DUNSMUIR AND THE CHANGING FACES OF CURIAL DEFERENCE & TRIBUNAL EXPERTISE: THE SHAPING OF A UNITARY STANDARD OF JUDICIAL REVIEW IN ADMINISTRATIVE LAW.

by

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Abstract

This paper focuses on the evolution of “reasonableness” as a unitary standard of judicial review and the role of tribunal expertise in that process. The modern era begins with *Nipawin* in 1973, a time when judicial review operated with a crude binary system of standards that allowed for either full curial deference (patent unreasonableness) or no deference (correctness). It ends in 2008 with *Dunsmuir* and the jettisoning of the highest standard of curial deference, the standard of patent unreasonableness. Correctness is now implicitly understood not as a standard but, as the justified absence of the need to extend deference to a tribunal’s decision. Patent unreasonableness and the middle ground standard of reasonableness have ostensibly been “collapsed” in favour of a single more rational, workable, flexible and sophisticated unitary system based on the multi faceted standard of reasonableness. It is argued that the new “standard of review analysis” expressed in *Dunsmuir* is simply a comprehensive restatement of all the previously articulated diverse and, typically, non-dispositive factors and exceptions. The hallmarks of this new standard are the recognition that, more often than not in administrative law, there is no one right or best answer and that, a reviewing court will respect and affirm a tribunal’s choice if it is within the range of options provided it is well reasoned. This paper also addresses the primarily academic criticism of the Supreme Court over conceptual problems in distinguishing patent unreasonableness from reasonableness, a dispute fuelled by this court’s continued attempts to justify a standard of review that allowed for a tribunal’s right to be wrong. It is argued that patent unreasonableness had become less of a standard of review and more of a simple expression of judicial censure for egregious fault in decision making; a qualifier to a finding of unreasonableness. Arguably that role may have been preserved even with the collapsing of the two standards into one standard in *Dunsmuir*. While *Dunsmuir* should have clarified many of the issues the three-way difference of opinion in the Court demonstrates continuing deep rifts that may portend further uncertainty. Uptake by lower courts indicates otherwise.
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Preface

Judicial review is the process by which a court is called upon to review the exercise of statutory authority delegated to an administrative tribunal or by some other form of statutory delegate such as a Cabinet Minister or the proverbial license bureau clerk. This work focuses on tribunals operating in a quasi-judicial manner.

This work addresses “curial deference”, the deference granted by the courts to the decisions of administrative tribunals. From the outset this writer refers to the “Pragmatic and Functional Analysis” and the “standards of review”.

The P&F Analysis was first enunciated by the Supreme Court of Canada in 1988. This analytical framework was intended to assist courts engaged in judicial review in focusing on just what purpose the provincial Legislature or Parliament intended to achieve in delegating decision making authority in a given domain to a tribunal. The standards of review were legal shorthand for the level of deference the reviewing courts should show to the decisions of tribunals in different circumstances.

The following summaries of the P&F Analysis and the standards of review that follow serve to provide some context to the reader from the very beginning.

When applying the Pragmatic and Functional Analysis, the standard of review is determined by considering four contextual factors:

a) the presence or absence of a privative clause or statutory right of appeal (The extent to which the Legislators have attempted in the legislation to shield their tribunal from judicial review.);

b) the expertise of the tribunal relative to that of the reviewing court on the issue in question;

c) the intended purposes of the law and the specific provisions in question; and,

d) the nature of the question (Is the question being decided one of pure fact, mixed fact and law or pure law and thus more likely, in the latter case, to fall solely within the expertise of the courts?).

These factors might overlap and no single one was meant to be dispositive. The overall aim was to discern legislative intent, keeping in mind the constitutionally protected supervisory role of the courts in maintaining the Rule of Law against incursions by the Legislators.

The “standards of review”, the level of curial deference to be afforded in a given situation, were traditionally defined as follows:

Patent Unreasonableness: The decision would be allowed to stand if it was “not patently unreasonable”. The level of curial deference afforded to the tribunal would be the highest. In its initial meaning, barring bad faith etc., a court would not enter into a review on the merits of the decision made by the tribunal unless it could be readily demonstrated that the error was patent on the face of the record.
Historically this level of deference contemplated that a privative clause in the law could be so strongly worded that it effectively ousted the courts’ authority to review and allowed for a tribunal’s right to be wrong.

Reasonableness: Initially this standard was somewhat problematically defined by way of distinguishing it from “patent unreasonableness” in that, if it took some significant searching or testing to find the defect, then the decision was simply unreasonable but not patently unreasonable. This standard allowed for the idea that there might be more than one right choice or answer. The tribunal’s choice, if reasonable, would be respected and allowed to stand.

Correctness: This standard was readily distinguishable from the other two in that, for a variety of reasons, little or no deference would be afforded to the decision of a tribunal. A reviewing Court could look into the case on its merits and substitute its own opinion as to what should have been done.

J.J.M.  

Chapter 1
Introduction

“With the enactment of Regulatory statutes came a proliferation of administrative tribunals. These boards and agencies were created in part out of the recognition that the traditional adjudicative model was ill suited to the determination of the issues to be dealt with by these tribunals. It was recognized that some matters addressed by various tribunals required a specialized technical knowledge and a process that was ill-suited to the courts. Instead of actually determining issues of this type, the courts were given the task of superintending administrative tribunals, and there evolved the jurisprudence concerning the court’s right to interfere in the decision of a board or agency.”

Words of the former Chief Justice of Ontario, the Honourable Mr. Roy McMurtry from his 1997 address to the Conference of Ontario Boards and Agencies.

The Chief Justice then quoted from an address delivered by Ms. Leah Price to the Canadian Bar Association in September of 1997 wherein Ms. Price stated:

No issue in administrative law attracts more heat [if not light] from the courts as the question of what standard should be applied in reviewing the decision of a tribunal. Much of the problem is of the Supreme Court’s making, in that it seems unwilling to set down rules that others [including other judges of the Court] can readily comprehend and follow. Moreover, the Court displays continuing schizophrenia towards tribunals, which one year must be accorded extreme deference, and the next year are more readily overturned. (As recounted in Sprague and Macaulay)\(^1\)

Ms. Price’s comment on a lack of direction from the Supreme Court of Canada\(^2\) has been a common and continuing lament. Whether justified or not is a question this thesis addresses.

This writer’s particular interest in tribunal expertise as a factor impacting on the level of curial deference granted was sparked by comments made in the Supreme Court’s 1995 ruling in *Canadian Pacific Ltd. v. Matsqui Indian Band*. (Matsqui)\(^3\) Although this

\(^1\) Robert W. Macaulay & James L.H. Sprague, Practice and Procedure Before Administrative Tribunal, looseleaf (Toronto: Thomson Carswell, 2007) [Macaulay & Sprague]

\(^2\) Any capitalized reference to the “Supreme Court” or simply the “Court” refers to the Supreme Court of Canada unless the context clearly makes reference to a lower court or the “Courts” generally.

\(^3\) *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] S.C.J. No. 1, [1995] 1 S.C.R. 3. [Matsqui Band] (In an effort to foster experience in self-government the federal government proposed delegating the authority to tax real property within reserves to the band councils. Assessment and appeal procedures had been drafted with the challenges first to be heard by tribunals established
decision was made on the basis of the availability of an “adequate alternate remedy” the apparent subtext to the decision was the perceived lack of expertise of a tribunal yet to be constituted to determine whether or not certain lands were “in the reserve” and thus subject to Band taxation.

Justice La Forest wrote that:

107 … The determination whether the respondents’ land is “in the reserve” is a jurisdictional question that brings into play discrete and technical legal issues falling outside the specific expertise of the band appeal tribunals. It is ultimately a matter within the province of the judiciary.

Essentially he ruled the proposed tribunal could not possess such expertise.

Justice Major echoed this concern:

135 Deciding whether land is "within the reserve" or not will inevitably require a consideration of a variety of factors, such as real property law, survey results, and treaty interpretations, to name but a few. These are matters in which the board has no expertise and over which there is no evidence that Parliament had any intention to grant the board jurisdiction.

This writer was left somewhat at a loss as to how these conclusions could be drawn given the Court had no idea as to who would sit on these tribunals or what procedures might yet be adopted by the Bands to ensure the members of the tribunal possessed the required expertise.

The key concept of “relative expertise” as opposed to simple expertise has developed over time. In the most recent major case addressing expertise and curial

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4 Ibid. at para.107.
5 Ibid. at para.135.
deference, the 2008 *Dunsmuir* case, the phrase expertise is mentioned 25 times. In 18 instances it is qualified as “relative”, “specific”, “specialized” or “core” all of which this writer takes to be roughly interchangeable. In the remaining seven instances it is often the case that “expertise” without a qualifier is found in a quote taken from earlier case law.⁶

The methodology for addressing the concept of relative expertise was set out by Justice Bastarache in 1998 in the *Pushpanathan* case.⁷ It involved the comparison of the value of applying the generalist expertise of the courts to the subject matter under review when compared to the technical or subject specific expertise that a tribunal may be able to bring to bear on the same question. Essentially the question is, will the Court’s intervention be a “value added proposition”? Relative expertise and the value added proposition are linked concepts.

This writer posits that within the modern body of case law, commencing with the *Nipawin* case⁸ in 1973, one can discern the formulation of a coherent set of principles. On occasion the waters were muddied by some members of the Supreme Court’s too ready grouping of diverse tribunals and the borrowing of principles derived from the work of one kind of tribunal to the radically different work of another.⁹ This in turn could

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⁶ *Dunsmuir* infra note 330.
⁷ *Pushpanathan* supra note 286. (See below, Chapter 3 at page 99 for a more detailed discussion.)
⁸ *Nipawin* infra note 201. (The SCC in *Dunsmuir* terms the “modern era” as commencing in 1979 with Justice Dickson’s judgment in *CUPE v. NB Liquor* infra note 207. When a year is referred to in the text it is taken from the neutral citation for the case as the reporter series may publish up to two years later. By way of example *Nipawin* issued in 1973 but was not reported until 1975.)
⁹ Perhaps the best example would be Justice L’Heureux-Dubé’s too ready borrowing from precedents applicable to labour tribunals to buttress her arguments in dissent in favour of the proposition that human rights tribunals should be afforded a high level of deference on questions of law. See for examples *Zurich* infra note 229 at para. 64, in particular and *Mossop* infra note 228 in general.
leave the judges of inferior courts, practitioners and their clients somewhat confused.

Chapter 2 is a thematically organized review of a selection of the commentaries on curial deference and tribunal expertise. It reflects a somewhat eclectic choice with an emphasis on lesser known works.

In Chapter 3 this writer traces these principles and argues that, in its latest decision addressing curial deference, the 2008 *Dunsmuir* case\(^\text{10}\), the Court has, to some extent, fallen away from a course it could have maintained, notwithstanding the criticism other judges, academics and practitioners. The review of the cases will focus on the introduction, development and transformation of the current core concept of the standard of reasonableness. The scenario is one of the courts' commencing in the seventies to eschew resorting to often obfuscating and inconsistent jurisdictional tools of convenience such as “collateral question” or “question not remitted to the tribunal”; the “preliminary question” theory\(^\text{11}\), in favour of the more coherent and internally consistent use of the expanded concept of reasonableness, the new unitary standard.

Chapter 4 will be a foray into proposals for tribunal reforms that might increase the prospects for a tribunal of garnering curial deference.

**Parameters:**

In general this thesis is restricted to studying the case law on what have been commonly referred to as “quasi-judicial tribunals” ("tribunals") and the deference

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\(^{10}\) *Dunsmuir* infra note 330.

\(^{11}\) *Ibid.* at para. 36.
granted to adjudicators operating in a more judicial format as opposed to the deference granted to the less judicially oriented work of other statutory delegates\textsuperscript{12} such as bureaucrats and ministers of state.

This thesis is further focused on cases dealing with substantive as opposed to procedural issues. While understanding cases such as \textit{Nicholson} and \textit{Baker}\textsuperscript{13} is central to understanding the procedural aspects of administrative law, the focus of this thesis is the recognition and assessment of subject matter tribunal expertise and the resulting level of curial deference that should be extended to tribunals when dealing with substantive issues.

It is now accepted that the expertise of a tribunal vis-à-vis the subject matter of its jurisdiction, “relative expertise”, is one of the principal if not the most important consideration influencing the level of deference the Supreme Court is prepared to grant to a tribunal’s decision.\textsuperscript{14}

It is this writer’s assumption that tribunal chairpersons would naturally seek the imprimatur of having their decisions regularly granted greater deference by the courts and, in particular, by the Supreme Court. One question is whether or not relevant raw subject matter expertise alone will lead to greater curial deference. For a variety of reasons specific subject matter or technical expertise does not always operate like a

\textsuperscript{12} The term “statutory delegate” has been used as a globally encompassing all forms of administrative action. Where the term “statutory delegate” is used in this paper it implies a discussion of the full range of administrative law decision makers.


trump card. These reasons are not always obvious or openly stated. There are many countervailing considerations. The variety and interplay makes discerning a principled or coherent approach on the part of the Supreme Court a sometimes challenging exercise.

One overarching principle is the courts’ obligation, exercised through judicial review, to supervise the activities of the “Legislators”15 with a view to preserving and protecting the Rule of Law. The instrument often relied upon is the superior courts’ constitutionally based supervisory authority over all legislation found in section 96 of the Constitution Act16. A privative clause in a tribunal’s enabling legislation17 is the expression of the extent to which the Legislators wish to see that tribunal’s decisions sheltered from or left open to judicial supervision or review.18 The effect of such clauses will often be tempered or limited by the courts with a view to stemming or reversing improper incursions by the Legislators or the Executive on the superior courts’ supervisory

15 The traditional formulation of our constitution is that the provincial Legislature or the federal Parliament, exercising legislative supremacy, debates policy in more or less broad terms, and then passes the legislation it believes will bring about the policy objectives. The implementation of the policy objectives as stated in the legislation is then left to the Canadian equivalent of the executive branch; the federal prime minister or the provincial premiere and his or her cabinet (often simply referred to as the “Cabinet”). Typically the policy objectives are implemented by way of regulations approved by Cabinet with more or less further delegation of authority, as permitted under the legislation, to the administrative bodies and / or tribunals charged with actually applying the legislation. The role of the Judiciary under our constitution extends not only to ensuring that Cabinet and the sub delegates have complied with the legislative objectives as expressed in the legislation but that they have also respected the limits on the authority of both the legislative and executive branches imposed by the division of powers contained in the Canadian Constitution generally and the Canadian Charter of Rights specifically. Party discipline in Canadian politics runs very strong and, thus, can operate to fully disguise the distinction between the legislative and the executive branches when a majority government is in power. For the purpose this thesis, unless the contrary is indicated, it is sufficient to accept that the legislative authority of Parliament or a Legislature is one and the same as the will of the Executive.

16 The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3 s. 96. [Constitution Act]

17 The case law uses the terms “constating” or “enabling” legislation interchangeably. This writer prefers the use of “enabling” as a more readily understandable term better reflecting the idea of delegation of authority.

18 Nipawin infra note 201 at 396. provides an example of a very strongly worded privative clause.

(21. There is no appeal from an order or decision of the board under this Act, the board may determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any certiorari, mandamus, prohibition, injunction or other proceeding whatever.)
authority.

This idea finds its origins in and is a variation on the early twentieth century works of A.V. Dicey. The principle finds one form of expression in Justice Rand's statement the 1959 case of *Roncarelli v. Duplessis* (*Roncarelli*) that “there is always a perspective within which a statute is intended to operate”. The idea of limiting the Legislators' efforts to encroach on the Judiciary’s role within the state flows through in the guise of section 96 arguments over the supervisory authority of the Superior Courts in cases such as the 1981 *Reference re: Residential Tenancies Act 1979 (Ontario)* (*Ref re RTA*) and the *Crevier v. Qué (AG)* (*Crevier*) case in the same year and the 2003 *Minister of Labour* case. The cases referred to will illustrate that the courts have regularly demonstrated considerable flexibility in finding reason to ignore or make use of a privative clause as they see fit. The 2003 *Paul* case states clearly that tribunals, like other “inferior courts” such as the provincially created small claims and provincial courts, even though they are creatures of statute, form part of a “unitary system of justice”. As

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19 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1961). [Dicey] (Dicey wrote that freedom was under attack by "modern incursions" against the Rule of Law. He posited that the freedom British subjects enjoyed was dependent on the sovereignty of Parliament, the impartiality of the courts free from governmental interference and the supremacy over both of the Common Law)

20 *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 at 141. [*Roncarelli*] (Rand J. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.)

21 *Reference re: Residential Tenancies Act 1979 (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714. at 729 [*Ref. re RTA*], Crevier *supra* note 21 at 236-238. (Summary comments from headnote: "Where a provincial legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, and where that insulation encompassing jurisdiction, the legislation must be struck down as unconstitutional because it constitutes, in effect, a s. 96 court. It is unquestioned that privative clauses, when properly framed, may effectively oust judicial review on questions of law and on other issues not touching jurisdiction. However, given that s. 96 is in the British North America Act and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, there is nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. Consequently, a provincially-constituted statutory tribunal could not constitutionally be immunized from review of decisions on questions of jurisdiction.")

22 *CUPE v. Minister of Labour infra* note 320 at para. 40.
such they must remain subject to section 96 superior court supervision through judicial review.\(^{23}\)

One cannot appreciate the difficulties inherent in formulating any set of rules or principles for tribunals unless one appreciates the diversity of the subject matter, the tribunals themselves. One authoritative source indicates there are 2,200 or so “administrative agencies” now operating in Canada.\(^{24}\) This includes statutory delegates of all stripes. In contrast to this rather large number another writer relied on the Ontario Ministry of Government Services classification of tribunals to arrive at a figure of 61 “tribunals” for Ontario with 70% or 43 of those being classified as “adjudicative”.\(^{25}\) The numbers will always vary according to the parameters set. In any event, the term “quasi-judicial” will always encompass a multitude of structures, domains, shades and textures. Quasi-judicial implies some form of court like formality to the decision making process. It does not imply that every agency that grants some form of hearing should fall within the category. As the courts are want to say, the determination is fact specific.

Macaulay and Sprague identify three broad varieties of “administrative tribunals”.\(^{26}\) Firstly, they mention the “advisory agencies” tasked by the Legislators with a discrete task. The best known recent examples would be the Gomery Inquiry into the federal sponsorship scandal or Ontario’s Walkerton Inquiry into that municipality’s tainted water supply. There is little doubt they operate quasi-judicially but, as one-off efforts with their

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\(^{24}\) Macaulay & Sprague supra note 1 at 4-2.


\(^{26}\) Macaulay & Sprague supra note 1 at 4-2.
tasks and mandate being very specifically limited and defined, discerning principles of broad application from the reviewing courts' treatment of their decisions can be difficult.

The second kind of administrative agency identified are rate setting agencies such as Ontario Power Generation or the Toronto Transit Commission.

The third category, the focus of this writer's attention, is the adjudicative or sector regulatory agencies. These include what was traditionally understood as the "quasi-judicial" or "adjudicative" tribunals. They will all share common characteristics in that they are all required to provide for some form of formal hearing. Within this group the diversity can be made patent.

In Ontario all municipal councils are empowered to launch full formal inquiries under the Public Inquiries Act (summonses, testimony under oath, power to commence contempt proceedings or launch stated cases) into the ownership of miscreant dogs.27 In contrast to the heft of that jurisdiction we can look at the authority of the Canadian Radio and Telecommunications Commission (CRTC). It operates in a well defined quasi-judicial format.28 It is charged with the delicate task of allocating access to the airwaves amongst many and diverse cultural interest groups;29 a policy implementation task for which the judges of a generalist court would be ill suited. While the identity and

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27 Livestock, Poultry and Honey Bee Protection Act, R.S.O. 1990, C. L.24 S. 16 (Inquiry to ascertain owner of dog that has destroyed livestock or poultry.)
6.(1) The council of a municipality may conduct an inquiry in order to ascertain the owner of a dog that has killed or injured livestock or poultry within the municipality.
(2) The council of a municipality for the purposes of an inquiry under subsection (1) has the powers of a commission under Part II of the Public Inquiries Act, which Part applies to such inquiry as if it were an inquiry under that Act.

and Public Inquiries Act, R.S.O. 1990, c. P.41, ss. 7-14.
28 <http://www.crtc.gc.ca/eng/LEGAL/Brodact.htm>
29 <http://www.crtc.gc.ca/eng/about.htm#mandate> and Broadcasting Act, S.C. 1991, c. 11, s.3.
relevant expertise of the members of the CRTC is a matter of public record\(^{30}\), divining the relevant expertise of the members of the elected council of a small rural municipality operating ad hoc would likely be next to impossible.

The type of question brought before certain tribunals highlights difficulties or shortcomings in the operation of particular principles or concepts. The Immigration Refugee Appeal Board (IRAB) deals with cases that may result in deportation to torture or death. Some academic commentators have suggested that one principle, consideration of the “outcome” or “impact on vulnerable individuals”\(^{31}\), was still missing from the Pragmatic and Functional Analysis introduced by the Supreme Court in 1988. Outcome, the importance of the decision to the individual or individuals affected, is the third consideration of procedural fairness enunciated in the milestone 1999 decision in *Baker*.\(^{32}\) *Dunsmuir* appears to have incorporated this fact in the new standard of review analysis.\(^{33}\)

Tribunals regulating specific market or economic sectors highlight another variable; the question of whether the matter before the tribunal is “polycentric” in that there may be the balancing of many interests or policies involved for which the tribunal is particularly well qualified to weigh the evidence and balance the considerations. Polycentric implies there may be no single right answer. This would be as opposed to a

\(^{30}\) <http://www.crtc.gc.ca/eng/about/commissioners.htm>


\(^{32}\) *Baker* supra note 13.

\(^{33}\) *Dunsmuir* infra note 330.
question with grave consequences involving an individual (deportation) or distinct group (i.e. access to funding for medical treatment) where the outcome may, in extreme cases, be fatally dispositive. It would be understandably easier to defer in a polycentric situation.

Implicit in many instances is a concern as to whether or not the government is involved as an interested party. It seems axiomatic that concerns about the level of independence a tribunal enjoys must be greater where the adjudicators are beholden to the government of the day. This concern was aptly expressed by Chief Justice Lamer in Cooper v. CHRC where he opined on the appropriateness of having tribunals rule under section 52 of the Constitution on the validity of their own enabling legislation:

13 The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by judicial bodies. Although the judiciary certainly does not have an interpretive monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the Charter. The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task......

Other dimensions to assessing a tribunal relative expertise are the institutional, operational and structural dimensions. By way of example questions can be asked such as whether the tribunal sits regularly, thus enhancing the prospect of there being institutional expertise, or on an ad hoc or occasional basis. Does the enabling statute provide for the creation of panels with a blend of expertise or by a single member drawn

from a cadre with mixed backgrounds? Does the enabling statute or its regulations require any sort of qualifications or is it left open to the Minister to create the cadre on the basis of patronage alone? Is there a very singular technical expertise at play such as when Dr. Moyra J. McDill (Doctor of Philosophy in Mechanical Engineering) of the Canadian Nuclear Safety Commission Tribunal was required to weigh the effectiveness of a nuclear reactor’s failsafe mechanisms? In contrast, is it a more broad based political / policy expertise such as when Mr. Alan R. Graham of the same board (Former Conservative New Brunswick Minister of Agriculture, Minister of Natural Resources and Deputy Premier) is or may be called upon to consider the many non technical and sometimes political or policy factors that may go into approving the continued production of medical nuclear isotopes, safety considerations notwithstanding? Given the very different levels and varieties of expertise and experience that may exist within a tribunal, assessing just when a reviewing court is better qualified to consider the issues may not be obvious. In such circumstances, can expertise really be determined on a tribunal basis or, can or should it be determined with regard to the specific member or panel’s expertise and, if so, how and when should this kind of evidence come before a reviewing court?

The history of the tribunal or the enabling legislation may also come into play. The best example is that of the higher level of deference now typically granted to labour

35 http://www.omb.gov.on.ca/about/pamphlet2.html. (The Ontario Municipal Board is a case in point: “the Ontario government appoints Members to the OMB. Members include people from different areas of the province with diverse backgrounds such as lawyers, former elected officials, engineers, surveyors, planners and public administrators”)

36 <http://www.nuclearsafety.gc.ca/eng/commission/about/commission_members.cfm#Keen>

37 Ibid.
arbitrators and boards. It can be argued that this deference finds some of its historical roots in the Court's early role as the convicting authority of union organizers following charges for restraint of trade and for awarding damages in civil suits for lost profits against union organizers and members.\textsuperscript{38} The legislation contemplating the appointment of independent boards dates back to 1907 at least.\textsuperscript{39} Once fostering collective bargaining was accepted by the government as the best route to industrial peace, in light of the courts' having been perceived as the instrument of the government's initial effort to suppress the development of unions, all involved recognized the need to exclude the courts and refer to and defer to tripartite boards made up of representatives from industry, labour and jointly chosen neutral chairs. In the Labour Law context there developed a concept similar to relative expertise but less dependent on the technical qualifications. It was the recognition of an acquired form of expertise referred to as “field sensitivity”. It is a concept that is regularly mentioned when labour arbitrator or board decisions are being reviewed.

\textbf{In Closing: The Nature of the Question.}

Often operating as a difficult and murky threshold task is that of identifying whether the tribunal is dealing with a question of fact (deference typically afforded to the tribunal); mixed law and fact (difficult if not impossible to define but deference

\textsuperscript{38} Legislation Branch, Department of Labour, “A Historical Outline of the Principal Dominion and Provincial Labour Laws”, (Ottawa: Legislation Branch, Department of Labour Canada, August, 1945) at 7.

\textsuperscript{39} \textit{Ibid.} page 11. (Parliament's passing of the \textit{Industrial Disputes Investigation Act} in 1907.)
sometimes afforded) and questions of general or pure law (deference only afforded if the question lies within the particular expertise of the tribunal within its enabling legislation or closely related legislation).\textsuperscript{40}

In this writer’s opinion, despite valiant efforts, the fact, mixed fact and law and law distinctions have not and may never be fully explained. The best one can do is to provide illustrative specific examples. Like obscenity, it appears to be more of “I can’t define it but I know it when I see it” proposition.\textsuperscript{41} The majority of the Supreme Court has now specifically stated that the precedential import of the question, i.e. one that is of central importance to the legal system, will also operate as a free standing factor in the Pragmatic and Functional Analysis; now newly renamed as the “judicial review analysis”.\textsuperscript{42}

At the core of this thesis is a challenge to the idea of some commentators that there can or should be a comprehensive set of principles underpinning a categorical and dispositive system of universal application regarding the issue of curial deference in administrative law. Dispositive categories operating as standards of review not only ill fit the necessary complexity and variety of tribunals but also ignore how, once a tribunal is created it may, as a microcosmic legal system in its own right, organically generate its

\textsuperscript{40} Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] S.C.J. No. 4, [1995] 1 S.C.R. 157 at para. 48. [CBC v. CLRB] (Iacobucci J. “As a general rule, I accept the proposition that curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate.”)

\textsuperscript{41} Jacobellis v. Ohio, 378 U.S. 184 (1964). [Jacobellis] (U.S. Supreme Court Justice Potter Stewart trying to explain "hard-core" pornography, or what is obscene, by saying: "I shall not today attempt further to define the kinds of material I understand to be embraced . . . but I know it when I see it . . .”)

\textsuperscript{42} Dunsmuir supra note 330 at para. 70. (Majority opinion with Justice Binnie dissenting on this issue at para. 128 referring to it as a distraction. Precedential import as a factor was addressed in 1996 by Justice Iacobucci in Southam supra note 262 at para. 37.)
own appropriate set of well reasoned principles and rules in response to its own particular or peculiar subject matter / jurisdiction. The need to remain open to these considerations has found better accommodation in the new and broader factor based unitary standard of reasonableness..

In addition, it is this writer’s contention that the rise of the concept of “reasonableness” as a unitary standard of curial deference can be traced logically if one does not feel compelled to ask, as one would of a Deity, that all be made patent and all inconsistencies be reconciled. As one commentator noted Dunsmuir is characterized by “the desire of the courts to say something new while being held by the ghost of the past.43 The work of the Supreme Court is a human endeavour with the cast of characters changing regularly as does the mix of foibles and opinions they bring to the table.44 Reasonableness contemplates there likely being more than one reasonable outcome in most situations and that the reviewing courts should, whether or not the court in question might have made a different decision, respect and affirm a properly articulated and reasoned decision for the choice made by the tribunal. In the event that the tribunal failed in its task of supporting its rationale with a good set of reasons supporting the outcome there should be no obligation on the reviewing court to grant curial deference.

