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THE YEAR IN REVIEW:
RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

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I. INTRODUCTION[1]

Mr. Justice Stratas of the Federal Court of Appeal recently described administrative law as a machine that[2]

> ... has many moving parts, the interrelationship of which often is not understood....

And the role of courts in administrative law as

> ... mediat[ing] the clashes by applying doctrines founded upon decades of well-considered solutions to practical problems - a mountain of decided cases...

The many moving parts of administrative law—which are often misunderstood and which are founded on decades of decided cases—explains why there is never a shortage of material for these annual recent development papers. And this year, the judicial administrative law machines have been busy.

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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 30 October 2014.

2. *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250. The case is discussed further below under the heading Multiple Forums.

II. STANDARDS OF REVIEW

In 2008, the Supreme Court of Canada in *Dunsmuir*[3] re-engineered (simplified!) the machinery of judicial review by merging the three existing standards of review into two—correctness and reasonableness. The past six years have been spent working out the ramifications of this new design—not always satisfactorily taking into account the interrelationship between standards of review and the other moving parts of administrative law, or even its constitutional foundation of keeping the executive within the authority which the legislature has granted to it.[4]

In practice, there are difficulties with the application of the new stream-lined standards of review analysis. For example:

(a) the Supreme Court has greatly narrowed the circumstances in which the correctness standard will be applicable.[5] On the one hand, *ATA News*,[6]

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

4. Readers will be interested in the recently published *Judicial Deference to Administrative Tribunals in Canada—Its History and Future* by Hon. Joseph Robertson, Peter Gall, Q.C. and Professor Paul Daly, 2014, LexisNexis which provides a review of the history of the development of standards of review since 1979 as well as thought-provoking questions about the justification for deference as the presumptive standard of review.

5. For an interesting review of the consequences of the post-*Dunsmuir* jurisprudence, see Lauren J. Wihak, "Whither the correctness standard of review?", (2014) 27 C.J.A.L.P. 173.

6. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 ("*ATA News*").

virtually abolished the concept of "a true jurisdictional error".[7] On the other hand, the Court has also reduced the types of legal questions which will attract the correctness standard of review.[8]

(b) The application of the reasonableness standard is inconsistent and unpredictable.[9] Indeed, in some cases, courts simply come to their own conclusions on what is—or is not—reasonable without explanation. This leaves litigants wondering whether a different court would have come to a different answer, and may encourage further litigation to try to obtain a different result.

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7. In *Canada (Canadian Human Rights Commission) v. Canada*, 2011 SCC 53 ("*Mowat*"), 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". See also *Boddy v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2012 NSCA 73, *Can-Euro Investments Ltd. v. Ollive Properties Ltd.*, 2013 NSCA 80; *Jones v. Halifax (Regional Municipality)*, 2012 NSSC 368; and *Isaac v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 1608. For examples of a "true jurisdictional issue", see *Isaac v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 1608, where the issue was whether the Superintendent had jurisdiction to make decisions with respect to roadside suspensions; and *1694192 Alberta Ltd. v. Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 319, where the issue was whether the SDAB had jurisdiction to hear an appeal where notice of a development permit had not been provided to an adjacent property owner.

8. *Smith v. Alliance Pipeline*, 2011 SCC 7; *Halifax (Regional Municipality) v. N.S. (Human Rights Commission)*, 2012 SCC 10; *Niyonkuru v. Alberta (Executor Director, Delivery Services, Assured Income for the Severely Handicapped Program)*, 2013 ABQB 542. For an example of an issue which is of general importance to the legal system as a whole and which attracted the correctness standard of review, see *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 at paragraphs 35-37 ("legal privilege").

9. For a thoughtful consideration of this issue, see Hon. John M. Evans, "The Triumph of Reasonableness: But How Much Does it Really Matter?", (2014) 27 CJALP 101.

(c) Sometimes, correctness masquerades as reasonableness—the court having made its own determination of what the right answer is. If that is different from the statutory delegate's answer, then the latter is unreasonable.

(d) There is an emerging uncomfortable interface between the principles of statutory interpretation (which lead to one "correct" interpretation) and the reasonableness standard of review (which contemplates the possibility of more than one interpretation).[10]

(e) It is still not clear whether *Dunsmuir*'s standards of review apply to all forms of delegated decisions, or just adjudicative ones. And it is also still not clear that either of the two standards of review applies to all *grounds* of review (such as procedural fairness, the *vires* of regulations or bylaws, unreasonableness as a ground of review in the *Wednesbury* sense).[11]

Some of these issues are illustrated by the recent cases discussed below.

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10. For example, see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraph 38 (discussed below). See also *Canada (Canadian Human Rights Commission) v. Canada*, 2011 SCC 53 (*"Mowat*") at paragraph 64 (discussed more fully in last year's paper).

11. Indeed, some might argue that the concept of *grounds* for judicial review no longer exists, and has been subsumed into standards-of-review analysis: *Alberta (Director, Assured Income for the Severely Handicapped Program Delivery Services) v. Januario*, 2013 ABQB 677, citing *Dr. Q*, 2003 SCC 19, referred to below.

A. The applicability of the *Dunsmuir* analysis: the *CNR* case

In *Canadian National Railway Co. v. Canada (Attorney General)*,[12] the Supreme Court of Canada reiterated that the standard of review analysis from *Dunsmuir* applies to all types of statutory delegates who make adjudicative decisions; it is not limited to judicial review of decisions by tribunals. This includes adjudicative decisions by Cabinet influenced by policy considerations.

The case involved a confidential shipping contract made between Canadian National Railway Co. (CNR) and Peace River Coal Inc. (PRC). Shortly after the contract took effect, CNR introduced a new tariff which provided for a higher diesel fuel strike price for the purposes of setting a fuel surcharge. CNR refused to apply the higher strike price to its contract with PRC. Pursuant to section 120.1 of the *Canada Transportation Act* (the Act), PRC complained to the Canadian Transportation Agency (the Agency) and asked for an order directing CNR to apply the new tariff strike price. The Agency dismissed PRC's application on the ground that it did not have jurisdiction to amend a confidential contract. PRC did not appeal the Agency's decision.[13] However, six months later, the Canadian Industrial Transportation Association (CITA)—a trade association of which PRC was a member—

12. 2014 SCC 40.

13. It could have appealed to the Federal Court of Appeal pursuant to section 41(1):

> 41(1) An appeal lies from the Agency to the Federal Court of Appeal on a question or law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

filed a petition with the Governor in Council pursuant to section 40 of the Act[14] requesting a variance of the Agency's decision. The Governor in Council rescinded the Agency's decision.

CNR successfully applied for judicial review of the Governor in Council's decision.[15] The issue was whether the Governor in Council had the authority under section 40 to vary or rescind the CTA's decision on a point of law. The question arose as to what standard of review, if any, applied in reviewing the Governor in Council's decision.

Justice Hughes of the Federal Court characterized the issue before the Governor in Council as one of pure jurisdiction and applied a correctness standard. He held that, while the Governor in Council had the authority to determine the question, its decision to rescind the CTA's decision was incorrect.

The Federal Court of Appeal set aside Hughes J.'s decision and dismissed CNR's application for judicial review.[16] The Court of Appeal characterized the question before the Governor in Council as a question of fact that carried a policy component and applied the

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14. Section 40 provides:

> 40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all the parties.

15. 2011 FC 1201.

16. 2012 FCA 278.

reasonableness standard of review. It concluded that the Governor in Council's decision was reasonable.

CNR appealed to the Supreme Court of Canada.

The Supreme Court of Canada unanimously dismissed the appeal.

Dealing first with the characterization of the issue, Justice Rothstein held that the question of whether a confidential contract precludes a party from filing a complaint under section 120.1 of the Act where the charges apply to more than one shipper was a matter of statutory interpretation and was, therefore, a question of law. In this case, policy considerations were at the root of the Governor in Council's decision on how to interpret the legislation, but that did not transform the question from one of law to one of policy or fact. Justice Rothstein rejected CNR's argument that the Governor in Council did not have jurisdiction to answer questions of law or jurisdiction.[17]

Justice Rothstein then went on to discuss what standard of review, if any, applied to the Governor in Council's decision:

> 50 Determining the appropriate standard of review in this case involves consideration of two issues. First, does the standard of review analysis set out by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, apply to decisions of the Governor in Council? Second, what is the applicable standard of review in this case?
>
> The Dunsmuir Framework Applies to Decisions of the Governor in Council
>
> 51 This case is not about whether a regulation made by the Governor in Council was *intra vires* its authority. Unlike cases involving challenges to the *vires* of regulations, such as *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R.

17. At paras. 34 to 49.

> 810, the Governor in Council does not act in a legislative capacity when it exercises its authority under s. 40 of the *CTA* to deal with a decision or order of the Agency. The issue is the review framework that should apply to such a determination by the Governor in Council. I am of the view that the *Dunsmuir* framework is the appropriate mechanism for the court's judicial review of a s. 40 adjudicative decision of the Governor in Council.
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> 52 When the Governor in Council exercises its statutory authority under s. 40 of the *CTA*, it engages in its own substantive adjudication of the issue brought before it. The decision of the Governor in Council is then subject to judicial review by the Federal Court (*Public Mobile*, at para. 26). In this way, the court exercises a supervisory function over the Governor in Council, a public authority exercising the statutory powers delegated to it under s. 40 of the *CTA*.
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> 53 *Dunsmuir* is not limited to judicial review of tribunal decisions (paras. 27-28; *Public Mobile*, at para. 30). Rather, in *Dunsmuir*, the standard of review analysis was discussed in the context of "various administrative bodies", "all exercises of public authority", "those who exercise statutory powers", and "administrative decision makers" (paras. 27, 28 and 49).
>
> 54 This Court has applied the *Dunsmuir* framework to a variety of administrative bodies (see, for example, *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paras. 13 and 35, per McLachlin C.J.). The precedents instruct that the *Dunsmuir* framework applies to administrative decision-makers generally and not just to administrative tribunals. The *Dunsmuir* framework thus is applicable to adjudicative decisions of the Governor in Council.
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> [Underlining added.]

Justice Rothstein then went on to determine the applicable standard of review. He concluded that the statutory provision in question amounted to economic regulation, an area with which the Governor in Council has particular familiarity, which Parliament had intended to recognize.[18] He concluded that reasonableness was the applicable standard of review, and the Governor in Council's decision to rescind the Agency's decision was reasonable.

18. At para. 56.

Comments

- Note that the Court makes it clear that *Dunsmuir* does not just apply to adjudicative *tribunals* but to any statutory delegate which exercises *adjudicative* functions.

- However, it does not necessarily follow that the *Dunsmuir* standards of review apply to other, *non-adjudicative* types of functions exercised by statutory delegates.

- Given that the decision in question was exercised by the Governor in Council, and the wording of section 40, it is not surprising that the court applied a deferential standard of review.

- What would have been the standard of review if PRC had appealed to the Federal Court of Appeal under section 41(1) about the Agency's decision that it did not have jurisdiction to hear its complaint? Correctness?[19]

- Is it odd to think that the Governor in Council can make an order that effectively tells the Agency it has jurisdiction to do something the Agency might not have jurisdiction to do?

19. Of course, the Governor in Council could still have entertained the trade association's petition—sections 40 and 41 are not mutually exclusive.

B. Implied reasons and reasonableness—*Agraira*

One of the issues in *Agraira v. Canada (Public Safety and Emergency Preparedness)*[20] was the meaning or definition of "national interest" used by the Minister of Public Safety in deciding not to permit a non-admissible person to remain in Canada, and whether the courts should use the correctness or reasonableness standard in reviewing the Minister's decision.

The Minister had concluded that it was not in the national interest to admit Agraira because he was a former member of a known terrorist or terrorist-connected organization.

Applying the reasonableness standard of review, the Federal Court granted the application for judicial review primarily on the grounds that there was only minimal evidence that the organization the applicant was linked to was involved in terrorism, and the Minister had failed to consider some questions set out in the department's policy guidelines.[21]

On appeal, the Federal Court of Appeal allowed the appeal.[22] It held that the meaning of "national interest" was a question of law about which the Minister did not have greater relative expertise, and therefore the correctness standard of review applied. The Federal Court of Appeal held that the Minister had correctly interpreted "national interest". It also ruled that the Minister had reasonably exercised his discretion about whether or not it was in the national interest to admit Agraira.

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20. 2013 SCC 36. See also *Canada (Attorney General) v. Canadian Human Rights Tribunal et al.*, 2013 FCA 75.

21. 2009 FC 1302.

22. 2011 FCA 103.

The Supreme Court dismissed Agraira's appeal and upheld the Minister's decision. Speaking for a unanimous court, Justice LeBel held that reasonableness was the appropriate standard of review for determining the meaning of "national interest". In reaching this conclusion, Justice LeBel considered prior jurisprudence,[23] the proper construction of the statute, and the fact that the decision of the Minister was discretionary and involved the interpretation of his own statute or statutes closely connected to its function with which he has particular familiarity. While the Minister did not expressly define the term "national interest", the Court was satisfied that it could imply (infer?) a particular interpretation of the statutory provision from the Minister's decision and that the inferred interpretation was reasonable:

> 56 The Minister, in making his decision with respect to the appellant, did not expressly define the term "national interest". The first attempt at expressly defining it was by Mosley J. in the Federal Court, and he also certified a question concerning this definition for the Federal Court of Appeal's consideration. We are therefore left in the position, on this issue, of having no *express* decision of an administrative decision maker to review.
>
> 57 This Court has already encountered and addressed this situation, albeit in a different context, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. In that case, Rothstein J. held that a decision maker's decision on the merits may imply a particular interpretation of the statutory provision at issue even if the decision maker has not expressed an opinion on that provision's meaning.
>
> 58 The reasoning from *Alberta Teachers' Association* can be applied to the case at bar. It is evident from the Minister's holding that "[i]t is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations" that the Minister made a determination of the meaning of "national interest". An interpretative decision as to that term is necessarily implied within his ultimate decision on ministerial relief, although this Court is not in a position to determine with finality the actual reasoning of the Minister. In these circumstances, we may "consider the reasons that could be offered for the [Minister's] decision when conducting a reasonableness review" of that decision (*Alberta Teachers' Association*, at para. 54). Accordingly, I now turn to consider, what appears to have been the ministerial interpretation of "national interest", based on the Minister's "express reasons" and the Guidelines, which inform the scope and

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23. This is consistent with the admonition in *Dunsmuir* that one is to look first to prior precedents about the standard of review applicable to the particular function—regardless of how those precedents would square with the rest of the *Dunsmuir* analysis.

context of those reasons. I will then assess whether this implied interpretation, and the Minister's decision as a whole, were reasonable.

. . .

62 Taking all the above into account, had the Minister expressly provided a definition of the term "national interest" in support of his decision on the merits, it would have been one which related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations (see Appendix 1 (the relevant portions of the Guidelines)).

63 As a result of my comments above on the standard of review, I am of the view that the Minister is entitled to deference as regards this implied interpretation of the term "national interest". As Rothstein J. stated, "[w]here the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear" (*Alberta Teachers' Association*, at para. 50).

64 In my view, the Minister's interpretation of the term "national interest", namely that it is focused on matters related to national security and public safety, but also encompasses the other important considerations outlined in the Guidelines and any analogous considerations, is reasonable. It is reasonable because, to quote the words of Fish J. from *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, it "accords ... with the plain words of the provision, its legislative history, its evident purpose, and its statutory context" (para. 46).

. . .

86 Thus, the Minister's implied interpretation of the term "national interest"—that it relates predominantly to national security and public safety, but does not exclude the other important considerations outlined in the Guidelines or any analogous considerations—is consistent with all these contextual indications of the meaning of this term.

87 In summary, an analysis based on the principles of statutory interpretation reveals that a broad range of factors may be relevant to the determination of what is in the "national interest", for the purposes of s. 34(2). Even excluding H&C considerations, which are more appropriately considered in the context of a s. 25 application, although the factors the Minister may validly consider are certainly not limitless, there are many of them. Perhaps the best illustration of the wide variety of factors which may validly be considered under s. 34(2) can be seen in the ones set out in the Guidelines (with the exception of the H&C considerations included in the Guidelines). Ultimately, which factors are relevant to the analysis in any given case will depend on the particulars of the application before the Minister (*Soe*, at para. 27; *Tameh*, at para. 43).

