consideration where the grounds for the motion is unwillingness to act, but I need not determine this point on this motion.

59 To summarize, then, the application of Rule 303, in the context of this judicial review application, proceeds from the following analytical sequence: As there are no persons directly affected by the order sought and required to be named as respondents pursuant to Rule 303(1), the Attorney General was properly named pursuant to Rule 303(2). Rule 303(2) requires that the Attorney General be named as a respondent by default to enable him to exercise his function as guardian of the rule of law. In exercising this function, the Attorney General is not required to defend the application. He may support it, or limit his participation to make submissions to assist the Court in reaching a decision that accords with the law. The Court may, on the motion of the Attorney General, consider whether another person should be named respondent in his place, but only if the Attorney General can show, and the Court is satisfied, that the Attorney General is unable to act as respondent.

[Extract 2: the traditional role and mandate of the Attorney General]

60 Before considering the reasons for which the Attorney General considers himself unable to act in this matter, it is helpful to understand the traditional role and mandate of the Attorney General.

61 Section 5 of the *Department of Justice Act*, RSC 1985, c. J-2 provides in part as follows:

> "5. The Attorney General of Canada
>
> (a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitution Act, 1867*, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;
>
> (...)
>
> (d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada;"
>
> * * *
>
> *"5 Les attributions du procureur général du Canada sont les suivantes :*
>
> a) il est investi des pouvoirs et fonctions afférents de par la loi ou l'usage à la charge de procureur général d'Angleterre, en tant que ces pouvoirs et ces fonctions s'appliquent au Canada, ainsi que de ceux qui, en vertu des lois des diverses provinces, ressortissaient à la charge de procureur général de chaque province jusqu'à l'entrée en vigueur de la *Loi constitutionnelle de 1867*, dans la mesure où celle-ci prévoit que l'application et la mise en oeuvre de ces lois provinciales relèvent du gouvernement fédéral;
>
> (...)

(d) il est chargé des intérêts de la Couronne et des ministères dans tout litige où ils sont parties et portant sur des matières de compétence fédérale;"

62 Considering the role and standing of the Attorney General in instituting judicial review proceedings, the Federal Court, in *Canada (Attorney General) v Canada (Information Commissioner)*, 2002 FCT 128, [2002] 3 FC 630, described the Attorney General's role as follows:

> "48 The Attorney General has standing which cannot be brought into question in the courts to assert a claim for declaratory relief to protect the public interest. De Smith *et al.* in *Judicial Review of Administrative Action* (5th ed., 1995), at page 147 has provided the following explanation of the broad limits on the "public interest" in respect of which the Attorney General can seek declaratory relief:
>
> > What are the limits of the public interest is almost impossible to accurately define. Examination of a large number of authorities would indicate the wide range of situations in which the public interest has been accepted by the courts as being involved, however, the courts have, probably deliberately, refrained from spelling out its boundary. Certainly, however, any interference with the rights of the public (for example, in the highway), failure to perform or unsatisfactory performance of duties by public bodies for the benefit of the public, abuse of discretionary powers and illegal acts of a public nature will be regarded as raising issues of public interest.
>
> 49 The English Court of Appeal has also stated [Attorney General v. Blake, [1997] E.W.J. No. 1320 (C.A.) (QL), at paragraph 46]:
>
> > In advancing ... a claim for relief in public law, the Attorney is performing a different role. He is not merely a convenient nominal plaintiff representing the Crown. He is seeking relief in his historic role as guardian of the public interest. This gives the Attorney a special status in relation to the courts. He has a particular role and a particular responsibility. The role extends well beyond the field of criminal law, for example to the fields of contempt of court, charities and coroners' inquisitions. Its sources in some instances is derived from statute. However, in relation to other functions, the role is an inherent part of his ancient office. It is the inherent power flowing from his office which enables the Attorney either to bring proceedings ex officio himself or to consent to the use of his name....
>
> 50 In all the applications for judicial review in which the Attorney General is an applicant, remedies are sought to curb [See: *De Smith*, *supra*, at page 147]:
>
> > ...unsatisfactory performance of duties by public bodies for the benefit of the public, abuse of discretionary powers and illegal acts of a public nature..."
>
> [emphasis added]

63 In judicial review proceedings, where the Court exercises supervisory jurisdiction over the "performance of duties by public bodies for the benefit of the public", that role justifies the Attorney General's standing to bring proceedings to redress perceived illegality or improper performance by public bodies. It also justifies the Attorney General's standing and mandate to act as respondent or intervener in judicial review proceedings when the attacks on the performance of public bodies are made by others.