43 Various. ("Roundtable on Dunsmuir * Faculty of Law, University of Toronto, June 4, 2008), Summary of Proceedings, <http://www.law.utoronto.cadocuments/conferences/dunsmuir_writeup.PDF>

44 Appendix A illustrates the comings and goings of the various members of the Supreme Court with annotations at the bottom showing when the milestone cases discussed in Chapter 3 were decided.
Chapter 2

Literature Review

Introduction:

The selection of works which follows is not exhaustive. A series of passing comments on every author who ever addressed curial deference or tribunal expertise would not advance understanding. This is a thematic review of a select sampling. The preference was for milestone works and those that provided a new, interesting or different perspective. To some extent, effort was made not to overload the review with references to the very important but already well acknowledged works of authors such as Prof. David Mullan of Queen’s University.45

The sources are ordered chronologically within each theme. As these comments are read, it may be helpful to keep in mind the timing of key cases in the development and transformation of the standard of review.46

45 A helpful complete listing of the writings of Prof. Mullan’s published works can be found as the appendix to the collection of articles gathered in tribute to Prof. Mullan, a Festschrift to his long, distinguished and influential career. Grant Huscroft & Michael Taggart, eds., Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan (Toronto: University of Toronto Press, 2006 [Huscroft & Taggart]

46 1979 CUPE v. NB Liquor Dickson, J. on Patent Unreasonableness
1981 Crevier Laskin C.J. on Reviewing Courts Dicey and the Rule of Law
1988 Bibeault Beetz J. on the Pragmatic and Functional Analysis
1993 Mossop Lamer J. v. L’H-D J., Expertise alone will not suffice
1994 Southam Iacobucci J. and the paradigm enabling statute and tribunal
1998 Pushpanathan Bastarache J., First re-statement of the law
2001 Ocean Port McLachlin C.J. On tribunal judicialization
2003 Dr. Q. McLachlin C.J. the second re-statement of the law
Ryan Iacobucci J. Discrete as opposed to a spectrum of standards
CUPE v. Minister of Labour Gonthier J Labour tribunals receive quasi-constitutional protection.
Martin Gonthier J. and the Charter extension to tribunals
2008 Dunsmuir Bastarache and LeBel Another restatement of principles from a divided court.
The Scope of Administrative Law:

In 2006, a collection of articles on administrative law was gathered into a “Festschrift”, a form of tribute to the work of Prof. David Mullan of Queen’s University. Many of the chapters are insightful capsules into specific aspects of the study of administrative law. Of particular interest was Professors MacLauchlan’s and Bryden’s article dealing with the impact of Prof. David Mullan’s 1,500 page course / casebook on administrative law47 when viewed in contrast to Dussault and Borgeat’s five volume “Traité de droit administratif”.48 What can be drawn from this comparison is an appreciation of the variety of different governmental activities contained in the basket of “administrative law”. Mullan’s text tends to address quasi-judicial and non judicial administrative action with a focus on how the operation of state mechanisms impacts on the individual. In contrast the Dussault and Borgeat’s work is said to include all of the state’s intra bureaucratic actions, including budget allocations and any other action used to control or mobilize the state’s operations and resources.49 By understanding this difference in the breadth of the field one is led to understand that commenting on administrative law first requires that the writer identify just which of the multiple facets of administrative law will be addressed.

In the same vein, Macaulay and Sprague’s discussion of the shape, variety and


48 Ibid. at 33

49 Ibid. at 33.
number of administrative agencies (“statutory delegates”) is helpful in gaining further perspective on the extent to which “administrative law” has blossomed. The scope and variety of organisms and processes that fall under the banner of administrative law, as well as the volume of legal discourse generated by their operations, can lead one to conclude that nothing less than a new branch of government has been or is being created which the Legislators, the Executive, the Judiciary and the academics are still trying to understand, classify and control.50

**The Standard of Review**

Standard of review initially referred to the “threshold” level of curial deference a court would apply in screening which decisions of a statutory delegate should be subject to judicial review. The answer to this initial question might lead a court to conclude that the standard of review was “patent unreasonableness”, a finding that would foreclose a review on the merits in most circumstances. Throughout this work, the writer has tended to prefer discussing the issues in terms of “curial deference”. Much ink was expended in this sometimes over-thought debate on the “standards of review” operating solely as a threshold or preliminary question.

The issues the Supreme Court has wrestled with in the almost thirty years since the 1979 *CUPE v. NB Liquor* decision are not unique to Canada. In his 2000 background paper to B.C.’s Administrative Justice Project Frank F.V. Falzon, government counsel to the project, provides a wonderfully succinct and enlightening summary of the situation at

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50 *Macaulay & Sprague* supra note 1 at pp. 4-1 to 4-3.
that time in England and the United States. 51

Maître Daniel Chénard’s 2003 French language review of what is implied and expressed in the courts’ use of the P&F Analysis “Le dit et le non-dit” is helpful less for its new insights than for its thorough review of the common law and civil case law and the perspective it provides on the operation of the Tribunal Administratif du Québec (TAQ), Québec’s four branch integrated administrative appeal tribunal discussed in greater detail below. 52 It is first and foremost a practitioner’s guide to a very difficult area of the law. This paper was delivered at a conference in the summer of 2003. Unfortunately it remains unpublished and difficult to obtain. 53

In his 2006 article, “Standards of Review and Sufficiency of Reasons: Some Practical Considerations”, Professor Philip Bryden, also a participant along with Frank Falzon in B.C.’s Administrative Justice Project, sets out to provide some guidance for practitioners. 54 Bryden supports the idea that the standard of review should first be determined before entering into a review on the merits. 55 This writer takes issue with this proposal. It is at the centre of this thesis that the Supreme Court has moved past the idea of using standards of review as obscuring filters, a threshold question to be addressed before the real question can be looked at. Perhaps more importantly, given


52 Below at 140.


55 Ibid. at 211.
how the P&F Analysis (now standard of review analysis as of the 2008 Dunsmuir decision) requires the reviewing court to enter into and determine the nature of the question, it is very difficult to see how the arguments and evidence could ever be unravelled into a truly bifurcated approach. It is only in a situation like motor vehicle negligence where the process of determining the conceptually different question of liability can be completely separated from proof and argument on the issue of damages.

This difference of opinion aside, Bryden is one of the most lucid, cogent and readable authors on the subject. This article is particularly helpful in focusing on the Monsanto cases as an example, if not the best example, of where the considered application of the same analytical tools by the Ontario Court of Appeal and the Supreme Court of Canada to a seemingly expert tribunal addressing a legal question falling squarely within its jurisdiction could result in the application of different standards of review; reasonableness before the Court of Appeal and correctness before the Supreme Court, with both being unanimous decisions. Of particular interest is the comment made by the Supreme Court to the effect that the consolidation of a number of jurisdictions under a relatively small panel of 12 adjudicators, the Financial Services Commission, likely meant that this new tribunal could not muster the same level of focused expertise of its more specialized predecessor, the Pension Services Commission. Bryden draws the conclusion that the Supreme Court must believe that “a governmental policy of tribunal consolidation carries with it the implication that the

consolidated tribunal is inherently less “expert”. 57 In addition to this contribution, Bryden also provides a helpful summary of the cases where concerns over the interpretation of the standard of review have been openly expressed by the courts.58

Bryden followed in 2005 with “Understanding the Standard of Review in Administrative Law”.59 It is a work that delivers exactly what the title promises. This article was written prior to the 2008 Dunsmuir case where patent unreasonableness standard of review was ostensibly collapsed into the new reasonableness standard. The practical focus of the article is an attempt to equip practitioners with arguments for addressing just what falls into that category. Bryden outlines the standard of review debate in the first part of this 32 page paper successfully extracting and isolating several important streams of thought. He comments on the too ready borrowing of principles appropriate to one kind of tribunal to another, the tendency of the courts to extend uncritically the P&F Analysis to inappropriate bodies such as municipal councils and school boards,60 the potential for confusion when the Supreme Court chooses not to repudiate discredited approaches61 (he himself is not reticent in sweeping aside a

58 Ibid. at 193, n. 4.
60 Ibid. at 78. see also Multani v. Commission scolaire Marguerite-Bourgeoys, Singh-Multani v. Marguerite-Bourgeoys (Commission scolaire), 2006 SCC 6, [2006] 1 S.C.R. 25. [Multani] (Multani is the case of a non-denominational school board having to deal with a question of impinging on freedom of religion. It involved a young Sikh’s having the right to carry a ceremonial dagger under his clothes in school. Ruling on this kind of issue would be as opposed to the run of the mill curriculum and budget concerns it a school board is normally tasked with. This provides a good example of the “Compromised” tribunal. In this instance it is compromised because it is seldom called upon and thus inexperienced. See note 144 for a fuller discussion of the idea of compromised tribunals.)
good deal of chaff), and, the inconsistency arising when critical factors such as weighing Charter considerations produces differing results. Bryden is also one of the few commentators on the characteristics of the standard of correctness. Citing the 2004 case of Voice Construction Ltd. v. Construction and General Workers’ Union, Local 92 (Voice Construction), he anticipates the disappearance of patent unreasonableness. Bryden comments on CUPE v. NB Liquor to the effect that the Supreme Court's having forced itself into the straightjacket binary response of patent unreasonableness or correctness inevitably led to the creation of the middle ground reasonableness standard in Southam. In extracting strands of thinking from the case law as he does, he allows the reader to see just how the Supreme Court's thinking has moved from concept to concept in transforming the standard of review debate.

Concluding that patent unreasonableness had become no more than a subset of unreasonableness, he devotes the second part of the article to listing those situations that will always lead to a finding of patent unreasonableness: a) bad faith, b) relying on legal authority not in effect or repealed or judgments overturned, c) finding facts where there is no evidence in support, d) going beyond authority into policy-making verging on lawmaking contrary to discernable legislative intent and, e) arguably, making a

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62 Ibid. at 83-84. (See his “at the risk of over simplification” comment at the bottom of the page.)
63 Ibid. at 79.
64 Ibid. at 81.
66 Bryden, “Understanding the Standard of Review” supra note 59 at 82.
67 Ibid. at 89.
68 Ibid. at 94 (Presumably as as opposed to a free standing standard operating as a threshold question preventing a review on the merits.)
discretionary decision inconsistent with the objectives of the statute.69

In a short twenty four pages, Bryden provides one of the best commentaries on the history of the standards of review this writer has come across. In addition, his listing of the nominate errors leading to finding of patent unreasonableness remains a useful checklist and a good argument for why the concept of patent unreasonableness should have been preserved. This should be the first piece of reading for any student wanting to understand curial deference and the standards of review.

David Phillip Jones Q.C., an Edmonton based practitioner, is listed by the Canada Transport Agency as an arbitrator with expertise in administrative, labour and commercial law.70 In the spring of 2006, he delivered his 138 page paper on the occasion of the Nova Scotia Administrative Law Conference, held under the auspices of the Canadian Bar Association.71 The strength of this work, as with Chénard’s work, is its readability. Equally important are Jones’ comments on subjects other than the standards of review, such as standing, reasonable expectations, procedural fairness and breach of statutory duty, to name but a few. In addressing these other areas, Jones provides good rounding out to one’s understanding of administrative law. The work provides a good survey of Administrative Law practice but, as a practitioner’s guide, it tends to highlight only discrepancies and contradictions in the case law without

69 Ibid. at 96. (These are the nominate errors referred to by Justice McLachlan in Dr. Q. infra note 315 at para 22 and listed in B.C.’s Administrative Tribunals Act, [SBC 2004] c. 45, s. 58(3), as justifying a finding of patent unreasonableness.)

70 <http://www.cta-otc.gc.ca/contact/list-arb/index_e.html>

advancing an analysis. The primary purpose of this kind of work is to alert the practicing lawyer to the discrepancies so that he or she may argue one side or the other of an issue with authority. It is not a paper intended to reconcile case law or propose reforms. This work is valuable to its readership as a practitioner’s workaday guide on a large number of administrative law issues.

The 2007 edition of Standards of Review of Federal Administrative Tribunals is a work that, from its premise, stands four square contrary to the fundamental thesis of this paper. The first chapter purports to identify a “framework” for identifying the appropriate standard of review for each of the eighteen tribunals addressed. It thus operates from the premise that such an all encompassing categorical system can be discerned from the case law. It is of interest that the authors are all former law clerks to the Justices of the Federal Court of Appeal. It is also of note that Justice John M. Evans of the Federal Court of Appeal writes the foreword. He is known in this context for his skill in applying the Pragmatic and Functional Analysis and his 2007 call that the Supreme Court of Canada further develop a more coherent, comprehensive and unified analytical framework for standards of review. The framework chapter devotes a short three pages to discussing tribunal expertise. This source does however provide very interesting background information on the expertise of the members of each of these

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73 Ibid. at p x. (Implied in the foreword)
74 Donald J.M. Brown & The Honourable John Evans, Judicial Review of Administrative Action In Canada, loose leaf (Toronto: Canvassback Publishing, 2007) [Brown & Evans]
75 Blais infra note 72 at 224-226.
eighteen federal tribunals.\textsuperscript{76}

**Milestone Articles**

The literature included under this section distinguishes itself either by reason of the fact that principles enunciated were adopted with approval by the Supreme Court or that it was particularly helpful in providing insights into the strengths and failings of the process.

Prof. David Dyzenhaus’ discussion of the distinctions between the thinking of “liberal anti-positivists” and the “heirs to democratic positivism”\textsuperscript{77} sometimes verged on the impenetrable for this writer. However, with diligence (more than one reading), one may discern the outlines of a struggle that finds its roots in the Judiciary’s Diceyan animosity to the growth of the administrative state; a mere creature of statute whose legal legitimacy is based solely on the will of the government of the day without external reference, limitation or control. By the same token, the administrative law branch’s growing elephant in the room presence could not be ignored. Because of this ambivalence (sometimes bordering on animosity), the foundations for curial deference remained ill defined or understood. The courts continued to deliver poorly founded or expressed reasons to support their skirting of the Legislators’ intent, as often expressed in privative clauses, doing as they saw fit in each case. Dyzenhaus posited that what lay at the heart of the problem was the perception by the Judiciary that the deference

\textsuperscript{76} Having said this, the writer must note that the CITT (Canadian International Trade Tribunal) is one of the few federal tribunals where it is virtually impossible to find some sort of information on the qualifications of its members from any online source.<http://www.ct-tc.gc.ca/english/View.asp?x=334>

being required of the courts was founded on the primary meaning of deference, submission, a submission by the courts to inferior tribunals, a difficult-to-accept submission dictated by the legislative branch. His position was that the secondary meaning of deference as respect for the actual reasons given should be the animating factor; “(d)deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”78 This provided a more palatable rationale to the Judiciary for granting deference and, as a result, it has found general acceptance. While distilling Dyzenhaus’ analysis down to one of respect versus submission may seem a gross oversimplification, the fact is that this distinction had been regularly adopted and applied by the Supreme Court79 well before Dunsmuir and, in this simple fact, lies the evidence of its importance. Given the level of acceptance, it is not inappropriate to simply refer to this reasoning as the Dyzenhaus principle.80

The 1988 propounding by the Court of the Pragmatic and Functional Analysis in Bibeault81 was a watershed event in administrative law. From that point onwards there was in place a judicially dictated conceptual and analytical framework for addressing

78 Ibid. at 256.
80 Therefore, the inherent and autonomous rationality of the Board’s reasons should be judicially recognized here Dyzenhaus supra note 77 at p. 289. Adopted with approval by Justice L’Heureux-Dubé in Canada Safeway supra note 79 at para.29 “Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”
81 Bibeault supra note 216 at paras. 124-127.
curial deference; as Professor Mullan puts it, “an overarching or unifying theory for review of substantive decisions of all manner of statutory decision and prerogative decision makers”. 82 The inferior courts would hopefully no longer automatically lose themselves in the miasmatic debates over jurisdiction and collateral questions, questions not remitted and the nature of the question.

An interesting historical note to the development of the P&F Analysis is that it was very closely presaged by H. W. MacLauchlan in his 1986 article "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" 83 Most of the key concepts making up the P&F Analysis were discussed in that article, however, he was not one of the authors cited in the Bibeault decision. The parallels between Maclauchlan’s article and the reasons in Bibeault are remarkably self-evident. Justice Beetz, the 1973 appointee to the Supreme Court from Québec, taught for twenty years at l’Université de Montréal. Most of the authors and works cited in his reasons in Bibeault understandably deal with “le droit civil” or are the works of francophone authors. This is perhaps simply a continuing illustration of the operation of the “Two Solitudes”. MacLauchlan’s work was subsequently alluded to and credited by Chief Justice Lamer some five years later in Mossop. 84

MacLauchlan took the courts to task over their inability to free themselves from the jurisdictional debate quagmire. His rather detailed critique of the confused and


84 Mossop infra note 228 at para 79.
sometimes irrational state of the law on standards of review in the early 1980’s serves as a convincing background for the need on the Supreme Court’s part to impose an analytical framework that would force reviewing courts to focus on the intended purpose of the legislation as opposed to resorting to the incoherent miscellany of jurisdictional terms and tools they had relied upon up to then. MacLauchlan likened trying to resolve an administrative law question on the basis of jurisdiction alone, to be divined from the bare and isolated meaning of some of the words in the statute, to trying to extract oneself from flypaper.85

In his 2002 article in praise of the scholar Prof. John Willis,86 Justice Iacobucci provides insight into the roots of the development of the standard of review. He finds that many of the principles currently in vogue, including the multi-factored approach inherent in the P&F Analysis were presaged by Willis. Iacobucci’s article tends to be in the nature of an acknowledgment of Willis as a prophet before his time. It is of particular interest because Iacobucci continues to speak of a spectrum of standards of reviews even at this late date, six years following Bibeault.87 Iacobucci’s respect for the role of the legislators is patent. He notes “(t)he complexity was created not by the courts but by the legislators, who wisely decided that not all administrative agencies would operate in the same way. It is a complexity that the courts must attempt to deal with and he

85 MacLauchlan, “How Much Formalism Can We Bear” supra note 83 at 344, n. 3.
86 The Honourable Mr. Justice Frank Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002) 27 Queen’s L.J. 860. [iacobucci, “Articulating a Rational Standard of Review”] (Willis is noted as one of the three founders of University of Toronto Law School –Wright, Willis and Laskin- following their joint 1949 resignations from Osgoode Hall in protest against the lack of scholarly effort or focus.)
87 It is noted in Chapter 3 that the reference to a spectrum of standards is referred to in Justice Iacobucci’s 1997 in Southam infra note 262; a position he later resiles from in 2003 in Ryan infra note 308.
suggests it would be irresponsible for judges to simply try to wish it away." He closes with the suggestion that it is for the legislators to define and dictate the levels of deference to be accorded to their various administrative schemes. At that time, in 2002, B.C.’s legislators were preparing to address the issue in that manner by statutorily dictating the levels of curial deference to be applied to their tribunals.

The year 2003 produced a bumper crop of significant standard of review cases from the Supreme Court, including Dr. Q., Ryan, Martin and Paul. Prof. Lorne Sossin was quick out of the gate with his analysis of the salient points raised in these decisions. In his article “Empty Ritual, Mechanical Exercise or the Discipline of Deference", Sossin identifies Dr. Q. and Ryan as attempts to synthesize the law, (implying a new result derived from the elements) whereas this writer sees them more in the form of a timely re-statement, in the American style, of the miscellany of existing principles. The most salient contribution in this paper is his paragraph touching on the lack of methodology for determining the expertise of a tribunal; the factor characterized as being “of the utmost importance". Sossin writes;

... The results of an investigation into legislative intent and into institutional competence often will yield similar findings, but may be fundamentally distinct.

This point may be illustrated with respect to the pragmatic and functional criterion of expertise, which was described memorably by Iacobucci J. in Southam as “the most important of the factors that a court must consider in settling on a standard of review". In Pushpanathan, the court articulated three indicia of "expertise": (1) the specialized knowledge of decision-makers; (2) special procedures; and (3) non-judicial means of implementing the Act. While this describes expertise, it does not provide guidance regarding the methodology to be employed to establish


89 See discussion on the BC’s Administrative Tribunals Act and the Québec’s Tribunal Administrative du Québec below at page 56 and 121 respectively.

expertise. Consider the example of the inquiry into expertise of a human rights adjudicator. The Canadian Human Rights Act provides that those appointed to the Canadian Human Rights Tribunal have "experience, expertise and interest in, and sensitivity to, human rights ". Should a court look no further than this statutory language, and conclude that adjudicators possess specialized knowledge and experience which judges as a group may lack? Should a court look additionally to the functions of a human rights adjudicator and infer expertise on that entire range of activities? Should a court accept (or seek out) evidence on how appointments of adjudicators actually are made in practice (how "sensitivity" to human rights is evaluated, for example)? What are the implications if, as a matter of administrative structure, the tribunal sits in panels of one or three adjudicators? What if, as a matter of administrative policy, appointments as adjudicators are limited to lawyers, or if, as a matter of practice, only lawyers with extensive human rights advocacy backgrounds are appointed? Depending on where a court starts and stops its analysis (at the statute, at the administrative structures, at the administrative policy, or at the administrative practice), a different conclusion affecting the outcome of the pragmatic and functional approach may result.91

Secondly, while others might chide the Supreme Court for not generating a single coherent set of rules, Sossin openly questions whether this is possible or advisable:

Is the harmonization of the standard of review for all manner of administrative decisions, from regulatory to adjudicative, policy to factual, immigration to ministerial, regulatory to discretionary, necessarily a good thing? Has the search for practicality, simplicity and predictability blinded the court to the importantly different role deference may play in different administrative contexts?92

Sossin's article is not listed as one of the milestone cases because he provided insight and direction like MacLauchlan or Dyzenhaus. It is because, in this writer's opinion, he asked so many of the right questions.

Professor Mullan’s 2005 article “Establishing the Standard of Review: The Struggle for Complexity?” was an important event leading to the Supreme Court’s decision in 2008 to effectively abandon “patent unreasonableness” as a free standing standard of review.93 As Bryden notes, in thirty seven pages, Mullan was able to address the following areas;

91 Ibid at 490.
92 Ibid. at 490, 506.
93 David Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004) 17 Ca. J. Admin L. & Prac.59 [Mullan, “Struggle For Complexity”] (It is interesting to note that a search of the phrase “Struggle for Complexity?” discloses that this article was referred to only once by the Supreme Court but that in the milestone Dunsmuir case. What is of particular interest is that the same unfiltered search provides 50 hits in the lower courts since its publication in 2004. Even taking into account duplicate cites this still indicates that this article struck a very responsive chord with the lower courts.)
1. the nature of expertise as an element in the pragmatic and functional analysis;
2. the significance of the reviewing court’s characterization of the question that is the subject of the judicial review application;
3. the application of the pragmatic and functional approach in the domain of review for abuse of discretion;
4. the continued relevance (if any) of the concept of "true jurisdictional question";
5. the applicability in the world of procedural rules and ruling;
6. the number of standards of review; and,
7. the delineation of the particular contours of incorrectness, unreasonableness, and patent unreasonableness review.\(^{94}\)

There is much to be mined from this work.

Mullan’s influence on the judiciary is difficult to overestimate. His year 2000 article, “Recent Developments in Standard of Review”, took direct aim at Justice Cory’s somewhat last ditch effort to bring some precision and underpinning to the task of distinguishing reasonableness from patent unreasonableness. Mullan referred to it as “making a nonsense of the law.” Mullan wrote:

... admittedly in his judgment in PSAC, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest ... that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.\(^{95}\)

This served to arm Justice LeBel in his broadside on the same issue in his obiter dicta concurring dissent in 2003 in the Toronto (City) v. C.U.P.E., Local 79 case (CUPE

\(^{94}\) Bryden, *Sufficiency of Reasons* supra note 54 at 195 and n. 12.

In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator’s interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness.

Working hand in glove in the challenge to the rationality of maintaining patent unreasonableness as a standard, Mullan then cites LeBel in turn in his 2004 “Searching For Complexity” article. Professor Mullan is then cited in turn once again by LeBel in *Dunsmuir* (where Justice LeBel also cites his own 2003 dissent in *CUPE 79*) in effectively dispatching patent unreasonableness as a stand-alone standard of review.

One concept which this writer found of particular interest was alluded to in a passing comment by Mullan. It is that of the almost irrefutable presumption as to the expertise of a Minister of State;

“The legislative choice of a specialized tribunal to deal with a particular matter carried with it the assumption of expertise. Indeed, this is always seemingly the case when the decision-maker is a political actor and member of the Executive Branch such as a Minister. There is almost an irrefutable presumption that Ministers of the Crown (with the backing of their Departments and political advisors) are going to be experts on questions with a high political or policy content.”

The difficulty arises when the presumption of ministerial expertise is applied without critical thought by a reviewing court to non policy / political situations. Examples are the

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97 Mullan, “Struggle For Complexity” supra note 93 at 90. (“Thereafter, LeBel J., in a carefully developed concurring judgment in *Toronto (City) v. C.U.P.E., Local 79, 10*) was very critical of even maintaining three standards of review. In particular, he expressed considerable skepticism as to the ability of the courts to articulate satisfactorily the distinguishing characteristics of unreasonableness and patent unreasonableness review.”)

98 *Dunsmuir* supra note 330 at para. 45. (“We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of “reasonableness” review.”

99 Mullan, “Struggle For Complexity” supra note 93 at 68.

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indefensible denial of an operating license to a hospital (*Mount Sinai*)\(^{100}\) and the reasoned but politically unpalatable ministerial effort to re-jig collective bargaining contrary to the stated objective of the enabling statute without recourse to the political process (*Minister of Labour*)\(^{101}\) and the assumption that, in exercising their authority to appoint to tribunals, a minister is presumed to exercise judgment and expertise in the choices made.\(^{102}\)

In 2005 Justice Michel Bastarache wrote a French language article for the Canadian Bar Review titled “Judicial Review: Recent Developments and Foreseeable Changes.”(this writer’s translation). Justice Bastarache’s comments go to one of the core elements of this thesis. It is less a milestone article than an example of the implicit understanding that the standards of review had transformed from obscuring threshold filters to a workable set of guiding principles where the core task remained arriving at an understanding and appreciation of the legislation’s purpose and the question before the tribunal and, ultimately, before the reviewing court.

Bastarache acknowledges the mixed treatment the Pragmatic and Functional Analysis had received from its critics but takes the position firstly, that it has not yet had the opportunity to fully develop; “the common law requires time, an it certainly requires time for the decisions to come to the attention of judges and practitioners.”(This Writer’s

\(^{100}\) *Mount Sinai Hospital Center v. Québec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281. [Mount Sinai]

\(^{101}\) *CUPE v. Minister of Labour* supra note 320.

\(^{102}\) *A.I. Et al. v. Giesbrecht* (an appointed Director pursuant to section 144 of the Child and Family Services Act) et al., 2005] O.J. No. 2358, 75 O.R. (3d) 663 at 86. [Giesbrecht] (“[86] The degree of deference should be assessed, as to the expertise factor, …and, at least in the absence of egregious circumstances, a working assumption that the Minister will carry out her duty by appointing persons who are suitable for such responsibilities.”)
Secondly, he notes there is nothing to indicate that the application of this jurisprudence is posing any particular difficulties for the inferior courts. The implication is that the problem may lay more with the academic community than the practitioners.

Bastarache argues that the term “patent unreasonableness” is misunderstood. While academics have been fond of attacking the term as tautological, difficult to understand, define or apply, Bastarache proposes a simple interpretation that rings true. Justice Iacobucci had tried to distinguish patent unreasonableness from reasonableness simpliciter in terms of the amount of effort required to discern the error. Bastarache cuts to the chase:

The upshot is that, in effectively disposing of patent unreasonableness as a standard in 2008, the Courts may have lost access to a still useful term or concept. A further problem is that its continued use in statutes may yet engender further confusion.

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103 The Honourable Mr. Justice Michel Bastarache, “Le contrôle judiciaire: Développements récents et changements prévisibles” (2005) 84 Can. Bar. Rev. 76 at 81. (Writer’s translation: In my opinion there exists a basic difference between the standards expressed clearly by the Court both in an explicit and implicit manner. An obvious indication of this difference arises from the terms themselves. The standard of patent unreasonableness carries a negative connotation. It requires the determination of whether the decision includes a flagrant defect, if it is bad and, by reason of this, necessitates revision. The standard of reasonableness in contrast supposes a more positive approach: we ask ourselves if the decider justified the decision otherwise said, if he made known the reasons justifying the exercise of the authority delegated. This comes out clearly in the recent Ryan case.)

104 See discussion of Southam infra note 262.

105 Bastarache, "Le contrôle judiciaire" supra note 103 at 83. (Writer’s translation: In my opinion there exists a basic difference between the standards expressed clearly by the Court both in an explicit and implicit manner. An obvious indication of this difference arises from the terms themselves. The standard of patent unreasonableness carries a negative connotation. It requires the determination of whether the decision includes a flagrant defect, if it is bad and, by reason of this, necessitates revision. The standard of reasonableness in contrast supposes a more positive approach: we ask ourselves if the decider justified the decision otherwise said, if he made known the reasons justifying the exercise of the authority delegated. This comes out clearly in the recent Ryan case.)