88 This interpretation is compatible with the interpretation of the term "national interest" the Minister might have given in support of his decision on the appellant's application for relief. It is consistent with that decision. The Minister's implied interpretation of the term related predominantly to national security and public safety, but did not exclude the other

> important considerations outlined in the Guidelines or any analogous considerations. In light of my discussion of the principles of statutory interpretation, this interpretation was eminently reasonable.
>
> [Emphasis added.]

Lebel J. then went on to discuss the meaning of reasonableness in determining whether the Minister exercised his discretion reasonably. Citing *Dunsmuir*,[24] *Nurses' Union*[25] and *Driver Iron*,[26] LeBel J. outlined the following principles about the meaning of reasonableness:

- Certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.

- Tribunals have a margin of appreciation within the range of acceptable and rational solutions.

- Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

- Reasonableness is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

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24. 2008 SCC 9.

25. 2011 SCC 62.

26. 2012 SCC 65.

- Inadequacy of a tribunal's reasons are not a stand-alone basis for quashing a decision; the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.

- In assessing whether a decision is reasonable, courts must show respect for the decision-making process of adjudicative bodies and not substitute their own reasons.

- Reviewing courts must consider the tribunal's decision as a whole; tribunals do not have to consider and comment upon every issue raised by the parties in their reasons, the issue is whether the decision, viewed as a whole in the context of the record, is reasonable.

Comments

- What happens when previous precedents about the standard of review applicable to a particular function are different from the standard of review that would result from the rest of the *Dunsmuir* analysis?

- The suggestion that a court can imply reasons or considerations taken into account by the statutory delegate is very troubling. Does such an approach effectively permit the court to re-do or re-make the statutory delegate's decision to save it from judicial review?

- Is there a difference between something which is "implicit" in the decision (*ATA News*) and something which is "implied" into the decision? Or something which is "inferred" from the decision?

- Is this an example of a subjective discretionary power—one which is not closely structured by specific defined criteria to be taken into account in exercising the discretion?

- The greater specificity of required considerations opens up the possibility of greater scrutiny by a reviewing court in determining whether the exercise of the discretion was reasonable, and *vice versa*.

- There is nothing particularly unusual in the courts showing considerable deference to a Minister (or the Cabinet) exercising broad discretionary powers.

C. "Reasonableness" is determined by taking into account all of the context

Farwaha

In *Farwaha v. Canada (Minister of Transport, Infrastructure and Communities)*,[27] the Federal Court of Appeal emphasized the need of a reviewing court to consider the delegate's decision in its totality when assessing its reasonableness. In addition, Stratas J.A. discussed

27. 2014 FCA 56.

the contextual nature of reasonableness and underlying notions of parliamentary supremacy and the rule of law:[28]

> 90 Part of the context that affects the breadth of the range of reasonableness are two principles lying at the heart of the Court's jurisdiction to review administrative decisions, namely parliamentary supremacy and the rule of law: see *Dunsmuir*, *supra* at paragraphs 27-31 and on the specific content of the rule of law see *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 and *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873.
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> 91 Some of the cases in paragraph 88, above, give us guidance on the breadth of the ranges in a particular case. In some cases, Parliament has given a decision-maker a broad discretion or a policy mandate - all things being equal, this broadens the range of options the decision-maker legitimately has. In other cases, Parliament may have constrained the decision-maker's discretion by specifying a recipe of factors to be considered - all things being equal, this narrows the range of options the decision-maker legitimately has. In still other cases, the nature of the matter and the importance of the matter for affected individuals may more centrally implicate the courts' duty to vindicate the rule of law, narrowing the range of options available to the decision-maker.

Lastly, Stratas J.A. also noted the importance of the purpose of enabling legislation when determining whether a decision is reasonable:

> 100 One way of assessing whether a decision is reasonable - a "badge of reasonableness," so to speak - is to assess whether it is consistent with the purposes of the provision authorizing the decision and the purposes of the overall legislation: see *Montreal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraphs 42 and 47. I canvassed the purposes of the *Security Regulations* at paragraphs 12-19, above.

D. "Correctness" masquerading as "reasonableness"

Sometimes, one wonders whether the courts determine the correct answer and then describe it as "reasonable".

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28. Trudel J.A. concurring; Mainville J.A. writing concurring reasons.

1. *Dionne*

In *Dionne v. Commission scolaire des Patriotes*,[29] the Commission des lésions professionnelles (CLP) held that Dionne, a pregnant supply teacher, was not entitled to statutory income replacement benefits because she refused to be exposed to a contagious virus in a classroom setting. The CLP took the view that because Dionne was unable to go into a classroom due to health risks, she was not a "worker" within the meaning of the *Act respecting occupational health and safety* and therefore was outside the protections of preventative withdrawal and income indemnity. The Superior Court dismissed Dionne's application for judicial review and the Quebec Court of Appeal dismissed the appeal.

The Supreme Court of Canada allowed Dionne's appeal. The Court held that Dionne's refusal to perform unsafe work did not disqualify Dionne from being a worker; it was merely the exercise of legislated protection. Dionne's temporary withdrawal from the workplace could not be seen as an absence from work, but rather a substitute for the work that she would ordinarily be expected to perform but for the danger.

Writing for a unanimous court, Abella J. did not undertake any specific analysis about what the appropriate standard of review was. Instead, she examined the statutory scheme and the purposes of the legislation—to address workplace health and safety issues and provide health and safety protections to workers—and concluded that Dionne was entitled to preventative withdrawal benefits. The only hint of standards of review analysis in Abella J.'s judgment is where she stated that the CLP's decision was an "unreasonable interpretation of the

29. 2014 SCC 33.

performance requirement for the formation of a contract of employment under the Act"[30] and, later, that "[b]ecause the CLP's conclusion undermines the objectives of the Act, it is, in my respectful view, unreasonable."[31]

2. *Ontario (Community Safety and Correctional Services)*

In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[32] the Supreme Court of Canada not only held that the impugned decision was reasonable, but went on to indicate that it was correct.

The case involved a request for information from the Ministry of Community Safety and Correctional Services under Ontario's *Freedom of Information and Protection of Privacy Act* (*FIPPA*).[33] The requester sought information from the Ministry regarding the number of registered sex offenders residing within certain areas of Ontario which were identified by the first three postal code digits. The information was available through a Sex Offender Registry which had been established and maintained under *Christopher's Law (Sex Offender Registry), 2000*.[34] Under that law, the information in the Registry is kept confidential and is available only to the Ministry and the police. Accordingly, the Ministry refused to disclose the information on the grounds of law enforcement and personal privacy exemptions.

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30. At para. 36.

31. At para. 45.

32. 2014 SCC 31.

33. R.S.O. 1990, c. F. 31.

34. S.O. 2000, c. 1 (*Christopher's Law*).

The Information and Privacy Commissioner overruled the Ministry's decision. The Commissioner decided that *FIPPA* applied to the request for information, and the information was not "personal information" exempted from disclosure because it was not reasonable to expect that an individual might be identified if the information was disclosed.[35] The Commissioner ordered the Ministry to disclose the information to the requester. The Commissioner's decision was upheld on judicial review[36] and on appeal.[37] The Ministry appealed to the Supreme Court.

The Supreme Court of Canada dismissed the appeal. In a unanimous judgment delivered by Justices Cromwell and Wagner, the Court described the main issue before it as the interaction between *FIPPA* and the confidential Sex Offender Registry. The question was whether the confidentiality provision in *Christopher's Law*—which established the Registry—meant that it prevailed over the provisions in *FIPPA* so that the information could be withheld.

On the issue of standard of review, the Court noted that previous jurisprudence had established that a reasonableness standard of review generally applies to decisions by the Commissioner interpreting and applying the disclosure exemptions under *FIPPA* and to a tribunal interpreting its home statute.[38] It rejected the Ministry's argument that a correctness standard was applicable because the Commissioner was also interpreting *Christopher's Law*, holding that the Commissioner was merely required to interpret *Christopher's Law* in the

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35. That is, the evidence did not establish a reasonable expectation of harm or a reasonable basis for believing that any danger would result from disclosure of the number of offenders within the designated area.

36. 2011 ONSC 3525.

37. 2012 ONCA 393.

38. At para. 26.

course of applying *FIPPA*. This was intimately connected to the Commissioner's core functions under *FIPPA* and reasonableness remained the proper standard.[39] And the Court found the Commissioner's decision to be reasonable:

> 31 The Commissioner noted, however, that in a *previous* appeal, the Ministry had argued that s. 10 of *Christopher's Law* was a confidentiality provision which prevailed over *FIPPA*. That argument was rejected in the previous appeal on the ground that s. 10, while a confidentiality provision, did not "specifically provide" that it prevailed over *FIPPA*. That same analysis was accepted by the Commissioner in this case. We find this to be a reasonable conclusion.

That might (should?) have been the end of the decision. However, the Court then went on to make it clear that it agreed that the Commission's decision was correct.

> 32 The legislature turned its mind to the interaction between *FIPPA* and *Christopher's Law*: A.F., at para. 73. This is evidenced by explicit reference to *FIPPA* in some of *Christopher's Law*'s provisions. Section 10(4), for instance, deems access to, use and disclosure of personal information by the police under s. 10(2) and (3) to be in compliance with s. 42(1)(e) of *FIPPA* (which in turn provides that an institution shall not disclose personal information in its custody, except for the purpose of complying with an Act of the legislature). Such specific references to *FIPPA* indicate that the legislature considered the manner in which both statutes would operate together and the possibility of conflict. Section 67 of *FIPPA* is the mechanism the legislature chose to resolve any conflict.
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> 33 However, no confidentiality provision in *Christopher's Law* specifically states that *FIPPA* does not prevail over it, as s. 67(1) of *FIPPA* requires. The text of the confidentiality provision of *Christopher's Law*, s. 10(1), is the following:
>
> > 10. (1) Subject to subsections (2) and (3), no person shall disclose to another person information obtained from the sex offender registry in the course of his or her duties under this Act or received in the course of his or her duties under this Act except as provided by this Act.
>
> Had the legislature intended the confidentiality provision in *Christopher's Law* to prevail over *FIPPA*, it could easily have included specific language to that effect. Section 10(1)

39. Question: or is this an example of drawing the division between two statutory regimes—such as occurred in the *Imperial Oil* case from the Alberta Court of Appeal, referred to below?

> contains no such language. The fact that s. 11(2) of *Christopher's Law* makes it an offence to contravene s. 10 does not impute the necessary specificity required by s. 67(1) of *FIPPA*.
>
> 34 When the legislature in other statutes intended that *FIPPA* would not prevail, it found specific language to make that intent clear. For instance, s. 29(2) of the *Members' Integrity Act, 1994*, S.O. 1994, c. 38, states that "[s]ubsection (1) prevails over the *Freedom of Information and Protection of Privacy Act*": see also the *Mining Act*, R.S.O. 1990, c. M.14, s. 145(11); *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B, s. 56(9); *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A, s. 75(9). Such language leaves no room for doubt, and is notably absent from *Christopher's Law*.

E. The interpretation of a tribunal's home statute—*McLean*

The reasonableness standard will generally apply when administrative delegates are interpreting their home statutes[40]—unless matters of "true jurisdiction" or "questions of central importance to the legal system as a whole" are involved, in which case a correctness standard will apply.

1. McLean—*reasonableness standard applicable to question of law about when a limitation period starts*

In *McLean v. British Columbia (Securities Commission)*,[41] the Securities Commission decided that it had authority to make a public interest order against McLean despite the fact that more than six years had past since the alleged misconduct had taken place. In so

40. See for example *Canada (Attorney General) v. Canadian Human Rights Tribunal et al.* ("*Mowat*"), 2011 SCC 53, [2011] 3 S.C.R. 471; and *ATA News*, 2011 SCC 61.

41. 2013 SCC 67. See also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36; *Iao v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 1253; *Qin v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 263 and *British Columbia v. Canadian National Railway*, 2014 BCCA 171.

deciding, the Commission interpreted the limitation period provisions in the *Securities Act*[42] so that the six years started running on the date of a settlement agreement, not the date of the alleged acts.

The British Columbia Court of Appeal upheld the Commission's decision.

On appeal to the Supreme Court of Canada, Justice Modaver, writing for the majority of the Court, held that the applicable standard of review was reasonableness.[43] The issue did not fall within one of the narrow exceptions that attracts the correctness standard of review. In particular, Moldaver J. rejected the argument that the interpretation of the limitation period provisions amounted to a general question of law that was both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise:

> 27 The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).
>
> 28 Here, the appellant's arguments in support of her contention that this case falls into the general question category fail for three reasons. First, although I agree that limitation periods, as a conceptual matter, are *generally* of central importance to the fair administration of justice, it does not follow that the Commission's interpretation of *this* limitation period must be reviewed for its correctness. The meaning of "the events" in s. 159 is a nuts-and-bolts question of statutory interpretation confined to a particular context. Indeed, the arguably complex legal doctrines such as discoverability that the appellant says demand correctness review (see A.R.F., at para. 9) have been specifically *excluded* from any application to s. 159. The appellant recognizes this fact elsewhere in her submissions (A.F., at para. 25, citing *British Columbia Securities Commission v. Bapty*, 2006 BCSC 638 (CanLII), at para. 28). Accordingly, there is no question of law of central importance to the

42. R.S.B.C 1996, c. 418, ss. 159, 161.

43. Although a B.C. case, the standard of review was not determined by the *Administrative Tribunals Act* because it only deals with applications for judicial review and this was an appeal directly to the Court of Appeal.

legal system as a whole, let alone one that falls outside the Commission's specialized area of expertise.

29 Second, while it is true that reasonableness review in this context necessarily entails the possibility that other provincial and territorial securities commissions may arrive at different interpretations of their own statutory limitation periods, I cannot agree that such a result provides a basis for correctness review – and thus judicially mandated "consisten[cy] ... across the country" (A.R.F., at para. 13). No one disputes that each of the provincial and territorial legislatures can enact entirely different limitation periods. Indeed, one of them has; see Manitoba's *Securities Act*, C.C.S.M. c. S50, s. 137 (providing an eight-year period, instead of the six-year norm). By the same token, it may be the case that provincial and territorial securities regulators come to differing (but nonetheless reasonable) interpretations of those limitation periods (though that has yet to occur). If there is a problem with such a hypothetical outcome, it is a function of our Constitution's federalist structure – not the administrative law standards of review.

30 Third, and most significantly, the problem with the appellant's argument is her narrow view of the Commission's expertise. In particular, the appellant argues that limitation periods "are not in themselves part of substantive securities regulation, the area of the [Commission's] specialised expertise" (A.R.F., at para. 9). The argument presupposes a neat division between what one might call a "lawyer's question" and a "bureaucrat's question". The logic seems to be that because the meaning of "the events" in s. 159 cannot possibly require any great technical expertise – there is, after all, no specialized "bureaucratese" to interpret – why should the matter be left to the Commission?

31 While such a view may have carried some weight in the past, that is no longer the case. The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work".

32 In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. Indeed, that is the case here, as I will explain in a moment. The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*

33 The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".

[Footnotes omitted.]

The Court held that there were two equally reasonable interpretations of the statutory provisions. Both interpretations found support in the text, context and purpose of the statute. Because the Commission had adopted a reasonable interpretation, the Court would not overturn the Commission's decision, even though other reasonable interpretations existed.

(See the discussion below about Justice Moldaver's observation that there are not always multiple reasonable interpretations of a statutory provision—with the consequence that reasonableness would not be the applicable standard of review in such a case.)

2. McCormick— *correctness under the B.C.* Administrative Tribunals Act

In contrast to *McLean*, the Supreme Court of Canada applied the correctness standard in a case involving the statutory interpretation of the tribunal's home statute in *McCormick v. Fasken Martineau DuMoulin LLP*.[44]

However, the *McCormick* case involved section 59(1) of British Columbia's *Administrative Tribunals Act*[45] which provides that in judicial review proceedings where the enabling statute contains no privative clause, the standard of review to be applied to a decision of a tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

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44. 2014 SCC 39.

45. S.B.C. 2004, c. 45. Of course, this section does not apply to every application for judicial review in British Columbia, but only to those tribunals whose enabling Acts have adopted the various procedures set out in the *Administrative Tribunals Act* (ATA).