64 The role performed by the Attorney General in judicial review applications is an important, yet delicate one. As noted in *Cosgrove v Canadian Judicial Council*, 2007 FCA 103, [2007] F.C.J. No. 352, at paragraph 51, "Attorneys General are constitutionally obliged to exercise their discretionary authority in good faith, objectively, independently, and in the public interest (...). Attorneys General are entitled to the benefit of a rebuttable presumption that they will fulfill that obligation."

65 It is well established that a tribunal whose decision is challenged in judicial review proceedings should not appear to defend the merits of its decisions. As stated by the Supreme Court of Canada in *Northwestern Utilities Ltd v Edmonton (City)*, [1979] 1 SCR 684 (SCC) at page 709:

> "Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance."

66 The Attorney General's participation as the default respondent in judicial review proceedings pursuant to Rule 303(2) ensures that there can be a party present at the judicial review to present an opposite point of view to the applicant's and defend the tribunal's decision.

67 However, because the Attorney General is also the defender of the public interest and has a duty to uphold the rule of law, there may be limits to how vigorously he should properly defend the merits of a public body's decision.

68 The case of *Samatar v Canada (Attorney General)*, 2012 FC 1263, [2012] F.C.J. No. 1357 involved a decision of the Public Service Commission. The Attorney General was named as sole respondent pursuant to Rule 303(2). The Federal Court expressed the following concerns:

> "37 The respondent is acting on behalf of the Commission here. This is not the first time that the respondent has taken a position that could be characterized as "aggressive", even "forceful", or even, in the absence of other qualifiers, "very defensive". For example, in Challal, [2009] F.C.J. No. 1589, the respondent argued that it was "too late to question the finding of guilt issued by the Commission" and that the corrective measures "were indeed within the Commission's jurisdiction and were reasonable" (Challal, at paragraphs 4 and 5).
>
> 38 However, there is generally no dispute that it is not up to a tribunal whose decision is under review, whether it is an appeal or a judicial review, to vindicate itself, as well as the merit of its decision. As it was so aptly stated in *Northwestern Utilities Ltd v Edmonton (City)*, [1979] 1 S.C.R. 684, at paragraph 39: "To allow an administrative board the

> opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions."
>
> (...)
>
> 43 In my opinion, when the respondent agrees to act on behalf of the Commission, in the absence of another party to support the legality of the impugned decision, the respondent should try to intervene like an *amicus curiae*, even if the respondent has more latitude that an *amicus curiae*. After all, the respondent represents the public interest. That being said, the respondent should, first and foremost, enlighten the Court objectively and completely on the facts stated in the impugned decision and on the Commission's reasoning, without seeking justification that was not provided by the Commission itself in the impugned decision - which of course includes the reasons in the investigation report that the Commission supported.
>
> 44 In short, there is no problem as long as the respondent explains the impugned decision and provides objective light on the Commission's jurisdiction and the powers vested in it under the law. I acknowledge that this can be difficult in some cases."
>
> [emphasis added]

69 The presumption that the Attorney General will perform his duty as guardian of the public interest and exercise his special status in relation to the courts in good faith has allowed the courts to rely on the expectation that the Attorney General will faithfully fulfill that role, even when he may have directly appeared before the federal body at issue. (see *Chrétien v Canada (Attorney General)*, 2005 FC 591, [2005] F.C.J. No. 684 at para 29 to 31 and 36).

70 Such is the Attorney General's special status of independence from the government, in his role as the Chief Law Officer of the Crown, that the Ontario Court of Appeal noted the existence of a body of opinion to the effect that the Attorney General would even be entitled to bring an action against a cabinet colleague if he believed that the Minister's proposed action was not in accordance with the law (see *Sutcliffe*, cited above).