106 The term “patent unreasonableness” is included as statutory language in British Columbia’s Administrative Tribunals Act and the Alberta Health Act, to name but two instances.
In 2007, in a book containing a series of articles written to honour the work of Justice Iacobucci, Professors Lorne Sossin and Colleen Flood collaborated on an article urging the Supreme Court of Canada, notwithstanding Ryan\textsuperscript{107} to recognize that the standard of review should be seen as a matter of varying degrees on a spectrum as opposed to a limited number of fixed and discrete points.\textsuperscript{108} All They continue to favour the Baker\textsuperscript{109} more “nimble approach”\textsuperscript{110} of the infinitely variable standard adopted by the Court for the content of procedural fairness.\textsuperscript{111} For Sossin and Flood, the evolution of the P&F Analysis reached its nadir in 2003. They consider Dr. Q. and Ryan to be synthesizing efforts that lead to an unacceptable level of formalism.\textsuperscript{112} This writer holds to the contrary.\textsuperscript{113}

The Supreme Court’s 2008 ruling in Dunsmuir reducing the number of standards to only two runs counter to Flood and Sossin’s argument for a spectrum of standards. Their secondary argument, that the factor missing from the P&F Analysis is the impact of the decision vis-a-vis more or less vulnerable individuals, remains valid, “the most striking omission of the contextual analysis is the lack of any reference to the effect of the administrative decision on the parties.”\textsuperscript{114} It is the loss of a license versus the deportation to torture or death argument. This concern goes a long way to explaining

\textsuperscript{107} Ryan infra note 308. (Generally)
\textsuperscript{108} Sossin & Flood supra note 31 at 588.
\textsuperscript{109} Baker supra note 13.
\textsuperscript{110} Sossin & Flood supra note 31 at 599.
\textsuperscript{111} Ibid. (Generally)
\textsuperscript{112} Ryan supra note 308 at 591.
\textsuperscript{113} Discussion above at 30.
\textsuperscript{114} Sossin & Flood supra note 31 at 596, 601.
the considerable effort invested in getting the decisions right in cases like *Baker* and *Pushpanathan*, both incidentally involving deportations. Sossin and Flood argue the impact on the individual “is as important in a contextual review as the degree of expertise accumulated by the decision maker or the question of whether the question is one of fact or law.” Their “outcomes” argument may explain in part the Supreme Court’s tendency to limit curial deference for agencies dealing with human rights issues. It is arguable that the use of the term “outcomes” in *Dunsmuir* in 2008 actually signals its adoption as an important factor in the new standard of review analysis.

**The Nature of the Question (Fact, Mixed Law and Fact or Pure Law)**

The “nature of the question” is a concept, along with jurisdiction, the collateral question consideration and question not remitted arguments that dominated the pre-*Bibeault* standard of review debate. At the heart of the question is the original premise that only the courts are qualified to interpret questions of law. Whether the court is dealing with a question of law, mixed fact and law or simply fact has been regularly used as a reason to grant or deny curial deference. One of the more curious juridical terms to come from this debate is the “constitutional fact”, a kind of hybrid legal fact.

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116 *Dunsmuir* at para. 28 and 47. (A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.”)

117 *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] S.C.J. No. 27, [1998] 1 S.C.R. 322 at para 39. ([Westcoast](https://example.com)). (The following quote is a good example of the somewhat tortured rationalizations a court will sometimes go through to call an apple an orange. “39 Although at first glance it may appear that the finding on which this controversy centres is one of fact, modest examination reveals that it is one of mixed law and fact. The key to this determination is to consider the purpose for which the finding was made, that is, what question it was intended to answer. Clearly, the characterization of processing and gathering as independent activities was not a pure finding of fact in the true sense, but rather, an inference drawn from other, detailed findings related to the natural gas industry and the business operations of Westcoast. It was meant as a partial answer to the core of the constitutional question at issue on this appeal, which is whether the Westcoast operations constitute a single undertaking or multiple undertakings. Thus, it was not simply a statement of the facts of the natural gas industry or the business of Westcoast. It went one
There have been valiant attempts by the likes of Justice Iacobucci to demystify the distinctions.

In the guise of commenting on the ebb and flow of the court in addressing questions of law Justice L'Heureux-Dubé, notwithstanding protestations to the contrary, continued her campaign to have curial deference extended to human rights tribunals even on general questions of law. Looking past this somewhat Quixotic effort we do find a good survey of the efforts to define just what is a pure question of law.

In his 2006 contribution to the Isaac Pitblado Lectures Justice Thomas A. Cromwell, newly of the Supreme Court of Canada, delved in considerable and helpful detail into the distinctions between standards of review to be applied to appellate reviews of inferior courts as opposed to judicial review of administrative tribunal decisions. He also delved into the “nature of the question” debate trying to divine principles for distinguishing questions of fact, mixed law and fact and pure law. His review of the questions is wide ranging touching upon questions of expertise, instances of uninspired formalism and excessive fluidity in the legal principles. As many do, he seeks a balance between certainty and flexibility. It is in guiding the reader to an appreciation of the distinctions between appellate review and judicial review that he is

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119 A campaign she waged with vigorous dissents in Zurich note 229 and Mossop note 228.

most helpful.

**Expertise**

Maître Mathieu Socqué’s 2006 thesis, “The Notion of the Administrative Decision Makers Expertise for the Purposes of the Application of the Pragmatic and Functional Analysis.”¹²¹ (this writer’s translation), forcefully argues that the Court’s failure to provide a coherent analytical grid for determining the expertise of a tribunal renders the attribution of expertise by the courts “illegitimate”. In a sometimes strident challenge to the lack of evidence brought before the courts, Socqué describes the existing process as follows:

In an impressionistic and totally subjective manner, the judge sitting on judicial review forms an opinion concerning the degree of expertise that would characterize the adjudicator in question and declares that the tribunal under scrutiny finds itself to be expert relative to this or that question. In fact, the Supreme Court rarely proceeds to a systematic and rigorous analysis of the intrinsic aptitude of the adjudicator to comprehend a question or problem … The Supreme Court does not lend itself to an exhaustive and precise study of qualifications of the administrative tribunal being studied … but it declares the said tribunal is or is not expert.¹²²

Socqué applies himself at length to demonstrating why the current state of affairs is not acceptable. In so doing, he delves into his understanding of the meaning of expertise. Socqué views the creation of administrative tribunals as an aberration in constitutional law and equates their existence to a threat to judicial independence.¹²³

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¹²³ *Ibid.* at 349. “The creation and implementation of administrative tribunals constitutes in some measure an aberration in constitutional law, and their existence equates to a form of threat to judicial independence. … By virtue of what principal should the superior courts abdicate their exclusive and sovereign prerogative to decide disputes between litigants and administer the common law if the opposing decision making authority does not dispose of an attribute or faculty that they themselves do not benefit from? It is unthinkable, do we dare add, would be also worrisome, if the superior courts exhibited deference with regard to conclusions formulated by an adjudicator who could not demonstrate talent, aptitude, or particular ability, in brief who would bring no added value to the subject legislative regime.” (This writer’s translation.)
His is clearly a Diceyan view. It is perhaps attributable in part to his “formation” in the civil law system with its emphasis on one single code of law promulgated under the sole authority of the Legislators. This would be as opposed to the common law system that presupposes more than one source of law. That having been said it can also be argued that it is in Québec, with its implementation of the Tribunal Administratif du Québec (TAQ), that we find the common law principles of administrative law most effectively adapted into statute form along with a novel but well reasoned structure for an umbrella administrative appellate review system.124

There is little doubt there is significant merit in the demand that, as in all other matters before a court, judicial expectations be expressed as to the evidence required to prove tribunal expertise. Is the solution to Socqué’s concern really much more difficult than having the courts require counsel to complete the record with briefs on this issue? Is it truly acceptable to continue having the reviewing courts limited to trying to discern tribunal expertise by examining the entrails of the enabling statute? It is only in the rare case such as in Southam where much can be inferred from the enabling statute.125 Given the importance of what can be at stake, the ingeniousness of motivated counsel in an adversarial stance, once required to do so, would likely soon bring the shortcomings and strengths of any tribunal to the fore.

Socqué’s article provides a good focus on the state of the law on tribunal expertise. It is unfortunate that it is not available to the English language only readership. That
having been said, such a good effort should have been followed by Socqué with at least an attempt at sketching out the analytical grid he demands of the Supreme Court.

In his 2007 article, *The Role of Appellate Courts in Administrative Law*, Justice Evans of the Federal Court of Appeal essentially chides the Supreme Court for giving mixed messages on the correct standard of review to apply.\(^{126}\) By implication he must believe there should be only one message, a universal system.

In their treatise on administrative law Brown and Evans state simply that the court will not call for copies of the curriculum vitae of the members who decided the matter under review to assess the degree of the tribunal’s expertise. In trying to assess the expertise of the Minister’s statutory delegate (the Director) in a custody dispute, one Ontario Superior Court justice referred to such an individualized assessment of expertise as “invidious” and, somewhat with a leap of faith, relied on the presumption that the Minister, in appointing the Director to the approved list, exercised his duty properly by choosing only qualified personnel.\(^{127}\) On the question of how much effort the Minister puts into exercising his or her discretion in these appointments Macaulay and Sprague recount from experience an incident where a very senior bureaucrat seemed somewhat dumbfounded when asked whether or not the Minister would be consulting with the tribunal’s chair on the appointments to be made.\(^{128}\)

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\(^{126}\) The Honourable John M. Evans, "The Role of Appellate Courts in Administrative Law" (2007) 20 C.J.A.L.P. 1. [Evans, "Role of Appellate Courts"] (This Justice Evans is one and the same as the Evans who co-authors the treatise Donald J.M. Brown & The Honourable John Evans, Judicial Review of Administrative Action In Canada, loose-leaf (Toronto: Canvasback Publishing, 2007.))

\(^{127}\) Giesbrecht *supra* note 102.

\(^{128}\) Macaulay & Sprague *supra* note 1 at 4.7. (Given the Chair may be the best positioned to really know what is needed for the job this speaks volumes with regard to the lack of proper ministerial consideration given to the appointment process.)
The common ground is that the courts will look to the statutory scheme (including statutorily-prescribed qualifications of the members of the tribunal), the institutional characteristics of the agency (policy makers or not, etc.) and the reasons for its creation as poor surrogates for a direct assessment of the actual depth and breadth of the expertise and practical experience possessed by the tribunal as a collective.\textsuperscript{129}

Professor Laverne Jacobs has, through the focus her writings on the subject, positioned herself as one of the better known commentators on the specific question of tribunal expertise.\textsuperscript{130} Her 2008 article written with Thomas Kuttner entitled "The Expert Tribunal" she provides a particularly interesting discussion on the justiciability of expertise\textsuperscript{131} including reference once again to the thin premise that appointment of qualified adjudicators is a function of "the good faith exercise of ministerial discretion". Her discussion of the challenge to the "presumptive integrity" of ministerial appointments to an expert tribunal is particularly interesting.

\textbf{Academia and the Judiciary}

A question raised in this thesis is the role academics, and, in particular, Professor Mullan, have played in challenging and pressing the Supreme Court to reform the standards of review. A myriad of critical articles could be cited. Reference has already

\textsuperscript{129} \textit{Brown & Evans supra} note 74 at 14:87.


\textsuperscript{131} Jacobs "The Expert Tribunal" supra note 130 at page 11.
been made to Prof. Mullan’s “Establishing the Standard of Review: The Struggle for Complexity?” In this article Professor Mullan reviews the case law since *CUPE v. NB Liquor* in 1979 illustrating the tensions and inconsistencies that have developed over time as the Court wrestled with developing standards of review for an admittedly complex area of the law. His commentary on the relationship between expertise and the issue of the nature of the question touches on an important point:

However, what is abundantly clear is that the critical element in the decision whether to accord deference to the statutory or prerogative decision-maker (and if so, how much) is not expertise in isolation but rather the nature of the question which is the subject matter of the judicial review application in light of the expertise of the decision maker.”

In essence, this is the concept of “relative expertise” so often referred to by the Court. Mullan also provides a helpful discussion of the Supreme Court’s treatment of deference with regard to procedural questions. He firmly believes the *Ryan* rejection of deference on a spectrum avoids confusion and complexity.

Mullan stands as the most prominent example of the increased influence of academics on the Court’s thinking. Mullan’s works have been cited by the Supreme Court twenty-seven times in twenty one cases since 1978. These include most of the key cases such as *Nicholson, Mossop, Baker* and *Dr. Q*.

Understanding Academia’s role in assisting and influencing the courts is assisted by Chief Justice MacLachlin’s article “Academe and the Courts: Professor Mullan’s

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133 Ibid. at 68.
134 Ibid. at 73.
135 Ibid. at 86.
136 Ibid. at 89.
Contribution”. It provides an interesting survey of the development of legal education from the establishment of the Inns of Court in England around 1400 through to the increasingly important role of academics as advisors to the Supreme Court, triggered in particular by the complexity of the questions coming before the Courts with the adoption of the Charter of Rights and Freedoms. The section dealing with the similarities between the academic and judicial roles is of particular interest as it highlights the freedom academics have to address broad theoretical frameworks while the courts generally remain limited to the facts of the disputes that come before them.

The Charter and the Issue of Courts of Competent Jurisdictions

Mr. Creighton’s very short 1984 case commentary written not long after the adoption of the Charter illustrates just how uncertain the legal profession and the Courts were about the potential scope and impact of the Charter. He muses as to whether or not Ontario’s Divisional Court, as a creature of statute, qualifies as a Court of Competent Jurisdiction under section 24 of the Charter. The distance travelled since those uncertain times becomes clearer when we contrast the doubts expressed by Mr. Creighton with Justice Gonthier’s pronouncements in Martin. In that case as humble a tribunal as the appellate tribunal to Nova Scotia’s Worker’s Compensation Board is a

138 Ibid. at 17.
139 Ibid. at 19.
Court of Competent Jurisdiction for Charter purposes vis-a-vis its own enabling legislation.141

The Charter competence question is not truly a standard of review question. The Court has made it clear that all constitutional questions addressed by a tribunal are reviewable on the lowest standard of deference, correctness. It does impact on the question of tribunal expertise in that the important role of the expert tribunal in preparing a complete factual record and communicating through its reasons its understanding of the issues to the reviewing court is emphasized. Adequacy of the reasons, as Dyzenhaus emphasized, becomes a critical issue if any regard or weight is to be given to the tribunal’s expertise. Effectively the reasons can act as a surrogate for standing before the reviewing courts.

Justice Lynn Smith of the Supreme Court of British Columbia provides us with a post Martin commentary on the effects of the extension of Charter authority to tribunals, subject to their enabling statutes, to scrutinize their own statutes. Her summary of the points to be derived from Martin provides a useful checklist.142 Her comments include concerns with regard to the lack of resources for the task, institutional capacity to address Charter challenges, institutional independence, impartiality and efficiency.143 Most of these concerns apply to the class of tribunals this writer would label as


143 Ibid. at 143-146.
“compromised”.144 At the heart of any debate over tribunal independence and Charter challenges will be the question of how the unenviable duty of being called upon to rule on the viability of one’s own enabling statute will play out, given the typical adjudicator’s lack of independence. Justice Smith also addresses British Columbia’s Administrative Tribunals Act which not only dictates the standards of review but allows those few tribunals allowed to consider constitutional questions to punt them over to B.C.’s Supreme Court by way of stated case.145

In 2005, Donald A. Macintosh wrote an article that focused on the impact and import of three cases that preceded the Martin decision.146 He analyzes the various positions previously expressed by major players in the debate such as the former Chief Justice

144 Compromised, Unseasoned or Occasional Tribunals:
In this category we find the newly minted, not so newly minted, over-tasked or seldom called upon tribunals. This is a basket category for those tribunals who have yet to or, may never be able to or have no desire to earn the brevet of curial deference. Some of the factors at play justifying the Courts approaching the decisions of these tribunals with less or no deference are:

a) the political element (patronage) operating in the appointment / decision making process for the subject tribunal resulting in:
   a. disruption of the development of corporate / institutional competence and expertise as the patronage appointments are cycled through following changes of government; and,
   b. the concern about unstated political agendas impacting on decision making process or creating the perception of a lack of sufficient impartiality.

b) the enabling statute making no provisions for any sort of subject area expertise, legal or otherwise, with the resulting implication that the emphasis is on simply recruiting “common sense” lay decision makers;

c) while there may be some expertise such as being a retired member of the judiciary (i.e. CPP Pension Appeals Board) this expertise does not relate to the subject area (CPP Pension eligibility disputes);

d) the workload assigned in relation to the resources allocated indicates that it was not the Legislators’ intention that the disputes be dealt with by the tribunal in anything but a summary fashion; and,

e) the relative expertise of the cadre of members created for the tribunal (particularly when they do not sit in mixed panels) cannot be discerned objectively, leaving the courts, if they choose, to review the decision on a standard other than correctness, to rely on the thin presumption that the Minister in charge would only appoint competent members.

The use of the term “compromised”, is more a reflection of reality and does not automatically imply fault save for the patronage concerns. It may simply be that, given the volume of work assigned with limited resources, it is intended that these tribunals act in an expeditious manner as possible if they are to remain effective. The price to be paid is the likelihood that errors will be made. The proper legal consequence is that no deference should be afforded to the decisions of these tribunals.

145 Smith supra note 142 at 142. Admittedly this is a somewhat simplified description of B.C.’s rather complex and innovative legislative approach to the standard of review issues.

Lamer’s opposition to ever allowing Charter review authority to tribunals,147 and Justice La Forest’s “ill conceived” view that “Charter issues would frequently be decided by an administrative tribunal without further litigation…”148 The interplay of various conflicting opinions on the issue is fascinating. Martin subsequently appears following Justice McLachlin’s ascension to the post of Chief Justice in 2000. It leads one to ponder, given Chief Justice Lamer’s marked and well reasoned opposition to tribunals ruling on constitutional questions delivered in 1996 in Cooper, what effect her appointment as Chief Justice had on her ability to bring about a result he so much opposed. Mr. Macintosh closes with some practical advice on marshalling evidence with regard to Charter issues such as proportionality. Mr. Macintosh operates from an untenable assumption that all tribunals have or should have the expertise and administrative support required to entertain such potentially complex questions.149

In her 2006 article, Beth Bilson looks further into the issue of granting some deference to a Tribunal’s expertise in the interpretation of constitutional questions. She argues the Court should, if there is to be consistency, apply the P&F Analysis and find some means within its review on a basis of correctness to extend some limited deference where the tribunal’s expertise on constitutional questions is made out.150

Prof. Mullan wades into the debate once again with his 2006 “No Room at the Inn”

147 Ibid. at 365 (And, for that matter, any other constitutional question; see Cooper v. CHRC infra note 34.)
148 Ibid. at 355.
149 This writer cannot resist noting that Mr. Macintosh writes from his perspective as a member of Canada’s largest law firm, the federal Department of Justice, and thus may not fully appreciate the administrative, workload and budget challenges faced by run or the mill adjudicators and tribunal chairs.
His article addresses the split in the Court occasioned by the *Multani* case, an instance where a school board ruled a young Sikh could not carry his ceremonial dagger while in school. While the Court affirmed his right, there was a split as to whether the decision warranted a full *Charter* analysis or whether the application of the existing principles of administrative law would suffice. He highlights the fact that, in the recent past, the Court has not necessarily automatically applied a standard of correctness to *Charter* related tribunal decisions, although *Multani* seems to indicate this should be the case. He then argues for various reasons, including concerns about micromanaging all tribunals dealing with human rights (i.e. Parole Boards etc.), that deference might be earned by a tribunal that demonstrated a history of well expressed responsible decisions à la Dyzenhaus and the proper weighing of consequences. He suggests something more than correctness may be appropriate for some tribunals dealing with *Charter* issues.152

**Judicialization and Reforms**

As James L.H. Sprague notes, judicial independence has been seen as the “grail” to be sought after for adjudicators.153 Understanding the debate over this issue is part and parcel of understanding curial deference and its relationship to expertise.

In his 1998 article, *Reputational Review: Expertise, Bias and Delay*, Prof. R.E.

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152 Ibid. at 244-248.

Hawkins explained the problem he perceived with regard to “acquired” expertise as follows:

the definition of tribunal expertise risks becoming tautological if it is limited to the nature of the tribunal's role. In Bradco, Justice Sopinka considered the matter from the opposite point of view. Instead of defining expertise by reference to role, he defined the tribunal's role by reference to its expertise. However, if role determines expertise and expertise defines role - if a specialized task is work done by an expert and an expert is someone who does a specialized task - the reasoning is circular. The solution is to break the circularity by broadening the inquiry to include other factors in determining expertise.\textsuperscript{154}

Hawkins is critical on three counts of the Court’s deducing the expertise of a tribunal from the context of the enabling statute. He asserts that relying on “whatever descriptive aspects one can discern from the statute should not be the primary determinant in assessing expertise.”\textsuperscript{155}

He argues firstly that the line between the need for specialist or non-specialist is not always evident. In his example, the Legislators may want a technical expert to make decisions on running nuclear reactors but would be quite content with a generalist of sound judgment in assessing questions of discrimination. Weighing the expertise of a tribunal reliant on generalists of sound judgment is virtually impossible unless and until there is a strong institutional track record tested by way of consistent success on appeal for the tribunal as a whole. Such a record might lead reviewing courts to conclude there is “acquired expertise” or “field sensitivity” justifying a finding of greater relative expertise. Another factor would be demonstrated and consistent ministerial regard for the appointment of only competent persons as opposed to just the politically deserving.

Secondly for Hawkins, as noted above, he focuses on the tautological nature of the

\textsuperscript{155} Ibid. at 12.
argument that the role defines the expertise and the tribunal becomes expert over time by becoming familiar with and exercising its role.

Lastly, he speaks of the disconnect between the intention of the legislature and implementation of a regulatory scheme. “While it is not unreasonable to assume that the legislature intended specialized tasks to be performed by expert tribunals, whether the tribunal performing the task is expert or not is an empirical matter. Legislatures do not usually write job descriptions for tribunal members, or define in detail how they are to be chosen, or choose them, or train them, or require them to collect precedents, or evaluate their performance.”¹⁵⁶ These are arguments that hold quite true.

What is particularly interesting in his article is that, unlike Socqué, he proposes five concrete reforms.¹⁵⁷ He suggests there should be evidence presented to establish expertise before the courts in five categories:

**First**, evidence of the method of tribunal appointments is relevant. How are appointments made? Are they open and advertised, or made in secret? By whom are they made? Is there a detailed job description? Does security of tenure exist, or are the appointments at pleasure? Are appointments staggered to preserve a reservoir of expertise? …¹⁵⁸ **Second**, evidence of the credentials -- training and experience prior to appointment -- is essential for judging expertise. Aside from a reference to the “special skills” of members of … (of certain boards) … the Supreme Court of Canada cases since 1979 reviewed for this article simply assume that board members possess the appropriate job credentials without specifying exactly what those credentials are or requiring proof of them. … **Third**, evidence of the accumulated "on-the-job" experience at the tribunal should be taken into account in assessing expertise. Do members sit on hearings on an "ad hoc" or an "ongoing" basis? When sitting, do they have a meaningful opportunity to participate in decision-making? Do

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¹⁵⁶ Hawkins supra note 154 at 12.
¹⁵⁷ Ibid. at 13–15.
¹⁵⁸ Southam infra note 262 at para. 51. (Iacobucci, J. “As I have already said, the Tribunal's expertise lies in economics and in commerce. The Tribunal comprises not more than four judicial members, all of whom are judges of the Federal Court -- Trial Division, and not more than eight lay members, who are appointed on the advice of a council of persons learned in "economics, industry, commerce or public affairs". See Competition Tribunal Act, s. 3. The preponderance of lay members reflects the judgment of Parliament that, for purposes of administering the Competition Act, economic or commercial expertise is more desirable and important than legal acumen.”)
they have other regular involvement, such as through mediation or education activities, with the regulated community?¹⁵⁹ …

Fourth, evidence of the institutional support available to tribunal members is important for determining expertise. Is the tribunal guided by an explicit set of objectives, or by an analytic and workable framework for applying its statute? Does it have a developed and published body of jurisprudence? Is the tribunal organized in such a way that members’ duties and responsibilities are clearly understood? Are there organizational charts and job descriptions? Are tribunal operating rules known and applied in a professional manner? Do tribunal members receive training, and of what kind, prior to beginning their job and on an ongoing and systematic basis? Are institutional manuals, both procedural and substantive, available? Are library facilities and research support given any priority? Are a sufficient number of professional and other staff available to support the work of the tribunal? Many of these factors are never overtly mentioned by the court in examining expertise, let alone proven. …

Fifth, evidence of evaluation methods and promotion policies provides a peer-group measure of expertise. Are there regular performance evaluations for tribunal members? Is there appropriate progress through the ranks, for example to vice-chair and chair positions? What is the tribunal’s judicial review record?

Many of Prof. Hawkins’ proposals for reforms found their way into Chapter 4: Tribunal Reforms.

Judicialization has two major aspects. The first is the question of institutional versus adjudicator independence. The second aspect is impact of procedural judicialization and the resulting strain on limited resources compromising tribunal effectiveness and efficiency through procedural encrustation. Prof. David Mullan addresses the latter in particular in his 2004 article “Tribunals Imitating Courts – Foolish Flattery or Sound Policy?”¹⁶⁰ Addressing the impacts of the “due process explosion”, an explosion that was at least in part attributable to Professor Mullan’s emphasis on the importance of procedural fairness, an argument that found judicial expression in Nicholson, he argues that the tendency amongst tribunals to mimic and try to introduce all the procedural

¹⁵⁹ As Hawkins notes Justice L’Heureux-Dubé discussed in Mossop the expertise gained in dealing with particular issues and communities as “field sensitivity”. (See Mossop infra note 228 at para. 68, “A related consideration is the connection of the board to the context. That is, even a body made up of “non-specialists” may develop a certain “field-sensitivity” where that body is in a position of proximity to the community and its needs. Where the question is one that requires a familiarity with and understanding of the context, there is a stronger argument that a higher degree of deference may be appropriate.”)

safeguards one might find in a court was straining their limited resources to no appreciable effect. More importantly he argues that perspective was being lost. Tribunals were losing sight of just what was actually required in terms of the procedure in each case to ensure fairness. In reviewing these issues he canvasses the various statutory enactments such as the Ontario’s *Statutory Powers Procedure Act* and compares them to equivalent efforts in other common law jurisdictions. Prof. Mullan then harks back to and recommends revisiting Ontario’s 1981 Model Administrative Code.\(^{161}\)

What is surprising is that there is no reference to the solutions implemented in Québec beginning in 1996 for the same set of problems. The discussion of Prof. Houle’s article in the following section\(^ {162}\) will show that Québec has wrestled with much the same issues and successfully implemented a comprehensive solution.

In pursuit of his Master’s in Law, Ron Ellis, an experienced administrative law lawyer and former tribunal adjudicator and chairman of an adjudicative tribunal, delved into the question of tribunal judicialization in his two part “The Justicizing of Tribunals."\(^ {163}\) Mr. Ellis has long been considered one of the deans of Ontario adjudicators. He limits himself to discussing “quasi-judicial tribunals” as opposed to the vast array of boards, commissions etc. that are comprised in the concept of administrative tribunals. Mr. Ellis writes in favour of “justicizing” administrative tribunals. His use of the term “justicizing”

\(^{161}\) Ibid. at 24
\(^{162}\) Houle infra note 173.
is a studied choice as it means “making tribunals just” so as to make them compatible with the structural imperative of a valid justice system as opposed to the concept of simply “judicializing” the tribunals with the incidents of judicial independence, security of tenure coupled with guarantees of adequate financial and administrative support. Ellis argues that, “Judicializing” in traditional terms will impose an unnecessary and expensive procedural overlay that would result in the loss of control and flexibility and expense that characterizes tribunal work. He refers to the Québec example in passing but does not explain in any detail why there would be profit in the study of this example.

Prof. Philip Bryden’s study of the case law surrounding the sufficiency of reasons as it impacts on the standard of review is helpful in its focus. There is no doubt that Justice Iacobucci’s focus of the comprehensiveness of the Competition Tribunal’s 147 page set of reasons in *Southam*164 communicated to the profession at large that comprehensively expressing the rationale behind the tribunal’s decision is, implicitly, almost as important as the raw technical expertise of the adjudicators. However, Prof. Bryden provides no more than a cautionary conclusion that the courts need to mind making too heavy a demand for detailed reasons for every administrative action. He makes it clear that this concern should not play as heavily for “when the decision is one made by a formal adjudicative tribunal”165

In his 2006 article Frank A.V. Falzon,166 formerly one of the project staff members on

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164 *Southam* infra note 262 at 15.
165 Bryden “Sufficiency of Reasons” *supra* note 54 at 215.
166 <http://www.gov.bc.ca/ajo/down/advisory_council_minutes.pdf>
BC’s 2001 Administrative Justice Project Advisory Committee, targets the premise in *Ocean Port* that administrative tribunals are in all circumstances no more than policy instruments of the executive. Basing much of his reasoning on the policy considerations behind BC’s *Administrative Tribunals Act*, Mr. Falzon argues that the true recognition of administrative tribunals as “justice tribunals” will not be achieved until the principle of judicial independence is fully recognized as an unwritten constitutional principle applicable to tribunals. This is as opposed to its relegation to the status of an easily abrogated common law principle of procedural fairness as contemplated in *Ocean Port*.

**Codifying Judicial Review and Integrated Tribunals**

There are two provinces that have implemented different models for addressing their administrative law concerns. In 1996, Québec reformed its administrative law structure by first requiring its tribunals to self-reflect and identify themselves as belonging to either the administrative or quasi-judicial streams. Québec also established an umbrella appeal tribunal with four specialized branches.

In 2004, British Columbia passed an Act that dictated the standards of review and who, when and how some of its tribunals are to deal with constitutional questions. Both are fairly innovative and radical efforts at bringing some structure and consistency to the operation of their administrative tribunals.