McCormick was an equity partner in the respondent law firm. He brought a complaint to the British Columbia Human Rights Tribunal challenging his firm's policy of requiring equity partners to retire as equity partners—and divest their ownership shares—at the age of 65. McCormick argued that the provision constituted age discrimination contrary to British Columbia's *Human Rights Code*.[46] The law firm argued that the Tribunal did not have jurisdiction to hear the complaint because McCormick's position of equity partner was not the type of workplace relationship covered by the Code. The Tribunal rejected the firm's argument and held that there was an employment relationship.

The law firm unsuccessfully applied for judicial review of the Tribunal's decision.[47]

The British Columbia Court of Appeal allowed the appeal and held that there was not an employment relationship for the purposes of the Code and, therefore, the Tribunal did not have jurisdiction to hear the complaint.[48]

The Supreme Court of Canada dismissed McCormick's appeal.

The parties conceded that the appropriate standard of review was correctness on the basis of section 59(1) of the ATA. The issue of whether an employment relationship existed did not deal with a finding of fact or the exercise of the Tribunal's discretion or procedural fairness. Abella J. concluded that the Tribunal's decision was incorrect—McCormick was not an employee of the partnership but, rather, was a part of the group that controlled the partnership. There was no employment relationship.

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46. R.S.B.C 1996, c. 210.

47. 2011 BCSC 713.

48. 2012 BCCA 313.

Comments

- Would the standard of review have been reasonableness if *McCormick* had arisen in another province and *Dunsmuir* applied to determine the standard of review?

- Did the interpretation of "employment" and "person" involve a question of "true jurisdiction", or raise a "question of central importance to the legal system as a whole"?

- If the reasonableness standard of review applied, would *McCormick* have been decided differently (*i.e.*, was the Tribunal's decision that an employment relationship existed reasonable)?

3. Imperial Oil— *correctness for a question of law of general importance to the legal system as a whole*

For an example of the application of the correctness standard of review where there is a question of law of general importance to the legal system as a whole, see *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*.[49] That case involved "settlement privilege" as one of the types of "legal privilege" referred to in the statute. The Court of Appeal of Alberta held that "legal privilege" refers to the common law concept of privilege; correctness is the appropriate standard of review; and there is no room for a statutory delegate to ascribe a different interpretation to privilege from its meaning at

49. 2014 ABCA 231.

common law:[50] "The law of privilege must be the same whenever it is applied, and the chambers judge was correct in concluding that the standard of review on this issue is correctness."

4. Qin— *the interface between the principles of statutory interpretation and the standard of review*

There is an emerging issue involving the application of the principles of statutory interpretation to determine the correct interpretation, thereby short-circuiting the possibility that the reasonableness standard might permit another interpretation to pass judicial scrutiny.

Although *obiter*, Justice Moldaver averted to this possibility in *McLean v. British Columbia (Securities Commissioner*):[51]

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable—no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration v. Khosa*,

50. Paragraph 34.

51. 2013 SCC 67. In *Mowat*, Justice Cromwell decided that "there is no other reasonable interpretation of the relevant provisions" (applying the reasonableness standard of review). Practically, it may not matter which standard of review is applied, if the application of the principles of statutory interpretation yield only one interpretation, it must either be incorrect or unreasonable for the statutory decision-maker to adopt any other interpretation. See also *New Brunswick Liquor Corp. v. Small*, 2012 NBCA 53 at paragraph 31 where Justice Robertson stated that the deference only comes into play if the court is satisfied that the statute is ambiguous. The Court of Appeal of Alberta referred to paragraph 38 from *McLean* in *1694192 Alberta Ltd. v. Lac La Biche (Subdivision and Development Appeal Board)*, 2014ABCA 319 at para. 24. For an early example of this type of analysis, see *IMS Health Canada Limited v. Alberta (Information and Privacy Commissioner)*, 2008 ABQB 213 (Ross J.).

> 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation—and the administrative decison maker must adopt it.
>
> [39] But, as I say, this is not one of those clear cases....

In *Qin v. Canada (Minister of Citizenship and Immigration)*,[52] Evans J.A. addressed the standard of review applicable to a visa officer's interpretation of the Regulations under the *Immigration and Refugee Protection Act*.[53]

While not having to decide the issue directly,[54] Evans J.A. took the opportunity to comment on the standard of review where there is only one possible interpretation of a statutory provision:

> 31 For the reasons that I develop below, section 87.1 of the Regulations clearly authorizes a visa officer to take comparator wage information into account when assessing whether a CEC applicant's employment duties match those described in the relevant NOC code so as to satisfy the Canadian work experience requirement. Since the interpretation of section 87.1 implicit in the visa officer's consideration of the wage information in his assessment of Ms Qin's visa application is correct it cannot be unreasonable.
>
> 32 Indeed, unreasonableness as a possible standard of review of an administrative interpretation of legislation only arises when the statutory provision in question is ambiguous and "there is no one interpretation which can be said to be 'right'": *CUPE, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 237.
>
> 33 Hence, if a reviewing court concludes that one interpretation is "right", after conducting a textual, contextual, and purposive interpretative analysis of the legislation, and giving careful and respectful consideration to the tribunal's reasons, correctness is the standard of review. In these circumstances, if a tribunal has interpreted the statute in some other way, the court may intervene to ensure administrative compliance with the legislature's clearly expressed intention. The rule of law requires nothing less.

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52. 2013 FCA 263.

53. S.C. 2001, c. 27.

54. Because the decision of the visa officer was overturned on the basis of procedural unfairness.

34 Although not necessary to determine the standard of review in this case because section 87.1 is not ambiguous, I would also note that deference is only due to administrative decision-makers on questions within their statutory power to decide. Adjudicative tribunals, such as labour relations boards, human rights tribunals, and professional disciplinary bodies, normally have express or implied statutory authority to decide any questions of law or fact necessary to dispose of a matter properly before them.

35 However, not all those entrusted with the exercise of statutory power necessarily have the delegated power to decide questions of law, including the interpretation of their enabling statute. Of course, from time to time all statutory delegates may have to form an opinion on whether the law permits them to take some particular administrative action, including enacting subordinate legislation. But this is not the same as a statutory power to decide definitively the meaning of a provision in an enabling statute, subject only to judicial review on the presumptive standard of reasonableness.

36 Whether the delegated statutory powers of any given public official or body include the power to decide questions of law, including the interpretation of their enabling legislation, may be determined by reference to the factors identified in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504 at para. 48: and see *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2007] 3 F.C.R. 169 at paras. 47-56 (*Covarrubias*); *Shpati v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 286, [2012] 2 F.C.R. 133 at para. 27 (*Shpati*); *Georgia Strait Alliance v. Canada (Fisheries and Oceans)*, 2012 FCA 40 at para. 99.

37 These factors include the terms of the delegate's statutory mandate, the delegate's relationship with other decision-makers in the statutory scheme, practicality, capacity, and procedure. On this basis, it must be inferred from the reasoning in *Agraira* that the Court was of the view that the Minister had the delegated power to interpret the term "national interest" in IRPA, subsection 34(2).

[Emphasis added.]

Comments

- How many statutory provisions only have one possible (and therefore correct) interpretation?

- What effect will such an application of the principles of statutory interpretation have on the concept of giving deference to delegates interpreting their home statutes?

- Does it matter whether one characterizes an interpretation which is different from the one resulting from the application of the principles of statutory interpretation as being "incorrect" or "unreasonable"? In both cases, the court will set aside the decision.

F. Standards of review and procedural fairness—"correctness" vs. "fair"

A series of recent cases has again raised the issue of whether a standards of review analysis is required when a delegate's decision is being challenged on the basis of procedural unfairness. Courts have been inconsistent in their treatment on this issue—some take the view that allegations of procedural unfairness are to be reviewed on a standard of correctness;[55] others take the view that no *Dunsmuir* standard of review analysis is required at all and that the proper question is whether the procedure leading to the decision was *fair*—if not, the decision must be quashed.[56]

55. The genesis of saying that the correctness standard of review applies to questions of procedural fairness seems to be a realization that reasonableness cannot be the applicable standard of review, with the assumption that therefore correctness must be the applicable standard of review. This, of course, assumes that the *Dunsmuir* dichotomy analysis about standards of review applies to questions of procedural fairness.

56. See, for example, *Pacific Booker Minerals Inc. v. British Columbia (Minister of the Environment)*, 2013 BCSC 2258, and *Moreau-Bérubé v. New Brunswick*, 2002 SCC 11.

1. *Mission Institution v. Khela*

Mission Institution v. Khela[57] is a perfect example of this inconsistency. A prisoner applied for relief in the form of *habeas corpus* after he was involuntary transferred to a maximum security facility. In the course of hearing an appeal from the *habeas corpus* proceedings, the Supreme Court of Canada was faced with two issues: (1) the jurisdiction of provincial superior courts to review the reasonableness of decisions to transfer prisoners in federal penitentiaries; and (2) the scope of disclosure that must be given to ensure that transfer decisions are procedurally fair. It was in the course of deciding the second issue that the Court made interesting—and inconsistent—comments regarding standards of review and procedural unfairness.

The alleged procedural unfairness in this case arose from the Warden's failure to disclose information to the inmate before the transfer decision was made. Speaking for a unanimous court, LeBel J. upheld the decision of the British Columbia Court of Appeal that the failure to disclose amounted to a breach of procedural fairness and that the decision to transfer was, therefore, unlawful. LeBel J. stated:

> 4 ... it is well established that a superior court hearing a *habeas corpus* application may also review a transfer decision for procedural fairness. The statute at issue in this case, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), outlines the disclosure that is required for a reviewing court to find such a decision fair, and therefore lawful.
>
> 5 In this case, the correctional authorities did not comply with the statutory disclosure requirements. The breach of the statutory requirements rendered the decision procedurally unfair, and therefore unlawful...

57. 2014 SCC 24.

When talking about procedural fairness, LeBel J. does not concern himself with whether the decision was reasonable or correct, but, rather, whether it was lawful. However, later in his reasons he states:

> 79 ... the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".

But, in subsequent paragraphs, LeBel J. reverts back to his previous wording:

> 80 It will not be necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. As I will explain below, the decision was unlawful because it was procedurally unfair.

And again:

> 89 ...If, however, certain information is withheld without invoking s. 27(3), deference will not be warranted, and the decision will be procedurally unfair and therefore unlawful.

Thus, in the course of one decision, LeBel J. discusses procedural fairness in the terms of both unlawfulness and correctness.

Comments

- When a statutory delegate makes a decision in a procedurally unfair way, shouldn't the decision be invalid?

- What gives the court authority (jurisdiction) to set aside a procedurally unfair decision? What is the source of that power? The court's inherent jurisdiction to see that statutory decision-makers stay within their jurisdiction? If that is not the basis, what is?

G. The heretical suggestion that reasonableness is the standard of review for procedural fairness

A series of recent cases complicate the issue even further by suggesting that the standard of review in cases alleging procedural unfairness may, in some cases, be reasonableness. In my view, this is heretical, and conflates the contextual nature of whether the procedure was "fair" with the contextual nature of whether the substance of the decision was "reasonable" under one of the *Dunsmuir* standards of review. Although both are contextual, they are not the same question.

1. *Syndicat des employés de Au dragon forgé inc.*

In *Syndicat des employés de Au dragon forgé inc. c. Commission des relations de travail*,[58] the Quebec Court of Appeal held that the deferential reasonableness standard is to be applied by a court assessing whether a tribunal violated procedural fairness if the issue involves a procedural ruling that involves a tribunal's interpretation of a provision in its home statute.

58. 2013 QCCA 793. See also *Desrochers c. Centrale des syndicats du Québec*, 2013 QCCQ 6259; and *Aubé c. Lebel*, 2013 QCCQ 6531.

2. *I.R. v. Canada (Minister of Citizenship and Immigration)*

On the other hand, the Federal Court rejected the Quebec Court of Appeal's approach in *I.R. v. Canada (Minister of Citizenship and Immigration)*.[59] Madam Justice Gleason commented as follows:

> 13 Until recently, it has been taken as trite law that claims of violation of procedural fairness by an administrative tribunal are subject to full curial review and that it is for the court to determine whether a tribunal has violated a party's procedural fairness rights; some cases qualify this type of review as a review on the correctness standard (see e.g. *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 50, [2008] S.C.J. No. 9 ("*Dunsmuir*"); and *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43, [2009] S.C.J. No. 12).
>
> 14 A recent decision of the Québec Court of Appeal, however, casts doubt on this point and holds that the deferential reasonableness standard is to be applied by a court in assessing whether a tribunal has violated a party's procedural fairness rights if what is at issue is a procedural ruling that involves the tribunal's interpretation of a provision in its constituent statute or other disposition that is closely related to its mandate and function.
>
> ...
>
> 18 In my view, the decision of the Québec Court of Appeal in *Syndicat des employés de Au dragon forgé* does not require that the reasonableness standard be applied to assess the claimed violation of procedural fairness made by the Member in this case. In the first place, the decision does not constitute binding authority for this Court, whereas the decisions from the Supreme Court of Canada, indicating that the correctness standard applies to claimed violations of procedural fairness, are binding on me. Secondly, and more fundamentally, there is an important distinction between the legislative provision considered in *Syndicat des employés de Au dragon forgé* and the provisions of the Rules that the Member applied in the present case.

59. 2013 FC 973.

3. *Sound*

In *Sound v. Fitness Industry Council of Canada*,[60] while the Federal Court of Appeal accepted that a standard of correctness generally applies to allegations of procedural unfairness, it went on to differentiate the standard of review to be applied to an allegation of procedural unfairness when an administrative decision-maker has been given wide discretion to determine its own procedure. The Court also noted the need to look at the particular context. Evans J.A., speaking for a unanimous court, stated:

> 34 The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43.
>
> 35 Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts. This is evident from the discussion in *Dunsmuir v. New Brunswick*, 2008 SCC 9; [2008] 1 S.C.R. 190 at paras. 77 *et seq*. (*Dunsmuir*) of whether David Dunsmuir was entitled to procedural fairness before his employment in the provincial public service was terminated.
>
> 36 However, the standard of review applicable to an allegation of procedural unfairness concerning the content of the duty in a particular context, and whether it has been breached, is more nuanced. The content of the duty of fairness is variable because it applies to a wide range of administrative action, actors, statutory regimes, and public programs, with differing impacts on individuals. Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.
>
> 37 In the absence of statutory provisions to the contrary, administrative decision-makers enjoy considerable discretion in determining their own procedure, including aspects that fall within the scope of procedural fairness: *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-569 (*Prassad*). These procedural aspects include: whether the "hearing" will be oral or in writing, a request for an adjournment is granted, or representation by a lawyer is permitted; and the extent to which cross-examination will be allowed or information in the possession of the decision-maker must be disclosed. Context and circumstances will dictate the breadth of the decision-maker's discretion on any of these procedural issues, and whether a breach of the duty of fairness occurred.

60. 2014 FCA 48.

> 38 *Dunsmuir* does not address the standard of review applicable to tribunals' procedural choices when they are challenged for breach of the duty of fairness. However, the Court held (at para. 53) that the exercise of administrative discretion is normally reviewable on a standard of reasonableness. This proposition would seem applicable to procedural and remedial discretion, as well as to discretion of a more substantive nature. It is therefore not for a reviewing court to second-guess an administrative agency's every procedural choice, whether embodied in its general rules of procedure or in an individual determination.
>
> 39 That said, administrative discretion ends where procedural unfairness begins: *Prassad* at 569. A reviewing court must determine for itself on the correctness standard whether that line has been crossed. There is a degree of tension implicit in the ideas that the fairness of an agency's procedure is for the courts to determine on a standard of correctness, and that decision-makers have discretion over their procedure.
>
> . . .
>
> 42 In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

4. *Maritime Broadcasting*

In *Maritime Broadcasting System Ltd. v. Canadian Media Guild*,[61] the majority of the Federal Court of Appeal reiterated the notion that a reasonableness standard may apply to issues of procedural fairness. In this case, Maritime Broadcasting applied for judicial review of a both an original and reconsideration decision of the Canada Industrial Relations Board.

61. 2014 FCA 59.