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Tribunal Administratif du Québec (TAQ)

Whether it is the fact that Maître Socqué’s work on tribunal expertise remains completely un-cited in corresponding works or whether it is the fact that our common law academia gravitates to, and prefers examples from, other common law jurisdictions far afield while choosing to ignore the work done in our sister province, it is evident that a resource and source for academic consideration is often left untapped. As noted, a case in point is the urging that we consider resurrecting a 1981 model administrative law statute for reconsideration168 while the much more current and successful TAQ remains available for study. It is perhaps yet another unfortunate and continuing manifestation of Canada’s two solitudes.

Prof. Denis Lemieux’s study of the role of the Québec Civil Code in the administrative law was written in 1995 and thus precedes the creation of the TAQ in 1996.169 His is a study of the interface between the consolidation of civil law in that province known as the Civil Code,170 and Public Law generally. He suggests the rest of Canada would benefit from a better understanding of how Québec has addressed tribunal independence under the Civil Code.171 With the creation of the TAQ his observations are, to some extent, only of historical interest, but his suggestion that the Québec model deserves further investigation rings even truer with the creation and continued operation of the TAQ. Arguably, the operation of an integrated tribunal such

170 Act Respecting Administrative Justice, R.S.Q., c. J-3 [Q.S. 1996, c. 54] [Civil Code]
171 Lemieux note 169.
as TAQ has proven to be immensely more efficient in financial terms for its government than comparable agencies in other provinces.\textsuperscript{172}

In January of 2008 at the University of Toronto’s "The Future of Administrative Justice" symposium, Professor France Houle of l'Université de Montréal delivered a fascinating English language account of the studies and reforms leading to the establishment of the TAQ.\textsuperscript{173} Ms. Houle walks the reader through the 25 years of various government reports and studies leading to the creation of the TAQ and highlights the jurisdictional concerns raised at each stage by each report writer and the stakeholders such as le Barreau du Québec and the Québec Society of Notaries.\textsuperscript{174} She explains the self-reflective and self-selecting exercise every government agency went through to determine whether theirs was “an administrative function to be conducted in keeping with the duty to act fairly” (i.e granting of permits, licenses, indemnity’s, etc.) \textsuperscript{175} or more in the nature of an adjudicative function \textsuperscript{176} requiring a hearing with the incumbent more extensive set of procedures. Each stream has its own defined set of requirements. The process resulted in the modification of a total of 135 statutes.\textsuperscript{177} Ms. Houle also elaborates on how tribunal independence is maintained through innovative recruitment, evaluation and appointment renewal procedures. She

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172 Infra note 384
173 France Houle, “A Brief Historical Account of the Reforms to the Administrative Justice System in the Province of Québec” (A presentation to “The Future of Administrative Justice” symposium, Faculty of Law, University of Toronto, January 18, 2008) <http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/7/0/0/0&contentId=1694>.[Houle]
174 Ibid. at 1 n. 4 (Dussault report in 1971, Ouellete Report in 1987 and Garant report in 1994.)
175 Ibid. at 3, 5.
176 Ibid. at 3.
177 Ibid. at 5.
\end{flushright}
also explains how expertise at this appellate level is maintained through the creation of four specialized divisions, the statutory provision for at least ten years experience in the subject area to qualify for appointment and the appointment of a specified number of lay specialists in various pertinent fields. All these reforms are further addressed in greater detail in Chapter 4, Tribunal Reforms.

If Ms. Houle’s request that her work not be quoted without her permission is evidence of a concern on her part that her work is incomplete or lacking in some manner, then the deficiencies are really quite difficult to discern. Her article provides an extraordinarily clear insight into the creation and operation of the TAQ in addition to providing an interesting commentary on the political challenges the TAQ has and continues to face. Her comments on the consultation / challenge roles played by the provincial bar and society of notaries throughout the process provide a good example of the constructively critical collaboration between the government of the day and the profession at large in that province.

**British Columbia’s Administrative Tribunals Act**

Former Administrative Law professor, T. Murray Rankin surveys the case law as it relates to the implementation of British Columbia’s *Administrative Tribunals Act (ATA)* and the government’s decision, as reflected in section 58 and 59, to provide explicit
guidance to the courts on the standard of review to apply.\textsuperscript{178} Rankin’s first concern is with what is a bar to the use of the P&F Analysis in favour of statutorily dictated standards of deference for only twenty-six of B.C.’s tribunals, leaving the rest to be dealt with under the common law. By way of example, for a tribunal protected by a privative clause, the \textit{ATA} dictates that the tribunal is statutorily deemed to be an “expert tribunal.”\textsuperscript{179} A court may not interfere with any “finding of fact or law or an exercise of discretion” made by such a tribunal unless the decision is patently unreasonable. Patently unreasonable is defined as those decisions evidencing arbitrariness, bad faith, exercise of improper purpose, being based entirely or predominantly on irrelevant factors, or that fails to take into account statutory requirements.\textsuperscript{180}. One may ask what would happen if it is found that the tribunal is patently not expert in any way shape or form and has made a questionable decision but has not committed one of the nominate errors.

Mr. Rankin’s first concern is that failing to extend the \textit{ATA} to all tribunals will lead to intra and extra jurisdictional inconsistencies. Intra jurisdictionally those B.C. tribunals not covered by the \textit{ATA} will continue to be reviewed, perhaps inconsistently, under the common law. Extra jurisdictionally the decision of a worker’s compensation board in another province may give rise, on similar or exactly the same facts and legislation, to a


\textsuperscript{179} Administrative Tribunals Act, [SBC 2004] c. 45, s. 58. [ATA]

\textsuperscript{180} Ibid. s. 59 (1)(4) (This language very closely reflects the “nominate errors” referred to by Chief Justice Dickson in the \textit{Nipawin} case \textit{infra} note 201, “Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.”, a listing that was adopted repeatedly thereafter by the Court.)
decision inappropriately inconsistent with the decision of the same board reviewed in B.C. under the ATA.

His second concern relates to the ATA’s providing for the referring of constitutional questions to the Supreme Court. Notwithstanding Martin and Paul he continues to question the presumption that any of B.C.’s Tribunals are competent to rule on the applicability of the Charter to their enabling legislation.

In her 2005 article Deborah K. Lovett (now the Honourable Justice Lovett of the Supreme Court of British Columbia as of February 2008) provided a detailed critique of the Martin and Paul cases in support of a justification for the scheme in the ATA barring most tribunals from dealing with constitutional questions and allowing those considered competent and equipped to consider Charter and / or other constitutional division of powers questions. ¹⁸¹ Harking back to Justice Gonthier’s indirect reference to any attempts to place procedural barriers in the way of claimants wishing to assert Charter rights before tribunals, Justice Lovett suggests the Martin decision lacked “judicial empathy for their practical impact on both the works of the tribunals and the parties appearing before them.” These very practical considerations were at the heart of Chief Justice Lamer’s concerns in Cooper, the decision that was overturned to a large extent by the McLachlin Court in Martin.

Justice Lovett illustrated her arguments by reviewing the course of litigation in

Abrams v. North Shore Free Press and Collins, a case finding its genesis in a human rights complaint made in 1994, with final resolution seven years later in 2001, following 19 days of hearing time before the B.C. Human Rights Tribunal and with several interim trips to reviewing courts at all levels to address the constitutional questions raised by the respondent for tactical purposes. She also makes note of the nine days of trial subsequently extended to five weeks to address a constitutional challenge in the Westbank case, where a human rights complainant was ultimately defeated by reason of the native band’s lack of financial means to meet the respondent’s aggressive recourse to Charter freedom of expression challenges. Under the ATA scheme, the Human Rights Tribunal could have proceeded expeditiously to deciding the complaint on its merits and referred the Charter questions to B.C.’s Supreme Court.

Justice Lovett questioned many of the premises and assumptions in Martin, including the benefits of tribunal efficiency for resolving constitutional questions, the salutary effect of relaxed rules of evidence and the likelihood (or lack thereof) of intervention from an attorney general to ensure a complete record, to name but a few. Through its well reasoned criticism of the Martin and Paul, the article buttresses the policy reasons behind the ATA.

In 2005, Justice Lynn Smith, of the B.C. Supreme Court, provided her own analysis explaining why adjudicators themselves may not welcome the Martin mantle of Charter competence. For Justice Smith, the Martin decision raises concerns with regard to

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tribunal institutional capacity and resources and lower morale within tribunals that may result from the extra workload and the issues of independence and impartiality and, finally, the simple issues of efficiency in so far as the rest of a tribunal’s workload is concerned.\textsuperscript{183} In short, it may be a case of the worst of both worlds for those tribunals involved in highly charged or controversial areas.\textsuperscript{184} Certainly a worst case scenario is that of the embattled adjudicator dealing with multiple parties, including the government of the day that appointed him or her, with the battery of lawyers for the other interested parties arguing he or she should rule the enabling statute inoperative in the instant case thus perhaps working him or herself out of a job. No doubt questions of lack of independence and impartiality would overshadow issues of expertise in that scenario. In the end, adjudicators in other provinces may well wish they had the BC option of passing off the constitutional ball to the Superior Court of their province on a stated case and getting on with their own work.

Prof. Philip Bryden, the current Dean of the University of New Brunswick’s Faculty of Law, comments anew from his perspective as a participant in the creation of the proposals for the ATA. He provides insights into the political climate required to undertake and accomplish such reforms and concludes that these stars will seldom if ever align for other jurisdictions. In his presentation to the University of Toronto’s January 2008 Symposium on “The Future of Administrative Justice”,\textsuperscript{185} Prof Bryden

\textsuperscript{183} Smith \textit{supra} note 142 at 143-146.
\textsuperscript{184} Ibid. at 147.
\textsuperscript{185} Philip Bryden, “New Developments in Tribunal Reform: Lessons From British Columbia” (A presentation to “The Future of Administrative Justice” Symposium, Faculty of Law, University of Toronto, January 18, 2008)
makes his case for tribunal independence. He lauds the fact that the ATA requires that appointments be a merit based process and completed in consultation with the tribunal’s chair, but deplores the complete absence of detail on the process for reappointments.\textsuperscript{186}

**Dunsmuir Commentary**

The Supreme Court of Canada handed down its long awaited judgment in *Dunsmuir v. New Brunswick* on March 7th, 2008. The anticipation was that it would address and reconcile abiding issues with regard to the standard of review. There followed a symposium on “*Dunsmuir*” at the University of Toronto on June 4th, 2008. The decision illustrates that there are at least three quite different streams of thinking in the present Supreme Court on how the standard of review question is to be addressed. The implications are further discussed in Chapter 3.

There is already considerable commentary on the subject with much of it focused on the effect of this decision for industry-specific tribunals.\textsuperscript{187} The opening notes provided by Professor Mullan\textsuperscript{188} and the summary of proceedings from University of Toronto’s June 2008 Symposium on *Dunsmuir*\textsuperscript{189} currently best summarize the academic

\textsuperscript{186} Ibid. at 21-24.


\textsuperscript{188} David Mullan, "Implications of Dunsmuir" infra note 283.

\textsuperscript{189} Various ("Roundtable on Dunsmuir " Faculty of Law, University of Toronto, June 4, 2008), Summary of Proceedings, <http://www-law.utoronto.ca/documents/conferences/dunsmuir_roundtable.pdf> [Dunsmuir Roundtable Summary]
response to Dunsmuir. The consensus of this group was that the reasoning in
Dunsmuir does not advance our understanding of the problem.\textsuperscript{190} It would be an
understatement to say that Dunsmuir was somewhat less than what its academic critics
had hoped for in terms of providing further clarity in terms of theoretical underpinnings
and practical direction and authority. Its impact in practical terms may be seen as quite
the opposite.

\textsuperscript{190} Ibid.
Chapter 3
Reasonableness: The Shaping of a Unitary Standard of Review

The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by judicial bodies. Although the judiciary certainly does not have an interpretive monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the Charter. The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task.…

(Former Chief Justice Antonio Lamer writing in Cooper in 1996, \(^{191}\) a decision that was subsequently overturned in 2003 in Martin relying on the contrary opinions of the then Chief Justice McLachlin.)

“Judicial review is an idea that has lately become unduly burdened with law office metaphysics.” Supreme Court of Canada Justice Ian Binnie in 2008 in Dunsmuir.\(^{192}\)

Originally this writer had hoped to study tribunal expertise in some isolation from the maelstrom that was the standard of review debate. This proved impossible, particularly after the issuing of the landmark Dunsmuir decision in March of 2008. Expertise cannot be understood in isolation from the concept of reasonableness as a unitary standard of review.

It has become evident that, notwithstanding the assertion that presence or absence

\(^{191}\) Bell v. Canada (Canadian Human Rights Commission), Cooper v. Canada (Canadian Human Rights Commission), [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 at para. 13. [Cooper v. CHRC] (The Chief Justice was voicing caution to the recent trend to extending curial deference to tribunals on constitutional questions. To the extent that Cooper was an effort if failed. Cooper v. CHRC was overruled in 2003 in the Martin infra note 141.at para. 47.)

\(^{192}\) Dunsmuir infra note 330 at para. 122.
of a privative clause remains the first factor to consider, determining the true subject matter of the question has become the first and key contextual question to being able to identify, assess and weigh the “relevant expertise” of a tribunal. Discerning the subject matter is different from the fourth factor in the P&F Analysis, characterizing the question as one of fact, mixed fact and law or question of law alone. That sometimes metaphysical exercise was often simply a convenient tool resorted to in the past by a reviewing court when it was not comfortable with the decision made and, it needed a reason to supplant its own judgment for that of the tribunal’s.

A court must always first answer “What is the question?” before it can move on to assessing the relative expertise of the tribunal. The two are inextricably linked. Once these two steps have been taken, only then can the Court properly consider the impact of a privative clause and the position of the question on the spectrum of fact to pure law. These last two are now secondary considerations. The answer to the first two will trump a privative clause no matter how strongly worded.193

We will see that tribunal expertise can take several forms. The first is raw technical expertise in the subject matter. A panel of economists is likely better equipped to address multi-market trade issues and specialized engineers and scientists are better equipped to weigh the safety concerns regarding the operation of a nuclear facility.

There is a second form of expertise, competence in conducting judicial proceedings with an eye to complying with the requirements of procedural fairness. This requires

193 See for example CUPE v. N.B. Liquor infra note 207 where, notwithstanding a very strong privative clause, the question was so confounding as to ultimately require the intervention of the Supreme Court to provide a dispositive precedent that labour arbitrators and the Labour Tribunal could follow.
many skills not the least of which is training in statutory interpretation as opposed to technical subject matter expertise. This is the expertise which judges and lawyers are presumed to bring to tribunals. As will be seen, the incorporation of legal expertise can be part of the statutory scheme setting up the tribunal and the presence of the legally trained, often in the role of chairperson to a mixed panel, has weighed heavily in favour of a court recognizing an enhanced level of institutional expertise.\textsuperscript{194} It is not only in the conduct of the hearing that legal expertise can tell. It is also in the production of coherent, comprehensive and legally defensible reasons that legal training impacts. The Dyzenhaus principle of respect for and, thus, deference to the reasons given, is engaged.\textsuperscript{195}

The third type of expertise the Courts have regularly identified is “acquired expertise” or “field sensitivity”. Labour tribunals and arbitrators regularly attract curial deference due to their acknowledged expertise in a very specific field of endeavour; labour relations, contract interpretation and their appreciation of the nuances of collective bargaining generally. As will be seen, human rights tribunals, although also laboring in a very specific area, have not garnered the same level of curial deference for their “field sensitivity”.

What follows is a selection of cases highlighting the development of the standards of review and the reviewing courts’ growing appreciation of the importance of tribunal expertise in their analysis. These cases do not represent an exhaustive listing of the

\textsuperscript{194} Martin supra note 141 at para. 53.

\textsuperscript{195} Dunsmuir note 330 at para, 48 in particular and in many other instances.
Supreme Court’s pronouncements on these questions. They are simply a listing of those cases that this writer has found best illustrate the varieties of expertise recognized along the way. This selection should also illustrate the transformation of the standards of judicial review.

The process starts in the 1970’s with a crude binary system of curial deference operating like an on/off switch. The choice is between patent unreasonableness (almost total deference) and correctness (almost no deference). This system was heavily influenced by the status of the decision maker, Minister of State or vehicle license bureau clerk. It evolved into what is in effect one clarifying principle, the standard of reasonableness. This is a standard that readily allows for the likelihood of there being more than just one right decision or choice in most cases. It requires the reviewing courts to accommodate a tribunal’s proper role and authority, all things being equal, to make that choice. “All things being equal” implies there are a number of factors and considerations in play that can trump the default position of granting curial deference. Relative expertise remains the factor of the “utmost importance.” It can still be displaced by the weight of other factors. The inquiry conducted by the reviewing courts has now changed from the status of the decision maker (Minister or clerk) into an inquiry focused on the expertise of the decision maker on the issue in question relative to the expertise the reviewing court might bring to bear.

This writer has limited himself to cases dating from *Nipawin* in 1973. This case is the prelude to the introduction of the key concept of “reasonableness” and marks the beginning of the end to the irreconcilable and confounding decisions and debates over
“jurisdiction” and the “nature of the question”.

There were up to three standards of review:

**Patent Unreasonableness:** The decision would be allowed to stand if it was “not patently unreasonable”; a truly awkward legal construction. The level of curial deference afforded to the “decision maker” would be the highest. Typically this standard was supported by a very strong privative clause. As indicated, it was a standard that focused to a large extent on who the decision-maker was as opposed to looking at the purpose of the legislation and the tribunal’s expertise. Barring bad faith etc. a court would not enter into a review on the merits of the case unless it could be demonstrated that the error was patent on the face of the record, i.e. an error that does not require “a somewhat probing examination” for the fault to be made evident. Historically this level of deference contemplated that the privative clause could be so strongly worded that it effectively ousted a reviewing court’s authority to review the decision and allowed for a tribunal’s “right to be wrong.” This is the standard that was arguably jettisoned completely by the Supreme Court in *Dunsmuir* in 2008.

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196 The label of “patent unreasonableness” was always difficult to work with. The standard to apply was patent unreasonableness but for curial deference to be justified, the finding had to be that whatever had been done was “not patently unreasonable”, a form of double negative. Given one standard was expressed as a negative and the other a positive i.e. whatever was done was “reasonable” we have a situation where we are called upon to compare the operation of an inclusive concept to that of an exclusive concept. Since conceptually they were held to be free standing standards as opposed to obverse parts of a whole, it is not surprising that any effort to reconcile the two could appear muddled.

197 *Southam infra* note 262 at para. 56.

198 This troublesome concept of the right to be wrong continued to be asserted openly by the Supreme Court in a number of cases on to at least as late as 1993 *Bradco supra* note 14 at para. 40 and possibly quite a bit later.

199 See page 118 below for a discussion of what attributes of patent unreasonableness may have survived the collapsing of patent unreasonableness and reasonableness into one standard in *Dunsmuir* in 2008.
Reasonableness or Reasonableness Simpliciter: Initially this standard was somewhat problematically defined by way of distinguishing it from "patent unreasonableness" in that "if it takes some significant searching or testing to find the defect, then the decision “is simply unreasonable but not patently unreasonable". Over time it has evolved into a more easily understood and defensible concept of a decision being reasonable if it is one of several a tribunal might have made within the range of its statutory discretion and it was rationally supported by the reasons given.

Correctness: For a number of reasons, including most often lack of expertise relative to that of the reviewing court’s, little or no deference is afforded to the decision maker or the decision. The reviewing court will look into the case on its merits and readily substitute its own opinion as to what should have been done. Other typical triggers for the application of correctness are when a tribunal is called upon to rule on constitutional or Charter questions or when nominate errors such as bad faith or failing to consider relevant evidence are found. Correctness is now better understood, not as an independent standard of review but, simply, the absence of the need to extend any sort of curial deference.

1973 Nipawin: Core concepts and the Genesis of Reasonableness?

The Supreme Court’s 1973 decision in SEIU Loc 333 v. Nipawin District Staff Nurses Association (Nipawin) addressed whether or not the Labour Board had properly interpreted the legislation barring an employer controlled organization from being

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200 Southam infra note 262 at para.57
considered a union for certification purposes. There was a very strong privative clause in the enabling legislation.\textsuperscript{202}

Speaking for a unanimous Court, Justice Dickson pronounced on a number of principles that subsequently came to be referred to as the standard of “patent unreasonableness”. On the issue of remaining within its jurisdiction in order to be protected he wrote:

There can be no doubt that a statutory tribunal cannot, with impunity, ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so, it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but requisite in the public interest. \textellipsis A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.\textsuperscript{203}

Justice Dickson then introduces the kernel that lies at the core of the concept of “reasonableness”, the reasoned exercise of a choice made by a tribunal from a range or number of possible choices. Justice Dickson wrote:

But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the Court will not intervene\textsuperscript{204} \textellipsis (This writer’s emphasis)

On the troublesome concept of a tribunal’s right to be wrong Justice Dickson wrote:\textsuperscript{205}

\textsuperscript{202} Ibid. at 2 ("21. There is no appeal from an order or decision of the board under this Act, the board may determine any question of fact necessary to its jurisdiction, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any certiorari, mandamus, prohibition, injunction or other proceeding whatever.", \textit{Trade Union Act}, 1972 (Sask))

\textsuperscript{203} Ibid. at 4

\textsuperscript{204} Ibid.

\textsuperscript{205} Ibid. at 389. \textit{Bryden, "Understanding the Standard of Review"} supra note 59 at 83. (See Bryden’s strong language regarding the result of the application of the standard of patent unreasonableness resulting in a tribunal right to be wrong decision bringing justice into disrepute.).
If, on the other hand, a proper question is submitted to the tribunal, that is to say, one within its jurisdiction, and if it answers that question without any errors of the nature of those to which I have alluded, then it is entitled to answer the question rightly or wrongly and that decision will not be subject to review by the Courts.\(^\text{206}\)

Justice Dickson was a man of few words in this instance. The reasons for the *Nipawin* case run to only five pages, with very little authority cited, but it is rife with important concepts that will be echoed, disputed and elaborated upon in the decades to follow.

**1979  CUPE v. NB Liquor: Reasonableness Embedded in Patent**

**Unreasonableness.**

The idea of granting deference to a reasoned choice within a range or set of options was more directly addressed in 1979 by Justice Dickson once again in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp. (CUPE v. NB Liquor)*\(^\text{207}\) where, in dealing with the Labour Board’s treatment of an anti-scabbing provision that “bristled with ambiguities,”\(^\text{208}\) the situation was such that Chief Justice Dickson concluded “There is no one interpretation which can be said to be “right”.”\(^\text{209}\) The Supreme Court favoured the Labour Board’s ruling over that of the Court of Appeal:

> Upon a careful reading of the Act, the Board's decision, and the judgments in the Court of Appeal, however, I find it difficult to brand as “patently unreasonable” the interpretation given to s. 102(3)(a) by the Board in this case. At a minimum, the Board's interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal. Certainly the Board cannot be said to have so misinterpreted the provision in question as to "embark on an inquiry or answer a question not remitted to it."\(^\text{210}\) (This writer’s emphasis)

\(^{206}\) *Ibid.*


\(^{208}\) *Ibid.* at 3.


1981 Crevier: Dicey, Section 96 of the Constitution Act and the Division of Powers.

In the introduction, this writer made reference to Diceyan principles. In particular, reference was made to a reviewing court’s duty to protect the Rule of Law as animating the reluctance of the courts to defer to the authority of administrative tribunals.211 The Supreme Court’s decision in *Crevier v. Québec (Attorney General)* 212 is oft quoted in this context. The targeted threats were the efforts by Québec’s Legislators to isolate their administrative tribunals from judicial review through use of strongly worded and comprehensive privative clauses. Former Chief Justice Bora Laskin’s reasons in *Crevier* demonstrate that he was somewhat of a hardliner when it came to such attempted incursions on the constitutional authority of the Superior Courts.213 While his thinking is Diceyan in terms of acting to preserve the Rule of Law, the authority he relied on was section 96 of the *Constitution Act*.

The second issue arising from the reasons of the Québec Court of Appeal concerns the effect upon s. 96 of a privative clause of a statute which purports to insulate a provincial adjudicative tribunal from any review of its decisions. Is it enough to deflect s. 96 if the privative clause is construed to preserve superior court supervision over questions of jurisdiction, and if (as in this case) such a construction is not open because of the wording of the privative clause, is the clause constitutionally valid? In my opinion, where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court.214

Chief Justice Laskin then delivered what this writer considers to be one of the more

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211 See *Dicey* note 19.
213 Note 23.
214 *Crevier supra* note 212 at 234.
direct comments on the limited effectiveness of privative clauses:

It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the British North America Act and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.\textsuperscript{215}

1988 Bibeault The Pragmatic and Functional Analysis; the P&F.

\textit{Union Des Employés de Service Loc 298 c. Bibeault (Bibeault)}\textsuperscript{216} is the foundation case for the pragmatic and functional analysis (P&F Analysis). This is the analysis the Supreme Court dictated every reviewing court must go through before determining which standard of review it should apply. At this point we are nominally still dealing with only two standards; patent unreasonableness and correctness. The P&F Analysis had much to recommend it, not the least of which was that it dictated a structured but flexible approach that, if fully adverted to in the reasons, would allow the appellate court to understand how the initial reviewing court weighed factors in arriving at its choice of a standard of review.\textsuperscript{217}

At the heart of this dispute was a difficult and intriguing question dealing with the

\textsuperscript{215} \textit{Ibid.} at 236.


\textsuperscript{217} Dr. Q infra note 315. (See as an example of where both in the initial and appellate reviews the courts failed to apply the P&F Analysis.)
transfer of rights and obligations under a collective agreement. The school board in question had farmed out custodial services to one unionized company. The employees of this company went on strike. The School Board properly terminated the contract and sought tenders for a replacement. The contract was awarded to a competitor; the second company. A second union sought certification for the employees of the second company. In response, the union for the employees of the first company applied for a transfer of rights and obligations under the original contract to apply to the new contract and the new employees of the second company. The adjudicator at first instance, a labour arbitrator, granted this application and dismissed the second union’s application for certification.

The arbitrator’s decision was then appealed to the “Labour Court”. This Tribunal acceded to the request that the case be heard by all eleven judges of that tribunal in the hope that the existing dichotomy in that tribunal’s case law on this question would be finally resolved. This hope went unfulfilled. The process generated a ninety page decision with eight of the eleven judges writing conflicting decisions with sometimes only subtle differences.218 In the end, the majority of seven of the Labour Court held that there had been a “transfer of undertaking” in the circumstances and thus a transfer of rights and obligations under the original collective agreement but there was “no decisive majority in the Labour Court judgment on the crucial question, the meaning of an undertaking.”219 The industry was still left without direction. The reviewing courts

218 Bibeault supra note 216 at paras. 42-44.
219 Ibid. at para. 81.
stepped in to settle the question. As in many Supreme Court cases, the importance of this case lies not in the fact specific result but in the principles stated to arrive at that result.

Justice Beetz noted the occasions where an exercise of tribunal authority in excess of jurisdiction would have to be corrected:

It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:

1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;

2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.220

In addressing the question of excess of jurisdiction errors which will continue to justify Court intervention, Justice Beetz harked back to a 1984 decision in an attempt to bring some precision to the concept.221  The distinctions on issues of jurisdiction are expressed as follows: a) a tribunal's mere error of law as to its enabling statute, b) an error arising from a patently unreasonable interpretation of a provision and, c) an error which relates to a provision conferring jurisdiction. How any of these can be distinguished from “regular errors” continues to confound this writer. By way of example; if a Board were created to decide questions relating to the storage of fresh vegetables and it purported to make a decision governing the storage of tomatoes, a fruit, which of the three categories would best apply? If the Board member simply did not know that a tomato was a fruit then, one imagines, it is a “mere error.” Could it not

220 Ibid. at para. 117.
also be viewed as one of jurisdiction, as in c) above or, as to the enabling statute as in a) above? If the member was aware of the difference but determined that the legislature must have intended he or she have jurisdiction over all similar perishables, then perhaps this is a patently unreasonable conclusion. What kind of error would it be if the member determined that the jurisdiction included storage while in transit and, by extension, the standards for the cooling of transport containers? It is difficult to imagine that the last question could be answered without a rather probing review of the enabling statute, parallel statutes and industry practices. How would a privative clause directed to foreclosing such a review operate?

Addressing the “preliminary or collateral question” analysis that had previously dominated administrative review case law\(^222\), Justice Beetz echoes Justice Dickson in the *CUPE v NB Liquor* case when he distills the task down to one question: “Did the legislature intend the question to be within the jurisdiction conferred on the tribunal?”

The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: It substitutes the question “Is this a preliminary or collateral question to the exercise of the tribunal's power?” for the only question which should be asked, “Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?”\(^223\) He then goes on to articulate the “pragmatic and functional analysis”; the interpretative tool that continues to stand at the center of any administrative law analysis debate:

\(^{123}\) The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. At first sight it may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal's jurisdiction. The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the

\(^{222}\) *Ibid.* at para. 119.

\(^{223}\) *Ibid.* at para. 120.
question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal's jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal's jurisdiction....

Prior to Bibeault the analysis was often a strictly jurisdictional analysis that would myopically and lexicologically focus on just the meaning of the words in one part or section of the enabling statute.226 The purpose of the legislation or context for the Legislator's stepping in to create a regulatory regime for a specific sector might never be considered.

Justice Beetz reasoned that the "pragmatic and functional" analysis was better suited to administrative law for three reasons: a) it focused the inquiry on the intent of the legislature, b) it fit better with the concept of jurisdiction as it applies to tribunals, and c) it put renewed emphasis on the superintending and reforming function of the superior courts. In enunciating all these principles Justice Beetz was arguably heavily indebted to the 1986 milestone work of Professor H.W. MacLauchlan. 227

224 Ibid. at para. 123.
225 Note the use of the phrase "nature of the problem" as opposed to "nature of the question". It is this writer's contention that the first refers to the actual subject matter of the question before the Court whereas the latter refers to the often difficult task of distinguishing question of fact from questions of mixed fact and law from pure questions of law. This writer suggests the use of two phrases resembling each other so closely sewed confusion in, and hampered the understanding of just what subsequent courts meant in their reasons.
226 See Ref. re RTA supra note 29, (Arguably this case illustrates that the Court itself could still not resist focusing down myopically on a pure jurisdiction issue to the detriment of the statutory purpose as a whole.)
227 MacLauchlan, "How Much Formalism Can We Bear" supra note 83 (Prof. MacLauchlan's work was subsequently alluded to by Chief Justice Lamer in 1993 in Mossop infra note 228 at para. 79)
Expertise ≠ Deference Necessarily.

The 1993 case of *Canada (AG) v. Mossop* was important as an early decision addressing the legal concept of “family status” and “sexual orientation” in the context of the rights of long term same sex partners. The specific right in question was a same sex partner’s access to bereavement leave on the passing of his partner’s father. The question was whether the definition of family status in this federal employee’s collective agreement contravened the *Canadian Human Rights Act*. In this instance we have a Court that is split three ways with differing approaches and commentaries as to the level of deference due to the Canadian Human Rights Commission (CHRC). This division of opinion is important as it marks the resumption of the dissent by Justice L’Heureux-Dubé in the *Zurich* case. Justice L’Heureux-Dubé continued in her effort to have the expertise of the CHRC on questions of law acknowledged and to have it afforded the higher level of curial deference she felt was due based on the Commission’s expertise in human rights. To date the Supreme Court has not done so. The decisions of this tribunal were not protected by any sort of privative clause.

Speaking first, Chief Justice Lamer noted that, notwithstanding there being no privative clause, “specialization of duties” could result in deference being granted on findings of fact. It has always been the case that curial deference was generally

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230 See *Mossop* and *Zurich* generally.


granted for findings of fact by those who actually heard the testimony in the first instance and were best positioned to test or see it tested. This is in accord with general principles of appellate law.  

This case took a curious twist in terms of advocacy. Justice Lamer noted that, as no challenge under the *Charter* had been pleaded, the only question before the Court was one of statutory interpretation. Referring to two recent *Charter* decisions that had resulted in "sexual orientation" being added as a prohibited ground, he remarked that counsel had been invited to submit new arguments based on the *Charter*, but had elected not to do so. The Chief Justice then proceeded to decide the only question before the Supreme Court, one of pure statutory interpretation on the meaning of “family status”.

The Chief Justice noted that the CHRC, in its role as policy advisor to the government, had specifically recommended that sexual orientation be included as a prohibited ground. It followed that Parliament must have specifically elected not to do so when it amended the Act in 1983. He considered this fact determinative. Chief Justice Lamer did not accept the Court of Appeal’s contention that questions arising from one’s sexual orientation could be subsumed within the concept of discrimination on

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233 *Cromwell supra* note 120.
234 *Mossop supra* note 228 at para. 27.
236 *Mossop supra* note 228 at para. 30.
the basis of “family status”. Bowing to the intent of Parliament, and without the legal means to resort to the corrective measures possibly available in the Charter, the Chief Justice led the majority to rule that Mr. Mossop’s challenge should be dismissed. The ruling is a good example of judicial restraint. The Court decided the question properly pleaded before it. The inclination to activism was resisted. Addressing this situation was properly left to Parliament.

Justice La Forest agreed with the result but went into a more detailed analysis of the standard of review. His was a response to Justice L’Heureux-Dubé’s assertion that the Court should defer to the views of the tribunal, not only on questions of fact but, on questions of law. He noted that her analysis was based in large measure on jurisprudence from specialized fields, “particularly labour law”. This point is important as this writer argues that expertise can only be properly understood within a context limited to particular kinds of tribunals. Drawing from decisions in one domain holus bolus to apply to another confounds the analysis. Essentially, not all tribunals are created equal or achieve the same status. Labour Tribunals have traditionally been afforded a fairly high level of deference for many good reasons but, in particular, for their superior “acquired” expertise often characterized as “field sensitivity”.

Justice La Forest first noted that labour tribunal decisions are usually protected by strong privative clauses whereas human rights tribunals are not. He also noted that, as

238 Ibid. at para. 34.
239 Ibid. at para. 44.
240 See MacLauchlan “How Much Formalism Can We Bear” infra note 245.
in Zurich, even in the absence of a privative clause, the Courts could still extend
deferece with respect to questions of fact where highly specialized bodies were
involved.\textsuperscript{241} Justice La Forest goes on to observe that the Human Rights Commission
has multiple functions. These include education, policy advice, investigation and
mediation. As for the tribunal itself, it was an ad hoc affair, constituted only as required
with part time members. The implication was that, insofar as adjudication is concerned,
there was limited institutional memory or expertise built up. The presumption was that a
standing tribunal would have the opportunity to develop an institutional memory and
thus greater judicial rigour and consistency could be expected.\textsuperscript{242} Another difference
from labour tribunals that was highlighted was that the scope of a labour arbitrator’s or
tribunal’s ruling affects only the parties and, thus, is usually of very limited precedential
import. The process can adapt or self correct in the next round of negotiations. In
contrast a human rights tribunal ruling could have considerable precedential authority
and a direct, broad and significant impact on society at large.

Justice La Forest stated that the superior special expertise of a human rights tribunal
is in its fact finding as opposed to its statutory interpretation. He asserted that this
tribunal’s superior expertise did not extend to “general questions of law” such as the one
in issue in this case; the meaning of “family” and “family status”. He concluded the

\textsuperscript{241} Mossop \textit{supra} note 228 at para. 45.

\textsuperscript{242} It is interesting to note that Ontario has recently hived off the adjudicative functions of its Human Rights Commission into a
separate tribunal with full-time members under the direction of veteran adjudicator Raj Anand. S. Ronald Ellis, the former Chair of
Ontario Worker’s Compensation Board argues that a major factor in promoting tribunal independence would be to end “Host
Ministry” relationships as these can operate as a form of “interest capture” bringing the impartiality of the tribunal into question.;
Ellis \textit{“Justicizing Tribunals: Part II” supra} note 163 at 98. Whether this will result in this tribunal garnering an enhanced level of
curial deference on questions of law remains to be seen.
subject question was one that involves “statutory interpretation and general legal reasoning which the courts must be supposed competent to perform.”

No deference was due. The standard of review on a question of law was correctness.

As noted above, Justice L’Heureux-Dubé’s reasons echoed her thinking in *Zurich*. She argued for a high degree of deference (patent unreasonableness) based on the CHRC’s “specialized jurisdiction and expertise.” She made use of this occasion to refer to MacLauchlan’s concept of “field sensitivity” as a form of expertise to be considered.

“That is, even a body made up of “non-specialists” may develop a certain “field sensitivity” where that body is in a position of proximity to the community and its needs. Where the question is one that requires a familiarity with and understanding of the context, there is a stronger argument that a higher degree of deference may be appropriate.”

“Field sensitivity” is a concept which serves to avoid the formalism of simple tallying of the number of Ph.D.’s on a tribunal to determine whether or not there is sufficient relative expertise to trigger curial deference. As correctly noted by Justice La Forest, Justice L’Heureux-Dubé did not distinguish between the very broad duties, powers and authority granted to the Commission as a whole and the more limited role of the tribunal itself within the CHRC.

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243 Mossop supra note 228 at para. 45.
244 Ibid. at para. 156.
245 Ibid. at para. 68. (Reference to field sensitivity can be found in Prof. H.W. MacLauchlan’s 1986 Milestone article “How Much Formalism Can We Bear” supra note 83 at p. 356.)
246 Ibid. at paras. 86-87.
1994 Pezim: The Technically Specialized Expert Tribunal

The 1994 case of *Pezim v. British Columbia (Superintendent of Brokers) (Pezim)* illustrates well the Supreme Court’s treatment of a decision made by a highly specialized tribunal with a strong mandate that extends to formulating policy for the activities of a complex economic sector. This case revolved around whether or not there was an obligation on the part of the corporate directors of a junior mining exploration company to publicly disclose new assay findings while the stock in the company was being actively traded. The key issue was whether a change in “material facts” amounted to a “material change”, triggering the obligation to disclose under the statute. Certainly this was a subtle but important question for those involved in trading securities. For our purposes it is important because of the comments made with regard to curial deference. The *Pezim* decision is also of interest as it is Justice Iacobucci’s lead in to *Southam*248, the 1997 watershed decision that gave rise to the “reasonableness simpliciter” standard.

Following his review of the Court of Appeal’s reasons Justice Iacobucci, noted specifically that the appropriate standard of review had not been considered.249 Justice Iacobucci began by suggesting there are “various standards of review with respect to the myriad of agencies that exists in our country”; thus implying that there must be more than simply the two standards specifically elaborated to date: patent unreasonableness

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248 *Southam supra* note 262. (Generally)
249 *Pezim supra* note 247 at para 36.
and correctness. He asserts that legislative intent in conferring jurisdiction is the central question.\textsuperscript{250}

Justice Iacobucci states the factors to be considered as follows: a) the analysis of the tribunal’s role or function, b) the presence of a privative clause and, c) whether or not the question lies within the tribunal’s jurisdiction. He refers to the large number of factors the Courts have considered, resulting in their having developed a “spectrum that ranges”\textsuperscript{251} from that of standard of patent unreasonableness to that of correctness. This comment is particularly interesting as Iacobucci later stated specifically that there was not a range or spectrum of choices but only discrete standards.\textsuperscript{252} Interestingly, there is at least one set of scholars who later take issue with the fact that Justice Iacobucci did not continue to press for recognition of a range of standards on a spectrum such as one finds when dealing with the standard for procedural fairness on judicial review.\textsuperscript{253} There is another commentator who notes how quickly a number of other reviewing courts moved to adopt the concept of a spectrum of standards.\textsuperscript{254}

Justice Iacobucci affirms that deference should apply not only to findings of fact but, where the tribunal’s role and expertise fit, to questions of law.\textsuperscript{255}

Balancing the fact that there was a right of appeal in the subject legislation against

\begin{footnotes}
\footnote{Ibid. at 61.}{Ibid. at 61.}
\footnote{Ibid. at 61-62.}{Ibid. at 61-62.}
\footnote{Ryan infra note 308 (Justice Iacobucci later resiled from this position in this 2003 decision by firmly rejecting the idea there might be an infinite or many standard of review as opposed to three discrete standards.)}{Ryan infra note 308 (Justice Iacobucci later resiled from this position in this 2003 decision by firmly rejecting the idea there might be an infinite or many standard of review as opposed to three discrete standards.)}
\footnote{Sossin & Flood supra note 31 generally.}{Sossin & Flood supra note 31 generally.}
\footnote{Pezim supra note 247 at para 62.}{Pezim supra note 247 at para 62.}
\end{footnotes}
the highly specialized expertise of a tribunal of market regulators, Justice Iacobucci found that the standard of deference had to fall between patently unreasonable and correctness. Commenting on the weight to be given to this tribunal’s expertise, he built on precedent by citing Justice Sopinka’s comments in *Bradco* on the importance of expertise. He also harked back to Justice Wilson’s 1990 statement in *National Corn Growers* on the importance of recognizing and deferring to “experts who have accumulated years of experience and a specialized understanding of the activities they supervise.” Justice Wilson also made the telling remark at that time that part of the Court’s process in coming to a modern understanding of administrative tribunals was “a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated powers.”

Justice Iacobucci also looked to the extent of the authority given to the tribunal as reflected in the legislation, the fact that many of the concepts the tribunal deals with must be understood in context and the fact that there was ample precedent for granting deference to securities regulators specifically, as further reasons for granting deference to the tribunal in this instance. Justice Iacobucci also introduced a new factor to consider. He asserted that, where a tribunal has a policy making function, a higher

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256 *Ibid.* at para. 64.
260 *Pezim supra* note 247 at paras. 71-73.
degree of deference was warranted.\textsuperscript{261} Essentially, where their delegated authority approaches the level of making regulations, greater deference should be accorded.

1996 Southam: Expertise as the Foremost Factor

This writer suggests that Justice Iacobucci’s reasoning in the 1996 decision \textit{Canada (Director of Investigation and Research, Competition Act) v Southam (Southam)}\textsuperscript{262} is as much of a watershed event as the advent of the Pragmatic and Functional Analysis in \textit{Bibeault}. Justice Iacobucci enunciated the need for a middle ground standard between the binary standards of patently unreasonable and correctness and called it "reasonableness simpliciter" (now simply referred to as “reasonableness”). \textit{Southam} not only introduced the current dominant standard of review but, it also signaled the beginning of the end for the standard of "patent unreasonableness" as a standard allowing to a tribunal the right to be wrong. While not explicitly renouncing the use of patent unreasonableness as a separate standard the introduction of reasonableness set the stage for its subsequent decline into the role of simply being the converse of reasonable (i.e. unreasonable) and, finally, the collapsing of the standard into reasonableness in 2008 in \textit{Dunsmuir}. The reasons are rich in the number of judicial review concepts and factors listed and elucidated.

In this instance we had a dually specialized tribunal (legal / technical) dealing with sector specific concepts such as “cross-elasticity of demand”,\textsuperscript{263} “functional

\textsuperscript{261} \textit{Ibid.} at para. 74.


\textsuperscript{263} \textit{Ibid.} at para. 16.
interchangeability” and “inter-industry competition” all with a view to making findings “about the dimensions of the relevant market.” These concepts were definitely not the typical fodder for a generalist judge of a reviewing court. The complaint was that Southam’s purchase of local community newspapers had added to its broader coverage through its two Vancouver based dailies, this to the point that there was an unacceptable reduction in the level of competition.

Justice Iacobucci made the most of the fact he had before him a statute that comprehensively detailed the qualifications of its members and their specific roles. Justice Iacobucci reviewed the statutory structure of the tribunal in an effort to identify the Legislators’ purpose in creating the tribunal. He noted first that the Board as whole would not exceed twelve members with not more than four being judges for the Federal Court and not more than eight being Cabinet appointed lay experts in the economic regulation of competition. The structure of the tribunal was further defined by the fact that the ratio of judicial to lay was to be preserved whenever a panel was constituted. Further, the roles were defined in that pure questions of law were reserved to the judicial members while questions of fact and mixed fact and law remained within the purview of the lay members. This is not the first or the last time that the introduction of legal expertise in a tribunal assisted in garnering a higher level of curial

264 Ibid. at para. 42.
265 Ibid. at para. 27.
266 Ibid. at para. 12.
267 Ibid. at paras. 24 and 53.
To torture an adage somewhat; familiarity appears to breed curial deference.

As in Pezim, having noted that he was dealing with a tribunal that was not protected by a privative clause, Justice Iacobucci outlined the basic steps to follow: have regard to a) the nature of the problem b) the applicable law properly interpreted in light of its purpose and c) the expertise of the tribunal.

Some of Justice Iacobucci’s analysis addressed the difficult question of how to distinguish questions of law from mixed law and fact from questions of pure law. Having tried to cast some light on this issue Justice Iacobucci looked back to Pezim to illustrate another analytical concept impacting on the decision to grant curial deference. In Pezim the court was concerned with the concepts of a “material change” in the value of assets. In that instance the language was found in the statute. Any decision would have industry-wide effect and would thus be of considerable precedential import. He suggested that high precedential impact could be a factor weighing in favour of caution through closer court supervision as opposed to allowing for greater curial deference.

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269 Southam supra note 262 at para. 32.

270 Ibid. at paras. 34 to 40. (While this discussion is not central to the questions being addressed in this work they remain worthy of some mention. Justice Iacobucci begins with the proposition that questions of law are questions about the correct legal test. Questions of fact are questions about what happened between the parties. Finally, questions of mixed fact and law are questions about whether the facts satisfy the legal tests. What constitutes negligence in tort is given as an example of a question of law i.e. too great a rate of speed given the conditions amounts to negligence. How fast one was travelling on a given curve and when and what the conditions are questions of fact. Whether these facts applied to the legal rule amounts to negligence is then a mixed question of law and fact.)

271 Ibid. at para. 36.
This concern was echoed by the majority and disputed by Justice Binnie some twelve years later in *Dunsmuir*. In contrast, the impact of the decision in *Southam* would be restricted both geographically and temporally in its impact. As the regulation of competition is an activity that is very fact specific, the precedential value of the decision would be greatly attenuated. It follows that it would be of less concern if a greater curial deference were accorded.

In dealing with the assertion that the Tribunal failed to consider all of the evidence and thus erred in law Justice Iacobucci’s reasoning highlighted two other factors to consider. He first noted that, with detailed reasons running to 147 pages of analysis touching on all the evidence presented it could not be said that the Tribunal erred by not taking into consideration (best proven by averting to in the reasons) some part of the evidence.272 While it may seem trite to state, the proposition is that regularly producing comprehensive and carefully written reasons will enhance the prospects of garnering curial deference. This proposition dovetails with the concept enunciated in 2003 by the Court in *Martin* that a key reason for allowing tribunals to rule on *Charter* questions is to allow them to apply their specialized expertise and communicate their opinion on the issue by way of a more complete record for review on appeal.273 It also fits in with the Dyzenhaus principle of deference by way of respect given to a well reasoned tribunal

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272 *Ibid.* at paras. 15 to 17.

273 *Martin supra* note 141 at para. 53. (McLachlin C.J. “... In my view, there is no reason to doubt that the Appeals Tribunal is an adjudicative body fully capable of deciding *Charter* issues, as demonstrated by its competent reasons on the s. 15(1) issue in the case at bar.”)
decision.274

The second aspect of the challenge to the decision was the assertion that insufficient weight had been given to some of the evidence. Justice Iacobucci’s response was that this goes to the weight of the evidence and the discretion with regard to the weight to be assigned to the evidence brought before a regulatory tribunal such as this one should be left to the tribunal.275 The level of deference accorded in assigning weight increases with the measure of technical expertise the tribunal has and with the extent to which the situation is "multi-factored”. Balancing being essential in this exercise in market measurement and impacts, the Court was quite ready to defer to the expertise of this tribunal.276

In dealing with the third factor, tribunal expertise, Justice Iacobucci stated forcefully as follows."

The Area of the Tribunal's Expertise

Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review. This Court has said as much several times before, though perhaps never so clearly as in the following passage, from United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, at p. 335:

. . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in Bell Canada ..., it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction. (This writer's emphasis)277

274 Dyzenhaus supra note 77.
275 Southam supra note 262 at para.43.
276 Ibid. at paras. 43 and 44. (The concept of a “polycentric” form of regulation is touched on later in the paper. This refers to economic sector regulation by a tribunal where there are a variety of interests at play and it is the tribunals job to balance these interests while complying with government policy.)
277 Ibid. at para. 50.
Justice Iacobucci’s reasons for finding relevant tribunal expertise in this case provide one of the few examples of an explicit and detailed review of the guidance one may, though seldom, find in the enabling statute. This is as opposed to simply a bald statement from the reviewing court that the tribunal in question is an expert tribunal. For these reasons Justice Iacobucci is quoted at length.

52 The particular dispute in this case concerns the definition of the relevant product market -- a matter that falls squarely within the area of the Tribunal's economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest indicium of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more, indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.

53 All of this is not to say that judges are somehow incompetent in matters of competition law. Significantly, Parliament mandated that the Tribunal should include judicial members, and that the Chairman should always be a judge. See Competition Tribunal Act, s. 4. Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges. However, one of the principal roles of the judicial members is to decide such questions of pure law as may arise before the Tribunal. Over those questions they have exclusive jurisdiction. See supra at s. 12(1)(a). But over questions of fact and of mixed law and fact, the judicial members share their jurisdiction with the lay members. See, supra, at s. 12(1)(b). Thus, while judges are able to pronounce on questions of the latter kind, they may do so only together with the lay members; and, in a typically constituted panel, such as the one that sat in this case, the lay members outnumber the judicial ones, so that in the event of a disagreement between the two camps, the lay members as a group will prevail. This makes sense because, as I have observed, the expertise of the lay members is invaluable in the application of the principles of competition law.278 (This writer’s emphasis)

In this passage Justice Iacobucci encapsulates the reasons for granting deference to this tribunal in these circumstances. At the heart of the reasoning is the fact that this tribunal had greater technical expertise vis-à-vis the question in dispute than would a generalist judge on a reviewing court. Essentially the intervention of a reviewing court, if it must occur, should be a "value added proposition". A reviewing court should be

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278 Southam para. 52 and 53.
reluctant to interfere if it knows significantly less about the subject matter before the tribunal than the adjudicators to whom the Legislators have entrusted the problem.

Until Southam, the "correctness" standard and the "patent unreasonableness" standard were the only two standards acknowledged as available to a reviewing court. This binary switch on / switch off thinking was crude to say the least. In Southam, a "reasonableness" standard was applied as the most accurate reflection of the competence intended to be conferred on the tribunal by the Legislators. Justice Iacobucci described the range of standards available as a "spectrum" with a "more exacting end" and a "more deferential end". It was the incongruity of a full right of appeal (no privative clause whatsoever) and statutory provision for a highly expert tribunal that acted as the midwife to the delivery of this new standard of curial deference.

Noting there was a statutory right of appeal on questions of law and mixed law and fact, Justice Iacobucci concluded the Court could not apply the patent unreasonableness standard to this decision as this is generally considered a standard triggered by the presence of a strong privative clause.

Justice Iacobucci attempted to distinguish the two standards as follows:

The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

As such, it appears that patent unreasonableness was not to be abandoned or  

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279 Ibid. at para. 30.
280 Ibid. at para. 57.
modified at this stage. He further comments that an unreasonable decision “is one that, in the main, is not supported by any reasons that can stand a somewhat probing examination.”

Justice Iacobucci’s somewhat cryptic statement that the difference between unreasonable and patently unreasonable “lies in the immediacy or obviousness of the defect” has proven elusive in practical application and has provided academics with fodder for a barrage of critical commentary. The distinctions are now perhaps only of historical importance. Over time the Courts have come to find that the “reasonableness simpliciter” standard meant that, deference would be granted if, at the end of the day, there was a number of reasonable options or choices open to the tribunal and the tribunal made a defensible choice supported by a good set of reasons within that set of options. This writer suggests it is possible that Justice Iacobucci was telegraphing by way of example that this should be how the new standard should operate. Near the end of his reasons Justice Iacobucci wrote as follows:

In that sense, the Tribunal's finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning. More generally, I notice that the Tribunal seems to have been preoccupied with the definition of the relevant market. It is possible that the members may occasionally have lost sight of the ultimate inquiry, which is whether the acquisition of the

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281 Ibid. at para. 56. (This echoes the argument put forward by Prof. Dyzenhaus in his milestone article, See the Literature Review at see infra note 77.)

282 See Sossin, "Empty Ritual" note 90 at 481 n. 10 for a long but only partial listing of the critical commentary.

283 While Dunsmuir purports to bring the debate to an end by eliminating patent unreasonableness as a stand-alone standard, Professor Mullan has queried what is to be done with statutes such as the B.C. Administrative Tribunals Act that actually incorporate the concept of patently unreasonable; “David Mullan, "Implications of Dunsmuir for Standard of Review" (A Draft Outline of an Introduction to Standard of Review Panel presented at the "Roundtable on Dunsmuir " Faculty of Law, University of Toronto, June 4, 2008) <https://www.law.utoronto.ca/documents/conferences/Dunsmuir-Mullan-points.pdf> [Mullan, "Implications of Dunsmuir"]
community newspapers by Southam substantially lessened competition. But again, I cannot say that the Tribunal's approach was unreasonable.\textsuperscript{284} Prof. Dyzenhaus has written that respect is at the core of curial deference.\textsuperscript{285} In ruling as he did and respecting the tribunal’s choice on this key issue Justice Iacobucci demonstrated this essential characteristic by resisting the temptation to arrogate the authority properly granted to another even where he might have come to a different conclusion.

1998 Pushpanathan: Human Rights and the P&F Analysis at Work

In his 1998 judgment in \textit{Pushpanathan v. Canada (Minister of Citizenship and Immigration)} (\textit{Pushpanathan}),\textsuperscript{286} speaking for the majority, Justice Bastarache restated the \textit{Bibeault} P&F Analysis and the \textit{Southam} principles into four factors to be taken into consideration as follows:

a) the existence of a privative clause in the legislation and the strength of that clause,\textsuperscript{287}
b) the expertise of the tribunal
c) the purpose of the act as a whole, and the provision in particular and
d) the "Nature of the Problem"; characterized as a question of fact, mixed fact and law or pure law.

The question before the Court was whether certain provisions of the international conventions on refugees that Canada had signed\textsuperscript{288} operated to bar Pushpanathan's extradition following his having served his sentence in Canada for large scale drug

\textsuperscript{284} Southam supra note 262 at para. 79.
\textsuperscript{285} Dyzenhaus supra note 77.
\textsuperscript{287} Ibid. at para 30 (A full privative clause is "one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded")
\textsuperscript{288} Ibid. at 45 and 47.
trafficking.

Justice Bastarache discusses “polycentricity”; a concept impacting on the level of deference that should be extended. It corresponds in some ways with the “multi-factored balancing test” discussed in Pezim and its equivalent in National Corn Growers. The issue before these tribunals involved many interests as opposed to just a dispute between two parties. The concept is best illustrated by way of quotation rather than a paraphrase:

These considerations are all specific articulations of the broad principle of “polycentricity” well known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies. A “polycentric” issue is one which involves a large number of interlocking and interacting interests and considerations” (P. Cane, An Introduction to Administrative Law (3rd ed. 1996), at p. 35). While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint. The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the “statutory purpose”. 289

In this instance, as in the CUPE v. Local 79 case,290 we had the argument that the tribunal in question, the Immigration Refugee Appeal Board (IRAB) had no particular expertise in the law actually before it. The facts were not disputed as Pushpanathan’s crimes were admitted, as was the fact that he was at some risk to his person if deported. The focus of the debate was the IRAB’s expertise in interpreting the various United Nations Conventions entered into by Canada. The Court found that, although the IRAB might have some knowledge of its own enabling legislation, it had no

289 Pushpanathan infra note 286 para. 36.
290 In CUPE Local 79 supra note 96, the argument was that the labour arbitrator’s specialized expertise did not extend to an understanding of legal concepts such as res judicata. In that case the question was whether a convicted pedophile should be re-instated to a workplace where he would continue to be involved with youths.
particular expertise in interpreting international conventions. The Supreme Court applied the standard of correctness.

As noted above, Professors Flood and Sossin have argued quite reasonably that the potential harm to the individual, the denial of a license as opposed to deportation to torture argument, the “outcome”, was a factor still missing from the P&F Analysis. Similarly, Justice Binnie in *Dunsmuir* has urged a focus on the “outcome” as a key element in judicial review. These arguments highlight the need to consider the impact on the individual.

Another factor that came into play in Pushpanathan was the *Southam* concern about the precedential import of the case. Simply stated, might not automatically allowing the conviction of a serious offense to lead to deportation clear the decks for wide scale deportation to torture or death by ministerial fiat?

In commenting on tribunal expertise as a factor, Justice Bastarache specifically noted that “If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded.” Both “special procedure” and “non-judicial means of implementing the Act” are concepts that could benefit from further study and comment.

Justice Bastarache describes the “relative expertise” analysis as follows:

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291 Sossin & Flood supra note 31 and Binnie J. in *Dunsmuir infra* note 364..

292 Pushpanathan supra note 286 at para 32.
Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise. Many cases have found that the legislature has intended to grant a wide margin for decision-making with respect to some issues, while others are properly subject to a correctness standard. … The criteria of expertise and the nature of the problem are closely interrelated.293 (This writer’s emphasis)

This writer has characterized the idea of measuring the contribution a reviewing court’s expertise might bring to a question as the “value added proposition”. Would the court’s intervention actually increase the measure of relevant expertise being brought to bear on the question? If not, then why presume, contrary to the intention of the Legislators, to intervene or interfere. In this instance, having found it was a legal question outside this tribunal’s area of expertise and competence, the Court felt justified in intervening.

This writer emphasized the reference to the “nature of the specific issue” because there is confusion in the language used. When such a term is used it is sometimes difficult to know whether the reference is to the subject matter being within the expertise of the tribunal as a specific area of knowledge or as a reference to the question being in or out of the tribunal’s expertise as a question of fact, mixed law and fact or pure law.