It argued that the original decision should have been quashed because of the procedural unfairness leading up to it.[62]

Speaking for the majority, Stratas J.A. adopted the reasoning of Evans J.A. in *Sound* and applied the reasonableness standard:

> 48 ... In my view, the standard of review is reasonableness as that is understood in the current jurisprudence.
>
> 49 The Board reconsidered the procedural fairness of its original decision without any deference. It considered the matter afresh. If we were to review the Board's reconsideration decision on the basis of correctness, we would be putting ourselves into the shoes of the Board and engaging in reconsideration of the procedural fairness of its original decision without any deference. In my view, this would be inapt.
>
> 50 Looking at the matter from first principles, there is a case for the application of the reasonableness standard. As is often said, the concept of procedural fairness is "eminently variable and its content is to be decided in the specific context of each case" (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 21). The Board is best placed to decide this. It, not the reviewing court, is the fact-finder. It knows the circumstances in particular proceedings before it. It has expertise in the dynamics of labour relations and has policy appreciation. Armed with these advantages, the Board is master of its own procedure, free to design, vary, apply and, in reconsideration proceedings, assess its procedures to ensure they are fair, efficient and effective: *Re Therrien*, 2001 SCC 35, [2001] 2 S.C.R. 3 at paragraph 88; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 685.
>
> 51 Looking at the matter from the standpoint of the decided cases, the case for the reasonableness standard is also strong. Perhaps the best support for this is in *Dunsmuir*, *supra*, the recent authority that changed the direction of Canadian administrative law. An administrative decision-maker's decision regarding the procedures to be followed in a particular case is often a discretionary one. What does *Dunsmuir* say about discretionary decisions? Paragraph 53 of *Dunsmuir* tells us that discretionary decisions are presumptively subject to reasonableness review. Further, paragraph 54 of *Dunsmuir* tells us that where an administrative decision-maker has "developed particular expertise in the application of a general common law...rule in relation to a specific statutory context" - in the case of the Board, the common law of procedural fairness in relation to the specific statutory context of the *Canada Labour Code* - it is entitled to deference. For good measure, in paragraph 54

62. Maritime Broadcasting argued that the Board violated the duty of fairness by allowing further submissions by the Canadian Media Guild and failing to give it an opportunity to reply to them and by failing to hold an oral hearing.

of *Dunsmuir*, the Supreme Court added that "[a]djudication in labour law" was a "good example of the relevance of this approach." In the case at bar, the Board's application of the law of procedural fairness to the particular facts before it is indistinguishable from any other decision where an administrative decision-maker applies law with which it is familiar, such as its home statute, to a set of facts before it: *Dunsmuir* at paragraph 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

52 *Dunsmuir* is also notable for what it does not say. At paragraphs 51-64 of *Dunsmuir*, the Supreme Court set out presumptive rules for the standard of review in all manner of cases. Yet, in *Dunsmuir*, a discussion of the standard of review for procedural matters is noticeably absent. Later in *Dunsmuir*, the Supreme Court found that procedural fairness duties in public law did not apply, but said nothing about the standard of review that would apply if they did. So we are left with paragraphs 53-54 of *Dunsmuir* and the suggestion that reasonableness should be the standard of review.

53 I note that six years have passed since *Dunsmuir* and the Supreme Court has not addressed the standard of review of an adjudicative tribunal's decision on procedural matters. I acknowledge that in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 43, the Supreme Court said in passing and in *obiter* (in a case not involving procedural fairness) that *Dunsmuir* affirmed correctness as the standard of review for procedural matters. But *Dunsmuir* did not actually do that: see the similar observation of Evans J.A. in *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at paragraph 38. Looking only at *Dunsmuir*, paragraphs 53 and 54 stand alone.

54 Many pre-*Dunsmuir* authorities are consistent with the position taken in paragraphs 53 and 54 of *Dunsmuir*. These pre-*Dunsmuir* authorities have never been the subject of judicial criticism and remain good law today.

55 By my count, six of these are from the Supreme Court. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 27, the Supreme Court held that in deciding whether an administrative decision-maker has been procedurally fair, a reviewing court must take into account and respect the particular choices made by the decision-maker: see also *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at pages 568-569. On other occasions, the Supreme Court has deferred to administrators' procedural choices: see, *e.g.*, *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 S.C.R. 713 (decided at almost the same time as *C.U.P.E.*); *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176 (labour tribunal decision about participatory rights in a bargaining unit determination). The Supreme Court has also stated that "[considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process": *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paragraph 231. Even the very case that marked the birth of the modern law of procedural fairness - *Nicholson v. Haldemand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311 - suggests the appropriateness of deference. There, the Supreme Court found that Nicholson was entitled to a hearing as a matter of procedural fairness but declined to go further. It left the manner of hearing - oral or written - to the choice of the Board of Commissioners. Reviewing procedural decisions

of administrative decision-makers on the basis of correctness sits uneasily with these authorities.

56 Other authorities also support reasonableness review. Both before and after *Dunsmuir*, on occasion this Court has reviewed the procedural decisions of administrative decision-makers on a deferential standard: see *Xwave Solutions Inc. v. Public Works & Government Services Canada*, 2003 FCA 301 at paragraph 34 *per* Evans J.A. ("the Court should only intervene to prevent manifest unfairness"); *Canadian Airport Workers Union v. Garda Security Screening Inc.*, 2013 FCA 106 at paragraph 5 (the Board's decision not to disclose a report to a party "was a matter squarely within its labour relations mandate, which, as an expert administrative body, is owed deference"). Similarly, from time to time, other appellate courts have reviewed the procedural decisions of administrative decision-makers on a deferential standard: *Syndicat des travailleuses et travailleurs de ADF-CSN c. Syndicat des employés de Au Dragon Forgé Inc.*, 2013 QCCA 793; *Ontario (Ministry of Community, Family and Children Services) v. Crown Employees Grievance Settlement Board* (2006), 81 O.R. (3d) 419 at paragraph 22 (C.A.). See also David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can. J. Admin. L. Prac. 59 at pages 86-87. Reviewing procedural decisions of administrative decision-makers on the basis of correctness also sits uneasily with these authorities.

57 Does reasonableness review undercut the ability of this Court in appropriate circumstances to enforce fundamental matters of procedural fairness? Definitely not. Reasonableness review does not take anything away from reviewing courts' responsibility to enforce the minimum standards required by the rule of law. In other words, it is not unduly deferential. Indeed, in some cases, the nature or importance of the procedural fairness issue, the severe effect of the alleged procedural defect upon the aggrieved party, the similarity of the procedures under review to court procedures, or any combination of these may severely constrain or eliminate the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker on the facts and the law (see paragraphs 34-35, above). Two pre-*Dunsmuir* Supreme Court cases, often cited as examples of correctness review, may be examples of this: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249.

58 Further, legislative standards and legal standards worked out in the jurisprudence can constrain the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker on the facts and the law: see *Almon Equipment Limited v. Canada (Attorney General)*, 2012 FCA 318 (where a legislative recipe tended to narrow the range of options available to a tribunal in making a discretionary decision); *Abraham*, *supra* (where existing tax jurisprudence similarly tended to narrow the range of options available to the Minister of National Revenue in making a discretionary decision); *Canadian Human Rights Commission*, *supra* at paragraphs 13-14 (jurisprudence downplaying the role of comparator groups in section 15 Charter jurisprudence rendered unreasonable a tribunal decision that insisted on the presence of a comparator group). Again, *C.U.P.E.* and *Moreau-Bérubé* may be examples of this. See also *McLean*, *supra*, at paragraph 37-41 where the clarity of legislative wording significantly narrowed the range of acceptability and defensibility. Given the well-defined legal standards set by the existing case law on

> procedural fairness, the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker often will be constrained. There will be cases, however, where the nature of the matter and the circumstances before the administrative decision-maker should prompt the reviewing court to give the decision-maker a wider margin of appreciation.
>
> . . .
>
> 63 In my view, the case at bar is one where the Board should be given some leeway under reasonableness review. The Board understood the requirements of procedural fairness, citing two of its own decisions that were based on relevant jurisprudence from the Supreme Court of Canada. The Board's task in this case was to apply those standards in a discretionary way to the factually complex matrix before it, a task informed by its appreciation of the dynamics of the case before it and its knowledge of how its procedures should and must work, all in discharge of its responsibility to administer labour relations matters fairly, justly and in an orderly and timely way. It did so under the umbrella of legislation empowering the Board to consider its own procedures based on its appreciation of the particular circumstances of cases and to vary or depart from those procedures when it considers it appropriate: *Canada Industrial Relations Board Regulations 2001*, *supra*, section 46.

It should be noted that, although concurring in the result, Webb J.A. wrote separate reasons in which he disagreed with Stratas J.A. on the issue of standard of review. Citing *Dunsmuir*, he took the position that the standard of review applicable to procedural matters is correctness.[63]

Comments

- Is there confusion between the contextual nature of deciding whether a procedure is *fair*, and the contextual determination of whether the substance of a decision is *reasonable*?

63. At para. 79.

H. Standards of review applicable by administrative appellate bodies

One of the issues in recent administrative law has been whether administrative appellate bodies are to apply standards of review analysis in determining the scope of their appellate jurisdiction.[64]

1. *BC SPCA*

In 2012, the British Columbia legislature passed reforms to the animal welfare regime creating an independent appeal process.[65] Under the new scheme, the first level of appeal of an animal apprehension is to the Society for the Prevention of Cruelty to Animals (SPCA). The animal's owner or custodian can appeal the SPCA's decision to the Farm Industry Review Board (the FIRB). In 2013, the FIRB held its first appeal hearing and its decision was challenged in an application for judicial review.

In *BC Society for the Prevention of Cruelty to Animals for British Columbia (Farm Industry Review Board)*,[66] the issue was whether the process set out in the new Act directed the FIRB to hold a "true appeal" which was limited to the record before the SPCA and give deference to the lower tribunal (the SPCA), or whether the FIRB was free to conduct a hearing *de novo*, look beyond the record, and come to its own decision about the merits.

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64. See Professor Paul Daly's comment at: http://administrativelawmatters.blogspot.ca/2013/12/internal-appellate-review-role-of-new.html#more.

65. *Prevention of Cruelty to Animals Amendment Act, 2012* SBC 2012, c. 15.

66. 2013 BCSC 2331. This case was recently followed in *Huruglica v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 799.

The FIRB's decision was:

> 82. The Society submits that appeals to BCFIRB from review decisions of the Society are required to be conducted as "true appeals", which can only be judged based on the evidence that was before the lower decision-maker unless traditional "new evidence" tests are met. The society refers among other cases two 1992 decision, *McKenzie v Mason*, 1992 CanLII 2291 (BCCA), which interpreted the word "appeal" to mean a "true appeal" in a case involving an appeal from a specialised decision-maker to a court of law. The Society further submits that BCFIRB must uphold the Society's decisions unless they are "unreasonable", applying the test in *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9. The Society argues that BCFIRB should give deference to the Society's decision just as the court stayed on judicial review prior to the reform legislation being enacted.
>
> 83. I do not think that appeals under Part 3.1 of the *PCAA* are required to be conducted as true appeals, and I do not think that the BCFIRB is required to defer to decisions of the Society.
>
> 84. This is not judicial review, and it is not even a right of appeal from a specialized body to court. It is a broad appeal from one specialized body to another - from the Society in the first instance to BCFIRB as a specialized but administrative tribunal in its own right, and which also has specialised animal welfare knowledge in its membership. In my opinion, the creation of a right of appeal to a specialized administrative tribunal means we cannot automatically or blindly apply principles that were developed to govern the relationship between courts or between courts and specialized tribunals. The important thing is not the word "appeal" by itself. It is what the legislature intended in the larger context.
>
> 85. When we look at the reform legislation as a whole, the clear intent was to give BCFIRB, as the specialized appeal body, full authority to operate in a way that is flexible and accessible to lay persons, and to use its expertise to ensure that decisions are made in the best interests of animals. Engaging in arguments about what is "the record" and how to apply the "*Palmer* principles" to every piece of evidence tendered in situations that are necessarily dynamic and unfolding, would make no sense in this context. Requiring BCFIRB to "defer" to findings and judgments that it believes have been overtaken by circumstances or wrong on the merits does little to enhance the interests of transparency and accountability.
>
> 86. Courts of law are focused on the law and legal principles. BCFIRB appeals are broader than that. There are no limits on the grounds of appeal. BCFIRB has been given broad evidentiary and remedial powers on appeal. While the legislature could have created an appeal or review "on the record", it has not done so here. Instead, the legislature has gone the other way in these reforms. It has given BCFIRB extensive evidence-gathering powers, some of them to be used proactively. It has made the Society "party" to appeals, and it requires the Society to provide BCFIRB "every bylaw and document in relation to the matter under-appeal" (s. 20.3(4)), which will in many cases be much broader than the record relied on by the reviewing officer. Included in BCFIRB's powers is s. 40 of the *Administrative*

Tribunals Act: "The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law." Collectively, these statutory provisions are not consistent with a legislative intent to require BCFIRB to merely undertake "mini" judicial review or a traditional judicial appeal.

87. In this case, the Society did not hold an oral hearing. It made a decision after giving reasons and disclosure after a written submissions process. While the Society is to be encouraged and commended for doing so, it is noted that that process is not mandated in the *PCAA*. Cases could well arise where the Society decides to use a more abbreviated process in its reviews. BCFIRB's appeal mandate cannot depend on the process the Society may choose to adopt and that may vary over time or depending on the case.

88. Related to this is the further point that BCFIRB can hear appeals even where the Society has made no decision within 28 days after the review application was made: *PCAA*, s. 20.3(1)(a). Obviously, in those appeals, there is no review decision, no reasons and usually no prior opportunity for the Appellant to have been heard. It does not make sense that the fundamental nature of BCFIRB's mandate would differ depending on the type of appeal that comes to us when the legislature has applied one set of statutory powers and procedures to <u>all</u> appeals.

89. The reform legislation did not simply change the place where "judicial review" could be held. It did more than that. Its intent was to increase oversight of Society decision-making. This was made clear by the Minister who introduced the *Prevention of Cruelty to Animals Amendment Act*, 2012 on March 6, 2012 in the Legislative Assembly:

> Today I am pleased to introduce the amendments to the act that <u>will increase transparency and accountability for decisions related to taking animals into custody</u>, with an independent appeals process that will be led by the B.C. Farm Industry Review Board. The board has a successful history as an administrative tribunal, independent of government, in its general supervision of B.C.-regulated marketing boards and commissions. [Emphasis added by FIRB.]

90. At second reading, on April 18, 2012, the Minister said this:

> There are four main parts to this bill. Firstly, to create a statutory appeal mechanism for decisions made by the BCSPCA related to animal seizure and destruction. This appeal function will resolve complaints in a timely manner and reduce costs to the public and to government that are associated with a judicial review, which is currently the only recourse for those wanting to appeal a BCSPCA custody decision....
>
> The body that will be hearing appeals under the *PCAA* is the British Columbia Farm Industry Review Board, known as BCFIRB. We considered the option of creating an entirely new body dedicated to hearing PCAA appeals; however, the cost of this option is prohibitive and unnecessary,

> considering the wealth of expert experience we have available to us in the BCFIRB.
>
> BCFIRB reports directly to the Minister of Agriculture in matters of administration but is independent of government in its decision-making. As a quasi-judicial administrative tribunal it must adhere to the principles of administrative law. The courts have recognized BCFIRB as an expert tribunal with decisions worthy of considerable judicial deference.
>
> 91. There would be little point in creating the appeal rights reflected in the reform legislation here only to prevent BCFIRB from proceeding flexibly and using its knowledge and expertise based on current circumstances in order to bring some finality to a dispute in the best interests of animals. While cases may arise where the parties to an appeal agree to proceed based on "the record" that was before the Society on the review, that is a case management decision. Appeals are not required to be conducted on that basis.
>
> 92. Having rejected the "true appeal" approach, I want to add that I do not think BCFIRB is required to go to the other extreme of "ignoring" the Society's actions or its reasons where it has made a decision. While the Society argued this issue as requiring one extreme or the other, administrative law is more flexible than that.
>
> 93. In my view, the Appellant in a case like this has the onus to show that, based on the Society's decision or based on new circumstances, the decision under appeal should be changed so as to justify a remedy. Where, as here, the Society has made a reasoned review decision, BCFIRB will consider and give respectful regard to those reasons. However, that consideration and respect does not mean the Society has a "right to be wrong" where BCFIRB believes that the decision should be changed because of a material error of fact, law or policy, or where circumstances have materially changed during the appeal period. BCFIRB can give respect to Society decisions without abdicating its statutory role to provide effective appeals.

On judicial review, Mr. Justice Grauer agreed with the FIRB. He held that he should apply the reasonableness standard when reviewing the FIRB's decision concerning the scope of its appellate review. He went on to find that the FIRB's decision concerning its scope of appellate review was reasonable—the FIRB was free to hold a hearing *de novo*.

In reaching this result, Justice Grauer rejected the approach taken by the Court of Appeal of Alberta in *Newton*[67] which held that correctness was the proper standard of review for determining the scope of an administrative appeal. He distinguished *Newton* based on the wording of the statute, the fact *Newton* dealt with professional discipline, it only considered the alternatives of a "true appeal" and a "*de novo* hearing", and pre-dated the Supreme Court of Canada's decision in *Nor-Man*, *ATA News*, and *McLean*:

> [29] With respect, I find neither the *Newton* nor the *McKenzie* cases to be of assistance in the unique circumstances of this case.
>
> [30] *Newton* concerned the basic structure and interrelationship of the tribunals in Alberta that review the conduct of police officers when that conduct is called into question in disciplinary proceedings under the *Police Act*, RSA 2000, c P-17. The specific issue was the extent to which the Law Enforcement Review Board may conduct a hearing *de novo* when an appeal is launched from the decision of a presiding officer in a disciplinary matter.
>
> [31] The problem with *Newton*, as I see it (apart from the fact that it appears never to have been followed outside of Alberta), is that it turns on the interpretation of a very different statute regarding an appeal process that may appear, superficially, similar to the one here, but is in fact quite different—involving, as it does, professional discipline. Like *McKenzie*, *Newton* considered only the alternatives of a "true appeal" and a "*de novo* hearing", a dichotomy to which we are not limited. I also consider, with respect, that the Alberta Court of Appeal's reasoning on the standard of review of a tribunal's decisions is inconsistent with subsequent pronouncements of the Supreme Court of Canada, discussed below.

Justice Grauer was satisfied the FIRB had acted reasonably in deciding that, in creating the new scheme, the BC legislature had intended that the FIRB be in a position to proceed flexibly and not restrict itself to the record. (In *obiter*, he also stated that he found the FIRB's decision to be correct.)

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67. *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399.

2. *College of Dental Surgeons of British Columbia v. Health Professions Review Board*

In the *Health Professions Review Board* case,[68] Madam Justice Donegan held the scope of the Review Board's review of the College's decision was not a true question of jurisdiction.[69] Nor was it a question of demarcating jurisdictional lines between two competing specialized tribunals operating at the same level (as opposed to one being subordinate to the other).[70] Because there was a privative clause, reasonableness was the applicable standard of review.[71] However, she held that the Review Tribunal's decision was patently unreasonable because it fundamentally misunderstood its review role. While the Review Board's decision stated that it was applying the reasonableness standard when reviewing the College's decision, Justice Donegan held[72] that it did not actually do that, because it did not defer to the College's reasonable interpretation of its legislation, but instead substituted its view of the correct interpretation. In addition, the Review Board misapprehended its role in making its own interpretation of the evidence. Accordingly, Justice Donegan quashed the Review Board's decision.

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68. 2014 BCSC 1841.

69. Paragraph 102.

70. Paragraphs 103-109.

71. Paragraph 115. See also s. 58 of the *Administrative Tribunals Act*.

72. Paragraphs 125-132.

3. *Lac La Biche*

The reverse situation arose in *1694192 Alberta Ltd. v. Lac La Biche (Subdivision and Development Appeal Board)*.[73] There correctness was the applicable standard of review to be used by the appellate administrative body, but the court held that it could nevertheless defer to the initial decision-maker on at least some matters:

> [18] Section 688(1) of the *MGA* provides for a statutory appeal from the SDAB on questions of law or jurisdiction. This Court has held that to the extent that an extricable transcendent (*i.e.* beyond the parties' interests) question of law or jurisdiction arises, review is for correctness: *Cameron Corp v Edmonton (Subdivision and Development Appeal Board)*, 2012 ABCA 254 at paras 3-8. Nonetheless, "[s]ome deference is extended to questions of law if the expertise of the Board is engaged, and to the application of the law to particular sets of facts": see *Emeric Holdings Inc v Edmonton (City)*, 2009 ABCA 65 paras 8-9, 448 AR 31; *Maduke v Leduc (County No. 25)*, 2010 ABCA 331 paras 5-6, 2010 CarswellAlta 2151; *McCauley Community League v Edmonton (City)*, 2012 ABCA 86 para 18, 522 AR 98; *Cameron Corp* at para 6; *Kiewit Energy Canada Corp v Edmonton SDAB*, 2013 ABCA 407 para 12, 566 AR 90, leave denied [2014] SCCA No 27 (QL).
>
> [19] The SDAB was not required to show deference to the Authority: *Stewart v Lac Ste Anne (County) SDAB*, 2006 ABCA at paras 9-12, 397 AR 185. But, practically speaking, it would seem logical for the SDAB to pay at least some respectful attention to determinations involving technical expertise or factual awareness that the Authority might possess. As a result, it would not be an error of law for the SDAB to show some deference to the Authority on topics of that sort: compare *Edmonton Police Service v Furlong*, 2013 ABCA 121 paras 15-24, 544 AR 191.

4. *Dorn*

In *Dorn v. Assn. of Professional Engineers and Geoscientists of Manitoba*,[74] an engineer appealed a disciplinary decision to an internal appeal council. He sought a preliminary ruling from the appeal council that the appeal hearing would be heard by way of a hearing *de novo*.

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73. 2014 ABCA 319.

74. 2014 MBCA 25.

The appeal council refused and held that nothing in the *Engineering and Geoscientific Professions Act*[75] provided for a right of appeal by way of *de novo* hearing. The appeal would be based solely on the record of the discipline committee hearing. Dorn applied for judicial review of that decision. The Manitoba Court of Queen's Bench dismissed the application for judicial review.[76] The application judge held that when a statute is silent, the presumption as to the right of an appeal in an administrative law context is that of a "true appeal" on the record as opposed to a *de novo* hearing. The Manitoba Court of Appeal dismissed Dorn's appeal.

The Court of Appeal held that there were no exceptional circumstances to justify judicial review of the council's interpretation of its own statute regarding the appellant's right of appeal before the completion of the administrative process. Dorn had not exhausted the administrative process remedies and the decision dismissing the application for judicial review was upheld.

5. Refugee Appeal Board

In *Huruglica v. Canada (Citizenship and Immigration)*,[77] Justice Phelan of the Federal Court held that the standard of review which an appellate administrative tribunal must apply is a question of law of general importance outside of its expertise, which the court must determine using the correctness standard of review:

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75. C.C.S.M. c. E-120.

76. 2013 MBQB 185.

77. 2014 VC 799.

> [30] The selection of the appropriate standard of review is a legal question well beyond the scope of the RAD's expertise, even though it depends on the interpretation of the *IRPA*, the RAD's home statute...
>
> [32] The determination of the RAD's standard of review for an appeal of a RPD decision is outside its expertise and experience. Similarly, the determination of what is or what distinguishes an issue of fact from an issue of mixed law and fact and further, the determination of distinguishing what is an issue of law are likewise outside the expertise and experience of the RAD.
>
> [33] The determination of the standard of review that an appellate tribunal must apply to a lower decision maker and the process by which that determination is reached has significance outside the refugee context.

And he went on to hold that the Refugee Appeal Division was required to conduct a broader appeal, and not merely determine whether the initial decision was reasonable:

> [54] Having concluded that the RAD erred in reviewing the RPD's decision on the standard of reasonableness, I have further concluded that for the reasons above, the RAD is required to conduct a hybrid appeal. It must review all aspects of the RPD's decision and come to an independent assessment of whether the claimant is a Convention refugee or a person in need of protection. Where its assessment departs from that of the RPD, the RAD must substitute its own decision.
>
> [55] In conducting its assessment, it can recognize and respect the conclusion of the RPD on such issues as credibility and/or where the RPD enjoys a particular advantage in reaching such a conclusion but it is not restricted, as an appellate court is, to intervening on facts only where there is a "palpable and overriding error".

I. The relationship between standards of review and grounds of review

There is some thought that the standards of review have completely supplanted the concept of grounds of review.

1. *Januario*

In *Alberta (Director, Assured Income for the Severely Handicapped Program Delivery Services) v. Januario*,[78] the Court of Queen's Bench of Alberta held that the question of whether an Appeal Panel had wrongfully fettered its discretion was to be considered as part of the reasonableness review. Mr. Justice Brown (as he then was) held that, while fettering of discretion used to be a nominate ground of judicial review, it is no longer a stand-alone basis for review:

> 32 Although our Court of Appeal has not yet expressly considered this question, its recent practice has been to consider fettering arguments within the reasonableness review. (*United States of America v. Cail*, 2009 ABCA 345 [*Cail*] at paras. 29-31.) *Cail* leaves some ambiguity, however, as within the Court's reasonableness review (which was of the Minister of Justice's decision to surrender the appellant unconditionally to the United States under Section 40 of the *Extradition Act*, SC 1999, c 18) it found (at para 31) that "he did not *incorrectly* fetter his discretion." (Emphasis added.)
>
> 33 Considering fettering arguments within a reasonableness review is, however, also consistent with the statement of McLachlin CJ in *Dr Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 [*Dr Q*] at paras 22-25 (quotation omitted)...
>
> 34 Recent decisions of the Federal Court of Appeal have applied *Dr Q* to require matters that traditionally represented nominate grounds for review associated with abuse of discretion be considered for reasonableness. (*Stemijon*; and *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250.)
>
> 35 I am satisfied that *Dr Q* resolves the question of where, within the analytical framework for judicial review, I am to address the Director's argument about fettering discretion. Since there appears to be little caselaw directly on point, and none from Alberta, it is worth making explicit the conclusion to be drawn from *Dr Q*. *Dr Q* marks a substantial shift in the law of how, and where within the analytical framework of judicial review, a fettering argument is to be considered by a reviewing court. The fettering by an administrative tribunal of its discretion was once a stand-alone nominate ground of judicial review within the category of abuse of discretion. If proven, it automatically invalidated the tribunal's decision. Now, however, the standard of review to be applied to the tribunal's reasons themselves also governs the standard by which the Court ought to consider a fettering argument.

78. 2013 ABQB 677.

> 36 In effect, this subsumes my consideration of the Director's fettering arguments into my review of the reasonableness of the Appeal Panel's commencement date decision. Doing so is also consistent with *Dunsmuir*. While fettering discretion, like any other ground of abuse of discretion, has traditionally been understood as jurisdictional in nature (David P Jones & Anne S de Villars, *Principles of Administrative Law*, 5th ed. (Carswell, 2009) at 175, the Supreme Court in *Dunsmuir* confined true questions of jurisdiction or *vires* to "the narrow sense of whether or not the tribunal had the authority to make the inquiry." This relegates the grounds of abuse of discretion to review for errors of law. (*Pastore v. Aviva Canada Inc*, 2012 ONCA 642 at para 25.) And, as to questions of law, in *Dunsmuir* the Supreme Court also held (at paras 60 and 70) that, aside from questions of general law "that [are] ... of central importance to the legal system as a whole", a standard of reasonableness (and not correctness) should apply.
>
> 37 In other words, a finding that an administrative tribunal has fettered its discretion in deciding a matter militates against a finding of reasonableness.

It should be noted, however, that Brown J. was very careful to limit his reasons to the issue of fettering of discretion, and does not decide the issue with respect to whether other aspects of abuse of discretion continue to exist as *grounds* of review.[79]

III. NATURAL JUSTICE AND PROCEDURAL FAIRNESS

The most significant decisions about procedural fairness relate to (a) the investigative process, (b) the requirement for notice, (c) bias in the decision-making process, and (d) legitimate expectations.

79. At paras. 38 and 39.

A. The duty to be fair in the investigative process

1. *Wood v. Schaeffer*

In *Wood v. Schaeffer*,[80] the Supreme Court of Canada considered police officers' duties to make notes and their right to consult with legal counsel before making notes with respect to civilian shooting incidents. The issue was whether the legislative scheme provided for in Ontario's *Police Services Act*[81] permitted officers to consult with counsel and obtain legal advice before completing their notes for the purposes of investigations before the Special Investigations Unit (SIU).[82]

The Ontario Court of Appeal held that the legislative scheme did not permit officers to seek the assistance of legal counsel in completing their notes, but that they were entitled to receive basic legal advice regarding the incident, and subsequent investigation, prior to completing their notes.[83] The police officers appealed the ruling, arguing the decision was too restrictive regarding when legal advice could be sought. The Director of the SIU cross-appealed, arguing the officers were not entitled to any legal advice prior to making notes. The Supreme Court of Canada dismissed the appeal and allowed the cross-appeal.

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80. 2013 SCC 71.

81. R.S.O. 1990, c. P-15.

82. The SIU is an all-civilian body whose mission is to determine independently and transparently what happened in an incident in which a civilian is killed or seriously injured at the hands of a police officer.

83. 2011 ONCA 716.

The majority decision

The majority judgment was delivered by Justice Moldaver.[84] The Court carefully considered the wording of the *Duties of Police Officers Respecting Investigations by the Special Investigations Unit Regulation*[85] and concluded that the Regulation did not permit officers to consult with legal counsel before completing their notes. It dismissed the police officer's appeal and allowed the Director's cross-appeal. Moldaver J. identified three reasons for this conclusion:

(i) consultation with counsel at the note-taking stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence about the objectivity of the process;

(ii) the legislative history showed no discussion of the role for counsel at the note-making stage in any of the reports related to the passing of the Regulation; and

(iii) consulting with counsel at the note-taking stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes as soon as practicable after an incident.

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84. McLachlin C.J. and Abella, Rothstein, Karakatsanis and Wagner JJ. concurring. It should be noted that the majority did not consider the right to counsel (contained in the *Charter* or at common law) or the right to remain silent.

85. O. Reg. 267/10, ss. 7 and 9.

The majority took the position that it was not dealing with police officers in their capacity as ordinary citizens, but, rather, it was dealing with them in their professional capacity as police officers who are subject to a SIU investigation.

The minority decision

Justices LeBel, Fish and Cromwell agreed that the police officers' appeal should be dismissed, but would have held that officers maintained the right as ordinary citizens to consult with counsel prior to making notes but that counsel could not assist the officer in preparing notes. As such, the minority would have dismissed the cross-appeal.

2. *Attaran v. Canada (Attorney General)*

The duty of fairness in the investigative process was also addressed in *Attaran v. Canada (Attorney General)*.[86] In that case, the applicant argued that the investigation under the *Canadian Human Rights Act*[87] was flawed because the investigator made errors in the way it handled document disclosure and that the investigation was not thorough and neutral.

Madam Justice Strickland of the Federal Court dismissed the application for judicial review. On the issue of disclosure, she stated:

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86. 2013 FC 1132. See also *Anderson v. Canada (Attorney General)*, 2013 FC 1040 for another decision by Madam Justice Strickland on the duty to be fair in the investigative process. For another case regarding disclosure of reports made in the investigative process, see *Slansky v. Canada (Attorney General)*, 2013 FCA 199 which is discussed in detail below under the heading Privacy, Disclosure, and Privilege.

87. RSC 1985, c. H-6.

> 68 The overall principle of disclosure applicable here is that procedural fairness requires that each of the parties have a fair opportunity to know and to meet the whole of the contrary case. This does not require that the Commission systematically disclose to a party all of the documents it receives from the other party, but it does require that it inform that party of the substance of the evidence gathered by the investigator so that it may reply to that evidence (*Canada (Attorney General) v Cherrier*, 2005 FC 505 at para 23 [*Cherrier*]; *Mercier*, above at para 18).
>
> 69 Generally speaking, the Commission is not required to disclose the actual submissions of the parties. Rather, the submissions are summarized within the investigation report to which the parties have a right of response. As the Applicant notes, a potential exception to this is when the comments from one party to the investigation report contain facts that differ from those set out in the report which the adverse party would have been entitled to try to rebut had it known about them at the investigation stage (*Mercier*, above, at para 18).

Strickland J. was satisfied that the documents in question which had not been disclosed did not serve to withhold new facts or deprive the applicant of the right to reply and, therefore, procedural fairness had not been breached.