2001 Ocean Port: A Line in the Sand on the Judicialization of Tribunals?

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch) (Ocean Port)294 is a 2001 case that primarily focused on the

293 Ibid. at para. 33.
argument that the Board lacked the necessary guarantees of judicial independence to ensure the impartiality of an administrative decision maker authorized to impose penalties. Tribunal independence has been referred to as “the holy grail” for some adjudicators by at least one administrative law commentator.295 Others have argued that training, experience and mutual acceptability by the parties are far more effective in ensuring tribunal independence.296 Certainly the questions of “tenure, financial security and administrative control”, the three pillars of judicial independence297, have been consistent issues of concern298 when it comes to assessing whether or not deference should be accorded to a tribunal’s decisions. Independence would be particularly important where the government of the day was involved in the dispute as an interested party.

Others have argued that other measures short of lifetime financially secure appointments are available, the “justicizing” of tribunals. 299 Further, at least one province appears to have directly and successfully addressed the problem of tribunal

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295 Sprague, “Quest For the Grail” supra note 153. (Mr. Sprague refers to judicialization as the Holy Grail for some but does not himself support traditional judicialization of tribunals as a policy.)

296 Prof. Joseph Weiler of the University of British Columbia’s Faculty of Law was quoted at length and with approval in the groundbreaking ruling in CUPE v. Minister of Labour infra note 320 at para. 179.

(179 His reading of the legislative intent is reinforced by the evidence of practice and experience in the labour relations field. I accept, as did the Court of Appeal, the testimony in this respect of Professor Joseph Weiler, whose affidavit was filed on behalf of the unions (at para. 36):

The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security, but by training, experience and mutual acceptability. [Emphasis added by the Court.]’)


298 Matsqui Band supra note 3.

299 See Ellis, “Justicizing Tribunals: Part II” supra note 163.
independence without resorting to lifetime appointments. \(^{300}\) This case is of interest in that Chief Justice McLachlin states somewhat too broadly that all administrative boards are, by definition, no more than agents of government policy and that the required measure of independence is dictated by the Legislators' wishes, essentially unfettered by common law principles.

24 Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.\(^{301}\)

32 Lamer C.J. also supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.\(^{302}\)

This writer suggests this reasoning quite misses the mark. Judicial type independence may be a secondary or unimportant factor where the primary purpose of the enabling legislation is to implement and apply government policy to parties other than the government itself. The importance of independence increases exponentially, if the tribunal is to have any credibility, when the government is interested in the outcome,

\(^{300}\) See Chapter 4, Tribunal Reforms.

\(^{301}\) Ocean Port supra note 294 at para. 24.

\(^{302}\) Ibid.
financially or otherwise. By way of example, the importance of the government’s financial interest in an administrative process was central to the Supreme Court’s finding in 2003 that the decision of a Minister of State, Ontario’s Minister of Labour, was patently unreasonable.\textsuperscript{303}

Justice McLachlin spoke for a unanimous court in this instance. What is of interest in terms of curial deference is that this represents a line in the sand drawn by the court when it comes to the “judicialization” of administrative tribunals. Arguments with regard to tenure, financial security and administrative support may have been telling when it came to the Provincial Court Judges and Justices of the Peace\textsuperscript{304} but it was clear the Supreme Court was now pulling the ladder up into the tree house and was not prepared to find an unwritten constitutional principle when it came to less elevated adjudicators. The agency in this instance was a mere licensing board with very little discretion. This was perhaps not the best fact situation on which to argue the need for judicial independence. The Supreme Court may have seized on the opportunity to make a point. Whether traditional judicialization would actually serve to improve tribunal performance is a question that will be addressed in Chapter 4: Tribunal Reforms.


The question of procedural fairness and the standard of review are distinct legal concepts. The Supreme Court has ruled that, the standard of review for judging

\textsuperscript{303} CUPE v. Minister of Labour supra note 320. (Tampering with collective bargaining without engaging the political process.)

\textsuperscript{304} PEI Judges Reference supra note 297 and Ell supra note 297.
procedural fairness is correctness, as members of the judiciary are taken as paramount
experts in dealing with issues of procedural fairness and natural justice.\textsuperscript{305} It has also
ruled that the content of the procedure is “eminently flexible”; it can vary from simply
giving notice by letter with the opportunity to respond in writing to requiring a hearing
with access to the full panoply of court--like procedural safeguards. As previously
noted, academic commentators have argued that the standard of review should be a
concept that is variable on a spectrum running from the most deferential point of patent
unreasonableness to the least deferential of correctness.\textsuperscript{306} Justice Iacobucci gave
credence to this proposition by referring to a “spectrum” of review on more than one
occasion.\textsuperscript{307}

In 2003 in \textit{Law Society of New Brunswick v. Ryan (Ryan)} Justice Iacobucci himself
resiled from this position and put the question beyond debate.\textsuperscript{308} \textit{Ryan} was a case
dealing with egregious breaches of professional misconduct by a lawyer. Justice
Iacobucci addressed the arguments that there should be a fourth standard created that
would fall somewhere between reasonableness and patent unreasonableness. Justice
Iacobucci wrote:

\textbf{44} This argument must be rejected. If it is inappropriate to add a fourth standard to the three
already identified, it would be even more problematic to create an infinite number of standards in
practice by imagining that reasonableness can float along a spectrum of deference such that it is
sometimes quite close to correctness and sometimes quite close to patent unreasonableness.
This argument rests on a mistaken extension of the metaphor of a spectrum.

\textsuperscript{305} As implied in the \textit{Nicholson} and \textit{Baker} cases.

\textsuperscript{306} Sossin & Flood, “The Contextual Turn: Iacobucci” supra note 31, Pezim supra note 247 (Justice Iacobucci comment of a “myriad
of standards”), Dunsmuir supra at 116 (Justice Binnie’s comment on “infinite degrees of deference”)

\textsuperscript{307} Iacobucci. “myriad of standards” note 253

It is true that the Court has resorted to the metaphor of a spectrum in order to explain the relative ordering of the three recognized standards of review. The idea is that the standards could be arranged from least deferential to most deferential with reasonableness as the intermediate standard of review. The metaphor suggests standards arranged along a gradient of deference but it was never meant to suggest an infinite number of possible standards. That the metaphor relates to a spectrum of deference and not a spectrum of standards has become increasingly clear since the use of the term “spectrum” in Pezim, supra, at p. 590 (see Baker, supra, at para. 55, per L'Heureux-Dubé J.; Pushpanathan, supra, at para. 27, per Bastarache J.). As Major J. recently wrote: "The various standards of review are properly viewed as points occurring on a spectrum of curial deference. They range from patent unreasonableness at the more deferential end of the spectrum, through reasonableness simpliciter, to correctness at the more exacting end of the spectrum" (Mattel, supra, at para. 24).  

It is in Ryan that we find nine paragraphs providing a further and last attempt by Justice Iacobucci to distinguish the standard of reasonableness from patent unreasonableness. Justice Iacobucci stated that reasonableness did not imply that the tribunal is “merely afforded a margin of error” around what the court believed was the correct result. He acknowledged once again there would often be “no single right answer”, “no particular trade-off that is superior to all others”. He then made marked reference to the role of the reasons given:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see Southam, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see Southam, at para. 79).

It is in paragraphs 52 and 53 where Justice Iacobucci addressed the standard of patent unreasonableness that problems arose. He made reference to the descriptions of “clearly irrational” and “evidently not in accordance with reason” used by Justices

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309 Ibid. at para 44-45.
310 Ibid. at para 48 to 56.
311 Ibid. at para 50.
312 Ibid. at para 51.
313 Ibid. at para 55.
Cory and Gonthier respectively to posit that a decision was “patently unreasonable” if it was “so flawed that no amount of curial deference can justify letting it stand.”\textsuperscript{314} He also harked back to the idea in \textit{Southam} that the defect must not be less obvious and might only be discovered after “significant searching or testing”. The Court might have to show there were no lines of reasoning supporting the decision. These statements cannot be reconciled. Reviewing a decision to show there are no tenable lines of reasoning within it will essentially require that the reviewing court examine the situation exhaustively. This task, of necessity, will require a rather probing and detailed review on the merits.

It is this writer’s contention that Justice Iacobucci’s reasons in \textit{Ryan} illustrate a continuing and irreconcilable dichotomy in the Court’s thinking. The paragraphs addressing patent unreasonableness are a last effort to support an untenable position, the continued use of patent unreasonableness as a free standing standard of review as opposed to recognizing its demotion to a role as a qualifier or adjunct to the concept of reasonableness. Understanding this dichotomy is important as it is central to understanding how and why we now have, the unitary standard of review of reasonableness, a standard that is much more flexible and manageable than a greater number of discrete conceptual standards on a spectrum would have been.

\textbf{2003 Dr. Q. The Standard of Review Roadmap}

\textit{Dr. Q v. College of Physicians and Surgeons of British Columbia, (Dr. Q.)} \textsuperscript{315}

\textsuperscript{314} \textit{Ibid.} at para 52.

\textsuperscript{315} \textit{Dr. Q v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19, [2003] 1 S.C.R. 226. [Dr. Q.]}

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involved a discipline hearing into the sexual misconduct of a physician. It was overturned on appeal to B.C.’s Superior Court with that decision being affirmed by B.C.’s Court of Appeal. Both applied standard principles of appellate review of a court decision as opposed to the standards appropriate for a judicial review of a tribunal decision. This case illustrates the proposition that the appropriate standard of judicial review for the tribunal decision must be applied at each succeeding level of appeal before the courts. Each level of review must go through its own Pragmatic and Functional Analysis.

In this instance the standard of review should have been reasonableness based on the need to defer on findings of fact and the tribunal’s expertise on what constituted sexual misconduct under the B.C. College of Physicians and Surgeons’ Code of Behaviour. The Superior Court Justice mistakenly entered into a full review of the facts on a correctness basis without doing any sort of P&F Analysis. The Court of Appeal extended the error by ruling on a standard applicable to the appellate review of a Superior Court’s decision. It found the reviewing Justice was not “clearly wrong” in her decision rather than determining what should have been the appropriate standard of review to apply to the tribunal’s initial decision. 316

Perhaps the most interesting aspect of this case is Chief Justice McLachlin’s taking advantage of the occasion to pen a precise and cogent summary of the law governing the standards of review. Whether this is a direct response to Justice LeBel’s recent “cri

316 Cromwell, “Appellate Review” supra at 120. (See Cromwell for an excellent discussion of the distinction between appellate standards of review and judicial review standards of review.)
de coeur” bemoaning the lack of precision in the area \(^{317}\) will likely remain speculation unless and until memoirs are written. In a relatively short 16 paragraphs,\(^{318}\) Chief Justice McLachlin walks the reader through the history of the P&F Analysis, listing all the steps and factors to be considered. The Chief Justice essentially provided a roadmap for inferior courts. It is not an innovative judgment. It was a comprehensive re-statement of the law.

Applying a baseball statistics type analysis to gauge the impact of this decision, one can compare the number of times this case has been mentioned or followed in other decisions. In the twenty years since the *Bibeault* case was handed down, it has been cited 1,094 times (55 times a year) and followed 137 times. In the five years since Dr. Q. was handed down, it has been cited 1,329 times (271 times a year) and followed 224 times. The milestone *Southam* case clocks in at 1,790 mentions (149 times a year) with 125 instances of its being followed, but this is over the twelve years since it was handed down. *Pushpanathan*, a seemingly more referenced case in academic circles (likely because it addresses ministerial discretion), has been mentioned 1744 times since 1998 (a respectable 175 times a year) and followed 366 times.\(^{319}\) Given the number of

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\(^{317}\) *Toronto v. CUPE Local 79* supra note 96 for a review of the comments made by Justice LeBel

\(^{318}\) *Dr. Q* supra note 315 at paras. 20 to 35

\(^{319}\) In response to queries Quicklaw confirmed that the “mentioned” total is not a global amount and does thus does not necessarily subsume the followed, criticized, distinguished and explained categories. A decision could have been mentioned, criticized, distinguished and not followed all of which warrant listing.

Quicklaw attempted to clarify the situation for this writer as follows:

“I think there is some confusion here. “Mentioned” is a separate category of treatment letter, not a global total of all treatment letters for a particular case. With respect to [1997] S.C.J. No. 94 there would be a total of 885 treatments for that decision, including the 641 “mentioned” treatments.

Mentioned — The case is cited with no explicit treatment. The citing case provides no more information about the cited case than what was available in the cited case itself.
times Dr. Q. has been referred to and followed, it seems evident that the legal profession and the judiciary had come to rely on and been well served by this case.

To press the analogy somewhat, it appears the Chief Justice hit a homer with Dr. Q. The March 2008 Dunsmuir case appears to be positioned to easily surpass Pushpanathan, Dr. Q. and Ryan as it has already been mentioned 836 times and followed 275 times already. (See Appendix D for comparisons.)


In Canada Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour) (Minister of Labour) it was argued that, by 2003, the tripartite appointments process to labour tribunals had, "become entrenched". This is language that edges away from simple statute protection and suggests form of quasi-constitutional protection.

It is possible for there to be multiple treatment letters flowing from one decision, which can be the case if a decision has multiple opinions or if different points of law are being discussed. This tends to happen most frequently with Supreme Court of Canada decisions. The totals in the summary would include the multiple treatment letters.

So, with reference to the [1997] S.C.J. No. 94 case, it could not be definitively said that 885 decisions had made reference to it because it is possible that some of the references flow from the same case. All that could be determined is that not more than 885 decisions had referred to it."

While not perfectly scientific, the ball park figures (Please excuse the writer’s continuing with the baseball analogy) do provide interesting material for comparisons and speculation.

Other laws or forms of proceedings have been referred to a “quasi-constitutional” by the Courts and that this may engender some confusion. The term “quasi-constitutional” has been applied in at least two different contexts. Human Rights legislation has been referred to as being of a “quasi-constitutional nature”. This characterization maybe due: a) to the fact that this legislation typically has an “applies notwithstanding any other Act” clause and thus has a sort of universal application that gives it a “cut above the rest” aspect or, b) that the enabling statute is a lesser version of the Charter such as the provincial and federal rights charters that preceded the 1982 federal Charter; or provisions either mirror or supplement similar rights found in the Charter.

The first explanation has some merit but one can also find less elevated laws than the provincial rights charters such as Ontario’s Residential Tenancies Act that also have the same clause a clause that Act to trump conflicting provisions under the Mortgages Act allowing for the eviction of residential tenants.

The second explanation ignores the fact that this term was in use before the adoption of the Charter in 1982.

Quasi-constitutional is also a term used to refer to provincial legislation dealing with minority language rights. As such the right to a trial in French under Ontario’s Courts of Justice Act is sometimes referred to as a quasi-constitutional right. This is a case of a
The background for labour tribunals acceding to a higher level of protection in the 

**CUPE v. Minister of Labour** case lies in an oft repeated principle enunciated by Justice Rand in *Roncarelli v. Duplessis* to the effect that “there is always a perspective within which a statute is intended to operate”.\(^{322}\)

In the *CUPE v. Minister of Labour* case the context was the Conservative government of the day’s struggle to bring the scale of awards in public sector contract interest arbitrations (in this instance, hospital workers) under control. The Minister of Labour, James Flaherty, had chosen, in the face of well established precedent, to choose otherwise skilled retired judges with no particular expertise in hospital affairs as the chairs of interest arbitration panels where the parties could not agree on a choice. There was a belief that these nominees would favour management and, by extension, the government’s financial interests. The Supreme Court noted specifically that the hospital employers favoured this practice and had adopted the policy of triggering such appointments by refusing to agree with CUPE on a mutually acceptable candidate.\(^{323}\) As such the party “buy-in factor” inherent in the appointment process to labour tribunals was fully compromised.

Interest arbitration is to be distinguished from grievance arbitration in that the latter

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\(^{322}\) *Roncarelli v. Duplessis*, supra note 20 at 140.

\(^{323}\) *CUPE v. Minister of Labour* supra note 320 at para. 78.
involves resolving disputes under existing contracts whereas interest arbitration involves actually setting the key and contested terms of a pending contract under negotiation; typically key provisions such as wages and rates of increase. This is not a case involving a quasi-judicial tribunal per se. It is the impact on the perception of the tribunal’s expertise and thus, effectiveness, that was in question.

The authority being exercised was the Minister of Labour’s discretionary authority to appoint the chair of a panel in a deadlock. The upshot was that the process by which Labour Tribunal chairs were chosen crystallized an issue and a policy. The level of deference applicable to a Minister’s exercise of this kind of authority was found to be the highest; that of “patent unreasonableness”. The ruling was that the Minister’s choosing to substitute expertise in arbitration and mediation generally\(^\text{324}\) as opposed to expertise in “hospital affairs” was patently unreasonable.\(^\text{325}\) The Court recognized that it was the express policy of the government of the day to revamp the system. It was dissatisfied with how collective bargaining was operating in public sector. The changes proposed to how the chairs in hospital sector interest arbitration were seen by CUPE as the thin edge of the wedge. CUPE no longer had confidence in the process and without this confidence and buy-in to the process, as pointed out in the decision, the collective bargaining process as a whole was threatened.\(^\text{326}\)

\(^{324}\) It is to the credit of the four Judges initially appointed by the Minister that they recognized the importance of buy-in in collective bargaining and, in the face of a challenge to their appointments, elected not to participate. Unfortunately others were found who were prepared to step in. \textit{Ibid. at para. 76.}

\(^{325}\) \textit{Ibid. at paras 58-64.}

\(^{326}\) \textit{Ibid. at paras. 108-109.} ("108 Compulsory arbitration is a fairly well-understood beast in the jungle of labour relations. Dickson C.J., dissenting on other grounds in Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, pointed out, at p. 380:"
The Supreme Court recognized that the exercise of discretion by a Minister of the Crown would attract the highest level of deference, patent unreasonableness.\textsuperscript{327} This writer suggests that what the Supreme Court was not prepared to tolerate was executive action by sleight of hand / fiat that was counter to the existing government policy as expressed by the legislature in the existing legislation\textsuperscript{328}. A cabinet minister exercising executive authority could not thwart or compromise the will of the Legislature as discerned by the Court from its understanding of the legislation. It conceded such an action would not be beyond the Legislators’ authority but, where the perception of the impartiality of Labour Tribunals was at stake and, by extension, the process collective bargaining put at risk, such a radical step would have to be accomplished by a more open means that would allow for political accountability. This writer suggests the Supreme Court was not prepared to see the end of true collective bargaining and the subset of compulsory arbitration through this first of a thousand cuts.

The characterization of the status of the labour tribunals as “Quasi Constitutional”

\textsuperscript{327} Ibid at para. 152.

\textsuperscript{328} Ibid. at para. 174- 175 and \textit{Labour Relations Act, 1995}, S.O. 1995, c. 1, s. 2.1.

“Purposes
2. The following are the purposes of the Act:
1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.”
will certainly be open to criticism as somewhat of an overstatement. The emphasis should be on the “quasi” part of the label. CUPE’s 2003 victory in the face of the Ontario Tories’ Common Sense Revolution\textsuperscript{329}, a political platform that included challenging some of the well accepted and basic principles of collective bargaining, marked a watershed event in administrative law insofar as one type of tribunal was concerned.

It may be that a safer and less confusing categorization or characterization for labour arbitrators and tribunals would be that of “protected tribunals”. The protection would be in the form of the Supreme Court’s requirement that, in the spirit of operating within perspective which labour statutes are intended to operate, as understood in Roncarelli, radical changes, while permitted by reason of legislative supremacy, must be undertaken in an open manner that engages political accountability.

\textbf{2008 Dunsmuir: A Fractured Court and the Effective End of the Standard of of Patent Unreasonableness?}

It was anticipated that \textit{Dunsmuir v. New Brunswick}\textsuperscript{330} would address and resolve the difficulties experienced in distinguishing between patent unreasonableness and reasonableness simpliciter. The Court was unanimous on the result, but it split 6/3 on the standard of review to be applied and 5/1/3 on how to arrive at that standard.

\textsuperscript{329} \textit{CUPE v. Minister of Labour} supra note 320 at para. 115 (Supreme Court takes note of the position of the Minister of Labour as committed to “Public sector rationalization and pay restraint.”)

\textsuperscript{330} \textit{Dunsmuir v. New Brunswick}, 2008 SCC 9; [2008] 1 S.C.R. 190. [\textit{Dunsmuir}]
Dunsmuir appears to have been taken as an opportunity to respond to pointed criticism on the continued use of patent unreasonableness both from academia and other judges.

This decision signals the end of the 1973 Nipawin principle sheltered within the standard of patent unreasonableness that a tribunal has the right to be wrong. Up to this point the courts had often wrestled with the difficulty of distinguishing patent unreasonableness from reasonableness simpliciter, and the fact that, if the patent unreasonableness standard was found to apply, then, provided the tribunal was within its jurisdiction, the Court would have to metaphorically hold its nose and allow a wrong decision to stand. The Court had long been criticized for such results. This included broadsides from the academics such as in Professor Mullan’s statement that retaining patent unreasonableness makes a “nonsense of the law”331 and Justice LeBel’s blunt 2002 comments from the bench to the effect that retaining or supporting an irrational decision is unacceptable.

Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear enough. It is also inconsistent with the rule of law to retain an irrational decision.332

In the majority’s reasons (Bastarache333 and LeBel JJ. jointly writing for McLachlin

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331 Mullan, “Recent Developments in Standard of Review” supra note 95 at 25.
332 Ibid. at para. 42.
333 As an ardent critic of the continued use of the patently unreasonable standard Justice LeBel makes an odd partner for Justice Bastarache make in the penning of this decision since Justice Bastarache just as persuasively argued in 2005 against any dramatic changes to the pragmatic and functional analysis as he considered them premature. Just as ardently and convincingly he argued that finding of patent unreasonableness continued to serve a purpose as it connoted a stronger finding by the Court with negative connotations.

“À cet égard, je suggérai aussi que la critique suivant laquelle la norme de la décision manifestement déraisonnable et celle de la décision raisonnable sont identiques sur le plan conceptuel constitue une exagération. À mon avis, il existe une différence de fond
CJ. and Fish and Abella JJ.), we find, referring back to the 1981 *Crevier* decision,\(^{334}\) another summary of the reasoning and the law outlining the rationale and constitutional authority for judicial review. On this point the whole of the Court seems to be in accord.

The majority opinion restates a now common theme. In reviewing a decision made by an administrative tribunal where, having regard to the purpose of the enabling legislation, when one concludes the decision made is one within a range or choice of reasonably supportable decisions, deference should follow and the decision should be respected. This writer is uncertain as to why this reasoning signaled a move towards the “correctness” standard for some academics. It is in the nature of administrative law that discretion will be delegated, particularly for those tribunals that have a role in forming or elaborating policy. It follows that, once a range or choice of reasonably supportable decisions or results is acknowledged and the decision made is supported by adequate reasons, the Court should, even if it differs as to the decision it might have made, respect the authority granted by the Legislators and allow the decision made to stand. This was the approach suggested and adopted by Justice Iacobucci as far back as 1996 in *Southam*.\(^ {335}\)

The Court finally conceded that the concepts outlined by Iacobucci in *Southam* of looking at either the immediacy or magnitude of the defect “provided no meaningful way...
in practice of distinguishing between a patently unreasonable and an unreasonable
decision”.336 Repeating Justice LeBel’s earlier comments the Court found “it would be
unpalatable to require parties to accept an irrational decision simply because, on a
deferential standard, the irrationality of the decision is not clear enough.”337

The Collapsing of the Standards:

In Dunsmuir the Court purported to collapse the standard of patent
unreasonableness (Nipawin in 1973338 and CUPE v. N.B. Liquor in 1979339) and
reasonableness simpliciter (Southam in 1994) into the unitary standard of
reasonableness.340 “Collapsing” the standards should imply that at least some parts of
both standards survived in theory and effect. It is arguable that in both theory and effect
the standard of patent unreasonableness was completely jettisoned. Arguably, given
the Court’s continuing adherence to the importance of stare decisis, use of the term
“collapsing” was an effort to dampen or disguise a tectonic shift on a legal precedent.

Citing Justice Iacobucci, the Court noted that the two hallmarks of patent
unreasonableness were that the “patently unreasonable defect, once identified, can be
easily explained simply and easily, leaving no real possibility of doubting that the
decision is defective” and that “a decision may be unreasonable without being patently
unreasonable when the defect is less obvious and might only be discovered after

336 Dunsmuir supra note 330 at para. 40
337 Ibid. at para. 42.
338 Nipawin supra note 201.
339 CUPE v. NB Liquor supra note 207.
340 Dunsmuir supra note 330 at para. 45.
“significant searching or testing” 341

Quite correctly the Court noted that the controversy within CUPE v. Minister of Labour decision laid paid to the usefulness of those ideas. This was a case involving a high level of ministerial discretion that attracted the application of the standard of patent unreasonableness. It provided a clear example of the difficulties in addressing these “illusory” distinctions. This case required a great deal of analysis in order to identify the defect. Justice Bastarache quite rightly pointed in his dissenting reasons (McLachlin and Major supporting) that the level of effort the majority had to put in to discerning the defect ran quite counter to a patent unreasonable analysis as contemplated in the Southam, Ryan and PSAC cases.342

Somewhat without any bridging, the majority in Dunsmuir then concluded that “both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that the courts ought not to interfere where a tribunal’s decision is rationally supported”.343 Up to this point patent unreasonableness had been, for the most part, about first determining whether the decision or process justified a high degree of deference and then determining whether, notwithstanding that level of deference, the fault in the decision making was so obvious that the Court was justified in intervening. Once intervention was justified the process then resembled the application of the correctness more than anything else. The Court

341 Ibid. at para. 40.
342 CUPE v. Minister of Labour supra note 320 at para. 36.
343 Dunsmuir supra note 330 at para. 41.
substituted its own opinion. Unlike reasonableness, traditional patent unreasonableness had little to do with looking for a number of supportable outcomes. It focussed on whether the Court was foreclosed from delving deeply into the merits of the case because of the presence of a privative clause.

It is evident that the level of scrutiny or effort required of the Court to determine whether the decision made is rationally supportable is much more a function of the legal complexity and/or importance of the question (i.e. such as in CUPE v. Minister of Labour, Pushpanathan, CUPE Local 79).

The only other identifiable attribute of the standard of patent unreasonableness is, as obliquely mentioned by the Court, the Nipawin principle that a tribunal protected by a strong privative clause and acting within its jurisdiction does have “the right to be wrong.” The Court phrases it in Dunsmuir as being “unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear enough.”

If we do not accept the Court’s premise that patent unreasonableness was ever a variant of the search for a rationally supportable decisions within a range of outcomes as opposed to a threshold question typically foreclosing judicial scrutiny then the only remaining attribute of the traditional concept of patent unreasonableness was the Nipawin principle of a Tribunal’s right to be wrong when operating within its jurisdiction. If that principle has been abandoned in Dunsmuir then the upshot is that, barring the

\[\text{344 Ibid. at 42.}\]
identification and survival of any other attribute this writer has failed to identify, the collapsing of the standards was, in effect, the complete dispatching or jettisoning of the Nipawin standard of patent unreasonableness.

Justice Bastarache argued in his 2005 article for the recognition of a shift in the Court’s use of the term “patent unreasonableness” to one of simply carrying a negative connotation highlighting a flagrant defect in a decision. In essence the role of this phrase was becoming simply didactic and emphatic, a qualifier to a finding of unreasonableness used to communicate judicial displeasure to an errant Tribunal.345

One could take it that few if any decisions evidencing the Bastarache like egregious and obvious error should make it as far as the Supreme Court.346 While it would or should be rare that the Supreme Court would have to resort to the term “patent unreasonableness” to express its displeasure the same does not follow for the lower courts conducting initial reviews. Continued access to this term might have continued to assist them when called upon to give firm and emphatic direction to an errant Tribunal.

This writer asserts that the Bastarache’s characterization of the modified role of the concept of “patent unreasonableness” is the only possible attribute of the term that could have survived the Dunsmuir “collapsing” of the two standards.

Attributes of Reasonableness

Having dispatched the role of “patent unreasonableness” as a free standing

345 Bastarache, “Le contrôle judiciaire” supra note 103.

346 The exception may be CUPE Local 79 supra note 96 where a labour union’s fight to reinstate a convicted pedophile to a position of trust involving youths made its way to the Supreme Court. This case may be better understood in terms of the Court having to address an “unacceptable outcome”.

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standard of review, the Court indicated that little would be gained unless reasonableness as a legal concept was clearly defined. As noted, the key element is the concession that questions before tribunals often do not lend themselves to one specific or particular result. What immediately comes to mind are those tribunals such as in Southam, and Pezim where the questions are multi-factored or polycentric. An obvious example is the work of the CRTC in doling out licenses for television channels where it juggles a multitude of factors and interests, including financial viability, Canadian content, moral standards, underserviced target audiences and, finally, fairness in setting rates in quasi-monopoly situations such as for television cable services.

Collateral to the acknowledgement that there can be more than one reasonably supportable decision is that, as pointed out by Professor Mullan, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or “field sensitivity” to the imperatives and nuances of the legislative regime.”

In short, there may be a range or series of possible decisions each of which may be rationally supported. In those instances, provided the question falls within the tribunal’s jurisdiction and realm of expertise and as long as the choice made is rationally

347 Ibid.
348 Ibid. at para. 47.
349 Mullan, “Struggle for Complexity” supra note 93 at 93.
supported (hence the need for a good set of reasons as highlighted in Pezim) and the outcome may not be fatally dispositive to a party, then, even if the Court might have made a different decision based on the evidence, the Court will respect and grant deference to a decision rationally arrived at by the tribunal. This is the broadened concept of “reasonableness”, free from the distracting confusion and debate about how “patent unreasonableness” is to be distinguished.