On the issue of thoroughness and neutrality of the investigation, Strickland J. also concluded that there had been no procedural unfairness:

> 95 In *Slattery*, above, the leading case on procedural fairness in a Commission investigation, Justice Nadon (as he then was) held that judicial review is warranted where an investigator fails to investigate obviously crucial evidence. Minor omissions in an investigator's report will not be fatal, as the parties can point out such omissions to the Commission in their comments.
>
> 96 However, where complainants are unable to rectify omissions in the investigator's report through rebuttal comments to the Commission, judicial review is warranted. This situation may arise where an investigator's report contains an omission of such a fundamental nature that drawing the Commission's attention to it will not compensate for the omission (*Slattery,* above, at para 57). Similarly, where rebuttal comments allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must provide reasons explaining why those discrepancies are either immaterial or insufficient to challenge the investigator's recommendation (*Herbert*, above, at para 26).
>
> 97 In *Slattery*, above, at para 55, Justice Nadon commented on the factors to be considered in assessing the completeness of an investigation:

> [55] In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being balanced: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system [...]
>
> . . .
>
> 99 In *Miller v Canada (Human Rights Commission)*, [1996] F.C.J. No. 735 (TD) (QL) at para 10, Justice Dubé stated the test with respect to a thorough investigation as follows:
>
> > [10] The SEPQA decision has been followed and expanded upon by several Federal Court decisions. These decisions are to the effect that procedural fairness requires that the Commission have an adequate and fair basis upon which to evaluate whether there was sufficient evidence to warrant the appointment of a Tribunal. The investigations conducted by the investigator prior to the decision must satisfy at least two conditions: neutrality and thoroughness. In other words, the investigation must be conducted in a manner which cannot be characterized as biased or unfair and the investigation must be thorough in the sense that it must be mindful of the various interests of the parties involved. There is no obligation placed upon the investigator to interview each and every person suggested by the parties. The investigator's report need not address each and every alleged incident of discrimination, especially where the parties will have an opportunity to fill gaps by way of response.
>
> 100 In considering the merits of the Applicants' submissions, it is important to note that the standard set out in *Slattery*, above, does not require that the investigator's report be perfect. This Court is concerned, not with perfection, but with ensuring that the Applicant was treated fairly in the investigation and his discrimination complaint was considered. The Court should not dissect the investigator's report on a microscopic level or second-guess the investigator's approach to his task (*Guay*, above at para 36; *Besner v Canada (Attorney General)*, 2007 FC 1076 at para 35). The Applicant can only succeed if the alleged deficiencies render the investigator's report "clearly deficient".

Strickland J. concluded that while there were minor procedural deficiencies in the investigation, they did not suffice to invoke the Court's intervention. Quoting Chief Justice McLachlin, she concluded that "what is required is fairness, not perfection."[88]

88. From *C.P.C. Co. v. Vancouver (City)*, 2006 SCC 5 at para. 46.

B. The requirement of notice

In *Pacific Booker Minerals Inc. v. British Columbia (Minister of the Environment)*,[89] the British Columbia Supreme Court held that a Minister's failure to disclose an executive director's report making recommendations concerning an environmental assessment amounted to a breach of procedural fairness. Mr. Justice Affleck took the view that the failure to disclose amounted to a failure to give the petitioner notice of the executive director's recommendations and impeded the applicant's ability to meet the case against it. He also noted that the failure breached the petitioner's legitimate expectations of being given ample opportunity to participate and be heard, as its right to procedural fairness had been respected throughout the previous process.

While Affleck J. recognized the need to respect the procedure adopted by the tribunal, he stated that the choice of procedure was not conclusive:

> 152 The choice of procedure of the tribunal is to be respected but it is not determinative. If it was determinative judicial review of that procedure would be cut off before it began. The usual practise of the executive director not to provide his recommendations to the affected parties may be fair in most instances; however, when the executive director intends to urge the ministers to deny the certificate the usual practise results in an unfair process.

C. Bias

There have been several interesting decisions on bias this past year.

89. 2013 BCSC 2258.

1. *Bizon*

In *Bizon v. Bizon*,[90] the Court of Appeal of Alberta was dealing with an allegation of bias against a motions judge. The Court took the opportunity to review the principles of Rule of Law, rationality and impartiality. While the case deals with alleged bias of a judge, the discussion is relevant to administrative decision-makers as well. The relevant portions of Wakeling J.A.'s reasons are worth reading in their entirety.[91]

2. *Seanic Canada Inc.*

In *Seanic Canada Inc. v. St. John's (City)*,[92] the Supreme Court of Newfoundland and Labrador heard an application for judicial review of the City Council's rejection of a rezoning application. The applicant alleged bias on the part of one of the City Councillors.[93]

The Supreme Court allowed the application, holding that the Councillor in question had a closed mind and had prejudged the application to the extent that any representations made by the applicant at the hearing were futile. The Court found that the Councillor's closed mind was primarily the result of opposition from area residents, not legitimate planning considerations. The Court noted that while "[a] degree of prejudgment, perhaps to a significant degree, is to be expected as a lengthy consultation and public process approaches

90. 2014 ABCA 174.

91. Justices Picard and Costigan delivered a short, separate, concurring set of reasons.

92. 2014 NLTD (G) 7.

93. Other allegations included lack of reasons and conflict of interest, but the Court rejected those grounds.

completion",[94] a vote by Council on a rezoning application is expected to be a considered vote following deliberation and debate by Council. City councillors are required to bring a degree of independent judgment to their decisions and not be simple proxies for their electors. The Court stated:

> 72 When the time comes for a vote on a development proposal, fairness to the applicant and adherence to the regulatory regime for property development require that each councillor listen to the views expressed by his or her colleagues, respect and be governed by the criteria against which the discretionary authority is to be exercised and, where there has been a degree of prejudgment, honestly and objectively consider whether his or her position should be maintained.

3. *Konya*

The court in *Konya v. Canada (Minister of Citizenship and Immigration)*[95] held that the fact that the Board incorporated certain passages which had been provided by a third party into its reasons and used other "boilerplate" comments which had been copied from previous decisions did not amount to a reasonable apprehension of bias.

4. *Punia*

In *Punia v. Canada (Minister of Citizenship and Immigration)*,[96] the Federal Court held that a member of the Immigration Appeal Division had breached the rules of procedural fairness by not giving the applicant the opportunity to give evidence and make submissions on

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94. At para. 70.

95. 2013 FC 975. See *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 and the discussion in last year's paper.

96. 2013 FC 1078.

whether he should recuse himself from an appeal hearing. The member happened to be the same person who had dismissed a previous appeal in the same matter. While the Court did not decide the question of whether the member should have recused himself, it did say that the applicant should have been given a chance to argue and convince the member that the case should be decided by someone else.

5. *Altus Group Ltd.*—institutional independence

The case of *Altus Group Ltd. v. Calgary (City)*[97] dealt with an allegation of institutional bias. The *Municipal Government Act (Alberta)* (MGA) was amended to implement a new assessment complaint and appeal process. The amendments eliminate a right to appeal assessments to a provincially appointed board and limit an appeal to either a local, municipally appointed and compensated tribunal (an Assessment Review Board or "ARB"), or a board that has one provincial member from the Minister of Municipal Affairs in addition to the local members. Appeals from either board proceed directly to the Court of Queen's Bench and can only be granted on questions of law of importance that have a reasonable prospect of success.

The Applicants argued that the very structure of the ARB established under the amendments disabled it from assessing a taxpayer's complaint independently. Madam Justice Eidsvik examined and applied the principles from *Bell* and *Ocean Port* in holding that the statutorily imposed structure must be respected:

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97. 2013 ABQB 617. See also *Muhammad v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 448 which dealt with whether the Minister's delegate under IRPA had the necessary independence to make an assessment on a risk of torture and the ability to make an impartial decision.

> 144 ... While it is clear that the Court in *Ocean Port* found that the courts may infer common law principles when "confronted with silent or ambiguous legislation", I would not so categorize the impugned provisions of the MGA. While the Legislature has no doubt delegated the ultimate structure of the ARB to council, it has done so clearly. Any questions arising from the discretion provided for in the MGA are answered by operation of the Bylaw and the actual practice of the tribunal. I do not read *Ocean Port* as stating that any "gaps" created by legislated delegation must be filled by the common law principles of natural justice. Rather, I prefer the argument of the Board that while the Legislature provided that council *must* establish an ARB and *must* prescribe tenure and remuneration, the ultimate decision as to "how much and how long" is left to the municipality.
>
> 145 Although, as I briefly discussed above, some of the optics of this structure may be a cause for concern, the courts are not to interfere with the desires of the Legislature. To borrow again from Chief Justice McLachlin, "it is easy to imagine more exacting safeguards of independence -- longer, fixed-term appointments; full-time appointments; a panel selection process for appointing members to panels instead of the Chair's discretion. However, in each case one must face the question: 'Is this what the legislature intended?'" In this instance, although the municipality is charged with the creation of a board that ultimately assesses taxation payable to the municipality, and although the MGA provides the municipality with some discretion over tribunal structure, member tenure and remuneration, I must answer the question of whether "this is what the legislature intended" in the affirmative. This Court is not to apply a common law rule in the face of clear statutory direction.

The Court rejected the argument that the ARB was a quasi-judicial board and was, therefore, entitled to some measure of protection over its institutional independence:

> 161 ... the principles in *Ocean Port* apply, no matter where along the spectrum a tribunal may fall. If the common law guarantees of independence have been ousted by statute, it does not matter whether a tribunal is classified as 'administrative' or 'quasi-judicial' in nature. The common law must yield to a validly enacted statutory scheme.

D. Other noteworthy cases on procedural fairness

1. *Chung*

In *Chung v. Canada (Minister of Citizenship and Immigration)*,[98] the Federal Court held that the Minister did not breach procedural fairness by failing to cross-examine the applicant on a particular point in his sworn testimony before coming to a conclusion on credibility. The court rejected a strict interpretation of the approach taken in *Browne v. Dunn*[99] and concluded that the effect to be given to the absence or brevity of cross examination depends on the circumstances of the case. In this case, the applicant was well aware of the case he had to meet and no procedural unfairness had occurred.

2. *Agrium Vanscoy*

In *Agrium Vanscoy Potash Operations v. USW, Local 7552*,[100] the Saskatchewan Court of Queen's Bench held that an arbitrator breached the rules of procedural fairness by ruling on remedy in a hearing in which the parties had agreed that only substantive issues would be dealt with. By ruling on remedy, the arbitrator had deprived Agrium the opportunity to be heard on the issue of remedy. The Court referred the issue of remedy back to the arbitrator.

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98. 2014 FC 16.

99. (1893), 6 R 67 (H.L.). The rule in *Browne v. Dunn* provides that a cross-examiner cannot rely on evidence that is contradictory to the testimony of a prior witness without having put the evidence to the prior witness in order to allow them to attempt to explain the contradiction.

100. 2013 SKQB 445.

The Saskatchewan Court of Appeal dismissed the appeal.[101] The lower court had not erred by referring the matter back to the arbitrator. The arbitrator had not lost jurisdiction and there was no reasonable apprehension of bias.

3. *Canadian Arab Federation*

In *Canadian Arab Federation v. Canada (Minster of Citizenship and Immigration)*,[102] the Federal Court held that the rules of procedural fairness did not apply where the relationship between the parties was strictly commercial.

4. *Agraira*—legitimate expectations

One of the issues in *Agraira v. Canada (Public Safety and Emergency Preparedness)*,[103] was whether the Minister had breached the applicant's legitimate expectations about how the Minister would exercise his discretion. The Supreme Court of Canada reiterated that the doctrine of legitimate expectations cannot give rise to substantive rights.[104] The Court also held that there was no breach of any legitimate expectation about any procedural rights.

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101. 2014 SKCA 79.

102. 2013 FC 1283.

103. 2013 SCC 36.

104. At paragraph 97, referring to *Baker*, [1999] SCC 1 at paragraph 26; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at p. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at paragraph 131. Compare this with the decision in *Pacific Booker Minerals Inc. v. British Columbia (Minister of the Environment)*, 2013 BCSC 2258.

IV. STANDING

Standing has arisen in two different contexts over the last year: (a) the standing of decision-makers to make submissions in applications for judicial review, and (b) the standing of decision-makers to appeal from judicial review applications striking down their decisions.

A. Standing of decision-makers to make submissions in applications for judicial review

1. *Moore*

Moore v. College of Physicians and Surgeons of British Columbia[105] is another example of a court struggling between the two lines of authority with respect to the role of the tribunal in judicial review proceedings: the strict *Northwestern Utilities* approach refusing to allow the Board to make submissions on the merits of its decision, and the *Ontario (Children's Lawyer)* approach which takes a more flexible stance to the issue of standing.

Moore involved an application for judicial review of a decision of the Health Professions Review Board. The British Columbia Supreme Court reviewed the recent cases and granted the Board the right of full participation in the application for judicial review:

> 74 It is clear from *Henthorne* that the approach of Goudge J.A. in the *Ontario Children's* case has not been fully embraced in British Columbia. The Board will be afforded more latitude to participate fully where there are allegations of jurisdictional error or in the choice

105. 2013 BCSC 2081. But see *Imperial Oil Ltd. v. Calgary (City)*, 2014 ABCA 231, where the Court of Appeal of Alberta held that the Privacy Commissioner had no standing to appeal a judicial review decision quashing the Commissioner's decision.

of the appropriate standard of review. However, where the matter is clearly a private matter between, for example, Mr. Henthorne and his employer, or where there is no public law principle at stake there will be a more restrictive approach.

75 In this case, the Board emphasized the fact that without its participation, there is no one to oppose the relief sought by the petitioner. However, counsel for the Board also submitted that there are other policy reasons that have significant implications beyond the facts of this case. He submits the import of this case includes the proper interpretation of the *HPA*, the proper role of decision-makers within the various colleges in interpreting what counsel referred to, correctly in my view, as "deceptively complex legislation."

76 The Board also argued that this is not a case where the review is simply to determine whether the tribunal was correct in its decision. Rather, the Board seeks to make submissions as to why its decision was "within the scope of rational options" available. The Board says the issue is the proper institutional relationship between it and the court. It does not take a strong adverse position to the petitioner or the College, but rather to submit that the decision of the Board was within its exclusive jurisdiction and to make submissions as to why its decision is not patently unreasonable.

77 Given the absence of the complainant or any other party to oppose the relief sought by the petitioner, it is my view that it is appropriate in this case for the Board to fully participate in this review. Partly, I base my decision on the absence of any serious opposition to the right of the Board to make submissions by either the petitioner or the College; however, issues related to the role of the *HPA* in reviewing decisions from the colleges governed by the *HPA* are significant issues that deserve examination with the assistance of full argument by counsel.

78 Based upon my review of the authorities, it is my view that in this case, there is an issue that raises the proper interpretation of the *HPA*, in particular the jurisdiction of the Board in reviewing decisions of a College, or the role of participants within the legislative scheme, the court should have the benefit of the most complete submissions available. While counsel for the Board may arguably have crossed the "blurry line" referred to by Donald J.A. in *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at para. 54, his submission focusses largely on the Board's jurisdiction. Therefore, I conclude that in the circumstances of this case the Board should be granted the right of full participation upon the judicial review.

2. *Buterman*

In *Greater St. Albert Roman Catholic Separate School District No. 734 v. Buterman*,[106] the Court of Queen's Bench of Alberta granted standing to the Director of the Alberta Human Rights Commission to make submissions on judicial review of two decisions: (a) the decision by the Director dismissing a discrimination complaint and (b) the decision by the Chief of the Commission and Tribunals that the complaint should not have been dismissed and referring it to a human rights tribunal.

The Director was granted standing to make submissions about the narrow issues which concerned his role in the administration of the Alberta *Human Rights Act*. More specifically, the Director was granted standing to make submissions on whether he was required—as a condition precedent to the Chief's jurisdiction to advance the complaint to a tribunal—to consider whether the School Board and complainant had entered into a settlement agreement, or whether the complainant had refused to accept a proposed settlement that was fair and reasonable. In addition, the Director was allowed to make submissions on whether or not the application was filed within the six-month time limit contained in the *Alberta Rules of Court*. However, the Director did not have standing to argue the merits of the application.