As previously alluded, to Sossin and Flood had argued that “outcome”, the actual impact of a decision of an individual or individuals involved, was a factor missing from the pragmatic and functional analysis.\(^{350}\) In Dunsmuir the Court specifically refers to outcomes indicating that the reasonableness standard “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.”\(^{351}\) It is also notable that the source work for their outcome argument is also cited in the reasons thus suggesting the Court was well aware of this argument.\(^{352}\) Arguably their concept of outcome has now been fully integrated as a factor in the new “standard of review analysis”.

The Court had already rejected the idea that there would be a multitude of standards in Ryan.\(^{353}\) The Court opted for a conceptually quite different and arguably much more manageable approach in Dunsmuir. The flexibility is found within a unitary standard of

\(^{350}\) Sossin & Flood supra note 31.

\(^{351}\) Dunsmuir infra note 330 at para. 47.

\(^{352}\) Ibid. at para. 44.

\(^{353}\) Ryan supra note 308.
curial deference. It is now a broader amalgamation of countervailing factors to be weighed in each instance. Correctness operates as an exception to the default position of curial deference applying the standard of reasonableness. It operates in the absence of the need, for any number of specified reasons, to extend curial deference on the standard of reasonableness. It simply means the reviewing court will consider the question without deference to the tribunal’s opinion. Hereafter, having conceded there is, more often than not, no single right answer to the question respectful deference is accorded to the Legislator’s decision to entrust the choice to a tribunal.

In an effort to provide “real on-the-ground guidance” the majority then provides a step by step analysis which bears a strong resemblance to the analysis noted in Dr. Q. Within this analysis, the steps and standard exceptions are noted, i.e. there will be deference on questions of fact or properly delegated discretion or policy etc. and correctness will be applied on questions of law outside the tribunal’s expertise including always specified circumstances like where Charter and other constitutional questions are in play. The Court also notes that this detailed analysis need not be undertaken in cases where the standard of review has already been determined for a tribunal.

354 Westcoast supra note 117, Pushpanathan supra note 286 and Pezim supra note 247 are good examples of cases it could have gone either way without affronting reason.

355 Dunsmuir supra note 330 at para. 43.

356 Ibid. at paras. 51-64; Dr. Q. supra note 315 at paras. 26-35.

357 Dunsmuir supra note 330 at para. 53.

358 Ibid. at para. 54.

359 Ibid. at para. 57. (This presupposes a similar or identical issue before the tribunal.)
If this thesis were about the standards of review and this had been a unanimous decision, then the inquiry might have ended here. Given the disappointment evident amongst leading academics ("summing up the day's discussions, participants seemed to agree that the majority decision in Dunsmuir is poorly reasoned." 360) this is likely not the case.

Justice Binnie weighs in to the fray taking issue on some key points. He posits the proposition that "(i)t should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge." He states there are three basic legal limits on the allocation of administrative discretion: a) the constitution and the division of powers including the section 96 authority granted to the Superior Courts; b) the source or lack thereof of the authority granted to the tribunal through enabling legislation and, c) the existence of a fair procedure, "the hand maiden to justice."361 This boils down to deciding cases on the basis of ultra-vires and natural justice. This writer leaves aside for the moment discussing the distinctions between "natural justice", "procedural fairness" and "fundamental justice". By the breadth of its terms, this analysis suggests that, like Dicey, Justice Binnie is disposed to seeing any effort to limit judicial review of administrative action as the executive's incursion into the jurisdiction of the courts, leaving him well predisposed to questioning and limiting such actions.

His first criticism of the majority opinion is that, in allowing an exception for questions "of central importance to the legal system" as a whole as standing outside the

360 Various ("Roundtable on Dunsmuir " Faculty of Law, University of Toronto, June 4, 2008), Summary of Proceedings, <http://www.law.utoronto.ca/documents/conferences/dunsmuir_writeup.PDF>. at 10.
361 Dunsmuir supra note 330 at paras. 126-129.
adjudicator’s specialized area of expertise, they have laid the groundwork for a “distracting debate”. He comments as follows:

It is, with respect, a distraction to unleash a debate in the reviewing judge’s courtroom about whether or not a particular question of law is “of central importance to the legal system as a whole”. It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.362

Arguably, making an exception for a question of central importance to the legal system is a like a failsafe mechanism. It provides an out that should be rarely resorted to. It is difficult to understand why Justice Binnie takes such strong exception to this proviso.

Justice Binnie also asserts that the focus should be on the substantive outcome,363 with the premise operating that judicial review will proceed on the justified presumption that legislators do not intend results that depart from “reasonable standards” 364 and that, given far too much time and effort is spent on determining the standard as opposed to dealing with the issue before addressing the outcome, “the law of judicial review should be pruned of some of its unduly subtle, unproductive or esoteric features.”365 These are fine words. This writer agrees that outcome is a concept that is now properly incorporated into the pragmatic and functional analysis; now renamed the “standard of review analysis”. However, this writer asserts to the contrary, that the majority’s listing of rules and exceptions that go into the operation of the broadened

362 Ibid. at para. 128.
363 Ibid. at para. 130.
364 Ibid. at para. 131.
365 Ibid. at para. 133.
concept of reasonableness provide a necessary fleshing out of the concept. There is really very little remaining in the majority’s analysis that is “unduly subtle, unproductive or esoteric”.

Justice Binnie also feels that the discussion on standard of review should address not only tribunals but the decisions of Ministers of State and clerks. Accepting that there is an infinite number of degrees of deference, he suggests quite cryptically that “administrative decision makers generally command respect more for their expertise than their prominence in the administrative food chain” The meaning of this comment escapes this writer. He then states that the degree of deference also depends on the “nature and content of the question”. It is difficult to see the value added to the debate by these rather cryptic comments.

Justice Binnie compares switching from a debate on whether a multitude of standards is advisable to a debate on an analysis focussed on whether the subject decision falls within a single broader standard of reasonableness may be like the “bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one intersection to another without any overall saving to motorists in time and expense.” This characterization is somewhat facile and misses the point.

The process of canvassing a range of reasoned possible outcomes is well illustrated in Justice Iacobucci’s reasons in Southam. It ends the need for a reviewing court to

\[\text{\cite{369:ibid.at пара. 139.}}\]
search for what it perceives as a perfect or best answer. Instead the court is to accept and affirm an answer it can live with from a range of rationally supportable answers. This is the conceptual mechanism that facilitates the flow and breaks up the traffic jam. Conceptually the Court has gone from the carriageway allowing only one or the best possible answer to pass to the multi lane highway of several or many possible answers. It does not simply shift the traffic. The process has universal application and should reduce the number of viable applications for judicial review. The more arguably supportable answers the reviewing finds for a given dispute falling within the tribunal’s jurisdiction the more likely it will be that it should defer to those with greater expertise in the area to decide the question. The fewer possible answers it identifies the more likely the application of the correctness standard will occur. The demonstration of the court’s ability to distill the issue down to one or two appropriate outcomes or to identify a legal principle misinterpreted or not averted to by the tribunal implies that it is operating with as great or greater expertise that the tribunal. In those circumstances its intervention through the application of correctness more justified.

This writer argues that allowing for a number of possible outcomes in a given situation and context is a far more manageable and predictable exercise than the less specific analysis Justice Binnie proposes. Applying the majority’s set of principles one could imagine counsel advising their clients that, while they would have preferred a different result, this outcome was one of the ones possible within the meaning of the legislation. Further, provided the decision was supported by well articulated, comprehensive and thoughtful reasons that demonstrated the tribunal took into account
(weighed and balanced) all the evidence heard, although the client’s preference was for one of the other options, a reviewing court should recognize that the authority lay with the tribunal to make the choice it did and, as a result, the Tribunal’s decision will be respected and affirmed. Success on appeal would be unlikely. If Justice Binnie’s approach had prevailed, counsels’ discussion with the client would be more along the lines of, “Perhaps the next set of judges will consider our choice more reasonable or the best. Let’s take a chance and appeal.”

Justice Binnie’s reasons do highlight a need for greater precision in the language used. The case law has often used “irrational” and “unreasonable” interchangeably. This writer has suggested that there is some confusion about what is actually meant at different times by the “nature of the question”.370 In Justice Binnie’s thinking, “reasoned” is linked to the legal context of the question before the court whereas “rational” is a much more abstract concept. By way of example, Justice Binnie notes that, in the CUPE v. Minister of Labour case,371 the government may have had a very good rationale for wanting to appoint retired judges lacking public sector labour law experience as panel chairs. Presumably this was setting up interest arbitration in public sector disputes so as to generate lower awards, thus easing the strain on the public purse. The Court intervened and defeated the government’s rational purpose by concluding that, within the construct of legislation, case law and historical and political accommodation that is collective bargaining, the overarching principle of promoting

370 Ibid. note 222.
labour peace would not be served by these types of appointments and, as such, the
Minister’s executive decision, “although coldly rational” was not “reasonable” within the
class of the existing legislation. This conceptual distinction is interesting.

Justice Binnie’s reasons are delivered sometimes tongue in cheek and sometimes
with a barbed inflection. This would perhaps be acceptable if he were proposing a clear
workable alternative to the majority’s analysis. This is not the case. He seldom differs
from the points raised by the majority but, overall, urges an analysis that is less precise
and provides less tangible guidance. At the very least the majority’s decision tidies up
and focuses the thinking.

Justice Deschamps, with Justices Charron and Rothstein concurring, urges her own
form of an even more stripped down analysis. She first proposes that “when the issue
is limited to questions of fact, there is no need to enquire into any other factor in order to
determine that deference is owed to the administrative decision maker.” This has
been the case in the vast majority of instances, but there can be exceptions. In
Westcoast Energy, the factual issue became transmuted into a “fact of constitutional
significance” and thus elevated to a constitutional question subject to review on the
standard of correctness. This led that court to conclude that what actually appeared to
be a conclusion drawn on undisputed fact was in effect a mixed question of law and
fact. Admittedly this should occur rarely.

372 CUPE v. Minister of Labour supra note 320.
373 Dunsmuir supra note 330 at para. 161.
374 Westcoast infra note 117 at para. 39.
Justice Deschamps goes on to state that, when “considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show to a lower court.” At the very least Justice Deschamps’ position would certainly justify and encourage more appeals from otherwise better qualified and fully authorized administrative tribunals. This position would be contrary to the general intent of most legislators that certain questions and issues are to be hived off for consideration by expert tribunals so as to unburden the courts. Since it is a position espoused by at least three justices of the Supreme Court, this opinion should be a matter of continuing concern.

Notwithstanding Justice Iacobucci’s helpful efforts in Southam to illustrate and explain the distinctions between questions of law and mixed fact and law, this question remains a fount of irresolvable metaphysical intricacies. By way of a simple example once again; presuming the point of manufacture governs the standards for a product, is the load of a cement truck being mixed as it travels over MacDonald Cartier Bridge from Ottawa to Gatineau manufactured in Ontario or Québec? Should a court ever have to be troubled with deciding this kind of question when a battery of Ph.D.’s in cement manufacturing have been marshalled by the Legislators to ponder the question?

While this writer can sympathize with the statement that judicial review should be no more complex than appellate review in criminal or civil case (most of which tend to be disputes between two parties), it is worrisome that, after having applied what they perceive as a more straightforward analysis, they conclude, contrary to the majority, that the applicable standard is correctness. It should be particularly worrisome as this is the
judicial review of a decision of a labour tribunal, a category of tribunal to which the
standard of reasonableness would normally apply. The majority’s analysis that the
applicable standard of review is reasonableness should be preferred.

At the end of the day Dunsmuir does not advance our conceptual understanding of
curial deference markedly. The majority’s opinion is more or less another restatement
of the existing law. Perhaps the best evidence of Dunsmuir’s significance is not that it
appears to have failed to find acceptance within the academic community because of
perceived conceptual shortcomings but that, with less than a year since it issued, it has
been cited 836 times and followed 275 times. As the numbers in Appendix D
demonstrate, the uptake on this case by the judiciary and the profession is truly
remarkable. It will very quickly eclipse all of the milestone cases that preceded it.

There remains the fact that, in this writer’s opinion, it would have been preferable
had the Court openly recognized that patent unreasonable use as a standard was
conceptually flawed from the beginning because it sheltered a tribunal’s right to be
wrong, thus affronting our sense of justice. The Court could have recognized its
continuing decline in use for this reason but also recognized the term’s continued
usefulness as a qualifier to reasonableness, effectively communicating, as Justice
Bastarache suggested, the Court’s disapproval of egregiously bad decision making. As
a term that had been adopted for use in several provincial statutes, there remains the
issue of how patent unreasonable will be interpreted in those instances.
Chapter 4
Tribunal Reform

“Of course one would expect the legal profession to play a substantial role in any system of appellate jurisdiction, but if the system is to function in a manner significantly different from that of ordinary courts, one would also expect more diversity of perspective. That surely requires more of the crucial positions to be occupied by people whose backgrounds are primarily in other disciplines.” Prof. Terence George Ison, a specialist in the study of Industrial Disease and Workers’ Compensation as quoted by Prof. France Houle.

Discussions of tribunals often seem to operate from the premise that there is a paradigm tribunal. Often as not the paradigm is equated to the operation of a traditional court with all procedures and safeguards mimicked, including judicial independence. The term paradigm implies that this fictional tribunal would demonstrate characteristics that all administrative tribunals should emulate. This reasoning is mistaken.

Tribunals are creatures of their enabling statutes. In creation and operation they reflect the Legislators’ assessment as to the available resources, the importance of the questions confided to them and the policy of the government of the day. Any or all of these may quite reasonably operate to limit the array of procedures and authority available. The subservient role of administrative tribunals as instruments of government policy was emphasized by Chief Justice McLachlin in 2001 in the Ocean Port case.376

Tribunal reforms can touch on a number of areas, not the least of which is the

375 Houle infra note 173..

376 Ocean Port infra note 294. (Chief Justice McLachlin, wrote in the Supreme Court’s 2001 decision in Ocean Port that the constitutional position occupied by the tribunals has been characterized as the “constitutional divide” between the executive and the judiciary with primarily a policy implementation role.)
ongoing debate over the pros and cons of tribunal judicialization. Robert Ellis wrote at length on the idea of “justicizing” as opposed to judicializing tribunals. He equates “judicialization” with compliance with the principles identified in the Ref. PEI Judges Reference case and repeated in Valente, requiring the institutional guarantees of security of tenure, adequate compensation and administrative support. Borrowing from the realm of the theory of justice Mr. Ellis defined “justicizing tribunals” somewhat abstractly as the process of making tribunal just by “making them congruent with structural imperatives of a justice system that one accepts as valid”. One’s initial reaction is that Mr. Ellis, a very well-respected and experienced adjudicator and the inaugural chair of an association formed to represent the interests of Ontario adjudicators, may be trying to soft pedal judicialization by another name. This is not the case.

In the first part of his paper, Mr. Ellis outlines the history of the growing recognition by the Courts of adjudicative tribunals as becoming more part of the judicial branch as opposed to the executive branch of our constitution. He refers to the fully adjudicative tribunals as a “separate administrative justice tier”. He notes that Ocean Port dealt with a tribunal that was closer to the regulatory as opposed to the adjudicative end of the spectrum and that, as such, Justice McLachlin’s comment on tribunals being the

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378 PEI Judges Reference supra note 297.
379 Valente supra note 297.
381 Ellis. “The Justicizing Tribunals: Part II” supra note 163 (Society of Ontario Adjudicators and Regulators)
382 Ibid. at 71.
policy extension of the legislators of the day was correct in that context. He then contrasts this with the 2003 decision in *Bell v. CTEA*, a case taken before the Canadian Human Rights Commission, a fully adjudicative tribunal, where account is taken of the provisions of the enabling statute fulfilling the need for that tribunal to be quite independent. 383

Mr. Ellis lays the idea of soft pedaling judicialization by another name to rest by first outlining what he sees as the distinction between tribunals and the courts:

These advantages include the statutory monopoly they have on the determination of all rights disputes arising within a narrowly focused jurisdiction defined by a particular statutory enterprise. That monopoly allows them to develop a high degree of expertise in the handling of those disputes and gives them an institutional decision experience that is deeper, richer, and more current than is typically found in the ordinary courts. Other obvious advantages are the deference with which modern courts treat tribunal decisions, and, perhaps most importantly, a tribunal's unique adaptability. The literature does not often stress the latter point, but the freedom of tribunals from the *stare decisis* doctrine, their typical power to reconsider their own decisions, all of these combine to create a capacity for constructive measured, institutional responsiveness to the tribunal's continuous, highly focused, decision experience – a responsiveness that cannot be found in comparable measure in the courts. 384

Mr. Ellis then goes on to concede that, by reason of their role as the Diceyan guarantors of the Rule of Law and ultimate vindicators of individual rights, the Courts must possess a “magisterial gravitas”. This requires not only environment and regalia projecting that image but well understood guarantees of independence from the government of the day. 385 Given the need for such gravitas Mr. Ellis argues that, “for economic and other pressing reasons”, the courts cannot adapt to tasks such as the effective and expedient processing required to deal with matters such as a denial of welfare benefits or a


384 Ellis "The Justicizing Tribunals: Part II" supra note 163 at 71-72

385 Ellis "The Justicizing Tribunals: Part I" supra note 163 at 315.
challenge to an eviction. This must be left to tribunals.386

In Part II of his paper, Mr. Ellis addresses the structural imperatives for achieving justicization. The first is judicial independence both in terms of the tribunal’s independence from the executive as a separate institution and, the individual’s members’ freedom from interference. Secondly, he speaks of structural arrangements for ensuring optimum adjudicative competence.387 Competence is a broader concept than pure subject matter expertise.

Mr. Ellis identifies two components to the optimizing process;

“The first is “adjudicative competence” itself – what skills, knowledge, innate abilities, temperament, training and experience if there is to be reason for confidence that individuals selected for appointment will become competent adjudicators. The second is the function of optimizing - of installing and administering the structures required to ensure that the average adjudicative competence of a particular tribunal’s roster of adjudicative members is always as good as can be.”388

Mr. Ellis takes issue with the custom of dealing in a limited series of short-term appointments indicating, it is no more that the Executive’s wish to retain control of the patronage turnstile. He also argues for the end to the secretive and arbitrary reappointment process that regularly results in the wasteful dismissal of seasoned adjudicators. Mr. Ellis argues for limited term appointments with reviews based on performance alone. Tribunal members would be given the right to know and respond to

386 Ibid.
387 Ibid. at 75.
388 Ellis “The Justicizing Tribunals: Part II” supra note 163 at 77.
the review. Mr. Ellis also takes aim at what he argues is a commonly held presumption in government circles that, as American President Andrew Jackson posited, people who are too long in government service become indifferent to the public’s interest and that, insofar as the positions are concerned, “the duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance”. There follows to this belief that any appointment contains a significant element of public service and therefore, remuneration need not be competitive in the marketplace. That kind of thinking certainly ensures that you will attract to adjudication the independently wealthy or those ready to retire as opposed to simply the best and the brightest, a circumstance that must convey an impression of dilettantism to the reviewing courts. Such beliefs may explain why it is considered acceptable to pay the pittance of $135 per day to the members of Ontario’s Criminal Injuries Compensation Board.

Mr. Ellis outlines what he sees are the 13 steps required to achieve the “justicizing” of tribunals. One of the most important is putting an end to “ministry hosting” for tribunals. He considers it critical, if tribunals are to be seen as just, that they not be directly tied to a Ministry that may, at times, be adverse in interest. E. Hawkins also

390 Ibid. at 89.
391 Ibid. at 91.
392 Ellis “The Justicizing Tribunals: Part II” supra note 163 at 93. (This is the policy that is now being adopted for human rights tribunal. The upside for the Commission is that they can pursue the advocacy role more vigorously.)
393 Ibid. at 98.
contributes his own checklist of proposed reforms. What is of particular interest in Mr. Ellis’ article are his regular references to the system already in place in Québec. He readily concedes that this system addresses a great many of his concerns.

Ms. Houle’s article provides a good deal of information in this regard. In a thorough and comprehensive fashion her paper illuminates for English language readers, the history of and the principles on which Québec based the 1996 radical reforms of its administrative tribunals. It amounts to an existing but largely ignored roadmap for reform for the rest of Canada’s common law jurisdictions and, as such, warrants more than the passing comment it usually receives.

The table in Appendix B sets out the statutory provisions / principles governing the exercise of both administrative and adjudicative functions in Québec. As might be expected from a Civil Law jurisdiction, these provisions are intended to operate as code. They correspond to the core principles of administrative law enunciated over time by the common law courts.

Collateral to the creation of the administrative and adjudicative streams, the government also created the Tribunal Administratif du Québec (TAQ). The TAQ takes its place alongside the Québec Human Rights Tribunal (QHRT) and the Professionals Tribunal. In terms of status, Prof. Houle notes that QHRT decisions can only be signed by the judges sitting on the tribunal and that the Professions Tribunal is composed only of Court of Québec judges.

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394 Hawkins note 154.
395 Houle supra note 173 at 9.
Prof. Houle traces the idea of one umbrella administrative appeals tribunal back to
an address given in 1965 by then Professor Jean Beetz, later Justice Jean Beetz of the
Supreme Court. Concerns were expressed with regard to the risks of excessive
centralization, loss of tribunal specialization and estrangement of parties familiar with
the existing system. Perhaps partly to address some of these concerns, the TAQ was
created with four specialized divisions, each with their own vice-chair; Social Affairs;
Immovable Property, Territory and Environment and Economic Affairs. The changes
were viewed as positive in that they enhanced the credibility and prestige of
administrative justice and realized significant costs savings through centralization of
support services.

Provision is made to ensure that generally two or three members with a mix of
expertise sit on each appeal. Section 41 of the enabling statute requires that “only a
person who has qualifications required by law and at least ten years’ experience
pertinent to the exercise of the functions of the Tribunal may be a member of the
Tribunal.” The Panel within the Social affairs division requires that at least 10 of the

396 Ibid. at 10
397 Ibid. at 11.
398 Ibid. at 13 One way to estimate of the impact of Québec’s reforms would be to try to look at some sort of cost comparison.

In 2001-2002, with a cadre of 27 full-time members, the Ontario Municipal Board, an tribunal with jurisdiction over some 70
statutes, carried a case load of about 1,400 cases with an annual budget of $6,836,566; $4,833 per

In comparison, the TAQ, whose “section immobilier”, arguably completely subsumes the jurisdiction of the OMB, had 87 full-time
and 30 part-time members with a total caseload of 21,963 and a budget of almost 27,000,000, $1,229 per case.

One could try to identify and bundle in all the budgets for other Ontario Boards like the Social Assistance Review Board and the
Landlord and Tenant Board to arrive at an approximation of the same jurisdiction but the point remains that the difference, in terms
of economic efficiency, is still significant.

399 Ibid. at 13.
members be physicians with four of them, at a minimum, being psychiatrists. Another
two of the members are to be social workers and a further two to be psychologists. This
is one of the most precise statutory expressions of the qualifications/expertise required
for a tribunal membership found by this writer. In addition the decisions of the TAQ are
protected by a full privative clause.400

Prof. Houle comments on the more recent efforts to dispense with the
multidisciplinary aspect of the panels by supplanting with more lawyer appointments.
She notes that, of the 13 appointments made in 2007, 11 were lawyers or notaries. It
appears there is concern that the panel (87 at the time of writing) may come to be
dominated and controlled by the legal profession; a result which should, depending on
the subject matter of a judicial review, negatively impact on the assessment of the
panel's relative expertise.

Independence for the members of the TAQ is addressed through a number of
advanced and innovative provisions not the least of which are:

1. an arm's length approach to fixing qualifications and recommendations for
   appointment;

2. a neutral and broad performance review prior to renewal, with anonymity
   maintained on the recommendations on which the government relies in
   deciding on renewal;

3. tenure subject only to loss of qualification or permanent disability. (Dismissal

400 Ibid. at 14.
can only occur following a complaint and the recommendation of the “Conseil de la justice administrative”); and, finally,

4. a guarantee that the salary base cannot be reduced once fixed and all tribunal members receive at least a percentage increase applicable across the board. 401

It is evident from the above that many of the issues that gravely troubled Mr. Ellis, such as tribunal independence, have been addressed directly and with apparent good effect in Québec. These issues continue to percolate in the other provincial common law jurisdictions, save to a lesser extent in B.C. with its ATA reforms, In addition, the province has managed to save some money. Why these efforts receive so little commentary or attention in the rest of Canada is a question of abiding interest for this writer.

This writer operates on the assumption that the vast majority of tribunal chairs and members would prefer to have their decisions respected and upheld by the reviewing courts. It does happen that, no matter how well qualified the tribunal panel is, judicial review may still be required. One need only recall the eight reasoned but differing positions taken by a panel of eleven experienced labour adjudicators in the *Bibeault* case. 402

One might hope that the legislators would wish to have their tribunals attract as high

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401 *Ibid.* at 16-17

402 *Bibeault* supra note 216.
a level of deference as possible. The message to the parties would be that the tribunal's decisions are likely to stand. This would serve to reduce the number of applications for judicial review. In turn this maximizes the economic benefits to be derived from a more expeditious process, not the least of which is the consequent reduction in the demand for scarce court resources on ill advised applications for judicial review.

The following are suggestions as to how the process may be reformed to maximize the presence of expertise and enhance the chances of securing curial deference:

a) Within the legislation:

a. provide details as to the qualifications and experience required for appointment;

b. direct that the appointment be an open, transparent and competitive process, open only to candidates who meet detailed qualifications as specified in the act and / or regulations;

c. direct that, on appointment and re-appointment, the candidates be vetted

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403 Mr. Ellis looks at this question with some depth and concludes, to the contrary, that, the executive arm of government wishes to shield itself from difficult or embarrassing decisions and results through the "perception" that their tribunals are independent, while exercising continuing control of tribunal members both through the threat of non reappointment and the other measures available while the tribunals are administered and provided for within host Ministries.

404 These suggestions are derived from some independent thought but also from the suggestions found in the works of many of the authors cited, not the least being, Prof. R.E. Hawkins, Mr. Ron Ellis, Mr. James Sprague. In addition, many are not unlike the reforms already instituted in Québec under the course of creating the TAQ.

405 As an example, the recent revisions to the Ontario Human Rights Code contain some direction as to qualifications:

32. (3) The selection process for the appointment of members of the Tribunal shall be a competitive process and the criteria to be applied in assessing candidates shall include the following:
1. Experience, knowledge or training with respect to human rights law and issues.
2. Aptitude for impartial adjudication.
3. Aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules.
by a committee at arm’s length from the appointing minister for his or her consideration so as to marginalize patronage as a factor;

d. provide for de facto tenure save in instances of loss of qualification or permanent disability, as provided for in the Québec model. It would follow that this decision should be made by an independent council akin to a Judicial Council;

e. ensure financial security for appointees as provided for in the Québec model.

f. Increase the likelihood of retaining competent adjudicators by:

i. eliminating limits of re-appointments and encouraging the re-appointment of those demonstrating superior performance through financial incentives thus making adjudication a career option;

ii. instituting a form of internal competence review blending peer and supervisory reports for the Minister’s consideration prior to re-appointment;\(^{406}\)

g. on reappointment, ensure as a further safeguard, that the process is open, fair and transparent, with the opportunity for the candidate to know the result of the review, comment and challenge;

h. provide for longer and staggered terms of appointments (minimum five

\(^{406}\) As was instituted by the OCRT in 2005. This peer-based review was intended to assist the Commissioner in making his case before the Minister for the reappointment of the most competent members.
years) so as to engender and maintain a reservoir of institutional expertise
sheltered from the impact of a change in government; and,

i. ensure, where possible, the use of blended panels incorporating both
subject matter and legal expertise;407

b) Within the Tribunal:

a. publish the biographies of the members detailing their experience and
qualifications;408

b. adopt and make known that there is in-house preparatory training
(procedural and / or substantive as required), along with a commitment to
continuing education for members both as participants and contributors;

c. publish summaries of significant decisions, thereby validating quality work
internally and communicating the level of expertise externally;

d. provide sufficient administrative / legal support, including the preparation
and publication of well considered “non-binding” guidelines;409

407 See Southam and Martin for an example of how much more comfortable the Supreme Court can feel when it knows the legally
trained are involved.

408 See Canadian International Trade Tribunal (CITT) for an example of where no information whatsoever and the CHRC and the
OHRC for very good examples of such publications of qualifications. It is interesting to note that, in contrast to tribunals
such as the Nuclear Safety Commission, the Ontario Municipal Board and the CRTC that make a point of trumpeting the
qualifications and achievements of their members the CITT, the 1995 successor to the Import Tribunal (see (Deputy Minister of
silent on just who or where their members come from. The members are listed in the CITT annual reports but online efforts to
locate any sort of biographical / CV info on these members were not successful. The only information provided on the CITT
website is as follows: “The Chairperson is the Chief Executive Officer responsible for the assignment of members and for
the management of the Tribunal’s work. Members come from a variety of educational backgrounds, careers and regions of the
country”. http://www.citt-tcce.gc.ca/publicat/ar2h_e.asp#P341_13261 As such the Court is called upon to trust somewhat blindly
that the Ministers will appoint only qualified members.