3. *Forestell*

In the New Brunswick case of *Regional Health Authority B v. Forestell et al.*,[107] the Chief Coroner refused to grant standing to a hospital corporation and two physicians to participate

106. 2013 ABQB 485.

107. [2014] N.B.J. No. 57, rev'd 2014 NBCA 40 (decision issued on 19 June 2014, reasons issued on 18 September 2014).

at an inquest in the death of a patient. The hospital and physicians applied for judicial review of the Chief Coroner's decisions, arguing that the inquest would affect their reputations, and, therefore, they should be entitled to cross-examine witnesses and participate in the proceedings. The Chief Coroner counter-argued that the hospital and physicians had been given a significant opportunity to participate and that the duty of procedural fairness had been satisfied.

The Court of Queen's Bench allowed the application for judicial review and held that the hospital and physicians should have "substantial participatory rights". In particular, the hospital and physicians should have the rights to be represented by counsel, to have confidential disclosure of any witness statements or related documents, to cross-examine witnesses, to call witnesses and to make oral and written submissions to the presiding coroner (but not to the jury). However, the Court denied full standing.

On June 19, 2014, the Court of Appeal allowed the Chief Coroner's appeal and reinstated his decision denying standing.[108] The Court held that the statute did not give the Chief Coroner authority or discretion to grant standing and the physicians were not owed the duty of fairness.

B. Standing of a decision-maker to appeal a judicial review decision quashing the decision

A second—but distinct—aspect of standing relates to the ability of a decision-maker to appeal a judicial review (or appellate) decision quashing the decision-maker's original decision.

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108. 2014 NBCA 40.

In *Brewer v. Fraser Milner Casgrain LLP*,[109] the Court of Appeal of Alberta determined that the Chief Commissioner of the Human Rights Commission did not have standing to appeal from a judicial review decision setting aside his decision to dismiss a complaint.[110]

1. *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*

In *Imperial Oil*,[111] the Court of Appeal held that *Brewer* is binding authority in Alberta, and dismissed the appeal by the Information and Privacy Commissioner from a judicial review decision which had set aside the Commissioner's decision that certain records were not protected by legal privilege.[112]

In reaching this decision, the Court of Appeal noted that standing to appeal is a different issue from standing to make submissions in an appeal.[113]

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109. 2008 ABCA 160, leave to appeal refused at [2008] 3 SCR 654.

110. It may be that *Brewer* recognized an exception that a statutory tribunal would have standing to appeal if its own jurisdiction is in question: see *Imperial Oil* at paragraph 24.

111. 2014 ABCA 231. Application for leave to appeal to SCC filed on 29 September 2014 (#36098).

112. Although *obiter*, the Court of Appeal went on to hold that correctness was the standard of review about whether the records were protected by legal privilege (settlement privilege in this case), there being one law of legal privilege, so there was no ability for the Commissioner to reach a different decision, and the reasonableness standard of review did not apply. See paragraphs 35 - 37. The Court of Appeal also would have applied the correctness standard of review to the Commissioner's interpretation of the requirements of the environmental legislation in which the issue arose, as well as his interpretation about the role of the Environmental Appeal Board (and held that the Commissioner was wrong).

113. The Court of Appeal also rejected the suggestion that the fact that the Information and Privacy Commissioner's right to appeal had not been questioned in *ATA News* was determinative. And it rejected the Information and Privacy Commissioner's attempt to distinguish and differentiate his role from that of the Chief Commissioner of the Human Rights Commission: see paragraphs 25 and 26.

2. *Ontario Energy Board*

The Supreme Court of Canada has granted leave to appeal[114] the decision of the Ontario Court of Appeal in *Power Workers' Union, Canadian Union of Public Employees, Local 1000 v. Ontario (Energy Board)*,[115] which set aside a decision of the Ontario Energy Board on the basis that it was unreasonable.

One of the issues that is being argued is whether the Ontario Energy Board has standing to appeal.

V. MULTIPLE FORUMS

1. *Mission Institution*

In *Mission Institution v. Khela*,[116] the Supreme Court of Canada held that a provincial superior court may rule on the reasonableness of an administrative decision to transfer an inmate of a federal penitentiary to a higher security facility. The inmate's application for *habeas corpus* could be made in a provincial superior court or to the Federal Court—the two courts have concurrent jurisdiction.

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114. [2013] S.C.C.A. No. 339. Leave granted March 20, 2014.

115. 2013 ONCA 359.

116. 2014 SCC 24.

2. *JP Morgan*

In *Canada (Minister of National Revenue - M.N.R.) v. JP Morgan Asset Management (Canada) Inc.*,[117] the issue was whether a tax assessment decision of the Minister could be challenged by way of an application for judicial review in the Federal Court, or whether the matter was within the exclusive jurisdiction of the Tax Court of Canada. JP Morgan alleged that the Minister committed an abuse of discretion and a failure to consider departmental policies in her decision. A prothonotary held that the application raised an independent administrative law ground of review and was properly made in the Federal Court. That decision was upheld by the Federal Court.[118]

However, the Federal Court of Appeal allowed the Minister's appeal and held that the essential character of the application was an attack on the legal validity of a tax assessment and the matter fell within the exclusive jurisdiction of the Tax Court. Speaking for the Court, Stratas J.A. reviewed the Minister's obligations under the *Income Tax Act* and the Tax Court regime and concluded that JP Morgan's application for judicial review in the Federal Court should be struck. JP Morgan had not offered any authority to support the abuse of discretion argument and its challenge was, in essence, an attack on the legal validity of a tax assessment. It did not involve a recognizable administrative law claim that could be heard by way of judicial review:

> 67 Cognizable administrative law claims satisfy two requirements.

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117. 2013 FCA 250. See also *General Motors of Canada Ltd. v. Minister of National Revenue*, 2013 FC 1219.

118. 2012 FC 1366.

68 First, the judicial review must be available under the *Federal Courts Act*. There are certain basic prerequisites imposed by sections 18 and 18.1 of the *Federal Courts Act*: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (summary of many, but not necessarily all, of the relevant prerequisites).

69 Overall, there is no doubt that, subject to the limitations discussed below, the Federal Court can review the Minister's actions under section 18 of the *Federal Courts Act* in certain situations: *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94; *Addison& Leyen*, *supra* at paragraph 8. Behind section 18 stands the Court's plenary "superintending power over the Minister's actions in administering and enforcing the Act": *M.N.R. v. Derakhshani*, 2009 FCA 190 at paragraphs 10-11 and *RBC Life Insurance Company*, *supra* at paragraph 35, interpreting and applying *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paragraphs 33, 36, 38 and 39.

70 Second, the application must state a ground of review that is known to administrative law or that could be recognized in administrative law. Grounds known to administrative law include the following:

> - *Lack of* vires. Administrative action must be based on or find its source in legislation, express or implied: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at paragraph 16. Administrative action cannot be unconstitutional in itself, be authorized by unconstitutional legislation or be taken under subordinate legislation that is not authorized by its governing statute. These are often called issues of *vires*.
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> - *Procedural unacceptability*. Most administrative action must be taken in a procedurally fair manner. On the threshold issue whether obligations of procedural fairness are owed, see *Canada (Minister of National Revenue) v. Coopers & Lybrand*, [1979] 1 S.C.R. 495; *Martineau v. Matsqui Inmate Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643. Where procedural fairness obligations are owed, the level of procedural fairness can be dictated by statute or, in the absence of statutory dictation, varies according to a common law test: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21-28.
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> - *Substantive unacceptability*. Depending on which standard of review applies, administrative action must either be correct or fall within a range of outcomes that are acceptable or defensible on the facts and the law (*i.e.*, "reasonable"): *Dunsmuir*, *supra*; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. In the case of reasonableness, the range can be narrow or broad depending on the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. "Reasonableness" is a term of art defined by the cases - it does not carry its colloquial meaning.

Thus, merely stating that the ground of judicial review is that the Minister "abused her discretion" was insufficient to support an administrative law claim in the Federal Court—the proper forum was the Tax Court of Canada.[119]

3. Class actions where an administrative penalty has already been imposed

In *AIC Limited v. Fischer*,[120] the Supreme Court of Canada addressed whether a class action against a group of mutual fund managers was the preferable procedure in a civil action by investors when settlement payments had already been obtained in a non-litigation proceeding before the Ontario Securities Commission. The Court held that the correct approach had to consider both substantive and procedural aspects in assessing whether a class action was the preferable procedure. The Supreme Court of Canada upheld the decision to certify the proposed class action.

It is interesting to note that there was no discussion in the judgments about multiple forums, issue estoppel, *Penner* or *Figliola*. The Court did recognize that the motions judge's decision about whether to allow the class action was discretionary, and entitled to deference, but could properly be set aside (as the Divisional Court and the Court of Appeal and the Supreme Court of Canada all did) if it was based on a wrong principle (which it was).

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119. Justice Stratas also made some interesting observations about the large number of unsuccessful applications for judicial review in tax cases: see paras. 29 to 33.

120. 2013 SCC 69.

VI. CONSTITUTIONAL ISSUES IN ADMINISTRATIVE LAW

1. *Bernard*

In *Bernard v. Canada (Attorney General)*,[121] the Supreme Court of Canada considered the authority of a federal administrative tribunal to deal with constitutional issues.

Bernard was a member of a bargaining unit in the federal public service, but did not belong to the union that had exclusive bargaining rights for her bargaining unit.[122] Although Bernard was not a union member, she was entitled to the benefits of the collective agreement and to representation by the union, and was required to pay union dues. The union requested the employer to provide home contact information for all bargaining unit members, including Rand Formula employees. The employer refused and the union complained to the Board that the employer's refusal to provide the home contact information constituted an unfair labour practice and improperly interfered with its ability to represent the members of the bargaining unit.

The Board decided that, in principle, the employer's failure to provide the union "with at least some of the employee contact information that it requested" was an unfair labour practice because it interfered with the representation of employees by the union. However, on the issue of remedy, the Board asked for more information about several privacy-related issues and directed the parties to consult in order to determine whether they could agree on disclosure terms, failing which the Board would hold a further hearing to address the

121. 2014 SCC 13.

122. This is known as a "Rand Formula employee".

question of remedy. The parties did ultimately reach an agreement about the remedy, which the Board incorporated into a consent order. Under the terms of the consent order, the employer was required to disclose to the union, on a quarterly basis, the home mailing addresses and home telephone numbers of members of the bargaining unit, subject to a number of conditions, all of which related to the security and privacy of the information. An email was accordingly sent to all bargaining unit members, including Bernard.

Bernard applied to the Federal Court of Appeal for judicial review of the consent order, arguing that it violated the federal *Privacy Act* and breached her *Charter* rights.

The Federal Court of Appeal held that the Board should have considered the application of the *Privacy Act* to the disclosure of home contact information, rather than simply adopting the agreement of the parties. It remitted the matter to the Board for redetermination, and directed that the Office of the Privacy Commissioner and Bernard be given notice of the redetermination proceedings and an opportunity to make submissions.

At the redetermination hearing, Bernard's position was that disclosure of her home telephone number and address breached both her privacy rights and her *Charter* right not to associate with the union. She also alleged that the consent order breached her rights under section 8 of the *Charter*.

On redetermination, the Board dealt only with Bernard's alleged breach of her privacy rights.[123] It concluded that workplace contact information was insufficient to allow the union to meet its obligations to represent all employees in the bargaining unit and that a bargaining

123. The Board took the position that it did not need to consider Bernard's *Charter* arguments because the order of the Federal Court of Appeal directed it to consider privacy rights, not *Charter* rights.

agent had a right to contact all employees directly. There was no breach of the *Privacy Act* in disclosing home telephone numbers and addresses to bargaining agents because that disclosure was consistent with the purpose for which the information was obtained and was, as a result, a "consistent use" of the information under s. 8(2)(*a*) of the *Privacy Act*. However, the Board imposed two additional privacy safeguards: the information was to be provided to the union only on an encrypted or password-protected basis, and expired home contact information was to be appropriately disposed of after updated information was provided.

Bernard sought judicial review of the Board's redetermination decision. The Federal Court of Appeal dismissed the application. The Court concluded that the Board's decision was reasonable, and that the union's use of home contact information was a "consistent use" under section 8(2)(*a*) of the *Privacy Act*.

Bernard appealed to the Supreme Court of Canada.

The Supreme Court of Canada dismissed the appeal.

The majority decision

Speaking for the majority, Justices Abella and Cromwell[124] held that the standard of review applicable to the Board's decision was reasonableness. It is a cornerstone of labour relations that a union has the exclusive right to bargain on behalf of all employees in a given bargaining unit, including Rand Formula employees, and the union must represent those employees fairly and in good faith. While an employee is free not to join the union and

124. Justices LeBel, Karakatsanis and Wagner concurred.

become a Rand employee, he or she may not opt out of the exclusive bargaining relationship, nor the representational duties that a union owes to employees. In that context, the Board's decision was reasonable. Work contact information was insufficient to enable the union to carry out its duties to bargaining unit employees—the union needed employee home contact information to represent the interests of employees, a use consistent with the purpose for which the employer collected the information.

The majority also held that the Federal Court of Appeal did not err by agreeing with the Board that its mandate on the redetermination was limited to the question of how much home contact information the employer could disclose to the union without infringing the employee's rights under the *Privacy Act*.

However, the majority went on to address Bernard's *Charter* arguments in a summary fashion and concluded that they had no merit. The compelled disclosure of home contact information in order to allow a union to carry out its representational obligations to all bargaining unit members did not engage Bernard's freedom not to associate with the union and did not violate section 2(d) of the *Charter*. Bernard's section 8 *Charter* argument alleging that the disclosure constituted an unconstitutional search and seizure similarly had no merit.

The partial dissent

Justices Rothstein and Moldaver dissented in part. They took the position that the main issue in the appeal was about a tribunal which wrongly declined to exercise its jurisdiction to hear and determine *Charter* arguments. They held that where a tribunal does not respond to a constitutional challenge because of a mistaken understanding of its jurisdiction, it is

wrongfully declining the jurisdiction that it not only has, but that it must exercise. Thus, they differentiated between a tribunal exercising its discretion to decline to address non-meritorious *Charter* arguments and a tribunal that wrongly decline to exercise its jurisdiction to consider *Charter* arguments. In this case, they held the latter had occurred. In concluding that the Board was barred from determining Bernard's *Charter* arguments on reconsideration, both the Board and the Federal Court of Appeal erred in law. This jurisdictional error resulted in a denial of procedural fairness insofar as Bernard was deprived of her right to make her *Charter* submissions and have them considered and ruled upon.[125]

Rothstein and Moldaver JJ., however, went on to conclude that the mere provision of Bernard's home address and telephone number to the union could not be characterized as either forced association—in breach of section 2(*d*) of the *Charter*—or a seizure for the purposes of section 8 of the *Charter*.

125. Given that they decided that there was a jurisdictional error, why did Justices Rothstein and Moldaver need to characterize that as a denial of procedural fairness?

2. *Alberta (Information and Privacy Commissioner) v. UFCW, Local 401*

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401[126] involved an appeal by the Information and Privacy Commissioner of Alberta[127] from a judgment of the Alberta Court of Appeal which held that the *Personal Information Protection Act (Alberta)*[128] (PIPA) breached the freedom of expression of the union by preventing it from recording and photographing individuals crossing the picket line. The union had used the videos and photographs for signage and website communications. The Court of Appeal held that PIPA was overbroad, unjustifiably restrained the union's freedom of expression and the breach could not be saved under section 1 of the *Charter*. It granted the union a constitutional exemption from the application of PIPA.

The Supreme Court of Canada dismissed the Commissioner's appeal. Speaking for a unanimous court, Justices Abella and Cromwell held that PIPA violated section 2(b) of the *Charter* because its impact on the union's freedom of expression in the labour context was disproportionate and the infringement was not justified under section 1. The Supreme Court agreed with the reviewing judge and Court of Appeal that the collection, use and disclosure of personal information by the union in the context of picketing during a lawful strike was

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126. 2013 SCC 62. For another case dealing with section 2 of the *Charter*, see *Najafi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 876, which dealt with an alleged breach of both the freedom of expression and freedom of association stemming from an inadmissibility decision due to the applicant's involvement with a political group. The Federal Court noted the non-discretionary nature of the board's decision and applied the correctness standard. The board's inadmissibility decision was upheld.