409 The Ontario Landlord and Tenant Board’s guidelines are a particularly good example of this practice and are particularly
important given the number of lay members sitting alone. They allow skilled counsel to gently prod a new member in the right
e. establish internal reviews to ensure that all decisions are supported by
written decisions that are jurisdictionally compliant, well reasoned and
sufficiently detailed; and,\textsuperscript{410}

f. establish regular opportunities for conferences so as to breakdown
decision making isolation and foster peer-based sharing of knowledge and
opinions.

c) Externally:

a. have legislative provision for the tribunal’s intervention before the courts
for the purpose of giving evidence as to the subject tribunal’s relative
expertise on the issue in question; or

b. prepare, for the benefit of any counsel to a party so requesting, such
briefing and affidavit material as may be required to prove the Tribunal’s
relative subject matter expertise.

By way of a quick sketch of only some of the steps that can be taken to enhance the
institutional expertise one can look to the Federal Office of the Commissioner of Review
Tribunals (OCRT). It sits in appeal on denials of disability benefits and other issues
arising under the Canada Pension Plan.\textsuperscript{411}

The OCRT has instituted a comprehensive system of peer-based and supervisory

\textsuperscript{410} The exception to this rule is as discussed at 152 where the workload of some adjudicators militates against providing written
reason save in the most important cases.

\textsuperscript{411} The writer served as a chairperson on OCRT panels for a three year term from March of 2004 to March of 2007. There is a full
right of appeal to the Pension Appeals Board, a panel made up of retired Superior and Appellate Court justices. The appeal route
raises interesting questions as to the relative expertise of the OCRT vis-à-vis the Pension Appeal Board.
performance evaluations with a view to better informing the appointing minister as to those candidates for re-appointment who have best performed and qualify. Regrettably this procedure appears to have had no impact whatsoever as the vast majority of this tribunal’s adjudicators were thanked for their services following the most recent change of government.

Each appeal is heard by a panel of three, blending the intellectual rigour of legal counsel as chairperson with the medical expertise of a health professional and the common sense approach typical of well-trained lay members appointed from the community at large. If the OCRT receives notice of a constitutional question the metaphorical “heavy hitters” are brought out, as its procedures provide that such a question will be adjudicated by a panel made up of three of its legal chairpersons⁴¹². The decision writing is almost exclusively assigned to the legal member of a panel so as to assure a certain quality and consistency in the presentation of the findings and the legal analysis consistent with the Dyzenhaus principle.

Prior to sitting, all members undergo intensive training that includes the study of volumes of material, instruction from a cadre of experienced staff, counsel and experienced members, and participation in highly realistic mock hearings. The training is intensive enough that most members emerge confident that their knowledge of their enabling statute and governing policies will allow them to stand their ground even when

⁴¹² One is reminded of Justice Gonthier’s favourable comments on the presence of lawyers on a tribunal in his ruling on the question of a tribunal’s jurisdiction as a court of competent jurisdiction to rule on Charter questions in involving their own enabling legislation. *Martin supra* note 141 at para. 53 “While only the Chief Appeal Commissioner is required to be a practising lawyer (s. 238(5)), in reality all appeal commissioners have been admitted to the bar.”
faced with experienced counsel or advocates.

The member’s knowledge is buttressed by regular participation in continuing education focusing on legal and medical developments and any other new areas of concern. It is further buttressed by the publication and delivery of quarterly communiqués from the tribunal’s administration that provide focused insights and advice on how to best deal with emerging issues.

The results of any decision appealed to the Pension Appeal Board are communicated back to the members involved so as to enhance their expertise by way of cautionary instruction on or validation of their work.

Finally, the OCRT maintains a website that provides summaries of the qualifications of each member.

At the heart of the conundrum over reforms is the reluctance of most governments to take steps that would actually result in greater independence for “their” tribunals. Mr. Ellis argues that the required reforms must be systemic and do not lend themselves to the incremental approach of the common law. The radical changes implemented in Québec were actually motivated by hard economic times and the need to streamline their system. These reforms succeeded in reducing the overall operational costs for their administrative law tribunals. The same motivation applied for the reforms implemented in B.C. although their reforms took a somewhat different tack. There is perhaps hope that the perfect storm of hard economic times and the political will to act may someday arise in some of the other provinces.
Chapter 5
Conclusion

The judicial review issues the Supreme Court has wrestled with over the more than thirty years since 1973 *Nipoawin* decision are not unique to Canada.

It appears England troubles itself far less with concerns over jurisdiction or curial deference to tribunals on questions of law. As Frank A.V. Falzon reports “(t)heir solution has been to hold that any material error of law constitutes a jurisdictional error sufficient to nullify a decision. In England, not even a full privative clause will oust the court’s jurisdiction to review for correctness on a question of law.” Further, Falzon quotes another writer who suggested that a purely pragmatic or functional approach was unprincipled and the source of both confusion and a wilderness of single instances.413

Quoting from Lord Diplock, Falzon notes the English Courts operate on three rather broadly stated principles in addressing whether judicial review is warranted: legality, procedural propriety and rationality. He further quotes directly from the House of Lords case of *R. v. Hull*, citing back to the milestone 1969 *Anisminic*414 case, as follows:

In my judgment the decision in Anisminic …rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision making power on the basis that it was to be exercised on a correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires.415

413 Falzon, "Background Paper" supra note 51 at 40.


One American commentator refers to Anisminic “as an unprecedented decision in a constitutional system whose foundation is Parliamentary supremacy”\(^{416}\)

The English position is broadly interventionist to say the least. Wade MacLauchlan wrote of the concern Canada’s Supreme Court had in the early 1970’s with managing its growing docket due to its expanded leave-to-appeal functions. A second factor motivating the Supreme Court to reform was its perceived anti-administration bias.\(^{417}\) How or whether these same concerns were manifested in England would be an interesting study.

The other pole in the debate appears to be occupied by the American courts which are highly deferential to their Executive. Their Supreme Court’s attitude is encapsulated in a statement from the 1984 Chevron case, “We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer …”\(^{418}\)

The 2001 Mead decision uncannily echoes the difficulties Canada’s Supreme Court also faced in dealing with a binary system of all or nothing curial deference:

Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either Chevron deference or none at all, then the breadth of the spectrum of

\(^{416}\) Falzon, "Background Paper" supra note 51 at 41.


\(^{418}\) Chevron v. National Resources Defence Council, 81 L. Ed. 2d 694 (1084) [Chevron] (As quoted in Falzon, "Background Paper" supra note 51 at 43.)
possible agency action must be taken into account. Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect Chevron deference. (This writer's emphasis)419

Mead appears to mean that the U.S. Supreme Court recognizes the need for a wide range and variety of discretion. This position is in direct contrast to that taken in Canada in Ryan that a variety of standards is simply unworkable.

If these more extreme positions are kept in mind, it will be seen that Canada’s Supreme Court has not only come to occupy a relatively well reasoned middle ground, (as opposed to the “wilderness of single instances” previously suggested) but has also developed a conceptually unique and workable approach with its unitary reasonableness standard of curial deference.420 The difference is in the shift in focus away from the status or authority of decision maker to the subject matter of the question weighed against the relative expertise of the decision maker.

Initially, the standards of review operated as merit obscuring filters. They focused the inquiry on assessing the decision maker’s place in the constitutional pecking order as opposed to assisting in discerning the legislative purpose of the statute or in reviewing the merits of the case. The process required the application of one of two very blunt instruments; correctness for no curial deference or patent unreasonableness for almost full curial deference. The focus was on the role of the courts and tribunals as opposed to the actual merits of case and the competence of those charged with deciding the

419 United States v. Mead Corporation (June 18, 2001, unreported, Cornell law Website) [Mead] (As quoted in Falzon, "Background Paper" supra note 51 at 46.)

420 Falzon, "Background Paper" supra note 51.
question. The reviewing courts struggled with trying to give due regard to Parliamentary Supremacy while still trying to correct outcomes they perceived beyond the pale of acceptability. In doing so, they sometimes felt compelled to resort to the use of legal principles such as ultra vires or jurisdiction in an obfuscating manner. The miasma that was the debates over jurisdiction, collateral questions, questions not remitted or loss of jurisdiction were, too often, either manifestations of the reviewing court’s efforts to cure plainly wrong decisions it could not abide or, sometimes, a lack of discipline in properly deferring to a tribunal with superior expertise duly authorized to make the decision. The judiciary’s own reluctance to cede authority contrary to its Diceyan bent often operated in the latter instance.

The introduction of the Pragmatic and Functional Analysis in 1988 (*Bibeault*) represented a revolution in the Court’s thinking. The *Bibeault* decision was radical in the sense that, not unlike Manhattan’s early settler government deciding to impose a conceptual grid plan of streets and avenues on the undeveloped swamps and forests to the north of Wall Street, *Bibeault* imposed intellectual structure and rigour on the morass that was the inconclusive intellectual debates over jurisdiction.

*Bibeault* dictated that reviewing courts switch their focus away from who the decision maker was and the Legislators’ efforts/struggle to bar court intervention or interference through privative clauses. Instead it directed the focus to appraising the intended purpose of the statute against the capacity/competence/expertise of the persons entrusted with the adjudicative responsibility as best could be discerned from the sometimes scant evidence available.
The shortcomings of the common law became apparent. The process was too often one of only providing piecemeal and sometimes contradictory encrustations on what was already a crude and unworkable binary set of standards. While having enunciated a new analytical framework that properly brought the focus to bear on the purpose of the statute and the competence of the statutory delegate (as evidenced by expertise) to address the question, the Supreme Court left itself burdened with the concept of patent unreasonableness rendered indigestible by its corollary, the tribunal’s right to be wrong. This position was untenable. It provided ample opportunity for criticism from academics, practitioners and some members of the judiciary.421

The changes in the standard of review have left the role of correctness relatively untouched. It is engaged by either the absence of a reason for curial deference (i.e. no demonstrable or proven relative expertise) or a reason for denying curial deference (i.e. a nominate error such as fraud, or the presence of a constitutional or Charter issue). It is best understood now as simply the absence of the obligation to extend any curial deference as opposed to being a separate standard of review.

The reasonableness simpliciter standard of review, a standard introduced almost a decade after Bibeault in Southam in 1997, flows logically from a Pragmatic and Functional Analysis.

Where the tribunal’s expertise on the question is superior, then reviewing Court must move on to determining whether the reasons provided by the tribunal meet the

421 See Sossin “Empty Ritual” supra note 90 at 481, n. 10 for a helpful listing of the critical commentary through to 2003.
Dyzenhaus standard of warranting curial deference. The underlying assumption in
Reasonableness is that, in most scenarios, and, in particular, in a multi-factored or
polycentric scenario, there will be more than one option or choice that can be
reasonably supported. If the reasons given support the option chosen by the tribunal
then the reviewing court will extend curial deference and affirm the choice made by the
tribunal.

Consideration of outcome, the concept illustrated by comparing the risk of
deporation to torture or death as opposed to the denial of a vendor’s permit, remained
unacknowledged as an important factor in the Pragmatic and Functional Analysis. It is
arguably now acknowledged as an important factor in Dunsmuir. The concept
expressed by Sossin and Flood is too limited. It should be expanded to also included
results that are simply an affront to common sense. The most obvious example of such
a result is the Toronto v. CUPE Local 79 case where the tribunal should not have
directed the re-instatement of a convicted pedophile to a position of trust where he
would remain in regular contact with vulnerable youths.

Justice Bastarache understood that the standard of “patent unreasonableness” had
become the qualifier, “patently unreasonable”, simply a statement of denunciation for
flagrant error or egregious behaviour as opposed to the simply mistaken judgment. In
like thinking, Professor Bryden identified it as a subset to the broader concept of
unreasonableness, a concept which, in turn, is simply the obverse of reasonableness.
As such, the Supreme Court’s collapsing of patent unreasonableness into
reasonableness in Dunsmuir may have rendered a disservice. Arguably, it was an
inappropriate reaction to accumulated criticism from academic quarters based on a misconception of what patent unreasonableness had become. As Justice Bastarache suggested in 2002, the Court should have stayed the course. By effectively jettisoning patent unreasonableness reviewing courts have been denied a useful tool for expressing particular dissatisfaction with a tribunal’s work. While other terms such a “egregious” or “unfathomable” or “inappropriate” are available to describe poor decision making their use may simply trigger further debate as to whether their use is just the disguised resurrection of the standard of patent unreasonableness. The opportunity to capitalize on the simplicity and directness of Justice Bastarache’s reasoning has likely passed.

In the decade intervening between Bibeault and Pushpanathan, the Supreme Court endeavored to provide further guidance by elaborating on various factors. Expertise concepts such as “field sensitivity” and subject matter concepts such as “polycentric” and “policy laden” were identified. The Court gave examples of appropriate judicial restraint, openly acknowledging that, while in some instances it might have made a different decision, the tribunal’s should be respected. This approach reflected the thinking of David Dyzenhaus to the effect that deference does not imply submission by the courts but, rather, respect due to a tribunal for a rational and well expressed set of reasons supporting the choice it made.422

The Supreme Court began to address the “right to be wrong” problem sheltered in

422 Dyzenhaus supra note 77.
the standard of patent unreasonableness in the *Southam* decision by providing a further, more flexible alternative to patent unreasonableness. The implications and consequences of this decision were profound. First, in deferring to a decision it might not have itself made, it showed that it actually was prepared to share judicial authority. It also showed how and when this would happen. Secondly, it significantly released the tension the pre-existing binary system of extremes created. Finally, it set the stage for the marginalizing of patent unreasonableness' role as a separate standard of review.

Academic debate continued to focus on the conceptual difficulties inherent in distinguishing patent unreasonableness from reasonableness. The pressure from this source was unrelenting. Meanwhile, the Court continued in its good work of elaborating on the Pragmatic and Functional Analysis. *Pushpanathan* in 1998 and the five 2003 buttressing decisions of *LSNB v. Ryan*, *Dr. Q.*, *Paul* and *CUPE v. Minister of Labour* and *Martin* represent the high point of the judicial effort to bring reason and logic to bear on the standard of review debate. The success of these efforts can and should be measured less in terms of approbation from the academic community seeking an intellectually perfect system, than in its widespread adoption and use and, thus, demonstrated reliance by the judiciary on these decisions in the day to day work of the courts. In that regard, it can be seen that the rate at which *Pushpanathan*, *LSNB v. Ryan* and *Dr. Q.* were cited (sometimes almost 300 times a year) \(^{423}\) demonstrates, in a somewhat imperfect way, the level of reliance on those decisions. It is nonetheless

\(^{423}\) *Pushpanathan*, 175 time a year since 1998, *LSNB v. Ryan*, 298 times a year since 2003 and, *Dr. Q.*, 268 times a year since 2003.
evidence that a rational and workable system was in place.

In 2008, the Supreme Court delivered its ruling in *Dunsmuir*. Somewhat surprisingly, given they had been poles apart, Justice Bastarache and Justice LeBel collaborated in writing reasons that attempted to clarify the now unitary standard of review of reasonableness. This decision did not meet expectations of the academic community for two reasons. Firstly, it demonstrated there was no real consensus on the Supreme Court. Given the split in the Supreme Court’s opinion on the issue and the rather vague and unstructured alternate approaches suggested in the two minority supporting opinions, it appears the debates may yet continue, perhaps with the next change of Chief Justice. Secondly, the majority restatement of the principles did not add significantly to the work done in *Pushpanathan, LSNB v. Ryan* and *Dr. Q*. However, as previously noted, *Dunsmuir* is demonstrating an extraordinarily high rate of uptake from by the judiciary and the profession (See Appendix D). In practical terms it appears it will become the most significant administrative law decision of the modern era.

The Court did jettison the still potentially useful concept of “patent unreasonableness” along with the right to be wrong. This left questions unanswered about those statutes that made reference to the standard of patent unreasonableness.424 Justice Bastarache had prepared the ground work for converting patent unreasonableness from an obfuscating relic into simply the expression of disapprobation for beyond the pale or negligent decision making. This could have

provided a useful contrast to reasonableness where a more tempered explanatory, corrective or didactic approach would have been appropriate for a decision found not to fall into the range of rationally supportable alternatives.

Over time we have seen the Canadian courts have demonstrated remarkable flexibility in giving the judicial nod to the presence or absence of a privative clause and then developing reasoning one way or the other for emphasizing or minimizing the impact of this factor. The upshot is that the absence or presence of this first factor in the Pragmatic and Functional Analysis does not weigh as heavily as one would expect.

The last factor, the nature of the question, (i.e. question of fact, mixed fact and law or law alone), is and always will be a potentially tricky intellectual exercise. The Westcoast decision is probably the best example of the Supreme Court’s conversion of what should have been a factual determination left to an obviously well qualified and authorized expert tribunal into a mixed fact and law question of constitutional significance for the Court’s determination. In that instance, we see the introduction of a further obscuring concept, the “fact of constitutional significance.”425

It is in developing an understanding of the second and third factors that the most important strides have been made, that is to say, understanding the relationship between the purpose of the Act and its provisions and the expertise of the tribunal assigned adjudicative responsibility.

The assessment of tribunal expertise remains a difficult task. It is seldom the case

425 Westcoast supra note 117.
that, as in Southam, a court can point to a well thought out legislative scheme for choosing and melding relevant expertise. It is much more common that the how or the why of choosing tribunal members is a mystery because the enabling statue simply states that they are to be appointed by cabinet, with no further guidance provided. Studying the enabling statutes in an effort to understand the how, why and when those drafting choose to write in some guidance would be an interesting exercise.

Many of the means adopted by various agencies to enhance the prospect of having their tribunal’s relative expertise recognized have been outlined. By far the simplest and most potent mechanism for accomplishing this is for a tribunal to simply publish, if not trumpet, the relevant qualifications of its members. Any discerning reader can then ponder how experience in working at call centre or pursuing a career as an Olympic athlete equips a person to sit on a quasi-judicial tribunal such as Ontario’s Landlord and Tenant Board. 426 This kind of scrutiny may cause the government of the day to be more circumspect in its appointments. Further to this effort, the tribunal could also avail itself of any statutory right to intervene on appeal, for the limited purpose of presenting evidence as to the tribunal’s relative expertise. In so doing, the gap in evidence that a court often faces in assessing a tribunal’s relative expertise, so well highlighted by Maître Socqué, 427 would be addressed.

426 <http://www.ltb.gov.on.ca/en/About_Us/STEL02_111416.html>
427 Socqué, supra note 121.
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## Appendix A: Charter Justices of the Supreme Court of Canada

| Justice      | Appointed | Ended   | 82 | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90 | 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 | 00 | 01 | 02 | 03 | 04 | 05 | 06 | 07 | 08 |
|--------------|-----------|---------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Ritchie      | 59/05     | 84/05   | √  | √  | √  | √  | √  | √  | √  | √  |
| Laskin       | 70/03     | 84/03   | √  | √  | √  |
| Dickson      | 73/03     | 90/06   | √  | √  | √  | √  | √  | √  | √  | √  |
| Beets        | 74/01     | 88/11   | √  | √  | √  | √  | √  | √  | √  | √  |
| Estey        | 77/09     | 88/04   | √  | √  | √  | √  | √  | √  | √  | √  |
| McIntyre     | 79/01     | 89/02   | √  | √  | √  | √  | √  | √  | √  | √  |
| Chouinard    | 79/09     | 87/02   | √  | √  | √  | √  | √  | √  | √  | √  |
| Lam  e       | 80/03     | 00/01   | √  | √  | √  | √  | √  | √  | √  | √  |
| Wilson       | 82/03     | 91/01   | √  | √  | √  | √  | √  | √  | √  | √  |
| Le Dain      | 84/05     | 88/11   | √  | √  | √  |
| La Forest    | 85/01     | 97/09   | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| L'Heureux-Dubé| 87/04    | 02/07   | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| Sopinka      | 88/05     | 97/11   | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| Gonthier     | 89/02     | 03/07   | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| Cory         | 89/02     | 99/06   | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| McLachlin    | 89/03     |         | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| Stevenson    | 90/09     | 92/06   | √  | √  | √  | √  | √  | √  |
| Iacobucci    | 91/01     | 04/06   | √  | √  | √  | √  | √  | √  | √  | √  |
| Major        | 92/11     | 05/12   | √  | √  | √  | √  |
| Bastarache   | 97/09     | 08/06   | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| Binnie       | 98/01     |         | √  | √  | √  | √  | √  | √  | √  | √  | √  |
| Arbour       | 99/09     | 04/06   | √  | √  | √  | √  | √  | √  | √  | √  |
| LeBel        | 00/01     |         | √  | √  | √  | √  | √  | √  | √  |
| Deschamps    | 02/08     |         | √  | √  | √  | √  | √  |
| Fish         | 03/08     |         | √  | √  | √  | √  | √  |
| Abella       | 04/08     |         | √  | √  | √  | √  |
| Charron      | 04/08     |         | √  | √  | √  | √  |
| Rothstein    | 06/03     |         | √  | √  | √  |
| Cromwell     | 08/12     |         | √  |

### Milestone Cases:

- Bibeault
- Zurich
- Mossop
- Pezim
- Southam
- Dr. Q., Martin, Ryan & Paul
- Dunsmuir

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### Appendix B: Excerpts from Québec’s Act Respecting Administrative Justice

**Act Respecting Administrative Justice, R.S.Q., c. J-3 [Q.S. 1996, c. 54], Excerpts**

<table>
<thead>
<tr>
<th>RULES SPECIFIC TO DECISIONS MADE IN THE EXERCISE OF AN ADMINISTRATIVE FUNCTION</th>
<th>RULES SPECIFIC TO DECISIONS IN THE EXERCISE OF AN ADJUDICATIVE FUNCTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedures.</td>
<td>Procedures.</td>
</tr>
<tr>
<td>2. The procedures leading to an individual decision to be made by the Administration, pursuant to norms or standards prescribed by law, in respect of a citizen shall be conducted in keeping with the duty to act fairly.</td>
<td>9. The procedures leading to a decision to be made by the Administrative Tribunal of Québec or by another body of the administrative branch charged with settling disputes between a citizen and an administrative authority or a decentralized authority must, so as to ensure a fair process, be conducted in keeping with the duty to act impartially.</td>
</tr>
<tr>
<td>Administration.</td>
<td>Hearing.</td>
</tr>
<tr>
<td>3. The Administration consists of the government departments and bodies whose members are in the majority appointed by the Government or by a minister and whose personnel is appointed in accordance with the Public Service Act (chapter F-3.1.1).</td>
<td>10. The body is required to give the parties the opportunity to be heard.</td>
</tr>
<tr>
<td>Duties.</td>
<td>Hearings.</td>
</tr>
<tr>
<td>4. The Administration shall take appropriate measures to ensure</td>
<td>The hearings shall be held in public. The body may, however, even of its own initiative, order hearings to be held in camera where necessary to maintain public order.</td>
</tr>
<tr>
<td>1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with the norms and standards of ethics and discipline governing its agents and with the requirements of good faith;</td>
<td>1996, c. 54, s. 10.</td>
</tr>
<tr>
<td>2) that the citizen is given the opportunity to provide any information useful for the making of the decision and, where necessary, to complete his file;</td>
<td>Hearing.</td>
</tr>
<tr>
<td>3) that decisions are made with diligence, are communicated to the person concerned in clear and concise terms and contain the information required to enable the person to communicate with the Administration;</td>
<td>11. The body has, within the scope of the law, full authority over the conduct of the hearing. It shall, in conducting the proceedings, be flexible and ensure that the substantive law is rendered effective and is carried out.</td>
</tr>
<tr>
<td>4) that the directives governing agents charged with making a decision are in keeping with the principles and obligations under this chapter and are available for consultation by the citizen.</td>
<td>Evidence.</td>
</tr>
<tr>
<td>Order or unfavourable decision.</td>
<td>It shall rule on the admissibility of evidence and means of proof and may, for that purpose, follow the ordinary rules of evidence applicable in civil matters. It shall, however, even of its own initiative, reject any evidence which was obtained under such circumstances that fundamental rights and freedoms are breached and the use of which could bring the administration of justice into disrepute. The use of evidence obtained in violation of the right to professional secrecy is deemed to bring the administration of justice into disrepute.</td>
</tr>
<tr>
<td>5. An administrative authority may not issue an order to do or not do something or make an unfavourable decision concerning a permit or licence or other authorization of like nature without first having</td>
<td>1996, c. 54, s. 11.</td>
</tr>
</tbody>
</table>
3) given the citizen the opportunity to present observations and, where necessary, to produce documents to complete his file.

**Exception.**

An exception shall be made to such prior obligations if the order or the decision is issued or made in urgent circumstances or to prevent irreparable harm to persons, their property or the environment and the authority is authorized by law to re-examine the situation or review the decision.

**Decision.**

6. An administrative authority that is about to make a decision in relation to an indemnity or a benefit which is unfavourable to a citizen must ensure that the citizen has received the information enabling him to communicate with the authority and that the citizen's file contains all information useful for the making of the decision. If the authority ascertains that such is not the case or that the file is incomplete, it shall postpone its decision for as long as is required to communicate with the citizen and to give the citizen the opportunity to provide the pertinent information or documents to complete his file.

**Application for review.**

In communicating the decision, the administrative authority must inform the citizen that he has the right to apply, within the time indicated, to have the decision reviewed by the administrative authority.

**Observations.**

7. Where, upon the request of a citizen, a situation is re-examined or a decision is reviewed, the administrative authority shall give the citizen the opportunity to present observations and, where necessary, to produce documents to complete his file.

1996, c. 54, s. 7.

**Reasons.**

8. An administrative authority shall give reasons for all unfavourable decisions it makes, and shall indicate any non-judicial proceeding available under the law and the time limits applicable.

<table>
<thead>
<tr>
<th>Requirements.</th>
</tr>
</thead>
<tbody>
<tr>
<td>12. The body is required to</td>
</tr>
<tr>
<td>1) take measures to circumscribe the issue and, where expedient, to promote reconciliation between the parties;</td>
</tr>
<tr>
<td>2) give the parties the opportunity to prove the facts in support of their allegations and to present arguments;</td>
</tr>
<tr>
<td>3) provide, if necessary, fair and impartial assistance to each party during the hearing;</td>
</tr>
<tr>
<td>4) allow each party to be assisted or represented by persons empowered by law to do so.</td>
</tr>
</tbody>
</table>

**Decisions.**

13. Every decision rendered by the body must be communicated in clear and concise terms to the parties and to every other person that the law indicates.

**Decisions.**

Every decision terminating a matter, even a decision communicated orally to the parties, must be in writing together with the reasons on which it is based.
Appendix C: Excerpts from B.C.’s Administrative Tribunals Act

Administrative Tribunals Act, [SBC 2004] c. 45, Excerpts

**Discretion to refer questions of law to court**

43 (1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

(2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.

(3) If a constitutional question is raised by a party in an application, on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(4) The stated case under subsection (2) or (3) must

(a) be prepared by the tribunal,

(b) be in writing,

(c) be filed with the court registry, and

(d) include a statement of the facts and relevant evidence.

(5) Subject to the direction of the court, the tribunal must

(a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,

(b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and

(c) decide the application in accordance with the opinion.

(6) A stated case must be brought on for hearing as soon as practicable.

(7) Subject to subsection (8), the court must hear and determine the stated case and give its decision as soon as practicable.

(8) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

**Tribunal without jurisdiction over constitutional questions**

44 (1) The tribunal does not have jurisdiction over constitutional questions.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

**Tribunal without jurisdiction over Canadian Charter of Rights and Freedoms issues**

45 (1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

(1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

(2) If a constitutional question, other than one relating to the *Canadian Charter of Rights and Freedoms*, is
raised by a party in a tribunal proceeding

(a) on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case, or

(b) on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(3) The stated case must

(a) be prepared by the tribunal,

(b) be in writing,

(c) be filed with the court registry, and

(d) include a statement of the facts and relevant evidence.

(4) Subject to the direction of the court, the tribunal must

(a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,

(b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and

(c) decide the application in accordance with the opinion.

(5) A stated case must be brought on for hearing as soon as practicable.

(6) Subject to subsection (7), the court must hear and determine the stated case and give its decision as soon as practicable.

(7) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Standard of review if tribunal's enabling Act has privative clause

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

Standard of review if tribunal’s enabling Act has no privative clause

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the 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.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

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

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.
## Appendix “D”: Significant Cases Mentioned and Followed.

<table>
<thead>
<tr>
<th>Case</th>
<th>Date Issued</th>
<th>Mentioned</th>
<th>Average</th>
<th>Followed</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ryan</td>
<td>2003.04.03</td>
<td>1477</td>
<td>298</td>
<td>163</td>
<td>32.9</td>
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<tr>
<td>Dr. Q.</td>
<td>2003.04.03</td>
<td>1329</td>
<td>268</td>
<td>224</td>
<td>45.2</td>
</tr>
<tr>
<td>Dunsmuir</td>
<td>2008.03.07</td>
<td>836</td>
<td>265</td>
<td>275</td>
<td>96.0</td>
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<tr>
<td>Housen</td>
<td>2002.03.28</td>
<td>1442</td>
<td>242</td>
<td>98</td>
<td>16.4</td>
</tr>
<tr>
<td>Baker</td>
<td>1999.07.09</td>
<td>1642</td>
<td>184</td>
<td>260</td>
<td>29.1</td>
</tr>
<tr>
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