127. In the subsequent decision in *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (discussed above), the Court of Appeal of Alberta decided that the Commissioner did not have standing to appeal a decision of the Court of Queen's Bench granting an application for judicial review.

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

inherently expressive.[129] Accepting a joint submission from the parties, the Supreme Court struck down PIPA in its entirety, but suspended its decision for one year to allow the Legislature to pass legislation that would make PIPA *Charter*-compliant.[130]

3. *Harkat*

In *Re Harkat*,[131] the Supreme Court of Canada rejected an argument that the scheme under the *Immigration and Refugee Protection Act* (IRPA)[132] governing the issuance of security certificates violates section 7 of the *Charter*.

The *Charter* challenge revolved around the issues of disclosure and fair process, and particularly (1) whether the failure by the Minister to disclose summaries of intercepted conversations which were tendered as evidence and the destruction of source materials breached section 7; (2) whether the restrictions on the participation and communications of special advocates violates section 7; and (3) whether the admission of hearsay evidence was unconstitutional.

The Court held the IRPA scheme did not violate the *Charter*. It noted the gatekeeper role of the designated judge under IRPA and concluded the scheme provides sufficient disclosure to the named person since the designated judge has a statutory duty to ensure that the person

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129. At para. 10.

130. The year expires on November 15, 2014. The Legislature had not passed any amending legislation prior to being prorogued until November 17, 2014. It is understood that the Alberta Government will be asking the Supreme Court for an extension until after the Legislature has been recalled.

131. 2014 SCC 37.

132. S.C. 2001, c. 27, ss. 77 and 83.

is reasonably informed of the case against him or her. A person is "reasonably informed" if he or she has received sufficient disclosure to be able to give meaningful instructions and guidance to counsel and/or special advocates.[133]

The Court stated that "[p]rocedural fairness does not require a perfect process" and that "[t]he overarching question, therefore, is whether the amended IRPA scheme provides a named person with a fair process, taking into account the imperative of protecting confidential national security information."[134] Section 7 does not require a "balancing approach to disclosure."[135] The IRPA scheme gives the designated judge broad discretion to require proper disclosure, exclude evidence and ensure a fair process.[136]

4. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*[137]

In early October 2014, the majority of the Supreme Court of Canada[138] used section 96 of the *Constitution Act* to hold that court fees which varied with the length of a civil trial were unconstitutional because they interfered with the constitutionally-protected right of citizens to access the courts.

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133. At para. 56.

134. At paras. 43 and 44.

135. At para. 66.

136. On another note, the Court also held that CSIS human sources are not protected by a class privilege.

137. 2014 SCC 59.

138. Chief Justice McLachlin and Justices LeBel, Abella, Moldaver and Karakatsanis.

Justice Cromwell reached the same result, but on administrative law grounds rather than constitutional grounds. He held that the exemptions to the fees could not be interpreted in a way that would be consistent with the common law right of access which is preserved by the *Court Rules Act* under which the fees were established. Accordingly, the fees were *ultra vires* the regulation-making authority conferred by the Act.

Justice Rothstein dissented, and his reasons are well worth reading.

VII. A MISCELLANY OF OTHER DEVELOPMENTS

A. Challenging the validity of regulations

Katz Group Canada Inc. v. Ontario (Health and Long-term Care)[139] dealt with a challenge to the validity of the regulations under Ontario's *Drug Interchangeability and Dispensing Fee Act*[140] and the *Ontario Drug Benefit Act*.[141] The purpose of the two Acts was to address the problem of rising drug prices and to permit the use of generic drugs to help control prices.

In 2010, the regulations were amended to create a category of drugs designated as "private label products" which included products sold but not fabricated by a manufacturer which did not have an arm's length relationship with drug wholesalers or pharmacies. Under the regulations, private label products cannot be listed as generic or interchangeable drugs. The appellants challenged the regulations as being *ultra vires* on the grounds that they were

139. 2013 SCC 64.

140. R.S.O 1990, c. P.23.

141. R.S.O. 1990, c. O.10.

inconsistent with the purpose and mandate of the statutes. The Ontario Court of Appeal dismissed the appellant's argument, and the Supreme Court of Canada confirmed that decision.[142]

The Supreme Court held that a successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate. Regulations benefit from a presumption of validity. The burden is on the party challenging the regulations to demonstrate their invalidity and an interpretative approach that reconciles the regulation with its enabling statute should be used. In this case, the regulations flowed directly from the statutory purpose and scope of the mandate.

Interestingly, the Supreme Court does not explicitly refer to the standard of review to be used in determining the legality of regulations—somewhat reminiscent of the Court's approach in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*.[143]

See also Justice Cromwell's reasons in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*.[144]

B. Availability of Judicial Review

The Ontario Court of Appeal held that a decision by a private secondary school's Board of Directors to expel a student was not an exercise of a statutory power of decision in *Setia v.*

142. 2011 ONCA 830.

143. 2004 SCC 19.

144. 2014 SCC 59.

Appleby College.[145] The Court noted that the College received no public funding and was not governed by the *Education Act (Ontario)*[146] provisions dealing with behaviour, discipline and safety. Even though the principles of procedural fairness apply to consensual bodies, the expulsion decision did not have a sufficient public dimension to fall within the ambit of public law and justify a public law remedy. Therefore, the Divisional Court did not have jurisdiction to judicially review the decision.

C. The record

In *IMP Group International Inc. v. Nova Scotia (Attorney General)*,[147] the Nova Scotia Supreme Court reviewed "some basic principles respecting the record on judicial review and statutory appeal". The Court found that IMP was seeking open-ended disclosure of materials without adducing any evidence to suggest that the Record was inadequate to provide a basis for judicial review. It concluded that IMP was asking the Court to speculate that additional relevant materials might exist and refused to order disclosure.

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145. 2013 ONCA 753. See also *Maloney v. Shubenacadie Indian Band*, 2014 FC 129, in which the Federal Court reviewed the criteria to determine whether a decision was of a public as opposed to a private nature and concluded that a Band Council's decision to assign a fishing quota was subject to judicial review. And see *Rapiscan Systems Inc. v. Canada (Attorney General)*, 2014 FC 68.

146. R.S.O. 1990 c. E.2.

147. 2013 NSSC 332.

D. Prematurity of appeal proceedings

In *MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta*,[148] an Investigation Committee decided to refer a disciplinary matter to a hearing before a Discipline Committee. At the outset of the hearing, the Appellant brought a preliminary application alleging that the Investigation Committee's decision was void due to procedural unfairness. The Discipline Committee agreed with the Appellant and held that the referral to a hearing was void. The Investigation Committee appealed to the Appeal Board which overturned the decision and referred the matter back to a differently constituted Discipline Committee. The Appellant appealed to the Court of Appeal of Alberta. The Court of Appeal adjourned the appeal *sine die* on the grounds that it was premature. The administrative proceedings had not been completed and the Court did not want to interfere in the administrative process.

E. Time limit for judicial review

In *Greater St. Albert Roman Catholic Separate School District No. 734 v. Buterman*,[149] the Alberta Court of Queen's Bench dismissed an application for judicial review on the basis that the application was not brought within the required time period. Greckol J. held that the time began to run when the Director of the Alberta Human Rights Commission decided that he had no authority to reconsider a decision to dismiss the complaint. Neither a subsequent reiteration of the request by the School Board nor the reiterative response by the Director revived the time limit.

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148. 2014 ABCA 58.

149. 2014 ABQB 14.

F. Solicitor-client privilege

Surprisingly frequently, the issue of solicitor-client privilege surfaces in the administrative law context.

1. *Slansky*

In *Slansky v. Canada (Attorney General)*,[150] a criminal lawyer complained to the Canadian Judicial Council about alleged misconduct by a federally appointed judge. The function of the Canadian Judicial Council (CJC) is to investigate complaints and make recommendations to the Minister of Justice. The Chair of the CJC dismissed the complaint and closed the file without referring it to a hearing panel. In making his decision, the Chairperson relied on a report from counsel whom he had retained to make further inquiries into Slansky's allegations.

Upon judicial review of the Chairperson's decision, Slansky sought disclosure of the report, but the CJC refused to disclose it on the grounds of solicitor-client privilege and pubic interest privilege. Slansky brought a motion before a Prothonotary for an order compelling disclosure of the report. The Prothonotary ordered disclosure, subject to the redaction of pages in the report that she considered to be legal advice.[151]

Allowing the CJC's appeal, Justice de Montigny of the Federal Court held that the report was subject to both legal advice privilege and public interest privilege, and that the factual components of the report could not be severed. However, he ordered the CJC to disclose the

150. 2013 FCA 199; leave to appeal denied at [2013] SCCA No. 452.

151. 2011 FC 476.

6,000 pages of trial transcript examined by the report's author as well as other publicly available materials that the author had considered in preparing the report.[152] Slansky appealed that decision to the Federal Court of Appeal.

The majority of the Federal Court of Appeal dismissed the appeal but varied the Federal Court's order slightly by ordering disclosure of 2 pages of the report. Justices Evans and Mainville gave separate but concurring judgments. Justice Stratas dissented.

The majority decision by Evans J.A.

Evans J.A. agreed with the decision of Justice de Montigny that the relationship between the author of the report, Professor Friedland, and the CJC was one of solicitor and client:

> 109 In summary, when Professor Friedland was engaged to conduct further inquiries into Mr. Slansky's allegations, and to submit a report on them to assist the Chairperson to discharge his legal duty to decide on how to proceed with the complaint, he was engaged in his professional capacity as a lawyer. In view of the complexity and nature of the complaint, any analysis of the data that would assist the Chairperson required the skills and knowledge of a lawyer. Hence, when the letter of engagement is read in the context of this complaint, it is my view that Professor Friedland was engaged to provide legal advice or otherwise to act as a lawyer. The report of his inquiries is therefore subject to legal advice privilege.

He went on to agree with Justice de Montigny on the issue of severance:[153]

> 112 As the Court observed in *Gower*, it is not permissible to sever findings of fact made in an investigative report covered by solicitor-client privilege when they form the basis of, and are inextricably linked to, the legal advice provided.

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152. 2011 FC 1467.

153. Subject to allowing the disclosure of a few pages of the report which contained statements made by third parties and policy advice.

Mr. Justice Mainville concurred with Justice Evans's outcome, but based his reasons more on public interest privilege than solicitor-client privilege.

The dissenting decision by Justice Stratas

Stratas J.A. would have held that the report was not privileged. He concluded that the prerequisites for legal advice privilege and public interest privilege were not satisfied and that, even if solicitor-client privilege did apply, it had been waived by the CJC.

On the issue of whether a solicitor-client relationship exists, Stratas J.A. held that the retainer letter or letter of engagement was the predominant factor to be considered. Here, the letter of engagement defined Professor Friedland's task as an information gatherer who, if necessary, could clarify ambiguities in the complaint. He was not instructed to provide legal advice, opinion or analysis or to weigh the merits of the complaint. Stratas J.A. stated:

> 221 In essence, the Council's submission is that if a person, working within a legal mandate and subject to legal obligations, chooses to hire a lawyer rather than an ordinary investigator to conduct a factual inquiry, privilege arises.
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> 222 I reject this. The mere fact that a lawyer is involved does not make a report generated by the lawyer privileged: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 at paragraphs 19-20; *Campbell*, *supra* at paragraph 50 ("not everything done by a...lawyer...attracts solicitor client privilege").
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> 223 Instead, the documents or information said to be privileged must themselves be for the dominant purpose of giving or receiving legal advice or closely and directly related to the seeking, formulating or giving of legal advice: *Pritchard*, *supra*, at paragraph 15; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445 at paragraph 36; *Campbell*, *supra*, at paragraph 49; *Descôteaux et al.*, *supra*, at page 872-873; *Solosky*, *supra*, at page 835; *Thompson v. Canada (Minister of National Revenue)*, 2013 FCA 197 at paragraph 40.

Stratas J.A. also held that the CJC was attempting to extend the scope of solicitor-client privilege far beyond its purposes and what jurisprudence dictates:

> 240 As explained above, a necessary condition of solicitor-client privilege is the seeking and giving of legal advice or practical advice related to the legalities. However, before us, the Council sought to extend the scope of solicitor-client privilege far beyond the decided cases. It sought to shift the analytical focus from whether legal advice has been sought to whether the skills of a lawyer were required for the assigned task.
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> 241 This is based upon the Supreme Court's comment at paragraph 10 of *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 that solicitor-client privilege extends to "all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or *otherwise acting as a lawyer*" (emphasis added). This comment appears as an introduction to the Supreme Court's legal analysis.
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> 242 The precise issue in *Blood Tribe* was whether the Privacy Commissioner could access documents that were covered by solicitor-client privilege. Whether the documents were privileged was not in issue. Therefore, this introductory comment is surplusage.
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> 243 Further, in adding the comment, "otherwise acting as a lawyer," I query whether the Supreme Court might have been alluding, infelicitously, to a different privilege, litigation privilege. Under that privilege, lawyers acting as a lawyer under a litigation retainer enjoy a zone of privacy. Of note, some of the cases cited in the same paragraph deal mainly with litigation privilege or, indeed, a different concept, professional secrecy under Quebec civil law. None of the cases cited support the proposition that solicitor-client privilege includes situations where a lawyer is "otherwise acting as a lawyer."
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> 244 Outside of this infelicitously worded introduction in *Blood Tribe*, the Supreme Court has never considered "otherwise acting as a lawyer" to be enough for solicitor-client privilege to apply. Indeed, that would be contrary to its own authorities that the privilege is not triggered just because a lawyer is involved, and many other authorities to the effect that the activities of lawyers doing things typically done by lawyers are not necessarily privileged: *Pritchard*, *supra* at paragraphs 19-20; *Campbell*, *supra* at paragraph 50; authorities cited above at paragraphs 224-232.
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> 245 Have decades of well-accepted jurisprudence in the law of solicitor-client privilege suddenly been swept aside by a sidewind - a fleeting, introductory comment in *Blood Tribe*? I think not.

On the issue of waiver, Stratas J.A. took the view that the CJC had waived privilege by voluntarily giving the report to third parties—the Law Society of Upper Canada and the Deputy Attorney General both had copies of the report.[154]

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154. An argument that both Evans J.A. and Mainville J.A. rejected.

Stratas J.A. also disagreed with Evans J.A.'s position that courts may not sever findings of fact made in an investigative report covered by solicitor-client privilege when they form the basis of, and are inextricably linked to, the legal advice provided.

2. *University of Calgary*

The case of *University of Calgary v. J.R.*[155] involved a statutory interpretation of Alberta's *Freedom of Information and Protection of Privacy Act* (FOIPP)[156] and, in particular, whether the Information and Privacy Commissioner has the authority to compel production of records with respect to which a party has claimed solicitor-client privilege for the purposes of determining whether the privilege applies.

While recognizing the importance of solicitor-client privilege to the due administration of justice, Justice Jones of the Alberta Court of Queen's Bench held that the Commissioner did have authority under FOIPP to order production of documents for the purposes of verifying claims of solicitor-client privilege.

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155. 2013 ABQB 652. A similar issue arose in Newfoundland about whether a provision in their *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1 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 Newfoundland 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: see *Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2010 NLTD 31, reversed 2011 NLCA 69. It will be interesting to see whether the Alberta Legislature will amend its legislation as was done in Newfoundland.

156. R.S.A. 2000, c. F-25.

It should be noted that this decision was stayed pending an appeal to the Court of Appeal of Alberta, which is scheduled to be heard on 13 January 2015.

G. Public nature of exhibits

In *Edmonton (Police Service) v. Alberta (Law Enforcement Review Board)*,[157] there was an issue about whether there was an implied undertaking of confidentiality with respect to the evidence presented at an appeal to the Law Enforcement Review Board, which would prevent the evidence being used for any other purpose (such as laying another complaint against a police officer).

The Court of Appeal of Alberta held that there is no such implied undertaking, particularly where the statute requires the Board's hearings to take place in public. Further, in the absence of a sealing order by either the Board of the court, the return of the record on an appeal is a public document.

With respect to when it might be appropriate to grant a sealing order, see the earlier decision in this case at 2013 ABCA 236.

VIII. CONCLUSION

The many moving parts of administrative law—and their interrelationship—continue to provide courts, statutory delegates and counsel with all sorts of practical challenges.

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157. 2014 ABCA 267.